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Employment Law Letter

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in this issue

Labor & Employment Law Department

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NLRB Poised to Impose Big Changes

April 30 is shaping up to be a big day for the National Labor Relations Board. Two significant new orders of the Board are scheduled to become effective on that date. However, both need to survive court challenges first.

One is the requirement that employers post an 11 x 17 inch notice advising employees of their right to organize and bargain collectively. Originally proposed more than a year ago, and scheduled to become effective in November of 2011, it has been postponed twice at the urging of a federal judge considering one of two challenges to the posting requirement. Lawsuits seeking to block the requirement are being pursued by the U.S. Chamber of Commerce and the National Association of Manufacturers.

The NLRB defends the notice based on the fact that only a small percentage of the workforce is unionized, so most employees are unfamiliar with their right to organize. According to the Board, the posting is no different from required postings on discrimination and wage and hour laws. Employers, however, call the posting a transparent attempt to encourage union organizing, or at least make it easier.

The other NLRB rule currently scheduled to take effect on April 30 makes various changes in the procedure for conducting representation elections. It limits the circumstances under which employers can seek Board review of decisions made by NLRB regional directors, and in many cases allows elections to be held before rather than after disputed issues are resolved.

Though not as sweeping as the changes originally proposed by the Board majority, employers and many Republicans in Congress argue that the overall impact of the new rules will be to allow unions to spring "quickie" elections on management before the employer has a reasonable opportunity to respond. Currently the average time between a union petition and a secret ballot election is 38 days; some predict the planned changes could cut that in half.

The U.S. Chamber of Commerce has sued to block the election changes, alleging various constitutional violations. It also

points out that the Board's action violates the longstanding tradition that significant changes in NLRB precedent or procedure are not implemented unless they are supported by at least three members of the Board. The new election procedures were the result of a two-to-one vote.

These changes come on the heels of other NLRB actions that are widely seen as pro-labor. One is a change in bargaining unit determination procedures that will allow unions to organize small groups of disaffected employees even if a majority of their co-workers are not interested. Another is a broader interpretation of "concerted protected activity" that includes almost any complaint about working conditions. The Board has also taken the position that arbitration provisions in employment agreements cannot preclude employees from pursuing complaints through group or class actions.

Our advice to employers is to regularly assess their vulnerability to unionization, and to provide supervisors with refresher training on the signs of union activity. Today's NLRB is doing everything it can to make it easier for unions to expand their reach.

Recent S&G Website Alerts

NLRB Postpones Requirements for Employers to Post Employees' Rights, Published October 7, 2011

NLRB Bars Waivers of Collective Action in Arbitration and Litigation, Published, January 18, 2012

Teacher Arbitrations Must Be Public

Experts have long disagreed over whether or not the presentation of evidence in interest arbitrations to resolve impasses in public employee contract negotiations must be open to the public. Denied access to a teacher arbitration in Torrington, a Republican-American reporter took the matter to the Freedom of Information Commission, which ruled in his favor.

Both the labor and management designated arbitrators appealed to court. They argued they were not the functional equivalent of a public agency, but rather independent contractors performing a service for hire. However, the judge noted that the arbitrators are selected from lists maintained by the State Department of Education, and are as a matter of law a committee of that agency. He upheld the decision of the FOIC.

The fundamental issue in the case was whether the "conduct and strategy of collective bargaining" exception to the public disclosure requirements of the FOI statute applies not just to public sector union contract negotiations, but also to any impasse resolution procedures that may follow. The FOIC acknowledges that if negotiations occur during the arbitration process, the public and press may be excluded. However, it says the presentation of evidence to the arbitrators must be open to anyone who wishes to attend.

Ironically, the Republican-American is the same paper that argued several years ago that the evidentiary portion of union grievance hearings before the Waterbury Board of Education were subject to the FOI open meeting requirement. That dispute ended up before the Connecticut Supreme Court, which agreed that such sessions should be open to the public.

Our opinion is that we haven't heard the end of this issue as it relates to public sector union interest arbitration in Connecticut. For one thing, the teacher arbitration decision in the Torrington case may well be appealed. For another, the State Board of Mediation and Arbitration takes the position that the statute governing negotiations with municipal employee unions, which is similar but not identical to the teacher legislation, does not provide for arbitration hearings to be open to the public.

There are valid policy arguments on both sides of the question. Some say public access would further polarize the positions of the parties, and would result in both sides playing to the press. Others say public access would shine a light on unreasonable demands, and would be in keeping with the substantial impact of wages and benefits on government expenditures. In many towns, for example, teacher salaries

are the largest single line item in the municipal budget. Stay tuned for further developments.

Casual Comments Can Create Lawsuits

It's a familiar scenario. An employee engages in conduct that leads to his or her dismissal. When the employer is sued, a perfectly legitimate reason for the termination is presented. However, the employee claims the real reason is not the one cited by the employer, but rather discrimination or retaliation based on some protected status or conduct. Often the employee's claim is bolstered by some casual but ill-advised comments made by the employer or its agents.

The latest example involves a lawyer in a small firm who became pregnant and refused to settle for a disability leave due to childbirth, but instead took a five-month maternity leave. The firm moved her to independent contractor status, and hired someone else to fill her position. When she sued, the court found the firm had a legitimate reason to let her go (i.e. the extended maternity leave), but declined to dismiss the lawsuit because comments by one of the firm's partners could be viewed by a jury as evidence of a discriminatory motive.

The offending remarks? The partner referred to the plaintiff as "pumper girl" because she expressed milk in the office after returning from her leave, and he questioned whether she could handle trial work, which requires a concentrated time commitment. In other cases, courts have made similar rulings where managers referred to an older employee as "gramps" or to an obese employee as "fatso."

Our advice is to sensitize supervisors about making insensitive comments. They don't necessarily prove an employer had a discriminatory motive for whatever action it may have taken against an employee, but they're enough to get the question before a judge or jury, which puts the employer at risk.

Legal Briefs
and footnotes...

Exotic Dancer Class: Last year we reported on the dramatic increase in litigation over misclassification, either by non-exempt employees being treated as exempt, or by employees being treated as independent contractors. We mentioned that many of these lawsuits were class actions. Recently a federal judge in Connecticut certified a class of exotic dancers who worked at Gold Club Groton, and were paid only in tips, because the Club treated them as independent contractors. He also said he would allow dancers at the Gold Club location in Hartford to join the lawsuit if they wished to do so.

Perez Pension Pulled: The pension benefit of a state or municipal official convicted of a crime related to his office may be reduced or revoked, and that's what happened to former Hartford Mayor Eddie Perez after his trial on charges that he accepted free remodeling services from a city contractor. He argued, however, that the change could not be implemented until all appeals were exhausted. A judge has ruled otherwise. He said the word "convicted" means convicted and sentenced, regardless of whether an appeal is pending.

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Yale Police and FOIA: A recent court decision has imposed a "split personality" on the Yale Police Department when it comes to freedom of information issues. On the one hand, it is subject to the Freedom of Information Act with respect to police enforcement matters, since it provides the functional equivalent of a public service, but it is not subject to the Act with respect to personnel records, since its members work for and are paid by the Yale University, a private entity.

Arbitrability and SBMA: The State Board of Mediation and Arbitration has decided to change the procedures followed by its grievance arbitration panels when a claim is made that a particular matter is not arbitrable. Previously, the parties were told in such cases to come prepared to present their positions on both arbitrability and the merits of the case, and the panel would decide whether or not to hear the merits on the same day. Now the first hearing will be limited to the question of arbitrability in cases where that issue is raised.

Project Labor Agreements Challenged: Many public works projects are conducted under a "project labor agreement," or PLA, which requires all work to be done by unionized contractors who sign standard trade union contracts in return for union acceptance of dispute resolution procedures designed to resolve jurisdictional disputes and avoid work stoppages. The Connecticut Supreme Court has now ruled that an otherwise qualified non-union contractor has standing to bring a legal challenge alleging that PLAs violate the public bidding laws.

Police Officer Tipped Off: How discipline cases will be decided by the State Board of Mediation and Arbitration is often a close call. A case involving the termination of a Norwalk police officer who tipped off a longtime colleague and superior officer that he was suspected of having sex with a minor is no exception. A majority of the arbitration panel upheld the discharge because they found the officer had betrayed the public trust by compromising an ongoing investigation. A dissenting member felt the punishment was too severe because another officer who helped cover up a crime committed by a co-worker's child had not been fired.

Jobless Benefits Tightening Up? Employers often complain that it's too easy to get unemployment compensation benefits in Connecticut, but that may be changing in this tough economic environment. A clerk walked off the job after refusing to scan some documents because she thought it was beneath her. Although initially awarded benefits because her refusal was an isolated incident, an appeals referee overturned that decision because she quit without sufficient job-related reason, and the Board of Review found she was terminated for willful misconduct. A reviewing court ruled that either rationale justified denial of benefits.

Save the Dates

Labor & Employment Spring Seminar for the Public Sector
Rocky Hill Marriott - March 30
8:00 a.m. - 12:15 p.m.

Sexual Harassment Prevention Training
Hartford Office - April 10
7:45 a.m. - 10.00 a.m.

Stamford Office - April 12
1:15 p.m. - 3:30 p.m.

Hartford Office - April 19
7:45 a.m. - 10.00 a.m.

Formal invitations to these events will be sent out shortly.

To register, visit www.shipmangoodwin.com.