But Wait, There's More – Additional Labor Law Developments You Need to Know About

Labor & Employment Law Update

By Beverly Alfon on January 12, 2023

While we continue to absorb the impact of the National Labor Relations Board's recent expansion of its authority to include awards for consequential damages in unfair labor practice (ULP) cases, there are other significant pro-union decisions and directives that need to be on your radar.

The Board Reverted to a Standard of "Overwhelming" Community of Interest in Union Elections. Though it may seem counterintuitive, in most cases, when a union petitions to represent a unit of employees, the employer considers its options for *expanding* the number of employees to be included in that petitioned-for unit. The logic is that the bigger the petitioned-for unit is, the harder it will be for the union to win by the majority vote that it needs to be certified the unit's bargaining representative. In American Steel, 372 NLRB No. 23 (Dec. 14, 2022), the Board reinstated a standard that makes it easier for unions to petition for "micro-units." It establishes a presumption that the union's petitioned-for unit (which the union defines) is appropriate, unless the employer can show that the employees who the employer is trying to add, share an "overwhelming" community of interest with the petitioned-for unit. Prior to this decision, an employer only had to show that the employees it wanted to add to the unit shared "a" community of interest with the petitioned-for unit.

The Board Affirmed That Employers Must Take Certain Actions Before Interviewing Employees in Relation to ULP Cases In most ULP cases, it is necessary for an employer to interview its employees as part of its own investigation into the allegations and to prepare its defense. In Sunbelt Rentals, Inc., 372 NLRB 24 (Dec. 15, 2022), the Board reaffirmed the standard set forth in *Johnnie's Poultry*, 146 NLRB 770 (1964), enforcement denied, 344 F.2d 617 (8th Cir. 1965), which requires employers to take the following steps before questioning union-represented employees in ULP cases: (1) communicating the purpose of the questioning to the employee; (2) assuring the employee that the employer will not retaliate if the employee refuses to answer any question or for any answer that the employee gives; and (3) notifying the employee that participation in the interview is voluntary. Employers must be familiar with these requirements – and document compliance – when interviewing union-

represented employees for ULP-related purposes.

The Board Made It Easier for Off-Duty Employees of Contractors to Access Property. In Bexar County Performing Arts Centers (Bexar II)(Dec. 16, 2022), the Board held that the property owner of a performing arts center violated the National Labor Relations Act by barring employees of the San Antonio Symphony (contractor) from protesting on its property. The Board reinstated a standard from *New York New York Hotel & Casino*, 356 NLRB 907 (2011), which established that unless a property owner can show why its property interests are greater than the Section 7 interest of employees of contractors that perform services on its property, removing those employees from the premises to stop or prevent protected concerted activities will constitute an unfair labor practice.

The Board's General Counsel Is After Employer Email Systems and Financial Information. The Board's General Counsel is urging Regional offices to look for opportunities to file ULP complaints against employers with the goal of overturning the current case law that allows employers to ban employees' non-business use of company email and information technology systems, absent proof of discrimination or that employees would "otherwise be deprived of any reasonable means of communicating with each other." The Board's General Counsel is also urging the Board to overturn the well-established standard related to when an employer is required to provide financial information to a union during contract negotiations. Currently, an employer is only required to provide general financial information if the employer has "opened the door" by indicating that it is unable (not merely unwilling) to pay more than it has offered at the table. The General Counsel wants a standard that will trigger the obligation to share financial information if an employer raises either its profitability or competitive advantage in response to a union's bargaining demands.