Inside The Beltway

Keeping You Informed

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Critical developments in labor and employment law

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NLRB's complaint against Boeing . . . will it fly?

Executive Branch/Administration
National Labor Relations Board—Acting General Counsel issues complaint alleging unlawful transfer of work to non-union South Carolina facility and seeking return of work to union-represented assembly plant in Washington.

On April 20, 2011, NLRB Acting General Counsel Solomon issued a complaint against the Boeing Company following investigation of a charge filed March 26, 2010, by the International Association of Machinists and Aerospace Workers District Lodge 751. The complaint contends that Boeing, through its executive leadership, made coercive statements to employees and the public impliedly threatening to remove work because of the union's repeated strike activities in 1977, 1989, 1995, 2005, and 2008. Boeing announced its decision in October 2009 to locate a second Dreamliner production line in South Carolina. It is one of 22 "right-to-work" states and has only a 2.7 percent private sector union density. In March 2010, a Boeing Executive Vice President commented to a reporter that the decision was a response to the union's past strike activity. The complaint alleges that Boeing's actions were inherently destructive of employees' statutory rights to strike and to engage in protected, concerted activities. Undoubtedly, the Acting General Counsel will argue that employees' rights were "chilled" and, using this Board's popular metaphor, that it was intended to "nip-in-the-bud" future strikes. The remedy sought is the "return" of the second line's production work to Washington State, even though it never existed there. A hearing before an administrative law judge is scheduled for June 14, 2011.

Not mentioned in the complaint are the facts that the union's 48-day strike in 1989 caused Boeing to miss orders resulting in $2 billion in lost sales, the 1995 strike lasted 69 days, the 2005 strike was approximately a month long, and the 2008 strike lasted 58 days costing the company $1.8 billion. Notably, Boeing purchased a union-represented plant in South Carolina, which the employees decertified shortly thereafter. Boeing has invested nearly $2 billion in the facility and Dreamliner

production is scheduled to begin in July. More than 1,000 workers have already been hired. At the same time, Boeing's Washington workforce has expanded by 2,000 workers since the 2009 decision regarding South Carolina production.

The Acting General Counsel relies, in part, on Board decisions involving fact patterns wholly unrelated to the Boeing case, e.g., comments made during a union election campaign, selecting key employees for layoff who otherwise would likely honor a union picket line, terminating operations and subcontracting the bargaining unit work, and discharging employees to avoid a threatened strike.

In the two weeks since the complaint issued, there has been a flood of commentaries critical of the Acting General Counsel's action. On April 28, nine states' attorney generals sent a letter to the Acting General Counsel denouncing the complaint and requesting that it be withdrawn. On May 3, Senators Enzi, Alexander, Burr, Isakson, Paul, Hatch, McCain, Roberts, Murkowski, and Kirk signed a letter to the NLRB Acting General Counsel stating strong disagreement and suggesting that there will be further inquiries into why the complaint issued. Also on May 3, Boeing's General Counsel responded to the NLRB Acting General Counsel, challenging his public statements and the complaint in a six page letter plus attachments. Of course, months will pass before a decision, which is likely to be appealed to the National Labor Relations Board and then to the federal appellate court and the U.S. Supreme Court, is final.

National Labor Relations Board—Acting General Counsel sues two states to invalidate state constitutional amendments requiring secret ballot elections for private sector union representation elections

As previously reported, on January 6, 2011, the NLRB authorized the Acting General Counsel to sue the states of Arizona, South Carolina, South Dakota, and Utah to enjoin enforcement of their recently approved state constitutional amendments requiring secret ballot elections in union representation elections on the ground these laws are preempted by the National Labor Relations Act. Following notification, they responded on January 27 announcing their intentions to aggressively defend such action. On February 2, the Acting General Counsel replied noting that the recent amendments could be construed to be consistent with federal law. However, on April 22, 2011, just two days after issuing the Boeing complaint, the Acting General Counsel directed lawsuits be filed against Arizona and South Dakota. The explanation provided for not filing against South Carolina and Utah, apparently ignoring alphabetical order in selection, was the conservation of "limited federal and state agency resources and taxpayer funds." (The Board's 2011 fiscal year budget request of $287.1 million was trimmed only .2 percent or approximately $5.7 million as approved by Congress on April 14, 2011. Chairman Liebman and Acting General Counsel Solomon defended the NLRB's 2011 budget request before a House Appropriations Committee hearing on April 3).

National Labor Relations Board—Acting General Counsel signals issues of interest for future litigation

In an April 12, 2011, Memorandum, the Acting General Counsel directed Regional Directors to submit certain new case matters to the Division of Advice for review and comment prior to issuing a

complaint or dismissing a charge. Among the issues of interest identified for possible future litigation before the Board—a warning for employers—are the following:

- Remedies involving access to employer electronic communications systems; access to nonwork areas; **equal time to respond to captive audience speeches**.
- **First contract bargaining reimbursement of bargaining and/or litigation expenses**.
- Consideration of factors demonstrating use of "independent judgment" in determining **supervisory status of charge nurses** and matters involving rotating supervisors.
- **Employer rules prohibiting or disciplining employees for protected concerted activity using social media.**
- Cases involving **contractor employees** who regularly work on another employer's premises **to have access to communicate with co-workers or the public when on non-working time**.
- **Employee use of employer's e-mail system**.
- Unusual or novel forms of conduct in corporate campaigns, e.g., inflatable rats, coordinated "shopping."
- **Cases alleging alter-ego liability or piercing the corporate veil in the absence of unlawful motive**.
- **Section 10(j) injunctions requests**.
- **Cases involving undocumented workers**.
- **Partial lockouts**.
- **Purchases of bankrupt entities**.
- **Permanent replacement of economic strikers with unlawful motive**.

National Labor Relations Board—overbroad employer handbook rules that "could possibly chill" (even though they were *never* enforced) saves union from defeat in decertification election

On March 28, 2011, in 2–1 decision, the Board held in *Jurys Boston Hotel*, that despite never being enforced and the union never objecting, three rules in the employer's handbook regarding solicitation, loitering, and wearing emblems or buttons had a "reasonable tendency to chill or otherwise interfere with the pro-union activities of employees" during the period prior to a decertification election which the union lost…by one vote. The Board directed a second election.

This decision underscores yet again the need for all employers to regularly review employee rules and policies to ensure they comply with NLRB caselaw decisions. When the metaphysical "test" concerns what is "reasonable" and "chilling," it is best never to have to face it.

National Labor Relations Board—revisiting business relocation decisions…maybe…

In *Embarq Corp.*, decided March 31, 2011, the Board applied precedent in holding that the employer's decision to close its call center in Nevada and relocate the work to its existing call center in Florida was not a mandatory subject of bargaining under *Dubuque Packing Co.*, 303 NLRB 386 (1991), enf'd. in pertinent part, 1 F.3d 24 (DC Cir. 1993), cert. denied 511 US 1138 (1994). While agreeing in the result, Members Becker and Hayes disagreed on which *Dubuque* factors were key to defending the employer's action without bargaining with the union. Significant for employers is that Chairman Liebman, while concurring in the result, suggested that in a future case the Board "might modify the *Dubuque* framework" to encourage bargaining—even when *Dubuque* would not require—and "provide the union with information about the labor-cost savings and advise whether, in its view, the union could make concessions that could change its decision."

National Labor Relations Board—pro-union supervisors conduct during union election campaign mitigated by employer's anti-union campaign…union election victory certified

In *Terry Machine Co.*, a Board majority certified the results of a 1999 union election despite efforts by seven supervisors overseeing approximately one-half of the workforce in soliciting employee signatures on behalf of the union. The majority reasoned that the supervisors' pro-union conduct was mitigated by the employer's aggressive antiunion campaign including threats to the supervisors and informing the employees that the supervisors' actions did not represent the company's position. In dissent, Member Hayes would direct a new election given the extreme passage of time and the fact that it was the supervisors themselves that informed the employees of the employer's threats against them.

National Labor Relations Board—contractor's off-duty employees may access property owner's premises to campaign for union

On March 25, in *New York New York Hotel & Casino*, a three member Board majority held that the Casino unlawfully denied access to its property by off-duty restaurant workers of an onsite lessee employer for the purpose of distributing handbills in support of a union organizing campaign. The case has a long history beginning with a 2001 Board ruling that the Casino violated the restaurant workers rights to engage in handbilling and concerted activities to form a union. The decision was appealed and the Court of Appeals for the District of Columbia Circuit remanded the case directing the Board to consider the implications of the Supreme Court's 1992 decision in *Lechmere, Inc. v. NLRB*, 502 US 527 distinguishing access rights based on employee or non-employee status of the property owner.

The Board majority noted that although the restaurant workers were not employees of the Casino/property owner, they regularly worked onsite performing work benefitting the Casino/property owner. The majority reasoned that the interests of the restaurant workers were more aligned to those of the Casino's own employees than to the non-employee/outsider interests of union organizers at issue in *Lechmere*. The majority acknowledged that the Casino/ property owner had a state law property right to exclude trespassers including off-duty non-employees and the right under *Republic Aviation v. NLRB*, 324 US 793 (1945) to restrict its own employees' solicitation and distribution activities to maintain production and discipline. At the same time, however, the majority

declined to condition access rights based on *NLRB v. Babcock & Wilcox Co.,* 351 US 105 (1956) granting access to non-employees only when there are no reasonable alternative means of communicating with their intended audience. The Board majority noted that the Casino could have dealt with the issue by contractually imposing "reasonable, non-discriminatory, narrowly-tailored restrictions on the access of contractors' off-duty employees, greater than those imposed on its own employees."

Ultimately, the Board majority concluded that the Casino/property owner "may lawfully exclude [contractor] employees only where the owner is able to demonstrate that their activity significantly interferes with his use of the property or where exclusion is justified by another legitimate business reason, including, but not limited to, the need to maintain production and discipline…." In dissent, Member Hayes would limit the off-duty restaurant workers to the area outside the main entrance to the casino complex.

The implications for shopping malls, hotels, office buildings, and similar multi-use facilities are serious. Unions will leverage this decision to enhance organizing and corporate campaigns and customers, third-party employees, and clients will be inconvenienced. Given that lease agreement restrictions, as mentioned by the Board majority, have yet to be considered or reviewed, property owners are advised to consult with counsel in drafting lessee-employee access restrictions.

National Labor Relations Board—residential customer service technicians may wear prisoner T-shirts…you're kidding?...No!

On March 24, 2011, in *AT&T Connecticut*, a Board majority affirmed an administrative law judge decision finding that AT&T unlawfully prohibited its residential customer service technicians from engaging in protected activities by wearing T-shirts with "Inmate #" on the front and "Prisoner of AT$T" on the back. In dissent, Member Hayes reasoned that some customers would be frightened being confronted at their front door with someone wearing the shirt. Hayes argued that the "special circumstances" defense of *Republic Aviation Corp. v. NLRB*, 324 US 793 (1945) should apply.

Department of Labor—Office of Federal Contract Compliance Programs

The OFCCP announced proposed regulations on April 26, 2011, regarding contractors' and subcontractors' obligations regarding veterans. As proposed, contractors must invite applicants to self-identify as a "protected veteran" prior to an offer of employment and maintain the data response. The applicant need not identify whether they are disabled as part of the self-identification process. Contractors would have to review their personnel practices at least annually rather than "periodically" as has been required.

Department of Labor—Wage and Hour Administration

Final regulations were issued April 5, 2011, to be effective May 5, 2011, addressing many issues including bonus payments to fluctuating workweek employees and information to be provided employees regarding tip credit and tip pooling. For further information, see our Employment Law Alert, *New FLSA rules address tip pooling, fluctuating workweek, and other issues*.

Equal Employment Opportunity Commission

On March 25, 2011, the EEOC published its final regulations implementing the Americans with Disability Amendments Act of 2008. The regulations become effective May 24, 2011. Significantly, the regulations adopt rules of construction for interpreting the Act including broadly construing the concept of "substantially limits" to assure expansive coverage. An "impairment" substantially limiting an individual to perform a major life activity need not require supporting scientific or medical evidence and an episodic impairment in remission that could recur is considered a disability if it substantially limits a major life activity when active and need not substantially limit other major life activities.

Legislative Branch/Congress
Senate

The Paycheck Fairness Act, S. 797 was introduced on April 12, 2011. The bill was originally introduced in the 111th Congress in 2009 and would amend the Fair Labor Standards Act to expand remedies for discrimination in wage payments based on sex to ensure equal pay for equal work.

The Payroll Fraud Prevention Act, S. 770 introduced on April 8, 2011, would require employers to provide each worker a written notice noting whether the individual is classified as an employee or non-employee independent contractor and informing the person of their rights under federal wage and hours laws and information on contacting the U.S. Department of Labor. Additional remedies are proposed for cases of misclassification.

The National Right-to-Work Act, S. 504 was introduced on March 8, 2011. The bill would eliminate special treatment for union shops as currently permitted in states that have not enacted right to work laws.

Legislative Branch/Congress
House

The Paycheck Fairness Act, H.R. 1519 was introduced on April 13, 2011. The bill was originally introduced in the 111th Congress in 2009 and would amend the Fair Labor Standards Act to expand remedies for discrimination in wage payments based on sex to ensure equal pay for equal work.

The Employment Non-Discrimination Act, H.R. 1397 was introduced on April 6, 2011, to prohibit employment discrimination based on sexual orientation or gender identity.

The Fighting for American Jobs Act of 2011, H.R. 1378, introduced on April 5, 2011, would require any federal department or agency providing contracts, grants, loans, or loan guarantees to require annual reporting for the contract's duration of program statistics regarding the number of persons employed in the United States, the number employed outside the United States, a description of the wages and benefits paid to employees, the percentage of domestic workforce laid off or induced to resign, and the percentage of the total workforce laid off or induced to resign. If the percentage laid off domestically is greater than for the entire workforce, the business enterprise shall be ineligible for

further assistance until the percentage regarding the domestic workforce is equal or greater than that for the preceding year.

The Jobs for Veterans Act of 2011, H.R. 1312 was introduced on April 1, 2011, to amend the Internal Revenue Code of 1986 to enhance favorable tax treatment of employers hiring veterans.

The State Right to Vote Act, H.R. 1047 was introduced on March 11, 2011, to require secret ballot voting as the only method to choose whether to be represented by a labor organization under the National Labor Relations Act.

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