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LABOR & BENEFITS UPDATE

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Seventh Circuit affirms NLRB Order Granting Union Access to Employer Facility to Examine Fatal Accident Site

The U.S. Court of Appeals for the Seventh Circuit, affirming an NLRB Order, held that Caterpillar, Inc. must allow a United Steelworkers investigator into a workplace facility to examine the site of a fatal workplace accident in which a union-represented worker lost his life. The Employer took the position that it did not need to grant Union access because it was cooperating with the police and with OSHA, and had provided reenactment videos of the accident to the Union. The Employer further argued that an order permitting a union inspection encroached on its "legitimate rights to control its operations and property." The appeals court determined that the reenactments were inadequate and that the Union's right to represent its employees vastly outweighed the Employer's interest in protecting its property rights. The cost to the Employer would be negligible, while the Union's investigation may uncover a cause of the accident and demonstrate the Union's right to look out for the safety of its members.

The Court explained that: “We can't exclude the possibility that the company's unexplained, unjustified refusal of access to [the Union] was intended not only to prevent the union from investigating safety issues and perhaps discovering negligence by Caterpillar but also to demonstrate to its employees that the union can do nothing to enhance their safety. The union's duty to attend to the safety of the employees whom it represents entitles it to insist on performing its own investigation of safety issues, rather than relying entirely on data given it by the company.”

NLRB Holds an Individual Filing a Collective Fair Labor Standards Act Class Action is Engaged in Protected Concerted Activity

A restaurant employee with no union affiliation filed a collective Federal Labor Standards Act complaint (“FLSA complaint”) against his Employer in Federal Court alleging that his Employer violated rules related to tipped employees. At the time of the filing of the FLSA complaint, the employee was the sole plaintiff. However, the FLSA complaint stated that it was brought by the employee plaintiff “on behalf of himself and similarly situated persons who are current and former tipped employees . . . who elect to opt in to this action . . . .” While there was no evidence that any fellow employee consented to the filing of the FLSA complaint, once served with the complaint, the Employer immediately removed the employee from the work schedule. The employee then filed an unfair labor practice charge with the NLRB. In a 2-1 decision, the National Labor Relations Board found that the individual employee was seeking to initiate or induce group action on terms and conditions of employment, and thus was engaged in concerted activity protected by Section 7 of the Act. Further, when disciplining the employee, it was reasonable for the Employer to conclude or suspect that the employee was engaged in concerted group action. As such, the discipline decision was a violation of Section 8(a)(1) of the Act.

Importantly, as noted in the dissent, the employee could have filed a retaliation claim under the FLSA. However, this fact did not preclude the NLRB action.

NLRB Revises the Standard for Determining Joint Employer Status

On August 27, 2015, the National Labor Relations Board issued a 3-2 decision which changed how to determine joint-employer status. The Board’s decision will make it easier for unions to negotiate with employers who rely upon subcontractors or franchisees. If joint employer status can be established, a large employer who subcontracts or franchises operations may be forced to the bargaining table to negotiate. The decision attempts to square Board law with the current economic environment where over 2.87 million of the nation’s workers are employed through temporary agencies.

The Board held that two or more entities are joint employers of a single workforce if (1) they are both employers within the meaning of the common law; and (2) they share or

codetermine the essential terms and conditions of employment.

The Board's decision overrules cases that made it more difficult to prove joint employer status. Now, the Board will not require proof that to be a joint employer, one must possess *and* exercise authority to control employees' terms and conditions of employment. Instead, restrained authority, even if not exercised, becomes relevant to the inquiry. The Board also found that "control exercised indirectly—such as through an intermediary—may establish joint-employer status." The Board opined that "It is not the goal of joint-employer law to guarantee the freedom of employers to insulate themselves from their legal responsibility to workers, while maintaining control of the workplace. Such an approach has no basis in the act or in federal labor policy."

The underlying case is a strong illustration of the application of the new test. Browning-Ferris Industries of California ("BFI") is a waste management company that owns and operates a recycling facility. It contracted with Leadpoint Business Services ("Leadpoint") to have Leadpoint supply sorters, screen cleaners, and housekeepers at the facility. A union petitioned the NLRB to represent the sorters, screen cleaners and housekeepers, and requested that both BFI and Leadpoint be named as employers. In reviewing the case, the Board found that BFI exercised control, even though it may have been through Leadpoint as an intermediary. The control was shown through the contracts between BFI and Leadpoint and BFI's control of the facility. The Board based its holding on BFI's explicit control over 1) hiring, firing and discipline; 2) supervision, direction of work, and hours; and 3) wages of Leadpoint employees. Based on the Board's order, if a union successfully organizes the employees, BFI will be required to participate in the negotiations on the terms and conditions over which it has sufficient control.

This is an important victory for labor rights. It recognizes the changing industrial landscape and has broad implications for unions that seek to represent employees of subcontractors or franchisees.

NLRB Holds That An Employer's Obligation to Check-Off Union Dues Survives Expiration of the CBA

When a collective bargaining agreement containing a dues-check off agreement expires, is the employer obligated to honor the dues check-off agreement while the parties negotiate a new CBA? For the past fifty years, the answer was no. An employer was permitted to discontinue the check- off process, creating obstacles for both the union and its members wishing to maintain union membership in good standing. However, the Board recently overturned this ruling and held that an employer must continue to honor a dues-check off agreement after the expiration of the CBA.

In its August 27, 2015 ruling in *Lincoln Lutheran of Racine* the Board found that, "like most other terms and conditions of employment, an employer's obligation to

check off union dues continues after expiration of a collective-bargaining agreement that establishes such an arrangement."

By requiring an employer to continue to honor dues check-off agreements after contract expiration, the Board explicitly overruled a fifty-one year old decision, *Bethlehem Steel*. The Board also held that this new rule decision will only be applied prospectively.

This case does not change the existing law that not all contractually established terms and conditions of employment survive contract expiration. For instance, arbitration provisions, no-strike clauses, and management rights clauses, do not survive contract expiration, even though they are mandatory subjects of bargaining. This is because in negotiating these provisions, a party – either the union or the employer – was required to waive rights that it otherwise would enjoy, and this waiver is not presumed to survive the expiration of a contract. In the case of dues check-offs, neither party is waiving a statutory or non-statutory right.

Labor Dispute Exception Removed From Pennsylvania Criminal Laws on Stalking and Harassment

On November 5, 2015, Governor Tom Wolf signed legislation into law which repeals the labor dispute exception from Pennsylvania's criminal laws which prohibit stalking, harassment, and threatening to use a weapon of mass destruction. Before this new law was enacted, a person (either management or union) who was involved in a labor dispute, as defined in the Labor Anti-Injunction Act, could not be charged with these crimes. These exceptions will no longer exist. The criminal laws still each contain an exception for constitutionally-protected activity.

Health Plan ACA Reporting

Beginning in 2016, health plans (including multiemployer plans) must provide Form 1095-B to participants and (with an accompanying transmittal Form 1094-B) to the IRS.

Self-insured plans are responsible for handling the reporting themselves, while insurance companies are required to handle the reporting for insured plans.

Information that plans are required to report on these Forms include participant and dependent names, social security numbers, and the months in which they were covered by the plan (not the months in which a contribution was made on their behalf).

The IRS recently extended the deadlines by which the Form 1095-B is to be provided to each participant (reported as the "responsible individual" on the Form) to March 31, 2016, and the Form 1094-B and Form 1095-B to the IRS to May 31, 2016 (or, June 30, 2016, if filing electronically).

Disability Claim Procedures

The Department of Labor published proposed new procedures for deciding disability claims under retirement and welfare plans. The

procedures place additional administrative burdens on plan sponsors in reviewing and sharing claim information with participants. The procedures also give participants additional opportunities to present their claims to plan sponsors. Finally, the new procedures gives participants a better chance at prevailing in litigation if plans do not strictly follow the claims procedures.

The new procedures will not materially affect plans that rely on a Social Security Administration disability determination. Plans making independent determinations may wish to reconsider this practice should the DOL finalize the procedures.

Withdrawal Liability

The U.S. Court of Appeals for the Ninth Circuit's recent decision in a case of successor liability makes it easier for multiemployer pension plans (particularly those in the construction industry) to assess withdrawal liability on a non-union company that effectively takes over (but does not purchase) a contributing employer's business.

In this case, a former sales representative of a defunct union contractor started his own non-union contracting business. While he only purchased 30% of the defunct contractor's assets, he used the same space, phone number, and similar branding as the contractor, hired a majority of the same employees, and using his connections as a sales representative, secured a significant portion of the same customers.

In recognizing the harm that this type of situation can have on a multiemployer plan, the court allowed the plan at issue to assess withdrawal liability even though the former employee did not make an outright purchase of the defunct contractor's business.

In light of this, business agents should continue to remain vigilant in tracking the corporate identity of the employers in their jurisdiction.

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