Tear-Downs, Fixer-Uppers and Restorations:
2020 Private Sector Labor Law Update

2020 Employment Law Seminar
Day 4: 2020 Labor Law Updates

Speaker Introduction

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Private Sector Labor Law and Regulators Change With Administrations in the Other Washington

- Public sector workers, and their unions and employers are governed by state law and regulators
- Most other private sector employers, workers, and their unions are subject to the federal National Labor Relations Act ("the Act") which preempts state regulations
  - Exceptions: trespass, property destruction and assault by unions and strikers

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Private Sector Labor Law and Regulators Change With Administration in the Other Washington

- For the most part, the balance between unions and management is struck in Washington DC
- The big news of 2020: The Trump Board and its roll-back of Obama Board labor-leaning rules—and the equally big news that the rebalancing may not long survive a new Biden Board and General Counsel

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2019—2020: The Trump Board

- Staffing: The Board has 5 slots for members with staggered terms
  - One expires each year
  - President nominates; Senate confirms
  - Quorum: 3 members (2010 Supreme Court ruling)
  - 4 now filled: 3 Trump-picked Republicans, 1 Democrat, 1 open
  - Current Democrat member McFerran's term expires Dec 2024.
  - Expect Biden can fill the open Democrat seat
  - Republican member Emmanuel's term expires August 31, 2021
  - So plan on a Democrat majority Board by late 2021

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2019—2020: The Trump Board

- **Key Takeaway**
  - Employers, don't push it. It's not a safe bet to count on pro-employer rulings by the Trump Board. Today's conduct will be judged by an Obama-like (Biden) Board.

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NLRB Rulings Take a Right Turn

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- ***Caesar's Entertainment*** (2019)
  - Expands employer's right to ban use of company email by employees for non-business discussions (for example, about union organizing)
  - Limits:
    - Can't discriminate against discussions about employee rights, complaints, or unions
    - Must allow where employees can't communicate with each other any other way on non-work time during the workday
- **Key Takeaway**
  - If you have such a rule, be sure it applies to **all** non-work communicating

NLRB Rulings Take a Right Turn (cont'd)

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- ***Apogee Retail*** (2019) (confidentiality requirement)
  - Loosens restrictions on employer-required confidentiality during ongoing workplace investigations
  - **Not decided:** Confidentiality after investigation is over
- ***Everglades College*** (2019)
  - Mandatory arbitration for all workplace disputes okay if employee handbook cannot reasonably be read by employees to preclude access to the NLRB
- ***800 River Road Operating Co.*** (2020)
  - Until there is a CBA, employers not required to bargain prior to disciplining employees in accordance with established disciplinary policies and practices

NLRB Rulings Take a Right Turn (cont'd)

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- ***General Motors*** (2020)
  - Profane *ad hominem* or racially offensive speech loses its protection
    - Abandons the Board's permissive "animal exuberance" leeway for impulsive behavior
    - Abusive conduct can be separated from heated but privileged Section 7 activity giving rise to it
- **Wal-Mart Stores** (2019)
  - Less latitude to wear union buttons on, than off the selling floor
    - Balancing test: extent of infringement of employees' speech versus the employer's business justification

More Employer-Friendly Rulings Upholding Work Rules

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- ***Bemis Co.*** (2020)
  - Upholds employer's social media rule requiring civility when publicly criticizing the company
- ***Motor City Pawn Brokers*** (2020) and ***BMW/Automobile Workers*** (Dec. 2020)
  - Upholding rules prohibiting disparagement of the employer
  - Democrat member dissents as improper categorical exemption
- ***Argos USA*** (2020)
  - Upholds ban on cell phones in the cab of 70,000 lb. concrete truck
  - Also applies *Caesar's Entertainment* doctrine banning non-business use of company email
  - **Key Takeaway**
    - Employees not guaranteed the right to use every method of communication available to them

Obama Board's "Quickie Election" Rules—Where's the Fire?

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- The Trump Board slows down the race to union election day the Obama Board initiated with its 2014 "quickie election" rules
  - Lengthens time between petition and election
  - Restores litigation about who are eligible voters and scope of the bargaining unit to before – not challenges after — the vote is taken
  - Federal court has thrown out some of the Trump Board's changes, including reinstatement of pre-election hearings on voter eligibility and timing of the election
  - The Board has announced it intends to appeal

"Employee Free Choice"

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- **Employee "free choice" union elections**
  - In 2020, the Board amended its rules to better protect employees' right to challenge union representation
- **"Blocking charges"**
  - Unfair Labor Practice charges against the employer no longer block a decertification election by employees
  - The election goes ahead, but the ballots are impounded until the charges are resolved
- **Voluntary-recognition bar changed**
  - Now restored is the rule that voluntary recognition of a union and agreement to a CBA by the employer does not bar an election petition filed by employees, who will have 45 days to file their petition after learning that voluntary recognition has been granted

"Employee Free Choice"

- Contract-Bar Doctrine Protecting Entrenched Unions
  - The doctrine precludes elections for the duration of a CBA (up to a three-year term) to oust a 9(a) union
    - By rival unions
    - Or a decertification election by employees
- The Trump Board is Considering Changes to its Contract-Bar Doctrine Protecting Entrenched Unions

Takeaway

These changes would make it easier and sooner for dissatisfied workers to get rid of a Section 9(a) union that a majority of employees no longer support

NLRB "Joint Employment" Standards

- The Trump Board reverses the Obama Board's *Browning-Ferris* test for when one company is a "joint employer" of another company's workers:
  - Example: owner of a plant or office building hires a cleaning and maintenance contractor to do the janitorial work instead of using its own employees
    - Obama Board: customer and janitorial company are "joint employers" of the janitors if the customer has a right under its contract with the maintenance company to control their work even though it never exercises that control

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NLRB "Joint Employment" Standards

- Trump Board: with the addition of two new Trump-appointed members, the Board reversed the *Browning-Ferris* rule in February of this year, reinstating the longstanding rule that two separate entities are joint employers
  - Only if they share meaningfully in hiring, firing, disciplining, supervising, and/or directing the contractor's employees

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FLSA "Joint Employment" Standard

- DOL has published regulations similar to the Trump Board's new *Browning-Ferris* standards
  - Would require actual exercise to a substantial degree of contractual authority to hire or fire, control or direct the contractor's workers
  - But a federal judge in New York says hold the phone
  - Appeal? Stay tuned!

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Thank You!

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