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?2023 NLRB Update: Key Developments for All Employers?

Labor & Employment Workforce Watch

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During 2023, strikes involving Hollywood writers, actors, automobile workers, and airline workers have dominated news story headlines. Meanwhile, unionization efforts affecting private employers across all industries are increasing. According to the National Labor Relation Board's ("NLRB" or the "Board") election statistics for January–August 2023, unions won 95% of all elections involving units over 500 members. The same NLRB data for the first half of 2023 shows that unions had an overall 80% win rate in all representation elections.

In part, recent union success can be attributed to the combination of NLRB General Counsel Jennifer Abruzzo's ("GC Abruzzo") aggressive efforts to enforce the National Labor Relations Act ("NLRA"), and the Democrat-controlled Board's reversal of numerous Trump-era pro-employer rulings. In what has been a very active year for unions, below are some of the key 2023 NLRB developments, about which all employers should be aware:

1. **The NLRB Expands Potential Remedies**

   In December 2022, the Board added "consequential damages" to its growing list of available remedies when an employer commits an unfair labor practice. In *Thryv Inc.*, the Board held that employers can be ordered to pay for all "direct or foreseeable pecuniary harms" resulting from an unfair labor practice. These consequential damages could involve reimbursement for business expenses, out-of-pocket medical expenses, or restoration of an employee's "book of business." However, the Board did not adopt GC Abruzzo's request to require employers to also pay emotional distress or pain and suffering damages.

   In April 2023, the NLRB further expanded the remedies available if an employer violates the NLRA. In *Noah's Ark Processors, LLC d/b/a WR Reserve*, the Board held that if an employer has "shown a proclivity to violate" the NLRA or "engaged in egregious or widespread misconduct," potential remedies could also include providing a Notice/Explanation of Rights to the workforce, requiring supervisors to read the Notice/Explanation to the workforce, mailing the Notice/Explanation to the workforce, requiring company and union representatives to sign the Notice/Explanation, publishing a copy of the Notice/Explanation in "local publications of broad circulation and local appeal," or an extended posting period for the Notice/Explanation.

2. **The NLRB Restricts Confidentiality and Non-Disparagement Provisions**

In February 2023, the NLRB significantly restricted the use of confidentiality and non-disparagement provisions in severance agreements for non-supervisory employees. Notably, the Board held in *McLaren Macomb* that confidentiality provisions are impermissible to the extent they prohibit individuals from discussing their severance agreements with their former coworkers. As to non-disparagement provisions, the Board explained that an employee's ability to make public statements about the workplace is central to their exercise of rights under the Act. Following the *McLaren Macomb* decision, GC Abruzzo issued a memorandum which further indicated how she intends to address these issues in her investigatory and prosecutorial capacity. Although these provisions do not *per se* violate the NLRA, employers should carefully tailor any confidentiality and non-disparagement provisions in separation agreements.

3. **GC Abruzzo Addresses Noncompete Agreements**

On May 30, 2023, GC Abruzzo issued a memorandum to stifle the use of employee non-compete agreements. Following the footsteps of other federal agencies including the Federal Trade Commission, GC Abruzzo contends that, except in special circumstances, proffering, maintaining, or enforcing non-compete agreements violates the NLRA. Although the memorandum is not law and applies only to non-supervisory employees, it indicates how the NLRB will address non-competes in its investigatory and prosecutorial capacity for the near future.

4. **The NLRB Addresses Employer Handbooks and Workplace Rules**

On August 2, 2023, the Board reversed its previous test to review workplace policies – balancing employers' legitimate interests to maintain workplace rules against employees' rights to engage in protected concerted activity. Under its new standard in *Stericyle, Inc.*, the Board instead focuses its analysis on whether a handbook policy or workplace rule could reasonably be interpreted to infringe on employees' protected concerted activity.

5. **The NLRB Issues an Ambush Election Final Rule**

On August 24, 2023, the NLRB announced a final rule regarding its representation election procedures. Effective December 26, 2023, the final rule provides an expedited timeline for union elections. For example, the new rule provides that pre-election hearings must be scheduled within eight calendar days from service of the notice of hearing. Notably, the new rule limits pre-election hearings to determinations of "whether a question of representation exists." Under this new standard, employers can no longer dispute whether certain individuals should be included (or excluded) from bargaining units, until after the election takes place. The new final rule also accelerates the time to submit statements of position, and it prohibits post-hearing briefs absent "special permission" from the Regional Director. In conjunction with the Board's new standard for addressing a union's demand for voluntary recognition, the final rule could drastically alter the outlook of upcoming elections.

6. **The NLRB Revises Its Standard for Protected Concerted Activity**

On August 31, 2023, the NLRB expanded its test for conduct that constitutes protected concerted activity. In *Miller Plastic Products, Inc.*, the Board returned to its pre-Trump standard: "the question of whether an employee has engaged in concerted activity is a factual one based on the totality of the record evidence." Historically, the Board has required two or more employees to be involved for protected activity to be "concerted." Notably, *Miller* involved whether an *individual* employee's comments constituted

protected *concerted* activity. The Board said yes, reasoning that the individual's comment was intended to induce group action. Under this broad standard, it is more likely that an individual employee's "gripes" could be considered protected activity under the NLRA, versus requiring two or more employees to engage in activity in a concerted manner.

The Board under President Biden currently has four of its five seats filled: three Democrats and one Republican. This majority will continue through at least the end of 2024, meaning the Board and GC Abruzzo will undoubtedly continue advancing their pro-union, pro-employee agenda. As a result of increased unionization efforts, the NLRB's recent decisions, and GC Abruzzo's aggressive enforcement approach, all employers should carefully review their existing policies and procedures for compliance with the NLRA. In addition, employers should take this opportunity to train managers on updated NLRB standards, union tactics, and election procedures.

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