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Two Views on the Trump National Labor Relations Board

By Angie Cowan Hamada and Kyllan B. Kershaw

It comes as no surprise that the Trump National Labor Relations Board is overruling Obama-era precedent. Some contend that the Trump Board is simply doing what the NLRB always does with a Republican majority—swinging the pendulum to reflect traditional conservative views on labor law, but others contend that, instead, the Trump Board is swinging a wrecking ball to dismantle workers’ and unions’ rights. Below, Angie Hamada, providing the union and employee perspective, and Kyllan Kershaw, providing the employer perspective, address this issue by focusing on some of the most controversial actions recently taken by the NLRB.

War on Workers?

Issue 1: Access Rights of Non-Employees

In *Bexar County Performing Arts Center Foundation d/b/a Tobin Center for the Performing Arts*, 368 NLRB No. 46 (2019), the Board held that a property owner not involved in an underlying labor dispute may prohibit leafletting and similar protected activity by off-duty employees of a licensee or contractor performing work on the property owner’s premises.

Historically the Board (and the Supreme Court) have held that a property owner’s own employees

have a right to engage in Section 7 activities during non-working time and outside of work areas, including a right of access during off-duty hours. A property owner has likewise been free to deny property access rights to non-employees, such as third-party union organizers. The Board historically has adjudicated these access rights by applying a balancing test weighing an employer’s property rights and employees’ Section 7 rights.

In *Bexar County* a contractor’s off-duty employees attempted to leaflet on the property owner’s privately-owned sidewalks.

In prior cases the Board has afforded off-duty contractor employees essentially the same access rights as employees. Reversing these prior decisions, the *Bexar County* Board held that “contractor employees are not generally entitled to the same Section 7 access rights as the property owner’s own employees.”

Union & Employee Perspective: This decision, which denies employees of contractors access rights unless they work “exclusively” on site is an egregious affront to Section 7 rights. This decision overrules *New York New York*, a decision upheld by the D.C. Circuit, which established that contractor employees may

generally access public areas of a property where they “regularly” worked. The *Bexar County* Board applied “regularly” too vaguely, and failed to clarify the meaning of “exclusively.” As dissenting Member McFerran noted, the “exclusivity” requirement is “arbitrary” and “serves no purpose except to frustrate the exercise of Section 7 rights.” This decision guts NLRA protections for a large segment of employees. As Member McFerran noted, “The majority cannot credibly deny the consequences of adopting its new access standard here: the destruction of Section 7 rights in almost all cases where on-site contractor employees seek access to the property to communicate with members of the public.”

Employer Perspective: The Board struck an appropriate balance between property rights and employees’ Section 7 rights. Employees of a third-party contractor have a limited privilege to access the contracting employer’s property to perform their assignments, hence, it is reasonable to limit contractor’s employees access to that property during off-duty times. The Board appropriately preserves employees’ Section 7 rights by requiring such access where there is no other reasonable non-trespassory



channel of communicating with their target audience.

Issue 2: Protected, Concerted Activity?

In *Electrolux Home Products, Inc.*, 368 NLRB No. 34 (2019), the Board reversed an Administrative Law Judge’s decision holding that Electrolux’s discharge of a known union supporter violated the Act. The employer terminated the employee eight months after the employee participated in a meeting where managers told the employee to “shut up.” The Board found that Electrolux’s proffered reason for the termination—insubordination—was pretextual, but reversed the ALJ’s decision on the ground that the employer’s providing a pretextual reason for the discharge was insufficient in and of itself to establish anti-union animus.

Union & Employee Perspective: This decision overrules years of Board precedent holding that

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I have been Chair of the Section for slightly more than two months and am surprised, but not shocked (I had been warned by former Section Chairs) at how quickly the time flies. Before the ABA Annual Meeting in August and since then, Samantha Grant, our superb Chair-Elect, and I have spent hours filling multiple positions on the Section's 23 administrative committees that perform the numerous tasks that make our Section hum. Each of these committees is made up of co-chairs and vice chairs from all of the Section's constituencies—management, union/employee, employee, government, academic and/or neutral—and also represent the racial, ethnic, LGBTQ, disability and gender diversity of the Section. Both last year and this year, due to the ABA's New Membership Model of drastically reduced dues combined with increased services, we in Section leadership, through seven of our administrative committees, are engaged in an intensive outreach to law students, young lawyers, government lawyers and to labor and employment lawyers active in other lawyer associations with whom we wish to collaborate. This is heady work at an exciting period in our Section.

I offer up two of the Section's committees to give you an insight into the kind of work and product produced by Section members. For the past twelve years, the Section has hosted an annual conference in early November attended each year by an average of 1,200 attorneys. Typically, the Section presents twelve tracks of 60+ programs covering the full range of labor and employment law, which are organized by nearly 100 Track Coordinators and a Planning Committee that meets in person twice: first to select the programs and then to make initial selections of speakers reflecting the full diversity of the Section. The Planning Committee then meets in weekly conference calls to replace speakers as those first selected decline or pull out. It is unbelievable work, and the product of their efforts will be on display in New Orleans from November 6 to 9 for the 13th time. Please thank them when you see them at the Conference.

In September, the Section hosted its 2nd Trial Institute in partnership with the National Employment Lawyers Council and IIT Chicago-Kent College of Law in Chicago for lawyers with approximately 5-10 years of experience at the point where they know what they don't know about successfully trying a case before a jury. Institute participants from across the country heard lectures, observed trial techniques and were coached by leading trial practitioners who donated their time. The students worked from materials developed by Section members with extensive trial experience and learned about conducting a jury trial from pleadings and motions practice, jury selection, opening statements, witness preparation, depositions, direct and cross examination, objections practice and closing argument. The Institute culminated with each of the students completing a mock trial at the federal courthouse in front of federal judges or magistrates. As one attendee commented: "The Trial Institute's small group breakout sessions were an unparalleled opportunity for me as a younger attorney to build my advocacy skills through trial and error within the safety net of a mock trial setting, while the lectures provided me valuable insight from my more experienced peers into the nuances of trial practice."

The Section's experience of preparing for and now producing two Trial Institutes has culminated in the "nuts and bolts" *Trial Techniques for the Labor and Employment Law Practitioner*, which was published by Bloomberg Law and the ABA and is available online at books.bloomberglaw.com.

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I could go on at equal length about each of our other superlative [??? *couldn't read*] committees and their hardworking members, but of course by then you would want to run me out of town. However, if any of you who have read this far in the Chair's Column, should you want more information about any of our administrative committees, don't hesitate to contact me. And, of course, I haven't even started talking about our amazing Standing Committees, whose 2020 Midwinter Meeting season will begin in January and run through early May. But that's for another column.

Finally, on a very sad note, I regret to relay the news of the passing of our colleague, Susan Grody Ruben, on October 13 after a long and courageous battle with cancer. Susan was an active leader and frequent speaker for the Section's ADR in Labor and Employment Law Committee, served for many years on the Section Council, and was our Section's liaison to the ABA Section of Dispute Resolution, getting both to cooperate on program collaborations. Susan's children described her in an obituary that appeared in the *Cleveland Plain Dealer*.

Adoring grandmother, proud mother, loving daughter, dedicated sister, steadfast friend, and esteemed colleague, Susan was a woman who crafted life to follow her passions. She shifted from an early career as a professional French horn musician to become a successful labor and employment attorney. Later, Susan founded a

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Changing Legal Burdens Under New Jersey's New Wage Theft Law

By Paul J. Sopher

New Jersey has joined the growing number of states and municipalities across the country adopting wage theft laws that expand the rights of employees and increase employers' legal exposure. Effective August 6, 2019, New Jersey's Wage Theft Law extends the statute of limitations on wage claims, toughens penalties for nonpayment of wages and retaliation (including triple damages and criminal penalties), extends coverage to types of compensation other than wages, and broadens potential individual, joint, and successor liability.

A notable feature of many recently enacted wage theft laws, including New Jersey's, is the readjustment of common burdens of legal proof and presumptions. State and local legislatures are increasingly shifting the burden to employers to affirmatively demonstrate compliance or rebut presumptions of non-compliance, often requiring employers to meet heightened legal standards to do so. These laws are also easing burdens of proof for employees to establish liability. New Jersey's Wage Theft law boasts some of the most robust such provisions of any wage theft law in the nation.

Employee's Allegations Presumed True in the Absence of Records

Under New Jersey's Wage Theft Law, an employer that fails to meet the law's record-keeping obligations and produce the requisite records now faces a presumption that an employee's allegations of hours worked and wages owed are true. The employer may rebut the presumption with competent evidence to the contrary; however, doing so will inevitably be challenging without records, particularly for claims of off-the-clock work. In criminal proceedings, an employer's failure to produce the required records creates an inference that the employee's

allegations are true, unless the employer shows good cause for failure to produce them.

Clear and Convincing Evidence Required to Rebut Presumption of Retaliation

New Jersey's Wage Theft Law also shifts a significant legal burden to employers in the context of retaliation claims. The Law provides that if an employer takes an adverse action against an employee within ninety days of the employee filing a complaint with the Labor Commissioner or instituting a civil court action, the employer's action is presumed to be retaliatory. The employer may rebut this presumption only by proving by clear and convincing evidence that it took the action for other, permissible reasons. Thus, the Law not only shifts the burden to employers to demonstrate their actions complied with the law, it applies a more rigorous evidentiary standard for them to do so than applies in most civil cases, *i.e.*, the preponderance-of-the-evidence standard. In criminal proceedings, the fact that the employer's adverse action occurred within ninety days of the protected activity is "presumptive evidence" of knowing retaliation by the employer, unless rebutted by the employer by clear and convincing evidence.

Lowered Standard for Joint, Successor, and Individual Liability

Joint, successor, and individual liability have long been available under New Jersey's wage laws. The new Wage Theft Law, however, significantly lowers the standards to establish such liability.

Broadening the potential for joint employment, the new Law subjects "client employers" and "labor contractors" to joint and several liability for violations. "Client employers" is defined to include any "business entity . . . that



obtains or is provided workers, directly from a labor contractor or indirectly from a subcontractor, to perform labor or services within its usual course of business." "Labor contractor" is defined to include "any individual or entity that supplies, either with or without a contract, directly or indirectly, a client employer with workers to perform labor or services within the client employer's usual course of business." These provisions make it easier for employees to hold employers and their business partners jointly and severally liable for a violation of the Law.

The Law also lowers the threshold for establishing successor liability. It creates a rebuttable presumption that a business entity is liable for the violations of a predecessor entity where only two of the following factors are shown: the two entities (1) perform similar work within the same geographical area; (2) occupy the same premises; (3) have the same telephone or fax number; (4) have the same email address or website; (5) employ substantially the same work force, administrative employees, or both; (6) utilize the same tools, facilities, or equipment; (7) employ or engage the services of any person or persons involved in the direction or control of the other; or (8) list substantially the same work experience. Previously, a rebuttable presumption of successor liability attached only where three of the eight factors were met.

Similarly, the Law makes it easier for individuals to be held criminally liable for violations. Under certain criminal provisions, the Law provides that "officers of a corporation and any agents having the management of that corporation shall be deemed to be the employers of the employees of the corporation."

The above provisions exemplify the growing trend in recent wage theft legislation to increase the burden of proof and production on employers in defending wage claims and to ease the burden on employees to establish liability. Although New Jersey employers must take steps to ensure compliance with all aspects of the new Wage Theft Law, they should take particular heed of the above-discussed provisions, as they represent some of the more ripe areas for potential employer legal exposure. In light of these provisions, employers should consider reviewing their recordkeeping practices, adopting a policy or procedure through which employees may report wage payment issues and provide training to managers to address reports of such issues, and reviewing the practices of any business partner that provides contract labor in order to ensure that their pay practices are compliant. ■

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New Legislation Bars Pre-Employment Marijuana Testing

By Ashley E. Calhoun

State and city law governing the use of marijuana, tetrahydrocannabinol (THC is the chemical that causes most of marijuana's physiological effects.) and cannabidiol (CBD is a non-intoxicating extract of the cannabis plant) continues to rapidly evolve throughout the country.

Currently, twelve states and the District of Columbia have either legalized or decriminalized the recreational use of marijuana. Thirty-three states and the District of Columbia have authorized some form of marijuana use for medical treatment. Thirteen other states have passed limited protections for products with low levels of THC and the medical use of CBD.

New York City and Nevada have passed some of the most recent new legislation in this area. These new laws make it an unlawful discriminatory practice for employers to conduct certain drug tests as a condition of employment.

New York City

New York City's ban on pre-employment marijuana/THC testing was the first of its kind and will go into effect May 10, 2020. It is known as "Local Law 91" and makes pre-employment drug testing for marijuana or THC an unlawful discriminatory practice. The law does not address CBD and provides numerous exceptions allowing for pre-employment testing of candidates applying for safety and security sensitive jobs and positions connected to federal contracts and grants.

Employers hiring candidates for any of following categories of positions will be able to continue to lawfully test for marijuana and THC as part of their pre-employment drug screening protocol:

- Police and peace officers,
- Most positions in the areas of construction work,
- Positions requiring a commercial driver's license,

- Positions requiring supervision or care of children, medical patients, or vulnerable persons, and
- Positions with the potential to significantly impact the health or safety of others.

The law also does not apply when testing is required by:

- City, state, or federal regulations by departments of transportation,
- Federal contracts or grants requiring testing as a condition of receiving the contract or grant,
- Federal and state statutes, regulations, or other orders requiring testing for purposes of safety or security, and
- Collective bargaining agreements that address pre-employment drug testing of applicants.

The law does not restrict employers from screening candidates for drugs other than marijuana and THC and it does not restrict testing of current employees.

Nevada

Nevada is the first and currently only state to pass legislation making it illegal for employers to use pre-employment drug test to screen out applicants testing positive for marijuana. The law, introduced as Assembly Bill No. 132, will go into effect January 1, 2020, and does not address either THC or CBD. In addition to barring pre-employment testing, the law provides additional protections for employees who are required to take a drug test within the first 30 days of employment. If an employee tests positive for the presence of marijuana within the first 30 days of employment, the employee can—at the employee's expense—submit to a second drug screening to attempt to



rebut the positive results from the first test. If an employee chooses to exercise this option, the employer must give appropriate consideration to the results of the second test.

Like the New York City law, Nevada's law includes numerous exceptions. Nevada employers hiring candidates for any of following categories of positions will be able to continue to lawfully test for marijuana as part of their pre-employment drug screening protocol:

- Firefighters.
- Emergency medical technicians.
- Positions requiring operation of a motor vehicle and for which federal or state law requires the employee to submit to screening tests, and
- Positions that could adversely affect the safety of others.

The law also does not apply:

- When the law is inconsistent with or conflicts with provisions of an employment contract or collective bargaining agreement,
- When the law is inconsistent with or conflicts with federal law, or

- To positions of employment funded by federal grants.

Employers' Next Steps

Employers in New York City and Nevada—and employers in cities and states subsequently passing similar laws—will need to take numerous steps to ensure pre-employment testing and hiring decisions comply with these new laws. This will include revising policies, handbooks, and pre-employment hiring procedures and may require training for human resources personnel.

Due to the numerous exceptions in these laws, employers should consult with their labor and employment counsel to ensure positions are correctly categorized and the applicability of the law is correctly determined.

These steps will help ensure candidates who should be tested are tested and will help ensure employers avoid liability for wrongfully testing employees covered by the law. ■

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Keeping Workers Safe from Violence in the Workplace

By Shelly C. Anand

During a home visit in December 2012, a 25-year old community service coordinator was stabbed to death by a mentally ill patient. The victim had previously met the patient at his home and was working to make sure he was getting the medical treatment and medication he needed. When learning about this horrendous event, most would not think about the issue of workplace violence and the Occupational Safety and Health Administration's (OSHA) response to it. But this young community service coordinator's tragic death did, in fact, implicate the general duty clause under Section 5 (a)(1) of the Occupational Safety and Health Act (OSH Act). Specifically, OSHA investigates and cites employers under Section 5 (a)(1) for failure to implement measures to reduce instances of workplace violence if the hazard is known to the employer and/or is recognized in the industry.

Workplace violence is defined by the National Institute for Occupational Safety and Health (NIOSH) as "any physically assault, threatening behavior or verbal abuse occurring in the work setting." Similarly, the World Health Organization (WHO) and the International Council of Nurses (ICN) define workplace violence as "incidents where staff are abused, threatened or assaulted in circumstances related to their work, including commuting to and from work, involving an explicit or implicit challenge to their safety, well-being or health." In 2017, close to 8% of workplace related fatalities were instances of workplace violence, according to the Bureau of Labor Statistics Census of Fatal Occupational Injuries. Unfortunately, many of these cases go unreported, so the real number could be even greater.

NIOSH lists four types of workplace violence. Type 1 occurs

when the perpetrator has no legitimate relationship to the business or its employees and, typically, the perpetrator is committing a crime in conjunction with the violence. An example is a robbery at a gas station or bank where the perpetrator injures the employees while committing the crime. Type 2 occurs when a workplace's customers and/or clients behave violently towards workers. This type of violence occurs frequently in healthcare and social services settings such as hospitals, retirement homes, and home health visits. Type 3 is defined as worker-on-worker violence and includes bullying, verbal and/or emotional abuse that is "offensive, vindictive, and/or humiliating though it can range all the way to homicide." NIOSH notes that worker-on-worker violence is "often directed at persons viewed as being 'lower on the food chain' such as ... a supervisor to a supervisee." Type 4 occurs where the perpetrator has an outside relationship with the employee that spills over to the workplace. Type 4 often occurs in domestic violence cases where the abusers show up at the victims' places of work.

As with any other general duty citation, OSHA must meet four elements to prove a violation:

1. a condition or activity in the workplace presented a hazard to employees;
2. the employer or its industry recognized the hazard;
3. the hazard was likely to cause death or serious physical harm; and
4. a feasible and effective means existed to eliminate or materially reduce the hazard.

Kokosing Construction Co., 17 BNA OSHC 1869, 1872, 1995-96 CCH OSHD ¶31,207 (No. 92-2596, 1996); *Safeway, Inc. v. OSHRC*, 382 F.3d 1189, 1195 (10th Cir. 2004).

The evidence must also show

that "the employer knew or with the exercise of reasonable diligence could have known of the hazardous condition." *Otis Elevator Company*, 21 BNA OSHC 2204, 2007 CCH OSHD ¶32,920 (No. 03-1344, 2007). The Occupational Safety and Health Review Commission (OSHRC) has heard two cases examining workplace violence violations under the general duty clause. The first case, *Megawest Financial, Inc.* 17 BNA OSHC 1337 (ALJ, 1995), dealt with an apartment complex in which tenants and guests assaulted the complex's office staff. Though the OSHRC Administrative Law Judge (ALJ) noted the seriousness of the hazard at the apartment complex, the ALJ did not find a violation of the general duty clause

relevant to industry recognition." *Id.* at *9-10. Importantly, however, the *Megawest* decision is an unreviewed ALJ decision and not binding Commission precedent. Contrary to the ALJ's ruling with respect to employer knowledge, other decisions have found that "[a]ctual knowledge of a hazard may be gained by means of prior accidents, prior injuries, employee complaints, and warnings communicated to the employer by an employee." *Walmart Stores, Inc.*, OSHRC Docket No. 09-1013, 2011 WL 7143222, *30 (April 5, 2011) (citing *St. Joe Minerals Corp. v. OSHRC*, 647 F.2d 840, 845 (8th Cir. 1981)).

The second case, *Integra Health Management Inc.*, 2019 CCH OSHD ¶ 33713 (No. 13-1124, 2019) dealt

In 2017, close to 8% of workplace related fatalities were instances of workplace violence, according to the Bureau of Labor Statistics Census of Fatal Occupational Injuries.

because neither the employer nor the industry recognized the hazard. The ALJ held that a "high standard of proof must be met to show that the employer itself recognized the hazard of workplace violence. It is not enough that an employee may fear that he or she is subject to violent attacks, even if that fear is communicated to the employer ... [n]or is it sufficient that there has been a previous injury from a violent incident." *Id.* at *9. Further, the ALJ stated that the apartment complex management industry was not a recognized high-risk industry group, and that "[p]ublicized studies, enactment of legislation, industry publications, or similarly disseminated information known to an applicable industry are all

with the fatality described in the beginning of this article. *Integra* served both mental health patients and health insurers by maintaining contact with the patients, and ensuring that patients received necessary medical treatment helping make doctors' appointments and obtaining prescription medications. The OSHRC ALJ and the Commission both found that the employer had violated the general duty clause. Unlike the apartment-complex management industry, industry knowledge of workplace violence risk is widespread in the healthcare and social services industries. Numerous publications emphasize that those who work with unstable individuals are

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discriminatory motive can be inferred from an employer's proffering a pretextual reason for termination. As Member McFerran observed in dissent, this new holding permits employers to "lie to the Board and get away with it," conduct that will have an unavoidable chilling effect on employees' discussion of working conditions.

Employer Perspective: The employee's alleged protected activity occurred eight months prior to the termination and provided an insufficient temporal nexus to the discharge to infer unlawful motivation by the employer. The Board should not infer anti-union animus when it is unsupported by the evidence, particularly when the adverse action in question occurred nearly a year after the protected activity.

In *Alstate Maintenance*, 367 NLRB No. 68 (2019), the Board implemented new standards for determining whether employee activity is concerted and protected by Section 7 of the Act. The Board held that factors that would support a finding of concerted activity include: (1) the statement was made in an employee meeting called by the employer to announce a decision affecting wages, hours, or some other term or condition of employment; (2) the decision affects multiple employees attending the meeting; (3) the employee who speaks up in response to the announcement did so to protest or complain about the decision, not merely to ... ask questions ...; (4) the speaker protested or complained about the decision's effect on the work force generally or some portion of the work force, not solely on the speaker; and (5) the meeting presented the first opportunity employees had to address the discussion, so that the speaker had no opportunity to discuss it with other employees beforehand.

Union & Employee Perspective: *Alstate* is another decision aimed at silencing employees and limiting their Section 7 rights. As

Member McFerran stated in dissent: "Against the weight of precedent, common sense, and even a basic sensitivity to workplace realities, the majority concludes that workers generally do not . . . engage in concerted activity under Section 7 of the Act, when they spontaneously protest their working conditions. . . Whether the Decision reflects that the Board is out of touch with workplace realities or that it is intent to undermine Section 7 rights, it will unquestionably chill protected activity since employees now need to consider whether their complaints about working conditions includes an "explicit" call to group action.

Employer Perspective: The Board's decision is not the attack on Section 7 rights union/employee advocates make it out to be. Rather, the Board sets forth clear guidelines on what may constitute protected activity, including an appropriate reminder that the activity must induce group action. By requiring that the "call" for group action be explicit, the Board is merely enforcing the Act as intended.

War on Unions? Issue 1: "Perfectly-Clear" Successors

In *Ridgewood Health Care Center, Inc.*, 367 NLRB 110 (2019), the Board narrowed the scope of when an employer acquiring a unionized company is considered a "perfectly clear successor," such that it must bargain with the union before setting the initial terms of employment. In doing so, the Board overruled precedent established in 1996 in *Galloway School Lines*, 321 NLRB 1422 (1996). The Board justified its departure from this precedent by invoking an economic rationale, i.e., that successor employers must be allowed to set initial employment terms because they often acquire distressed businesses that must undergo fundamental and immediate restructuring to remain operational.

Union & Employee Perspective: The *Ridgewood* decision reverses decades of precedent. By failing to require restoration of the status

quo as a remedy for the employer's violations, the Board is effectively inviting employers to be dishonest in successor situations. There is no sufficient deterrent to prevent employers from lying about continuing terms and conditions of employment in the absence of an order requiring implementation of the collective bargaining agreement terms in place when the successor took over. This decision "allows employers to enjoy the fruits of their unlawful conduct. The unfortunate result will be a potential increase in labor disputes and antiunion discrimination." (McFarren dissent).

Employer Perspective: The "perfectly clear" successor doctrine (and the duty to bargain before setting initial terms) still applies where an employer misleads employees into believing that all of the employees will be retained without a change in the terms and conditions of employment or creates an ambiguity regarding retention of some/all of the predecessor's workforce. Here, the Board remedied the employer's discriminatory hiring by ordering the employer to hire the employees in question. However, the Board properly rejected issuing the extreme penalty of not allowing an employer to set its own initial terms and conditions of employment, limiting such a remedy to employers who violate the *Spruce Up* standard. The decision strikes an appropriate balance between protecting workers while enabling the survival of downtrodden businesses.

Issue 2: Withdrawal of Recognition

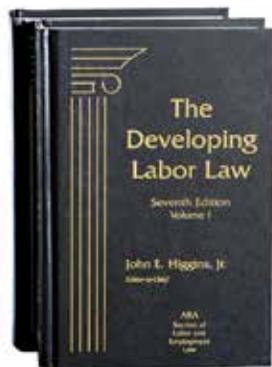
In *Johnson Controls, Inc.*, 368 NLRB No. 20 (July 3, 2019), the Board established a new standard for determining whether a union has majority status after an employer announces its anticipatory withdrawal of recognition based on its evidence that the union has lost majority support. The Board's new framework requires a secret ballot election be conducted, at the request of the Union, when both the employer and the union have

evidence supporting their positions of majority status.

Union & Employee Perspective: Under the guise of promoting "employee free choice" and "stability in collective bargaining," the Board made it easier for employers to withdraw recognition from unions. In overruling *Levitz Furniture*, the Board majority established a new scheme permitting employers to ignore the union's continuing presumption of majority support, and is based on a misunderstanding and misapplication of precedent and a blatant disregard for the intent of the Act. As Member McFerran opined in dissent, "the majority's apparent aim is to let employers off the leash. Here, letting employers off the leash means that unions and the workers that support them will get bit. That result may not trouble the majority, but it is inimical to the National Labor Relations Act." This Decision, coupled with *Sears Roebuck*, 13-CA-191829 (July 29, 2019), finding no unlawful assistance when a store manager gave an employee a decertification petition, effectively encourages employers to withdraw recognition from unions even in the absence of sufficient, and uncoerced, proof of a loss of majority status.

Employer Perspective: The "last in time" rule ensures that employees' Section 7 rights are protected and provides clarity to employers on how to respond to an employee decertification petition near the expiration of a CBA. The holding is narrow and limited to anticipatory withdrawal of recognition cases and respects the rights of workers over the rights of unions by mandating employee free choice. This Decision fits with the Board's ongoing efforts to make it easier for dissatisfied employees to get rid of an underperforming union. ■

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New Cumulative Supplement!

The Developing Labor Law: The Board, the Courts, and the National Labor Relations Act, Seventh Edition, and 2019 Cumulative Supplement

John E. Higgins, Jr., Editor-in-Chief (Seventh Edition); **Nicole Cuda Pérez, Jayme Sophir, and Amy J. Zdravecky**, Co-Editors (2019 Cumulative Supplement)

This treatise gives labor and employment law practitioners essential insight into all the latest updates in U.S. labor law. It covers the legal rights and duties of employees, employers, and unions, as well as procedures and remedies under the National Labor Relations Act. Updated regularly, it discusses major cases and what might be expected from the Board in the future.

The **2019 Cumulative Supplement** updates the treatise through December 31, 2018, and reviews the impact of two significant Supreme Court decisions: *Epic Systems Corp. v. Lewis* and *Abood v. Detroit Board of Education*.

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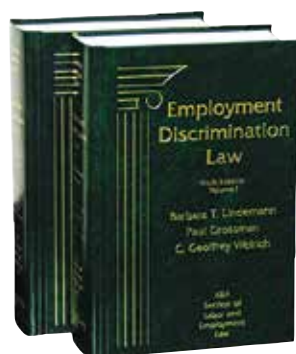
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New York State Addresses a Jim Crow-Era Legacy: The 2019 Farm Laborers Fair Labor Practices Act

By Beth Lyon

Food is a large, lucrative global industry that links predictable and growing demand with the instability of weather and the biology of plants and animals. Government bears some of the structural uncertainty, in the form of farm subsidies and tax and regulatory exemptions for farm owners. The personal risks fall on farmers and on America's estimated 2.5 million hired workers on farms and ranches, who often live in isolated farm labor camps



while they perform grueling, dangerous work. In July 2019, New York State passed the Farm Laborers Fair Labor Practices Act (FFLPA), a landmark law addressing a range of urgent concerns for farmworkers, including labor rights, wages, unemployment, health, safety, and wellbeing.

Farmworkers' Status

The law has failed farmworkers throughout history and throughout the world, including in the United States. The first failure has been the legal construction of farmworker status. The institution of chattel slavery of Africans was notoriously an economic project to use newly colonized land for

export agriculture. U.S. farm labor has involved other, varying levels of involuntariness over the centuries, including indentured servitude, the “coolie” labor system, the bracero program, and today's H2A temporary agricultural visa program, which ties visa holders' right to work to one employer.

A remarkable feature of farm labor today is the extremely high percentage of undocumented workers. The government estimates that 47% of farmworkers are undocumented, while other studies show a much higher percentage. Undocumented workers are more willing to accept low pay, sexual harassment and assault, and dangerous working conditions, and are less mobile than other workers due to lack of access to drivers' licenses (in most states). They also are vulnerable to deportation and dismissal after injury or assertion of rights. The National Human Trafficking Hotline notes that the agricultural industry is subject to two “industry vulnerabilities” leading to trafficking: seasonal/temporary work, and isolation. Also notable is the prevalence of child labor in farm work. According to the Government Accountability Office (GAO), the United States is systematically failing to track child labor in agriculture, and more than one-third of hired crop workers started working in U.S. agriculture at age 18 or under; of these, 30-34% began working in U.S. agriculture at age 14-18, and 6-8% began working at age 13 or younger.

Worker Protection Exclusions

The second failure lies at the feet of labor and employment law. Instead of innovating to protect these exceptionally vulnerable and marginalized workers, American labor and employment law include countless exceptional regimes *excluding* both

farmworkers and undocumented workers from basic protections. Promulgated during the Jim Crow era and the New Deal, federal and parallel state regimes almost uniformly excluded farmworkers and domestic workers, most of whom were African Americans. In the intervening decades, farmworkers have been written back into some New Deal-era protections such as social security, but glaring federal exclusions remain, including an agricultural employee exemption from overtime pay, a day of rest, union organizing rights, and key child labor protections, and most parallel state regimes reflect these exclusions. The prohibition on children undertaking hazardous labor does not apply to 16-to-18-year-olds working on farms.

Moreover, federal law contains *additional* exclusions from protection for undocumented workers, including no right to back pay for labor rights and employment discrimination violations, and the obligation to contribute to social security without the right to participation. Meanwhile, a minority of states have addressed their parallel farmworker exclusions. Before the FFLPA, ten states protected farmworkers rights to engage in collective bargaining: Arizona, California, Hawaii, Kansas, Louisiana, Massachusetts, Nebraska, New Jersey, Oregon, and Wisconsin, and five (California, Colorado, Hawaii, Maryland, and Minnesota) paid farmworkers time-and-a-half when working overtime. Of the protections that do exist, government monitoring and access to justice are severely limited owing to lack of political will and funding, and the isolated nature of farms.

Reduced Life Chances

As a result, today farmworkers have among the least favorable life chances in American society.

According to the Bureau of Labor Statistics, agricultural workers (separate from farmers) have the 11th most dangerous job while also having the lowest wages on the list of 15 most dangerous jobs. The BLS calculates that farmworkers are five times more likely to have a fatal injury than the average worker. The GAO reports that between 2003-2016, more than half of the 452 work-related fatalities among children were in agriculture, although 94.5% of working children work outside of agriculture. Reps. Rosa DeLauro and Lucille Roybal-Allard, who commissioned the report, stated: “child labor is contributing to a devastating amount of fatalities in the United States—disproportionately so in the agricultural sector. In that industry, kids are often exposed to dangerous pesticides, heavy machinery, and extreme heat, and they are being killed as a result.”

The 2019 New York State Farm Laborers Fair Labor Practices Act

For more than two decades, the New York State legislature has debated a broad bill addressing multiple Jim Crow-era farmworker exclusions. Introduced eight times, various iterations of the bill passed out of the State Assembly but foundered in the Senate along party lines, under vehement opposition from growers, dairy producers, and Republican legislators, particularly Republicans from upstate and Long Island farm communities. In 2018, with a new large Democrat majority in the state Senate and a Senate sponsor who vowed to be the last senator who would have to introduce the FFLPA, the bill gained political momentum. On June 19, 2019, the state legislature approved it in a vote of 84-51 in the State Assembly and 40-22 in

the State Senate. On July 17, 2019, Governor Andrew M. Cuomo signed the Farm Laborers Fair Labor Practices Act (FFLPA) into law, calling it a “a milestone in the crusade for social justice.” Most provisions of the new legislation will take effect on January 1, 2020.

Collective Bargaining

The right to collective bargaining was the subject of particularly intense negotiation. The FFLPA strikes the exclusion of “farm laborers” from the definition of “employees” under the New York State Employment Relations Act, thus granting them the right to organize and collectively bargain, and be free from retaliation for engaging in these activities. Fueling this legislative reform was a May 2019 New York state court decision ruling that the statutory exclusion of farmworkers from the State Employment Relations Act violated New York State’s constitutional mandate that “[e]mployees shall have the right to organize and to bargain collectively through representatives of their own choosing.” The FFLPA does, however, maintain a significant exclusion by stipulating that farmworkers may not strike or engage in a work stoppage or slowdown, leaving farmworkers without a fundamental economic weapon and negotiating tool.

Wage and Hour Law

Impassioned debates on overtime resulted in graduated change. The FFLPA grants farmworkers overtime pay, at one and one-half times normal rate for any hours worked over sixty hours within one week. The Act also creates a “Farm Laborers Wage Board” with three members respectively representing the Farm Bureau, the AFL-CIO, and the Governor, charged with holding hearings and reporting back to the legislature and the governor on “the extent to which overtime hours can be lowered below such amount set in law, and may provide for a series of successively lower overtime work thresholds and phase-in dates as part of its determinations.” Although farmworkers and allies advocated for a 40-hour workweek, the compromise was necessary to win Senate support, and farmworker rights proponents believe the bill creates a pathway to forty hours in the future. The FFLPA also eliminates the sub-minimum wage for underage farmworkers and removes the exclusion of “service as farm laborers” from the definition of employment in the New York State Minimum Wage Act.

Unemployment Insurance

The FFLPA ends the exclusion of farmworkers from the

unemployment insurance mandate, and also stipulates that farmers no longer need make unemployment insurance contributions for H-2A visa workers, who are not eligible to collect unemployment. Undocumented workers continue to be excluded from unemployment eligibility.

Health, Safety and Wellbeing

The FFLPA requires employers to give farmworkers at least 24 consecutive hours of rest each week, and protects workers from retaliation for asserting this right. If a farmworker chooses to work on their day of rest, they must be paid at least one and a half times their hourly rate for each hour worked that day.

Through the new law, farmworker eligibility for workers’ compensation is no longer conditioned on an individual length-of-employment or firm payroll-size threshold. The law also requires that farm labor contractors and supervisors report injuries to employers of farmworkers, mandates Spanish as well as English language workers’ compensation notice postings, and decrees that farm employers may not retaliate against farmworkers for requesting a workers’ compensation claim form. The FFLPA also brings farmworkers into the fold of the New York state law mandate that

employers provide disability and paid coverage to employees for off the job injury or illness, and paid family leave benefits.

In a provision that goes into effect one year later than the rest of the law, the sanitary code now applies to all farm and food processing labor camps intended to house migrant workers, regardless of the number of occupants.

Conclusion

The New York State Farm Laborers Fair Labor Practices Act resulted from years of engagement involving a broad coalition of farmworkers, farmworker organizers, a few individual farmers, faith-based communities, civil rights organizations, organized labor, researchers, and journalists. The New York Farm Bureau opposed the measure and three statewide hearings on the bill were heavily attended. Protection gaps remain between farmworkers and most other workers in New York State, but the new law represents a significant shift, and implementation of the law will create new paths in agricultural labor relations. ■

Beth Lyon (*mbl235@cornell.edu*) is a Clinical Professor of Law and Assistant Director for Clinical, Advocacy and Skills Programs at Cornell Law School.

The Section

continued from page 2

practice as an arbitrator and mediator. She thrived in the field for decades, including induction into the National Academy of Arbitrators and teaching dispute resolution across the country. Through it all, Susan’s primary focus was her family and friends, for whom she exuded love, joy, and care.

I missed Susan as soon as she had to absent herself from Section participation due to her illness. I miss her even more now. ■

Workplace Violence

continued from page 5

exposed to a particularly high risk of workplace violence. *See, e.g., Guidelines for Preventing Workplace Violence for Health Care & Social Service Workers*, OSHA 3148-01R 2004; NIOSH Publication No. 2002-101, *Violence - Occupational Hazards in Hospitals*; *Security Risk: Preventing Client Violence against Social Workers* by Susan Weinger (National Association of Social Workers, 2004). The ALJ and Commission also found employer recognition because Integra had created policies and trainings, albeit insufficient ones, on the

risk of workplace violence. The Commission found that feasible means of abatement existed, including OSHA’s recommendation of: instituting a written workplace violence program; performing background checks on patients before assigning employees to work with them; and initiating red flags for patients with criminal histories. Integra began taking all of these actions after OSHA issued its citation.

In summary, the topic of workplace violence is vast and vital, and many aspects of jurisprudence and enforcement remain to

be explored. Labor and employment practitioners in the private and public sectors need to be aware of the standards governing potentially violent working conditions, so that they can properly advise and represent employers, employees and labor unions who are directly and critically affected by such workplace risks. ■

Shelly C. Anand (*anand.shelly.c@dol.gov*) is a Trial Attorney in the Office of the Solicitor, U.S. Department of Labor in Washington, DC.

The Quest for Global Workplace Justice: Celebrating the Centennial of the International Labor Organization

By Mary K. O'Melveny

The International Labor Organization (ILO) is celebrating one hundred years of innovative global agreements that promote peace by fostering workplace justice. Ever since its founding, the ILO has vigorously promoted the idea of using consensus debate about the concept of decent work among its member nations to establish agreed-upon international labor standards that can effectively govern divergent workplace realities.

It is difficult to overstate the importance of the topics that have been addressed by the ILO over the past century—elimination of forced labor, abolition of child labor, establishment of minimal standards for occupational safety and health, minimum wage and hour guarantees, freedom of association, and collective bargaining rights, protections for workers who are pregnant or have children and equal pay protections. While some may take such guarantees for granted, the ILO was adopting international standards and policies about these issues beginning in 1919, when most countries did little to protect workers. ILO Convention No. 111, for example, established the right not to be discriminated against in employment on the grounds of “race, color, sex, religion, public opinion, national extraction or social origin,” or other grounds determined by member states. It was adopted in 1959, well before Title VII became law in the United States.

The organization, which received a Nobel Peace Prize in 1969, is the only tripartite United Nations agency. It brings together governments, employers and worker representatives from 187-member states. After careful dialogue among these constituencies, the ILO establishes global labor work and human rights

standards, develops trend-setting policies, and implements training programs and other initiatives to carry them out. International workplace law over the past century has been indelibly shaped by nearly two hundred comprehensive ILO treaties and conventions. Eight of these Conventions are binding on all countries regardless of ratification (e.g., prohibitions on forced labor, guarantees of freedom of association and



equal pay, protections against employment discrimination), while others have been widely adopted by many countries.

According to Deborah Greenfield, ILO Deputy General for Policy, “the ILO’s constitutional mandate for social justice remains as urgent today as it was in 1919 when the organization began. Looking back, the ‘wild dream’ of our founders has borne fruit over the last century, including the standard working day, limits to child and forced labor, the right to organize and bargain collectively, protection for vulnerable groups, regulations to achieve equality and safer work.” Greenfield, named to the post in 2016 by President Obama, served as Deputy Solicitor General at the US Department of Labor from 2009 to 2016 and before that as an Associate General Counsel of the AFL-CIO. She now leads the ILO’s policy, research and statistical work across a broad range of labor and employment issues.

Even with an impressive array of ILO global achievements being celebrated this centennial year, Greenfield cautions that much important work remains to be done. “[I]nequality is growing; over 60 percent of the world’s workers are in the informal economy; technology has made possible new business models that undermine decent work; and climate change poses challenges to workers and enterprises that that did not exist a century ago.” Greenfield remains confident that the ILO will rise to meet these challenges in the century ahead.

Key policy recommendations have been promoted by the ILO in recent years to address such rapidly changing global dynamics, including a report from its independent Global Commission on the Future of Work, “Work for a brighter future.” This June, at its Centenary International Labor Conference in Geneva, tripartite delegates completed the drafting of a new international compact to address continuing problems of violence and harassment against men and women at work, which leave workers more vulnerable to human trafficking and other labor exploitation.

The new ILO Violence and Harassment Convention No. 190 calls for the elimination of gender-based violence and harassment at work through the adoption of comprehensive laws, policies and other mechanisms that can protect against violence and trafficking and establish remedies for victims. Greenberg notes that with adoption of that standard, “the ILO will enter its second century at the forefront of one of the most pressing issues in the world of work.” For the first time, all types of harm are recognized—physical, psychological, sexual and economic—and work situations and spaces are broadly identified, including

work-related travel, training, commuting and job-related communications in both the formal and informal economy. The Convention also calls for specific measures to protect against and prevent domestic violence and encourages workers and their advocates to report abuses and work with employers to eliminate risks to life, health or safety.

Once formally ratified by at least two member nations, the Convention becomes enforceable within twelve months. It is expected to be used in conjunction with existing international compacts and ILO policies to expand opportunities for improved bargaining and organizing rights, develop enhanced grievance procedures, and increase reporting of and accountability for unacceptable behavior throughout global supply chains. It is anticipated that women workers world-wide will continue to take leadership roles in promoting ratification of the Convention in their home countries, just as they did in pressing for its development and adoption.

As with other ILO policy standards, the organization’s voice carries significant weight because of its tripartite consensus process. Adoption of the Convention followed four years of debate and analysis of working conditions throughout many nations and diverse industries. Its adoption ensures that all participants in the global workforce will benefit from increased protections as they face evolving changes and challenges ahead. ■

Mary K. O'Melveny (*maryo.laboratty@gmail.com*) is the Union & Employee Co-Chair of the Section’s Immigration & Human Trafficking Committee. She practices in Washington, DC.

OPINION

Clarion Call for a Uniform or Model Noncompete Law Act

By Hon. William Constangy

The proliferation of noncompete litigation and legislation across the country forcefully calls out for creation of a Uniform or Model Noncompete Law Act to unify and clarify intrastate and interstate transactions that include covenants not to compete and related restrictive covenants.

Noncompete covenants are ubiquitous and are standard business tools incorporated in a plethora of business transactions. Noncompete covenants have spilled over from their genesis in traditional employment contract and sale of business agreements to virtually every type of business transactional relationship, including, among others, employee benefit plans, severance and settlement agreements, commercial transactions, franchises, dealership and distributorship agreements, dissolution agreements for various forms of business, limited liability company membership agreements, and even toll road construction noncompetes, which have been banned by statute in Colorado under certain circumstances.

Spawned by public reaction to a 2016 lawsuit, *People v. Jimmy John's Enterprises, LLC and Jimmy John's Franchise, LLC*, brought by the Michigan Attorney General on behalf of low wage Jimmy John's delivery drivers, sandwich makers and other store employees bound by noncompetes as a condition of employment, a flurry of state and national legislation has been proposed. The latest proposed national legislation, the "Freedom to Compete Act" was introduced in United States Senate earlier this year. The Act would amend the Fair Labor Standards Act to prohibit noncompetes with minimum wage employees. Trade secret nondisclosure agreements with minimum wage employees are

expressly excluded from coverage by the Act.

State legislation has been adopted to protect low wage earners from such noncompetes. However, there are significant differences in the statutes concerning the definition of low wage earners, varying from employees who earn the greater of the minimum wage or thirteen dollars or less per hour in Illinois to employees who earn less than one hundred thousand dollars annually in Washington.

The Freedom to Compete Act would amend the Fair Labor Standards Act to prohibit noncompetes with minimum wage employees.

As a result of heavy media attention to the use of nondisclosure agreements to cover up sexual misconduct, rapid response legislation has been adopted in several states to protect victims of sexual harassment, assault or discrimination. However, these statutes vary in regard to the extent of the prohibition, from prohibiting inclusion of such nondisclosure covenants in employment dispute settlement agreements in New Jersey, to explicitly exempting inclusion of such settlement agreement nondisclosure covenants in coverage of the statute in Washington.

Specialized standalone noncompete statutes, differing from state to state, banning, restricting or otherwise governing noncompete covenants involving certain professions, trades and businesses pepper the country. The massive acceleration of institutional acquisition of private

medical practices around the country, has resulted in comprehensive statutory regulation of physician and other healthcare employment and sale of medical practice noncompetes in Tennessee, Texas, West Virginia, Florida and Connecticut and the outright ban of such noncompetes in Colorado, Delaware, Massachusetts, Rhode Island, and New Mexico.

Statutes have been adopted in various states banning or restricting noncompetes for broadcast industry employees in Arizona,

among the states, since many states consider conflicts with other states' noncompete enforceability standards adopted by statute or common law as public policy grounds to refuse to apply the law of the specified chosen state irrespective of inclusion in the underlying contract.

Although the states are relatively consistent in the identification and application of enforceability standards, some state courts, under new statutory law and developing common law, are exempting nondisclosure and nonsolicitation covenants from the rigors of noncompete strict scrutiny analysis traditionally applied to employment contract covenants not to compete.

There is also much variance among the states concerning modes of judicial modification of noncompetes from complete prohibition of modification to permissive severability of unenforceable portions, known as "blue-penciling", and mandatory reformation, a currently trending statutory requirement.

A comprehensive and cohesive Model or Uniform Act would provide a much needed map to guide state legislatures in constructing a more coherent, unified and consistent framework for applying and coordinating noncompete laws in this modern environment of constantly expanding consolidation and reach of multistate and multinational business entities and the demands of an increasingly mobile employment base. ■

The Honorable William Constangy (constangy@mindspring.com) is a retired North Carolina Superior Court Judge and now an Employment Arbitrator and Mediator in Charlotte, North Carolina. He is the author of *Noncompete Law*, a new national legal treatise published by LexisNexis Matthew Bender.



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February 19–21

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JW Marriott Los Cabos Beach Resort
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March 1–4

**Committee on Development of the
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March 3–6

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March 3–6

**Occupational Safety & Health Law
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March 9–10

**Federal Sector Labor & Employment
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March 11–13

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