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Top Labor Law Developments for August and September 2018

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President Donald Trump nominated Mark Gaston Pearce for a third term on the National Labor Relations Board (NLRB) on August 28.

Pearce's nomination came despite widespread criticism from Republicans and business groups who viewed Pearce as having taken an anti-business approach on many issues before the Board. It appears the nomination may have been part of a deal in which the Senate agreed to confirm Pearce in exchange for confirmation of a number of Trump appointees to positions in other agencies. If confirmed by the Senate, Pearce and Member Lauren McFerran will maintain the two-seat Democratic minority on the five-member Board.

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The Board may apply the U.S. Supreme Court's decision in* Epic Systems Corp v. Lewis, et al., *138 S. Ct. 1612, 584 U.S. __ (May 21, 2018), to further limit what is considered "protected" activity under the National Labor Relations Act (NLRA).

In *Epic Systems,* the Supreme Court upheld the legality of mandatory class action waivers, and in doing so found that filing a class action is not, in itself, a concerted act protected by the NLRA. On August 27, following the Supreme Court's decision, the Board vacated and decided to reconsider its decision in *Cordua Restaurants,* in which it found that an employer violated the Act by firing a worker who filed a collective wage and hour lawsuit against the company. *See Cordua Restaurants,* 366 NLRB No. 72 (April 26, 2018). Some have suggested that by reconsidering the case, the Board hopes not only to confirm that filing a class action is no longer NLRA-protected, but also to expressly deny NLRA-protected concerted activity status to any activity not directly related to union organizing or collective bargaining.

***The NLRB found an employer violated the NLRA by telling workers they could not discuss striking over higher wages while meeting in the employer's parking lot. EYM King of Michigan, LLC d/b/a Burger King,* 366 NLRB 156 (Aug. 15, 2018).**

The employer maintained a non-solicitation rule prohibiting employees from soliciting inside or outside the employer's facility. The employer disciplined an employee after she sat with another employee in a car in the parking lot while off-duty, discussing a wage survey and the possibility of a strike. The NLRB held that the non-solicitation policy violated the NLRA because it prohibited protected concerted activity (discussing wages and the possibility of a strike) in a non-work area on non-work time. The Board rejected the employer's argument that solicitation in the parking lot could disrupt its drive-thru business, finding no evidence to suggest activity in the parking lot affected or was likely to affect sales.

***The NLRB held that employees who signed severance agreements releasing legal claims did not waive the right to file Board charges in connection with their terminations. A.S.V., Inc. a/k/a Terex,* 366 NLRB No. 162 (Aug. 21, 2018).**

In the period around a union election, the employer allegedly threatened employees and interrogated them about their views on the union. The employer laid off employees following the union's election loss, and 11 signed a severance agreement releasing the employer from all legal claims. The union filed NLRB charges claiming the

employer violated the Act by the alleged threats and interrogations, and by requiring a release of the employees' right to file NLRB charges concerning the terminations. The Board found the threats and interrogations violated the Act, and that the severance agreements signed by the 11 employees were invalid, as they were "part of a broader scheme to eliminate union supporters," and because the agreements did not remedy the employer's allegedly unlawful actions.

On September 14, the NLRB published a proposed rule that would change the standard for determining joint-employer status under the NLRA.

Under the Board's proposed rule, joint-employer status would be found only where two entities actually share or codetermine employees' essential terms and conditions of employment, such as hiring, firing, discipline, supervision, and direction. An employer would have to possess and actually exercise substantial direct and immediate control over the essential terms and conditions of employment of another entity's employees in a manner that is not limited and routine. If implemented, the rule would reinstate the traditional joint-employer standard the Board abandoned in its *Browning-Ferris* decision, 362 NLRB No. 186 (2015). In that case, the Board held that indirect control, or even the unexercised right to control, may be sufficient to establish a joint-employer relationship. The Board invited the public to submit comments on the proposed rule by November 13, 2018.

Members of Congress have asked Board Member William Emanuel to recuse himself from the NLRB's deliberations in a case in which the Board may reconsider its standard governing employees' use of their employers' email systems.

In a September 17 letter to NLRB Chairman John Ring, Senators Elizabeth Warren (D-Mass.), Kirsten Gillibrand (D-N.Y.), Cory Booker (D-N.J.), Tammy Baldwin (D-Wis.), and Mazie Hirono (D-Haw.) asked that Emanuel not participate in deliberations over *Caesar's Entertainment Corp.* They cited a potential conflict of interest due to work performed by Emanuel's former law firm in *Purple Communications,* the decision the Board may reconsider in *Caesar's.* In his September 24 letter responding to the Senators, Chairman Ring stated that NLRB recusal issues are handled under the prescribed government ethics rules and procedures and the Board's Designated Agency Ethics Officer, not the Board Chair, makes recommendations on whether recusal is required in a particular case.

On September 14, the NLRB General Counsel's Office, in an internal memorandum, directed Board regional officials to issue complaints against unions accused of certain "negligent" behavior toward members, such as misplacing employees' grievances or failing to respond to employee phone calls.

The memo instructs regional offices investigating these claims of negligence to issue a complaint where such negligence is alleged, unless the union had a procedure in place for avoiding the negligence (and the procedure "was not effective … for some clearly-enunciated reason"), or where there was a reasonable excuse or explanation for the alleged negligence.

The NLRB's Division of Advice held that an employer did not violate the NLRA by maintaining a policy prohibiting audio recordings at work or by terminating an employee who violated the policy. Blue Cross Blue Shield of Tenn., 10-CA-207362 (Div. of Advice, released Sept. 14, 2018).

The employer's "inappropriate behavior" policy prohibited making audio recordings at work. The employee was terminated after surreptitiously recording a meeting with a manager, sharing the recording, and lying about having shared the recording. Applying its decision in *The Boeing Company,* 365 NLRB No. 154 (Dec. 14, 2017), the Board found the no-recording rule was lawful as a "Category 1" rule (*i.e.,* it advanced substantial legitimate management interests while causing only a minor infringement, if any, on Section 7 rights). Further, the Advice Division found the employee had not engaged in NLRA-protected activity anyway because the recording was made for the employee's own interests, not as part of a concerted effort with other employees.

A newspaper's policy against its employees publishing articles with competitors was a lawful work rule under the NLRA, the Board's Division of Advice found. Washington Post, 05-CA-206213 (Div. of Advice, released Sept. 14, 2018).

However, the newspaper violated the NLRA by applying the policy to discipline a reporter who published an article criticizing the newspaper's treatment of employees. Applying the Board's decision in *The Boeing Company,* 365 NLRB No. 154 (Dec. 14, 2017), the Advice Division found the newspaper's rule was a valid Category 1 rule. It found the rule furthered the employer's legitimate interest in stopping its employees from working for competitors, while posing no significant impact on the reporters' rights under the NLRA. The Advice Division,

however, also found the rule was unlawful as applied to the employee who criticized the paper. The criticisms involved employees' working conditions during contract negotiations. Therefore, they were protected under the NLRA.