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Top Five Labor Law Developments for September 2019

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The National Labor Relations Board (NLRB) has adopted a new standard for determining whether contractual language acts as a waiver of a union's right to bargain over a specific issue. MV Transportation, Inc., 368 NLRB No. 66 (Sept. 10, 2019). The employer notified the union that it planned to revise certain policies and work rules. The employer unilaterally implemented the proposed changes before reaching an agreement or an impasse with the union. The union filed an unfair labor practice charge alleging the changes violated the National Labor Relations Act (NLRA). It cited then-current NLRB law stating that an employer making a unilateral change in the terms and conditions of work must first show that the union "clearly and unmistakably waived" its right to bargain over the change. *See Provena St. Joseph Medical Center,* 350 NLRB 808 (2007). Overturning *Provena,* the Board in *MV Transportation* adopted a more employer-friendly "contract coverage" standard. Under that standard, the NLRB will allow a unilateral change, notwithstanding the lack of a clear and unmistakable waiver by the union of the right to bargain, where the change falls "within the compass or scope of contract language that grants the employer the right to act unilaterally," based on "ordinary principles of contract interpretation." Applying its new standard, the Board found the contract in question allowed all of the employer's changes. (For more, see our article, Labor Board Adopts 'Contract Coverage' Standard in Unilateral Change Cases, Overturns Precedent.)

***Adopting another new standard, the Board has ruled an employer did not violate the NLRA when it ejected non-employee union agents from its property. Kroger Limited Partnership,* 368 NLRB No. 64** (Sept. 6, 2019). Union representatives had entered the employer's parking lot and began soliciting customers to boycott the employer's store. The employer called the police, who removed the union agents. The union filed an unfair labor practice charge alleging the ejection violated the NLRA. Applying then-current Board law (*Sandusky Mall Co.,* 329 NLRB 618 [1999], that

an employer could not deny nonemployee union solicitation if the employer allowed "substantial civic, charitable, and promotional activities"), an administrative law judge (ALJ) found the employer violated the Act because it removed the union agents while allowing other nonemployees access to engage in community and charitable activities. Reversing the ALJ and overturning *Sandusky Mall,* the Board held an employer may lawfully eject union organizers if the other nonemployee activities permitted by the employer on its property are not similar in nature to the union activities prohibited. The Board found the union protest and boycott activities at issue are not sufficiently similar in nature to the charitable, civic, or commercial activities the employer allowed on its property in the past. (For more, see our article, Access to Private Property: Labor Board Rules Girl Scout Cookies and Union Protesters are Different.)

The NLRB has proposed a rule to exclude student workers at private colleges and universities from NLRA coverage. The Board issued a "Notice of Proposed Rulemaking" to establish that "students who perform any services for compensation, including, but not limited to, teaching or research, at a private college or university in connection with their studies are not 'employees' within the meaning of Section 2(3) of the [NLRA]." The proposed rule would "overrule extant precedent and return to the state of law as it existed from shortly after the Board first asserted jurisdiction over private colleges and universities in the early 1970s to 2000 and, with brief exceptions, for most of the time since then." Comments to the Notice of Proposed Rulemaking must be submitted by November 22, 2019.

NLRB members have expressed support for loosening rules restricting when employers can bar off-duty employees from accessing employer property. In a decision released in September (*Southern Bakeries,* 368 NLRB No. 59 [Aug. 28, 2019]), Board Members Marvin Kaplan and William Emanuel signaled they support rethinking a key element of the Board's longstanding precedent on the legality of employers' off-duty employee access rules. They are prepared to "reconsider … in a future appropriate case" the "third prong" of the test in *Tri-County Medical Center,* 222 NLRB 1089 (1976), for determining the validity of those rules. Under *Tri-County,* to demonstrate the legality of an off-duty employee access rule, an employer must show the rule applies to off-duty employees seeking access to the employer's property for "any purpose." That prong of *Tri-County* has been vexing for employers, because it bars them from maintaining a rule that would allow an employee to return to the workplace for innocuous reasons (*e.g.,* to pick up a paycheck), because such a rule could be interpreted as an unlawful prohibition against access to engage in union activity.

NLRB Chairman John Ring has reiterated his objections to U.S. House members' requests for documents on NLRB ethics issues. The original request for documents, made on May 6, 2019, by Bobby Scott (D-Va.), Chairman of the House Committee on Education and Labor, and Frederica Wilson (D-Fla.), Chairwoman of the House Subcommittee on Health, Education, Labor and Pensions, related to Board members' alleged conflicts of interest. In responses dated May 23, June 5, and June 21, Ring provided some but not all of the information requested, objecting to the appropriateness of some of the requests. The House members renewed their request on August 15, 2019, for: (1) memoranda from the NLRB's ethics official (who makes determinations on members' recusals from certain cases); (2) updated lists of cases in which Board members could not participate; (3) documents relating to the "appropriateness" of members' participation in a certain matter; and (4) an update on the Board's internal ethics reviews. In his September 4 response, Ring again declined to release the requested documents. He noted that the documents were "pre-decisional" and their production would violate Board norms that promote candor when evaluating potential conflicts of interest. Ring also maintained the Board's "longstanding position" that the requested documents contained "privileged" communications among Board members and NLRB staff that cannot be released outside the NLRB. Ring further noted that disclosure of recusal lists

could “reasonably be expected to interfere with the Board’s law enforcement function,” because parties may be able to claim a denial of due process when members recuse themselves from the affected party’s case.

This post features contributions from Christopher M. Repole*.*

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