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Top labor and employment developments for December 2019

By Ronald Miller, J.D.

In case you missed the in-depth coverage of Employment Law Daily for December, here’s a recap of some key developments in the L&E community.

Supreme Court news

Justices will take up ministerial exception question

On December 18, the U.S. Supreme Court granted petitions for certiorari in a pair of cases that ask the Justices to determine whether the religious clauses found in the First Amendment bar civil courts from adjudicating discrimination claims that employees bring against their religious employers when those employees “carried out important religious functions.” Both petitions seek review of Ninth Circuit decisions addressing the First Amendment’s ministerial exception to generally applicable employment laws, first recognized by the Supreme Court in its Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC decision.

St. James School v. Biel (19-348). In this case, a teacher was diagnosed with breast cancer only six months after receiving a positive teaching evaluation. She told the school she needed to take time off for treatment. Several weeks later, the school informed her that it would not renew her contract for the next academic year, saying her classroom management was lax and that it was unfair to students to have two different teachers during the school year. She filed an ADA suit asserting disability discrimination. The district court granted summary judgment to the school, finding that the ministerial exception barred her claims.

However, the Ninth Circuit reversed. At most, only one of four considerations mapped out in Hosanna-Tabor weighed in the school’s favor, it found, and no other federal appeals court has applied the ministerial exception to a case that bears so little resemblance to Hosanna-Tabor. Declining the school’s invitation to be the first, the circuit court panel explained that while the First Amendment “insulates a religious organization”’s “selection of those who will personify its beliefs,”” it does not provide carte blanche to disregard antidiscrimination laws when it comes to other employees who do not serve a leadership role in the faith.

Our Lady of Guadalupe School v. Morrissey-Berru (19-267). In an unpublished decision, the Ninth Circuit reversed summary judgment in favor of a school in a teacher’s ADEA suit, rejecting the district court’s conclusion that she was a “minister” for purposes of the ministerial exception. Unlike the employee in Hosanna-Tabor, the employee’s formal title of “teacher” was
secular. “Aside from taking a single course on the history of the Catholic Church, [the employee] did not have any religious credential, training, or ministerial background,” the appeals court noted, and the employee “did not hold herself out to the public as a religious leader or minister.” Citing its Biel decision, the appeals court also said that “an employee's duties alone are not dispositive under Hosanna-Tabor's framework.”

The Court consolidated the cases for one hour of oral argument.

**Regulatory developments**

**NLRB issues final rule on representation case procedures**

The NLRB on December 13 released a direct final rule on representation case procedures that upends the Obama-era rule promulgated through the public notice and scrutiny process. The Board issued the election rule changes without notice and comment, citing “the Board’s clear regulatory authority to change its own representation case procedures” and its “longstanding practice of evaluating and improving its representation case procedures.” Dissenting, Democratic Board Member Lauren McFerran questioned the timing and method of the rulemaking, as well as the need for the changes. The rule will become effective April 16, 2020.

**DOL defines what payments must be included in regular rate**

On December 12, the Department of Labor announced a final rule to provide clarification as to which perks and benefits must be included in the regular rate of pay under section 7 of the FLSA. Part 778 of CFR title 29 addresses the calculation of the regular rate of pay for overtime compensation purposes. When this regulation was promulgated more than 60 years ago, typical compensation consisted predominantly of traditional wages, paid time off for holidays and vacations, and contributions to basic medical, life insurance, and disability benefits plans. According to the DOL, the final rule will allow employers to more easily offer other perks and benefits to their employees.

**DOL to expand public-sector union reporting requirements**

The DOL on December 16 announced a proposed rule that would require governing intermediate labor bodies wholly composed of public-sector organizations but yet subordinate to national or international labor organizations covered by the Labor-Management Reporting and Disclosure Act (LMRDA) to file Form LM-2 and Form LM-3 annual union financial reports.

**OFCCP to codify procedures used to resolve potential violations**

The DOL”s Office of Federal Contract Compliance Programs (OFCCP) issued a notice of proposed rulemaking December 30 to codify the procedures used by the agency to resolve potential discrimination and other material violations by federal contractors and subcontractors. The proposed changes to 41 CFR Parts 60-1, 60-2, 60-300, and 60-741 would add clarifying definitions to specify the types of evidence the OFCCP will use to support its discrimination findings. Specifically, the proposed rule would codify procedures for two formal notices that the OFCCP uses when it finds potential violations—the Predetermination Notice (PDN) and the Notice of Violation (NOV)—and clarify the strength of evidence that agency staff must find before issuing a PDN or NOV. The proposed rule also would define “statistical evidence” and
“nonstatistical evidence” to clarify the different types of evidence that the OFCCP will use to support a violation.

The goal is to provide federal contractors and subcontractors with greater certainty about the procedures the agency follows during compliance evaluations, and to promote efficiency by clarifying that contractors have the option to expedite the OFCCP’s normal resolution procedures for discrimination findings by entering directly into a conciliation agreement before the issuance of a PDN or NOV.

In the federal courts of appeal

D.C. Cir.: Public-sector union can’t bargain over performance rating levels. Holding that an agency’s rights to establish a performance evaluation system and to evaluate its employees are incorporated in management’s nonnegotiable rights to “direct employees” and “assign work,” the D.C. Circuit denied a union’s petition to review the Federal Labor Relations Authority’s refusal to require the Department of Homeland Security to negotiate over the union’s proposed change to a CBA. During contract negotiations, DHS refused to negotiate with the union over a proposal to limit the number of appraisal levels that the agency could use in performance appraisals. The FLRA agreed with the agency that the union proposal infringed upon the agency’s management rights, which are nonnegotiable under the Federal Service Labor-Management Relations Statute. This was a reasonable interpretation of the statute, the appeals court held (National Treasury Employees Union v. Federal Labor Relations Authority, December 3, 2019, Edwards, H.).

D.C. Cir.: NLRB better say why ALJ’s contrary findings were not considered. Granting a nursing home’s petition for review of an NLRB decision finding that an employer had suspended and discharged a nursing assistant because she engaged in protected activity, the D.C. Circuit found that the Board’s decision, at odds with the ALJ’s findings, was not supported by substantial record evidence. “Although the Board is not obliged to agree with either the judge or its dissenting Member, the Board is obligated to confront evidence detracting from its conclusions, particularly where the dissenting Member has offered a non-frivolous analysis,” said the court. In this instance, the Board failed to consider evidence of the employer’s zero-tolerance elder-abuse policy, as well as evidence the allegedly better-treated employee who was not fired had not engaged in similar misconduct (Windsor Redding Care Center, LLC v. NLRB, December 10, 2019, Rogers, J.).

D.C. Cir.: Firing pro-union nurse one month after election violated NLRA. The D.C. Circuit denied a hospital’s petition for review of an NLRB decision finding that it committed four unfair labor practices after its registered nurses voted to unionize. Shortly after the election, the employer terminated a pro-union nurse and reported her to the Ohio Board of Nursing. The temporal proximity between the nurse’s union advocacy and her termination, in addition to the fact that she was disciplined more harshly than nurses who committed similar infractions, indicated that her union activity was the reason for her termination, said the court, which also agreed with the Board that the employer committed additional unfair labor practices after the election when it banned a union representative from the hospital’s premises, refused to bargain with the union, and threatened to retaliate against nurses who filled out a union-issued complaint form (DHSC, LLC dba Affinity Medical Center v. NLRB, December 20, 2019, Garland, M.).
D.C. Cir: Board must revisit finding that “whore board” comment was protected—and consider conflicting EEO law. The NLRB did not depart without explanation from precedent or lack substantial evidence for its findings, the District of Columbia Circuit held. Nonetheless, it denied enforcement of an NLRB decision finding an employee who wrote “whore board” on an overtime sign-up sheet was engaged in protected conduct as part of a protest against a unilateral change in overtime procedures. The Board failed to address the merits of the employer’s contention that, having recently been assessed a $1 million adverse jury award for a hostile work environment at its plant, the Board’s interpretation of protected conduct failed to address the employer’s obligations under state and federal EEO law (Constellium Rolled Products Ravenswood, LLC v. NLRB, December 31, 2019, Ginsburg, D.).

1st Cir.: Federal au pair regs don’t preempt Massachusetts wage-hour laws. Affirming the district court’s dismissal, the First Circuit held that the federal au pair program does not preempt Massachusetts from enforcing the state’s wage and hour laws against host families of participants in the au pair program. The plaintiffs, a Department of State (DOS)-approved sponsor placement agency and two individuals from host families, failed to prove either field or conflict preemption. The federal regulations governing the au pair program only imposed requirements and potential sanctions on sponsors, not on host families, so there was no basis to infer from their comprehensiveness that individual participants were excluded from state law protection. Further, the DOS’ expressed desire to create “uniform compensation” for au pair participants was in reference to the need to establish a compensation floor, not to limit participants from receiving compensation due under state law (Capron v. Office of the Attorney General of the Commonwealth of Massachusetts, December 2, 2019, Barron, D.).

1st Cir.: Officer’s untrustworthiness, not disability, led to discharge. A military veteran employed as a nuclear security officer was deemed unqualified for his position, not because of medical diagnoses that included chronic fatigue syndrome and PTSD, but because he failed on multiple occasions to disclose them. Upholding summary judgment in an employer’s favor on his disability discrimination claims, the First Circuit found the employee failed to establish that he was qualified for the position from which he had been terminated. The lower court did not abuse its discretion in striking key statements from an affidavit submitted by the employee that purported to correct his deposition testimony regarding a key issue related to his qualification to hold the security officer position and thus his prima facie case. His repeated failure to disclose medical diagnoses led to a determination that he was neither reliable nor trustworthy—qualities that were required by regulation for authorization to hold the sensitive position (Flaherty v. Entergy Nuclear Operations, Inc., December 23, 2019, Torruella, J.).

2d Cir.: Plaintiffs don’t have to establish a prima facie EPA case to assert pay discrimination under Title VII. An employee need not establish an Equal Pay Act violation in order to make out a prima facie pay discrimination claim under Title VII, the Second Circuit held. Rather, all Title VII requires is that an employee prove that the employer discriminated against him or her with respect to compensation because of sex, the appeals court explained. The appeals court vacated in part a grant of summary judgment favoring a company and two of its officials on a female executive’s claim the company paid her less because she was female,
retaliated against her when she complained about her disparate pay, and fired her because she was pregnant. The employee established a prima facie case of pay discrimination under Title VII (without having to meet the EPA’s “unequal pay for equal work” standard), as well as pregnancy discrimination and retaliation (Lenzi v. Systemax, Inc., December 6, 2019, Pooler, R.).

2d Cir.: Court approval not required for Rule 68(a) offers of judgment settling FLSA claims. Judicial approval is not required of Rule 68(a) offers of judgment settling FLSA claims, ruled a divided Second Circuit in a 2-1 decision. In light of the unambiguously mandatory command of Rule 68(a) for the clerk of the court to enter offers of judgment when they are accepted, and because the appeals court found no indication by Congress or the Supreme Court that the FLSA requires judicial approval of stipulated judgments concerning FLSA claims in the context of ongoing litigation, the appeals court declined to find such a requirement. The Second Circuit concluded that the FLSA does not contain “the necessary clear expression of congressional intent” required “to exempt the statute from the operation of” Rule 68.” Thus, the judgment of the district court was reversed and remanded with instructions that the clerk of the court enter judgment as stipulated in the parties’ accepted Rule 68(a) offer (Yu v. Hasaki Restaurant, Inc., December 6, 2019, Walker, J., Jr.).

Judicial approval is not required of Rule 68(a) offers of judgment settling FLSA claims.

3d Cir.: Class certification reversed in American Airlines overtime suit. American Airlines fleet service workers, passenger agents, and mechanics at Newark Liberty International Airport could not proceed as a class on their overtime suit under the New Jersey Wage and Hour Law (NJWHL). The employees alleged that the airline shorted them on pay through its use of a timekeeping system that, by default, compensated them only for their scheduled hours, and required them to seek approval for “exceptions” to their normal work hours. The Third Circuit reversed a district court’s order certifying a Rule 23 class, finding the lower court had erroneously approached certification as though it were conditionally certifying an FLSA collective action. Applying the proper Rule 23 analysis, the appeals court found the workers could not satisfy commonality or predominance under Rule 23(b)(3). To determine whether and when the employees worked hours beyond their scheduled shifts, and in excess of 40 hours per week, individualized inquiries were needed (Ferreras v. American Airlines, Inc., December 24, 2019, Jordan, K.)

3d Cir.: LPNs were not supervisors under NLRA. A nursing home violated the NLRA by refusing to bargain with a union representing a unit of licensed practical nurses and changing their wages and benefits without notice to the union or providing the union with an opportunity to bargain, ruled the Third Circuit, granting the NLRB’s cross-application for enforcement of its decision. After hiring the majority of its predecessor’s LPNs, the employer attempted to circumvent its obligation to bargain with the union by converting the LPNs into supervisors. But the Board found the LPNs lacked independent judgment as required under Section 2(11) of the Act, and the record supported this conclusion, the appeals court held (Coral Harbor Rehabilitation and Nursing Center v. NLRB, December 26, 2019, McKee, T.).
5th Cir.: Nineteen months too long an interval to find causal link between paramedic’s speech and his termination. A Louisiana parish paramedic terminated 19 months after sending a letter to county officials critical of certain personnel procedures failed to allege a continuous “chronology” of events that would bridge the time interval between his speech and the action against him, the Fifth Circuit held. Reversing a district court ruling denying the employer’s motion to dismiss the paramedic’s retaliation claim, the appeals court held his failure to plead a necessary element of a First Amendment claim meant he could not overcome the employer’s qualified immunity defense. However, the appeals court upheld the denial of a motion to dismiss another paramedic’s claim, also alleging violation of free speech rights, on the grounds that the defendant did not clearly move against that claim (Benfield v. Magee, December 17, 2019, Clement, E.).

6th Cir.: Nurse required to work beyond 12-hour restriction can take ADA claims to trial. Reversing summary judgment against the ADA failure-to-accommodate claim of a licensed practical nurse who alleged she was under a 12-hour work restriction due to physically disabling back issues, the Eighth Circuit cited evidence that her employer had a blanket policy of denying accommodations for all nonwork-related disabilities, knew she had requested an accommodation of working eight-hour shifts, forced her to work beyond her restriction, and attempted to do so again five days later. Further, in light of her employer’s repeated failure to honor her accommodation requests, a reasonable person in her position would have felt compelled to resign, said the court, reversing summary judgment against her disability discrimination claim as well. Her retaliation claim was also revived (Morrissey v. Laurel Health Care Co., December 3, 2019, Donald, B.).

6th Cir.: Employer comes up empty in bid to undo grievance committee award. An employer can’t escape an adverse grievance award or a proceeding to break a deadlock over the award’s interpretation in a dispute over its obligation to make pension and welfare plan contributions. With the case before it for a third time, the Sixth Circuit found no support for the employer’s contentions that the award was unenforceable and the grievance proceeding was now terminated. Rather, the district court properly directed the parties to proceed to the next stage of the grievance and arbitration procedure, pursuant to the operative master agreement (Local 1982, International Longshoremen’s Association v. Midwest Terminals of Toledo, International, Inc., December 10, 2019, Stranch, J.).

7th Cir.: VISTA worker canned for phone-sex memoir has First Amendment claim revived. A VISTA worker’s previous pseudonymous publication of a memoir reflecting her experience as a phone-sex operator was constitutionally protected speech, the Seventh Circuit held, and her firing from the Indiana National Guard as a VISTA worker could have been retaliatory. As a result, the court reversed summary judgment granted in favor of the Guard’s family program director on the employee’s First Amendment retaliation claim under Section 1983. The director was not entitled to qualified immunity because it was clearly established the book was protected speech and there was no evidence of actual or future disruption to the Guard’s efficiency (Harnishfeger v. United States, December 3, 2019, Hamilton, D.).

7th Cir.: Jury may consider applicant’s contradictory statements about disability. A disability discrimination plaintiff who lost at trial on her claim that the Social Security
Administration (SSA) unlawfully rescinded a job offer after she disclosed her physical disabilities failed to convince the Seventh Circuit that the district court erred in allowing the jury to consider evidence that she made contradictory statements about her disability in a subsequent application. The lower court also properly admitted evidence that the candidate hired for the job had a disability since ample evidence supported the jury verdict finding that the SSA’s hiring decision contained no discriminatory motive, including the successful applicant’s superior qualifications and more favorable responses to the interview questions (Stegall v. Saul, December 4, 2019, Bauer, W.).

7th Cir.: Full-time National Guard counter-drug duty covered by USERRA. The Seventh Circuit reversed the dismissal of a police sergeant’s claim that a police department violated USERRA by placing him on unpaid leave during his deployment to full-time duty with the Illinois National Guard Counterdrug Task Force. The lower court’s finding that his service wasn’t covered under USERRA was based on a faulty interpretation of the Act and Title 32 National Guard service under Section 112. The plain language of this statute contemplated the officer’s service as “Full-Time National Guard Duty,” which USERRA explicitly covers. The district court erred in interpreting USERRA as excluding the sergeant’s service, said the appeals court, reviving his claim that the department’s denial of compensation and benefits during his deployment amounted to unlawful anti-military discrimination (Mueller v. City of Joliet, December 4, 2019, Bauer, W.).

7th Cir.: No error in disallowing evidence that student employees were “temporary.” The NLRB did not abuse its discretion in refusing to admit the University of Chicago’s proposed pre-election evidence purporting to show its student library employees could not collectively bargain since they were temporary employees who did not manifest a sufficient interest in the terms and conditions of their employment. The university’s “categorial assertions” were explicitly rejected by the Board in Columbia University, the prevailing law regarding the ability of student employees to unionize. Thus, the proposed evidence did not support the university’s position. Because the university also failed to show that the Board violated its due process rights, the Seventh Circuit denied its petition for review and granted the Board’s cross-application for enforcement (University of Chicago v. NLRB, December 17, 2019, Kanne, M.).

8th Cir.: Law firm equity partner not an employee, not covered by ADEA. Guided by factors set out by the Supreme Court’s Clackamas decision and its review of the record here, the Eighth Circuit found that an attorney’s role as equity partner in his law firm “was not simply a title that carried no legal significance.” Rather, he shared in the firm’s profits and losses, voted on changes in firm policies, and could be expelled from the firm in very limited ways, among other things. The appeals court found that “consistent with the manner in which the term „employee‟ has been interpreted under federal antidiscrimination laws,” he was not an employee of the firm and therefore was not covered by the ADEA. Accordingly, it affirmed judgment in favor of the law firm on his claim that its mandatory retirement policy violated the ADEA (Von Kaenel v. Armstrong Teasdale, LLP, December 3, 2019, Erickson, R.).

8th Cir.: Employer had good-faith belief of employee misconduct, despite inability to confirm it. A male pharmacist who was fired following HR’s investigation into reports that he viewed pornography on his work computer and touched coworkers inappropriately failed to
convince the Eighth Circuit to revive his gender bias claim, despite his contention that the IT department did not conclusively determine that he had visited pornographic websites. Affirming summary judgment in the employer’s favor, the appeals court held there was no direct evidence of discrimination and the employee failed to refute that the employer believed in good faith he engaged in prohibited conduct. As for his contention a female employee accused of inappropriate conduct was treated more favorably, he failed to show that she was similarly situated (Rinchuso v. Brookshire Grocery Co., dba Brookshire Pharmacy #102, December 9, 2019, Erickson, R.).

8th Cir.: No abuse of discretion in fee award to CRST in EEOC’s Title VII sexual harassment case. Addressing for the second time—after Supreme Court remand—the EEOC’s appeal of an attorneys’ fee award in favor of CRST Van Expedited in the sweeping Title VII lawsuit against the trucking company alleging sexual harassment of female drivers, the Eighth Circuit found the court below did not abuse its discretion in calculating a fee award of more than $1.8 million. The district court, in its extensive 82-page order, determined the award using a “flexible and commonsense application of the Fox standard in light of the realities of the case, how it was litigated and the court’s unique understand[ing] of the issues,” said the appeals court in affirming its judgment (EEOC v. CRST Van Expedited, Inc., December 10, 2019, Smith, L.).

9th Cir.: Reciprocity contributions on behalf of union “travelers” did not belong to (underfunded) home fund. Union “travelers” whose home pension funds participated in reciprocity contributions were entitled to damages for amounts wrongfully withheld by an underfunded multiemployer pension plan that used the amounts to improve the plan’s funding status, the Ninth Circuit ruled. The case was before the appeals court for a second time; previously, it vacated part of the damages award and instructed the district court on remand to give further consideration of the claims arising under another plan amendment. The lower court concluded those damages were proper, and the appeals court now affirmed (Lehman v. Nelson, December 3, 2019, Ezra, D.).

9th Cir.: Objectors get exotic dancers’ FLSA settlement thrown out. The Ninth Circuit reversed a district court’s approval of a settlement agreement, executed prior to class certification, to resolve a misclassification suit brought by exotic dancers at various nightclubs in the San Francisco area. The appeals court concluded that the notice process was inadequate under Rule 23(c)(2)(B): The claims administrator sent notice of the settlement via mail only, and the employer set a up a website and hung a poster inside the clubs. Further, the district court erred by reviewing the agreement under Rule 23(e)’s “fair, reasonable, and adequate” standard rather than the heightened scrutiny required for pre-certification agreements. As a result, the lower court failed to investigate many terms in the settlement that were indicative of collusion or other conflicts of interest (Murphy v. SFBS Management, December 11, 2019, Tashima, A.).

10th Cir.: Reservist revives “cat’s paw” claim that anti-military animus influenced HR recruiter’s adverse decision. Triable issues existed as to whether an art museum director harbored anti-military animus against an employee who applied for a promotion, and if so, whether that animus influenced the HR recruiter’s decision to deny her an interview, the Tenth Circuit ruled, in reviving her USERRA claim under a cat’s paw theory. Though the recruiter claimed that she rejected the employee due to her lack of supervisory experience, there were ambiguities about her qualifications which could have been fleshed out during the interview process and evidence of the museum director’s anti-military comments and desire to block the
employee from any promotions while she remained in the navy reserves suggested that, the recruiter chose to disallow an interview because of the director’s anti-military animus (Greer v. City of Wichita, December 3, 2019, Bacharach, R.).

NLRB rulings

Reversal of Obama-era Board rulings continued as McFerran’s term wanes

Continuing its practice of issuing significant, often controversial decisions on the eve of a Board member’s departure, a divided four-member NLRB reversed two decisions issued by the Obama Board that had been a source of much consternation for employers. The rulings were issued on the final day of Democratic Member Lauren McFerran’s term:

Purple Communications reversed. The Board overruled its 2014 Purple Communications, Inc. decision and “reestablished the right of an employer to restrict employee use of its email system if it does so on a nondiscriminatory basis.” In Purple Communications, the Board held that employees who have been given access to their employer’s email system for work-related purposes have a presumptive right to use that system, on nonworking time, for communications protected by Section 7 of the Act. The current Board rejected this premise, finding that employees do not have a statutory right to use employers’ email or other IT resources for non-work-related communications, including NLRA-protected communications. “Rather, employers have the right to control the use of their equipment, including their email and other IT systems, and they may lawfully exercise that right to restrict the uses to which those systems are put, provided that in doing so, they do not discriminate against union or other protected concerted communications,” the majority held (with Member McFerran dissenting), effectively reinstating the Board’s 2007 holding in Register Guard.

However, acknowledging that workers “must have adequate avenues to engage in communications protected by Section of the NLRA,” the Board created an exception in circumstances where the employer’s email system “is the only reasonable means for employees to communicate with one another on non-working time during the workday.” (Caesars Entertainment dba Rio All-Suites Hotel and Casino, December 16, 2019).

“... employers have the right to control the use of their equipment, including their email and other IT systems, and they may lawfully exercise that right to restrict the uses to which those systems are put, provided that in doing so, they do not discriminate against union or other protected concerted communications.”

Board OKs blanket confidentiality rules for workplace investigations. A blanket work rule requiring employees to maintain confidentiality during the course of a workplace investigation is presumptively lawful, a divided four-member panel of the NLRB held, with Member McFerran
dissenting. The Board overturned an Obama-era decision that required employers to determine on a case-by-case basis whether such confidentiality is necessary. Applying its Boeing Co. rubric, the majority held that investigative confidentiality rules are categorically lawful (and fall under Boeing Category 1) when they apply only to currently open investigations. However, if a confidentiality rule is not limited on its face to the duration of an investigation, it falls within Boeing Category 2, and thus requires a determination of whether there is a legitimate employer justification for the restriction that outweighs any impact on employees’ Section 7 rights. The decision overturns Banner Health System dba Banner Estrella Medical Center, a 2015 decision (Apogee Retail LLC dba Unique Thrift Store, December 16, 2019).

In other December NLRB decisions:

**Board refuses to apply new anticipatory withdrawal of recognition standard retroactively.** For “institutional reasons,” the fact that a bargaining order had been in effect for six months at the time longstanding precedent was overturned, and that retroactively applying a new standard here could “seriously undermine the Board”s expectation of prompt compliance with its bargaining orders,” a three-member panel chose not to apply the NLRB”s new standard for anticipatory withdrawal of recognition set forth in Johnson Controls. Reversing its bargaining order would disrupt a bargaining relationship and also “incentivize parties to delay compliance with bargaining orders in the hope or expectation of a change in the law,” explained the Board. The underlying Board decision was issued six months before Johnson Controls and was pending in the D.C. Circuit when the new standard was adopted. On remand, the Board instead reaffirmed its original decision finding the employer had unlawfully withdrawn recognition (Leggett & Platt, Inc., December 10, 2019).

**Board strikes dues checkoff requirement post-CBA expiration.** Racking up yet another reversal of an Obama-era decision, a 3-1 NLRB ruled that an employer may stop checking off employees” union dues and passing those dues on to the union once the CBA that created the check-off obligation expires. “A dues-checkoff provision properly belongs to the limited category of mandatory bargaining subjects that are exclusively created by the contract and are enforceable through Section 8(a)(5) of the Act only for the duration of the contractual obligation created by the parties,” the Board majority held, dismissing the complaint. The holding, which the Board will apply retroactively to this and other pending cases, gives considerable leverage to employers during negotiations for a new contract. Member McFerran dissented (Valley Hospital Medical Center, Inc. dba Valley Hospital Medical Center, December 16, 2019).

**Selling delivery routes to independent distributors consistent with past practice.** Reversing an ALJ decision, the NLRB found 2-1 that a producer and distributor of snack foods did not violate the Act when it refused to bargain with the union over the sale of four distribution routes. In response to yearly declines in its net worth, the company began removing union employees from delivery routes and selling the routes to non-employee independent distributors who assumed the costs of transporting the products. Because the company had sold 51 routes over the past 17 years, the majority viewed the sales as consistent with a longstanding past practice, a continuation of the status quo, and in accord with the Board”s decision in Raytheon Network Centric Systems (Mike-Sell’s Potato Chip Co., December 16, 2019).
Board weighs employer confidentiality interests in face of union information request. In a four-member decision, the Board modified its precedent to ensure that an employer challenging a union’s certification reserves both its right to secure judicial review of the underlying representation case and, if the certification is upheld by a court of appeals, to engage in accommodative bargaining with respect to union information requests for which it has raised a legitimate defense, such as confidentiality, that would normally require such bargaining. Here, conflicting lines of precedent created a legal catch-22 for the employer because it was simultaneously challenging the validity of the union certification and raising legitimate confidentiality concerns over some of the information requested. According to the Board, it had never adequately addressed the manner in which these lines of precedent collide. It determined that the conflict can best be resolved by modifying the remedy for the violations found (NP Palace, LLC dba Palace Station Hotel & Casino, December 16, 2019).

Requiring employees to arbitrate “all claims” violated the Act. An employer unlawfully maintained a mandatory arbitration agreement that required employees to arbitrate “all claims” arising from their employment, the NLRB ruled. This clause would be interpreted by a reasonable employee as a prohibition on filing charges with the Board, in violation of the Act. Its “savings clause” excluding claims that cannot be arbitrated “as a matter of law” was vague and would require employees to determine the state of the law themselves. The employer also violated the Act when it discharged a project employee who refused to sign the unlawful agreement (E.A. Renfroe & Co., Inc., December 16, 2019).

Limited bargaining order can remedy unilateral implementation of final offer. The Board found that an employer violated the NLRA by unilaterally implementing its final offer in the absence of a valid impasse, but the three-member panel was divided on the proper remedy. Concluding that an affirmative bargaining order would “add nothing” to the employer’s legal obligations, the majority modified the ALJ’s recommended order to provide a limited bargaining order. While the majority acknowledged that its precedent has been inconsistent on this issue, it reasoned that similar cases demonstrated that a limited bargaining order was the standard remedy for unilateral change violations. Dissenting in part, Member McFerran would have adopted the ALJ’s recommendation for an affirmative bargaining order to fully remedy the employer’s unlawful conduct (American Security Programs, Inc., December 16, 2019).

“Special circumstances” test dropped in union button and insignia cases. Two Walmart dress code policies that limited, but did not prohibit the wearing of union insignia did not violate the Act, ruled a divided four-member panel of the NLRB. When an employer maintains a facially neutral rule that limits the size and/or appearance of buttons and insignia that employees can wear, but does not prohibit them, a different analysis other than the “special circumstances” test is required. In such circumstance, the Board will apply its Boeing Co. analytical framework. Applied here, the Board found that the retailer lawfully maintained its graphics and logo policies on the selling floor of its stores. Member McFerran dissented (Wal-Mart Stores, Inc., December 16, 2019 (released December 23, 2019)).

Code of conduct requiring employees to preserve confidentiality lawful. An employer’s code of conduct which required employees to maintain the confidentiality of confidential information was lawful under a Boeing Co. analysis, ruled a three-member Board panel. The code of conduct

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did not specifically designate as confidential terms and conditions of employment or, more generally, employee information, so the Board failed to see how it affected employees’ Section 7 rights. Moreover, the Board held that a remedial order to rescind the confidentiality agreement was unnecessary, but a rescission order for an employer memorandum was necessary (National Indemnity Co., December 18, 2019).

**Restrictive post-arbitral deferral standard overturned.** The NLRB reinstated a 30-year old precedent governing deference to arbitration decisions, overturning yet another Obama-era ruling. Dismissing a UPS driver’s claims that his termination violated the NLRA, the Board found that a decision by a grievance panel upholding his termination was entitled to deference under its 1955 decision in Spielberg Mfg. Co. and 1984 decision in Olin Corp. The Board overruled Babcock & Wilcox Construction Corp., which overturned the Spielberg and Olin decisions and instituted a more restrictive standard for when the Board may defer to an arbitrator’s decision. The Board also held the restored standard is to be applied retroactively (United Parcel Service, Inc., December 23, 2019).

**Agency news**

**EEOC does about-face on mandatory arbitration**

The EEOC has rescinded its 1997 “Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment,” in which the Commission took the position that agreements mandating binding arbitration of discrimination claims as a condition of employment “are contrary to the fundamental principles evinced” in the employment discrimination laws that the agency enforces. Since the issuance of the 1997 Policy Statement, the Supreme Court has ruled that agreements to arbitrate employment-related disputes are enforceable under the FAA, the Republican-majority EEOC noted. Moreover, in other arbitration-related cases decided since 1997, the High Court has rejected concerns about using the arbitral forum within and outside the context of employment discrimination claims. These decisions conflict with the 1997 Policy Statement, according to the Commission.

**OSHA inspections up in FY 2019, “record amount” of compliance assistance offered**

OSHA’s final statistics for its fiscal year 2019 show a “significant increase” in the number of inspections and a “record amount” of compliance assistance, in furtherance of the agency’s mission to ensure that employers provide workplaces free of hazards, the agency announced December 3. The number of inspections conducted in FY 2019 increased 4.3 percent over FY 2018, and were more than the agency conducted in FYs 2016 and 2017. (In FY 2015, though, the agency conducted 35,820 inspections—7.2 percent more than in FY 2019.)

**Employers charged with ULPs in 41.5 percent of union elections**

Unfair labor practice charges were filed against employers in 41.5 percent of all union election campaigns, according to a new report by the Economic Policy Institute (EPI) and University of Oregon. The report also found that employers were charged with illegally firing workers in nearly 20 percent of all Board-supervised elections. (Importantly, ULP data measures only alleged illegal employer conduct; a charge is not a determination that the law has been violated.)