Inside The Beltway

Keeping You Informed

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Critical developments in labor and employment law

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NLRB to unions: Don't risk picketing…rat and banner!

Executive Branch/Administration
National Labor Relations Board—Rats, like banners, are not coercive

On May 26, 2011, in *Sheet Metal Workers International Association Local 15 (Brandon Regional Medical Center)*, 356 NLRB No. 162, the National Labor Relations Board (NLRB) in a 3-1 decision held that displaying a large inflatable rat at the entrance to a hospital where an HVAC sheet metal contractor was performing work and with which the union had a dispute was not unlawful secondary picketing. The HVAC contractor employed nonunion labor with wage and benefit payments allegedly below area or union standards. Under the National Labor Relations Act (Act) Section 8(b)(4)(ii)(B), it is an unfair labor practice for a union to threaten, coerce, or restrain an employer to cease doing business with another employer or to force or require another employer to recognize or bargain with a labor organization unless such union is a certified representative of the secondary employer's employees.

The union placed a 16-foot high inflatable rat on a flatbed trailer in front of the hospital on public property within 100 feet of the hospital's front door. The name of the contractor was displayed on the rat's belly. Union members stood next to the trailer distributing leaflets announcing a "rat employer" at the hospital and one picketer held out a leaflet to display to oncoming traffic. Charges were filed, a complaint issued, and the administrative law judge held that the inflatable rat displaying a banner was the equivalent of picketing, and the display and holding of a leaflet directed at motorists entering the hospital was picketing and that the conduct was confrontational, coercive, and constituted illegal secondary activity.

On review, in a 3-1 decision, the NLRB reversed the administrative law judge's decision and applied its August 27, 2010, bannering decision in *Eliason & Knuth of Arizona, Inc.*, 355 NLRB No. 159. In *Eliason*, the NLRB held that the stationary holding and display of large banners announcing a "labor dispute" at three neutral, secondary employers' businesses seeking to "shame" the employers and/or to persuade customers not to patronize the employers for using nonunion construction contractors was lawful, nonconfrontational conduct. The NLRB majority reasoned that like bannering, ratting is not unlawful intimidation threatening or coercing secondary/neutral employers by violence,

intimidation, blocking ingress and egress, or similar direct disruption of their businesses. Rather, ratting is merely lawful persuasion—protected, symbolic speech. In dissent, Member Hayes repeated his argument in *Eliason* that the essential feature of picketing is the posting of individuals at entrances to a place of work, not patrolling or patrolling combined with the carrying of placards.

Now that both bannering and ratting are deemed lawful, the traditional carrying of picket signs presumably will no longer be used at secondary worksites. And, unions may also opt for ratting and bannering at primary worksites as well to avoid typical state law infractions of massing and blocking ingress and egress to private property. In the future, perhaps employers should consider responding with inflatable "rat traps" or catchy banners? Whether such actions would be treated similarly remains to be seen.

National Labor Relations Board—Social Media…**more**, more, more

As previously reported on November 11, 2010 and November 16, 2010, and again on February 8, 2011, unions continue to take full advantage of the NLRB's decade-long foray into evaluating whether a company's work rules and employment policies would reasonably tend to chill employees' exercise of their Section 7 rights to engage in self-organization and other concerted activities for the purpose of collective bargaining or other mutual aid or protection. Despite the NLRB's direction in fashioning workplace social media policy, it is interesting to note that recent cases in both the United Kingdom, *Preece v. JD Wetherspoons plc* ET/2104806/10, and in British Columbia, Canada, *Lougheed Imports Ltd.* (2010) B.C.L.R.B.D. No. 190, found terminations of employees lawful because of their Facebook postings. In *Wetherspoons*, the decision acknowledged the European Convention on Human Rights regarding freedom of expression, but noted that it is limited where there is a risk of damage to the reputation of others. In *Lougheed*, the Provincial Labour Board found the "disrespectful, damaging and derogatory comments on Facebook" were likely to damage the reputation and business interests of the employer.

On April 21, the Associate General Counsel for the Division of Advice concluded in Lee Enterprises, Inc., d/b/a Arizona Daily Star, Case 28-CA-23267, that the employer's discharge of a reporter for writing inappropriate and offensive Twitter postings did not violate the Act. The employer encouraged reporters to use social media. Although the employer had no social media policy, its employee handbook contained various conduct rules. The reporter tweeted using his work and home computers, and his company-provided cellphone. He made an insulting tweet about his company and was counseled. He later posted a critical comment about a local television station and was terminated. He filed a post-termination charge with the NLRB which was dismissed, because even if there had been an orally promulgated, overbroad rule against inappropriate tweets, the employee had not been engaged in protected concerted activity. The employee's postings did not involve terms or conditions of work and he did not seek to involve other employees in employment-related issues.

On May 20, 2011, a complaint issued against a Chicago area auto dealership alleging the unlawful termination of a car salesman for posting critical comments about the Company on Facebook. Following a company promotional event, the salesman posted pictures and critical comments complaining that the company offered only hot dogs and bottled water. The complaint does not allege the existence of an unlawful policy. A hearing is scheduled for July 21.

On May 23, 2011, the NLRB issued a press release announcing its complaint against the New York nonprofit organization Hispanics United of Buffalo for terminating five employees who posted critical comments about working conditions on Facebook. The complaint does not allege an unlawful social media policy; rather, it is limited to the discharges for protected concerted activity by the employees involved.

These recent cases demonstrate that the NLRB continues to scrutinize overbroad or vague, written or orally promulgated work rules that would tend to restrain or prevent employees from engaging in Section 7 rights to form, join, or assist organizing for collective bargaining or other mutual aid or protection. The NLRB will also examine whether such activities are both protected ***and*** concerted. Interestingly, the NLRB has yet to explain why it apparently considers modern day internet postings analogous to the old-fashioned "water cooler" conversations to justify applying the older workplace law principles to a very different era of, at best, the "virtual" workplace.

National Labor Relations Board—Acting General Counsel issues guidelines on parties' obligations to provide information regarding assertions made in collective bargaining

In a May 17 memorandum, the Acting General Counsel directed that complaints issue in future cases where, during bargaining, information requested either by a union or an employer is not provided to the requesting party. Examples provided include where an employer claims an inability to pay or comments made about an inability to compete for business due to labor costs, or where a union refused to provide copies of contracts with other employers that it used to develop bargaining proposals to the requesting employer. Most concerning is the extended discussion in the memorandum expanding on what "inability to pay" embraces. It is clear that the Acting General Counsel wishes to extend a broad reach to any fact pattern to argue that the employer's comments trigger a legitimate union request for relevant financial information.

National Labor Relations Board—Associate General Counsel orders all future relocation "situations" be submitted to Division of Advice

In a May 10, 2011 Memorandum, the NLRB's Associate General Counsel (AGC) noted NLRB Chairman Liebman's comment in *Embarq Corp.*, 356 NLRB No. 125 (2011), that "in a future case, I would be open to modifying the *Dubuque* framework in connection with union requests for information." In furtherance of the Chairman's comments, the AGC directed that all future relocation charge filings be referred to the Division of Advice. Consequently, it is anticipated that a complaint will issue soon giving the NLRB an opportunity to consider what information an employer must provide to a union regarding any contemplated relocation. Under current case law, where a union cannot offer sufficient labor cost concessions to dissuade an employer from relocating, bargaining over the relocation decision is not required. *Dubuque Packing Co.*, 303 NLRB 386 (1991), enfd. in pertinent part, 1 F.3d 24 (D.C. Cir. 1993), cert. denied 511 U.S. 1128 (1994). As Liebman noted:

> Current law does not compel the production of information…if the Board, in hindsight, determines that concessions would have made no difference…[and] is based, to greater or lesser degree, on guesswork about the concessions that a well-informed union would have offered….[T]he Act's policy of promoting collective bargaining might well be better served,

if employers were required to provide unions with requested information about relocation decisions whenever there was a reasonable likelihood that labor-cost concessions might affect the decision.

While the Chairman's desire for more information in relocation cases is understandable, hopefully the NLRB will not engage in second-guessing an employer's stated profit objectives to then assess whether the employer engaged in good-faith bargaining. This is a matter to watch carefully as it unfolds.

Executive Branch/Administration

Department of Health and Human Services—Office for Civil Rights

On May 31, 2011, the Department of Health and Human Services HHS issued a notice of proposed rulemaking to implement the Health Information Technology for Economic and Clinical Health Act (HITECH) requiring accountability by health plans, health care clearinghouses, and health care providers for disclosures of protected health information regarding treatment, payment, and health care operations if such disclosures are through an electronic health record. Comments are due August 1. The proposed rule would expand the accounting provision to provide individuals with the right to receive an access report indicating who has access to electronic protected health information.

Department of Labor—Office of Federal Contract Compliance Programs

On April 26, 2011, the Office of Federal Contract Compliance Programs (OFCCP) issued proposed regulations regarding hiring and prohibited discrimination against protected veterans. Comments are due by June 27, 2011. The proposed rule would apply to government contracts or subcontracts of $100,000 or more entered on or after December 1, 2003. Such contracts are not aggregated and must be for the purchase, sale, or use of personal property or "nonpersonal" services, including construction. Records on veteran referrals and applicants would have to be retained for five years. The affirmative action notice would have to be accessible and understandable to a disabled veteran. And, despite possible violations of the Americans with Disabilities Act, OFCCP proposes that contractors invite applicants to self-identify as protected veterans to permit the contractor to engage in a discussion with offerees on how best to accommodate any condition.

On May 12, the OFCCP announced proposed regulations to revise the scheduling letter and itemized listing sent to federal supply and service contractors to initiate compliance evaluations. Supporting data would be expanded to include copies of leave policies and Veterans' Employment Report VETS-100 and/or VETS-100A for the prior three years. Contractors also would be required to submit data both by job group and job title rather than by one or the other. Finally, contractors would be required to submit "aggregate data" rather than "disaggregate data" to enable the agency to better focus on possible race or sex discrimination. Comments are due by July 11, 2011.

On May 17, the OFCCP announced a program to examine federal supply and service contractors' compliance experience with all other Department of Labor agencies, including the Wage and Hour Division, Veterans' Employment and Training Service, Occupational Safety and Health Administration, and the Equal Employment Opportunity Commission over a rolling three-year

period. Under the acronym ACE, or "active case enforcement" directive, every desk audit in every compliance evaluation will now include this extended examination.

Department of Labor—Occupational Safety and Health Administration

The Occupational Safety and Health Administration (OSHA) announced a new, voluntary employer survey on May 23, 2011. Surveys are being sent to 19,000 randomly selected employers to inquire whether they have a program in place, perform annual inspections, identification of those individuals who manage safety at the workplace, and types of hazards managed and encountered.

Department of Labor—Wage and Hour Division

High-tech was upfront and center on May 9, 2011. A new application for iPhone and iPod Touch smartphones was announced to assist employees in independently tracking their work hours to determine their wages owed by their employer. The app enables employees to track hours worked, break time, and overtime hours for one or more employers. Labor Secretary Solis announced: "This app will help empower workers to understand and stand up for their rights when employers have denied their hard-earned pay." In progress are additions to the application to account for tips, commissions, bonuses, deductions, holiday pay, weekend pay, shift differentials and pay for rest days, as well as extension to other smartphone platforms, including Android and BlackBerry.

Office of Management and Budget—21st Century Regulation Reform

President Obama issued Executive Order 13563, "Improving Regulation and Regulatory Review," on January 18, 2011. His general principles include:

> Our regulatory system must protect public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation. It must be based on the best available science. It must allow for public participation and an open exchange of ideas. It must promote predictability and reduce uncertainty. It must identify and use the best, most innovative, and least burdensome tools for achieving regulatory ends. It must take into account benefits and costs, both quantitative and qualitative. It must ensure that regulations are accessible, consistent, written in plain language, and easy to understand. It must measure, and seek to improve, the actual results of regulatory requirements.

On May 25, the Office of Management and Budget (OMB) announced a 30-agency summary of initial efforts to comply with the order. Notably, the Department of Labor's Wage and Hour Division reported that contractors' comments suggested that more weight be given to wage data gathering for setting contract wage rates rather than increased enforcement. OSHA reported its efforts to remove or revise duplicative, unnecessary, and inconsistent safety and health standards. The Office of Labor Management Standards announced its intent to review its 2007 changes to Form LM-30 regarding labor union annual financial reporting, and to reduce the number of pages in the report form from 9 to 2. The NLRB submitted its preliminary plan to announce that its Rules Revision Committee will "meet at least once per year to review and update existing rules and, if necessary, propose modifications or new rules."

Legislative Branch/Congress – Senate

The Senate Health, Education, Labor and Pensions Committee held a hearing on May 12, 2011, to consider the future of the middle class, but directed most of the inquiry to the NLRB's proceeding against the Boeing Company. Following the hearing, 35 Senators cosponsored and introduced Senate Bill 964, "Job Protection Act," to amend the National Labor Relations Act to address the NLRB's complaint against Boeing. The bill would:

1) Protect an employer's expression of any views, argument, or opinion regarding costs associated with collective bargaining, work stoppages, or strikes, or the dissemination of any views and shall not be evidence of antiunion motive provided such expression contains no threats of reprisal or promise of benefit;

2) Prevent the NLRB from ordering any employer to relocate, shut down, or transfer any existing or planned facility or work or employment opportunity or prevent any employer from taking such actions unless the employer is adjudicated to have unlawfully undertaken such actions without advance notice to the union representing affected employees, if any, or in direct response to a union organizing effort.

Legislative Branch/Congress – House

On May 24, 2011, the House Committee on Education and the Workforce Subcommittee on Health, Education, Labor and Pensions held a hearing on the impact of union corporate campaigns on employers and job creation. Following the hearing, five South Carolina Representatives introduced House Bill 1976, "Job Protection Act," a companion bill to the Senate Bill 964.

Also on May 24, the House Appropriations Committee approved an amendment to the FY 2012 military appropriations act to prohibit federal agencies from requiring project labor agreements on military construction projects. If ultimately approved by both the House and Senate, the Davis-Bacon Act prevailing wage requirements, frequently reflecting higher union hourly wage rates, would no longer be considered for Department of Defense and Veterans Affairs construction contracts.

The House Oversight Committee has scheduled a field hearing for June 17, 2011, in North Charleston, South Carolina, to investigate issues of job creation and the impact of the Boeing Company's new facility to produce 787 aircraft.

For further information on the content of this *Alert*, please contact your Nixon Peabody attorney or:

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