CONSTANGY
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The Employers' Law Firm, Since 1946

EXECUTIVE LABOR SUMMARY

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IN THIS ISSUE

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NEWS & ANALYSIS

NLRB "Poster Rule" enjoined! – See Constangy's *Client Bulletins* on the **emergency injunction** issued by the U.S. Court of Appeals for the District of Columbia Circuit, the decision of the district court in South Carolina **invalidating** the rule, and the decision of a district court in the District of Columbia **finding that the NLRB had authority to issue but not enforce** the rule. The rule treats any failure to post the Notice as an unfair labor practice and tolls the six-month limitation period for filing unfair labor practice charges if the Notice is not posted. The April 30 effective date has been postponed indefinitely. Constangy will keep you informed of all developments.

NLRB claims Hyatt policies and handbook are overbroad and discriminatory. – NLRB claims Hyatt policies and handbook are overbroad and discriminatory. NLRB Region 28 in Phoenix recently issued a **Complaint** against Hyatt Hotels Corporation, alleging that many of the company's policies, guidelines and rules are overly broad and discriminatory, having the effect of interfering with, restraining, and coercing employees in the exercise of their Section 7 rights. The broad-based Complaint takes issue with many of the typical guidelines and rules employers have in place, including codes of business conduct and ethics, social media policies, appearance guidelines, acknowledgement forms, and employee handbooks.

The Complaint specifically identifies numerous provisions that the Region considers to be problematic:

From the Social Media Policy covering online networks, blogs and other social media such as Facebook, LinkedIn and Twitter, employees must

- "Avoid commenting on Hyatt or any Hyatt location," and
- "Refrain from posting images of Hyatt's locations or facilities or displaying Hyatt logos."

From the company's code of business conduct and ethics, employees

- "Have a duty to report any known or suspected violation of this Code …" and
- "Are prohibited from disclosing to third parties such confidential information as 'training materials' and 'personnel information.'"

The company handbook contains further rules that prohibit employees from

- "Unauthorized disclosure or use of any confidential information about Hyatt, its associates, its clients or guests . . . you have learned through, or as a result of, your employment at Hyatt";
- "Participating in civic or professional organization activities in a manner whereby confidential company information is divulged";
- "Revealing confidential data to anyone";
- "Misstating revenues, expenses, or assets";
- "Interfering with or hindering work schedules, failing to work a shift as scheduled";
- "Leaving your department or work area without the permission of your supervisor or being in locations other than your assigned work areas";
- "Refusing to cooperate with a hotel investigation or failing to report a violation of hotel policies and procedures"; and
- "Making derogatory or unfounded statements about Hyatt, its employees . . .."

The policy also requires that employees agree that they "shall not, at any time, disparage Hyatt or any of its respective subsidiaries, affiliates, directors, officers, or employees or associates."

The Complaint also alleges the company has maintained an overbroad and discriminatory "acknowledgement form" in its handbook, which contains the following statement: "I understand my employment is 'at will,' I acknowledge that no oral or written statements or representations regarding my employment can alter my at-will employment status, except for a written statement signed by me and either Hyatt's Executive Vice President/ Chief Operating Officer or Hyatt's President."

Finally, the Complaint alleges, as overbroad and discriminatory, rules in Hyatt's Style Guide and Appearance Guideline that require the company's permission or approval to wear a union pin, limit employees to the wearing of only approved or authorized union pins, and limit employees to wearing only one union pin.

Although the Complaint was issued by the Phoenix Region of the Board, it seeks an order requiring Hyatt to rescind and cease maintaining and enforcing the alleged unlawful rules and policies in all of Hyatt's facilities nationwide. A hearing on the Complaint has been scheduled for May 2 in Phoenix before an administrative law judge.

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Pro-union conduct of supervisors did not materially affect election outcome. – The U.S. Court of Appeals for the District of Columbia Circuit recently **ruled** that the NLRB properly certified the union's victory among registered hospital nurses despite pro-union conduct by supervisory charge nurses. After the union won the election among registered nurses 72-39, the employer filed objections claiming that the conduct of supervisory charge nurses tainted the results. Several charge nurses spoke in favor of the union, attended union meetings and signed authorization cards in front of registered nurses. One charge nurse, Silva, approached or sent text messages to RNs to notify them of union meetings. Another, Gilliatt, told about 10 RNs to attend the meetings and told some RNs to sign authorization cards. Both Silva and Gilliatt were subsequently promoted, and then they began actively campaigning against the union in the days before the election. Gilliatt told 20-30 RNs she no longer supported the union, and Silva told four. In addition, they both signed personalized company letters urging the RNs to vote against the union. The letters reached most of the RNs.

With regard to the first group of charge nurses, the court used the Board's two-pronged ***Harborside*** **test** to decide whether the conduct required setting aside the election. First, the court determined that signing authorization cards in front of the RNs, attending union meetings and speaking in favor of the union did not rise to the level of interference with the RNs' exercise of free choice. Second, the court found that there was no evidence that the conduct, even if it did interfere with freedom of choice, materially affected the outcome of the election, which the union won by a large margin.

With regard to the actions of Silva and Gilliatt, the court found that even though their solicitation of authorization cards could be considered coercive, their conduct was mitigated by their actions after they were promoted. In the opinion of the court, by the time of the election the RNs would have had no reason to feel pro-union coercion or interference from Gilliatt's or Silva's earlier behavior. According to the court, ". . . any registered nurses who felt pressured by Gilliatt or Silva would have felt coerced to vote *against* the Union."

Supervisory criteria of authority to "responsibly direct others" is very difficult to prove. – In ***Rochelle Waste Disposal, LLC v. NLRB***, the court upheld an NLRB decision that an employee with the job title of "landfill supervisor" was not a "supervisor" within the meaning of Section 2(11) of the Act and was, therefore, unlawfully fired in retaliation for engaging in union organizing activities. At issue before the court was whether the so-called "landfill supervisor's" job included any one of the 12 supervisory criteria required by Section 2(11). Although the employer could not show that the job of "landfill supervisor" contained any of the other 11 criteria, it claimed that the employee, Jarvis, had the authority "responsibly to direct others." The employer argued that a statement by Jarvis to an equipment operator that the operator was allowing his machine to "idle" too long, was evidence of Jarvis' responsibility to direct the equipment operator. However, the employer did not show that the equipment stopped idling because Jarvis placed a burden or requirement on the operator, nor did it show that the operator should have stopped the idling because of such a burden or requirement. According to the court, the Board correctly found that Jarvis' statement did not demonstrate responsibly directing the work of others.

The court emphasized that, in order to establish that an employee has the authority to responsibly direct another coworker, it had **previously required** that the employee be accountable for the coworker's performance. According to the court, "the proper inquiry is whether the purported supervisor is at risk of suffering adverse consequences for the actual performance of others, not his own performance in overseeing others." Although the employer showed that on two occasions Jarvis was told that the equipment operators were performing inadequately, it failed to show that Jarvis actually suffered an "adverse consequence" as a result of such conversations.

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NLRB refuses to address recess appointment issue. – As **previously reported**, the validity of President Obama's January 4 recess appointments of Republican Terence Flynn and Democrats Sharon Block and Richard Griffin to the NLRB is being raised in several court proceedings. Those recess appointments were also challenged in a recent NLRB case, ***Center for Social Change, Inc.***, decided on March 24. The employer claimed that, because the recess appointments occurred while the Senate was in session but without the advice and consent of the Senate, the Board now lacks a quorum to act. That argument was unanimously rejected by the Board. Democrat Chairman Mark Gaston Pearce and Members Griffin and Block declined to rule on the merits of the claim, and instead applied what they referred to as the "well-settled presumption of regularity" of the official acts of public officials in the absence of clear evidence to the contrary. Republican Members Brian Hayes and Flynn refused to rely on any "presumption of regularity," but they found no jurisdictional basis for the Board to decide the lack of quorum issue.

THE GOOD, THE BAD AND THE UGLY

AFL-CIO re-launches website. – The AFL-CIO recently re-launched its official website, according to a report in *Bloomberg BNA*. AFL-CIO Secretary Treasurer Liz Schuler says that the **revamped website** has a "fresher, more modern" feel, includes more videos, has an enhanced search engine, and also includes more than 7,000 pages of content. One feature allows site visitors to input their zipcodes and be directed to union-related events in their communities as well as local activity by unions. The union's goal is to get a million "hits" a month and for it to become a tool for non-union workers to learn about unions.

Board Member Flynn in hot water over disclosures. – Politics continues to pervade the NLRB. Before Republican Terence Flynn began serving his recess appointment to the NLRB in February, he was chief counsel to previous Republican Board members Peter Schaumber and Peter Kirsanow, and attorney for Republican Member Brian Hayes. *Bloomberg BNA* (3/26/12 and 4/3/12) reports that after Flynn was sworn in as a Board Member on January 9, NLRB Inspector General David Berry filed a report directly with two Congressional oversight committees concluding that Flynn made improper disclosures to former Board Members Schaumber and Kirsanow. According to the report, Flynn asked an NLRB librarian to conduct legal research and then reported the results to Kirsanow shortly before Kirsanow filed a lawsuit for the National Association of Manufacturers **challenging the Board's new posting rule**. The report also claims that Flynn gave Schaumber, who is co-chair of labor policy advisory group Mitt Romney for President, case lists and data on pending cases that the Inspector General called "the most confidential of Agency information."

Flynn's attorney has **denied** that Flynn engaged in wrongdoing. According to the attorney, "Mr. Flynn disclosed nothing of any substance constituting agency 'deliberative information.'" Apparently, Flynn did forward an email "that reprinted an earlier email from someone else," but "that was a non-substantive error and inadvertent oversight on Mr. Flynn's part."

The reaction of the Democrats and unions was predictable. Rep. George Miller (D-Calif.), ranking member on the House Education and the Workforce Committee, forwarded the report to Attorney General Eric Holder with a request for an investigation. Rep. Elijah Cummings (D-Md.), ranking member of the House Oversight and Government Reform Committee, has asked Committee Chairman Darrell Issa (R-Calif.) to investigate the report on Flynn. Sen. Tom Harkin (D-Iowa), Chairman of the Senate Health, Education, Labor and Pensions Committee, has requested that Flynn provide the committees with records of his communications with former NLRB officials

and lawyers outside the agency. AFL-CIO President Richard L. Trumka called the Inspector General's findings "a test for candidate Romney" and said that "allowing Schaumber to remain as an advisor will speak volumes about candidate Romney and the value he places on ethics in government officials." Flynn has called the allegations a "manufactured controversy [that] is emblematic of the mean-spirited political theatrics that currently paralyze Washington."

Surprise? AFL-CIO endorses Obama and creates super PAC. – To no one's surprise, the AFL-CIO General Board voted unanimously to endorse President Obama for a second term. As reported by *Bloomberg BNA*, AFL-CIO President Trumka said the endorsement is affirming "our faith in him, and [we] pledge to work with him through the election and his second term to restore fairness, security, and shared prosperity." The AFL-CIO plans to place a high priority on voter registration of both union and non-union workers. With 2.3 million active and retired union members and members of their households not registered to vote, the organization's goal is to register 400,000 of those workers.

The AFL-CIO also has a newly created super PAC called "Workers' Voices" designed to build an online network of small donors in addition to the funds that the Union raises from its affiliates. To date, *Bloomberg BNA* reports that the super PAC has raised $5.4 million. Despite that amount of money, the AFL-CIO's political director forecasts that organized labor will probably be outspent more than 20 to one, "but we are going to have to out-organize them 20 to one."

Non-union workers' pay rose more than that of union workers, but non-union workers lag in benefit increases. – According to figures recently released by the Labor Department's Bureau of Labor Statistics, the average hourly pay of non-union workers rose 2.8 percent in 2011, while that of union workers rose only 0.8 percent. Moreover, the average hourly wage of union workers ($22.86), remains $3.56 lower than that of non-union workers. Still, the cost of employer-provided benefits, including health insurance and retirement plans for unionized workers, increased more during 2011 than did those benefits for non-unionized workers. The cost of employer-provided benefits for union workers is almost double the amount spent on non-union workers, $15.19 per union worker versus $7.74 per non-union worker.

UAW membership shows some increase. – LM-2 filings recently released by the U.S. Department of Labor show that membership in the United Auto Workers union rose by more than 4,000 members during 2011. The increase is attributed to increasing production capacity and workers by the big three U.S. automakers. As the UAW continues to diversify its representation of workers in the gaming, academic and health care sectors, it is also working to gain membership among workers at foreign-owned automotive plants and parts suppliers in the United States. According to a recent report by WDEF News 12, a television station in Chattanooga, Tennessee, employees have begun passing out union authorization cards at the new 2,700-worker Volkswagen plant near Chattanooga. In keeping with its previously announced "neutral" position on unionization, Jonathan Browing, President and CEO of Volkswagen of America, commented that "we believe the employees are the people that will make their decision, we hope that it will be a very well informed decision . . . and a decision they make freely on the basis of good information."

About Constangy, Brooks & Smith, LLP

Constangy, Brooks & Smith, LLP has counseled employers on labor and employment law matters, exclusively, since 1946. A "Go To" Law Firm in Corporate Counsel and Fortune Magazine, it represents Fortune 500 corporations and small companies across the country. Its attorneys are consistently rated as top lawyers in their practice areas by sources such as Chambers USA, Martindale-Hubbell, and Top One Hundred Labor Attorneys in the United States, and the firm is top-

ranked by the U.S. News & World Report/Best Lawyers Best Law Firms survey. More than 130 lawyers partner with clients to provide cost-effective legal services and sound preventive advice to enhance the employer-employee relationship. Offices are located in Alabama, California, Florida, Georgia, Illinois, Massachusetts, Missouri, New Jersey, North Carolina, South Carolina, Tennessee, Texas, Virginia and Wisconsin. For more information, visit www.constangy.com.