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Newsletters

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NLRB Finds Violation for Failure to Provide Union Opportunity to Bargain

A newspaper publisher hired a nonemployee freelance journalist as an investigative reporter. The Graphic Communications Conference, International Brotherhood of Teamsters (GCC/IBT), the certified bargaining agent of all full-time and regular part-time employees in the news department, brought an unfair labor practice charge against the employer for hiring a nonemployee freelancer to perform bargaining unit work without notifying the union or giving it an opportunity to bargain. The National Labor Relations Board (Board) found that the freelancer in fact worked on in-depth investigative stories, but the Board said his work was "indistinguishable" from the work performed previously by regular reporters. The Board also rejected the employer's past practice claim, stating that the three-year-time lapse since a freelance writer authored an investigative story was not regular or frequent enough to provide a defense to the unfair labor practice allegation. Finding that investigative and noninvestigative work constituted bargaining unit work, the Board determined that assigning work to the freelancer without giving GCC/IBT an opportunity to bargain about the decision and its effects on unit employees violated the National Labor Relations Act. Employers having union employees should take caution and be mindful of any potential violations that may result from hiring freelance workers.

Ampersand Publ'g LLC d/b/a/ Santa Barbara News-Press, 358 N.L.R.B. No. 141, Sept. 27, 2012

Rotating Shift an Essential Job Function and No Duty to Promote as an Accommodation

An energy company employed resource coordinators (RCs) who were responsible for monitoring energy distribution, scheduling and routing maintenance resources, and responding to emergency situations. The company required 24-hour, 7-days-per-week coverage in this department and, as a consequence, RCs were required to work a rotating 9-week schedule that alternated between 12- and 8-hour shifts, and day and night shifts. One RC had Type I diabetes and Peripheral Vascular Disease, which limited her ability to walk. The employee's diabetes was exacerbated by the rotating shift schedule and she requested a straight day shift as an accommodation. The company rejected this request, asserting that the rotating shift constituted an essential function of the position that could not be eliminated as an accommodation. The

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company provided the employee with a number of open positions to which she could transfer that had regular hours, but the employee rejected each for various reasons. The employee also applied for an open position that was two job grades higher than her current position, and the company ultimately selected a more qualified applicant. Ultimately, the employee filed suit against the company alleging a failure to accommodate her disability. In ruling against the employee, the U.S. Court of Appeals for the Eighth Circuit held that the rotating shift was an essential job function based in part on the fact that it was listed as a requirement on the job description and allowing an exception for the employee would have required other RCs to carry a heavier load working night and weekend shifts. The court also focused on the fact that the rotating shift allowed the employer to achieve significant benefits with respect to training and service. The court further held that an employer is not required to promote an employee as an accommodation, and that the company's offer of available positions otherwise satisfied its duty to engage in the interactive process. This case highlights the importance of maintaining accurate job descriptions, engaging in the interactive process, and being able to provide sound, business-related justifications for why an accommodation was rejected.

*Kallail v. Alliant Energy Corporate Services, Inc.,*No. 11-2202 (8th Cir. Sept. 4, 2012)

Court's Determination That Nurses Were Supervisors Nullifies Attempts to Organize

In August 2010, the union represented certified nursing assistants (CNAs) at a health care employer and filed a petition with the National Labor Relations Board (Board) seeking representation elections to establish the union as the collective bargaining representative for the employer's licensed practical nurses (LPNs). The Board found LPNs were not supervisors and therefore had a right to unionization. Once the LPNs' union was certified, it filed an unfair labor practice charge against the employer for refusing to recognize and bargain with the union. The Board's General Counsel filed a complaint against the employer, and ultimately, a three-member panel granted summary judgment in favor of the Board, finding that the employer violated the National Labor Relations Act. The employer appealed to the Eleventh Circuit. The U.S. Court of Appeals for the Eleventh Circuit Court held that the LPNs were supervisors and thereby vacated the decision of the three-member panel. The court's analysis concentrated on what authority the LPNs had, whereas the Board gave greater weight to whether LPNs actually exercised that authority. The Eleventh Circuit found that LPNs had the authority to discipline, suspend and effectively recommend the termination of CNAs through independent judgment through the use of their discipline procedures. This was in contrast to the Board's finding that the LPNs simply reported employee misconduct. Furthermore, the court found that LPNs had the responsibility to direct CNAs, meaning that LPNs would be held accountable for a CNAs performance due to failure to adequately supervise a CNA. Employers should be aware of the various considerations involved in classifying its employees, and the effect that it can have on the employees' rights to unionize.

Lakeland Health Care Associates, LLC v. National Labor Relations Board.Nos. 11-12000 & 11-12638 (11th Cir., Oct. 2, 2012)

NLRB: When Former Union's Benefit Plans Are Unavailable, Employer Must Set Aside Monthly Contributions Until Agreement Is Reached With New Union

At the end of June 2005, the collective bargaining agreement between the owner of an asphalt plant and its employees' union expired. The following month, a different union was elected by the plant employees as their new bargaining representative. Under the terms of the former collective bargaining agreement, the employer had been required to make payments to certain benefits funds sponsored by the union. The new union, upon requesting bargaining, demanded that the employer continue making benefits contributions in order to maintain the status quo. The employer, finding the former union's accounts unavailable and believing that it could not yet legally contribute to the new union, chose what it believed to be a logical solution: enroll the unit members in its own healthcare plan and pay the required monthly amount into its own plan for the benefit of its employees. The National Labor Relations Board's (Board's) General Counsel subsequently filed suit against the employer, alleging that its solution had failed to maintain the status quo and that the employer had therefore violated the National Labor Relations Act. The Board agreed, finding that the employer could not unilaterally replace employees' benefits during bargaining. The Board also noted, however, that the employer could not do nothing, because that would allow employees to be stripped of benefits that they had under the former agreement. The only solution, the Board determined, was for the employer to continue calculating the payments required under the former collective bargaining agreement, set that amount aside each month until it reached a new agreement with the new union,

and bargain with the new union regarding the discontinuation of benefits. In this case of first impression, the Board clarified how an employer confronted with a new union certification should maintain the status quo regarding benefits contributions when the former union's benefits plans are no longer available: the employer must set aside monthly contributions equal to the amount required under the former contract until a contract is reached with the new union. As a result, employers that find themselves in this situation going forward should be aware of their very specific obligation.

Cofire Paving Corporation, No. 29-CA-027556 (NLRB, Sept. 28, 2012)

Tax Court Holds Masonry Workers Were Employees Not Independent Contractors

An employer operated a masonry subcontracting business and treated its workers as independent contractors and not employees. The workers were hired on a per-job basis, brought their own tools to the jobs, were free to work for other employers, and were paid on a piecework basis in cash. The payments made to the workers were often not adequately recorded and minimal documentation existed. In an employment tax audit the Internal Revenue Service (IRS) determined that the workers should be classified as employees, and calculated the employment taxes the employer should have withheld, along with penalties and interest on these amounts, and penalties for the failure to file returns and remit the taxes. The employer then brought suit in U.S. Tax Court to contest the IRS's classification of the workers as employees. The Tax Court applied the seven-employee factor test (as opposed to the IRS 20 factor test) and held that the workers were employees. The Tax Court found that the employer had the authority to tell the workers what jobs to do, and how and when to perform their work. While the workers brought their own tools to work, none of them had a significant investment in the facilities. Furthermore, the workers had no opportunity for profit or loss and the employer had the right to fire the workers who were an integral part of its business. The Tax Court noted that while the workers were engaged on a per-job basis and were free to work elsewhere, this one factor among the others did not compel workers classification as independent contractors. Based on the Tax Court's ruling, employers should be aware that an employee's classification is typically based on several factors, not one of which is dispositive.

Atlantic Coast Masonry, Inc. v. Commissioner, T.C. Memo 2012-233 (Aug. 13, 2012)

NLRB Finds Employer Bound by CBA Despite Employer's Informal Attempt to Terminate

The employer was a construction industry employer who became a member of the Upstate Iron Worker Employers' Association, Inc. (Association) in 1997. At the time the employer joined the Association it executed a document which provided that the Association would be the exclusive agent of the employer in collective bargaining with the union. The document also provided that no member of the Association could resign during the period beginning 90 days prior to the expiration of a collective bargaining agreement between the Association and the union. About 10 years later, the Association and the union executed a collective bargaining agreement (CBA), which was to remain in effect through April 30, 2009. The employer agreed to the terms of the CBA by way of a Letter of Assent, but then, in late 2008, stopped applying the terms and conditions of the CBA, and failed to notify the Association or union that it was apparently terminating the agreement. Several months later, it notified the Association and Union that it was revoking the Letter of Assent as well as the Association's authority to bargain on the employer's behalf, and indicated that it was withdrawing from any collective bargaining relationship with the union, but then later entered into a new CBA. The union filed an unfair labor practice charge, alleging that the employer unlawfully terminated the CBA and refused to abide by the new CBA negotiated with the Association. The National Labor Relations Board initially determined that the employer did, in fact, violate the National Labor Relations Act, and the employer filed exceptions. The Board reviewed the matter again and affirmed. It found that the employer was bound by the CBA and failed to provide proper notice of its intent to terminate, therefore, the Association remained the employer's agent for purposes of binding it to the subsequent CBA. Thus, the Board concluded that the employer's 1997 agreement with the Association had overridden previously well-established law that an employer may withdraw from multi-employer bargaining any time prior to an association commencing negotiations with a union. Before undertaking any actions which could be detrimental to employees' rights or an existing collective bargaining agreement, employers should consult with counsel to ensure that they are proceeding accordingly and are apprised of any potential risk associated with the selected action.

*Carr Finishing Specialties, Inc. and G.P.C. Construction, Inc. and International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers,*358 NLRB No. 165 (2012)

Employer's Changed Workweek Did Not Violate FLSA

Employees brought action against their employer, alleging violations of wage and hour requirements of Fair Labor Standards Act (FLSA). The FLSA provides that covered workers employed "for a workweek longer than forty hours" must be compensated "at a rate not less than one and one-half times the regular rate" for work in excess of forty hours. 29 U.S. C. § 207(a)(1). The employees claimed that their employer violated this overtime provision by changing the designation of their workweek, but not their work schedule, so that fewer hours qualified as "overtime." The FLSA prohibits an employer from changing an existing workweek for the purpose of reducing employee overtime. The employer presented evidence that changing the workweek increased efficiency by reducing the time it takes the office manager to prepare payroll from five to two days a month and decreased payroll expense by reducing the number of hours that drill rig employees must be paid at the FLSA-mandated overtime rate. The employees argued that the workweek change was pretextual to reduce employee overtime. The district court granted the employer's motion for summary judgment concluding that the FLSA does not require a workweek schedule that maximizes an employee's accumulation of overtime pay. Thus, a schedule whereby an employee's actual work schedule is split between two workweeks does not violate the federal legislation. If such a schedule does not itself violate the FLSA, a change to such a schedule is not designed to evade the overtime requirements of the Act. The U.S. Court of Appeals for the Eighth Circuit rejected the employees' contention that an employer's permanent change in the designated workweek violates the FLSA unless it is justified by a "legitimate business purpose" because so long as the change is intended to be permanent, and it is implemented in accordance with the FLSA, the employer's reasons for adopting the change are irrelevant. Accordingly, whether the employer in fact adopted the change in question to achieve administrative efficiencies in calculating and paying wages and overtime, and if so, whether that was a "legitimate business purpose" justifying the change, were not genuine disputes of material fact that precluded the grant of summary judgment in favor of the employer. Employers should review their scheduling policies to ensure that they are compliant with the FLSA and other applicable state and local laws.

Abshire v. Redland Energy Services, LLC, No. 11-3380 (8th Cir., Oct. 10, 2012)

NLRB Finds Discharge of Employee for Use of Offensive Language Unlawful

A pro-union employee was discharged after his employer discovered that he had written vulgar, offensive, and possibly threatening statements in several union newsletters encouraging other employees to join the union. Thereafter, the employee filed a complaint arguing that the employer violated Section 8(a)(1) of the National Labor Relations Act (NLRA) because it had investigated, interrogated and ultimately terminated the employee on the basis of his protected union activity. The administrative law judge (ALJ) reviewing the complaint found that the employer had not violated the NLRA because the offensive and threatening nature of the comments removed the employee's conduct from the protection of the act. In reviewing the ALJ's decision, the National Labor Relations Board (NLRB) agreed with the ALJ's conclusions regarding the employer's investigation and questioning of the employee, but found that the employee's suspension and discharge violated the Act. The NLRB reasoned that, although the comments were vulgar and offensive, they were not so egregious as to cost the employee the protection of the Act because the comments could not reasonably be perceived as a threat of physical harm, the employee had previously dealt with vulgar employee conduct by issuing only minor discipline, and there was no evidence the employee's commentary interfered with production, challenged any supervisor's or manager's authority, or otherwise undermined the employer's ability to maintain order. In light of the NLRB's decision, employers should be cautious and consult counsel before disciplining an employee whose conduct involves his union activities or an expression of union support.

*Frenenius USA Manufacturing, Inc. and Int'l Brotherhood of Teamsters, Local 445,*358 NLRB No. 138 (Sept. 19, 2002)

Thirteen-Month Gap After Alleged Protected Activity Insufficient to Show Retaliation

A postal worker who suffered from asthma claimed that his employer failed to accommodate his disability. He sought accommodations on the grounds that his workplace was damp and had too much mold and mildew such that it made him ill. The employer undertook various repairs in order to remedy the situation, including $32,000 worth of building renovations. The employee was not satisfied and sought to be reassigned to a different position or area. The employer

claimed that it attempted to accommodate the employee and that its own doctor said that the employee could return to work. Over the course of seven years, the employee filed multiple complaints with the Equal Employment Opportunity Commission (EEOC) and the Occupational Safety and Health Administration (OSHA) in addition to union grievances, requesting a reasonable accommodation of his disability. During the same period, the employee had extended periods of absences from work. The employee unsuccessfully sought relief through the EEOC, and subsequently filed suit against his employer claiming that it had violated the Americans with Disability Act (ADA), the Family Medical Leave Act (FMLA), and the Rehabilitation Act. The trial court granted the employer's motion for summary judgment and the employee appealed. The U.S. Court of Appeals for the Seventh Circuit agreed with the district court and the employer. In doing so, the Court found that the employee had to provide direct or indirect evidence to support his claims of retaliation discrimination under the Rehabilitation Act. Absent evidence of an event comparable to an adverse admission by the employer, the employee could try to rely on indirect evidence, such as suspicious occurrences, timing, and statements, and compare treatment of similarly situated employees to show that the reason for the employer's discipline was pretextual, however, all the employee had was evidence of suspicious timing and pretext which failed to create a material issue of fact. The biggest deficiency in the evidence was the 13-month gap between the employee's protected activity of seeking a reasonable accommodation and the disciplinary action taken by the employer. This case serves as a reminder to employers not to take hasty disciplinary action against employees who claim to have disabilities. Instead, a steady documentation of performance issues, while also taking steps to reasonably accommodate an employee, may well be recognized by courts as building sufficient grounds for a nonretaliatory termination.

Anderson v. Donahue, No. 11-3784 (7th Cir., Oct. 26, 2012)

Employer's Collective Bargaining Agreement Must "Clearly and Unmistakably" Waive Employee's Right to Bring Civil Action to Be Valid

The employee package driver struck a telephone pole while delivering packages for her employer delivery company. The employer terminated the employee for "recklessness resulting in a serious accident." The employee, who was also a union member, filed a grievance under her union's collective bargaining agreement (CBA), claiming that the decision to fire her was unjust, but she did not allege sex discrimination at that time. According to procedures established in the CBA, the employee's grievance was denied. The employee then filed a sex discrimination action under Title VII of the Civil Rights Act of 1964, as amended. The employer argued that the grievance procedure established in the CBA provided the employee's exclusive remedy for her sex discrimination claim, and that she "failed to exhaust that remedy by failing to assert discrimination by Employer in the grievance process." The district court agreed with the employer and granted summary judgment. The U.S Court of Appeals for the Fifth Circuit vacated and remanded the case, holding that only "a collective bargaining agreement that clearly and unmistakably requires union members to arbitrate" statutory civil rights claims could waive the right of individual members to bring civil actions. The Fifth Circuit noted that, at the very least, the CBA must identify the specific statutes the agreement purports to incorporate, or include an arbitration clause that explicitly refers to statutory claims, which in this case, the CBA did neither. It is clear that the mere presence of an anti-discrimination policy and a grievance policy and procedure cannot be construed as an explicit waiver of an employee's right to bring civil rights claims. The employee would get his or her day in court unless the CBA explicitly waives the employee's right to a judicial forum for statutory claims. All employers, whether subject to collective bargaining agreements or not, should review their policies to ensure that any waivers of any employee's right to file a civil action are clearly stated and comply with applicable state and federal laws.

*Ibarra v. United Parcel Service, 5th Cir.,*No. 11-50714 (Sept. 13, 2012)

Employer's Policy Regarding Off-Duty Work Access Found Invalid

A hotel had two policies regarding off-duty employees' access to work areas: one that restricted off-duty access to interior areas of the hotel, and another that restricted off-duty employee use of guest facilities. The policies required management permission for off-duty employees to enter the interior working areas of the hotel, and further identified specific guest areas where employees could not have access unless they were on a specified work assignment or had prior approval from their managers. Almost four decades ago, the National Labor Relations Board articulated a three-part test to determine the validity of off-duty access rules. A policy restricting access by off-duty employees was said to be valid if it "(1) limits access solely to the interior of the plant and other working areas; (2) is clearly disseminated to all employees;

and (3) applies to off-duty employees seeking access to the plant for any purpose and not just to those employees engaging in union activity." The National Labor Relations Board found that the employer's policies violated the third prong, in that the policy did not "uniformly prohibit access to off-duty employees seeking entry to the property for any purpose." Ultimately, the employer was prevented from maintaining control over its workplace. This case emphasizes the importance of working with counsel to draft and implement lawful policies to manage risk and avoid potential issues such as this.

Marriott Int'l Inc. dba J.W. Marriott Los Angeles at L.A. Live, No. 8, (NLRB, Sept. 28, 2012)

Date of Birth Question on Employment Application Lands California Employer in Hot Water

A former wealth management advisor was contacted by a recruiter as a bank employer was interested in interviewing the advisor for a financial position. The advisor was provided with an application for employment to complete, which he did, and was subsequently interviewed. The advisor, who was 57 years old at the time of his application, sensed an immediate negative reaction from the interviewer, who he contended was significantly younger than he. The advisor was not selected for the position, but was given no explanation. He then filed suit against the employer, alleging violations of the Age Discrimination in Employment Act (ADEA) and California's Fair Employment and Housing Act (FEHA) on the grounds that younger workers with inferior qualifications were hired instead of him. He argued that age was a factor in the denial of the position because he was required to inform the bank of his date of birth on the application, and that this facially neutral requirement of providing the date of birth leads to discrimination against older applicants. The bank sought to dismiss the complaint or strike the disparate impact age discrimination claims, but the U.S. District Court for the Southern District of California declined to do so, finding that the employee's allegations concerning the neutral requirement of providing a date of birth was sufficient to withstand a motion to dismiss. Employers with employees in the State of California or recruiting within the State of California should be mindful of the fact that an individual who is declined an employment opportunity after providing a specific date of birth may ultimately have to defend against an age discrimination claim. For that reason, and as always, it is important for employers to carefully document the selection and hiring process to demonstrate legitimate, non-discriminatory bases for the ultimate decisions.

Ernst v. Bank of America Corporation, No. 12-1255 (S.D. Cal., Oct. 30, 2012)

NLRB Advice Memos Find Selected At-Will Provisions to Be Lawful

Employees filed charges with the National Labor Relations Board (NLRB) alleging that their employers' handbooks contained overbroad at-will policies which inferred that employees could not engage in activities which are otherwise protected by the National Labor Relations Act (NLRA). In reviewing the selected policies, the NLRB determined that neither policy was unlawful, but identified circumstances which may lead to a different determination. The NLRB noted, for example, that an employer violates the Act when it implements and enforces policies that explicitly prohibit NLRA-protected union or concerted activities. Further, even if no such explicit policy exists, an employer may still be found to have violated the NLRA if its general policies or rules are worded in such a manner that employees could construe the language to prohibit such activities. Despite these new advice memos, this area of the law remains somewhat unsettled, and accordingly, the NLRB has sought further information from its regional offices for further analysis and evaluation. In the meantime, however, employers are cautioned to review their at-will policies and procedures, and to consult with counsel to ensure that the policies are not unlawfully overbroad.

NLRB Office of the General Counsel Advice Memoranda, October 31, 2012

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