Inside The Beltway

Keeping You Informed

A publication of Nixon Peabody LLP's Washington, DC, office

September 3, 2010

Critical developments in labor and employment law

By John N. Raudabaugh

Executive Branch/Administration

Department of Labor (DOL)

Addressing Labor Day 2010, Secretary Hilda Solis outlines the Department's agenda:

> "To those who want to cut corners and disregard safety in the workplace, I say: Keeping workers safe matters far more than saving a few cents.
>
> To those who want to deny workers a voice in the workplace, let me be clear: This Secretary of Labor recognizes, respects and celebrates a workers' right to organize and bargain collectively." http://www.dol.gov/laborday/

In further celebration, DOL launched its official blog with Labor Day commentaries from senior Department officials. http://social.dol.gov/blog/

National Labor Relations Board (NLRB)

On August 27, the Board announced its intention to reconsider the successor bar doctrine and, given the Board's current 3 Democrat and 1 Republican composition, presumably reverse *MV Transportation*, 337 NLRB 770 (2002). That decision holds that an incumbent union has only a rebuttable presumption of continuing majority status, which does not bar a valid decertification, rival union, or employer petition challenging the union's status. The Obama Board will most likely return to the Clinton Board precedent in *St. Elizabeth Manor, Inc.*, 329 NLRB 341 (1999), which held that a successor employer must recognize an incumbent union for a reasonable period of time for bargaining without challenge to its majority status.

On the same day, August 27, the Board also announced its intention to reconsider and surely reverse the Bush Board decision in *Dana Corp.*, 351 NLRB 434 (2007). The issue is the finality accorded voluntary card-check recognition by an employer. *Dana* holds that the employer voluntarily recognizing a union must post a notice notifying the employees of their right, within 45 days, to file a petition for an election to decertify the union or to support a rival union. The outcome is predictable given NLRB Chairman Liebman's comments in the recent decision, *Rite Aid Store 6473 – Lamons Gasket Co.*, 355 NLRB No. 157 (August 27, 2010). Her footnote 5 is telling:

> The statistics show that 54 elections were conducted, out of 1,111 cases in which *Dana* notices were requested from the Board: an election rate of 5 percent. In 15 instances, 1 percent of the total cases, the recognized union was rejected by employees. In 99 percent of the total cases, in other words, it is arguable that *Dana* did not serve any clear purpose. As for the 1 percent remainder, it is important to remember that the pre-*Dana* regime would have kept the (unwanted) union in place only temporarily.

With voluntary card-check recognition often linked with neutrality agreements, many employees stand to lose the opportunity for a secret ballot election to protect against overreaching in the typical card-signing process.

The Board also issued on August 27 a long-awaited decision on "bannering," where Carpenters Union members held 16-foot-long banners announcing a "labor dispute" and seeking to "shame" two medical centers and a restaurant into not patronizing the construction employers the union claimed paid substandard wages and benefits. While picketing secondary employers not to do business with the primary employer is deemed unlawful under Board precedent, the Board majority, Chairman Liebman and Members Becker and Pearce, found the conduct protected speech akin to lawful stationary handbilling. In dissent, Member Hayes and former Member Schaumber characterized the majority's reasoning as "strained" in order to avoid a result that "they view as too 'severe.'" Given the Obama Board's reasoning, the answer to the forthcoming decision regarding "inflatable Rats" used to "shame" employers seems apparent.

Occupational Safety & Health Administration (OSHA)

On the eve of Labor Day, Assistant Secretary of Labor/OSHA Dr. David Michaels announced fines totaling nearly $4.5 million against employers in Alabama, Arkansas, Rhode Island, and Texas for tampering with safety mechanisms on hydraulic equipment, improperly recording and failing to record work-related injuries and illnesses, unprotected excavation, and failure to provide machine guard protection against amputation.

On September 1, OSHA published interim final rules effective August 31 for whistleblower protection for employees who file complaints against their employers in the railroad, public transit, commercial motor carrier, and consumer product industries.

http://www.whistleblowers.gov/

Labor/employment news reports

Former Labor Secretary Elaine Chao offers her opinion on Labor Day 2010.
http://online.wsj.com/article/SB10001424052748703467004575463932749862058.html?mod=WSJ_Opinion_LEFTTopOpinion

AFL-CIO President Richard Trumka will launch "a massive mobilization in 26 states, and we will work on Senate races, governor races, over 70 House races, and when you include state legislatures, we'll be involved in over 400 elections in this cycle."
http://www.huffingtonpost.com/2010/09/01/afl-cio-labor-day-tea-parties_n_701713.html

Human Rights Watch issued a 130-page report on September 2 entitled "A Strange Case — Violations of Workers' Freedom of Association in the United States by European Multinational Corporations." The report is an attempt to shame some European multinational firms which allegedly have carried out aggressive campaigns to keep their U.S. workers from organizing and bargaining in violation of international standards as well as U.S. labor laws. http://www.hrw.org/node/92719

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

- John N. Raudabaugh at 202-585-8100 or jraudabaugh@nixonpeabody.com