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By Cliff Nelson

Atlanta Office

NEWS & ANALYSIS

Breaking news . . . Wilma Liebman's term expires! – NLRB Chair Wilma Liebman's third term expired midnight Saturday, August 27. A Clinton appointee, Liebman was on the Board 14 years and was strongly pro-union. Meanwhile, ultra-pro-union Craig Becker's recess appointment will expire at the end of the year. We'll keep you informed on the political maneuvers and machinations, but we expect the Republicans in Congress to do what they can to avoid giving President Obama the opportunity to make any more recess appointments. If Liebman and Becker are gone and not replaced, the Board will be left with only two members – Mark Pearce, a Democrat, and Brian Hayes, a Republican – and **no authority to issue decisions**. Pearce has been designated the new Chair.

Employers must post notice explaining employees' right to organize. – Starting November 14, 2011, employers subject to the National Labor Relations Act (which includes non-union employers) **will be required to post a Notification of Rights under the NLRA**. The Board has announced its final rule with few changes from the **proposed rule**. The most significant change is that the final rule no longer requires that employers distribute the new notice via email, voice mail, text message or any other electronic form of communication they customarily use to communicate with employees. Constangy is issuing a Client Bulletin that will discuss the posting in more detail.

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Boeing trial not yet off the ground. – Two months after it began, the administrative law judge assigned to the **Boeing case** has not yet heard one word of testimony. So far, lawyers for both sides have been locked in negotiations and motions involving challenges to subpoenas from the NLRB acting general counsel and those of the International Association of Machinists. Boeing has sought a protective order that will shield it from what it considers sensitive business, commercial and proprietary information, as well as information that could provide the IAM with an unfair advantage in future collective bargaining. Among other issues, the IAM attorney plans to object to redactions in a Power Point presentation to the company board of directors that describes the costs of establishing another Dreamliner assembly line in an existing plant in suburban Seattle versus building one from scratch in South Carolina. Boeing redacted the suburban Seattle costs, but not the costs for South Carolina. The union contends that setting up a second assembly line in Seattle would have been much less expensive and that the redaction “confirms that the motive was to evade union activity and not a legitimate decision based on finances.”

Not all social media complaints about work are protected. – In three recent memos to its Regional Offices, the NLRB Division of Advice concluded employee Facebook postings about their employment may not be protected from disciplinary action even if the complaints are job related. Associate General Counsel Barry Kearney concluded in each case that the online comments were individual grievances rather than protected concerted activity. Acting General Counsel Lafe Solomon **followed up** with a memorandum summarizing all of the NLRB social media/protected concerted activity cases from the past year, including the three discussed by Kearney.

How about that! Election set aside because of union's unlawful promise. – In most cases, it is an employer's express or implied promise of a tangible benefit that is viewed as objectionable conduct during a union election campaign. Normally, a union promise of benefits is not considered objectionable conduct since a union is not capable of delivering on a promise of benefit without the employer's acquiescence. Under those circumstances, it is the employer who will ultimately provide the benefit, not the union. However, in *Go Ahead N. Am. LLC*, the NLRB **ruled** this summer that a union local's promise that employees would not have to pay union dues that their former employer failed to deduct from their pay, improperly granted a benefit that interfered with an employee vote on decertifying the union. The dues issue began when the former employer failed to deduct and remit union dues as required by the collective bargaining agreement. The union sent the company an e-mail requesting an explanation, but took no other action to collect the dues and also did not inform the employees that it was waiving the delinquency. During a subsequent decertification campaign, the union promised that it would waive collection of the dues that the employer failed to deduct. In directing a second decertification vote, the Board found that the union's waiver of back dues was “an objectionable grant of a tangible benefit . . . that employees reasonably would infer that the purpose of the union's expressed willingness to forgive the obligation was to induce them to support the union.”

No back pay for illegal immigrants. – Despite its pro-labor bent, the Obama NLRB has reluctantly followed Supreme Court precedent and ruled that undocumented workers whose rights were violated under federal labor law cannot obtain back pay even though their illegal immigrant status was known by the employer when they were hired. Despite the Supreme Court's decision in *Hoffman Plastic Compounds Inc. v. NLRB*, an ALJ had ruled against the company because it was the employer, not the workers, who violated immigration laws by failing to verify the workers' authorization status.

A three-member panel of the Board, however, unanimously agreed that *Hoffman Plastic* is controlling even though the workers never presented fraudulent documents to obtain their jobs and the employer knew they were undocumented. However, in a concurring opinion, Liebman and Pearce said, “We . . . remain convinced that the

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result in this case – an order relieving the employer of economic responsibility for its unlawful conduct – can only serve to frustrate the policies of both the [NLRA] and our nation's immigration laws.” Liebman and Pearce also made it clear that this issue has not been finally resolved. They wrote, “We would be willing to consider in a future case any remedy within our statutory powers that would prevent an employer that discriminates against undocumented workers because of their protected activity from being unjustly enriched by its unlawful conduct.”

What?! Reinstate workers who “threatened” a supervisor? – Yes, that is what the D.C. Court of Appeals ruled in *Kiewit Power Constructors Co. v. NLRB*. The U.S. Court of Appeals for the District of Columbia Circuit denied an appeal and enforced a NLRB order in favor of two former Kiewit electricians who were fired for allegedly threatening a supervisor who was giving oral warnings to groups of workers because they were taking longer breaks than permitted. One electrician told the supervisor that he had been out of work for a year before the Kiewit project and that if he got “laid off it's going to get ugly and [the supervisor] better bring [his] boxing gloves.” Another electrician told the supervisor that he had been out of work for eight months and repeated that “it's going to get ugly.” Pursuant to its zero-tolerance workplace violence policy, Kiewit fired the two electricians.

The two workers filed unfair labor practice charges, a complaint was issued, and the ALJ upheld the discharges. In a 2-1 decision, the Board reversed the ALJ's decision and Kiewit appealed. The appeals court agreed with the company that an employee who was engaged in protected concerted activity could “by opprobrious conduct, lose the protection of the Act,” but concluded that the Board reasonably found that the statements were not actual physical threats and acknowledged “that the employees were speaking in metaphor.” According to Judge Thomas Griffith, “It would defeat [NLRA] Section 7 if workers could be lawfully discharged every time they threatened to ‘fight’ for better working conditions.”

In her dissent, Judge Karen Henderson emphasized that the ALJ had found that the workers' comments “amounted to an outright threat uttered in anger” and the Board should not have overruled the ALJ's credibility determination. Henderson wrote “the board's reinstatement – seconded by my colleagues – of employees who openly challenged, by threatening language, lawful decisions of their employer compels me to observe: ‘so much for industrial peace.’”

Chuck Roberts, with Constangy's Winston-Salem Office, argued the case for Kiewit Power Constructors on appeal.

“Quickie election” proposal gets more than 30,000 comments. – As reported in two Constangy Client Bulletins, the NLRB and the Department of Labor have proposed two new rules that will drastically change the manner in which employers respond to union representation elections. The **NLRB's proposed new rule** provides for “quickie elections” and give unions immediate access to employee contact information. The **DOL's proposed new rule** provides a new, narrow interpretation of the “advice exemption” of the Labor Management Reporting and Disclosure Act, which would vastly expand the reach of “persuader” reporting obligations for employers and their labor relations consultants. The public was given time to submit comments on both of the proposed new rules. The period for comments on the NLRB's proposal to amend its rules for representation elections closed on August 22. By that deadline more than 30,000 comments had been made by businesses, union groups, legislators, academics, members of Congress and individuals. If nothing else, the 30,000 comments indicate there is strong disagreement over both the need for a rule change and the appropriateness of the Board's proposal. Business groups filed extensive comments objecting to the proposals, arguing the Board has moved too hastily on the proposals issued only two months ago, cannot demonstrate any need for changes in existing procedures, will severely limit an employer's opportunity to educate employees about unions, and will give an unfair advantage to unions during organizing campaigns. Union comments favored the NLRB pro-

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posals as a necessary and appropriate adjustment of Board procedures, arguing that the more time that elapses between a petition and an election, the more opportunities employers have to commit unfair labor practices which intimidate workers and convince them that supporting a union is not worth sacrificing their jobs. The Congressional response to the proposed rule change was divided along party lines. Republicans said the proposed rule changes would stack the deck against employers by limiting the time available for a response to union organizing. Democrats argued that “gamesmanship” and abusive employer behavior in election campaigns have undermined the NLRA, which was designed to promote and encourage collective bargaining.

The period for comments to the DOL’s proposed rule change on persuader reporting expires on September 21. Major unions support the proposed changes, saying that employers should be required to disclose relationships with consultants and attorneys if they are persuading workers against joining unions. Law firms and business interests say the change could be a blow to labor law boutique firms and firms with large labor practices that may have to severely limit the advice they provide clients if they don’t want to be saddled with the reporting requirements. They also say the new rule will threaten attorney-client privilege by requiring firms to disclose the names of clients and the advice they give on how the employer communicates with employees about the union. According to Michael Eastman, Executive Director for Labor Law Policy at the U.S. Chamber of Commerce, the proposed broader disclosure rules will “make it harder for employers to find someone to talk to for advice during a union campaign.”

THE GOOD, THE BAD AND THE UGLY

Gov. Haley is vindicated. – We **previously reported** that Gov. Nikki Haley of South Carolina was being sued by the Machinists Union for publicly making strong anti-union comments shortly after taking office in January of this year.

This month, a federal judge **ruled** that Haley did not violate the constitutional or federal labor law rights of the union. The union argued that Haley violated its First Amendment rights. The court disagreed, finding that Haley used a “pervasive and mundane” type of rhetoric that a reasonable person would view as spotlighting the state’s pro-management laws and not as a “threat of imminent regulation.”

Haley’s comments were made in connection with the state’s support of Boeing’s efforts to bring a Dreamliner assembly line to its recently acquired facility in North Charleston. Haley said, “There’s no secret I don’t like the unions . . . I will do everything I can to defend the fact that we are a right-to-work state. . . we are pro-business by nature. I want us to continue to be pro-business.”

That had to hurt — SEIU intimidation manual revealed. – For more than a decade unions have become increasingly desperate to obtain new dues-paying members. One of the most successful tactics, aimed at larger employers, has been “the corporate campaign.” This tactic is used to pressure corporate boardrooms as a means of organizing entire companies rather than by site-by-site secret ballot elections conducted by the NLRB. The typical corporate campaign is designed to paint a company as a labor law violator and bad corporate citizen by exposing EEO, safety, immigration, wage/hour, and workers’ compensation issues to stockholders and the general public. A successful corporate campaign will pressure a company into agreeing to card check recognition or into remaining neutral during an organizing campaign.

Catering company Sodexo, Inc., has been the target of a corporate campaign by the Service Employees International Union for several years, and filed suit against the SEIU alleging racketeering and extortion. During discovery, the

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union was forced to provide a 70-plus page “intimidation manual,” which describes the use of community groups to “damage an employer’s public image and ties with community leaders and organizations.” It recommends going after company officials and managers personally. The union states, “it may be a violation of blackmail and extortion laws to threaten management officials with release of ‘dirt’ about them if they don’t settle a contract. But there is no law against union members who are angry at their employer deciding to uncover and publicize factual information about individual managers.” The SEIU recommends “leafleting outside meetings where “[targeted managers] are speaking, their homes, or events sponsored by community organizations they are tied to . . . to make sure their friends, neighbors, and associates are aware of the controversy.” In some circumstances, the manual advocates civil disobedience, stating, “Union members sometimes must act in the tradition of Dr. Martin Luther King and Mohatma Gandhi [sic] and disobey laws which are used to enforce injustice against working people.”

Corporate campaigns were the subject of a recent hearing by the U.S. House, Education and Workforce Subcommittee on health, employment, labor and pensions. Chairman Phil Roe (R-Tenn.) noted the increase in corporate campaigns and said that the NLRB recently had “taken steps to expand the arsenal of tactics available for corporate campaigns,” including upholding union elections tainted by intimidation because the intimidation was originated by “nonparties” and by removing restrictions on union boycotts of neutral employers.

UAW is rolling along. – During the week of July 25, the United Auto Workers and the three U.S. domestic auto manufacturers – General Motors, Ford and Chrysler – began bargaining to renegotiate their master agreements that expire on September 14. These are the first formal talks since the 2009 government-aided bankruptcy reorganizations of GM and Chrysler. The top priorities for the union this year are investment commitments to maintain and expand job opportunities; to raise standards for new hires, temporary and contingent workers that will allow those workers to advance to the top pay tier; and to resist health cost-shifting to employees and seek longer periods of company-paid health coverage for laid-off workers. The historic practice of pattern bargaining might not take place this year because the three companies’ financial conditions are so different. Another historic concept, short strikes, is probably obsolete because workers at GM and Chrysler do not have the right to strike this year as a condition of the federal bailout.

The UAW is touting its “21st century approach” in its attempt to attract employees of foreign automakers who operate in the United States. The UAW has repeatedly failed to organize workers at the U.S. plants of Toyota, Honda and Nissan. However, union officials have previously said they were talking about organizing workers at a new Volkswagen plant in Chattanooga, Tennessee. UAW officials say the union is making “great inroads” in its organizing efforts and predict that, before the end of this year, a campaign will be under way. UAW President Bob King’s message to the foreign automakers is, “Why would you spend millions and millions of dollars to try and keep a union out when that union can add value?” Easier said than done, Mr. King!

Unions turn to town hall meetings by phone. – Unions are starting to use telephone town hall meetings to communicate with members about many topics, including contract negotiations, political elections and legislative issues. In 2009, the Teamsters had more than 10,000 members on one call about details of tentative agreements reached on major national contracts. More recently, in March of this year, 100,000 union and Working America members in 12 states participated in a telephone town hall meeting with Vice President Joe Biden and Labor Secretary Hilda Solis, who pledged support for public employees who face mounting pressure to eliminate their collective bargaining rights.

Union pays big, apologizes for sending “stinky” mailer. – During a nationwide corporate campaign against Angelica, a company that provides linens to hospitals, UNITE HERE investigated Angelica’s compliance with health and safety regulations. The union claimed to have found evidence that Angelica delivered

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linens that were dirty, stained, foul-smelling and possibly smeared with blood or feces. The union sent a report of its findings to many of Angelica's customers, including Sutter Health, a northern California hospital chain. After the chain refused to meet with the union to discuss its labor dispute with Angelica, in March of 2005, UNITE HERE mailed a postcard to current and former patients of Sutter Health, as well as women of childbearing age who lived near Sutter Health facilities, urging them to protect their newborns from potentially infectious conditions at the hospital. The front of the postcard pictured a sleeping infant and stated, "Expecting? You may be bringing home more than your baby if you deliver at a Sutter birthing center."

Sutter Health immediately sued UNITE HERE in California State Court for defamation, trade libel, and intentional interference with prospective economic relations. A jury awarded Sutter \$17 million in damages, but that award was subsequently overturned because of a faulty jury instruction. Six years later, on July 5, 2011, the union and Sutter announced a settlement under which the union will pay Sutter \$6 million. Sutter said it will use the money to invest in patient care. As for the union, UNITE HERE President Wilhelm issued a letter of apology to Sutter admitting that the postcard mailed to its customers was "offensive and in poor taste." Predictably, Wilhelm said the union leaders who oversaw the mailing are no longer with the union. Apparently, Wilhelm is referring to leaders who, along with co-President Bruce Raynor, broke from the union in 2009 to form Workers United, an affiliate of the SEIU.

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.