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The National Labor Relations Board says “Happy Labor Day” with Flurry of Late Summer Pro-Union Moves

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- Labor & Employment
- All Federal

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While some people may have been on vacation at the end of August, the past few weeks have been extremely busy at the National Labor Relations Board (“NLRB” or “Board”), with a series of decisions that will continue to make it easier for unions to organize non-union employers.

Virtual Organizing Has Arrived! The General Counsel Issues Guidance that Electronic Signatures Are Valid In Representation Cases

On September 1, the General Counsel issued guidance that unions may submit electronic signatures to satisfy a showing of interest in representation cases. No longer will an actual signed union authorization card be necessary, opening the door for virtual organizing, eliminating physical barriers that may previously have prevented union organizers from communicating with employees.

Memorandum GC 15-08 details the requirements for petitions containing electronic signatures to be valid. Such submissions must include:

1. the signer’s name;

2. the signer's email address or other known contact information (e.g., social media account);

3. the signer's telephone number;

4. the language to which the signer has agreed (e.g., that the signer wishes to be represented by said union for purposes of collective bargaining or no longer wishes to be represented by said union for purposes of collective bargaining);

5. the date the electronic signature was submitted; and,

6. the name of the employer of the employee.

The General Counsel also requires the party submitting the electronic signature to submit additional information identifying and explaining what technology was used to ensure that the electronic signature is that of the signatory employee, that the employee herself signed the document, and that the electronically transmitted information is the same information seen and signed by the employees.

While the General Counsel notes that its requirements are more stringent that what is required for non-electronic signatures, this is a dramatic shift in how unions can generate the required 30% interest to get a Board election. With virtual organizing, it makes it more likely that an employer will never see the organizing activity (before it's too late).

Labor Board Rules That An Employer May Not Terminate Dues Deduction Upon Expiration of CBA: Take Two

In a long expected decision, on August 27, the NLRB, in *Lincoln Lutheran of Racine*, 362 NLRB No. 188, a 3-2 decision, ruled that an employer may not unilaterally cease making dues deductions upon the expiration of a collective bargaining agreement. This decision explicitly overturns *Bethlehem Steel*, a case which stood for more than 50 years.

If this sounds familiar to you, you are not having déjà vu. The NLRB decided a case in 2012 with the identical holding. However, the 2012 case was vacated as a result of the United States Supreme Court's decision in *Noel Canning*. Thus, *Bethlehem Steel*, while on very shaky footing, was given a three year reprieve...until now.

Employers with collective bargaining agreements should review their agreements to determine whether they have a dues deduction provision. If so, employers should now treat the provision like any other mandatory subject of bargaining and not deviate from the provision even after a contract has expired.

NLRB's New Successorship Rule Raises the Question of Whether Worker Retention Statutes Are Preempted By Federal Law

Also on August 27, 2015, the National Labor Relations Board decided in *GVS Properties, LLC*, 29-CA-077359, 362 NLRB No. 194 (Aug. 27, 2015), the issue of when an employer required to hire its predecessors' employees under a state or local

worker retention law becomes a successor (under labor law) and is required to recognize and bargain with the union representing the predecessor's employees.

The statute at issue in *GVS Properties*, the New York City Displaced Building Service Workers Protection Act ("DBSWPA"), mandates that a successor employer in the building service industry retain its predecessor's workers for a 90-day transition period. Many other state and local statues contain similar requirements. Establishing new law, the Board held – in a split decision – that when such a statute requires an employer to hire its predecessor's employees, the successorship doctrine applies when the employer first hires the workers, not after the mandatory retention period, even though the employment is mandated by law, not by choice.

The Board's holding substantially limits the ability of building service employers and others subject to worker retention statutes to structure their employment relationships when acquiring a company. The Board's decision, however, may have even broader implications, as the most significant, unintended consequence may be to call into question the lawfulness of the worker retention statutes themselves. Board Member Johnson predicted in his dissent that the Board's holding will result in the statutes being preempted by federal law: "Ironically, it could prove the death knell for local worker retention statues. By allowing a local statute to control a matter of federal labor law, the majority paves the way for these statutes to run headlong into the Supremacy Clause of the Constitution." Member Johnson argued that it is the statutory responsibility of the Board, not local governments, to fashion federal successorship law. Thus, Member Johnson claimed that the Board's decision in *GVS Properties* created a "reverse preemption" situation, where "[t]he local tail will be wagging the Federal Supremacy Clause dog."

Whether Member Johnson's prediction rings true will be up to the federal courts, where this issue will be decided. The courts have already provided some forecast for what is to come. In an earlier proceeding involving the same employer and facts as in *GVS Properties*, Judge Cogan of the Southern District of New York stated that based on the Board's position that a new employer should become a successor before the 90-day retention period expires, "the New York City Council has superseded the Supreme Court on a matter of national labor policy..." *Paulsen ex rel. N.L.R.B. v. GVS Properties, LLC*, 904 F. Supp. 2d 282, 291-92 (E.D.N.Y. 2012). While the D.C.. Circuit has suggested in a prior case (*Washington Serv. Contractors Coalition v. District of Columbia*, 54 F.3d 811 (D.C. Cir. 1995) that the Board's new position may be valid, much more recently two other circuit courts rejected challenges to worker retention statutes on preemption grounds but only because they assumed that successorship would not apply until after the mandatory retention periods. *Rhode Island Hospitality*, 667 F.3d 17 (1st Cir. 2011) and *California Grocers Assn. v. City of Los Angeles*, 52 Cal. 4th 177 (2011). With this type of split already existing, we may see this issue before the Supreme Court in short order.

And Don't Forget…

The Board's recent decision greatly expanding the scope of the reach of its joint employer test in *Browning-Ferris Industries of California, Inc.*, 362 NLRB No. 186 (August 27, 2015). This departure from its long-standing joint employer standard, which we summarized last week, will have the Board applying a much broader

standard in assessing whether a joint employer relationship exists.

The flurry of pro-union activity by the Board has given employers a lot to digest.