A bus driver for a New Jersey transportation company didn't show that his obesity was perceived as a disability for purposes of his claim that he was subjected to a hostile work environment in violation of the state law against discrimination. Obesity only qualifies as a disability under the law if it has an underlying medical cause, and the fact that he passed several medical exams during his 10-year employment company, along with two of his supervisors' testimony that they didn't believe he was disabled, undermines his contention that they thought he had a qualifying disability. The case is Dickson v. Cmty. Bus Lines, Inc., 2019 BL 119911, N.J. Super. Ct. App. Div., No. A-3857-17T3, 4/4/19.

Case: Wage & Hour/Settlement Agreements (S.D. Ga.)

A company and one its employees may not settle the employee's federal wage claim under seal. Her sexual harassment claim included in the settlement is already on the public docket, so the parties' interest in keeping that claim confidential isn't significant enough to outweigh the interest in public access to federal wage settlements; however, the parties may have her claim dismissed without prejudice. The case is Brown v. Pontus LLC, 2019 BL 120598, S.D. Ga., No. CV417-202, 4/4/19.

Case: Discrimination/Retaliation (2d Cir.)

The Department of Homeland Security prevails over a Senior Special Agent's retaliation claims, saying his removal from an investigation and his suspension for drawing a firearm on two civilians was actually retaliation for his participation in two separate discrimination proceedings brought by coworkers. The court said that he was removed from the investigation for submitting reports too late, which he admits he was warned about, and the investigation into the firearm incident began before he had engaged in any protected activity, even though the resulting suspension wasn't imposed until over a year later. The case is D'andrea v. Nielsen, 2019 BL 121740, 2d Cir., 18-687-CV, unpublished 4/5/19.

Case: Discrimination/Adverse Action (N.D. Ill.)

A University of Illinois political science professor who comes from South Korea didn't state an adverse action to sustain his discrimination, retaliation, and

hostile work environment claims based on race and national origin bias, because all of his complaints referenced benefits that either he wasn't entitled to or did receive, or actions that didn't affect the terms of his employment. Among other things, he got the sabbatical and promotion he complained about, he wasn't entitled to a pay raise just because he got another job offer, and comments that Koreans are "good at math" and "stubborn" aren't severe enough to sustain a harassment claim, the court said. The case is Seung-Whan Choi v. Bd. of Trs. of Univ. of Ill., 2019 BL 119950, N.D. Ill., No. 16 C 11627, 4/3/19.

Case: Labor Relations/Anti-union Campaign (N.L.R.B.)

Sysco Grand Rapids, LLC committed numerous unfair labor practices to deter a union organizing campaign that began in 2014 among its warehouse and transportation employees. The NLRB adopts an administrative law judge's findings that the company, among other things, unlawfully threatened employees that it would close its facility if they chose to be represented by a Teamsters local, promulgated a rule prohibiting the wearing of union insignia, reduced the hours of an employee who challenged assertions by the company's president at a captive-audience meeting, and fired a driver who solicited union authorization cards. The case is Sysco Grand Rapids, LLC, 2019 BL 120984, N.L.R.B., 07-RC-147973, 4/4/19.

Case: Wage & Hour/Overtime Exemptions (11th Cir.)

Route sales representatives who ordered, sold, and delivered Carvel ice-cream products for Rich Products Corporation were properly classified as motor carriers exempt from the federal overtime law. Despite the fact that they only made deliveries within Florida, they were engaged in the transportation of property in interstate commerce, and therefore subject to the motor carrier exemption, because the company's shipment of products from Connecticut to a Florida warehouse based on sales predictions, as well as its complete turnover of product at the warehouse more than once a month, show that the representatives' deliveries were part of a continuous stream of commerce. The case is Ehrlich v. Rich Prods. Corp., 2019 BL 120262, 11th Cir., 18-12195 Non-Argument Calendar, unpublished 4/4/19.

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From: Rice, Tresa
To: Robb, Peter; Stock, Alice B.; Ring, John; Lucy, Christine B.
Cc: Schreckengost, Lindsey A.
Subject: BU Health Unit Arbitration: Request for Information.pdf
Date: Friday, April 5, 2019 10:17:13 AM
Attachments: Request for Information.pdf

Good morning,

I am writing to advise that the attached request for information has been received from the NLRBU for the upcoming health unit arbitration, scheduled for Friday, May 10, 2019. (b) (5) [redacted]

(b) (5) [redacted]

Thank you.

National Labor Relations Board Union
26 Federal Plaza, Room 3614
New York, NY 10278-0104
Tel: (212) 776-8667
Fax: (212) 264-2450
Email: eric.brooks@nlrb.gov

April 4, 2019

Tresa A. Rice, Labor Relations Counsel
National Labor Relations Board
Office of General Counsel
P.O. Box 241398
5815 Landerbrook Drive
Cleveland, OH 44124

Sent by e-mail only to tresa.rice@nlrb.gov

Re: Elimination of Health Services Units
FMCS Case No. 180712-06379
Request for Information

Dear Ms. Rice:

Pursuant to 5 U.S.C. Sec. 7114 (b)(4) and applicable collective-bargaining provisions, including Article 1 and Article 3, Section 7 of the collective-bargaining agreements, this will request the production of certain information necessary to the National Labor Relations Board Union's (NLRBU or Union) representation of bargaining unit employees.

It is requested that the documents be provided to Counsel for the NLRBU by the close of business on April 12, 2019.

Please provide the following data[1]:

[1] "Data" means any existing printed, typewritten or otherwise recorded material of whatever character, records stored on computer or electronically, records kept on microfiche or written by hand or produced by hand and graphic material, including without limitation, checks, cancelled checks, computer hard drives, discs and/or files and all data contained therein, computer printouts, E-mail communications and records, any marginal or "post-it" or "sticky pad" comments appearing on or with documents, licenses, files, letters, facsimile transmissions, memoranda, telegrams, minutes, notes, contracts, agreements, transcripts, diaries, appointment books, reports, records, payroll records, books, lists, logs, worksheets, ledgers, summaries of records of telephone conversations, summaries of records of personal conversations, interviews, meetings, accountants or bookkeepers' work papers, records of meetings or conference reports, drafts, work papers, calendars, interoffice communications, financial statements, inventories, news reports, periodicals, press releases, graphs, charts, advertisements, statements, affidavits, photographs, negatives, slides, disks, reels, microfilm, audio or video tapes and any duplicate copies of any such material in the possession of, control of, or available to the subpoenaed party, or any agent, representative or other person acting in cooperation with, in concert with or on behalf of the Agency.

A. Cost Savings Work Group:

1. Agency-NLRBU agreements or communications addressing the impact of deliberations and agreements of labor management committees including the Cost Savings Work Group on collective bargaining obligations in effect in 2017 and 2018.
2. Documents issued by federal agencies such as Office of Personnel Management addressing the impact of deliberations and agreements of labor management committees including the Cost Savings Work Group on collective bargaining that were in effect in 2017 and 2018.

> *Particularized Need – Items 1 and 2*: The Agency in its grievance answer appears to assert that pre-decisional deliberations of the Cost Savings Work Group may waive or limit the Union's ability to bargain over changes to the practice of providing occupational health services. Agreements, directives and guidance as to the impact of pre-decisional involvement on traditional collective-bargaining obligations may limit any such claims and are necessary to determine the impact, if any, of the Cost Savings Work Group's deliberations on elimination of the occupational health services benefit.

3. Agency communications about the restoration of expenditures that were identified by the Cost Savings Work Group as expenditures that might be reduced or eliminated, when the Agency received the Fiscal Year (FY) 2018 appropriation, including:
    a. Agency discussions of the expenditures that would or would not be restored, and reasons for taking or not taking action;
    b. Agency discussions with the NLRBU about whether to restore expenditures;
    c. Agency communications with bargaining unit employees about restoration of expenditures.
4. Expenditures that were identified by the Cost Savings Work Group to be reduced or eliminated, that were not reduced or eliminated in FY 2018.
5. Dates of expenditures that were identified by the Cost Savings Work Group to be reduced or eliminated, were restored.

> *Particularized Need – Items 3 through 5*: The evidence will establish that the Cost Savings Work Group's report was not consistently implemented, and that recommendations to reduce or eliminate expenditures ("cuts") were not effectuated or were reversed when the Agency's FY 2018 appropriation proved to be much greater than the Work Group anticipated. The Agency and NLRBU discussed restoration of cuts, including occupational health services. These documents will show that the NLRBU and employees reasonably expected that restoration of occupational health services was likely.

B. Occupational Health Services:

6. Contracts, agreements or Inter Agency Agreements (IAA) with entities such as U.S. Department of Health and Human Services, Program Support Center, Federal

Occupational Health ("FOH") to provide occupational health services[2] to bargaining unit employees applicable in effect from 1985 through 2018.[3]

7. To the extent not described in the contracts, agreements or IAAs provided in response to the preceding paragraph, documents showing occupational health services provided to bargaining unit employees in 2017 and 2018.

> *Particularized Need – Items 6 and 7*: This information is necessary to establish the occupational health services that were provided to bargaining unit employees before March 31, 2018, and the existence of a longstanding past practice. It is also necessary to formulate a settlement proposal for reimbursement of employees who had to obtain and pay for these services from other sources on March 31, 2018 and thereafter.

8. Communications with FOH concerning termination of the Agency agreement for FOH to provide occupational health services to bargaining unit employees, including discussions of alternatives such as payment for each service, to the then-current arrangements, from October 1, 2016 to the present.

> *Particularized Need – Item 8*: This information is necessary to establish whether less expensive alternatives to the Agency – FOH agreement in effect before March 31, 2018 were available, and whether the agreement could be maintained without interruption when the Agency learned that its ultimate FY 2018 appropriation would be much larger than had been anticipated by the Working Group. It is also necessary to enable the NLRBU to determine the cost of various options in when it prepares a grievance settlement proposal, and of any Agency counterproposals.

9. Headquarters and field offices in which an Agency office was in the same building as an occupational health services facility in 2017 and 2018.
10. For the Agency offices that were not in the same building as an occupational health services facility, distance between an Agency office and an occupational health services facility in 2017 and 2018.

> *Particularized Need – Items 9 and 10*: This information is necessary to show the convenience of the occupational health services facilities operated by FOH before March 31, 2018. This information is also necessary to formulate a grievance settlement proposal. Many NLRB offices are located in or near the same building as the local FOH center. A proposal to use a provider other than FOH may result in greater distance for employees to use an alternative provider's services if not located in or near the building where the NLRB office is located. The NLRBU

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[2] "Occupational health services" includes but are not limited to immunizations, health screening and testing (including blood pressure, cholesterol/lipid, diabetes, colorectal cancer, hearing, vision, and colorectal cancer), wellness and health promotion programs such as "FedStrive", emergency care, treatment for minor illnesses, nursing stations and other lactation support.

[3] In lieu of the agreements for 1985 through 2016, the Agency may stipulate that it continuously provided occupational health services to bargaining unit employees from 1985 through 2016.

needs to know whether use of a provider with an distant facility will discourage bargaining unit employees from using services.

11. Emergency response times of occupational health services facilities to requests for medical assistance in 2017 and 2018.
12. Emergency response times of local emergency responders such as "911" to requests for medical assistance in 2017, 2018 and 2019.

Particularized Need – Items 11 and 12: This information is necessary to show whether responses to emergencies have been negatively impacted by the termination of occupational health services. The information will show that there has been a negative impact on conditions of employment.

13. Costs incurred by employees since March 31, 2018 for services formerly provided by occupational health services facilities.
14. Non-administrative leave (such as annual leave, compensatory time, and sick leave) used by employees since March 31, 2018 to obtain services formerly provided by occupational health services facilities.

Particularized Need – Items 13 and 14: This information is necessary to show the negative impact on employees' expenditures for health services formerly provided by FOH and the use of employee leave to obtain services that had not required leave before March 31, 20198.

C. <u>Agency Communications With the Union and With Employees</u>:

15. Agency communications with the NLRBU about reducing or eliminating occupational health services, including whether the collective-bargaining agreement requires that the Agency provide such services to bargaining unit employees, from October 1, 2016 to the present.
16. Agency communications with the NLRBU about reducing, eliminating, or restoring Agency expenditures from October 1, 2016 to the present.
17. Agency communications with the NLRBU as to Agency collective-bargaining obligations to provide occupational health services to bargaining unit employees.
18. Agency communications with bargaining unit employees concerning Agency FY 2018 expenditures.
19. Agency communications with bargaining unit employees, for October 1, 2016 until the present, concerning status of occupational health services.

Particularized Need – Items 15 through 19: This information is necessary to establish the full range of communications about expenditures for occupational health services and for other expenses. The evidence will establish that the Cost Savings Work Group's report was not consistently implemented, and that recommendations to reduce or eliminate expenditures ("cuts") were not effectuated or were reversed when the Agency's FY 2018 appropriation proved to be much greater than the Work Group anticipated. The Agency and NLRBU

discussed restoration of cuts, including occupational health services. These documents will show that the NLRBU and employees reasonably expected that restoration of occupational health services was likely.

D. Assertions of Privilege:

If any document responsive to any request above was withheld from production on the asserted ground that it is privileged, identify and describe:
1. the author;
2. the recipient;
3. the date of the original document;
4. the subject matter of the document; and
5. the grounds on which it is withheld.

If a claim of privilege is made as to any document which is the subject of this information request, a claim of privilege must be expressly made and you must describe the nature of the withheld document, communication, or tangible thing in a manner that, without revealing information itself privileged or protected, will enable an assessment of the claim to be made.

Please feel free to contact me at (212) 776-8667 if you have any questions.

Very truly yours,

/s/ *Eric Brooks*
Eric Brooks
Counsel for the NLRBU

Cc: Stephen Sloper, Chairperson, NLRBU Grievance Committee

From: Apple News
To: Ring, John
Subject: The Day the Dinosaurs Died
Date: Saturday, April 6, 2019 8:12:05 AM

News Spotlight

Five stories to read this weekend, chosen by our editors.

News Spotlight

Five stories to read this weekend, chosen by our editors.

The Day the Dinosaurs Died

A young paleontologist may have discovered a record of one of the most significant events in Earth's history — the asteroid strike that wiped out 99.9999 percent of life on the planet.

Are the Kardashians America's Savviest CEOs?

Even when bad things happen to the Kardashians, they still make money. Case in point: Khloé's boyfriend cheated with Kylie's best friend, and Kylie Cosmetics' sales spiked. The *New York Times* spoke to the Kardashian-Jenner moguls to understand the inner workings of an American dynasty.

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When the Border Patrol Spins Out of Control

Every nine days, a high-speed car chase near the southern border ends in a crash — often with gruesome consequences. A look at the controversial tactics used by U.S. Border Patrol agents as they crack down on illegal immigration.

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The Return of Ladies' Bronc Riding

Women's saddle bronc riding has been nearly wiped from the rodeo event roster ever since a death in 1929. But now a fearless group of riders is getting back in the saddle.

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The State of Our Unions

They say you can never understand someone else's marriage. But for this special issue, *New York* examined 74 of them, documenting couples' secrets, anxieties, and dedication. Here, in the introductory essay, Heather Havrilesky wonders whether the entire institution has become obsolete.

The State of Our Unions

They say you can never understand someone else's marriage. But for this special issue, *New York* examined 74 of them, documenting couples' secrets, anxieties, and dedication. Here, in the introductory essay, Heather Havrilesky wonders whether the entire institution has become obsolete.

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From: Employment Law360
To: Ring, John
Subject: Week In Review: DOL Tackles Joint Employer Regs & Jones Day Slapped With Sex Bias Suit
Date: Saturday, April 6, 2019 11:07:02 AM

Employment Week In Review

Saturday, April 6, 2019

TOP NEWS

DOL Joint Employer Push Has Worker Advocates Up In Arms

The U.S. Department of Labor on Monday proposed a four-part test for determining when businesses jointly employ workers under the Fair Labor Standards Act, winning plaudits from the management bar but drawing criticism from plaintiffs lawyers who said the agency ignored court precedent that took an expansive view of joint employment.

Ex-Jones Day Associates Hit Firm With $200M Bias Suit

A group of former Jones Day associates hit the BigLaw powerhouse with a $200 million pregnancy and gender discrimination suit Wednesday, accusing the firm of systematically underpaying women, devaluing the work of female associates and pushing out lawyers who have children.

DOL Releases Opinions On OT Exemptions, '8-And-80' Pay

The U.S. Department of Labor issued opinion letters Tuesday weighing in on Fair Labor Standards Act overtime exemptions for agricultural workers and teachers, and on health industry employers' use of an overtime structure that calculates workers' pay across two weeks.

LAW FIRMS

Altshuler Berzon LLP
Burr & Forman
Call & Jensen
Carothers DiSante
Cohen Milstein
Fisher Phillips
Jones Day
Ogletree Deakins
Orrick Herrington
Paul Hastings
Quinn Connor
Sanford Heisler Sharp
Withers

COMPANIES

American Federation of Labor and Congress of Industrial Organizations
Federation Internationale de Football Association
General Motors
National Basketball Association
National Employment Law Project
United States Soccer Federation Inc.
United Steelworkers
WNBA Enterprises LLC
Women's National Basketball Players Association

GOVERNMENT AGENCIES

National Labor Relations Board
U.S. Department of Labor
U.S. Supreme Court
Wage and Hour Division

State Of The States: New Employment Laws So Far In 2019

Three states adopted laws in the first quarter of 2019 to incrementally boost their minimum wages to $15 an hour — including Maryland, which became the sixth state overall to move toward a $15 wage floor when legislators overrode a gubernatorial veto. Here, Law360 looks at these and other notable state employment statutes that have been passed so far this year.

NLRB Upends Precedent On Successor Bargaining Duties

In a reversal of precedent, a split National Labor Relations Board held that the new owners of a skilled nursing facility didn't have to bargain with a preexisting union before changing work conditions, though it should have recognized the union.

EXPERT ANALYSIS

Equal Pay Day And The US Pay Equity Landscape

April 2 was Equal Pay Day, symbolizing how far into the current year women must work to reach the same level of compensation that men earned in the prior year. With this in mind, Dan Forman of Carothers DiSante discusses recent Equal Pay Act lawsuits and what to expect in this area going forward.

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From: Employment Law360
To: Ring, John
Subject: 4 Tips For Avoiding And Surviving Strikes
Date: Monday, April 8, 2019 3:35:23 AM

EMPLOYMENT

Monday, April 8, 2019

TOP NEWS

Analysis

4 Tips For Avoiding And Surviving Strikes

Recent strikes or strike threats by such varied groups as Sacramento school teachers, Los Angeles Uber drivers and New York City nurses show that work stoppages are on the rise. Here, Law360 looks at four ways employers can ward off strikes and weather them when they happen.

Read full article »

A Short History Of BigLaw Gender Bias Suits

When a group of former Jones Day associates slammed the law firm with a $200 million gender bias lawsuit on Wednesday, they joined a small but growing community of female attorneys calling out alleged inequities in BigLaw.

Read full article »

6th Circ. Says FLSA Fines Can't Include Meal, Commute Time

A federal judge shouldn't have let the U.S. Department of Labor include the time a logging company's workers spent commuting or eating in its calculation of penalties for overtime violations under the Fair Labor Standards Act since that time isn't compensable, the Sixth Circuit ruled Friday.

Read full article »

NLRB's Union Election Rule Revamp Set For Spring Release

The National Labor Relations Board will release the first in a planned series of regulations revamping parts of an Obama-era union election rule “this spring,” it said in a recent memo, marking a slight delay from the board’s initial time frame.

Read full article »

DISCRIMINATION

11th Circ. Sides With Winn-Dixie In Pregnancy Bias Suit

The Eleventh Circuit has denied a former Winn-Dixie worker's bid to revive her suit alleging she was fired because of her pregnancy, holding that there was no need to order a new trial.

Read full article »

Mercedes Co. Asks 9th Circ. To Undo $5M Disability Verdict

Mercedes Benz of Seattle asked the Ninth Circuit Thursday to dismantle a $5 million jury verdict it was hit with for firing a finance director who received a prosthetic voice box after undergoing surgery for throat cancer, saying the award was overly punitive.

Read full article »

NJ Judge Can't Make Hostile Work Claims Again, Court Told

A New Jersey state court judge and staffers have urged a federal court to stop another judge from rehashing the hostile work environment allegations

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New Cases

Discrimination (49)
ERISA (34)
Labor (46)

LAW FIRMS

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Andrus Anderson
Atkinson Andelson
Axinn
Ballard Spahr
Berkowitz Hanna
Bradley Arant
Brown & Connery
Bryan Cave
Burges Salmon
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Clifford Chance
Clyde & Co
Cooley
Covington & Burling
DLA Piper
DWF LLP
Davis Polk
Desai Law Firm PC
Dinsmore & Shohl
Dorsey & Whitney
Eversheds Sutherland
Faegre Baker
Fisher Phillips

she made in New Jersey Supreme Court ethics committee proceedings that resulted in her suspension for two months without pay.

Read full article »

Mass. School District Must Face Teacher's ADA Suit

A federal judge has shot down a Massachusetts school district's attempt to escape a disability bias suit brought by a teacher who sought part-time work to accommodate her fibromyalgia, saying questions remained about whether continuous classroom presence was essential to the job.

Read full article »

WAGE & HOUR

Attys Owe $2K For Late Deliveries In Sushi Eatery OT Suit

A New York federal judge on Friday dismissed a proposed wage-and-hour class action against a Manhattan sushi restaurant and sanctioned the plaintiffs' attorneys, saying they had repeatedly ignored deadlines and failed to pursue the case.

Read full article »

LABOR

Sysco Workers Get New Vote After Union-Busting, Says NLRB

Although the National Labor Relations Board ordered Thursday that workers at a Sysco Corp. unit can hold a fresh union election after their first vote was marred by the company's egregious anti-union misconduct, it said too much time has passed for it to order the food distributor to start bargaining right away.

Read full article »

TRADE SECRETS

Texas High Court Kills 2-Year Limits For Civil Conspiracy

The Texas Supreme Court on Friday said civil conspiracy claims are subject to the statute of limitations of the underlying claims that form the basis of the conspiracy instead of a uniform two-year limit, reviving a drilling technology company's suit over trade secrets.

Read full article »

WORKER SAFETY

Two Firms To Split Fees From NFL Player's Settlement

A Pennsylvania federal magistrate judge on Thursday approved splitting the attorney fees from former football player Roderick Green's share of the NFL concussion settlement between The Lorentz Law Firm PA and Berkowitz & Hanna LLC.

Read full article »

EXPERT ANALYSIS

OFCCP Case Sheds Light On Pay Equity Analysis Techniques

A U.S. Department of Labor judge's recent ruling in Office of Federal Contract Compliance Programs v. Analogic highlights several issues that the OFCCP and contractors must consider when conducting statistical analyses of alleged discriminatory pay practices, say Kevin Weissman and Gurkan Ay of Resolution Economics.

Read full article »

LEGAL INDUSTRY

Analysis

'Varsity Blues' Case Strong Enough To Humble BigLaw Boss

Fredericks Peebles
Gibson Dunn
Hoover Slovacek
Hughes Hubbard
Jenner & Block
Jones Day
K&L Gates
Kimball Brousseau
Kirkland & Ellis
Latham & Watkins
LeClairRyan
Liddle & Robinson
Loomis Law Firm
Mayer Brown
Morgan Lewis
Morrison & Foerster
Newton Law Firm
Norton Rose Fulbright
Ogletree Deakins
Orrick Herrington
Paul Hastings
Perkins Coie
Phillips Nizer
Proskauer Rose
Quinn Emanuel
Rapp & Krock
Ropes & Gray
Sanford Heisler Sharp
Sedgwick LLP
Seyfarth Shaw
Shook Hardy
Skadden
Smith Goodfriend
Smith Villazor
Steptoe & Johnson LLP
Weinberg Wheeler
White & Case
Williams Kastner
Willkie Farr
Winston & Strawn
Withers

COMPANIES

Amazon.com Inc.
American Arbitration Association
American Bar Association
Analogic Corp.
BASF SE
Baltimore Ravens
Compass Minerals International, Inc.
Facebook
Google Inc.
Ho-Chunk Inc.

The strength of the government's case against Gordon Caplan in the nationwide "Varsity Blues" college admissions scandal brought the former Willkie Farr & Gallagher LLP co-chair to his knees Friday, prompting him to issue a repentant statement that could put him in a good position to seek the court's leniency, experts told Law360.

Read full article »

Ex-Willkie Co-Chair To Plead Guilty In 'Varsity Blues' Case

Gordon Caplan, the former co-chair of Willkie Farr & Gallagher LLP, said in a statement Friday that he will plead guilty in connection with his role in a nationwide college admissions scheme, prompting the firm to announce his departure.

Read full article »

UK Gender Pay Data Shows Disparities At All Lawyer Ranks

A clearer picture is forming of the U.K. law firm gender pay gap as a second year of legally required reporting draws to a close, and it doesn't look good.

Read full article »

Analysis

Will Law Firms Ever Report Their US Gender Pay Gaps?

As large law firms in the U.K. report their gender pay gaps to the government for the second year, some say the concept of pay transparency in law firms may ripple across the pond to the U.S., where it could be the impetus for major positive change.

Read full article »

Legal Sector Jobs Hit Post-Recession High

The total number of legal industry jobs crested at just more than 1.14 million, setting a high for the decade following the Great Recession, thanks to surges in positions created in January and March, a new report says.

Read full article »

Ho-Chunk Inc. CEO Launches Tribally Owned Law Firm

The chief executive of the Winnebago Tribe of Nebraska's development arm, Ho-Chunk Inc., said he has launched a new law firm that is 100%-owned by enrolled members of federally recognized tribes, a majority of whom are women.

Read full article »

LegalZoom Says Rival's 'Trademarkia' Claims Still Fail

LegalZoom has urged a California federal court to again toss allegations by a rival in the trademark search market that it infringed that company's "Trademarkia" mark and engaged in "cyberpiracy," arguing its claims are still full of holes.

Read full article »

GC Cheat Sheet: The Hottest Corporate News Of The Week

The successful law firm edition of the Mansfield Rule extended to in-house legal departments with increased demands, and a regulator's report detailing how sexual abuse allegations against the former Wynn Resorts CEO paints a picture of attorneys failing to serve their ultimate client. These are some of the stories in legal news you may have missed in the past week.

Read full article »

In Case You Missed It: Hottest Firms And Stories On Law360

For those who missed out, here's a look back at the law firms, stories and expert analyses that generated the most buzz on Law360 last week.

Read full article »

Podcast

Law360's Pro Say: Fear And Loathing At An Opioid Trial

In one of the first criminal cases brought against pharma execs over the

International Brotherhood of Teamsters
LegalZoom.com Inc.
LendingClub Corp.
Lippman Jungers LLC
Major Lindsey & Africa
Massachusetts Mutual Life Insurance
NFL Enterprises LLC
Nike Inc.
PayPal Inc.
SYSCO Corp.
Spotify Technology SA
SunEdison LLC
Symantec Corp.
U.S. Bancorp
Washington Post Co.
Wynn Resorts Ltd.

GOVERNMENT AGENCIES

Bureau of Labor Statistics
Cheyenne River Sioux Tribe
Committee on Foreign Investment in the United States
Confederated Salish & Kootenai Tribes
Equal Employment Opportunity Commission
European Commission
European Union
Federal Trade Commission
Illinois Supreme Court
Lac Courte Oreilles Band
Massachusetts Commission Against Discrimination
Massachusetts Gaming Commission
National Labor Relations Board
New Jersey Supreme Court
Office of Federal Contract Compliance Programs
Securities and Exchange Commission
Shakopee Mdewakanton Sioux
Texas Supreme Court
Three Affiliated Tribes of the Fort Berthold Reservation
U.S. Attorney's Office
U.S. Department of Justice
U.S. Department of Labor
U.S. Patent and Trademark Office
U.S. Supreme Court
United States District Court for the Eastern District of Pennsylvania
Wage and Hour Division

opioid crisis, officials at a small drug company are standing trial on charges they fueled the epidemic by bribing doctors to prescribe fentanyl. Law360's Chris Villani has been in the courtroom for all of it, so he joins us on Pro Say this week to break down the trial and preview the verdict.

Read full article »

Winnebago Tribe

JOBS

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From: GovExec Today
To: Ring, John
Subject: Labor-Management Impasse Panel Guts Telework, Holiday Leave for Some Feds
Date: Monday, April 8, 2019 5:32:09 AM

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GovExec Today

April 8, 2019

Labor-Management Impasse Panel Guts Telework, Holiday Leave for Some Feds // Erich Wagner

The decision in a contract dispute at the Health and Human Services Department is a setback for a federal union.

Shake Up at Homeland Security as Border Crisis Mounts // Katherine McIntire Peters

President Trump pledged to go in a "tougher" direction after withdrawing his nomination to lead ICE on Friday and accepting Homeland Security Secretary Kirstjen Nielsen's resignation on Sunday.

Securing Transportation: The Technology and Strategies Protecting Tomorrow's Travel

Join Noblis on 4/11 as they convene federal and industry leaders across the aviation and security communities to discuss why embracing a proactive approach to technology strategy is key to advancing national security solutions.

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Pentagon Contract Managers Failed to Police Overpayments to Executives // Charles S. Clark

Inspector general questioned $22 million in 18 audits not allowable under the FAR.

Trump Administration Cancels Contract That Failed to Bring on More Border Agents // Eric Katz

CBP had hoped to bring on as many as 7,500 employees but instead received only 36.

Watchdog Details Shutdown's Damage to IRS Work During Tax Season // Charles S. Clark

The 35-day lapse in appropriations exploded the correspondence backlog and left 3.8 million calls unanswered.

Trump to Nominate U.S. Treasurer to Run Small Business Administration // Charles S. Clark

Jovita Carranza, who served as an adviser to the Trump campaign, worked at the agency before.

Nixon And Reagan Tried Closing The Border To Pressure Mexico – Here's What Happened // Aileen Teague

Both presidents brought border traffic and trade to a standstill in hopes of changing Mexican policy in the drug war. And both failed to achieve their goals.

How to Deal With a Confrontational Naysayer During a Presentation // Art Petty

A workplace communication fable with three great lessons.

The IRS Tried to Take on the Ultrawealthy. It Didn't Go Well. // Jesse Eisinger and Paul Kiel

Ten years ago, the tax agency formed a special team to unravel the complex tax-lowering strategies of the nation's wealthiest people. But with big money — and Congress — arrayed against the team, it never had a chance.

FDA Proposes Regulations for AI-Powered Medical Devices // Jack Corrigan

Because AI retrains itself over time, the administration wants to keep tabs on what's happening under the hood.

Surprise Medical Billing: Some States Ahead of Feds // Michael Ollove

Nine states have laws to stop unexpected, out-of-network medical bills.

How Customer Experience is Disrupting Government Technology // Frank Konkel

Better service delivery is changing the way implementers and users view technology.

Tensions Flare Over a Proposal to Strengthen Public Sector Unions // Bill Lucia

Amid clashes with an activist group and fallout from a Supreme Court ruling, unions in Oregon are backing legislation that local governments see as "impossible" to fully implement.

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From: Bloomberg Law Daily Labor Report
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Subject: First Move: Pay History Bans Pop Up in Unlikely Places
Date: Monday, April 8, 2019 7:08:40 AM

What you need to know to start your day.

Pay History Bans Pop Up in Unlikely Places

By Patricio Chile

Coastal blue states tend to lead the charge in passing worker-friendly legislation, but laws to ban inquiries into the salary histories of job candidates are popping up in traditionally conservative parts of the country, including North Carolina, Maine, Louisville, Ky., and Cincinnati.

- **Growing Trend:** Thirteen states and Puerto Rico have passed similar legislation since 2016, as have 13 municipalities. About half of the laws ban employers from asking the pay question, while the other laws apply to state agencies, Genevieve Douglas reports.

- **Promoting Transparency:** Lawmakers in Congress also are working to address **wage gaps** and promote **pay transparency**. House Democrats in March passed the Paycheck Fairness Act, though it may not receive a warm welcome in the Senate.

FORCED MEETINGS FACE LEGISLATIVE CHALLENGE

Unions are hoping a pair of bills under consideration in Connecticut will notch another win in their effort to outlaw “captive audience” meetings, which they say employers use to prevent labor organizing. The bills would protect workers from being forced to attend the mandatory gatherings where employers often communicate their opinions on politics or religion.

- **Meeting Ban:** Oregon is the only state that currently prohibits these meetings, according to the **Connecticut AFL-CIO**.

Speech Concerns: While unions decry these meetings as coercive, employers and trade groups say the bills prohibiting them amount to **"gag orders"** that would infringe on employer free speech rights, Aaron Nicodemus reports.

WHAT ELSE WE'RE WATCHING

- **Pay Gap:** U.K. law firms will release their government-mandated **gender pay gap** disclosures this week, but they'll likely show that gender pay progress is as slow across the pond as it is in the U.S., Stephanie Russell-Kraft reports.

- **Admissions Scandal:** Gordon Caplan, the former co-chair of **Willkie Farr & Gallagher**, intends to plead guilty over accusations of paying $75,000 to boost his daughter's college entrance scores, and is among the highest profile parents caught up in the college admissions federal probe.

- **Union Fees:** Two major public sector unions lost nearly 210,000 agency fee payers combined in 2018, according to reports showing the impact of a U.S. Supreme Court decision that prohibits forcing nonmembers to pay for **collective bargaining** and other nonpolitical expenses. Robert Iafolla has the story.

- **Contractor Meeting:** The **Office of Federal Contract Compliance Programs**, the Labor Department's contractor watchdog, is hosting two meetings in New York City—one geared toward the financial industry and the other to the legal industry, on April 8 and 9, respectively.

PRACTITIONER INSIGHTS

New DOL 'Joint Employer' Rule—Expect Legal Challenges

The Department of Labor's proposed rule to update the Fair Labor Standards Act in situations where multiple employers are held liable for wage and hour violations reverses the legal trend under the Obama administration. Jonathan Turner, partner with **Mitchell Silberberg & Knupp**, predicts legal challenges will follow.

DAILY RUNDOWN

Top Stories

J&J Worker May Have to Arbitrate Under Kelly Services' Pact
Johnson & Johnson may be able to force a worker it briefly employed through Kelly Services to arbitrate his class claims under the Fair Credit Reporting Act, the Third Circuit ruled.

Bias Trial for Worker With Mobility Issues Still a Go
The Fourth Circuit won't reconsider whether the EEOC has enough evidence to show that traveling between job sites really wasn't an essential duty for a worker with mobility issues

Proposed NLRB Election Rule Changes Expected This Spring
The National Labor Relations Board aims to release proposed changes to its rules for union elections sometime this spring, the agency said.

Discrimination

Hope Solo's Unequal Pay Suit May Not Be Solo for Long
Superstar goalie Hope Solo's pay discrimination lawsuit against the U.S. Soccer Federation Inc. is on hold until a separate federal panel decides whether to combine her claims with those brought by her teammate, Alex Morgan.

Winn-Dixie Employee Not Fired for Taking Pregnancy Leave
Varonica Udeh said the timing of her firing from Winn-Dixie was suspicious: The in-store coordinator was terminated six weeks and a day after she began her pregnancy leave. Yet, the store argued she was fired when she failed to show up for several shifts.

Wage & Hour

Timber Firm Gets Partial Win in Overtime Calculation Dispute
A Michigan timber-harvesting enterprise will get another chance to debate how much it owes its workers in unpaid overtime, the Sixth Circuit said.

Harassment

Obese Bus Driver Fails With Disability Harassment Claim
An obese Coach USA driver can't show he was subjected to a hostile work environment because he was perceived to be disabled, a New Jersey appeals court ruled.

Labor Relations

Phillips 66 Paid Leave Suit Should Be Booted, Steelworkers Say
A United Steelworkers local union wants to jump into a lawsuit asking whether Phillips 66 Co. has to provide workers with paid family leave through its disability benefit plan.

Sysco Subsidiary Evades Bargaining Order for Union Busting
A Michigan-based subsidiary of multinational food distributor Sysco Corp. won't have to recognize and negotiate with a union despite the company's widespread labor law violations prior to an election, the NLRB said in a ruling that canceled its earlier bargaining order.

WORKFLOWS

Shook, Hardy & Bacon is launching a new office in Los Angeles after taking a three-partner litigation team from Sidley Austin | **Norton Rose Fulbright** closed its office in Colombia - less than two months after the firm lost its Venezuela team to Dentons | **Three Greenberg Traurig** litigation partners — Timothy Kolaya, Ian Ross and Adam Foslid — have left the Miami office to join litigation boutique Stumphauzer & Sloman as name partners; the firm will be renamed Stumphauzer, Foslid, Sloman, Ross & Kolaya | **Kasowitz Benson Torres'** real estate transactional team in New York - Wallace Schwartz, Julia Sanabria and Adam Endick - is poised to leave to join a Texas-based firm; one source said the trio is eyeing Vinson & Elkins | **Freshfields Bruckhaus Deringer** promoted 37 attorneys to counsel, including Jan Rybnicek in Washington, DC; Rybnicek joined Freshfields' antitrust, competition and trade group from the U.S. Federal Trade Commission | **Jenner & Block** has hired an eight-lawyer group of energy and regulatory lawyers from former Chicago-based boutique Rippie Rooney & Ratnaswamy | **Cozen O'Connor** has taken a pair of New Jersey-based energy and utility lawyers from Windels Marx Lane & Mittendorf and launched an office in Newark | **Hunton Andrews Kurth** promoted 11 lawyers, including three women, to partner

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Access to Justice

Monday, April 8, 2019

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The Rise of the Progressive Prosecutor

Across America, criminal justice reform advocates are running for local prosecutor's offices — and winning. But is the prosecutor's office the right perch from which to mount an agenda of progressive change?
Read full article

Amid Pushback, NY Bolsters New Tool To Police Prosecutors

Supporters of a New York panel for investigating prosecutor misconduct say threats by state district attorneys to derail the effort forced lawmakers to put the underlying legislation under an unusual level of scrutiny — and design an even better tool for policing prosecutors in the process.
Read full article

Squire Patton Boggs Foundation Unveils Puerto Rico Initiative

As Puerto Rico struggles to recover from Hurricane Maria, the Squire Patton Boggs Foundation is launching a new fellowship program to help residents get

the legal assistance they need.
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Senate Hurdle Looms As House Advances VAWA Reforms

The Violence Against Women Act hangs in legislative limbo after reforms that passed the House of Representatives last week met with a frosty reception in the Senate.
Read full article

Is Criminal Justice Reform Working In NJ?

The fallout from New Jersey all but eliminating cash bail in 2017 continues to transition from speculation to hard numbers, as state officials last week released statistics demonstrating that the percentage of those released without posting bail who skipped their hearings or committed another offense remained virtually unchanged.
Read full article

Amnesty Days: Short Term Fixes For Long Term Problems

Amnesty days for those with outstanding arrest warrants can help local and state courts tackle problems like dire case backlogs, overpopulated jails and ever-climbing sums of uncollected debt, but even proponents of the practice agree it's a bandaid for systemic flaws best addressed by lawmakers.
Read full article

Ga. Case Won't Be Justices' Last Chance On Bail Reform

While the U.S. Supreme Court recently rejected a case challenging a Georgia town's policy to wait up to two days before offering arrestees a chance to prove they can't afford bail, a growing split among appellate courts could pressure the justices to tackle wealth-based detention in the near future.
Read full article

All Access

Lisa Foster On The Impact Of Court Fines And Fees

After a decade as a California state court judge, Lisa Foster is using that experience to reform an often-overlooked aspect of the criminal justice system: fines and court fees, and the outsized impact they can have on indigent defendants.
Read full article

Perspectives

Changing The Conversation On Bail Reform

Instead of looking at "bail reform" as a choice of bail or no bail, we need to focus on reforming four major aspects of the criminal justice process that lead up to the point of bond determination, says Wilford Pinkney of FUSE Fellows.
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From: Martin, Andrew
Subject: Legal News FYI 04-08-19
Date: Monday, April 8, 2019 7:58:39 AM

Monday, April 8, 2019

NLRA, NLRB, Board Members (14) Explore & Analyze

Pay History Bans Pop Up in Unlikely Places
BloombergLaw - Daily Labor Report 08 Apr 2019 07 06

By Patricio Chile Coastal blue states tend to lead the charge in passing worker-friendly legislation, but laws to ban inquiries into the salary histories of job candidates are popping up in traditionally conserva ive parts of the country, including North...

Punching In: The Trump Overtime Rule Numbers Battle
BloombergLaw - Daily Labor Report 08 Apr 2019 06:36

By Chris Opfer and Jaclyn Diaz Monday morning musings for workplace watchers Math Makes Reporter's Head Hurt | Acosta, Meet Women's Caucus | Labor Board Staffing Blues Chris Opfer: A prominent, labor-backed policy group is out with a new analysis today...

Employers' Forced Worker Meetings Face Legislative Challenge
BloombergLaw - Daily Labor Report 08 Apr 2019 06 07

• Unions say mandatory gatherings unfairly used by employers to quash organizing drives • Connecticut considering restrictions, but only Oregon has a ban By Aaron Nicodemus Unions are hoping that a pair of bills under consideration in Connecticut will...

INSIGHT: New DOL 'Joint Employer' Rule—Expect Legal Challenges
BloombergLaw - Daily Labor Report 08 Apr 2019 04 06

The Department of Labor's proposed rule to update the Fair Labor Standards Act regarding situations where multiple employers are held liable for wage and hour violations reverses the legal trend under the Obama administration. Jonathan Turner, partner...

"I Fully Intend to Outlast These People": 18 Federal Workers on What It's Really Like to Work for the Trump
Washingtonian Magazine (Washington, DC) 07 Apr 2019 18:14

Changes of administration have always brought some handwringing inside executive-branch agencies, but according to independent surveys, federal workers under President Trump are, by and large, distinc ly demoralized about their professional identities....

NLRB General Counsel Seeks to Limit Use of Investigative Subpoenas in Unfair Labor Practice Investigations
Employment Law Information Network 07 Apr 2019 00 00

NLRB's Union Election Rule Revamp Set For Spring Release
Public Policy Law360 06 Apr 2019 01:38

Already a subscriber? Check out Law360's new podcast, Pro Say, which offers a weekly recap of both he biggest stories and hidden gems from he world of law.

Labor Board: Is Union's Inclusion of Weingarten Rights Statement in Collective Bargaining Agreement Coercive?
National Law Review 05 Apr 2019 19:31

The National Labor Relations Board (NLRB) has remanded a 2013 decision to an administrative law judge to determine whether the Board's landmark 2017 decision on work rules and policies affects its 2013 determination that a union did not violate National...

Two Great Articles
Administrative Law Prof Blog 05 Apr 2019 17:51

Friday, April 5, 2019 By Workplace Prof Share Liz Tippett (Oregon) and Ann Hodges (Richmond, emerita) have each posted on SSRN terrific articles on unrelated labor/employment topics; both have been or will be published in the Employee Rights & Employment...

Case: Labor Relations/Anti-union Campaign (N.L.R.B.)
BloombergLaw - Daily Labor Report 05 Apr 2019 14:26

Sysco Grand Rapids, LLC committed numerous unfair labor practices to deter a union organizing campaign that began in 2014 among its warehouse and transportation employees. The NLRB adopts an administrative law judge's findings that the company, among...

NLRB Changes Rule on Successor's Bargaining Obligations
JD Supra: Labor & Employment Law 05 Apr 2019 14:07

A National Labor Relations Board decision this week may help more businesses avoid "perfec ly clear successor" liability after hey take over operations of another company.... By: Barley Snyder

Sysco Subsidiary Evades Bargaining Order for Union Busting
BloombergLaw - Daily Labor Report 05 Apr 2019 14 06

• GOP members rescind ' Gissel order' to force bargaining • Other remedies issued to ensure fair union election By Robert Iafolla A Michigan-based subsidiary of multinational food distributor Sysco Corp. won't have to recognize and negotiate with a union...

Blog Post: Sysco Workers Get New Vote After Union-Busting, Says NLRB
LexisNexis Legal Newsroom : Workers Compensation Law (Blog) 05 Apr 2019 13:25

Although the Na ional Labor Relations Board ordered Thursday that workers at a Sysco Corp. unit can hold a fresh union elec ion after their first vote was marred by the company's egregious anti-union misconduct, it said too much time has passed for...

From: Morning Shift
To: Ring, John
Subject: POLITICO"s Morning Shift: Nielsen is out — Delays at the border— H-1B regular cap for FY 2020 reached
Date: Monday, April 8, 2019 10:03:56 AM

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2018 Newsletter Logo: Morning Shift

04/08/2019 10:00 AM EDT

By REBECCA RAINEY (rrainey@politico.com; @RebeccaARainey)

With help from Ted Hesson

Editor's Note: This edition of Morning Shift is published weekdays at 10 a.m. POLITICO Pro Employment & Immigration subscribers hold exclusive early access to the newsletter each morning at 6 a.m. To learn more about POLITICO Pro's comprehensive policy intelligence coverage, policy tools and services, click

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QUICK FIX

— Kirstjen Nielsen is out as Homeland Security secretary, following the president's withdrawal Friday of Ron Vitiello's nomination to lead ICE. Reports say USCIS director Lee Francis Cissna may be next.

— The president warned of "traffic and commercial delays" at the southern border.

— USCIS announced Friday that it's already reached fiscal year 2020's congressionally mandated cap of 65,000 regular H-1B visas.

GOOD MORNING! It's Monday, it's April 8, and this is Morning Shift, your daily tipsheet on labor and immigration news. Send tips, exclusives and suggestions to rrainey@politico.com, thesson@politico.com, ikullgren@politico.com, and tnoah@politico.com. Follow us on Twitter at @RebeccaARainey, @tedhesson, @IanKullgren, and @TimothyNoah1.

DRIVING THE DAY

EXIT NIELSEN: "Secretary of Homeland Security Kirstjen Nielsen will be leaving her position," President Donald Trump tweeted Sunday evening. "Kevin McAleenan, the current U.S. Customs and Border Protection Commissioner, will become acting secretary." Nielsen will stay through this week, a White House official told POLITICO.

"The president was widely expected to dismiss Nielsen after November's midterm elections," reports POLITICO's Ted Hesson and Eliana Johnson, "and surprised allies by keeping her on board. The two have clashed on their approach to immigration and border security from the outset of her tenure, with Trump complaining that she was too soft and regularly pushing her to take measures that crossed legal boundaries, she told allies." More here.

News of Nielsen's departure follows Trump's announcement Friday that he was withdrawing Ron Vitiello as his nominee for director of Immigration and Customs Enforcement. Nielsen was informed of the president's decision two weeks ago, a senior White House official told POLITICO, but had hoped to change his mind. Vitiello, who took over ICE in an acting capacity in June, cleared the Senate

Homeland Security Committee on March 11 and was awaiting action by the Senate Judiciary Committee. "We're going in a little different direction," Trump told reporters Friday. "Ron's a good man, but we're going in a tougher direction. We want to go in a tougher direction."

Is Stephen Miller cleaning house? Jill Colvin and Colleen Long report for the Associated Press that the withdrawal of Vitiello "was encouraged" by Trump de facto immigration czar Miller, who is also "eyeing the removal" of USCIS director Lee Francis Cissna. Miller reportedly had no great fondness for Nielsen.

AT THE BORDER

DELAYS AT THE BORDER: President Donald Trump isn't shutting down the U.S.-Mexico border, as many businesses and Republicans feared he would. But the administration's decision last week to ramp up the number of immigration officers processing Central American migrants attempting to enter the U.S. through Mexico is straining commercial processing times at the border.

The president warned on Twitter Saturday that 750 custom's officers' reassignment to "specific Ports of Entry in order to help with the large scale surge of illegal migrants" will cause "traffic & commercial delays" along the southern border. "Until Mexico cleans up this ridiculous & massive migration, we will be focusing on Border Security, not Ports of Entry," Trump warned. More here.

Related read: "Businesses on US-Mexico border suffer as wait times jump 500%," from Supply Chain Dive

VISA UPDATE

H-1B REGULAR CAP REACHED: U.S. Citizenship and Immigration Services announced Friday that it has received enough H-1B visa petitions to reach the congressionally mandated cap of 65,000 for fiscal year 2020, which starts Oct. 1. It took less than one week, a pace that matches previous years. USCIS said Friday that it will next determine whether it's received a sufficient number of petitions to meet the separate 20,000 cap on H-1B visas for workers with U.S. master's degrees or higher. "USCIS will continue to accept and process petitions that are otherwise exempt from the cap," USCIS said.

JOBS REPORT

JOBS BOUNCE BACK IN MARCH: Employers added 196,000 jobs in March, the Bureau of Labor Statistics reported Friday, and February's dismal job number was revised to 33,000, up from a first estimate of 13,000. Wage growth slipped a little, to 3.2 percent over the previous year, down from February's 3.4 percent.

The Washington Post's Matt O'Brien writes that the March jobs number may have "overstated growth." The report includes two surveys, one on how many positions businesses have added and the other on how many individuals are working in a household. "Usually these figures come pretty close to matching up, but sometimes they don't — sometimes, they're not even close," he writes. "This was one of those times." More here.

Related read: "Enjoy that raise. This might be as good as it gets," from Bloomberg.

UNIONS

SEIU MEDIATION SET FOR TOMORROW: SEIU and the D.C. local of the Office and Professional Employees International Union will have their first mediation session Tuesday, a person familiar with the discussions told Morning Shift. The two unions agreed to mediation after OPEIU members working at SEIU's Washington headquarters authorized a strike. OPEIU says that SEIU reduced union-staffed professional and technical support positions and outsourced work to non-union consultants.

2020 WATCH

DO DEMOCRATS LACK A BORDER AGENDA?: As border arrests spike to their highest levels in a decade, some argue that Democrats will need to develop border-security proposals to put on their 2020 platform, Tal Kopan writes for the San Francisco Chronicle. Rep. Raúl Grijalva (D-Ariz.), a senior member of Congress' Progressive Caucus and Hispanic Caucus, told Kopan that "This is going to be the cannon fodder for the Trump campaign and for Republicans in general."

"I think the vast middle are looking for somebody taking the lead," Grijalva added. More here.

IMMIGRATION

ICE NAMES OF AGENTS IN TENNESSEE WORKSITE RAID: U.S. Immigration

and Customs Enforcement last week provided advocacy groups with the names of 37 officers, including seven Customs and Border Patrol Agents, who were present at a raid last April of the Southeastern Provision meat processing plant in Grainger County, Tennessee. The disclosure was filed in a lawsuit brought by the National Immigration Law Center and the Southern Poverty Law Center that alleges ICE agents violated dozens of workers' constitutional rights during the raid. CBP declined to comment. NILC is pressing the agency for more details. More here.

MOTEL 6 PAYS $12 MILLION FOR GIVING GUEST INFO TO ICE: The Motel 6 chain last week agreed to pay $12 million to resolve a lawsuit brought by Washington State that alleged its motels in the state gave more than 80,000 customers' names, birth dates, and license plate numbers to ICE agents, Tiffany Hsu reported for the New York Times. The settlement stated that immigration agents would "sometimes circle the names of guests that sounded Latino before targeting them for questioning, detainment and deportation," Hsu wrote. More from the Times here. Read a press release from the Washington State Attorney General Office here.

CENSUS CITIZENSHIP QUESTION STRUCK DOWN AGAIN: A third federal court on Friday struck down the Trump administration's addition of a question about citizenship to the 2020 census, NPR reported. "The unreasonableness" of the move to add a citizenship question, Maryland District Court Judge George Hazel wrote in an opinion Friday "is underscored by the lack of any genuine need for the citizenship question." The move is the third blow to the administration's Census addition; a Manhattan-based district court judge blocked inclusion of the question in January, and a San Francisco-based district court judge followed suit in March. The Supreme Court will hear oral arguments on the matter this month.

The drama over the administration's attempt to add the question reached a was at an all time high on Capitol Hill last week, after Commerce Secretary Wilbur Ross declined a second invitation to testify on President Donald Trump's budget request before lawmakers. The House Oversight Committee last week also authorized subpoenas for documents from Secretary Ross related to administration's efforts to add a citizenship question to the 2020 census.

NOMINATIONS

NOMINATION WATCH: "President Donald Trump on Thursday chose Jovita Carranza, the U.S. treasurer, to lead the Small Business Administration, following

news that the current administrator is stepping down to head a pro-Trump super PAC," POLITICO's Matthew Choi reported. More here.

COFFEE BREAK

— "Asylum for sale: Refugees say some U.N. workers demand bribes for resettlement," from NBC News

— "Fire Your Agent? Not Yet. Hollywood Writers and Talent Agencies Extend Talks." from The New York Times

— "Trump says Mexico auto tariff threat supersedes new NAFTA pact," from POLITICO

— "The Trumps were once one of many immigrant families in the working-class Bronx," from The Washington Post

— "Judge rules certain asylum seekers must get prompt bond hearings," from POLITICO

— "Sen. Bennet says Biden controversy is no joke," from POLITICO

— "Small towns are dying everywhere but here," from The Washington Post

— "Pushing for Tighter Borders, Trump Asks Jews for Support," from The New York Times

THAT'S ALL FOR MORNING SHIFT!

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Cc:	Walsh, Dennis; Thurman, Shane D.; Coffman, Jill H.; Yashiki, Dale K; Thompson, Karen K.; Cohen, David; Habenstreit, David; Johnston, Rebecca; Ewasiuk, Craig; Cantor, Jared
Subject:	Circuit Court Dismissals and Consent Judgments in Settled Cases January-March 2019
Date:	Monday, April 8, 2019 1:31:04 PM

Ninth Circuit dismissal in *Y.P. Advertising*, Board Case Nos. 20–CA–147219, 20–CA–167875, 20–CA-176151, 20–CA–177029, 20–CA–181140, 20–CA–181554, and 20–CA–181851
(reported at 366 NLRB No. 89)

On May 16, 2018, the Board issued a Decision and Order in this case involving the employer's direct dealing with employees represented by the International Brotherhood of Electrical Workers, Local 1269 and its unreasonable delay in responding to the union's relevant information requests. After the Board filed an application for enforcement in the Ninth Circuit, the employer entered into a settlement agreement to comply with the Board's order in full and waive its right to contest the propriety of that Order or the underlying findings of fact and conclusions of law. On January 7, 2019, the court granted the Board's motion to dismiss its application for enforcement.

Third Circuit consent judgment in *Hard Hat Services*, Board Case No. 04–CA–196783 (reported at 366 NLRB No. 106)

On June 12, 2018, the Board issued a Decision and Order in this refusal-to-hire case involving an electrical contractor and two job applicants who listed their affiliation with the International Brotherhood of Electrical Workers, Local Union No. 98 on their job applications. After the case entered court mediation, the employer thereafter agreed to the entry of a consent judgment requiring it to instate and make whole the two applicants, with the remedy to be determined under *Oil Capitol*, and to include the Board's Notice with any job listings during the 60-day Notice period. On January 10, 2019, the court granted the Board and employer's joint motion for entry of a consent judgment.

Eleventh Circuit dismissal in *Gulf Coast Rebar*, Board Case Nos. 12–CA–149627, 12–CA–149943, 12–CA-150071, 12–CA–151050, and 12–CA–151091 (reported at 365 NLRB No. 128)

On September 18, 2017, the Board issued a Decision and Order in this case finding that the employer threatened employees in numerous ways and unlawfully discharged one employee after threatening, physically assaulting, and filing a false police report against him because of his support for the Iron Workers Regional District Council, International Union of Bridge, Structural, Ornamental and Reinforcing Iron Workers, AFL–CIO. The Board further found, resolving the only issue contested before it and rejecting the employer's Section 10(b) argument with respect to an unlawful contract repudiation, that the employer unlawfully refused to provide relevant information to the union. After the employer petitioned for review and the Board cross-applied for enforcement, the parties participated in the court's mediation program but did not achieve a settlement. Following briefing and the scheduling of oral argument, the union indicated that it was no longer requesting that the employer bargain by furnishing the requested information. The employer agreed to complete its compliance with the Board order by expunging the discharged employee's file (having already offered him reinstatement and with no make whole relief due) and posting the Notice. On March 12, 2019, the Court granted the parties' joint motion and dismissed the petition for review and

cross-application for enforcement.

Ninth Circuit dismissal in *Matson Terminals, Inc.*, Board Case No. 20–CA–178312 (reported at 367 NLRB No. 20)

On October 17, 2018, the Board issued a Decision and Order in this unilateral change case finding that the employer unlawfully transferred bargaining unit work without notifying Hawaii Teamsters & Allied Workers Union, Local 996 and giving the union an opportunity to bargain over the decision. After the Board filed an application for enforcement in the Ninth Circuit and in conjunction with a settlement of additional unfair labor practice findings that were enforced by the D.C. Circuit, the employer entered into a settlement agreement to comply with the Board's order in full and waive its right to contest the propriety of that Order or the underlying findings of fact and conclusions of law. On March 20, 2019, the court granted the Board's motion to dismiss its application for enforcement.

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From: Bloomberg Law Daily Labor Report
To: Ring, John
Subject: Daily Labor Report Highlights
Date: Monday, April 8, 2019 4:36:10 PM

Bloomberg Law

DAILY LABOR REPORT®

Highlights

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TOP STORIES

Anthropologie Worker's Age Bias, Retaliation Claims Revived (1)

By Porter Wells and Erin Mulvaney

A federal appeals court in New York revived a former Anthropologie Inc. worker's claims that her managers relegated her to a fitting room and told her she was "too old" for a promotion.

Employers' Forced Worker Meetings Face Legislative Challenge

By Aaron Nicodemus

Unions are hoping that a pair of bills under consideration in Connecticut will notch another win in their effort to outlaw captive audience meetings, which they say employers use to prevent labor organizing.

Labor Department Official Resigns Amid Possible Ethics Probe (1)

By Tyrone Richardson

A Labor Department official who continued legal work against an Ironworkers' union after joining the agency has stepped down from his post.

Illinois Governor's Campaign Will Face Discrimination Claims

By Bernie Pazanowski

The JB Pritzker Campaign for Governor must face discrimination claims by black campaign organizers, a federal district court said April 5.

DISCRIMINATION

Professor Seeks Class Action on Gender Reassignment Bias Claims

By Brian Flood

A University of Arizona professor, who says the state's refusal to cover the costs of employees' gender reassignment surgery is discriminatory, sought to make his lawsuit a class action April 5.

GM Seeks Immediate Appeal of Age Discrimination Ruling

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General Motors seeks immediate appeal of a ruling that China's mandatory retirement law doesn't shield the company from an age discrimination lawsuit.

WAGE & HOUR

Farm May See Damages Reduced in Onion Packers' Wage Case (1)

By Laura D. Francis

A Georgia farm could see a reduction in its $1.5 million liability for failing to pay overtime to its onion packers.

HARASSMENT & RETALIATION

Civil Service Law Upstages Inspector's Tort Claim Against OSHA

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An inspector's Federal Tort Claims Act suit against the Occupational Safety and Health Administration was dismissed by the Eleventh Circuit April 8.

STATE & LOCAL LAWS

Pay History Bans Continue Popping Up at the State and Local Level

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University of Illinois Strike Ends as Labor Agreement Reached

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More than 1,500 striking graduate and teaching assistants at the University of Illinois at Chicago returned to the classroom April 8 after reaching a tentative three-year deal that would boost pay, cut mandatory fees, and decrease their health benefits costs.

California FedEx Freight Drivers Move to Cut Ties With Teamsters

By Andrew Wallender

The International Brotherhood of Teamsters is facing yet another decertification bid at a recently organized FedEx Freight facility. If successful, the campaign would remove the Teamsters as the employees' bargaining agent.

LEGAL PROFESSION

Gender Pay Gap Narrows Slightly at U.K.'s Magic Circle Firms

By Stephanie Russell-Kraft

Although top U.K. law firms as a whole have narrowed their gender pay gaps, statistics show that men still dominate the highest-paying jobs.

Fisher Phillips Adds New Office, Six Laterals From Jackson Kelly

By Rebekah Mintzer

Fisher Phillips has grabbed six new attorneys from law firm Jackson Kelly to open a new office in Pittsburgh and further ramp up capabilities in its Denver location.

IMMIGRATION

Administration's H-1B Denials Again Subject to Litigation (1)

By Laura D. Francis

A company that runs salons and spas in senior communities is challenging the Trump administration's denial of a temporary employment visa to an Indian graduate student it wants to hire as its director of business development.

HEALTH CARE & BENEFITS

Anthem to Pay Nearly $24 Million to Resolve 401(k) Class Action

By Jacklyn Wille

Anthem Inc. will pay $23.65 million to resolve a class action claiming the company's $5.1 billion 401(k) plan offered high-fee mutual fund share classes and paid excessive record-keeping fees to Vanguard Group Inc.

Daikin America Defends Would-Be Class Suit Over $100M 401(k)

By Jacklyn Wille

Daikin America Inc. defended itself from a lawsuit challenging the John Hancock-affiliated mutual funds in its 401(k) plan, saying the plan investors who filed suit lack standing to challenge funds they don't personally hold.

Cigna Retirees Accuse Company of Flouting Pension Rulings

By Jacklyn Wille

Cigna Corp. is trying to unilaterally rewrite court orders requiring it to give

higher pensions to certain retirees in an effort to save more than $100 million, retirees told a federal judge.

ALSO IN THE NEWS

Construction Industry Could See More DOL Checks, Fewer Audits (1)

By Paige Smith

The Labor Department proposed to conduct construction industry-focused compliance checks, according to an April 8 Federal Register entry.

Papa John's Seeks Dismissal, Arbitration of No-Poach Suits

By Mike Leonard

Papa John's International Inc. says a consolidated antitrust lawsuit over a "no poach" clause in its franchise agreements should be dismissed or sent to arbitration.

Democrats Try to Smooth Trade Deal Passage With Labor Proposal

By Jenny Leonard and Laura Litvan

Two top Senate Democrats, including longtime free-trade foe Sherrod Brown are crafting a labor enforcement proposal that could help ease the way for passage of President Donald Trump's new North American trade agreement.

Punching In: The Trump Overtime Rule Numbers Battle

By Chris Opfer and Jaclyn Diaz

Monday morning musings for workplace watchers

Tesla Opens New Quarter With Another Round of Sales Staff Cuts

By Dana Hull

Tesla Inc. followed a disappointing deliveries report by cutting another swath of sales staff across the country, as the electric-car maker continues to pare back personnel and shift its ordering process online.

PRACTITIONER INSIGHTS

INSIGHT: New DOL 'Joint Employer' Rule—Expect Legal Challenges

The Department of Labor's proposed rule to update the Fair Labor Standards Act regarding situations where multiple employers are held liable for wage and hour violations reverses the legal trend under the Obama administration. Jonathan Turner, partner with Mitchell Silberberg & Knupp, predicts legal challenges will follow.

LATEST CASES

Case: Wage & Hour/Overtime Exemptions (11th Cir.)

An onion processing company improperly classified its packing shed employees as overtime-exempt agricultural workers. Their packing work was only incidental to the growing and harvesting of the onions, because they packed onions produced by outside growers, and the fact that the company sometimes gave the growers advice and cash advances doesn't transform it into a farming operation. The case is Acosta v. Bland Farms Prod. & Packing, LLC, 2019 BL 122017, 11th Cir., No. 17-15322, unpublished 4/5/19.

Case: Discrimination/Pregnancy Discrimination (11th Cir.)

A jury had enough evidence to rule in favor of Winn-Dixie in Alabama over an employee's pregnancy discrimination claim after she was fired for job abandonment, because there was evidence that she didn't show up for several shifts, that she never called her supervisor back after she was informed of her termination, and she admitted that she was allowed to take maternity leave without any hassle. The case is Udeh v. Winn-Dixie Montgomery, LLC, 2019 BL 120434, 11th Cir., No. 16-16867, unpublished 4/4/19.

Case: Discrimination/Constructive Discharge (D. Colo.)

A female senior developer may not proceed with her claim that a resorts management company in Colorado forced her to resign because of her sex. Her assertions that she was hired, another senior developer complimented her

work performance, and her subjective assessment that her job performance was "good-to-excellent" weren't enough to show that she was qualified for her position; additionally, she didn't provide any evidence that was treated less favorably than any male senior developers. The case is Sellitto v. Vail Corp., 2019 BL 121482, D. Colo., No. 1:18-cv-03096-RM-KLM, 4/4/19.

Case: Discrimination/Discharge (C.D. Cal.)

A black customer services agent may not proceed with her claim that Delta Air Lines in California fired her because of her race, rather than for poor job performance, customer complaints, and altercations with co-workers. She didn't show that she was treated differently than any non-black customer service agents under similar circumstances because there was no evidence that her alleged comparators held the same job title, had a history of customer complaints, or engaged in similar behavior. The case is Harris v. Delta Air Lines, Inc., 2019 BL 122809, C.D. Cal., No. 2:18-cv-02341-ODW (FFM), 4/5/19.

Case: Discrimination/Hostile Work Environment (N.D. Ala.)

A Caucasian security guard may proceed with his claim that the City of Birmingham, Alabama subjected him to a hostile work environment because of his race. His allegations, including that his black supervisor verbally abused and intimidated him, he was treated differently than his black co-workers, and he reported the alleged harassment to his supervisor and human resources, could show that the City subjected him to a racially hostile work environment. The case is Kent v. City of Birmingham, 2019 BL 122576, N.D. Ala., No. 2:18-cv-00734-JHE, 4/5/19.

Case: Discrimination/Exhaustion (D. Colo.)

A Hispanic fired contract administrator at Denver International Airport may not proceed with her claim that the City and County of Denver, Colorado treated her differently than her non-Hispanic co-workers because of her race. She didn't exhaust her administrative remedies because her original EEOC charge only contained a complaint of sex discrimination, and her emails with an EEOC investigator about amending her discrimination complaint didn't mention racial discrimination or put the city and county on notice of any such claims. The

case is Martinez v. City & County of Denver, 2019 BL 121821, D. Colo., No. 17-cv-03140-NYW, 4/5/19.

Case: Discrimination/Hiring (11th Cir.)

A black female candidate may not proceed with her claim that a metal manufacturing company in Alabama didn't hire her for its technical support team because of her race and sex. The selected candidates had more experience with technical customer support and her allegations, including that the original job posting only required experience in inside sales and customer support and made no mention of technical support experience, didn't show that her race and sex were factors in the hiring decision. The case is Zinnerman v. Worthington Indus., Inc., 2019 BL 122110, 11th Cir., No. 18-12889 Non-Argument Calendar, unpublished 4/5/19.

Case: Wage & Hour/FLSA Coverage (6th Cir.)

The U.S. Secretary of Labor showed that employees of a Michigan timber-harvesting company were engaged in commerce for purposes of establishing that the company is subject to the Fair Labor Standards Act. The equipment and trucks that the employees used for cutting down trees and transporting timber were "materials" that moved in commerce, because they were manufactured outside of Michigan, and they had a significant connection to the company's main commercial activities of harvesting and selling timber. However, the trial court must recalculate the amount of unpaid overtime the company owes, because it improperly included time employees spent commuting from home to work and bona fide meal breaks in determining how many overtime hours they worked. The case is Sec'y of Labor v. Timberline South, LLC, 2019 BL 121786, 6th Cir., No. 18-1763, 4/5/19.

Case: Individual Employment Rights/Whistleblowing (Mich. Ct. App.)

SVRC Industries didn't violate the Whistleblowers' Protection Act, or unlawfully retaliate against a director in violation of Michigan public policy when it laid her off for economic reasons. The director claimed she was "about to report" to police an incident involving an employee's statements in a disciplinary meeting regarding guns, when SVRC Industries let her go. The record showed that she didn't explicitly or implicitly threaten to report the disciplinary incident. Her text

messages and testimony reveal she discussed it with several people, but the director never indicated that she was on the verge of reporting the threatening statements to the police, and she didn't do so. The case is Rivera v. SVRC Indus., Inc., 2019 BL 122190, Mich. Ct. App., No. 341516, 4/4/19.

Case: Discrimination/Damages (E.D. Va.)

PhyAmerica Government Services must pay over $114,000 in back pay and benefits, as well as $50,000 emotional distress damages and post-judgment interest to a female art therapist that it employed to work at the Womak Army Medical Center and who complained to PhyAmerica of a retaliatory hostile work environment after she reported sexual harassment at Womak. PhyAmerica told her not to "make any trouble" if she wanted to keep her job, she made diligent, though unsuccessful, efforts to find a new job, and the harassment caused her such distress that she has constant nightmares, depression, and extreme anxiety that have required her to see a doctor, wear a jaw protector for anxiety-related teeth-grinding, and caused her to lose 10 pounds from lack of appetite. The case is Arbas v. PhyAmerica Gov't Servs., Inc., 2019 BL 122028, E.D. Va., No. 2:18cv97, 4/4/19.

Case: Disability Discrimination/Discharge (W.D. La.)

A former President Emeritus of Louisiana College failed to show he was fired based on his heart disease or post-traumatic stress disorder, because there was no evidence of disability-based bias on the part of any decision-maker. The court held that conflicts between him and the college's administration were mainly based on religious differences and on an anonymous letter that the college attributed to him, based on information it found on his college-issued laptop, which made derogatory statements about the college and its administration and violated the terms of his contract. The case is Aguillard v. La. Coll., 2019 BL 120719, W.D. La., No. 1:17-CV-01671, 4/4/19.

Case: Individual Employment Rights/First Amendment (D. Neb.)

The Chase County School District is entitled to summary judgment on the First Amendment retaliation, due process and Equal Opportunity in Education Act claims of a school district administrative assistant who advocated for her son because he misbehaved and was kicked off the football team. She argued that

a superintendent who made the final decision to terminate her employment was making policy for the school district. The court concluded that the school board itself was the final policymaker, therefore no unconstitutional policy could be inferred from the superintendent's decision to fire her. Furthermore, the employee spoke on a matter of private concern when she advocated for her son. The case is Davis v. Chase Cty. Sch. Dist. No. 536, 2019 BL 121892, D. Neb., No. 7:17-CV-5007, 4/5/19.

Case: Disability Discrimination/Essential Job Function (D. Mass.)

An elementary school teacher in Newton, Massachusetts, with fibromyalgia can go to trial on her claim that Newton Public Schools illegally denied her disability accommodation request to work part-time, despite NPS's argument that her full-time presence at school was essential to her job, because she can show that teachers commonly job-shared in order to work part-time, and NPS did not argue that the full-time continuous presence of the same teacher in a classroom was essential, the court ruled. The case is Incutto v. Newton Pub. Sch., 2019 BL 120727, D. Mass., No. 16-12385-LTS, 4/4/19.

Case: Individual Employment Rights/Contracts (W.D. La.)

A RIF'd account manager for Honeywell International can't proceed with his claims contending that Honeywell orally agreed—based on a conversation with his supervisor—to grant him 1,000 stock options in return for his continued employment, that the company breached a written option agreement, and that he detrimentally relied on its promise based on his belief that he could wait indefinitely to exercise the stock options. The manager was advised that the options had expired based on terms of his severance agreement when he tried to exercise them in 2012. The option agreement expressly states that the option must be exercised prior to July 15, 2011, an option for an indefinite period of time is void, and the court finds it unreasonable that the employee made no attempt to find out when the options expired after he signed a separation agreement. The court adopts a magistrate's report and recommendations over the parties' objections. The case is Ackley v. Honeywell Int'l Inc., 2019 BL 118906, W.D. La., No. 2:15-1188, 4/3/19.

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From: Connell, Erin M.
To: Eric Reicin; VICTORIA A. LIPNIC; Ring, John; Dreiband, Eric (CRT; OScannlain, Kate S - SOL; Assefi, Omeed (CRT; SHAWANDA HARDY; Livingston, Donald (CRT; Leen, Craig - OFCCP; Dankowitz, Beverly - SOL; donald.mcintosh@eeoc.gov; Bashford, Jo Ann; Walter, Courtney E - SOL; Bissell, Katherine - SOL; Smith, Kelley - OFCCP; Christine E. Webber
Cc: Speights, Grace E.; Anne B. Shaver; Kevin Brodar
Subject: ABA EEO Committee - Thank you!
Date: Monday, April 8, 2019 4:36:56 PM
Attachments: image002.png
image005.png

Dear All,

On behalf of the ABA EEO committee, I'm writing to say thank you to each of the speakers on the government plenary panel, as well as to Eric and Christine as co-facilitators. We've received great feedback on the panel – all of it well-deserved! We know how busy you all are, and greatly appreciate you taking the time to participate in our annual conference. I hope everyone had safe travels home, and hope to see you all again soon.

Very best regards,

Erin

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Employment Blog

From: Eric Reicin <Eric.Reicin@morganfranklin.com>
Sent: Friday, March 22, 2019 1:29 PM
To: VICTORIA A. LIPNIC <VICTORIA.LIPNIC@EEOC.GOV>; John.Ring@nlrb.gov; Dreiband, Eric (CRT <Eric.Dreiband@usdoj.gov>; OScannlain, Kate S - SOL <OScannlain.Kate.S@dol.gov>; Assefi, Omeed (CRT <Omeed.Assefi@usdoj.gov>; SHAWANDA HARDY <SHAWANDA.HARDY@EEOC.GOV>; Livingston, Donald (CRT <Donald.Livingston@usdoj.gov>; Leen, Craig - OFCCP <Leen.Craig@DOL.gov>; Dankowitz, Beverly - SOL <Dankowitz.Beverly@dol.gov>; donald.mcintosh@eeoc.gov; JoAnn.Bashford@nlrb.gov; Walter, Courtney E - SOL <Walter.Courtney.E@DOL.gov>; Bissell, Katherine - SOL <Bissell.Katherine@dol.gov>; Smith, Kelley - OFCCP <Smith.Kelley.J@dol.gov>; Christine E. Webber <CWebber@cohenmilstein.com>
Cc: Connell, Erin M. <econnell@orrick.com>; Speights, Grace E. <grace.speights@morganlewis.com>; Anne B. Shaver <ashaver@lchb.com>; Kevin Brodar

<kbrodar@smart-union.org>
Subject: Current Slide Deck -- ABA National Conference on EEO Law - April 4 9 a.m. Government Plenary

AAG Drieband, Solicitor O'Scannlain, Chair Ring, Chair Lipnic, and Director Leen -

Thank you again for agreeing to speak on the Government Plenary panel at the American Bar Association National Conference on EEO Law at the Biltmore Hotel in **Coral Gables, Florida on April 4 from 9 a.m. – 1030 a.m.**

As mentioned on the planning call this afternoon, Christine Webber (Cohen Milstein) and I will serve as your facilitators for our plenary panel.

Attached is the current **draft** powerpoint, which is a general a list of topics so that the audience can follow along (and is similar to what AAG Drieband, General Counsel Robb, Chair Lipnic, and I used at Georgetown Law earlier this month).

As we discussed on the call, we are hoping for a **5** minute opening statement from each of the leaders and then we will go to slide 4 and have cross agency/panel discussion on the topics on that slide.

After that we will go to some quick hits on the individual agency slides.

Again, if we are missing any topics or you have any heartburn on any of the topics, we are happy to edit the slides accordingly.

Have a great weekend.

Eric and Christine

Best Regards,

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From: Bloomberg Law Daily Labor Report
To: Ring, John
Subject: First Move: California Trucking Industry Pushes Against Classification Test
Date: Tuesday, April 9, 2019 7:07:50 AM

What you need to know to start your day.

California Trucking Industry Pushes Against Classification Test

By Patricio Chile

The California trucking industry is pressing the argument that its drivers shouldn't be subject to a standard that makes it more difficult to classify workers as contractors as opposed to employees.

- **Ruling Impact:** The trucking industry is among many employers pushing back against last year's California Supreme Court ruling that bolstered the so-called **"ABC" worker classification** test. That test put the burden on employers to show workers qualify as contractors, a standard the trucking group and others say could hurt their business models.

- **High Stakes:** Trucking groups, led by the **Western States Trucking Association**, continue to argue the industry should be exempt from the test despite a recent loss in federal court, Erin Mulvaney reports.

ANTHROPOLOGIE AGE BIAS CASE REVIVED

The Second Circuit revived a former Anthropologie Inc. worker's claim that she was discriminated against based on her age. The employee's case will head back to court where she will argue that her younger managers called the then-54-year-old "too old" for a promotion at the clothing retailer and relegated her to the fitting room.

- **Repeated Conduct:** The appeals court panel vacated a New York federal court's decision to dismiss the case before trial. Second Circuit Judge Amalya Kearse said the lower court was wrong to say it couldn't review the case, arguing that the **hostile work environment** claims imply repeated conduct.

- **Equal Treatment:** The Equal Employment Opportunity Commission and the National Employment Attorneys Association sided with the plaintiff on appeal and pushed for equal treatment of **older workers**. Porter Wells and Erin Mulvaney have the story.

Workers rearrange a window at an Anthropologie Inc. store in New York City, Jan. 6, 2014.
Photographer: Jin Lee/Bloomberg via Getty Images

WHAT ELSE WE'RE WATCHING

- **Wage and Hour:** A House Appropriations subcommittee will hold a hearing on **wage and hour enforcement**, featuring Illinois Attorney General Kwame Raoul and former Labor Department Wage and Hour Administrator Paul DeCamp.

- **Airline Workers:** Southwest Airline mechanics will vote on a tentative **labor contract**, that among other things, would give them an immediate 20 percent base pay increase. Read more in this week's "Unions at Work."

- **Judicial Confirmations:** The Senate could confirm up to four **federal district court picks** today, including Oklahoma Supreme Court Justice Patrick Wyrick, a protege of scandal-plagued, former EPA Administrator Scott Pruitt. Patrick Gregory has the story.

- **Labor Talk:** House Speaker **Nancy Pelosi**, U.S. Labor Secretary **Alexander Acosta**, and AFL-CIO Secretary-Treasurer **Liz Shuler** are among the speakers addressing the **Building Trades'** legislative conference in Washington this morning. Wednesday, union members will hear from a number of Democratic 2020 presidential hopefuls.

- **Wage Proposal:** The Colorado House is scheduled to vote on a bill today that would make it a felony for employers to willfully **refuse to pay wages** or to falsely **deny a wage claim** greater than $2,000. Under existing law, an employer who fails to pay a worker less than the state minimum wage—currently $11.10—can be charged with a misdemeanor.

- **Safety Practitioners:** Law firm **Fisher Phillips** opened a Pittsburgh office and expanded its presence in Denver, bringing in six attorneys who specialize in **worker and mining safety** issues.

- **Job Openings:** The **Bureau of Labor Statistics** issues results of its February job openings and labor turnover survey at 10 a.m.

PRACTITIONER INSIGHTS

Former DOJ Prosecutor Back in BigLaw Shares Tips to Help Clients
Morgan Lewis's Zane David Memeger, former U.S. Attorney for the Eastern

District of Pennsylvania, shares tips for how attorneys “switching hats” from public to private practice can better understand and help their clients.

DAILY RUNDOWN

Top Stories

Employers’ Forced Worker Meetings Face Legislative Challenge
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Discrimination

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Harassment & Retaliation

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An inspector’s Federal Tort Claims Act suit against the Occupational Safety and

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State & Local Laws

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More than 1,500 striking graduate and teaching assistants at the University of Illinois at Chicago returned to the classroom April 8 after reaching a tentative three-year deal that would boost pay, cut mandatory fees, and decrease their health benefits costs.

California FedEx Freight Drivers Move to Cut Ties With Teamsters
The International Brotherhood of Teamsters is facing yet another decertification bid at a recently organized FedEx Freight facility. If successful, the campaign would remove the Teamsters as the employees' bargaining agent.

Immigration

Administration's H-1B Denials Again Subject to Litigation
A company that runs salons and spas in senior communities is challenging the Trump administration's denial of a temporary employment visa to an Indian graduate student it wants to hire as its director of business development.

WORKFLOWS

Covington hired former FDA official Dr. Julie Dohm to its Food, Drug, and Device practice in Washington | **Morrison & Foerster** added former DOJ national security official Alex Iftimie to its National Security Practice in Washington | **Jones Day** announced that Joshua (Josh) K. Brody has joined its Business Restructuring & Reorganization Practice as a partner in New York from Kramer Levin | **Holland & Knight** added three Colombia-based attorneys as senior counsel in Bogota; Isabella Gandini and Inés Elvira Vesga were both previously at Norton Rose Fulbright Colombia and Carolina Arciniegas arrives from GlaxoSmithKline | **Goodwin** said employee benefits and executive

compensation lawyer Patrick Menasco joined its ERISA and executive compensation practice in Washington from Stroock | **King & Spalding** announced that Rachael Trummel has joined its Trial and Global Disputes practice group as a partner in Chicago

For all of today's Bloomberg Law headlines, visit Daily Labor Report

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From: Martin, Andrew
Subject: Legal News FYI 04-09-19
Date: Tuesday, April 9, 2019 8:34:27 AM
Attachments: image001.png

Tuesday, April 9, 2019

Joint employer rule provides clarity but may be overturned by courts

Business Insurance 09 Apr 2019 08:03

The proposed joint employer regulation announced by the U.S. Department of Labor last week will give employers needed clarity and guidance if promulgated, say experts. But they also warn the rule would provide only interpretative guidance to the Fair...

Waiting for Student Athletes to Become Student Activists

New York Times, The (New York, NY) 09 Apr 2019 00:00

MINNEAPOLIS -- This Final Four is he fifth anniversary of one of the most effective, if inadvertent, instances of athlete activism in college sports. This was when the Connecticut star Shabazz Napier , speaking to the news media shortly before the 2014...

Joint Employer Status Under the Fair Labor Standards Act, 14043-14061 [2019-06500]

Federal Register - Proposed Rules 09 Apr 2019 00:00

This proposed rulemaking is intended to update and clarify he Department of Labor's (Department) interpretation of joint employer status under he Fair Labor Standards Act (FLSA or Act), which has not been significantly revised in over 60 years. The...

Recent Case Provides Important Lessons For Buyers Acquiring Unionized Businesses

National Law Review 08 Apr 2019 18:04

When healthcare enti ies are seeking to expand their opera ions, they often will find interesting targets who have union-represented employees. A union's presence will create additional compliance obligations but, contrary to common misconceptions,...

Critics accuse Texas of favoring online companies at workers' expense

Houston Chronicle, The (Houston, TX) 08 Apr 2019 16:44

A proposed rule that would classify gig economy workers as independent contractors and allow the tech companies that hire them to avoid paying unemployment taxes has provoked the outrage of worker advocacy groups that view the measure as opening the door...

Union scores another victory inside Burgerville

Restaurant Business Magazine 08 Apr 2019 16:15

The staff of another Burgerville quick-service restaurant—the second in a week —has voted to unionize, expanding organized labor's influence to 11% of he chain. The vote by crewmembers of a unit near the convention center in Portland, Ore., concluded...

California FedEx Freight Drivers Move to Cut Ties With Teamsters

BloombergLaw - Daily Labor Report 08 Apr 2019 12:27

• Two other FedEx Freight locations previously cut union ties • Teamsters represent about 50 workers at the facility By Andrew Wallender The International Brotherhood of Teamsters is facing yet another decertification bid at a recently organized FedEx...

Detroit partners with Maven in first step to support car-sharing

Featuring a Region 7 Field Attorney, Patricia Fedewa. HT to Renee McKinney for this article.

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From: Morning Shift
To: Ring, John
Subject: POLITICO"s Morning Shift: Judge blocks "remain in Mexico" — Is Cissna next? — DOL joint employer comment period starts today
Date: Tuesday, April 9, 2019 10:04:33 AM

View online version

2018 Newsletter Logo: Morning Shift

04/09/2019 10:00 AM EDT

By REBECCA RAINEY (rrainey@politico.com; @RebeccaARainey)

QUICK FIX

— Judge blocks "remain in Mexico."

— Immigration hardliners to Trump: Don't fire USCIS chief Francis Cissna.

— The 60-day comment period on DOL's joint employer proposal starts today.

GOOD MORNING! It's Tuesday, it's April 9, and this is Morning Shift, your daily tipsheet on labor and immigration news. Send tips, exclusives and suggestions to rrainey@politico.com, thesson@politico.com, ikullgren@politico.com, and tnoah@politico.com. Follow us on Twitter at @RebeccaARainey, @tedhesson, @IanKullgren, and @TimothyNoah1.

DRIVING THE DAY

'REMAIN IN MEXICO' BLOCKED BY FEDERAL JUDGE: A federal judge Monday halted the Trump administration's policy of forcing certain non-Mexican asylum seekers to wait in Mexico during their court proceedings, POLITICO's Ted Hesson reports. "In a 27-page order , San Francisco-based U.S. District Judge Richard Seeborg issued a preliminary injunction against the policy, a decision that represents another legal setback for the Trump administration's hard-line immigration agenda," Hesson writes. "The ruling did not tackle the question of whether DHS has the authority to send asylum seekers to Mexico. Instead, it found that plaintiffs were likely to demonstrate that the policy did not comply with federal regulatory law." More here.

INSIDE THE AGENCIES

IS CISSNA NEXT?: President Donald Trump's hard-line immigration allies are urging him to hang on to USCIS Director Francis Cissna as de facto White House immigration czar Stephen Miller cleans house, POLITICO's Ted Hesson, Anita Kumar, and Nancy Cook report. Secret Service Director Randolph Alles was the latest DHS official to be shown the door Monday, following Homeland Security Secretary Kirstjen Nielsen's abrupt resignation Sunday and the Friday withdrawal of Ronald Vitiello's nomination to lead ICE. Cissna is expected to go next. But Roy Beck, president of NumbersUSA, said: "He's great. He's worked in this issue for years, he's extremely knowledgeable. He's exactly the type of person who needs to be in DHS in leadership." Miller, though, has grown frustrated as he's pressed Cissna, "unsuccessfully, to launch more experimentally and legally questionable policies," Hesson and Orr write.

With top Nielsen allies out of the way, Miller "wants tent cities to house migrants on the border and is pressing to extend the amount of time U.S. immigration

officials can detain migrant children beyond the current 20-day limit imposed by a federal judge" POLITICO reports."Miller wants to force migrant parents arrested at the border to choose between splitting apart from their children or remaining together indefinitely in detention while awaiting court proceedings, according to five people familiar with the plans."

Two other DHS officials expected to be pushed out, POLITICO reports, are General Counsel John Mitnick and Acting Deputy Claire Grady. More here.

Nielsen is going quietly. She told reporters outside her house Monday: "I will continue to support all efforts to address the humanitarian and security crisis on the border," according to Playbook . CNN reports that Nielsen argued at a White House meeting two weeks ago "that if you close all the ports of entry all you would be doing is ending legal trade and travel, but migrants will just go between ports. According to two people in the room, the President said: "I don't care." More here.

More: "Stephen Miller pressuring Trump officials amid immigration shakeups, " from POLITICO

AT THE BORDER

REPORT: TRUMP TOLD BORDER AGENTS TO KEEP OUT MIGRANTS: During President Donald Trump's trip to the border in Calexico, California last Friday, he told border agents not to let migrants in, CNN's Jake Tapper reported. "Tell them we don't have the capacity, he said. If judges give you trouble, say, 'Sorry, judge, I can't do it. We don't have the room.'" Leaders told agents after the meeting "they were not giving them that direction and if they did what the President said they would take on personal liability."

"You have to follow the law, they were told." More here.

BORDER JOB KILLER: Delays as much as "four and five hours to cross the border near San Diego" are prompting concerns that the administration's redeployment of 750 U.S. customs personnel to help process migrants will cost jobs and a lot of money, POLITICO's Doug Palmer reports. "For us, the quick fix is: Bring the CBP officers back, open those lanes and allow trade to proceed," Pete Saenz, mayor of Laredo, Texas, said during a call hosted by the Wilson Center's Mexico Institute Monday. "Thirty percent of our lanes were closed last week." More here.

VISA UPDATE

H-2B RALLY ON THE HILL: The Seasonal Employment Alliance will host a rally on Capitol Hill this morning with 10 lawmakers, including Republican Reps. Andy Harris (Md.), Doug Collins (Ga.), and Jack Bergman (Mich.), to urge Congress to lift the H-2B visa cap and to "commend" the Trump administration's "recent efforts to save seasonal businesses." A total of 66,000 H-2B visas are available each fiscal year, with the allotment released in two installments. DHS recently announced that it will nearly double the number of H-2B visas allocated through September, making an additional 30,000 available to "returning workers." A clause included in appropriations bills in recent years grants DHS the option to roughly double the number of existing visas. The rally starts at 9:30 a.m.

UNIONS

AFL-CIO GETS NEW DIGITAL CHIEF: Nick Gaw will lead data and technology operations for the labor federation's organizing and political campaigns. Gaw most recently was technology director at Avaaz, a nonprofit dedicated to global activism, and has served as director of engineering at the Democratic National Committee.

CORPORATIONS SEEK OUT TRANS WORKERS: A job fair in Los Angeles for "transgender, gender non-binary and non-conforming individuals" drew more than 700 job seekers and 70 employers, including "corporate giants such as Hilton, Sony, Starbucks and Viacom," Melissa Gomez reports for the Los Angeles Times. "In seeking qualified job candidates for positions including sales, marketing and entry-level executive assistants," Gomez writes, "the companies were taking a definite stance in a supporting a community whose rights have been debated — both politically and culturally — for well over a decade."

The unemployment rate among transgender people in 2015 (the most recent year for which data is available) was three times higher than the national rate, the National Center for Transgender Equality told Morning Shift. According to NCTE's 2015 US Transgender Survey , 30 percent of those respondents who were employed during the previous year "reported being fired, denied a promotion, or experiencing some other form of mistreatment in the workplace related to their gender identity or expression." Another 77 percent said they "took steps to avoid mistreatment in the workplace," including "quitting their job."

No federal law explicitly prohibits employment discrimination based on gender identity or expression; the Justice Department in 2017 reversed its previous

position that transgender workers were protected under the Civil Rights Act of 1964's prohibition against discrimination based on sex. A House Education and Labor subcommittee will hold a hearing today at 2 p.m. on Rep. David Cicilline (D-R.I.)'s Equality Act, H.R. 5 (116), which would bar discrimination based on sex, sexual orientation or gender identity. More info on the hearing here. More from the Times here.

GAO: DOL NEEDS BETTER AUTOMATION DATA: A Government Accountability Office report released Monday said that DOL needs to develop ways to use data "to identify and systematically track the workforce effects of advanced technologies," such as automation and artificial intelligence. Read a summary here and the full report here.

JOINT EMPLOYER

COMMENT PERIOD ON DOL JOINT EMPLOYER: DOL will publish its joint employer proposal in the Federal Register today, starting the 60-day comment period. The proposed regulation released last week would make it harder to hold businesses jointly liable when their franchisees or contractors violate the Fair Labor Standards Act. More on the proposal from POLITICO's Ian Kullgren here.

DELAURO THREATENS LEGAL ACTION: "Rep. Rosa DeLauro (D-Conn.) today warned HHS that she's reviewing 'legal remedies' after three House Democrats were barred from accessing a Florida facility where migrant children are being housed Monday," POLITICO's Dan Diamond reports. More here.

COFFEE BREAK

— "Texas rule limiting worker benefits in gig economy would hurt local businesses, owners say," from The Houston Chronicle

— "San Diego airport officials vote to use PLA on $3B airport project," from Construction Dive

— "Wikipedia Isn't Officially a Social Network. But the Harassment Can Get Ugly." from the New York Times

— "Bernie Sanders says he does not support open borders," from POLITICO

— "How Americans see automation and the workplace in 7 charts," from Pew

Research Center

— "Trump Administration Set to Tighten Rules for Baseball Players From Cuba," from the Wall Street Journal

— "California sees shift in immigration detention contracts," from The Associated Press

THAT'S ALL FOR MORNING SHIFT!

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NLRB Case 20-CB-216170

04/08/2019 01:37 PM EDT

NLRB Case 20-CB-216170 - International Longshore and Warehouse Union, Local 10 (Pacific Maritime Association)

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From: Bloomberg Law Daily Labor Report
To: Ring, John
Subject: Daily Labor Report Highlights
Date: Tuesday, April 9, 2019 4:31:57 PM

Bloomberg Law

DAILY LABOR REPORT®

Highlights

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TOP STORIES

Pilgrim's Pride Shakes Claims of Worker Fired Over Absences

By Patrick Dorrian

A supervisor at a Pilgrim's Pride plant in Florida failed to show his violations of the company's absence policy were a cover for disability discrimination, the Eleventh Circuit ruled April 9.

Fluor Worker With Colitis to Get Trial on ADA, FMLA Claims

By Patrick Dorrian

Fluor Enterprises Inc.'s decision to lay off a quality assurance worker with colitis may have violated federal disability bias and medical leave laws, a federal judge ruled.

Chicago City Council Kills Predictive Scheduling Legislation

By Andrew Wallender

The Chicago City Council failed to advance a bill that would have required employers to provide workers two weeks' notice of scheduled shifts. Employers would have had to compensate employees for unscheduled work time and last-minute schedule changes.

Deputy Sheriff Can Lose Job for Campaigning Against Boss

By Bernie Pazanowski

A local sheriff didn't violate the First Amendment when he fired a deputy who openly campaigned against him, the Fourth Circuit said April 9.

DISCRIMINATION

Worker With Bipolar Spouse Fails With Bias, Reprisal Claims

By Patrick Dorrian

A customer service representative with a St. Paul, Minn., medical supply company failed to show her marital status or job bias complaint spurred her termination, the Eighth Circuit ruled April 9.

Gulf Deckhand Beats Attempt to Knock Out Disability Suit

By Porter Wells

A Louisiana deckhand can keep pursuing his claims that Gulf Logistics Operating Inc. unlawfully fired him because of his depression, a federal judge ruled.

WAGE & HOUR

Facebook Gets U.S. Chamber Backing in OT Lawsuit Notice Dispute

By Porter Wells

The U.S. Chamber of Commerce has thrown its weight behind Facebook Inc.'s effort to appeal a recent federal court decision that addressed whether workers who've executed arbitration agreements must be notified of wage and hour lawsuits.

Atlanta Food Service Distributor Owes $1.8M in Back Wages

By Chris Marr

A food service distributor to Chinese takeout restaurants in the Southeast must pay $1.8 million in back wages and damages after a Labor Department investigation.

Circle K $8.25M Overtime Settlement Gets Final Nod

By Julie Steinberg

An $8.25 million overtime class settlement between Circle K Stores Inc. and managers won final approval from a federal court in Nevada.

HARASSMENT & RETALIATION

Democrats Introduce Workplace Harassment Proposal

By Jaclyn Diaz

The #MeToo era has toppled Hollywood giants like Harvey Weinstein, but ordinary workers in the hospitality, janitorial, and restaurant industries continue to face harassment and assault daily, Sen. Patty Murray said April 9.

HBO Hit With Another Retaliation Suit by Parking Assistants

By Peter Hayes

Home Box Office Inc. was hit with a new suit by parking production assistants alleging HBO blacklisted them for suing for overtime pay.

STATE & LOCAL LAWS

Failure to Pay Wages in Colorado May Soon Be Deemed Theft

By Tripp Baltz

Failure to pay wages would be reclassified as theft under a bill given preliminary approval in the Colorado House.

Texas Approves Digital Business Worker Classification Rule

By Paul Stinson

Texas businesses operating solely on a digital platform will be able to designate their employees as “marketplace contractors” as a proposed rule got the green light from the state’s labor regulator.

Truckers' Loss in Calif. Contractor Fight Won't End Legal Battle

By Erin Mulvaney

The California trucking industry is pressing the argument—so far without gaining much traction—that its drivers should be classified as contractors, not employees.

New York City Looks to Bar Marijuana Testing for Job Applicants

By John Herzfeld

New York City employers wouldn't be allowed to require job candidates to submit to drug testing for marijuana as a condition of hiring, under a bill approved by the City Council.

Tennessee Anti-Bullying Bill With Employer Immunity Goes to Gov.

By Chris Marr

Tennessee employers would get immunity from state lawsuits alleging abusive workplace conduct if they adopt the state’s model anti-bullying policy, under legislation that’s headed to the governor’s desk.

WHISTLEBLOWERS

Medicaid Whistleblower Who Didn't Show Retaliation Loses Appeal

By Peter Hayes

A regional vice president for Health Management Systems lost a whistleblower claim stemming from the company's contracts to recover Medicaid funds.

LABOR RELATIONS

Labor Union Loses Arbitration Award for Reassigned Work

By Brian Flood

A labor union's arbitration victory after an employer reassigned work at a chemical plant must be tossed, a federal appeals court ruled April 8.

D.C. Hospital Faces Labor Complaint After Ousting Union

By Hassan A. Kanu

George Washington University Hospital is facing a labor complaint after deciding to stop recognizing a union representing roughly 150 of its workers.

Unions at Work: Southwest Airlines, Mechanics Reach New Pact

By Louis C. LaBrecque

Keep up to date with a roundup every Tuesday of union initiatives, bargaining developments, leadership changes, and other labor news.

LEGAL PROFESSION

Pruitt Protege Advances in Senate Judicial Vote (1)

By Patrick L. Gregory

Controversial nominee Patrick Wyrick moved closer to likely confirmation to a federal district court seat on Tuesday as the Senate accelerated votes on another batch of Donald Trump judicial selections.

Wisconsin Bar Dues Requirement Unconstitutional, Lawyers Say (1)

By Martina Barash

Wisconsin's requirement that attorneys pay bar dues to practice in the state unconstitutionally compels them to participate in the state bar's advocacy, a pair of lawyers says in a new suit.

HUMAN RESOURCES

Trump Pick for Federal HR Office Gets High Marks for Hill Skill

By Louis C. LaBrecque

President Donald Trump's pick to lead the Office of Personnel Management has the Capitol Hill connections and labor relations chops to help the administration streamline how it manages people, those familiar with Dale Cabaniss said in interviews.

HEALTH CARE & BENEFITS

Rockwell Automation Accused of Outdated Pension Calculations

By Jacklyn Wille

Rockwell Automation Inc. is the latest employer to be accused of shortchanging worker pensions by relying on lifespan assumptions that haven't been updated for more than 40 years.

Workers for Sovereign Health Denied Class Status, for Now

By Jacklyn Wille

A lawsuit accusing Sovereign Health of failing to fund its health-care plan won't be certified as a class action unless the employees who filed suit propose a narrower class, a federal judge said April 8.

GE Says 401(k) Suit Tied to Insurance Shortfall Can't Proceed

By Jacklyn Wille

General Electric Co. asked a federal judge to toss a lawsuit targeting losses in the company's retirement plan, saying the case is blocked by a 10-year-old settlement agreement.

Waddell & Reed's $4.9M 401(k) Settlement Gets Final OK

By Jacklyn Wille

Waddell & Reed Financial Inc. received final court approval of its $4.9 million deal with employees who claimed the company filled its 401(k) plan with

expensive and poorly performing funds that paid fees to the company.

ALSO IN THE NEWS

Labor Department Meets With Finance Sector to Avoid Bad Blood

By Paige Smith

The Labor Department's contractor watchdog wants a good relationship with the financial sector, where exorbitant salaries and some old-school corporate cultures could put it at odds with the DOL agency.

DOL Wage and Hour Division Needs More Resources, Lawmakers Told

By Tyrone Richardson

The Labor Department's Wage and Hour Division needs a funding boost to ensure the nation's workers are paid for time they work, witnesses told a House Appropriations subcommittee.

Telecom Employment Contract Dispute Won't Be Heard in U.S. Court

By Brian Flood

Michigan isn't the right venue to hash out a contract dispute between an Equatorial Guinea telecommunications firm and its U.S. citizen founder, a federal appeals court ruled April 9.

5G Battle Among U.S. Wireless Companies Sparks Hiring Spree (1)

By Shelly Hagan and Scott Moritz

Wireless companies are ramping up hiring as they roll out 5G service in cities across the U.S.

Albertsons-Owned Plated Lays Off 10 Percent of Corporate Staff

By Deena Shanker

Plated, the meal-kit company owned by Albertsons Cos., has laid off about 10

percent of its New York City staff as it reorganizes its corporate office to cut costs.

BofA to Increase Minimum Wage to $20 an Hour Over Two Years (1)

By Lananh Nguyen

Bank of America Corp. plans to raise its minimum wage to $20 an hour over two years.

U.S. Job Openings Fell 538,000 in February, Most Since 2015 (1)

By Reade Pickert

U.S. job openings decreased in February by the most since 2015 while still exceeding the number of unemployed Americans, a sign of some potential relaxation in what's been a consistently tight labor market.

PRACTITIONER INSIGHTS

INSIGHT: Former DOJ Prosecutor Back in BigLaw Shares Tips to Help Clients

Morgan Lewis's Zane David Memeger, former U.S. Attorney for the Eastern District of Pennsylvania, shares tips for how attorneys "switching hats" from public to private practice can better understand and help their clients.

LATEST CASES

Case: Labor Relations/Arbitration (7th Cir.)

An arbitration panel lacked authority to award scaffolding work—which an industrial contractor reassigned to a Carpenters union—to employees represented by a Laborers local. Laborers who were already working on the job were terminated because the work was assigned to the Carpenters, the gravamen of the grievance is work jurisdiction, and a labor contract creates a separate, tripartite arbitration procedure to resolve work-jurisdiction disputes. The case is Brock Indus. Servs., LLC v. Laborers Constr. & Gen. Laborers Local 100, 2019 BL 124112, 7th Cir., No. 17-2597, 4/8/19.

Case: Wage & Hour/Tip Credit (N.D. Ind.)

A delivery driver for a Domino's franchise company may move forward with his claim that the company paid him subminimum wages due to its failure to adequately reimburse him for vehicle expenses, because he said that the company's reimbursement rate was about 16 cents per mile below what he spent, and it isn't permitted to use his tipped wages in excess of the tip credit to meet the minimum wage requirement without giving him advance notice that it intended to use a higher tip credit rate. The case is Rechtoris v. Dough Mgmt., Inc., 2019 BL 123564, N.D. Ind., 3:18CV708-PPS/MGG, 4/5/19.

Case: Individual Employment Rights/Wrongful Discharge (W.D. Wash.)

Individuals employed by a Washington state Indian Tribe are entitled to summary judgment on the wrongful discharge in violation of public policy claim of an at-will employee who was suspended and terminated by them, and then allegedly excluded from the Sauk-Suiattle Indian Tribe Reservation. A wrongful discharge claim can't be asserted against an entity other than one's employer, and the claim doesn't run to co-workers or supervisors who might have been involved in the decision to end the employment relationship, a court said. The case is Dahlstrom v. United States, 2019 BL 123858, W.D. Wash., No. C16-1874RSL, 4/8/19.

Case: Disability Discrimination/Discharge (N.D. Iowa)

An Iowa medical center didn't violate the state disability law when it fired a credentialing coordinator for poor performance one month after she was diagnosed with anxiety, given that the center wasn't aware of her disability until long after her performance issues had arisen and her supervisor had tried unsuccessfully to assist her in performing her job. Further, the employee's requested accommodation of assignment of her duties that caused her stress to her co-workers wasn't reasonable, she received the additional training she requested without a change in performance, and she rejected the suggestion that she find a more manageable job at the center, the court found. The case is Upah v. Mercy Med. Ctr., 2019 BL 125186, N.D. Iowa, 18-CV-63-CJW-KEM, 4/8/19.

Case: Wage & Hour/Hours Worked (N.D. Iowa)

A credentialing coordinator for an Iowa hospital failed to show the hospital owes her unpaid overtime premiums, because the hospital encouraged her to report all hours that she worked, it compensated her accurately each time she notified her manager that she had worked overtime, and it isn't responsible for paying her for overtime work of which it wasn't aware. The case is Upah v. Mercy Med. Ctr., 2019 BL 125186, N.D. Iowa, 18-CV-63-CJW-KEM, 4/8/19.

Case: Discrimination/Discharge (10th Cir.)

A systems test mechanical technician may not proceed with his claim that a technology company in New Mexico fired him because of his age, rather than for lying during a disciplinary investigation and for safety violations. His allegations, including that there were inconsistencies in the reasons he was fired and that the company didn't follow policy when it fired him, were unfounded and he didn't show that his age was a factor in the firing decision. The case is .

Case: Wage & Hour/Burden of Proof (E.D. Okla.)

Three Oklahoma employees who said they were jointly employed by two gas stations and a hotel operating as a Budget Inn can proceed with their claims for unpaid overtime, unpaid minimum wages, and FLSA retaliation, because the employers submitted no uncontested facts to support their motion for summary judgment. The court ruled that the employers' unsupported counter arguments—that they weren't subject to the FLSA and that the employees didn't prove the elements of their claims—weren't sufficient to prevail on summary judgment. The case is Zeeshan v. Zainab Petroleum, Inc., 2019 BL 125170, E.D. Okla., CIV-17-447-KEW, 4/8/19.

Case: Wage & Hour/Commissions (N.D. Cal.)

A software sales representative for International Business Machines Corporation cannot proceed with his claim under California Labor Code's Section 221, saying that IBM refused to pay him his full commission because it was "too much money," despite a provision in his "Incentive Plan Letter" stating that there were no caps on commissions. Section 221 only protects commission income guaranteed by contract, and his "Incentive Plan Letter"

was not a contract, the court ruled. The case is Beard v. Int'l Bus. Machs. Corp., 2019 BL 124430, N.D. Cal., No. C 18-06783 WHA, 4/7/19.

Case: Discrimination/Claim Preclusion (6th Cir.)

A federal district court erred in dismissing a male former employee's sexual harassment and discrimination complaint against Nike in Tennessee for claim preclusion. There wasn't a final decision on the merits because the complaint was dismissed without prejudice on the same day that the court entered final judgment on the underlying claim, so he wasn't able to make any revisions or corrections on his complaint, the court said. The case is Wingo v. Nike, Inc., 2019 BL 123658, 6th Cir., 18-6083, unpublished 4/5/19.

Case: FMLA/Retaliation (S.D. Tex.)

An ex-employee's Family and Medical Leave Act retaliation claim survives an engineering company's motion for summary judgment, because conflicting reasons for his selection for lay off in a reduction in force on the day that he returned from disability leave, which was less than two months after his FMLA leave expired, may allow him to show that a decrease in workload wasn't the real reason he was essentially fired. The case is Caplan v. Fluor Enters., Inc., 2019 BL 123627, S.D. Tex., No. H-17-2083, 4/8/19.

Case: Disability Discrimination/Reduction in Force (S.D. Tex.)

A quality specialist can go ahead with his disability bias claim after an engineering company selected him for discharge in reduction in force on the day that he returned from medical leave for the diagnosis and treatment of colitis. Although the company consistently said that he was selected due to a decrease in workload, his manager contradicted the company's explanation of why the employee was selected instead of any other co-worker, thus raising a factual issue as to whether the stated reason for his selection was pretext for discrimination, the court found. The case is Caplan v. Fluor Enters., Inc., 2019 BL 123627, S.D. Tex., No. H-17-2083, 4/8/19.

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From: Employment Law360
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Subject: MoFo Presses For Sanctions In Pregnancy Bias Battle
Date: Wednesday, April 10, 2019 4:06:11 AM

EMPLOYMENT

Wednesday, April 10, 2019

TOP NEWS

MoFo Presses For Sanctions In Pregnancy Bias Battle

Morrison & Foerster LLP wants a California federal court to sanction Sanford Heisler Sharp LLP and one of the women it represents in a pregnancy discrimination class action, saying an ex-associate brought claims she knew were barred by a severance agreement.

Read full article »

Contractor Bias Watchdog Poised To Drop First Opinion Letter

The Office of Federal Contract Compliance Programs will soon release its first opinion letter ever, Director Craig Leen said Tuesday at a Manhattan outreach event meant to break down barriers between the agency and the federal contractors it monitors for job discrimination.

Read full article »

Mass. Justices Back Unions On Exclusive Representation

Massachusetts' highest court affirmed the exclusive right of unions to bargain for their employees Tuesday, rejecting a challenge by a group of educators who said they deserve a seat at the table in negotiations even though they aren't union members.

Read full article »

Facebook Can Fight OT Class Cert. In 7th Circ.

An Illinois federal judge on Tuesday paused an overtime pay action against Facebook to allow the Seventh Circuit to review whether arbitration agreements would bar more than half a conditionally certified class from participating in the case.

Read full article »

Medical Supplier Dodges Spousal Bias Claims At 8th Circ.

The Eighth Circuit on Tuesday refused to revive a suit from a former Handi Medical Supply customer service representative alleging the medical supply store retaliated against her for complaining she faced discrimination because her husband had bipolar disorder.

Read full article »

DISCRIMINATION

EEOC Should Speed Up Pay Data Collection, Court Hears

Advocacy groups that recently won reinstatement of the U.S. Equal Employment Opportunity Commission's expanded pay data survey told a D.C. federal judge on Monday to reject the agency's plan to collect that data from large employers by Sept. 30 and instead order that it get done by the end of May.

Read full article »

10th Circ. Upholds Tech Co.'s Win In Age Bias Suit

The Tenth Circuit on Tuesday backed Jacobs Technology Inc.'s victory in a suit brought by a former worker who said the company's decision to fire him

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New Cases

Discrimination (47)
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after an allegedly staged truck accident was an act of age discrimination.
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La. Court Sanctions Atty Suspected Of Using Bathroom Cam

Louisiana's top state court has handed an attorney two years' probation over misconduct related to suspicions he installed a surveillance camera inside a bathroom at his Colorado-based law office, mirroring sanctions a court in the Centennial State placed on the lawyer in November.
Read full article »

WAGE & HOUR

Ga. Food Distributor To Pay $1.8M After FLSA Probe

A Georgia importer and distributor of Chinese food will have to cough up more than $1.8 million for allegedly shorting a group of workers on minimum wage and overtime pay by only paying them fixed amounts in violation of the Fair Labor Standards Act, according to the U.S. Department of Labor.
Read full article »

Don't Change Colo. Contract Law For Our Case, Strippers Say

A group of strippers suing their employers urged the Colorado Supreme Court on Tuesday not to expand the state's rules governing arbitration agreements, telling the court it could end up altering Colorado's entire contract law scheme to deal with one case.
Read full article »

Fla. AG Seeks Justices' Thoughts On Minimum Wage Petition

The Florida attorney general asked the state's Supreme Court on Monday to weigh in on the validity of a voter initiative petition proposing an amendment to the Florida Constitution that would raise the minimum wage to $15 per hour by 2026.
Read full article »

NONCOMPETES

21st Century Oncology Blasts Noncompete Antitrust Suit

21st Century Oncology has hit back against a group of its own oncologists suing the cancer treatment center in Florida federal court for antitrust violations over its noncompete agreements, calling their suit a "fatally flawed" bid to "dress up" simple employment claims as an antitrust case.
Read full article »

EXECUTIVE COMPENSATION

Credit Suisse Exec Owes Jefferies $1.5M Over Snubbed Offer

Jefferies Financial Group asked a New York federal judge Tuesday to confirm a $1.5 million award an arbitration panel held a Credit Suisse Securities director owes the financial services firm after he backed out of an employment agreement.
Read full article »

EXPERT ANALYSIS

A Door Opens For NJ Worker Medical Marijuana Bias Claims

The New Jersey Appellate Division's recent ruling in Wild v. Carriage Funeral Holdings provides a blueprint for employees to bring medical marijuana claims under the New Jersey Law Against Discrimination, say Ivo Becica and Joel Clymer of Obermayer Rebmann.
Read full article »

Freelance Attorneys Are An Asset To In-House Legal Teams

With recent technological advances and a broader acceptance of flexible

Stephan Zouras
Steptoe & Johnson LLP
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GOVERNMENT AGENCIES

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work arrangements, the opportunity for freelance attorneys is greater than ever, as is the value that this freelance workforce can create for companies, says Ben Levi of InCloudCounsel.

Read full article »

LEGAL INDUSTRY

How Law Firms Can Weather The Inevitable Downturn

While the legal market has shown some of its strongest signs of growth since the onset of the Great Recession, firms would do well to begin planning for a reversal, according to panelists discussing law firm economics at a conference Tuesday.

Read full article »

The Way Forward For Law Firms Is Less Hierarchy

Regulations preventing nonlawyers from holding equity in a law firm are just one piece of an outdated culture holding law firms back, and the market won't wait for them to come around, two law professors warned a conference of legal industry marketers on Tuesday.

Read full article »

Texas Judge Who Accidentally Resigned Denied 2nd Chance

A Texas civil court judge who accidentally resigned when he posted about his intent to run for the state Supreme Court was replaced on Tuesday by the Harris County Commissioners Court, which said keeping him in place would jeopardize his independence.

Read full article »

Senate Confirms Trump High Court Short-Lister For Judgeship

The Senate confirmed two more of President Donald Trump's nominees to district courts Tuesday, including a trial court post for Oklahoma Supreme Court Justice Patrick Wyrick, who was on the president's shortlist for a U.S. Supreme Court vacancy.

Read full article »

Trump's Deputy AG Pick To Take Hot Seat Before Senate Panel

President Donald Trump's choice for the U.S. Department of Justice's second-in-command will face his Senate confirmation hearing Wednesday, an hourslong public test of the Kirkland & Ellis LLP veteran who has faced lawmakers' criticism for having never served as a prosecutor.

Read full article »

Del. Bankruptcy Judge Kevin Gross To Retire In March 2020

Delaware Bankruptcy Judge Kevin Gross is slated to retire from the bench in March 2020, capping a 14-year term that saw his court handle some of the nation's biggest and most sensitive cases, during which he emerged as a sought-after mediator.

Read full article »

ABA Hammers Trump Administration For Restricting ICC Visas

American Bar Association President Bob Carlson on Tuesday called upon the Trump administration to reverse its push to restrict the visas of International Criminal Court staff responsible for a pending investigation into alleged U.S. war crimes in Afghanistan.

Read full article »

Steptoe To Close Phoenix Office As Ranks Halved By Dentons

Steptoe & Johnson LLP will close its Phoenix office as nine of the outpost's attorneys defect to Dentons, the firms confirmed Tuesday.

Read full article »

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U.S. Environmental Protection Agency
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From: Bloomberg Law Daily Labor Report
To: Ring, John
Subject: First Move: EEOC Raises Pay Data Security Scare
Date: Wednesday, April 10, 2019 7:07:01 AM

What you need to know to start your day.

EEOC Raises Pay Data Security Scare

By Patricio Chile

The Equal Employment Opportunity Commission says it can collect employee pay data by Sept. 30. The catch? It would need to turn to an outside contractor to meet the deadline.

- **Privacy Risk:** More than 60,000 employers could turn their wage and hour data over to NORC at the University of Chicago, but employer groups and data security experts say that involving any **third party** inherently comes with risk.

- **Oversight Concerns:** Worker advocates are saying information security isn't the real reason that employers are worried about turning over the data—it's more about companies opposing oversight of **pay practices**, Paige Smith reports.

A technician uses a laptop to control data storage servers while working in a server room.
Photographer: Andrey Rudakov/Bloomberg via Getty Images

LABOR DEPARTMENT TO GET NEW WAGE CHIEF

The Senate is set to vote today to confirm Cheryl Stanton for Labor Department Wage and Hour Administrator. The vote comes after lawmakers recently approved a move to shrink required floor debate times for certain Trump administration nominees.

- **Full Slate:** The South Carolina lawyer would join the department as it works to finalize a trio of new **wage and hour regulations**. That includes proposed rules to update overtime pay requirements and limit "joint employer" liability for franchise and other businesses.

- **Wage Police:** Democrats have chided the DOL for a program that allows businesses to self-report certain **minimum wage** and **overtime** violations.

WHAT ELSE WE'RE WATCHING

- **Work Suits:** Lowe's Home Centers was accused of **bias and harassment** in four lawsuits filed in federal court last week. Read about this and other cases in our weekly "New Work Suits."

- **Workplace Harassment:** Sen. Patty Murray (D-Wash.) introduced legislation yesterday which aims to stop **workplace harassment**.

- **Rosen Nomination:** The decades Jeffrey Rosen spent as a white collar attorney representing companies such as General Motors, PG&E and Raytheon Corp. are likely to guide his approach to the role of **Deputy Attorney General**, should he clinch Senate confirmation.

- **Trump Nominee:** President Donald Trump's pick to lead the **Office of Personnel Management** may have the connections and experience to help the administration streamline how it manages people, but worker unions aren't so sure she'll be good for the agency, sources told Louis LaBrecque.

PRACTITIONER INSIGHTS

What Makes a Great Expert Witness? Look for the Four C's
Expert witnesses are key in the courtroom, as more complicated disputes need clear explanation to a jury. But, there's little agreement on what makes a great witness. **GLG Law's** David Solomon gives four characteristics to look for—clear communication, coachability, confidence, and candor.

DAILY RUNDOWN

Top Stories

Pilgrim's Pride Shakes Claims of Worker Fired Over Absences
A supervisor at a Pilgrim's Pride plant in Florida failed to show his violations of the company's absence policy were a cover for disability discrimination, the Eleventh Circuit ruled.

Fluor Worker With Colitis to Get Trial on ADA, FMLA Claims
Fluor Enterprises Inc.'s decision to lay off a quality assurance worker with colitis may have violated federal disability bias and medical leave laws, a federal judge ruled.

Chicago City Council Kills Predictive Scheduling Legislation
The Chicago City Council failed to advance a bill that would have required employers to provide workers two weeks' notice of scheduled shifts. Employers would have had to compensate employees for unscheduled work time and last-minute schedule changes.

Deputy Sheriff Can Lose Job for Campaigning Against Boss
A local sheriff didn't violate the First Amendment when he fired a deputy who openly campaigned against him, the Fourth Circuit said.

Discrimination

Worker With Bipolar Spouse Fails With Bias, Reprisal Claims
A customer service representative with a St. Paul, Minn., medical supply company failed to show her marital status or job bias complaint spurred her termination, the Eighth Circuit ruled.

Wage & Hour

Facebook Gets U.S. Chamber Backing in OT Lawsuit Notice Dispute
The U.S. Chamber of Commerce has thrown its weight behind Facebook Inc.'s effort to appeal a recent federal court decision that addressed whether workers who've executed arbitration agreements must be notified of wage and hour lawsuits.

Harassment & Retaliation

HBO Hit With Another Retaliation Suit by Parking Assistants
Home Box Office Inc. was hit with a new suit by parking production assistants alleging HBO blacklisted them for suing for overtime pay.

State & Local Laws

Failure to Pay Wages in Colorado May Soon Be Deemed Theft
Failure to pay wages would be reclassified as theft under a bill given preliminary approval in the Colorado House.

Texas Approves Digital Business Worker Classification Rule
Texas businesses operating solely on a digital platform will be able to designate their employees as “marketplace contractors” as a proposed rule got the green light from the state’s labor regulator.

Whistleblowers

Medicaid Whistleblower Who Didn’t Show Retaliation Loses Appeal
A regional vice president for Health Management Systems lost a whistleblower claim stemming from the company’s contracts to recover Medicaid funds.

Labor Relations

Labor Union Loses Arbitration Award for Reassigned Work
A labor union’s arbitration victory after an employer reassigned work at a chemical plant must be tossed, a federal appeals court ruled April 8.

D.C. Hospital Faces Labor Complaint After Ousting Union
George Washington University Hospital is facing a labor complaint after deciding to stop recognizing a union representing roughly 150 of its workers.

WORKFLOWS

Dorsey & Whitney announced that Douglas S. Lang, a former Justice of the Fifth District Court of Appeals in Texas, has joined the firm’s Commercial Litigation practice group as Of Counsel in Dallas | **McGuireWoods** said that Kris Wigness joined the firm as senior counsel in New York from Israel Discount Bank of New York | **Covington & Burling** hired intellectual property litigator Teena Sankoorikal as a partner from Levine Lee | **Winston & Strawn** added corporate energy lawyer Jimmy Vallee to the Houston office from Paul Hastings | Crowell & Moring hired Jarno J. Vanto as a partner in the Privacy & Cybersecurity Group in New York | **Spilman Thomas & Battle** announced that Stephen Yslas, former general counsel at Northrop Grumman, will serve as a senior adviser in Pittsburgh | **Orrick, Herrington & Sutcliffe** said that Carolyn Frantz, Microsoft Corp.’s deputy general counsel and head of the technology giant’s corporate legal group, has joined the firm’s Supreme Court and appellate practice group | **Norton Rose Fulbright** announced that Samuel R. Ramer, who most recently served as Senior Associate Counsel to the President at the White House, has joined its Washington, DC office as a partner | **Fenwick & West** hired Evan Bienstock as a corporate partner in New York |

Willkie Farr & Gallagher added Alison Nemeth Steger as an associate in the Communications & Media Group in Washington from the FCC

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From: Martin, Andrew
Subject: Legal News FYI 04-10-11
Date: Wednesday, April 10, 2019 8:24:54 AM
Attachments: image001.png

Wednesday, April 10, 2019

United States: In Another NLRB Shift, An Employee's Complaint Was A Mere Gripe And Not Protected Concerted Activity

Mondaq Business Briefing 10 Apr 2019 01:12

Section 7 of the National Labor Relations Act protects employees—both union and nonunion—who engage in "concerted activities for the purpose of ... mutual aid and protection." However, not all employee complaints are shielded from consequence, and the...

United States: 2019: The Beginning Of The End For Mandatory Arbitration?

Mondaq Business Briefing 10 Apr 2019 01:11

The Federal Arbitration Act (FAA) provides that agreements to arbitrate claims are valid and enforceable. With the support of federal law, employers regularly craft and rely on broad arbitration agreements, some going so far as to require arbitrators to...

Chattanooga Volkswagen workers file petition to join United Auto Workers so they can bargain like other VW

Chattanooga Times/Free Press (Chattanooga, TN) 09 Apr 2019 18:07

Updated at 6:02 p.m. on Tuesday, April 9, 2019, with photos and more information. For he third time in about five years, some Volkswagen plant workers in Chattanooga are seeking an election to align with the United Auto Workers. "It's pressure from the...

It's Perfectly Clear Once Again— NLRB Limits "Perfectly Clear" Successor Exception

BNA - Labor & Employment Blog 09 Apr 2019 17:19

The circumstances under which an asset buyer has a duty to bargain with an incumbent union may be changing. In NLRB v. Burns Security Services, Inc., 406 U.S. 272 (1972), the Supreme Court held that an employer who purchases he assets of a unionized...

D.C. Hospital Faces Labor Complaint After Ousting Union

BloombergLaw - Daily Labor Report 09 Apr 2019 15:36

Unions • Hospital stops recognizing union, which alleges facility didn't have right to cancel contract • NLRB counsel has indicated desire to change policy on repudiation By Hassan A. Kanu George Washington University Hospital is facing a labor complaint...

A Harvard Professor Filed a Shareholder Lawsuit to Restrict Shareholder Rights

The Intercept 09 Apr 2019 14:00

Hal S. Scott speaks during a panel discussion at he Chicago Federal Reserve's annual conference in Chicago, Ill., on May, 7, 2009. Over the past two years, some senior officials at he Securities and Exchange Commission have indicated that they would be...

Players Hold Power Over the N.C.A.A., if They Feel the Hunger

New York Times, The (New York, NY) 09 Apr 2019 13:56

MINNEAPOLIS — This Final Four is the fifth anniversary of one of the most effective, if inadvertent, instances of athlete activism in college sports. This was when the Connecticut star Shabazz Napier , speaking to the news media shortly before the 2014...

Volkswagen Workers Make New Run at Unionizing Tenn. Plant (1)

BloombergLaw - Daily Labor Report 09 Apr 2019 13:16

• United Auto Workers files union election petition • Workers narrowly voted against union in heated 2014 contest By Chris Opfer Workers at a Volkswagen plant in Tennessee are taking another shot at trying to unionize. The United Auto Workers today filed...

NLRB Overrules Precedent And Limits Use Of Perfectly Clear Exception In Successorship Law

JD Supra: Labor & Employment Law 09 Apr 2019 09:11

On April 2, 2019, in a 3-1 decision split along party lines, the Trump administration's National Labor Relations Board (Board) appointees significantly narrowed he circumstances under which a successor employer will be construed as a perfectly clear.....

NLRB Narrows Situations ULP-Committing Successor Employers Are Precluded from Setting Initial Employment Terms

Thomson Reuters Practical Law : Labor & Employment 09 Apr 2019 00:00

In Ridgewood Health Care Center, Inc., the National Labor Relations Board (NLRB) held that although a successor employer hat discriminatorily refused to hire a targeted number of its predecessor's employees to avoid a successor bargaining obligation was...

NOTE: ACCESS THIS WITH YOUR WESTLAW CREDENTIALS

Can I ask or tell employees not to discuss pay?

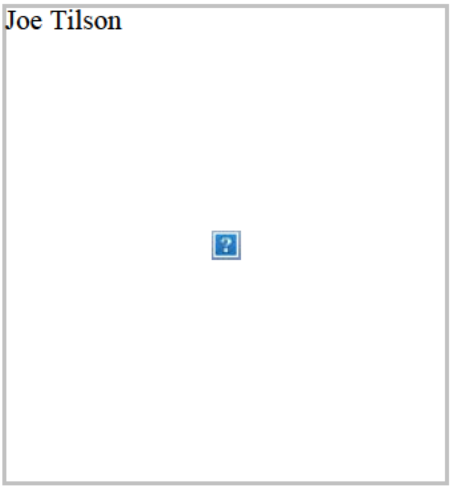
Rehmann: Business Wisdom 04 Apr 2019 14:20

Most people have worked at a job where here was a policy of not discussing pay among workers. For most, it's something that people just assume is in place and don't question. However, the truth is that these policies may not be legal. Indeed, they could...

Legal News FYI monitors news, cases, and legislative developments of interest to the NLRB. To be added to or removed from the distribution list contact Andrew Martin. Please note that these are external links and the Agency takes no responsibility for their content.

From: ABA Section of Labor and Employment Law
To: Ring, John
Subject: LEL FLASH | April 2019
Date: Wednesday, April 10, 2019 9:44:05 AM

Chairs Column



It is hard to believe that I am over halfway through my term as Chair of the Section! I have thoroughly enjoyed my first six months on the job, and it has been an honor and privilege to serve our Section and our 18,000 members. And these are exciting times for the Section with the New Membership Model radically reducing dues from $450 to $75 for young members, record attendance this year at many Midwinter Meetings, the upcoming Leadership Development Program and our Second Trial Institute in September!

But perhaps the most exciting news is that on July 1, 2019, our Section Secretary, Judge Rebecca Pallmeyer, will become the first female Chief Judge in the 200-year history of the U.S. District Court for the Northern District of Illinois. Judge Pallmeyer has been a phenomenal contributor to the Section for many years and an inspirational teacher of young lawyers. Judge Pallmeyer has not only spoken at many of our Annual Conferences, but she also has presided as the Judge each year for the Regional Finals of our Law Student Trial Advocacy Competition as well as our inaugural Trial Institute. As Section Secretary, she also delivered an insightful and entertaining Supreme Court Review at the 2018 Annual Conference in San Francisco. Congratulations Judge Pallmeyer on this great honor, and a heartfelt thank you for all of your support for our wonderful Section over the years!

Judge Pallmeyer also has been an ardent supporter of diversity on the bench and in the legal profession. Judge Pallmeyer said she is looking at this next chapter as a chance to show women that they should not give up on their dreams because determination can lead to success in a profession where there is a significant pipeline of women leaders. “Women have been in the pipeline for years and years and decades,” she said. “They do rise to leadership positions in a way that they couldn’t have 20 or 30 years ago and certainly that applies to me.”

In reflecting on this major accomplishment by our Section Secretary, it brings to mind the progress that our

Section has made in promoting women and diverse lawyers to leadership positions in recent years. Currently, over 50% of our leadership positions are held by women and a record 30% are held by diverse attorneys. It was so great to see so many diverse attorneys attend our Annual Conference and Midwinter Meetings this year! While we are never satisfied nor do we want to become complacent, it is apparent that our diversity and inclusion outreach efforts are not just gaining traction but also delivering in making our Section more representative of the members it serves.

Our Leadership Development Program (LDP) is one of the programs that the Section developed a number of years ago to provide a vehicle for women and diverse attorneys to jump start their Section involvement and secure leadership positions in the Section early in their careers. Diversity and Inclusion is a key component of the curriculum as well as effective mentoring relationships, communication skills, conflict resolution, emotional intelligence and self-assessment. Applications are now being accepted for our next Leadership Development Program this summer from July 17-19 in Chicago. Funding for travel and accommodations will be provided by the Section for those selected to participate. Visit the website to access the application form.

The Section also continues to partner with diverse bar associations on CLE programs and other projects to build bridges between the membership of those organizations and the Section and create a pipeline of diverse Section members. The 2019 Trial Institute will be co-sponsored once again by Chicago Kent Law School and the National Employment Law Council (NELC), a minority bar association comprised of prominent management side labor and employment lawyers. This is one of the few trial advocacy "boot camps" that focuses exclusively on building trial skills for employment law cases. On the final day, participants will try an employment case from start to finish before actual federal judges in federal courtrooms in Chicago. The Section is now accepting applications for our 2nd Trial Institute, which will take place in Chicago on September 19–22, 2019, and I urge you to apply for this excellent program if you are interested in honing your trial skills.

Finally, as our 2019 Midwinter Meeting season is winding down, I would like to extend my congratulations to our Standing Committee Co-Chairs for putting on a series of extremely successful programs. I attended many of these meetings and observed firsthand the extraordinary quality of the presentations, and I had the opportunity to meet and have meaningful conversations with EEOC Commissioners, the General Counsel and Members of the NLRB and many other high level government officials. Most of the meetings were very well attended, and we achieved record attendance at several meetings. Our final meetings will take place over the next two months:

National Symposium on Technology in Labor and Employment Law
Presented by the Technology in the Practice and Workplace Committee
April 10-12
Chicago, Illinois

International Labor and Employment Law Committee Midyear Meeting
May 5-9
Buenos Aires, Argentina

Both promise to be excellent meetings, and if you have not already attended a Midwinter Meeting this year, I urge you to sign up for one of these meetings. I can assure you that these two meetings will not disappoint!

Preparing to Compete: When does it cross the line?

By: David L. Johnson

An employee's ability to take preparatory measures to compete while still employed raises a number of issues. Let's take a look.

Duty of Loyalty

It appears to be universally recognized that every employee, regardless of position, owes a common law duty of loyalty to his or her employer. *See, e.g., American Fed. Grp., Ltd. v. Rothenberg*, 136 F.3d 897, 905 (2nd Cir. 1998). Thus, "[t]hroughout the duration of an agency relationship, an agent has a duty to refrain from competing with the principal . . ." Restatement (Third) of Agency § 8.04 (2006). In the absence of an enforceable contract, this duty ends when employment ends.

As a general matter, employees do not breach their duty of loyalty by taking preliminary, limited measures to prepare to compete. *See, e.g., Navigant Consulting, Inc. v. Wilkinson*, 508 F.3d 277, 284 (5th Cir. 2007); Restatement (Second) of Agency § 393 cmt. e (1958). On the other hand, preparatory measures "may become wrongful when they constitute concerted action designed with the purpose of leaving the principal in the lurch." Restatement (Third) of Agency § 8.04 cmt. b; *see also also* Restatement (Third) of Agency § 8.04 cmt. c (although an employee who plans to compete with his employer does not owe a duty to disclose this fact, the employee does owe a "duty not to mislead" his employer of his intentions). Further, the employee may not prepare to compete while "on the clock," while on his/her employer's property, or while using the employer's property; nor should an officer usurp a corporate opportunity. *See, e.g., Berman v. Sugo*, LLC, 580 F. Supp.2d 191, 206 (S.D. N.Y. 2008); Scott v. Beth Israel Med. Center, Inc., 47 A.D.3d 541, 850 N.Y.S.2d 81 (2008). Of course, misusing the employer's trade secrets or other proprietary information in preparation to compete is off limits. *Taser Int'l, Inc. v. Ward*, 231 P.3d 921 (Ariz. Ct. App. 2010).

Courts have been apprehensive about drawing a clear line between permissible preparatory measures and impermissible measures and, instead, have considered this a factual issue requiring consideration of the totality of the circumstances. *See, e.g., Cenveo Corp. v. Southern Graphic Sys.*, 784 F. Supp.2d 1130, 1136 (D. Minn. 2011); *Metzner*, 382 A.2d 564, 570 (Md. 1978). Courts have found that employees do not breach their duty of loyalty by performing the following:

- Incorporating a competing business. *See, e.g., ProductiveMD, LLC, v. 4UMD, LLC*, 821 F. Supp. 2d 955, 964 (M.D. Tenn. 2011); *ACI Chems., Inc. v. Metaplex, Inc.*, 615 So. 2d 1192 (Miss. 1993).
- Registering a trademark. *See, e.g., Abraham Zion Corp. v. Lebow*, 593 F. Supp. 551, 571 (S.D. N.Y. 1984).
- Purchasing equipment. *See, e.g., Maryland Metals, Inc. v. Metzner*, 382 A.2d 564, 571 (Md. 1978).
- Negotiating for the purchase of a competing business. *See, e.g., Tulumello v. W.J. Taylor Intern. Constr. Co.*, 84 A.D.2d 903, 446 N.Y.S.2d 673, 674 (1981).
- Opening a bank account, obtaining office space, and obtaining a telephone listings. *Harllee v. Prof'l. Serv. Indus., Inc.*, 619 So. 2d 298, 300 (Fla. Dist. Ct. App. 1992).
- Advising clients of his/her future plans to compete provided that the notifications are not solicitations. See, e.g., ProductiveMD, 821 F. Supp. 2d at 964; *American Credit Indem. Co. v. Sacks*, 213 Cal. App.3d 622, 636, 262 Cal. Rptr. 92 (1989); *Prof'l Energy Mgmt., Inc. v. Necaise*, 684 S.E.2d 374, 378 (Ga. Ct. App. 2009).

Restrictive Covenants Agreements

An individual's ability to take preparatory measures to compete—either before or after termination of employment—may also be limited by a restrictive covenants agreement. If the agreement is worded broadly enough that it restricts an individual's ability to take preparatory measures to compete, employers should be ready to articulate the protectable business interest that would support the covenant.

In *Berardi's Fresh Roast, Inc. v. PMD Enter., Inc.*, 2008 Ohio App. Lexis 4618 (Ohio Ct. App. 2008), the defendant, before the restrictive period elapsed, incorporated a competing coffee business; approached lenders about financing; gathered information about pricing, products, and supplies; signed a lease; and purchased equipment for the new facility. *Id.* at *4. Citing duty of loyalty case law that "preparing to compete does not equate to actively competing," the Ohio Court of Appeals concluded that the defendant "was not actively engaging in the coffee industry" and "[i]nstead was merely making preparations so that he could commence business the day after the noncompetition agreement expired." *Id.* at *14; *see also Brooks Automation, Inc. v. BlueShift Tech., Inc.*, 2007 Mass. App. Unpub. LEXIS 1, at *5 (Mass. App. Ct. 2007) (noting that a former employee's noncompetition covenant did not explicitly preclude preparation to compete and stating that "[n]o case in our jurisdiction stands for the proposition that a current or former employee, even one subject to a noncompetition agreement or a duty of loyalty, may not prepare to

compete with his or her employer”).

On the other hand, in a recent case, *Great Am. Opportunities, Inc. v. Patterson*, 2018 WL 1678077 (Tenn. Ct. App. Apr. 6, 2018), the Tennessee Court of Appeals enforced an agreement that prevented an employee from “prepar[ing] to compete directly or indirectly” while still employed. The court found that the defendant breached the agreement because, while still employed, he “concocted a plan to leave,” provided his new employer with a client list and sales estimate, and signed an agreement with his new employer. *Id.* at *27. Moreover, the defendant managed to enter into 12 customer agreements for his new employer only four days after leaving despite only entering into half of that number for his former employer during the months leading up to his resignation. *Id.* According to the court, “[t]hese facts establish, at the very least, that Employee was preparing to compete and failed to dedicate his best efforts while still employed by” the plaintiff. *Id.*

Conclusion

Based on fundamental principles of freedom of enterprise, employees generally may take basic measures to prepare to compete with their employer, regardless of whether they are subject to a restrictive covenants agreement. Typically, the key is whether the employee’s activities are placing the employer at an unfair competitive disadvantage. By staying abreast of applicable law, legal counsel may provide effective representation when these issues arise.

David Johnson is a Partner in the Nashville, Tennessee office of Butler Snow LLP.

Hands-On Trial Experience…Without the Stress!

By: Jill Walsh

Let’s face it: most cases never reach trial. If they do, many law firms tend to have a senior partner swoop in and try the case. As a result, attorneys with years of experience may have minimal trial experience, or none at all. If you find yourself in such a situation, fear not; the ABA’s Trial Advocacy Boot Camp is right around the corner! The Section’s 2nd Labor and Employment Law Trial Institute will be conducted September 19-22 in Chicago.

Boot Camp? Sounds tough. It is…but in an incredibly rewarding way. In September 2017, I attended the program in Chicago and it exceeded my expectations. Attendees included counsel for employees, employers, and unions, with wide-ranging years of experience.

What can you expect? Over the course of three days, outstanding faculty comprised of judges and attorneys from across the country teach participants the ins and outs of trial strategy, preparation, and delivery. Through a combination of lectures and hands-on small group breakout sessions, participants learn and practice invaluable trial skills in a setting intended to mimic the demanding pace of a real trial. Topics include voir dire, opening statements, witness examinations, objections, closings, and more. On the final day, using a case packet adapted from an actual employment case, participants try their case from start to finish. Throughout the seminar and at the conclusion of trial, you’ll receive personalized feedback from faculty and team leaders.

In addition, the networking is incredible. After a welcome orientation, participants are broken up into small groups and there’s nothing like practicing your skills and prepping for trial with complete strangers to break the ice. By the end of the three days, you are sure to walk away with a number of new connections and enhanced trial skills.

Learn all about the program and submit an application on the Section website.

Jill Walsh is an attorney licensed in PA and NJ, working at Hardwick Benfer, LLC, a women-owned firm based out of Doylestown PA. She primarily spends her time righting the wrongs of aggrieved employees as well as counseling employers on sound business practices, policies, investigations, terminations and training. Prior to practicing law, Jill worked on the front lines as an HR professional, most recently as VP

of HR for a Fortune 500 firm.

Apply for the Leadership Development Program – Deadline April 12

The Section is now accepting applications for the next Leadership Development Program ("LDP"), which will take place in Chicago from July 17-19, 2019. The LDP provides a pathway for leadership within the Section by offering training in leadership skills to a select group of Section members and then engaging them in a wide range of Section activities. The Section encourages applications from active Section members as well as Section members who have been active in other bar organizations and want to get involved with our Section. The LDP is in place to identify a diverse group of future leaders from all constituencies and to provide them the tools they need not only to move into leadership positions in the Section, but to become successful labor and employment lawyers. Diversity and inclusion is a key component of the curriculum, as well as effective mentoring relationships, communication skills, conflict resolution, emotional intelligence and self-assessment. Graduates of the LDP, many of whom are now Section Leaders, have raved about the outstanding opportunities the LDP provides:

Participating in the LDP and later serving as a co-chair of the LDP Committee were both great experiences for me. I've had the opportunity to work, and become friends, with attorneys from all constituencies. Lessons learned in the LDP have been extremely beneficial in my other leadership positions within the Section. ***Eunice Washington, Class of 2009***

I was interested in being part of LDP because I thought the experience would allow me to meet people and become more active in the Section. It was all those things, but what surprised me is I learned valuable skills and insights that have benefited my legal practice. I highly recommend it to anyone that is interested in becoming more effective in their legal practice or the Section. ***Scott Kelly, Class of 2009***

Funding for travel and hotel accommodations will be provided by the Section for those selected to participate. Apply Today!

Recognize Your Labor and Employment Law Colleagues

Nominations are now being accepted for the ABA Section of Labor and Employment Law's Frances Perkins Public Service Award and the Federal Labor and Employment Attorney of the Year Award. These prestigious Awards are excellent avenues through which you may recognize service by your colleagues.

Visit the webpages for complete criteria and nomination directions. Please contact the Section office with any questions. **Nominations will be accepted through July 2019.**

Connect with us our NEW Section LinkedIn Page!

Let us Spotlight YOU and your work on the Section webpage. Complete the online form TODAY!

Connect with the Section--Write for the FLASH!

christopher.meacham@americanbar.orgDavid JohnsonJohn HoLisa GomezBernard Mazaheri John Henderson The ABA Section of Labor and Employment Law's FLASH is an electronic publication sent to all Section members that provides members with a concise update via email about Section activities and developments in our area of practice. A dedicated group of Section members serve as co-chairs of the LEL FLASH, and they welcome articles from Section members on substantive issues for publication in the FLASH. If you have an idea for a proposed article, please contact Chris Meacham at . Alternatively, please

feel free to contact any of the FLASH co-chairs , , , and . We welcome your input!

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From: Morning Shift
To: Ring, John
Subject: POLITICO"s Morning Shift: DHS acting deputy is out — Organized labor"s in no hurry to endorse — Former McDonald"s chief raps McDonald"s for minimum wage move
Date: Wednesday, April 10, 2019 10:04:09 AM

View online version

2018 Newsletter Logo: Morning Shift

04/10/2019 10:00 AM EDT

By REBECCA RAINEY (rrainey@politico.com; @RebeccaARainey)

Editor's Note: This edition of Morning Shift is published weekdays at 10 a.m. POLITICO Pro Employment & Immigration subscribers hold exclusive early access to the newsletter each morning at 6 a.m. To learn more about POLITICO Pro's comprehensive policy intelligence coverage, policy tools and services, click here.

QUICK FIX

— Acting Deputy DHS Secretary Claire Grady is out.

— Organized labor will slow-walk its 2020 endorsements.

— Former McDonald's chief raps McDonald's for pledge to no longer lobby against minimum wage hikes.

GOOD MORNING! It's Wednesday, April 10, and this is Morning Shift, your daily tipsheet on labor and immigration news. Send tips, exclusives and suggestions to rrainey@politico.com, thesson@politico.com, ikullgren@politico.com, and tnoah@politico.com. Follow us on Twitter at @RebeccaARainey, @tedhesson, @IanKullgren, and @TimothyNoah1.

DRIVING THE DAY

ANOTHER SHOE DROPS AT DHS: Claire Grady, acting deputy secretary at the Homeland Security Department, resigned effective today, departing DHS Secretary Kirstjen Nielsen tweeted early Tuesday evening. For those keeping score, this is the fourth DHS departure in five days, following Monday's removal of Secret Service Director Randolph "Tex" Alles; Nielsen's own announced resignation Sunday; and the White House's withdrawal Friday of Ron Vitiello to be director of U.S. Immigration and Customs Enforcement.

Still awaiting removal, according to administration officials, are USCIS director Lee Francis Cissna and DHS General Counsel John Mitnik. White House senior adviser Stephen Miller, a hard-line immigration restrictionist, is driving the shakeup, which President Donald Trump doesn't wish to hear described as a housecleaning. "I never said I was cleaning house," the president said Tuesday. "I don't know who came up with that expression. We have a lot of great people over there."

Grady's departure is the consequence of a federal statute that requires Grady, as acting deputy, to replace temporarily the departing Nielsen; since President Donald Trump has already designated Customs and Border Protection Commissioner Kevin McAleenan to be acting secretary, Grady had to be made unavailable. More here from POLITICO's Ted Hesson, and, on the legal issues surrounding DHS succession, here from POLITICO's Josh Gerstein and Stephanie

Beasley.

LABOR SLOW-WALKS 2020: As Democratic presidential contenders line up today to address a D.C. gathering of North America's Building Trades Unions, labor leaders are reluctant at this early stage to choose among them, POLITICO's Ian Kullgren and Natasha Korecki report. "Everybody's kind of taking a step back," said Steve Rosenthal, a former political director for the AFL-CIO who's advising unions on 2020 campaigns. "I don't see ... any movement toward any type of major endorsements."

More than a dozen national unions endorsed Hillary Clinton in 2015, including the American Federation of Teachers and the SEIU. That prompted criticism from the rank and file as Bernie Sanders' presidential bid gained momentum. Then, of course, Clinton lost in November, at least partly because she scored the narrowest majority of union households seen by any Democratic presidential candidate since Walter Mondale in 1984. Now organized labor says it won't make that mistake again. "There's no process in place. We're not making any endorsements," said Sean McGarvey, president of the North America's Building Trades Unions. "We don't see ourselves making any endorsements any time early ... if at all." More here**.**

DEMS INTRODUCE HARASSMENT BILL: I n the first presidential election of the #MeToo era, Democratic presidential candidates lined up Tuesday behind a broad proposal to strengthen protections against workplace harassment, POLITICO's Alice Miranda Ollstein reports. The legislation, introduced Tuesday by Sen. Patty Murray (D-Wash.), would eliminate the tipped minimum wage, bar mandatory arbitration and pre-employment non-disclosure agreements, and extend civil rights protections for LGBT workers. The bill would also extend federal protections against harassment to independent contractors and interns.

Sens. Amy Klobuchar, Kamala Harris, Cory Booker, Kirsten Gillibrand, Bernie Sanders and Elizabeth Warren all signed on to **the bill, which for some of them cuts close to the bone. Sanders, Harris, Gillibrand, and Klobuchar have all been accused of presiding over, tolerating, or contributing to various types of hostile work environments. "They know they are under the microscope when it comes to sexual harassment," Ollstein writes, "Their campaigns have implemented mandatory trainings, set up anonymous hotlines for staff to report misconduct, and rigorously screened new hires for any history of past accusations." More here.**

KENNEDY BILL BARS NDAS IN HARASSMENT SETTLEMENTS: Republican Sen. John Kennedy is preparing to introduce legislation to disallow non-disclosure agreements in sexual harassment settlements if the alleged perpetrator is a public official or a public employee, POLITICO's Marianne LeVine reports.

AT THE BORDER

WH TO APPEAL 'REMAIN IN MEXICO' LOSS: The White House said in a statement Tuesday that it will appeal a Monday court ruling halting the Trump administration's "remain in Mexico" policy on the grounds that the "cooperative program" was "extensively negotiated with the government of Mexico." (Mexico has insisted it was a unilateral move by the U.S.) A San Francisco-based judge issued a preliminary injunction Monday against the administration's policy of forcing certain non-Mexican asylum seekers to wait in Mexico during their court proceedings. "This action gravely undermines the President's ability to address the crisis at the border with the tools Congress has authorized and disrupts the conduct of our foreign affairs," the statement from the White House said.

More immigration headlines:

"Trump's immigration plans face likely turbulence in courts," from POLITICO

"Border Patrol arrested nearly 93,000 migrants in March," from POLITICO

WAGES

BANK OF AMERICA HIKES MINIMUM TO $20: Bank of America CEO Brian Moynihan announced Tuesday that the bank will increase its hourly minimum wage to $20 over the next two years, POLITICO's Victoria Guida reports. "If you get a job at Bank of America, you'll make $41,000," Moynihan said on MSNBC, up from a current hourly minimum of about $16. In response, SEIU President Mary Kay Henry said in a written statement: "Bank of America is racing to raise wages for their lowest-paid employees thanks to the brave workers in the Fight for $15 and a union movement whose strikes, protests, and organizing on the job have made $15 and a union a demand that cannot be ignored."

The announcement came one day before Moynihan was set to appear before the House Financial Services Committee, where Democratic la wmakers are expected to excoriate corporate leaders for not passing tax-cut savings on to their employees. "From last summer to this summer, Bank of America will buy back more than $20

billion of its own stock," Guida notes. More here.

FORMER MCDONALD'S CEO RAPS WAGE MOVE: Ed Rensi, who was chief executive and president of McDonald's Corp. in the 1990s, doesn't approve of the fast-food chain's March pledge not to lobby against minimum-wage hikes. "McDonald's pursued a path of political correctness," Rensi wrote Tuesday in Forbes, "leaving policymakers, state restaurant associations, and franchisees unsure where it stands on radical wage proposals" and "providing a public relations coup for its detractors at the Service Employees International Union." POLITICO's Rebecca Rainey broke the news in March that McDonald's was halting its lobby efforts on minimum wage at all levels of government.

McDonald's' declar ation, Rensi wrote, blindsided McDonald's franchisees who were already "seeing their equity dwindle and margins squeezed." Rensi's most interesting point: "The corporation benefits when mandates force its franchisees to charge higher prices," because McDonald's Corp. "receives a portion of all sales as a percentage of rent and franchise fees." Read Rensi's piece here.

ON THE HILL

AWKWARD AT APPROPRIATIONS: The House Homeland Security appropriations panel postponed indefinitely a hearing scheduled for today with Acting ICE Director Ronald Vitiello, following the White House's decision Friday to withdraw Vitiello's nomination to lead the agency on a permanent basis. Rep. Lucille Roybal-Allard (D-Calif.), who chairs the subcommittee, said in a written statement: "It is unfortunate that the president is impulsively robbing the department of so much of its leadership at a time when it is more important than ever for Congress to hold the department accountable for its actions."

INSIDE THE AGENCIES

ROBOTS AT WALMART: In an effort to keep up with Amazon, mega-retailer Walmart is adding more machines and robots to its stores to take over tasks such as cleaning and sorting products that come off trucks, Sarah Nassauer and Chip Cutter report for the Wall Street Journal. This year the company plans to add "autonomous floor scrubbers" in 1,500 of its 4,600 stores, and machines that scan shelves in at least 300. "The company said the addition of a single machine can cut a few hours a day of work previously done by a human, or allow Walmart to allocate fewer people to complete a task," they write. More from the Journal here .

NOMINATIONS

CONFIRMATION CORNER:

Wage and Hour: The Senate late Tuesday afternoon voted to limit debate and invoke cloture on the nomination of Cheryl Stanton for Wage and Hour administrator, teeing up a Senate vote today.

PBGC: The Senate HELP Committee confirmed Gordon Hartogensis Tuesday to lead the Pension Benefit Guaranty Corporation. Hartogensis (whose brother-in-law is Senate Majority Leader Mitch McConnell) was cleared by the Senate Finance Committee late last month. His nomination now heads to the Senate floor. More from POLITICO's Rebecca Rainey here.

COFFEE BREAK

— "Joint employer rule provides clarity but may be overturned by courts," from Business Insurance

— "Trump denies there's any plan to restart family separations," from POLITICO

— "This undocumented worker and her husband were owed $11,000. Then their boss called the cops, they say." from The Washington Post

— "The role jobs play in opioid addiction recovery," from The Journalist's Resource

— "Committee had broken voting rules for years, gets scolding," from Roll Call

THAT'S ALL FOR MORNING SHIFT!

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Highlights

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TOP STORIES

Entrust Datacard Worker to Get Trial on Jury-Duty Bias Claims

By Patrick Dorrian

A jury must decide whether Entrust Datacard Corp. sacked a sales director because of his months-long grand jury duty rather than his alleged poor performance, a federal judge ruled.

Four Seasons Hotel Workers Keep Class Biometrics Suit in Court (1)

By Patrick Dorrian and Daniel R. Stoller

The Four Seasons Hotel Ltd. can't force arbitration of a class action alleging the fingerprint scanning system it uses to track employee hours violates Illinois' biometric privacy law, a state appeals court ruled.

EEOC May Contract Out Pay Data Gathering, Raising Security Fears

By Paige Smith

Business concerns over the security of their employee pay data jumped last week after the Equal Employment Opportunity Commission told a federal judge it would need the help of an outside contractor to meet the court's demand to collect the pay information.

Law Firms Warned About Diversity by Contractor Watchdog (1)

By Chris Opfer

The Trump administration's federal contractor police plans to take a closer look at diversity and discrimination at law firms, a Labor Department official said.

DISCRIMINATION

Manufacturing Group Calls for Uniform, Federal LGBT Rights Bill

By Tyrone Richardson

Manufacturers urged a House subcommittee on civil rights to push ahead with the Equality Act, a bill that would offer protections for LGBT individuals against discrimination at work and in public facilities.

WAGE & HOUR

NYC Transit Overtime Deal Won't Slow Down for Late Intervenor

By Porter Wells

A near-finalized settlement between a group of New York transit workers and their employer won't be derailed by an unrelated litigant's ill-timed attempt to intervene in the suit, a federal judge has ruled.

HARASSMENT & RETALIATION

LA Fitness's Arbitration Push Revived by Appeals Court

By Porter Wells

A trial judge failed to properly explain why it shut down a popular gym chain's effort to arbitrate a worker's sexual harassment lawsuit, a New Jersey appeals court said April 10.

Texas, New York Top List of States With Most Harassment Charges

By Paige Smith

Workers in Texas, New York, and Florida filed the most sexual harassment charges with the Equal Employment Opportunity Commission and state fair employment practice agencies in fiscal year 2018.

LABOR RELATIONS

Labor Union Wins Arbitration Dispute Reinstating Fired Member

By Julie Steinberg

A labor union won a victory when a federal appeals court said an arbitrator didn't exceed his authority in ordering an employee restored to his job without back pay.

Striking University of Illinois Graduate Assistants Ratify Pact

By Michael J. Bologna

Just days after settling a bruising three-week strike, graduate assistants at the University of Illinois at Chicago overwhelmingly ratified a new three-year pact that boosts wages 14 percent, cuts mandatory fees, and trims health benefit costs.

Federal Union Authority Wants Teachers Union Bias Suit Dismissed

By Porter Wells

The federal government's union authority has urged a federal court to put a stop to a teachers union's lawsuit that claims the agency is biased against organized labor.

Manufacturing Unions Lose Some Steam on Wage Increases

By Louis C. LaBrecque

Pay increases negotiated by manufacturing unions are slipping in 2019, the latest biweekly update of Bloomberg Law's database of U.S. wage settlements shows.

IMMIGRATION

Jump in H-1B Denials Affecting All Companies Seeking Visas

By Laura D. Francis

Nearly a third of H-1B visa petitions have been denied so far in fiscal year 2019, lending credence to employers' and immigration attorneys' complaints that getting the visas is getting more difficult.

LEGAL PROFESSION

More Diverse Trump Judicial Picks Get Senate Votes

By Patrick L. Gregory

The Senate cast key votes on Wednesday on two more of President Donald Trump's judicial selections, adding more diversity to a field of predominantly white males.

HEALTH CARE & BENEFITS

Health Savings Accounts Would Fund Family Leave Under GOP Plan

By Genevieve Douglas

House Republicans are exploring a potential "free-market" solution to federal paid family leave, using health savings accounts as a funding mechanism for new parents.

Anthem's $24M Settlement Over 401(k) Fees Gets Early OK

By Jacklyn Wille

Anthem Inc.'s pension committee received preliminary approval for a $23.65 million settlement with workers who said the company's 401(k) plan offered high-fee mutual fund share classes and paid excessive administrative fees.

ALSO IN THE NEWS

New Senate Order Could Kickstart Stalled Labor Nominations

By Tyrone Richardson and Jaclyn Diaz

President Donald Trump's choice to lead the Labor Department's division tasked with enforcing wage law violations has finally been confirmed after nearly a two-year long wait.

Presidential Hopefuls Talk Policy at Building Trades Union Event

By Andrew Wallender

Infrastructure was on the mind of nine Democratic presidential candidates and yet-to-announce contenders as they pitched their campaigns to Building Trades union members in Washington April 10.

Cancer Center Fires Back in Radiation Oncology Non-Compete Case

By Mike Leonard

21st Century Oncology Holdings Inc. has fired back at the doctors behind an antitrust lawsuit challenging its use of non-compete clauses, exclusive hospital contracts, and referral incentives, saying the suit “strains law and fact.”

New Work Suits: Lowe's Hit With Four Bias, Harassment Complaints

By Cynthia Harasty

Lowe’s Home Centers workers alleged race, disability, and sex bias as well as sexual harassment in four lawsuits they filed in federal courts.

PRACTITIONER INSIGHTS

INSIGHT: What Makes a Great Expert Witness? Look for the Four C’s

Expert witnesses are key in the courtroom, as more complicated disputes need clear explanation to a jury. But, there’s little agreement on what makes a great witness. GLG Law's David Solomon gives four characteristics to look for—clear communication, coachability, confidence, and candor.

LATEST CASES

Case: Discrimination/Demotion (N.D. Ill.)

A transportation security officer of Filipino descent may not proceed with his claim that the Department of Homeland Security demoted him from a "master coordination center officer" at O'Hare Airport because of his race and national origin. He didn't show that he was treated differently than any co-workers outside of his protected class and the Department demoted him because he was unable to satisfactorily perform the job duties of the position, such as failing to keep up with fast-paced security incidents. The case is Lichauco v. Kelly, 2019 BL 126572, N.D. Ill., 1:17-cv-7289, 4/9/19.

Case: Wage & Hour/Overtime Exemptions (D. Or.)

A bindery manager for an Oregon printing company may proceed to trial on his claim that he is owed overtime premiums due to misclassification as an overtime-exempt executive employee, because there are disputes as to whether his managerial duties, such as recommending candidates for hiring, were as important to the company as his non-managerial duty of operating binding machinery, whether he spent more time supervising employees or running machines, and whether he was under direct supervision of a product manager who oversaw the completion of tasks she assigned him. The case is Walker v. B & B Print Source, Inc., 2019 BL 125929, D. Or., 3: 17-cv-0 1159-AC, 4/8/19.

Case: Wage & Hour/Collective Certification (S.D. Tex.)

An employee of a Texas donut shop may not move forward with her proposed collective action based on her claim that she and other employees improperly received a flat biweekly paycheck that didn't compensate them for overtime. No other employees have indicated that they would like to opt into the lawsuit, and the fact that she was a close friend to the shop owners, who say they were training her to own the shop someday, as well as the fact that she's the only employee the owners accuse of stealing from the shop, show that she isn't sufficiently similarly situated to other employees. The case is Treadway v. Exxizz Foods, Inc., 2019 BL 126134, S.D. Tex., No. 2:18-CV-259, 4/9/19.

Case: Discrimination/Discharge (E.D.N.C.)

A female sergeant may not proceed with her claim that the North Carolina Department of Public Safety fired her because of her sex, rather than for violating the truthfulness policy. She didn't show that she was treated differently than any male sergeant under similar circumstances because, among other things, she failed to provide evidence that an alleged comparator dealt with the same supervisor or was subjected to the same standards. The case is Gupton v. N.C. Dep't of Pub. Safety, 2019 BL 126626, E.D.N.C., 5:18-CV-25-BR, 4/9/19.

Case: Disability Discrimination/Remand (S.D. Fla.)

A BB&T bank employee in Florida can take her state-law claim that she was fired due to her disability back to her home-state court, even though the North Carolina-based company said that she fraudulently added a tort claim against her Florida-citizen supervisor simply to defeat a federal court's diversity jurisdiction. The employee didn't have to prove that the supervisor acted with ulterior motives to the detriment of the company to establish her tortious interference claim, and whether the supervisor's discrimination resulted in the employee's termination is a factual issue that can't be resolved on a motion for remand, the court found. The case is Hartsing v. BB&T Corp., 2019 BL 125167, S.D. Fla., 19-cv-60098-BLOOM/Valle, 4/8/19.

Case: Individual Employment Rights/Privacy (Ill. App. Ct., 1st Dist.)

The Four Seasons Hotel can’t force arbitration of a class action alleging the fingerprint scanning system it uses to track employee hours violates the Illinois Biometric Privacy Act, a state appeals court ruled. The hotel chain argued that the allegations made by employees really describe "wage and hour" violations, and thus fall under its employee arbitration agreement. An employer's use of biometric data like employee fingerprints for payroll and timekeeping purposes doesn’t convert allegations of IBPA violations into wage-and-hour claims, and the arbitraton agreement doesn't cover IBPA claims, the court said. The case is Tony Liu v. Four Seasons Hotel, Ltd., 2019 BL 126112, Ill. App. Ct., 1st Dist., No. 1-18-2645, 4/9/19.

Case: Individual Employment Rights/First Amendment (4th Cir.)

A deputy sheriff in Loudoun County, Virginia failed to state a claim for the violation of his First Amendment rights to freedom of speech and political association. The deputy alleged his employment contract was not renewed by the re-elected sheriff because of the deputy's open political opposition to him during an election campaign. Public officials may fire certain employees who support a political opponent, the court said. The rule applies here because the Loudoun County sheriff was entitled to have a deputy willing to carry out his policies, it said. The case is McCaffrey v. Chapman, 2019 BL 125879, 4th Cir., No. 17-2198, 4/9/19.

Case: Individual Employment Rights/Whistleblowing (5th Cir.)

A former employee of FirstFleet Inc., who was fired in the first month of his employment because he caused several accidents, didn't deliver a time-sensitive order, and failed to follow directions, couldn't prove that his protected whistle-blowing activity contributed to the decision to fire him. His termination took place after his many mistakes at work, not directly after his protected activity, a court said. The case is Budr v. DOL Admin. Review Bd., 2019 BL 125633, 5th Cir., 18- 60579 Summary Calendar, 4/9/19.

Case: Individual Employment Rights/Contracts (6th Cir.)

The founder and former director general of IPX International Equatorial Guinea S.A. returned to Michigan in 2015 to set up an IPX subsidiary, but soon after, the company suspended him to investigate claims that he may have been stealing money. The director general sued for breach of an employment contract, and a federal district court in Michigan declined to hear the case based on forum non conveniens. The director claims that litigating in Equatorial Guinea is an inadequate remedy, because the country's judiciary is corrupt and he faces a risk of persecution. Affirming the district court, a federal appeals court concludes Equatorial Guinea is an adequate forum. The case is Jones v. IPX Int'l Equatorial Guinea, S.A., 2019 BL 125749, 6th Cir., 18-1405, 4/9/19.

Case: Disability Discrimination/Discharge (11th Cir.)

An ex-supervisor at a Pilgrim's Pride food processing facility in Florida didn't raise a triable issue on his claim that his firing for excessive absenteeism a month after neck surgery violated the state disability law, given that he failed to

provide a doctor's note for at least six days of work that he missed. Progressive discipline wasn't required before firing him because even one absence without an excuse or two-hour pre-shift notice was grounds for discharge under company policy and all of the alleged comparators provided medical excuses for their absences, so he was unable to refute the company's honest belief that his unexcused absences were grounds for termination, the court found. The case is Duckworth v. Pilgrim's Pride Corp., 2019 BL 125583, 11th Cir., 18-11006 Non-Argument Calendar, unpublished 4/9/19.

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From: Bloomberg Law Daily Labor Report
To: Ring, John
Subject: First Move: Comparison Evidence Rules in Bias Cases Still Murky
Date: Thursday, April 11, 2019 7:10:21 AM

What you need to know to start your day.

Comparison Evidence Rules in Bias Cases Still Murky

By Patricio Chile

Workers trying to prove job discrimination often have to compare themselves with similar colleagues who didn't face bias. How circuit courts calibrate the different elements of a legal test for proving discrimination, including comparison evidence, can significantly affect outcomes at the trial level.

- **Mixed Ruling:** A federal appeals court in Atlanta recently offered mixed messages on the rules for **comparison evidence**, highlighting the existing conflicts between and within circuits on how to handle those comparisons, Robert Iafolla reports.

- **Rigidity Risks:** "There are very few jobs for which a 'perfect' comparator exists," a legal scholar said. "As the economy continues to diversify, a rigid approach to comparators will cut the heart out of **anti-discrimination law**."

HARASSMENT CHARGES UP IN TEXAS, NEW YORK, FLORIDA

Workers in Texas, New York, and Florida filed the most sexual harassment charges with the Equal Employment Opportunity Commission and state fair employment agencies in fiscal year 2018, according to the EEOC's newly released enforcement statistics. All three states saw a jump in the number of charges filed compared to fiscal 2017, Paige Smith reports.

- **#MeToo Influence**: Eliminating workplace sexual harassment has been a priority for the EEOC, even before the rise of the #MeToo era in the fall of 2017. Still, the movement has had a "**significant impact**" on the number of harassment and retaliation charges filed, EEOC Acting Chair Victoria Lipnic said.

- **California Surprise:** One outlier was California, the nation's most populous state. Workers in the Golden State last year filed less than **half the number of charges** than workers in Texas. And California also saw a decrease in the number of charges filed compared to 2017.

EEOC Acting Chair Victoria Lipnic, pictured here, says the #MeToo era has had an impact on the growing

number of sexual harassment and retaliation claims filed with the agency.
Photographer: Joshua Roberts/Bloomberg

WHAT ELSE WE'RE WATCHING

- **No Concerted Activity:** A profanity-laced discussion between two Quicken Loans, Inc. employees **complaining about a customer call** did not contemplate taking any action to improve working conditions for the two employees or others and was **not protected concerted activity**, the NLRB ruled yesterday, overturning an administrative law judge's earlier decision.

- **College Faculty:** A local unit of the SEIU has refiled a petition to **unionize non-tenured professors** at Boston's **Northeastern University**. The refiling comes less than a month after a federal appeals court largely upheld an NLRB test for deciding when a college faculty subgroup can join a union.

- **State Laws:** A New Mexico law will limit questions about **criminal history** on job applications, and Vermont Democrats push ahead on a mandatory **paid family leave** proposal that conflicts with the governor's voluntary paid leave plan. Read more in "States of Work."

- **Labor Relations:** Union attorneys will discuss the Trump administration's **federal labor relations** program and executive orders that affect **federal workers** at the Society of Federal Labor & Employee Relations Professionals' annual conference today.

- **Gorsuch Tenure:** Justice Neil Gorsuch has now spent two years on the **Supreme Court,** largely fulfilling the hopes of conservatives, though his principles occasionally take him in another direction. Patrick Gregory and Kimberly Robinson have the story.

- **Legal Market:** A recent movement toward access to justice for poorer Americans may have a significant, unintended consequence: allowing the **Big Four accounting** companies to compete against top law firms in the U.S.

- **Federal Contractors:** The Trump administration's federal contractor watchdog plans to take a closer look at **diversity** and **discrimination** at law firms, a Labor Department official told Chris Opfer.

- **Judicial Picks:** The Senate cast key votes yesterday on two more of President Donald Trump's judicial selections, adding more diversity to a field of predominantly white males.

- **Immigration Officials:** The acting director of U.S. **Immigration and Customs Enforcement** quit yesterday, the latest departure among top immigration officials.

- **Jobless Claims:** The Employment and Training Administration issues its weekly jobless claims report at 8:30 a.m.

DAILY RUNDOWN

Entrust Datacard Worker to Get Trial on Jury-Duty Bias Claims
A jury must decide whether Entrust Datacard Corp. sacked a sales director because of his months-long grand jury duty rather than his alleged poor performance, a federal judge ruled.

Four Seasons Hotel Workers Keep Class Biometrics Suit in Court
The Four Seasons Hotel Ltd. can't force arbitration of a class action alleging the fingerprint scanning system it uses to track employee hours violates Illinois' biometric privacy law, a state appeals court ruled.

EEOC May Contract Out Pay Data Gathering, Raising Security Fears
Business concerns over the security of their employee pay data jumped last week after the Equal Employment Opportunity Commission told a federal judge it would need the help of an outside contractor to meet the court's demand to collect the pay information.

Wage & Hour

NYC Transit Overtime Deal Won't Slow Down for Late Intervenor
A near-finalized settlement between a group of New York transit workers and their employer won't be derailed by an unrelated litigant's ill-timed attempt to intervene in the suit, a federal judge has ruled.

Harassment & Retaliation

LA Fitness's Arbitration Push Revived by Appeals Court

A trial judge failed to properly explain why it shut down a popular gym chain's effort to arbitrate a worker's sexual harassment lawsuit, a New Jersey appeals court said April 10.

Labor Relations

Labor Union Wins Arbitration Dispute Reinstating Fired Member
A labor union won a victory when a federal appeals court said an arbitrator didn't exceed his authority in ordering an employee restored to his job without back pay.

Striking University of Illinois Graduate Assistants Ratify Pact
Just days after settling a bruising three-week strike, graduate assistants at the University of Illinois at Chicago overwhelmingly ratified a new three-year pact that boosts wages 14 percent, cuts mandatory fees, and trims health benefit costs.

Immigration

Jump in H-1B Denials Affecting All Companies Seeking Visas
Nearly a third of H-1B visa petitions have been denied so far in fiscal year 2019, lending credence to employers' and immigration attorneys' complaints that getting the visas is getting more difficult.

WORKFLOWS

Loeb & Loeb announced that Eric C. Lee has joined as a partner in the Corporate Practice in Los Angeles from Skadden, Arps, Slate, Meagher & Flom | **Cozen O'Connor** has rehired aviation industry attorney Rachel Welford to the firm's Transportation & Trade Group in Washington, DC from American Airlines | **Jackson Lewis** has added Danielle Alexis Matthews as a Principal in Dallas from Norton Rose Fulbright | **Covington & Burling** said that former Carlyle Group executive David Marchick is rejoining the firm as senior of counsel in Washington | **Paul Hastings** added white-collar partners Matthew Herrington and Tom Best from Steptoe & Johnson LLP in Washington | **Orrick, Herrington & Sutcliffe** has hired the former co-chairman of Morrison & Foerster's life sciences group, Stephen Thau, to Washington | **Nelson Mullins** named M&A partner Doug Starcher the new managing partner for its Orlando office | **Willkie Farr & Gallagher** grabbed Dechert tax lawyer Jane Scobie as a partner in

London from Kirkland & Ellis, and hired Alison Nemeth Steger, a former legal adviser to FCC Chairman Ajit Pai, as an associate in Washington | **Mintz** said former SEC enforcement attorney Sean T. Prosser joined the litigation department in its San Francisco, San Diego, and L.A. offices from Perkins Coie; also added Ed Pease (from Wilmer Hale) and Laurence Naughton (from Choate Hall & Stewart) as members in Boston | **McDermott Will & Emery** hired Venable wealth planning attorney Elizabeth Glasgow as a partner in Los Angeles | **Duane Morris & Selvam Taiwan** hired John R. Alison in its Intellectual Property Practice Group from Winston & Strawn LLP; he will be based in Taiwan, but will also spend time in the Washington office

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From: Martin, Andrew
Subject: Legal News FYI 04-11-19
Date: Thursday, April 11, 2019 8:19:53 AM
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Thursday, April 11, 2019

Comparison Evidence Rules in Bias Cases Still Murky

BloombergLaw - Daily Labor Report 11 Apr 2019 07 06

By Patricio Chile Workers trying to prove job discrimination often have to compare themselves with similar colleagues who didn't face bias. How circuit courts calibrate the different elements of a legal test for proving discrimination, including...

United Auto Workers officials want no 'outside interference' in proposed union election at Volkswagen's

Chattanooga Times/Free Press (Chattanooga, TN) 10 Apr 2019 22:02

United Auto Workers officials say they hope the focus of a proposed union elec ion in coming weeks at Volkswagen's Chattanooga plant is on he factory's workforce and not on outsiders. During the 2014 elec ion, there was "a lot of outside interference,"...

Northeastern University Faculty Members Refile Union Petition

BloombergLaw - Daily Labor Report 10 Apr 2019 17:26

Unions • Previous effort withdrawn after school said faculty are managers • Current peti ion could be bolstered by recent appeals court ruling By Hassan A. Kanu A local unit of the SEIU has refiled a petition to unionize full-time, non-tenured professors...

When Do You Have To 'Open The Books' For A Union?

Barnes & Thornburg 10 Apr 2019 16:00

Unions generally are entitled to broad categories of information from employers regarding their members' terms and conditions of employment. The National Labor Relations Board (NLRB) has come down hard on employers who fail to provide unions with...

DOL Joins NLRB in Proposing a New Rule to Determine Joint Employer Status – DOL Rule Would Apply to FLSA

National Law Review 10 Apr 2019 15:17

In the first meaningful revision of its joint employer regulations in over 60 years, on Monday, April 1, 2019 he Department of Labor ("DOL") proposed a new rule establishing a four-part test to determine whether a person or company will be deemed to be...

EMS Workers in Las Vegas File for a Union Election

American Federation of State County & Municipal Employees (Blog) 10 Apr 2019 15:17

LAS VEGAS, Nevada – Nearly 400 EMS professionals at AMR Las Vegas have filed for a union election. The workforce, made up of paramedics, EMTs and other EMS professionals, last week asked AMR – a private emergency services provider – to recognize their...

NLRB Weighs in on Confidentiality, Personal Use of Company Email, and Other Workplace Policies

JD Supra: Labor & Employment Law 10 Apr 2019 09:59

Employers should be careful about designating Employee Handbooks confidential as, according to the Na ional Labor Rela ions Board's advice division, that would be unlawful. That advice was contained in one of five memoranda issued by he advice... By:...

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Legal News FYI monitors news, cases, and legislative developments of interest to the NLRB. To be added to or removed from the distribution list contact Andrew Martin. Please note that these are external links and the Agency takes no responsibility for their content.

From: Morning Shift
To: Ring, John
Subject: POLITICO"s Morning Shift: Who"s most working-class? — LA Times walkout — Vitiello out at DHS
Date: Thursday, April 11, 2019 10:04:18 AM

View online version

2018 Newsletter Logo: Morning Shift

04/11/2019 10:00 AM EDT

By REBECCA RAINEY (rrainey@politico.com; @RebeccaARainey)

Editor's Note: This edition of Morning Shift is published weekdays at 10 a.m. POLITICO Pro Employment & Immigration subscribers hold exclusive early access to the newsletter each morning at 6 a.m. To learn more about POLITICO Pro's comprehensive policy intelligence coverage, policy tools and services, click here.

QUICK FIX

— Democratic presidential contenders jostled over who had the most working-class cred.

— LA Times staffers staged a lunchtime walkout over over slow contract negotiations.

— Ronald Vitiello is out at DHS.

GOOD MORNING! It's Thursday, April 11, and this is Morning Shift, your daily tipsheet on labor and immigration news. Send tips, exclusives and suggestions to rrainey@politico.com, thesson@politico.com, ikullgren@politico.com, and tnoah@politico.com. Follow us on Twitter at @RebeccaARainey, @tedhesson, @IanKullgren, and @TimothyNoah1.

DRIVING THE DAY

DEMOCRATS WOO WORKERS: Nearly half the field of Democratic presidential candidates addressed union leaders Wednesday at the North America's Building Trades Unions conference in D.C. The event prompted some proletarian one-upsmanship, POLITICO's Ian Kullgren reports. "For Sen. Elizabeth Warren (D-Mass.), it was having a union crane operator as a brother. For former Colorado Gov. John Hickenlooper, it was getting laid off as a geologist and starting anew as a brewpub owner. For Sen. Amy Klobuchar (D-Minn.), it was her grandfather saving money in a coffee can to send her father to college, and her father's struggle with alcoholism later in life." Corey Booker told the union crowd: "I live in Jersey, I am proud. You cut me, I bleed Jersey." More here.

More 2020 headlines: "Gillibrand: I was wrong on immigration," from POLITICO's Matthew Choi

DEMOCRATS SHRUG OFF BIDEN'S TOUCHING: In a new POLITICO/Morning Consult poll, most Democrats said allegations that Democratic presidential contender Joe Biden has touched women inappropriately will make no difference in their vote, POLITICO's Steven Shepard reports. Fewer than one third (29 percent) said it will make them less likely to support the former vice president. Responses were nearly identical for men and women. More here.

UNIONS

L.A. TIMES GUILD WALKOUT: Staffers at the Los Angeles Times Wednesday staged a lunchtime walkout over stalled contract negotiations, according to multiple Times reporters on Twitter. "Today hundreds of ???@latguild??? members protested the LA Times failure to bargain seriously," tweeted Margot Roosevelt, a California economy and labor reporter at the Times. "The @latguild is sticking together while @latimes management dithers," tweeted Times' copy editor Steve Devol.

Kristina Bui, vice chair of the LA Times Guild and a member of the bargaining committee, told Morning Shift that more than 100 members participated in the walkout, but that there was no work stoppage. The Guild has been "talking substantively about the contract since August," Bui said, and "lately the lawyers representing the company show up to sessions late and often empty-handed." The Times declined to comment.

UAW SEEKS VW, AGAIN: Workers at the Chattanooga, Tenn., Volkswagen plant filed a union election petition with the NLRB Tuesday, their third such petition in five years, the Associated Press reports. A 2014 election at the plant over whether to organize with the United Auto Workers became a national story when Republican politicians in the state, including Sen. Bob Corker (R.-Tenn.), tried to talk workers out of voting for the union even as VW management stayed neutral. Grover Norquist got involved , too. In the end the union lost, amid recriminations over Corker stating publicly two days before the vote that if the the plant went union it would lose its chance to make a new midsize SUV, a claim that the plant's chief of operations said was untrue. The new petition says 30 percent of the plant's employees have indicated they want union representation, and requests an election on April 29-30. More here. Read a press release from the UAW local here.

INSIDE THE AGENCIES

LEADERSHIP LOWDOWN:

VITIELLO OUT AT DHS: Top immigration official Ronald Vitiello, acting director of U.S. Immigration and Customs Enforcement since June, will leave his post tomorrow, POLITICO's Ted Hesson reports. "The agency has not announced a replacement, although Matthew Albence, acting deputy director, would be next in line." Vitiello's nomination to become permanent ICE director was pulled by the White House on Friday. Vitiello is the fourth top immigration official to be shown

the door since Sunday.

TSA Administrator David Pekoske is expected to step in as deputy DHS secretary and John Sanders is expected to be named acting Customs and Border Patrol commissioner, POLITICO's Stephanie Beasely reports. The White House is also weighing whether to nominate Julie Kirchner, former head of the anti-immigration group Federation for American Immigration Reform, to lead U.S. Citizenship and Immigration Services, POLITICO's Ted Hesson, Anita Kumar and An drew Restuccia report. The left-leaning Southern Poverty Law Center labeled FAIR a hate group "because it promotes hatred of immigrants, especially non-white ones." More here.

STANTON IN AT WHD: The Senate on Wednesday cleared Cheryl Stanton, 53-45, for Wage and Hour administrator, POLITICO's Rebecca Rainey reports. The confirmation vote came more than a year and a half after Stanton's initial nomination. "Stanton, a lawyer, previously ran the Department of Employment and Workforce in South Carolina, which POLITICO identified last year as one of six states where not a single state employee is assigned to investigate wage and hour violations," Rainey writes. "Her nomination drew scrutiny after a report revealed she was sued for underpayment to her housekeeper. After the report surfaced, Stanton resolved the dispute." More here.

VISA UPDATE

H-1B VISA DENIALS QUADRUPLE: The denial rate for high-skilled foreign-worker H-1B visas from October through December was 32 percent, or quadruple the rate seen during the previous administration, according to an analysis of USCIS data by the nonpartisan National Foundation for American Policy, POLITICO's Rebecca Rainey reports. NFAP says employers and attorneys blame the uptick on USCIS raising "the standard of proof for approving an H-1B petition" under President Donald Trump's April 2017 "Buy American and Hire American" executive order. More here.

REPUBLICANS LOOK TO TIGHTEN LEGAL IMMI GRATION: "Sens. Tom Cotton of Arkansas, David Perdue of Georgia and Josh Hawley of Missouri, key allies of President Donald Trump on Capitol Hill, planned to introduce a bill Wednesday that would favor admitting skilled workers and their immediate family members but cut by half the number of legal immigrants," POLITICO's Anita Kumar reports . The move comes in an apparent rebuff to White House adviser Jared Kushner's

unexpected plan to expand the number of migrant workers admitted to the country, which he has been working on in secret for months. Kushner showed Trump the proposal last week, but the president suggested he expand it "to include both changes to legal and illegal immigration as to address what he calls a crisis on the southern border."

MEDIAN PAY RISES AT S&P 500 COMPANIES: "Median pay rose at most of the 282 companies in the S&P 500 that had reported two years of median employee pay through midday April 9," a Wall Street Journal analysis found. "Twice as many companies increased their median-pay figure as lowered it, the Journal found, with 45 companies reporting gains of at least 10 percent and 33 reporting declines at least that large." Publicly traded companies were first required to disclose median pay last year under the 2010 Dodd-Frank Act. More from the Journal's Theo Francis here.

DEATH OF BRICK AND MORTAR: "An estimated 75,000 stores that sell clothing, electronics and furniture will close by 2026, when online shopping is expected to make up 25 percent of retail sales," a report by investment firm UBS found, Abha Bhattarai reports for the Washington Post. "The average U.S. household spent $5,200 online last year, up nearly 50 percent from five years earlier." More here .

OFCCP EYES LAW FIRM DIVERSITY: "The Trump administration's federal contractor police plans to take a closer look at diversity and discrimination at law firms," Chris Opfer reports for Bloomberg Law. "Law firms need to get their houses in order," said Craig Leen, director of the DOL's Office of Federal Contract Compliance Programs. "There is a big problem at law firms for women and women of color." In new guidelines released last year OFCCP said it was developing a system where contractors who don't submit affirmative action plans will be more likely to come up for review. The directive cited a 2016 Government Accountability Office study that found a vast majority of contractors weren't complying with affirmative action requirements.

Opfer notes the move comes as gender discrimination lawsuits are being filed against high-profile law firms. The New York Times' Tiffany Hsu reported last week that Jones Day was sued by six former female employees who alleged the firm underpaid them and engaged in pregnancy d iscrimination. More from Bloomberg Law here.

COFFEE BREAK

— "The Border Is Broken. And There's No Plan to Fix It." from The New York Times

— "New York Judges, Lawyers Want ICE Officials Out of Courts," from The Wall Street Journal

— "What's happening at the U.S.-Mexico border in 6 charts," from Pew Research Center

— "Hutchinson to sign anti-'sanctuary cities' bill" from The Associated Press

— "Amid Trump's immigration crackdown, the administration is sile nt on whether the president's own company is being scrutinized," The Washington Post

— "Senior Trump officials: It's not family separation if choice is 'up to the parent,'" from POLITICO

THAT'S ALL FOR MORNING SHIFT!

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Subject:	(Brief) Board Case No. 28-CA-224209; Docket Nos. 18-1318; 19-1006; Station GVR Acquisition, LLC v. National Labor Relations Board
Date:	Thursday, April 11, 2019 3:41:02 PM
Attachments:	Station GVR III (18-1318) Final Brief.pdf

Attached please find an electric copy of the Board's brief in the following case Station GVR Acquisition, LLC v. National Labor Relations Board.

Thanks,

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Final Brief Oral Argument Not Yet Scheduled

Nos. 18-1318, 19-1006

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATION GVR ACQUISITION, LLC, D/B/A
GREEN VALLEY RANCH RESORT SPA CASINO

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

JOINT EXECUTIVE BOARD OF LAS VEGAS

Intervenor

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR
ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Local Rule 28(a)(1) of the Rules of this Court, counsel for the National Labor Relations Board (the Board) certifies the following:

A. Parties and Amici

Station GVR Acquisition, LLC, d/b/a Green Valley Ranch Resort Spa Casino was the Respondent before the Board and is the Petitioner/Cross-Respondent before the Court. Joint Executive Board of Las Vegas was the charging party before the Board and has intervened on behalf of the Board. The Board is the Respondent/Cross-Petitioner before the Court; its General Counsel was a party before the Board. There were no intervenors or amici before the Board.

B. Ruling Under Review

The ruling under review is a Decision and Order of the Board in *Station GVR Acquisition, LLC, d/b/a Green Valley Ranch Resort Spa Casino*, 367 NLRB No. 38 (November 26, 2018).

C. Related Cases

This case has not previously been before this or any other court. This proceeding relies on a related representation proceeding before the Board, Case No. 28-RC-208266, and the Board's unpublished July 18, 2018 order in that case. Board counsel is not aware of any other related cases.

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[*] Authorities upon which we chiefly rely are marked with asterisks.

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Deffenbaugh Indus., Inc. v. NLRB,
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[*] Authorities upon which we chiefly rely are marked with asterisks.

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* Authorities upon which we chiefly rely are marked with asterisks.

GLOSSARY

Act	National Labor Relations Act, 29 U.S.C. § 151 et seq.
Board	National Labor Relations Board
Br.	Green Valley's opening brief
Green Valley	Station GVR Acquisition, LLC, d/b/a Green Valley Ranch Resort Spa Casino
JA	The parties' joint appendix
Union	Joint Executive Board of Las Vegas

UNITED STATES COURT OF APPEALS
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THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

JURISDICTIONAL STATEMENT

This case is before the Court on the petition of Station GVR Acquisition, LLC, d/b/a Green Valley Ranch Resort Spa Casino (Green Valley) to review, and

the cross-application of the National Labor Relations Board to enforce, a Board Order issued against Green Valley on November 26, 2018, reported at 367 NLRB No. 38. (JA 393-96.)[1] The Joint Executive Board of Las Vegas (the Union) has intervened on the Board's behalf. The Board had subject-matter jurisdiction under Section 10(a) of the National Labor Relations Act (the Act), 29 U.S.C. § 160(a), which authorizes the Board to prevent unfair labor practices affecting commerce.

The Court has jurisdiction over this appeal because the Board's Order is final under Section 10(e) and (f) of the Act, 29 U.S.C. § 160(e) and (f). Venue is proper under Section 10(f), which provides that petitions for review may be filed in this Court. Green Valley's petition and the Board's cross-application were timely, as the Act places no time limit on the institution of proceedings to review or enforce Board orders.

As the Board's unfair labor practice Order is based, in part, on findings made in an underlying representation (election) proceeding, the record in that proceeding (Board Case No. 28-RC-208266) is also before the Court. *See Boire v. Greyhound Corp.*, 376 U.S. 473, 477-79 (1964). The Court has jurisdiction to review the Board's actions in the representation proceeding solely for the purpose

[1] "JA" refers to the parties' joint appendix and "Br." refers to Green Valley's opening brief. References preceding a semicolon are to the Board's findings; those following are to supporting evidence.

of "enforcing, modifying or setting aside in whole or in part the [unfair-labor-practice] order of the Board." 29 U.S.C. § 159(d). The Board retains authority under Section 9(c) of the Act, 29 U.S.C. § 159(c), to resume processing the representation case in a manner consistent with the ruling of the Court. *See Freund Baking Co.*, 330 NLRB 17, 17 n.3 (1999) (citing cases).

ISSUES PRESENTED

Did the Board act within its wide discretion in overruling Green Valley's election objections and in therefore finding that Green Valley violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union?

RELEVANT STATUTORY PROVISIONS

In relevant part, Section 10(e) of the Act, 29 U.S.C. § 160(e), provides: "No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." Other relevant statutory provisions are set forth in Green Valley's brief.

STATEMENT OF THE CASE

The Board seeks enforcement of its Order finding that Green Valley violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union as the collective-bargaining representative of a unit of over 800 of Green Valley's hotel, resort, and casino employees. Green Valley admits that it has

refused to bargain with the Union but claims the Board abused its discretion in finding that Green Valley failed to meet its burden of showing that objectionable conduct occurred and prevented a fair election. The Board's findings in the representation and unfair-labor-practice proceedings are summarized below.

I. THE REPRESENTATION PROCEEDING

A. The Union Organizes Green Valley Employees, Petitions for an Election, and Distributes Election Signup Sheets

In 2017, the Union started organizing Green Valley's hotel, resort, and casino employees. In June 2017, it opened an office close to Green Valley's property and began steadily increasing the number of organizers assigned to that office. (JA 312; 224-25, 239-41.) The Union also formed a committee of about 60-70 volunteers from the putative bargaining unit to assist organizing Green Valley. (JA 312; 176-77, 223, 237.) Those unit employees wore buttons with the union logo and the words "committee leader." (JA 312; 66, 141, 151, 176-77, 198-99, 293.)

Committee leaders initially helped with the Union's organizing efforts by soliciting authorization cards, which are cards that employees sign to show that they support the Union becoming their exclusive representative. Committee leaders also accompanied organizers during home visits, distributed leaflets, and brought employees to the Union's office and union meetings. (JA 312; 58, 64, 99-101, 142-43, 146, 196-97, 223-24, 229, 232, 235.) The Union petitioned the Board

for an election to represent the casino employees on October 19, and the Board's Regional Director scheduled the election for November 8 and 9. (JA 309.) Between the petition and the election, committee leaders assisted with the Union's get-out-the-vote campaign. As part of that campaign, the Union distributed short lists of employees' names, all of whom were known union supporters, to each committee leader, and requested that committee leaders ask those voters to commit to a day and time that they would vote. (JA 312; 59, 69, 90, 124-25, 177, 181, 245.)

The documents the Union distributed to committee leaders were titled "Election Day Sign Up" and contained a list of employee names and contact information, plus the election schedule. There was a space for committee leaders to mark when each employee on the list planned to vote. (JA 316; 124-25, 291-92.) The Union only put employees' names on the lists if they had signed authorization cards and openly wore pro-union buttons. It used the contact information from the authorization cards that those employees had signed. (JA 316-17; 178, 244.) The Union assigned employees to committee leaders based on whether the employees spoke the same language and worked in the same department as the committee member. (JA 317; 71-74, 88, 91-92, 102-03, 185.) The Union did not tell any of the committee leaders that other committee leaders

also received lists, except for when it gave duplicates of the same list of employees to multiple committee leaders. (JA 317; 89, 177.)

The Union's organizers instructed committee leaders to inform the employees on their respective lists of the polling times and ask those employees when they would vote. After committee leaders did so, the Union requested that they report back which employees agreed to vote on which days. (JA 317; 59-62, 69-70, 105, 127-28, 168, 180.) If an employee refused to commit to voting, the Union would assess that employee as a "no" vote. (JA 317; 245.) The Union further instructed committee leaders to ask their assigned employees whether they had voted at the time they agreed to vote, and to report that information back to the Union. The Union cautioned committee leaders to leave their signup sheets at home and not to use any physical lists on the days of the election. The Union did not tell committee leaders why it was distributing the lists. (JA 317, 331, 352; 89-91, 136-40, 180-85, 188, 208, 244-45.)

B. Committee Leaders Ask Other Employees Whether They Had Voted and Report Results to the Union

Committee leaders followed the Union's instructions. Before the election, committee leaders asked employees on their signup sheets when those employees would vote and reported the answers back to the Union. (JA 318; 76, 77-79, 81, 103-04, 126-30, 147-50.) On the election days, committee leaders asked some of the employees if they had voted yet and reported the responses back to the Union.

There is no evidence that any committee member carried a list on the days of the election or that any employee observed a committee member reporting whether an employee had voted. (JA 331; 85-87, 107-09, 135-39.)

The Union tracked which of its presumed "yes" voters had voted in an electronic database. It did not tell any committee members or other unit employees about the database. The Union did not print any information about which employees had voted. The Union used the information to call its supporters who had not yet voted to remind them to vote the second day of the election. (JA 331; 180-85.)

C. The Union Wins the Election and the Board Certifies It as the Unit's Representative

On November 8 and 9, 2017, the Board held a secret-ballot election among the employees in the proposed bargaining unit. The tally of ballots showed 571 votes for the Union, 156 votes against representation, and 3 non-determinative challenged ballots. (JA 342; 8.) Green Valley timely filed 12 objections to the conduct of the election. Green Valley has abandoned all of its objections except Objection 8, which alleges that the Union impermissibly kept a list of unit employees who had voted, thereby intimidating and coercing employees and giving employees the impression that the Union was surveilling whether they voted. (JA 342; 289.)

The Board's Regional Director ordered a hearing on the objections. (JA 286-290.) The hearing officer conducted a hearing, then issued a report recommending that the objections be overruled in their entirety. (JA 308-41.) In relevant part, the hearing officer found that the committee leaders were special agents of the Union for the limited purpose of asking supporters when they intended to vote and whether they voted. (JA 320.) Treating the committee leaders as union agents, the hearing officer found that the Union had not engaged in objectionable list keeping because even if its computer records could be considered a list of voters, the Board has only found list-keeping at or near the polls objectionable and no employees knew or suspected that the Union had kept a list of voters. (JA 333-34.)

After Green Valley filed exceptions to the hearing officer's report, the Regional Director affirmed and certified the Union as the exclusive representative of the bargaining-unit employees. (JA 342-55.) The Regional Director affirmed the hearing officer's rulings for the reasons stated in the hearing officer's report and reasoned that Green Valley had not shown any circumstances that would lead voters to believe that the Union kept a list of who had voted. (JA 352-54.) Green Valley requested review of the Regional Director's decision, and the Board denied review on July 18, 2018. (JA 369-70.)

II. THE UNFAIR LABOR PRACTICE PROCEEDING

A. Procedural History

On July 23, 2018, the Union filed an unfair-labor-practice charge alleging that Green Valley had refused to bargain with it. (JA 371.) After the Board's General Counsel issued a complaint alleging that Green Valley had so refused, Green Valley admitted in its answer that it had failed and refused to bargain with the Union in order to challenge the Union's certification. (JA 393; 375, 378.) The General Counsel then moved for summary judgment, and the Board issued a notice to show cause why the motion should not be granted. (JA 393.) In response, Green Valley admitted its refusal to bargain but contended that the Board erred by certifying the election results. (JA 393; 381-92.)

B. The Board's Conclusions and Order

On November 26, 2018, the Board (Chairman Ring and Members McFerran and Emanuel) issued its Decision and Order, granting the General Counsel's motion and finding that Green Valley's refusal to bargain violated Section 8(a)(5) and (1). (JA 393-96.) The Board concluded that all representation issues raised by Green Valley in the unfair labor practice proceeding were or could have been litigated in the underlying representation proceeding, and that Green Valley neither offered any newly discovered and previously unavailable evidence nor alleged the

existence of any special circumstances that would require the Board to reexamine its decision to certify the Union. (JA 393.)

The Board's Order requires Green Valley to cease and desist from refusing to bargain with the Union, and from in any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act, 29 U.S.C. § 157. (JA 394.) The Board's Order also directs Green Valley to, on request, bargain with the Union, and to post a remedial notice. (JA 394-96.)

SUMMARY OF ARGUMENT

Keeping an unauthorized list of who has voted is grounds for overturning an election if, and only if, employees know that their votes are being recorded. Although the Union kept some data on which of its supporters voted on the first day of the election, as the Board found, there is no evidence that any voter knew the Union was doing so. None of the committee leaders who helped the Union's get-out-the-vote efforts knew what the Union intended to do with their reports about who had voted. There was no reason for any of them to believe that the Union was recording a list of who had voted, as opposed to simply tracking its overall turnout number or contemporaneously contacting supporters to get out the vote. In such circumstances, the Board reasonably found that committee leaders did not know that the Union was recording a list of voters.

Similarly, there is no record evidence that any other employees knew of the Union's data collection. Although the Union intended to contact supporters who had not yet voted to remind them to vote, there is no evidence that it actually did so. Even if it did, there is no evidence that the Union told such voters that it knew whether they voted. In those circumstances, the Board was not required to infer that employees whom the Union reminded to vote between sessions would somehow know, from that minimal information, that the Union kept a list of voters.

There is similarly no evidence that any committee leader kept a partial list of employees who voted. Committee leaders used signup sheets exclusively *before* the election. The sheets only contained employee names and the election schedule; the committee leaders did not record information about who voted on them. The Union instructed them to leave those sheets at home during the election, and there is no record evidence that any committee leaders disregarded those instructions. Committee leaders' mere knowledge of who voted does not constitute recording a list. Indeed, Board procedures allow parties to designate election observers who see each employee voting, and there is no prohibition on observers remembering or reporting what they see so long as they do not record voters' names. Because there is no evidence that committee leaders kept partial lists of voters, the Board did not

abuse its discretion in declining to analyze whether hypothetical partial lists could warrant overturning an election.

Finally, the Board reasonably found that the Union did not create the impression that employees' votes were under surveillance. No employees had any reason to think or suspect that anybody watched them vote. The only employees who had any reason to even suspect that the Union collected data about employee votes were the committee leaders, who were the ones doing the collecting. All the Union instructed committee leaders to do was to ask other employees whether they voted. Simply asking employees whether they voted does not establish that those employees were under surveillance when they voted. And Green Valley has forfeited its claim of coercion by failing to raise it in its request for review. Even if its claim had been raised to the Board, there is no evidence that any union supporter coerced any employee into revealing whether the employee voted. Therefore, the Board's overruling of Green Valley's objections was not an abuse of its discretion.

ARGUMENT

BECAUSE THE BOARD ACTED WITHIN ITS WIDE DISCRETION IN OVERRULING THE OBJECTION THAT THE UNION KEPT AN UNAUTHORIZED LIST OF VOTERS, GREEN VALLEY'S REFUSAL TO BARGAIN WITH THE UNION VIOLATES SECTION 8(a)(5)

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of [its] employees . . . ." 29 U.S.C. § 158(a)(5). An employer's failure to meet its Section 8(a)(5) bargaining obligation produces a derivative violation of Section 8(a)(1), which makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the[ir statutory] rights . . . ." 29 U.S.C. § 158(a)(1); *see Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983). Green Valley has admittedly refused to bargain with the Union in order to challenge the Board's certification of the Union following its overwhelming election victory. (JA 393.) There is no dispute that if the Board properly certified the Union as the employees' collective-bargaining representative, Green Valley violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union. *See C.J. Krehbiel Co. v. NLRB*, 844 F.2d 880, 880-82 (D.C. Cir. 1988). Accordingly, the issue before the Court is whether the Board abused its discretion in overruling Green Valley's one disputed election objection and certifying the Union. *See NLRB v. A.J. Tower Co.*, 329 U.S. 324, 329-30, 335 (1946); *Amalgamated Clothing Workers v. NLRB*, 424 F.2d 818, 827 (D.C. Cir. 1970).

As stated above, Green Valley has abandoned all of its objections except for its objection alleging that the Union maintained a list of who had voted, thereby interfering with employees' rights to refrain from voting and giving the impression that employees' votes were being monitored. As shown below, Green Valley has not shown that the Board abused its discretion in overruling that objection. Instead, substantial evidence supports the Board's findings that Green Valley failed to prove that any employee recorded the names of voters and that any voter knew that the Union kept a list of voters. As such, the Board reasonably concluded that no objectionable conduct occurred.

A. The Board Has Broad Discretion in Conducting Representation Proceedings and the Party Seeking To Overturn a Board-Approved Election Bears a Heavy Burden

"Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees." *A.J. Tower Co.*, 329 U.S. at 329-30, 335; *accord C.J. Krehbiel Co.*, 844 F.2d at 882. Accordingly, the scope of appellate review of the Board's decision to certify a union is "extremely limited." *Amalgamated Clothing & Textile Workers v. NLRB*, 736 F.2d 1559, 1562, 1564 (D.C. Cir. 1984). The Board's order is entitled to enforcement unless the Board abused that wide discretion in overruling the objections to the election. *See Canadian Am. Oil Co. v. NLRB*, 82 F.3d 469, 473 (D.C. Cir. 1996).

There is a "strong presumption" that an election conducted in accordance with those safeguards "reflect[s] the true desires of the employees." *Deffenbaugh Indus., Inc. v. NLRB*, 122 F.3d 582, 586 (8th Cir. 1997); *accord NLRB v. Coca-Cola Bottling Co. Consol.*, 132 F.3d 1001, 1003 (4th Cir. 1997) ("the outcome of a Board-certified election [is] presumptively valid"). Therefore, the results of such an election "'should not be lightly set aside.'" *NLRB v. Mar Salle, Inc.*, 425 F.2d 566, 570 (D.C. Cir. 1970) (citations omitted); *accord 800 River Rd. Operating Co. v. NLRB*, 846 F.3d 378, 385-86 (D.C. Cir. 2017) (court will overturn a Board decision to certify a union "in only the rarest of circumstances") (internal quotation marks and citation omitted). Thus, "there is a heavy burden on [the employer] in showing that the election was improper." *Amalgamated Clothing Workers*, 424 F.2d at 827.

The determination of whether an objecting party has carried its burden of proof is "fact-intensive" and thus "especially suited for Board review." *Family Serv. Agency S.F. v. NLRB*, 163 F.3d 1369, 1377 (D.C. Cir. 1999). The Board's factual findings are conclusive if supported by substantial evidence on the record as a whole. 29 U.S.C. § 160(e). "Because substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion," this Court has said that it "will reverse for lack of substantial evidence only when the record is so compelling that no reasonable factfinder could fail to

find to the contrary." *Highlands Hosp. Corp. v. NLRB*, 508 F.3d 28, 31 (D.C. Cir. 2007) (internal quotation marks and citations omitted).

Although election proceedings should be conducted in "'laboratory . . . conditions as nearly ideal as possible,'" the Court has recognized that this "noble ideal . . . must be applied flexibly." *Amalgamated Clothing & Textile Workers*, 736 F.2d at 1562 (quoting *Gen. Shoe Corp.*, 77 NLRB 124, 127 (1948)). Moreover, "[i]t is for the Board in the first instance to make the delicate policy judgments involved in determining when laboratory conditions have sufficiently deteriorated to require a rerun election." *Amalgamated Clothing & Textile Workers*, 736 F.2d at 1562; *accord Serv. Corp. Int'l v. NLRB*, 495 F.3d 681, 684-85 (D.C. Cir. 2007).

B. Maintaining a List of Voters Separate From the Official Eligibility List Is Grounds for Setting Aside an Election Only When Employees Know Their Names Are Being Recorded

When an employer challenges the outcome of an election based on a union agent's alleged misconduct, the Board will overturn the election only if the conduct at issue has "the tendency to interfere with employees' freedom of choice." *Cambridge Tool Pearson Educ., Inc.*, 316 NLRB 716, 716 (1995). The Board has held that conduct in the polling area that undermines the Board's rules and procedures, such as electioneering in a designated no-electioneering zone, can interfere with employee free choice. *See Bally's Park Place, Inc.*, 265 NLRB 703,

703 (1982). The Board's election rules provide that there be one voter eligibility list, and each party's selected observer checks voters' names off that one list. NLRB, *Outline of Law and Procedure in Representation Cases*, § 22-108. Because the Board's rules provide for only one official voter list in the polling area, other lists are prohibited, thereby guaranteeing "confidence in and respect for" Board procedures. *Int'l Stamping Co.*, 97 NLRB 921, 923 (1951). Allowing only one voter list also limits the potential for reprisal or discipline based on whether employees voted because although both the union and the employer can have observers view the list during polling times, those observers do not keep a copy of the list after the election. *Mead Coated Bd., Inc.*, 337 NLRB 497, 497-98 (2002) (citing *Masonic Homes of Cal.*, 258 NLRB 41, 48 (1981)).

There is no opportunity for confusion or fear of retaliation unless voting employees know their names are being recorded. Therefore, maintaining a list of employees who have voted is only grounds for setting aside an election "when it can be shown or inferred from the circumstances that the employees knew that their names were being recorded." *Days Inn Mgmt. Co.*, 299 NLRB 735, 737 (1990) (finding objectionable conduct where employer stood at hotel entrance with a list of recently terminated employees, asked employees their names as they entered, crossed names off the list, and directed them to the security guards who escorted them to the polling area); *see also Elizabethtown Gas Co. v. NLRB*, 212

F.3d 257, 267 (4th Cir. 2000) (list keeping not objectionable absent "evidence, direct or circumstantial, that any voter noticed the company observers recording their vote"). Thus, even recording voter names in the polling area is not objectionable conduct if there are no voters present at the time. *See, e.g.*, *NLRB v. S. Miss. Power Ass'n*, 616 F.2d 837, 839 (5th Cir. 1980) (employer's observer's statement that union observer marked off employee names on unauthorized list during polling times did not warrant an objections hearing because no voters other than union observer were present).

Conduct that could give rise only to employee suspicions of list-keeping is insufficient to meet the knowledge requirement. For instance, in *NLRB v. WFMT*, 997 F.2d 269, 277 (7th Cir. 1993), after being relieved as the union's observer, an employee remarked to other employees that an eligible voter had not yet voted. Those circumstances were insufficient to show that the former observer had kept an unauthorized list of employees who had not voted. *Id*. Similarly, the Board has found an alleged employer agent's conduct unobjectionable when he spoke the name of employees as they went to vote and wrote something down, because no employee "actually testified to having seen a list of any kind." *Snap-On Tools, Inc.*, 342 NLRB 5, 7 (2004), *enforced mem.*, 54 F. App'x 502 (D.C. Cir. 2002).

In short, the Board's list-keeping doctrine provides grounds to overturn an election only when voters know that their names are being recorded. Green Valley

claims that the Union's electronic records constituted an impermissible list of voters and that committee leaders kept "partial lists" of union supporters who had voted. As to the former, there is no record evidence that any employee knew that the Union was keeping such records. As to the latter, there is no evidence that committee leaders ever recorded whether anybody voted. Thus, as shown below, the Board reasonably concluded that no objectionable list-keeping occurred, and Green Valley has not carried its heavy burden of establishing that the Board abused its discretion in overruling Green Valley's election objection.

C. Green Valley Has Not Shown that any Employees Knew that the Union Kept Track of Which Supporters Had Voted

Regarding Green Valley's first claim of list-keeping—the electronic records kept by the Union—the record does not show that any employee knew about it. Green Valley contends only that two groups of employees, the committee leaders and any union supporters who did not vote the first day and received follow-up calls or visits from the Union, knew about the Union's records. As to the committee leaders, as the Board found, there is no evidence that they were "aware that the [Union] kept track of who had voted." (JA 332.) Notably, both committee leaders who testified at the hearing stated that they did not know why the Union wanted information about who had voted. (JA 353.) The Union did not tell the committee leaders that it had electronically recorded the information they provided. Similarly, committee leaders did not tell any employees that information

about who voted would be recorded. No employees "testified to seeing or hearing about lists or note-taking in connection with voting" or "any indications of list-keeping by any party." (JA 353.) Thus, the Board aptly compared this case to *Indeck Energy Services*, 316 NLRB 300, 301 (1995), wherein "there was no 'clear' evidence that the [union's] observer or representative actually kept a list or that the employees even suspected that their names were being recorded." (JA 369 n.1.)

Moreover, even if committee leaders believed that the Union was keeping a list of voters, the Board has never extended the list-keeping doctrine to proscribe keeping track of information voluntarily provided to a party. List-keeping is only objectionable when employees know "that they are being monitored." *Pontiac Nursing Home, LLC v. NLRB*, 173 F. App'x 846, 847 (D.C. Cir. 2006) (citing *Med. Ctr. of Beaver County, Inc. v. NLRB*, 716 F.2d 995, 999 (3d Cir.1983)). As the Board observed, it has never found that employees know they are being monitored absent parties physically recording votes near the voting area. (JA 332, 369 n.1.) Employees who voluntarily report to the Union whether they voted would not believe their votes are also being monitored, as the Union would have no reason to do so. Nor could the situation here lead to employee concerns about retaliation for not voting; committee leaders solely asked employees if they had voted on the first day of polling and reminded those who said they had not that there was a day

remaining in the election. There is no evidence that the Union did anything to track who voted on the second polling day.

Green Valley further contends (Br. 17-18) that the Union's collection of information gave employees the impression that whether they voted was under surveillance. But it has not cited a single case where the Board overturned an election based solely on a union's collection of voluntarily provided information. Indeed, this Court has found that list-keeping did not constitute grounds for overturning an election when "any interactions between employees and [u]nion organizers on the day of the election were voluntary and uncoerced." *Pontiac Nursing Home*, 173 F. App'x at 847. That stands to reason; employees would not assume that the Union had monitored whether they voted if they were the ones who informed the Union about it. Despite Green Valley's claim that "[t]here is no exception that permits a party to request, monitor, track, compile and use information about who has and has not voted if it receives the information 'voluntarily,'" (Br. 17) the Board did not address voluntarily provided information in the case Green Valley cites in support. Rather, in *Days Inn*, 299 NLRB at 737, the employer created an impression of surveillance by crossing employee names off a list in view of employees as they went to vote. Thus, Green Valley's totally unsupported argument that voluntarily provided information can give an

impression of surveillance does not carry its burden of showing that the Board abused its discretion.

Whether "a rational employee would assume the Union intended to use the information it went to great pains to collect" (Br. 20) is irrelevant. List-keeping is objectionable only when employees *know* their names are being *recorded*. *Days Inn*, 299 NLRB at 737. An employee's hypothetical assumption does not establish knowledge, especially in light of the heavy burden an employer must overcome to warrant overturning a Board-sanctioned election. Notably, both committee leaders who testified stated that they did not know why the Union sought the information at issue and did not mention inferring the existence of any master list. (JA 353.) Committee leaders could have thought the Union simply wished to keep track solely of the *number* of its supporters who had voted, not their names, in order to determine the effectiveness of its turnout operation. Indeed, as the Board found, the Union created the signup sheets primarily to determine whether it could count on its supporters to turn out in the election. (JA 320.) Moreover, even if committee leaders knew that the Union intended to contact its supporters who had not yet voted, that knowledge would not establish that the Union *recorded a list* of those supporters. The Union's organizers could have sent voting reminders contemporaneously as it received the information without recording a list.

Similarly, Green Valley's claim that employees who were targeted for follow-up per the Union's get-out-the-vote effort after the first voting day would know about the Union's list of voters stretches the record evidence too far. It is unclear if any such employees even exist; none testified or were identified by name or otherwise at the hearing. None of the Union's representatives or committee leaders testified to personally reaching out to any employees after polls opened. The only reason to believe such employees exist is because a union representative testified that the Union intended to use the information provided by committee leaders to reach out to such employees. (JA 180-82.) There is no evidence that the Union actually did so.

Even if the Union did contact employees who had not yet voted, however, all that the Union's representative said was that the Union would "give them a call just to remind them that [. . .] the polls are open later in the day or the polls are open the next day." (JA 181.) There is no evidence that the Union told such employees that it knew they had not yet voted. Nor is there evidence that the Union even specifically targeted employees who it knew had not voted, as opposed to employees who had not informed committee leaders whether they voted. There is therefore no reason for such employees to assume that the Union had targeted them, as opposed to simply contacting all of its supporters in order to get out the vote in the remaining polling sessions. All that Green Valley has established is

that the Union may have called some of its supporters in between the two polling dates to encourage them to vote the second day. Such electioneering is common, innocuous, and does not provide grounds for overturning an election. *See, e.g.*, *AOTOP, LLC v. NLRB*, 331 F.3d 100, 105 (D.C. Cir. 2003) (noting that "we have upheld the Board in holding unobjectionable more serious conduct" than a putative union agent telling employees that they had to vote for the union).

Green Valley's contention (Br. 19-20) that voters would have reasonably inferred the existence of the Union's records is both legally mistaken and factually inaccurate. Under the *Days Inn* standard, which Green Valley has never disputed applies here, list-keeping is objectionable "when it can be shown or inferred from the circumstances that they employees *knew* that their names were being recorded." *Days Inn*, 299 NLRB at 737 (emphasis added). The standard as stated requires Green Valley to produce evidence that would allow the *Board* to reasonably infer that employees knew their names were being recorded. Green Valley has cited no case where the Board has overturned an election based on employees' possible inference that a list of their names might exist. Indeed, as stated above (p.XX), mere employee suspicions of list-keeping do not establish objectionable conduct and the Board has refused to set aside an election absent "clear" evidence that a union agent kept a list and employees had reason to know about the list. *Indeck Energy*, 316 NLRB at 301.

Finally, even if a reasonable inference on employees' part were sufficient here, Green Valley has not established that any employees inferred that the Union kept a list of whether they had voted. As the Board noted, it has never concluded that "employees reasonably inferred list keeping away from the polls based exclusively on being asked by a co-worker if they had voted, which is all the evidence here establishes." (JA 353.) Committee leaders who were explicitly told to leave their signup sheets at home and not to keep lists of any kind on the election day would infer that those sheets had served their purpose. No employees testified that they suspected their names were being recorded. Nor did any committee leaders testify that they thought the Union was keeping any kind of list. Indeed, one of the two committee leaders who testified stated that she knew some employees had voted but did not tell the Union about it because those employees were not on her signup sheet. (JA 85.) Thus, her actions indicate that she did not think the Union was interested in compiling a list of all employees who had voted. In short, as the Board found, Green Valley failed to prove that any employees even would have "inferred that the [Union] had made a list of employees who had not yet voted in the election." (JA 369 n.1.)

D. Green Valley Has Not Proven that Committee Leaders Kept Lists of Employees Who Voted, Partial or Otherwise

Green Valley's second claim of list-keeping—the committee leaders' so-called "partial lists" of who voted—also lacks record support. Specifically, it

contends that, even if no employees knew that the Union recorded information about who had voted, committee leaders kept partial lists of voters and knew about their own partial lists. But as the Board found, there is no record evidence that any committee leaders kept any kind of list on the day of the election. (JA 353.) The only lists that committee leaders had were the election signup sheets, which contained a short list of 4 to 15 union supporters. (JA 176-79.) Committee leaders asked the supporters listed on their signup sheets when they intended to vote and recorded those intentions on the signup sheets before the polling days. The signup sheets were not intended for use during the election itself; they have spaces for marking when employees intended to vote but do not have any spaces for marking whether those employees voted. (JA 292.)

Indeed, the Union specifically instructed committee leaders to leave their signup sheets at home and refrain from making or using any lists during the days of the election. (JA 182.) There is no record evidence that any committee leader disregarded those instructions; thus, the Board found that the signup sheets "were not used on election day." (JA 353.) When there is no evidence that employees' names were in fact being recorded, it is impossible to prove that employees know that their names were being recorded, which the Board's list-keeping doctrine requires objecting parties to prove. That is particularly so for the committee leaders, who would have been sure that they had not recorded their own names.

Thus, the record fully supports the Board's factual finding that committee leaders did not make any lists and that the only list at issue is the information the Union electronically stored. (JA 352-53.)

At most, committee leaders knew that some subset of the employees on their lists told them whether they had voted. But even if the plain language of the Board's list-keeping test did not make clear that lists must be recorded, the Board's precedent and procedures show that mere knowledge that employees have voted does not constitute a list of voters. For instance, in *WFMT*, a pro-union employee clearly knew who had voted and who had not when he asked an employee to find another employee who had not yet voted and remind her to vote. *WFMT*, 997 F.2d at 277. The Board also allows parties to have observers at elections, who afterward could presumably recall at least partial "lists" of employees who had voted. The Board similarly does not prohibit employees from standing in line to vote or from being in the polling area at the same time as another voter. This Court has even found that pro-union employees standing outside of the polling area and quizzing each employee who leaves as to how that employee voted does not merit overturning an election so long as nobody invades any no-electioneering areas designated by the Board agent. *Family Serv. Agency*, 163 F.3d at 1382. In short, although they may have known that certain employees voted, committee

leaders did not assemble anything that could possibly be considered a list within the meaning of Board and this Court's precedent.

Contrary to Green Valley's claim (Br. 15), the Board was not required to address any partial lists because, as discussed above, there were no such lists. Green Valley's admission that committee leaders "orally transmitted" (Br. 15) the names of employees who had voted to the Union seems to acknowledge the lack of evidence that any partial lists were recorded. Even if the committee leaders did record names of employees who had voted, which they did not, doing so would not be objectionable on this record. Despite Green Valley's claim to the contrary (Br. 16), the Board has consistently declined to overturn elections due to impermissible list-keeping if the only voters who know about it are the ones doing it. (JA 332.) *See Southland Containers*, 312 NLRB 1087, 1087 (1993) (only employees who possibly knew of list-keeping were the two employees keeping the list); *Cerock Wire & Cable Group*, 273 NLRB 1041, 1041 (1984) (union observer kept list of number of presumed "yes" and "no" votes based on voters' buttons and t-shirts but only other employee to see her do so was nonvoting employer observer). Indeed, the Board explicitly relied on that principle, citing *Robert's Tours, Inc.*, 244 NLRB 818, 818 n.5, 824 (1979), *review denied mem.*, 633 F.2d 223 (9th Cir. 1980), for the proposition that the voting choices of "the union adherents involved in the list

keeping . . . could hardly have been affected" by their own actions. (JA 369 n.1, internal quotation marks omitted.)

No committee leaders kept lists. Even if they had, no other employees knew about those lists, and Board law is clear that elections cannot be overturned due to unauthorized list-keeping when only the employees making the lists knew about it. Similarly, no employee knew that the Union had kept a list, and even if committee leaders knew about it, their votes could not have been affected. Green Valley has therefore not come close to meeting its burden of showing that the Board abused its discretion by certifying an election that the Union won by 450 votes (a nearly 4-to-1 margin).

E. Green Valley Has Shown Neither that the Union Coerced Employees Nor that Employees Thought the Union Was Observing Whether They Voted

Green Valley's contentions (Br. 17-18) that some employees involuntarily provided information to the Union, either because the Union coerced them or because the Union spied on them, is meritless. This Court lacks jurisdiction to review Green Valley's contention (Br. 18) that committee leaders' "direct questioning" coerced employees into revealing whether they voted. This Court cannot review arguments that were not raised to the Board. *See* 29 U.S.C. § 160(e) ("No objection that has not been urged before the Board . . . shall be considered by the court, unless the failure . . . to urge such objection shall be excused because of

extraordinary circumstances."); *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665 (1982) (stating Section 10(e) precludes court of appeals from reviewing claim not raised to the Board). In its Request for Review to the Board, Green Valley did not argue that committee leaders or anybody else coerced employees into revealing whether they voted. (JA 361-67.) That failure precludes consideration of its argument now. *See* NLRB Rules and Regulations, 29 C.F.R. § 102.67(e) (requiring that the Request for Review be a self-contained document enabling the Board to rule on the issues on the basis of its contents); *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952) (issue must be raised to agency "at the time appropriate under its practice"). The Board, with this Court's approval, does not allow parties to raise representation issues in a subsequent unfair-labor-practice proceeding. *Pace Univ. v. NLRB*, 514 F.3d 19, 23-25 (D.C. Cir. 2008).[2]

In any event, Green Valley has not come close to establishing that the Union coerced any voter. It did not present testimony from any employees who had been asked by committee leaders whether they had voted. Both committee leaders who testified stated that they simply asked an employee or two and did not testify to any

[2] Although Green Valley's objection initially included a claim that the Union's alleged list-keeping was "intimidating and coercive" (JA 352), it did not raise any argument in its Request for Review that the committee leaders coercively asked employees whether they voted.

possibly coercive circumstances. In short, there is no record evidence that any committee leader coercively questioned any employee about whether the employee voted.

Absent such evidence, Green Valley contends (Br. 18 n.2) that the hearing officer improperly excluded evidence of the Union's earlier coercive conduct, which would inform how employees reacted to questions about whether they voted. But Green Valley did not raise any objection to the hearing officer's exclusion of its proffered evidence in its Request for Review. (JA 361-68.) Even if Green Valley had preserved its challenge (Br. 18 n.2), the proffered evidence was from weeks or months before the election was held and did not deal with any committee leaders asking union supporters if they had voted yet. Moreover, Green Valley's offer of proof relates to the Union's general campaign before the petition was filed and employees being asked to sign union-representation cards. (JA 9-14, 316, 347-48.) Green Valley did not offer testimony from any individuals who were union supporters at the time of the election and who were asked if they had voted. Finally, as the hearing officer and the Regional Director found, Green Valley did not allege coercive pre-petition conduct in its objections, so it was reasonable to exclude evidence regarding that conduct at the hearing on the objections. (JA 13-14, 316, 347-48.)

Green Valley also contends that some committee leaders tracked employees' votes through "direct observation" (Br. 17), and that such observation led to an impression of surveillance. Even if committee leaders had done so, that would not constitute objectionable conduct, because there is no evidence that the employees being observed thought or knew that they were being observed. The committee leaders themselves would not think that the Union was engaging in surveillance because they were not asked to personally observe whether other employees voted or to spy on any other employees. Similarly, contrary to Green Valley's contention (Br. 18), employees who were asked by committee leaders whether they had voted would not think the Union was surveilling them as they voted; the Union would have no reason to ask if they voted if it were spying on the polling area.

Moreover, there is no record evidence that any committee leader actually observed other employees voting. Although the Regional Director once used the word "observe," in context, it appears that the Regional Director considered being told an employee had voted to be an observation. (JA 352 ("The evidence showed that during the election, Committee Leaders did observe and make some verbal reports to [the Union's] organizers that certain team members had voted, or at least told Committee Leaders that they voted.")) And the Board's denial of Green Valley's Request for Review makes clear that all information given to the Union was voluntary. (JA 369 n.1.) The record supports that finding; the Union

instructed committee leaders only to ask other employees if they had voted, not to personally watch the polls. Although one of the committee leaders testified that she told the Union that some employees on her list had voted whom she had not asked, the record does not reveal how she knew that those employees had voted. (JA 85-87.) There is no evidence that those employees did not tell her of their own accord or tell another employee to tell her, let alone that she physically watched those employees as they voted or that those employees thought she observed them voting on behalf of the Union.

CONCLUSION

The Union won an election in a large bargaining unit by a nearly 4-1 margin. Green Valley has sought to delay its employees' right to a bargaining representative by claiming that the Union engaged in objectionable conduct by maintaining a list of voters, when no voter testified to seeing, knowing of, or even suspecting the existence of such a list. Because Green Valley has not shown election-related misconduct, its refusal to bargain with the Union violates Section 8(a)(5) of the Act. The Board therefore respectfully requests that this Court enforce its Order in full.

Respectfully submitted,

/s/ Usha Dheenan
USHA DHEENAN
Supervisory Attorney

/s/ David Casserly
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National Labor Relations Board
April 2019

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATION GVR ACQUISTION, LLC, D/B/A GREEN VALLEY RANCH RESORT SPA CASION	)	
Petitioner/Cross-Respondent	)	Nos. 18-1318, 19-1006
	)	
v.	)	Board Case No. 28-CA-224209
NATIONAL LABOR RELATIONS BOARD	)	
Respondent/Cross-Petitioner	)	
	)	
and	)	
	)	
JOINT EXECUTIVE BOARD OF LAS VEGAS	)	
Intervenor	)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its brief contains 7,779 words of proportionally spaced, 14-point type, and the word processing system used was Microsoft Word 2016.

s/ David Habenstreit
David Habenstreit
Assistant General Counsel
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 11th day of April, 2019

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATION GVR ACQUISTION, LLC, D/B/A GREEN VALLEY RANCH RESORT SPA CASION Petitioner/Cross-Respondent	)	Nos. 18-1318, 19-1006
v.	)	Board Case No. 28-CA-224209
NATIONAL LABOR RELATIONS BOARD Respondent/Cross-Petitioner	)	
and	)	
JOINT EXECUTIVE BOARD OF LAS VEGAS Intervenor	)	

CERTIFICATE OF SERVICE

I hereby certify that on April 11, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I certify the foregoing document was served on all those parties or their counsel of record through the CM/ECF system.

s/ David Habenstreit
David Habenstreit
Assistant General Counsel
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 11th day of April, 2019

From:	Merberg, Elinor
To:	Bridge, Diane L.; Bush, Lynn; Carlton, Peter J.; Colwell, John F.; Dodds, Amy L.; Emanuel, William; Free, Douglas; Habenstreit, David; Jacob, Fred; Jacob, Chris W; Kaplan, Marvin E.; Kelly, David A.; Krafts, Andrew J.; Lennie, Rachel G.; Lesesne, Katherine; Lucy, Christine B.; Lussier, Richard; McFerran, Lauren; Meyers, Mary; Murphy, James R.; Ring, John; Robb, Peter; Rothschild, Roxanne L.; Shorter, LaDonna; Sophir, Jayme; Stock, Alice B.; Tursell, Beth; Vazquez, Laura T.; Zick, Lara S.
Cc:	Wilson, Nancy; Ghatan, Jeanette; Shorter, LaDonna
Subject:	Section 10(j) results: Checklist Facility Maintenance, Cases 06-CA-223468, 06-CA-228118 and 06-CA-231859
Date:	Thursday, April 11, 2019 4:26:09 PM
Attachments:	ILB.internalresults.06-CA-223468.Checklist.docx SET.06-CA-223468.conformedsetagtnotice.4-8-19.doc

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On February 15, 2019, the Board authorized the institution of Section 10(j) proceedings in these Section 8(a)(1), (2), (3), and (5) cases involving, among other things, the Employer's refusal to hire a majority of its predecessor's employees in order to evade successorship status and a refusal to recognize and bargain with the Union. The Region was directed to seek, among other things, an order requiring the Employer to recognize and bargain with the Union, offer interim employment to the former predecessor employees, and post and read the district court's order.

On April 8, 2019, after the Region filed a petition in district court, the Regional Director approved the attached settlement agreement providing for, among other things, recognition of the Union, written offers of instatement, backpay, a preferential hiring list, and posting of the notice.

UNITED STATES GOVERNMENT

memorandum

NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL

DATE: April 11, 2019

TO: Peter B. Robb
General Counsel

FROM: Jayme L. Sophir
Associate General Counsel

SUBJECT: Checklist Facility Maintenance
Cases 06-CA-223468, 06-CA-228118 and 06-CA-231859

On February 15, 2019, the Board authorized the institution of Section 10(j) proceedings in these Section 8(a)(1), (2), (3), and (5) cases involving, among other things, the Employer's refusal to hire a majority of its predecessor's employees in order to evade successorship status and a refusal to recognize and bargain with the Union. The Region was directed to seek, among other things, an order requiring the Employer to recognize and bargain with the Union, offer interim employment to the former predecessor employees, and post and read the district court's order.

On April 8, 2019, after the Region filed a petition in district court, the Regional Director approved the attached settlement agreement providing for, among other things, recognition of the Union, written offers of instatement, backpay, a preferential hiring list, and posting of the notice.

/s/
J.L.S.

Attachment

cc: The Board
Solicitor's Office
Executive Secretary
Operations Management

H:injlit/10j/ILB.internalresults.06-CA-223468.Checklist

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
SETTLEMENT AGREEMENT

IN THE MATTER OF

Checklist Cleaning, LLC d/b/a Checklist Facility Maintenance

Cases 06-CA-223468, 06-CA-228118, and 06-CA-231859

Subject to the approval of the Regional Director for the National Labor Relations Board, Checklist Cleaning, LLC d/b/a Checklist Facility Maintenance ("Respondent") and Service Employees International Union, Local 32BJ ("Union") **HEREBY AGREE TO SETTLE THE ABOVE MATTERS AS FOLLOWS**:

POSTING OF NOTICE — After the Regional Director has approved this Agreement, the Regional Office will send copies of the approved Notice to the Charged Party in English and in additional languages if the Regional Director decides that it is appropriate to do so. A responsible official of the Charged Party will then sign and date those Notices and immediately post them in the breakroom in the Alloy 26 management office at Nova Place. The Charged Party will keep all Notices posted for 60 consecutive days after the initial posting.

RESCISSION OF UNLAWFUL RULES — Within 14 days from the approval of this Settlement Agreement, Respondent will rescind its oral promulgation of a rule prohibiting employees from discussing their wage rates with others. Respondent will post a notice rescinding that rule on the same bulletin board(s) where it posts the approved Notice in this case and will also announce the rescission of the rule at its next weekly employee meeting immediately following the Regional Director's approval of this Settlement Agreement.

UNION ACCESS TO EMPLOYEES — Respondent will provide to the Union access to Nova Place at least one time per week for a two-month period for the purpose of holding meetings with the bargaining unit employees.

COMPLIANCE WITH NOTICE — Respondent will comply with all the terms and provisions of the Notice to Employees.

INSTATEMENT — Offers of instatement will be made in order of most senior to least senior and such seniority shall be based on the seniority date the employee had during his or her employment with The Huber Group ("Huber") as set forth in Attachment A. Within 7 days from approval of this Settlement Agreement, Respondent will make written offers of instatement to the following (b) (6), (b) (7) individuals: (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) These written offers of instatement will be to the employees' respective former positions, or if that position no longer exists, to a substantially equivalent position, without prejudice to their seniority or other rights and privileges they would have enjoyed if Respondent had hired them. Each written offer will advise the respective individual of the position being offered, wage rate and benefits, and work schedule. Respondent will displace, if necessary, employees who were not employees of the predecessor employer, Huber, at Nova Place.

PREFERENTIAL HIRING LIST — Within 7 days from approval of this Settlement Agreement, R (b) (6), (b) (7)(C) will notify the following individuals in writing that they will be placed on a preferential hiring list (b) (6), (b) (7)(C)

Attachment A, before seeking employees from other sources, including those whom have been displaced from other locations where Respondent performs cleaning services. The terms and conditions of employment that Respondent applies to the individual will be the terms and conditions of employment in effect at the time of the offer. Each named individual shall remain on the preferential hiring list until either Respondent presents the

employee with an offer of employment or the named individual notifies Respondent in writing that he or she wishes to be removed from the preferential hiring list. In any event, the employees placed on the preferential hiring list will have preferential hiring status for period not to exceed 24 months from the date of the approval of this Settlement Agreement by the Regional Director.

Respondent will provide the Region with copies of these offers of instatement and placement on the preferential hiring list at the time the offers are made.

TERMS AND CONDITIONS OF EMPLOYMENT- Respondent will apply to its employees working at Nova Place the wage rates, benefits, and other terms and conditions of employment set forth in the Pittsburgh Central Business District Collective-Bargaining Agreement, which is effective by its terms from November 1, 2015 to October 31, 2019.

EXPUNGEMENT — Within 14 days from approval of this Settlement Agreement, Respondent will remove from its files all references to its failure to hire (b) (6), (b) (7)(C) [redacted] (b) (6), (b) (7)(C) [redacted] (b) (6), (b) (7)(C) [redacted], and will notify them in writing that this has been done and that Respondent's failure to hire them will not be used against them in any way. Respondent will provide the Region with copies of these expungement letters.

BACKPAY ASSOCIATED WITH REFUSAL-TO-HIRE ALLEGATIONS —Respondent will make whole the employees named on Attachment B by payment to each of them of the amount listed opposite their names. Payments will be made payable to the employees and submitted to the Regional Office for disbursement. Payment #1 is to be paid on April 30, 2019; Payment #2 is to be paid on May 30, 2019. Respondent will make appropriate withholdings for each named employee from the net backpay and excess tax amounts. No withholdings should be made from the interest portion of the backpay. Respondent will also file a report with the Regional Director allocating the payments to the appropriate calendar year which the Region will file with the Social Security Administration.

WAIVER OF BACKPAY ASSOCIATED WITH UNILATERAL CHANGES — For the purposes of settlement, the Charging Party agrees to waive the back pay owed to the individuals whom Respondent employed at Nova Place from July 2, 2018 to the date of approval of this Settlement Agreement because of Respondent's failure to maintain the terms and conditions of employment that existed under the predecessor employer. If, however, Respondent fails to comply with this Settlement Agreement, the Regional Director will, through the procedure set forth in the "Performance" paragraph below, seek full back pay for the employees whom Respondent employed at Nova Place from July 2, 2018 to the present.

SCOPE OF THE AGREEMENT — This Settlement Agreement settles only the allegations in the above-captioned cases, including all allegations covered by the attached Notice to Employees made part of this Settlement Agreement, and does not settle any other cases or matters. It does not prevent persons from filing charges, the General Counsel from prosecuting complaints, or the Board and the courts from finding violations with respect to matters that happened before this Settlement Agreement was approved regardless of whether General Counsel knew of those matters or could have easily found them out. The General Counsel reserves the right to use the evidence obtained in the investigation and prosecution of the above-captioned cases for any relevant purpose in the litigation of this or any other cases, and a judge, the Board and the courts may make findings of fact and/or conclusions of law with respect to said evidence.

PARTIES TO THE SETTLEMENT AGREEMENT — If the Charging Party fails or refuses to become a party to this Settlement Agreement and the Regional Director determines that it will promote the policies of the National Labor Relations Act, the Regional Director may approve the Settlement Agreement and decline to issue or reissue a Complaint in this matter. If that occurs, this Settlement Agreement shall be between Respondent and the undersigned Regional Director. In that case, a Charging Party may request review of the

decision to approve the Settlement Agreement. If the General Counsel does not sustain the Regional Director's approval, this Settlement Agreement shall be null and void.

AUTHORIZATION TO PROVIDE COMPLIANCE INFORMATION AND NOTICES DIRECTLY TO RESPONDENT — Counsel for Respondent authorizes the Regional Office to forward the cover letter describing the general expectations and instructions to achieve compliance, a conformed settlement, original notices and a certification of posting directly to Respondent. If such authorization is granted, Counsel will be simultaneously served with a courtesy copy of these documents.

Yes ____DEM_____ No _____
Initials Initials

PERFORMANCE — Performance by Respondent, its officers, agents, and successors and assigns with the terms and provisions of this Settlement Agreement shall commence immediately after the Agreement is approved by the Regional Director, or if the Charging Party does not enter into this Settlement Agreement, performance shall commence immediately upon receipt by Respondent of notice that the Charging Party has not requested review of the Settlement Agreement or that the General Counsel has sustained the Regional Director.

Respondent, its officers, agents, and successors and assigns agree that in case of non-compliance with any of the terms of this Settlement Agreement by Respondent, and after 14 days' notice from the Regional Director of the National Labor Relations Board of such non-compliance without remedy by Respondent, the Regional Director will reissue the Complaint, as modified by the Amendment to Complaint. Thereafter, the General Counsel may file a motion for default judgment with the Board on the allegations of the Complaint and Amendment to Complaint. Respondent understands and agrees that the allegations of the aforementioned Complaint and Amendment to Complaint will be deemed admitted and its Answers to the Complaint and Amendment to Complaint will be considered withdrawn. The only issue that Respondent may raise before the Board is whether Respondent defaulted on the terms of this Settlement Agreement. The Board may then, without necessity of trial or any other proceeding, find all allegations of the Complaint and Amendment to Complaint to be true and make findings of fact and conclusions of law consistent with those allegations adverse to Respondent on all issues raised by the pleadings. The Board may then issue an order providing a full remedy for the violations found as is appropriate to remedy such violations. The parties further agree that a U.S. Court of Appeals Judgment may be entered enforcing the Board Order ex parte, after service or attempted service upon Respondent at the last address provided to the General Counsel.

NOTIFICATION OF COMPLIANCE — Each party to this Settlement Agreement will notify the Regional Director in writing what steps Respondent has taken to comply with the Settlement Agreement. This notification shall be given within five days, and again after 60 days, from the date of the approval of this Settlement Agreement. If the Charging Party does not enter into this Settlement Agreement, initial notice shall be given within five days after notification from the Regional Director that the Charging Party did not request review or that the General Counsel sustained the Regional Director's approval of this Settlement Agreement. No further action shall be taken in the above captioned cases provided that Respondent complies with the terms and conditions of this Settlement Agreement and Notice.

Respondent **Checklist Cleaning, LLC d/b/a Checklist Facility Maintenance**		**Charging Party** **Service Employees International Union, Local 32BJ**	
By: Name and Title	Date	By: Name and Title	Date
/s/David E. Mitchell, Labor Attorney	4/4/19	/s/Lyle D. Rowan, Associate General Counsel	4/3/19
Print Name and Title below		Print Name and Title below	

Recommended By:	Date	Approved By:	Date
/s/Julie R. Stern, Field Attorney	4/8/19	/s/Nancy Wilson, Regional Director, Region Six	4/8/19

(To be printed and posted on official Board notice form)

FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join, or assist a union;
- Choose a representative to bargain with us on your behalf;
- Act together with other employees for your benefit and protection;
- Choose not to engage in any of these protected activities.

WE WILL NOT interfere with, restrain, or coerce you in the exercise of the above rights.

WE WILL NOT ask you if you participated in activities sponsored by, or on behalf of, the Service Employees International Union, Local 32BJ ("Union") or any other labor organization.

WE WILL NOT maintain a rule which prohibits you from discussing your wages or wage increases with others, and **WE WILL NOT** threaten to fire you for discussing your wages with others.

WE WILL NOT tell you to conceal from others your status as our employee or your union membership status or affiliation with a union.

WE WILL NOT require you to relinquish your membership in the Union in order to be employed by us.

WE WILL NOT tell you that the Union is to blame for your uncertainty as to whether we would hire The Huber Group's former employees when we assumed the cleaning contract with Faros Property Management, LLC at Nova Place.

WE WILL NOT ask you if you wish to be represented by a union.

WE WILL NOT provide unlawful assistance to the International Union of Painters and Allied Trades ("IUPAT") or any other labor organization.

WE WILL NOT refuse to hire, or consider for hire, job applicants because of their membership in, or activities on behalf of, the Union or in order to avoid a bargaining obligation with the Union.

The Union is our employees' exclusive collective-bargaining representative in dealing with us regarding the wages, hours, and other working conditions of the employees in the following unit ("the Unit"):

> All cleaning employees employed at the Nova Place site, excluding supervisors as defined in the National Labor Relations Act.

WE WILL NOT refuse to recognize and bargain in good faith with the Union as the exclusive collective-bargaining representative of our employees in the Unit.

WE WILL NOT unilaterally change wages, hours and other terms and conditions of employment of our employees in the Unit without first giving notice to, and bargaining with, the Union about those changes.

WE WILL NOT in any other manner interfere with your rights under Section 7 of the Act.

WE WILL rescind our rule which prohibits you from discussing your wages or wage increases with others.

WE WILL offer instatement to the following individuals: (b) (6), (b) (7)(C) [redacted] (b) (6), (b) (7)(C) [redacted] to positions at Nova Place at the same terms and conditions of employment that they enjoyed as employees of The Huber Group and **WE WILL** pay to (b) (6), (b) (7)(C) [redacted] (b) (6), (b) (7)(C) [redacted] (b) (6), (b) (7)(C) [redacted] wages they lost as a result of our failure to hire them.

WE WILL remove from our files all references to our failure to hire the above-named individuals; and **WE WILL** notify them in writing that this has been done and that our failure to hire them will not be used against them in any way.

WE WILL place (b) (6), (b) (7)(C) [redacted] (b) (6), (b) (7)(C) [redacted] on a preferential hiring list until the individual is either offered instatement or indicates in writing that he or she wishes to be removed from the preferential hiring list.

WE WILL recognize the Union as the exclusive collective-bargaining representative of our Unit employees, **WE WILL** notify the Union in writing of this recognition, and **WE WILL** bargain in good faith with the Union concerning the terms and conditions of employees in the Unit and, if an understanding is reached, embody that understanding in a signed agreement.

WE WILL, if requested by the Union, rescind any or all changes to your terms and conditions of employment that we made without bargaining with the Union.

WE WILL provide the Union with access to our Nova Place jobsite, at reasonable times and upon reasonable notice, to carry out its duties as the exclusive representative of the Unit employees.

Checklist Cleaning, LLC d/b/a Checklist Facility Maintenance

(Employer)

Dated: _____ **By:** _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. We conduct secret-ballot elections to determine whether employees want union representation and we investigate and remedy unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below or you may call the Board's toll-free number 1-844-762-NLRB (1-844-762-6572). Hearing impaired callers who wish to speak to an Agency representative should contact the Federal Relay Service (link is external) by visiting its website at https://www.federalrelay.us/tty (link is external), calling one of its toll free numbers and asking its Communications Assistant to call our toll free number at 1-844-762-NLRB.

Telephone: (412) 395-4400
Hours of Operation: 8:30am to 5:00pm, Monday through Friday.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the above Regional Office's Compliance Officer.

ATTACHMENT A

NAME	SENIORITY DATE
(b) (6), (b) (7)(C) [redacted]	(b) (6), (b) (7)(C) [redacted]

Attachment B

Name	Net Backpay	Payment #1	Payment #2
(b) (6), (b) (7)(C) [redacted]	$ 7,589.18	$ 3,794.59	$ 3,794.59
	$ 5,231.34	$ 2,615.67	$ 2,615.67
	$ 3,262.01	$ 1,631.01	$ 1,631.00
	$ 9,977.60	$ 4,988.80	$ 4,988.80
	$ 5,901.56	$ 2,950.78	$ 2,950.78
	$ 1,301.26	$ 650.63	$ 650.63
	$ 3,882.32	$ 1,941.16	$ 1,941.16
	$ 6,219.23	$ 3,109.62	$ 3,109.61
	$ 9,493.58	$ 4,746.79	$ 4,746.79
	$ 9,921.25	$ 4,960.63	$ 4,960.62
	$ 2,491.98	$ 1,245.99	$ 1,245.99
	$ 97.66	$ 48.83	$ 48.83
	$ 7,686.30	$ 3,843.15	$ 3,843.15
	$ 1,889.92	$ 944.96	$ 944.96
	$ 3,498.12	$ 1,749.06	$ 1,749.06
Totals	$ 78,443.31	$ 39,221.67	$ 39,221.64
Grand Total Payments #1 & #2	$ 78,443.31		

Name	Interest	Payment #1	Payment #2
(b) (6), (b) (7)(C) [redacted]	$ 148.10	$ 74.05	$ 74.05
	$ 42.93	$ 21.47	$ 21.46
	$ 12.88	$ 6.44	$ 6.44
	$ 161.52	$ 80.76	$ 80.76
	$ 124.49	$ 62.25	$ 62.24
	$ 39.17	$ 19.59	$ 19.58
	$ 83.17	$ 41.59	$ 41.58
	$ 108.39	$ 54.20	$ 54.19
	$ 148.64	$ 74.32	$ 74.32
	$ 159.91	$ 79.96	$ 79.95
	$ 74.59	$ 37.30	$ 37.29
	$ 2.68	$ 1.34	$ 1.34
	$ 109.47	$ 54.74	$ 54.73
	$ 35.42	$ 17.71	$ 17.71
	$ 89.08	$ 44.54	$ 44.54
Totals	$ 1,340.44	$ 670.26	$ 670.18
Grand Total Payments #1 & #2	$ 1,340.44		

Name	Excess Tax	Payment #1	Payment #2
(b) (6), (b) (7)(C) [redacted]	$ 26.29	$ 13.15	$ 13.14
	$ 6.44	$ 3.22	$ 3.22
	$ -	$ -	$ -
	$ 28.44	$ 14.22	$ 14.22
	$ 18.78	$ 9.39	$ 9.39
	$ 5.90	$ 2.95	$ 2.95
	$ 12.34	$ 6.17	$ 6.17
	$ 16.10	$ 8.05	$ 8.05
	$ 26.29	$ 13.15	$ 13.14
	$ 28.44	$ 14.22	$ 14.22
	$ 11.27	$ 5.64	$ 5.63
	$ 0.54	$ 0.27	$ 0.27
	$ 16.63	$ 8.32	$ 8.31
	$ 5.37	$ 2.69	$ 2.68
	$ 13.42	$ 6.71	$ 6.71
Totals	$ 216.25	$ 108.15	$ 108.10
Grand Total Payments #1 & #2	$ 216.25		

From: Bloomberg Law Daily Labor Report
To: Ring, John
Subject: Daily Labor Report Highlights
Date: Thursday, April 11, 2019 4:34:50 PM

Bloomberg Law

DAILY LABOR REPORT®

Highlights

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By Patrick Dorrian

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By Robert Iafolla

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Contractor Pay Cop Says He's Still on Beat After Audit Changes

By Chris Opfer

Federal contractors facing discrimination audits won't get a free pass, despite changes to give businesses more say in the probes, Labor Department official Craig Leen told Bloomberg Law.

DISCRIMINATION

Samsung's American Subsidiary Gets Job Bias Damages Cut by $575K

By Patrick Dorrian

A Samsung SDI America Inc. employee who was subjected to job retaliation is only entitled to $50,000 in punitive damages, not the $625,000 a jury awarded, a federal judge ruled.

WAGE & HOUR

Cleveland Indians Hit With Ariz. Worker's Unpaid Wage Claims (1)

By Steven M. Sellers and Robert Iafolla

Cleveland Indians Baseball Co. LLC violated federal and state minimum wage and overtime laws in requiring an Arizona spring training facility worker to work seven-day weeks and "volunteer" her time, a new lawsuit alleges.

Island Casino to Pay $3 Million to Settle Latest Lawsuit

By Chris Opfer

The developer of a controversial Northern Mariana Islands casino project has agreed to pay $3 million to resolve claims it didn't pay construction workers minimum wages and overtime.

Football Players Press Fraud Claims Against Defunct League

By Steven M. Sellers

Former players of the now-defunct Alliance of American Football were duped into joining the league and are owed unpaid wages and damages as a result, a new class complaint alleges.

STATE & LOCAL LAWS

New Curbs on Sexual Harassment Pass Illinois Senate

By Michael J. Bologna

Employers in Illinois would have to comply with a menu of new leave, training, and transparency duties addressing workplace sexual harassment under a bill that streaked through the state Senate April 11.

Colorado Lawmakers OK Bill Aiming to Soften Wage Garnishment

By Tripp Baltz

The Colorado House gave final approval to a bill designed to lessen the sting of wage garnishment for workers.

States of Work: New Mexico Limits Criminal History Queries

By Chris Marr

This week's "States of Work" looks at a new law in New Mexico that limits questions about criminal history on job applications, as well as a push by Democrats in Vermont for a mandatory paid family leave proposal that doesn't quite match up with the Republican governor's voluntary paid leave plan.

LABOR RELATIONS

31,000 Stop & Shop Workers in New England Walk Off the Job

By Aaron Nicodemus

More than 31,000 retail workers walked off the job at Stop & Shop supermarkets across three states, the largest retail industry strike in the U.S. in 16 years, after contract negotiations stalled.

Northeastern University Faculty Members Refile Union Petition

By Hassan A. Kanu

A local unit of the SEIU has refiled a petition to unionize full-time, non-tenured professors at Northeastern University in Boston.

IMMIGRATION

Immigration Chief Quits After Trump Calls for 'Tougher' Nominee

By Justin Blum

The acting director of U.S. Immigration and Customs Enforcement quit Wednesday, the latest departure among top immigration officials as President Donald Trump calls for tougher border control.

LEGAL PROFESSION

Big Four May Gain Legal Market Foothold With State Rule Change

By Sam Skolnik and Amanda Iacone

An attempt by several Western states to relax their bar ethics rules to make the legal system more affordable could have an unintended effect—allowing Big Four accounting firms to finally gain a foothold in the U.S. legal market.

Gorsuch Charts Course as Originalist With Independent Streak

By Patrick L. Gregory and Kimberly Strawbridge Robinson

Justice Neil Gorsuch has delivered almost precisely what conservatives were hoping for over his two years on the U.S. Supreme Court, even though his principles occasionally take him in other directions.

HEALTH CARE & BENEFITS

Great-West's 401(k) Victory Should Be Reheard, Investors Say

By Jacklyn Wille

A 270,000-person class of 401(k) investors who sued Great-West Life & Annuity Insurance Co. over its guaranteed investment products asked the Tenth Circuit April 10 to rethink its decision rejecting their lawsuit.

Woman Who Embezzled $1M From Employer Can't Sue It Under

ERISA

By Jacklyn Wille

A woman who embezzled more than $1 million from her employer and its retirement plan can't sue the company over how it allocated the money she paid back as restitution.

Chevron Fights Worker's Appeal Claiming Pension Interference

By Jacklyn Wille

Chevron USA Inc. asked a federal appeals court to reject a lawsuit by a former employee who says he was wrongly fired two months before he would have vested in his retirement benefits.

Managing Baby Boomer Retirement When You're Not Allowed to Ask

By Carol Hymowitz

When a service technician with more than 30 years of tenure at Ingersoll Rand Plc told his bosses he was considering retirement—his knees were no longer strong enough for him to climb rooftops—they created a new job for him and urged him to stay on.

SAFETY & HEALTH

Worker's Loss of Four Fingers Prompts $159K OSHA Fine (1)

By Paul Stinson

A worker at a Mississippi plastics manufacturing company lost four fingers in a machine mishap, and the employer now faces $159,118 in proposed fines.

ALSO IN THE NEWS

Bezos Taunts Big U.S. Retail With $16 Wage Challenge: 'Do It!'

By Jonathan Roeder and Matthew Boyle

U.S. retail giants woke up April 11 to yet another challenge from Amazon.com

Inc. Chief Executive Officer Jeff Bezos, this time with a call to match his company's recent increase to a minimum wage of $15 per hour.

Amazon Sues Over Work-at-Home Telemarketing Scheme

By Brian Flood

Amazon.com Inc. claims its good name was used in a telemarketing scheme to swindle job seekers into buying unaffiliated website services, according to a new federal lawsuit.

U.S. Jobless Claims Unexpectedly Fall, Hitting New 49-Year Low (1)

By Reade Pickert

Filings for U.S. unemployment benefits unexpectedly dropped, falling to the lowest level since October 1969, as the tight labor market showed little sign of easing.

LATEST CASES

Case: Labor Relations/Agency Fees (Mass.)

A group of Massachusetts state employees who objected to the payment of agency fees don't have live claims that the state violated their First Amendment rights. The employees' unions voluntarily stopped collecting agency fees to comply with a U.S. Supreme Court precedent that found mandatory agency fees unconstitutional, the state Attorney General and Department of Labor issued guidance explaining that public sector unions are categorically prohibited from collecting agency fees from unit members who do not belong to the union and do not consent to pay the fees, and it is not reasonably likely that the unions will begin collecting the fees again. The case is Branch v. Commonwealth Emp't Relations Bd., 2019 BL 125454, Mass., SJC-12603, 4/9/19.

Case: FMLA/Interference (S.D. Ohio)

An injured Montgomery County, Ohio, water/sewer worker's Family and Medical Leave Act interference claim after he was fired for absenteeism fails,

because he never submitted FMLA paperwork indicating that he had a serious health condition and his intentionally vague and limited contacts with his supervisors indicating that he was "sick" didn't constitute legally sufficient notice of his need for FMLA leave to cover his month-long absence. The case is Brunson v. Montgomery County, 2019 BL 127401, S.D. Ohio, No. 3:16-cv-368, 4/10/19.

Case: Discrimination/Discharge (W.D. Wash.)

A black operator may not proceed with his claim that the Boeing Company in Washington fired him because of his race, rather than for misuse of company time. The company has fired over 200 employees of various races for the same or similar violations and he didn't show that any of the decision-makers were even aware of his race when he was fired. The case is Caldwell v. The Boeing Co., 2019 BL 128231, W.D. Wash., No. C17-1741JLR, 4/10/19.

Case: Labor Relations/Interference (N.L.R.B.)

Quicken Loans, Inc. lawfully fired a mortgage banker who was overheard by a supervisor in a restroom stall responding to a co-worker who said that a client "should get in touch with a fucking Client Care Specialist" and quit wasting the co-worker's time. An administrative law judge found that the two bankers were discussing common concerns regarding how calls are forwarded and whose responsibility it was to field them, but there is no evidence that employees as a group had any preexisting concerns about the routing of customer calls, the banker only said that he understood why the co-worker was frustrated, and his reply can't be objectively construed as implying that he recognized his co-worker's complaint as referring to a group workplace problem. The case is Quicken Loans, Inc., 2019 BL 128288, N.L.R.B., 4/10/19.

Case: FMLA/Retaliation (D. Minn.)

A Minneapolis public school teacher can't go ahead with a Family and Medical Leave Act claim after she was suspended for five days while on FMLA leave following a car accident, because the four-month span between her request for FMLA leave and her unpaid suspension after an investigation found that she had trashed her classroom during a reassignment move-out was too long to establish a causal connection between her protected activity and an adverse

employment action, and there there was no other evidence linking any legally recognized adverse action to her exercise of her FMLA rights. The case is Eilen v. Minneapolis Pub. Sch., 2019 BL 127404, D. Minn., 17-cv-04388 (ECT/DTS), 4/10/19.

Case: Discrimination/Retaliation (2d Cir.)

A black female former project manager may proceed with her claim that the City of New York retaliated against her for complaining that her supervisor and indirect supervisor subjected her to sexual harassment and racial discrimination. That her supervisors allegedly forced her to work through her lunch hour, despite the fact that she needed to take a specific lunch hour to prevent migraine headaches, could deter a reasonable employee from reporting discrimination to conserve their health. The case is Collymore v. City of New York, 2019 BL 129000, 2d Cir., 18-2099-cv, unpublished 4/11/19.

Case: Discrimination/Retaliation (W.D. Pa.)

A female ophthalmology resident may not proceed with her claim that a health center in Pennsylvania placed her on probation, forced her to repeat rotations, and fired her in retaliation for complaining about pregnancy discrimination, rather than for unsatisfactory work performance. The center had been documenting her performance deficiencies before she even disclosed her pregnancy and she didn't show that she was treated less favorably than residents who hadn't complained about pregnancy discrimination. The case is Parish v. UPMC Univ. Health Ctr. of Pittburgh, 2019 BL 127338, W.D. Pa., No. 2:16-cv-00006, 4/10/19.

Case: Disability Discrimination/Waiver (M.D.N.C.)

A North Carolina Department of Public Safety employee's signature on an agreement settling her internal grievance bars her claim for violations of the Americans with Disability Act, because her ADA claims predate the settlement agreement in which she unambiguously released all employment-related claims and agreed to resign, and she knowingly and voluntarily signed the agreement. The case is Shaw v. N.C. Dep't of Pub. Safety, 2019 BL 127975, M.D.N.C., 1:18-CV-00049, 4/10/19.

Case: Discrimination/Discharge (4th Cir.)

An employee may not proceed with his claim that a church in North Carolina fired him because of his age. The church showed that he voluntarily resigned when he abandoned his position and his claims, including that other employees received higher pay, were insufficient to show that he was actually fired because of his age. The case is Baskins v. Mack, 2019 BL 127538, 4th Cir., 18-2121, unpublished 4/10/19.

Case: Discrimination/Hostile Work Environment (4th Cir.)

A fired resident of Indian descent may not proceed with his claim that a health care system in South Carolina subjected him to a hostile work environment because of his race. His director's racially insensitive comments, including jokingly referring to him as "Achmed the terrorist," occurred only twice over the span of 18 months and the resident didn't show that they were related to the alleged harassment. The case is Irani v. Palmetto Health, 2019 BL 127398, 4th Cir., 16-2439, unpublished 4/10/19.

Case: Disability Discrimination/Evidence (E.D.N.Y.)

A home solar company's argument that two letters from an ex-employee's doctors are inadmissible hearsay fails, allowing the employee to offer the letters as evidence at trial of his disability bias and failure-to-accommodate claims, because the letters aren't offered to establish the employee's arthritis and high blood pressure as disabilities but instead to show that the employee requested accommodations. The case is Maehr v. NRG Home Solar, 2019 BL 127983, E.D.N.Y., 2:16-CV-03897 (ADS)(SIL), 4/10/19.

Case: Labor Relations/Arbitration (W.D. Tex.)

An arbitrator didn't err in rescinding an award that found that Southwestern Bell Telephone Co. violated a labor contract when it trained and assigned certain outside employees to splice fiber optic cables. The union argued that the arbitrator didn't have authority to reconsider his first award, but the arbitrator found that he had committed a "technical error" by relying upon an agreement between a different set of parties, and the union's narrow reading of the arbitration rule on which he relied would prohibit an arbitrator from correcting an undisputed material mistake. The case is Communications Workers v.

Southwesten Bell Tel. Co., 2019 BL 122234, W.D. Tex., A-18-CV-271 LY, 4/5/19.

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From: Employment Law360
To: Ring, John
Subject: Arbitration Pact Valid Despite Worker"s Snub, Calif. Panel Says
Date: Friday, April 12, 2019 4:01:48 AM

EMPLOYMENT

Friday, April 12, 2019

TOP NEWS

Arbitration Pact Valid Des pite Worker's Snub, Calif. Panel Says

A California state appeals court has ruled that a Sohnen Enterprises worker must arbitrate her discrimination suit against the consumer good refurbishing company, saying she consented to an arbitration agreement by continuing to work despite never signing the pact and verbally rejecting it.

Read full article »

Auto Dealer Can't Nix EEOC's Sui t Over Panic Attack Firing

An Arkansas chain of auto dealerships must face trial in a U.S. Equal Employment Opportunity suit accusing it of illegally firing a woman for having panic attacks in violation of the Americans with Disabilities Act.

Read full article »

Tainted Arbitration Pact Not Enfor ceable, Calif. Panel Says

A worker pursuing wage claims against a company that may have misclassified him as an independent contractor can do so without having to go to arbitration, a California appellate panel ruled Wednesday, saying the agreement he signed was riddled with problematic provisions rendering it totally invalid.

Read full article »

Trump Admin Moves To Rein In Agency Guidan ce Materials

The Trump administration announced Thursday a plan aimed at scaling back unofficial guidance materials that federal agencies issue without public input alongside or instead of formal regulations, often to the irritation of industries that must comply.

Read full article »

Hertz Wants Ex-GC To Cough Up Over $70M In Cla wbacks

Hertz is looking to recover more than $70 million in incentive pay and severance packages from former general counsel John Jeffrey Zimmerman and two other executives following their alleged roles in an accounting scandal from five years ago, according to a suit filed recently in New Jersey federal court.

Read full article »

DISCRIMINATION

UPMC Escapes Ex-Resident's Pregnancy D iscrimination Suit

A Pennsylvania federal judge tossed a former ophthalmology resident's pregnancy and gender discrimination suit against the University of Pittsburgh Medical Center, finding the hospital had legitimate, performance-based reasons for terminating the woman from her program.

Read full article »

JetBlue Drug Tester Says S uit Over Worker Detention Lacking

A company conducting drug tests for JetBlue Airways urged a Florida federal

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New Cases

Discrimination (35)
Labor (42)

LAW FIRMS

Akerman
Arent Fox
BakerHostetler
Ballard Spahr
Beck Reed
Black Srebnick
Boies Schiller
Breall & Breall
Buchalter PC
Buchanan Ingersoll
Cohen & Grigsby
Cotsirilos Tighe
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Dechert
Duane Morris
Eagan Avenatti
Finger & Slanina
Foley Hoag
Foliart Huff
Fredrikson & Byron
Gentry Locke
Gordon & Rees
Hall Booth
Honigman LLP
Hooper Lundy

court Wednesday to dismiss a former airline employee's claims she was wrongly detained for 11 hours and forced to expose her breasts while giving a urine sample after a work accident, arguing the complaint lacks key ingredients.

Read full article »

WAGE & HOUR

Cleveland Indians Required Unpaid Wo rk, Ex-Employee Says

An ex-administrative assistant for the Cleveland Indians accused the team in Arizona federal court of failing to pay her for her work, saying she was told by supervisors she needed to “volunteer” her time for the MLB club.

Read full article »

6 Ex-Workers Can Testify At Mario Sbarro's Steakhouse Trial

A New York federal court has permitted six former employees of a shuttered steakhouse to testify about how its owners, famed pizzeria boss Mario Sbarro and his son, allegedly shorted them on their wages, despite the Sbarros' argument that only two ex-workers should be called as witnesses.

Read full article »

LABOR

NLRB Tells Justices It Has J urisdiction Over Tribal Casino

The National Labor Relations Board on Wednesday asked the U.S. Supreme Court not to take up a California tribal casino's challenge to a ruling that it can't block workers from handing out union leaflets in guest areas, saying the agency has the authority to assert jurisdiction over tribal businesses.

Read full article »

NLRB OKs Banker's Firing For Foul-Mouthed Gripe

The National Labor Relations Board ruled that Quicken Loans didn't violate federal labor law when it fired a banker accused of griping about the job in a profanity-laced bathroom conversation, saying the brief chat didn't amount to protected activity.

Read full article »

NFL Union Tells 1st Circ. Ex-Agent's C laims Are 'Frivolous'

A former National Football League agent's antitrust claim against the league is barred by labor exemptions under competition law, the players union for the NFL told the First Circuit on Wednesday, saying the agent's appeal represents the latest in a series of "frivolous" filings.

Read full article »

Dem Lawmakers Question NAFTA 2.0 Labor Provisions

House Democrats on Thursday penned a letter to U.S. Trade Representative Robert Lighthizer asking whether the rewrite of the North American Free Trade Agreement will “lead to meaningful change and real improvements" to labor standards in Mexico.

Read full article »

WHISTLEBLOWER

Analysis

5 Things To Watch As Indivior At tacks DOJ Opioid Indictment

Indivior has enlisted a former federal prosecutor with 40 years of experience in its bet-the-company battle against a U.S. Department of Justice indictment that echoes long-running antitrust and False Claims Act suits alleging shady opioid sales. Here, Law360 spotlights five things to watch in the multibillion-dollar case.

Read full article »

WORKER SAFETY

Hunton Andrews Kurth
Keller Anderle
King & Spalding
Kutak Rock
Linklaters
Marino Tortorella
Marron Lawyers
Mayer Brown
Mintz Levin
Morgan Lewis
Motley Rice
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Orrick Herrington
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Wiley Rein
Winston & Strawn
Young Conaway
Zuckerman Spaeder

COMPANIES

Alpha Natural Resources, Inc.
Ameren Corp.
American Civil Liberties Union
American Electric Power Co. Inc.
Berkeley Research Group
Casino Pauma
Chevron Corp.
Cleveland Indians
Communications Workers of America
DTE Energy Co.
Ditech Holding Corp.
Endo International PLC
Examination Management Services Inc.
Fannie Mae
FirstEnergy Corp.
Freddie Mac
Goodyear Tire & Rubber Co.
Hertz Global Holdings Inc.
Indivior PLC
JetBlue Airways Corp.
Johnson & Johnson

United Fire, Cable Co. On Hook For P ipe Explosion, Suit Says

An Oklahoma cable company and its insurance carrier should have to pay for court costs and damages stemming from a pipe explosion that left several workers injured, contractor Trawick Construction Co. said in federal court Wednesday.

Read full article »

BANKRUPTCY

Ditech Seeking Ch. 11 Sale As It Negotiates With Creditors

Ditech Holding Corp. has temporarily put off distributing a Chapter 11 plan and seeking final full approval for debtor-in-possession financing while it negotiates a global settlement with its creditor base and engages with parties interested in buying its loan origination and servicing businesses, a Ditech bankruptcy attorney said Thursday.

Read full article »

EXPERT ANALYSIS

Worker Comparison Test For Bias Claims Is Uncert ain

The Eleventh Circuit's recent opinion in Lewis v. Union City may sound exciting for employers, but the court has vacillated on the standard for determining “similarly situated" co-workers in discrimination claims before and it may very well do so again, say Cathy Beveridge and Michele Ramos of Buchanan Ingersoll.

Read full article »

What H-1B Employers Can Learn From D OL's Back Pay Ruling

In Wage and Hour Division v. TLC Precision Wafer Technology, the U.S. Department of Labor recently awarded back pay to an H-1B worker whose hours were cut, reminding H-1B employers of the administrative steps that are necessary when material changes in the terms and conditions of employment occur, say attorneys with Mayer Brown.

Read full article »

LEGAL INDUSTRY

Analysis

Why Greg Craig's Defense Team Began With Offense< /a>

Attorneys representing former Skadden partner and Obama administration counsel Gregory Craig had nothing to lose and a lot to gain when they decided to announce his impending indictment before the news broke, defense attorneys told Law360.

Read full article »

Ex-Skadden, Obama Atty Indicted Over Manafort Work< /a>

Ex-Skadden partner Gregory Craig was charged Thursday with lying to federal officials probing work he did at the firm as part of Paul Manafort’s foreign lobbying effort for the government of Ukraine.

Read full article »

VIDEO: Ex-Skadden Partner Says, 'I Was Always Honest'

Former President Barack Obama counsel and ex-Skadden star Gregory Craig took the highly unusual step Thursday of taking to Twitter and YouTube to defend himself against allegations of lying to the government about lobbying connected to Paul Manafort's efforts for the government of Ukraine.

Read full article »

Analysis

Trump’s Sister Eschewed Family 217;s Flash On 3rd Circ. Bench

LinkedIn Corp.
London Stock Exchange Group PLC
Major League Baseball Inc.
Morgan Stanley
NFL Enterprises LLC
National Collegiate Athletic Association
National Football League Players Association
National Right to Work Legal Defense Foundation
New York Times Co.
Nike Inc.
Northeastern University
Peanut Corporation of America
Planned Parenthood Federation
Purdue Pharma LP
Quicken Loans Inc.
Reckitt Benckiser Group PLC
Sbarro Inc.
State Bar of California
TC Global Inc.
Target Corp.
The Southern Company Inc.
Trump Organization Inc.
Twitter Inc.
United Fire & Casualty Company
United Parcel Service Inc.
University of Pittsburgh Medical Center
Urban Outfitters Inc.
Vistra Energy Corp.
Windstream Holdings Inc.
YouTube Inc.

GOVERNMENT AGENCIES

Bureau of Citizenship and Immigration Services
Central Intelligence Agency
Equal Employment Opportunity Commission
Executive Office of the President
Federal Communications Commission
Federal Deposit Insurance Corp.
Federal Energy Regulatory Commission
Federal Reserve System
Food and Drug Administration
Internal Revenue Service
International Monetary Fund
NAFTA
National Labor Relations Board
Office of the U.S. Trade Representative

While her brother became known for gold-and-marble-bedecked buildings emblazoned with his family's name, attorneys say that Maryanne Trump Barry, the recently retired Third Circuit judge and elder sister of President Donald Trump, built a career in which she avoided the limelight and dedicated herself to circumspect and fact-driven rulings.

Read full article »

Avenatti Charged With Tax Evasion, Stea ling From Clients

Federal prosecutors in Los Angeles announced a 36-count indictment against attorney Michael Avenatti on Thursday, adding to the legal woes of a provocateur who already faced embezzlement and extortion charges.

Read full article »

Analysis

Will The Newest Charges Against Ave natti End His Career?

President Donald Trump's bombastic legal sparring partner Michael Avenatti is facing the end of his career and possibly substantial jail time thanks to Thursday's detailed federal indictment on fraud and tax evasion charges, the latest in a string of financial and legal troubles that have followed his star turn.

Read full article »

Analysis

'Varsity Blues' Judge Tough, Fair, An d A Good Draw For Feds

U.S. District Judge Nathaniel M. Gorton, the subject of a judge-shopping spat in the "Varsity Blues" case, is well-known around the Boston bar as a fair jurist, but one of the toughest on defendants and a potential delight for prosecutors.

Read full article »

Trump Defender, Ex-Wiley Rein Partner To Leave DOJ

Brett Shumate, a former Wiley Rein LLP partner and one of the lead advocates tasked with defending President Donald Trump and his policies in court, revealed that he would be leaving the U.S. Department of Justice in a notice filed Thursday.

Read full article »

Dems Press Hunton On Ties To 'Sec retive' Air Industry Group

House Democrats on Thursday demanded information from Hunton Andrews Kurth and eight utility companies about their relationships with what the lawmakers blasted as a "secretive" front group devoted to rolling back air quality regulations.

Read full article »

Linklaters Ramps Up Flexible Work Offerin gs In The UK

Magic Circle firm Linklaters on Thursday announced it has bolstered its flexible working policy in the U.K., expanding the privileges to any employee, without regard to seniority and without requiring staffers to spell out their reasons for seeking a change.

Read full article »

Law360's Weekly Verdict: Legal Lions & Lambs

King & Spalding snatched this week's top legal lion spot after a jury found client Johnson & Johnson's talcum powder does not contain asbestos, while Morgan Lewis & Bockius was among the week's legal lambs with the Second Circuit reviving an employment suit against client Urban Outfitters.

Read full article »

CORRECTED: 3rd Circ. Revisits Del.'s Bala nce On Bench Rule

A Third Circuit panel on Wednesday revisited a recent ruling that rejected Delaware's requirement that judicial applicants be registered Democrats or Republicans, though it kept the precedential decision largely intact.
Correction: A previous version of this story mischaracterized the nature of the

Securities and Exchange Commission

Tennessee Valley Authority

U.S. Attorney's Office

U.S. Department of Justice

U.S. Department of Labor

U.S. Department of Transportation

U.S. Environmental Protection Agency

U.S. Navy

U.S. Postal Service

U.S. Supreme Court

United States Bankruptcy Court for the Southern D istrict of New York

United States Court of Appeals for the Third Circuit

Wage and Hour Division

rehearing. The error has been corrected.

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From: Martin, Andrew
Subject: Legal News FYI 04-12-19
Date: Friday, April 12, 2019 7:29 07 AM
Attachments: image001.png

Friday, April 12, 2019

‘Game of Thrones’ Secrecy Spotlights NDAs in Worker Contracts

BloombergLaw - Daily Labor Report 12 Apr 2019 06:36

• Business world, Hollywood leverage the contracts • States have pushed to limit the agreements in #MeToo era By Erin Mulvaney Cast members have been careful not to leak spoilers in the run-up to the final season of “Game of Thrones,” the fantasy HBO...

Labor Department's Proposed Four-Factor Rule Would Limit Joint Employment

Mondaq Business Briefing 11 Apr 2019 22:12

The U.S. Department of Labor just became he latest federal agency to propose a rule to limit the scope of joint employment liability, this time for wage and hour matters. If the rule released earlier today is adopted in its current form, the USDOL would...

White House Moves to Gain More Control Over Federal Regulations

New York Times, The (New York, NY) 11 Apr 2019 18:30

WASHINGTON — The White House moved to exert greater control over he federal regulatory process on Thursday by imposing additional scru iny over independent government agencies when they establish new policies, guidelines or rules that affect large...

Blog Post: NLRB OKs Banker's Firing For Foul-Mouthed Gripe

LexisNexis Legal Newsroom : Workers Compensation Law (Blog) 11 Apr 2019 16:41

The National Labor Relations Board ruled that Quicken Loans didn't violate federal labor law when it fired a banker accused of griping about the job in a profanity-laced bathroom conversation, saying the brief chat didn't amount to protected activity...

Blog Post: NLRB Tells Justices It Has Jurisdiction Over Tribal Casino

LexisNexis Legal Newsroom : Workers Compensation Law (Blog) 11 Apr 2019 14:32

The National Labor Relations Board on Wednesday asked the U.S. Supreme Court not to take up a California tribal casino's challenge to a ruling that it can't block workers from handing out union leaflets in guest areas, saying the agency has the ...read...

NLRB LIBRARY Your Primary Source

Legal News FYI monitors news, cases, and legislative developments of interest to the NLRB. To be added to or removed from the distribution list contact Andrew Martin. Please note that these are external links and the Agency takes no responsibility for their content.

From: Morning Shift
To: Ring, John
Subject: POLITICO"s Morning Shift: Bezos fights for $15 — April 16 hearing for EEO-1 lawsuit — Trump tried to dump detainees in Pelosi"s district
Date: Friday, April 12, 2019 10:02:19 AM

View online version

2018 Newsletter Logo: Morning Shift

04/12/2019 10:00 AM EDT

By REBECCA RAINEY (rrainey@politico.com; @RebeccaARainey)

With help from Ian Kullgren

Editor's Note: This edition of Morning Shift is published weekdays at 10 a.m. POLITICO Pro Employment & Immigration subscribers hold exclusive early access to the newsletter each morning at 6 a.m. To learn more about POLITICO Pro's comprehensive policy intelligence coverage, policy tools and services, click

here.

QUICK FIX

— Jeff Bezos challenged other retailers to pay a $15 hourly minimum.

— The EEOC will be in court April 16 to seek delay for a judge's ruling that requires the agency to collect pay data broken down by race, ethnicity, and gender.

— Trump tried to dump immigrant detainees in Nancy Pelosi's district.

GOOD MORNING! It's Friday, April 12, and this is Morning Shift, your daily tipsheet on labor and immigration news. Send tips, exclusives and suggestions to rrainey@politico.com, thesson@politico.com, ikullgren@politico.com, and tnoah@politico.com. Follow us on Twitter at @RebeccaARainey, @tedhesson, @IanKullgren, and @TimothyNoah1.

DRIVING THE DAY

AMAZON'S FIGHT FOR $15: Amazon CEO Jeff Bezos urged competitors to match the online superstore's $15 hourly minimum wage plus benefits in a letter to shareholders Thursday, even as those same companies struggle to catch up with Amazon's sales.

"I challenge our top retail competitors (you know who you are!) to match our employee benefits and our $15 minimum wage," Bezos said in the letter, according to the Washington Post (which Bezos owns). "Do it! Better yet, go to $16 and throw the gauntlet back at us. It's a kind of competition that will benefit everyone." Amazon boosted its wage minimum in November (although it also slashed warehouse workers' bonuses and stock option benefits).

The letter drew some shade from Walmart Executive Vice President of Corporate Affairs Dan Bartlett, who tweeted Thursday morning: "Hey retail competitors out there (you know who you are) how about paying your taxes?" The tweet linked to a Feb. 16 news report by Yahoo! Finance that Amazon paid no federal income tax in 2017 or 2018. Bartlett added : "FWIW, the vast majority of our warehouse associates have been making more than $15 for a long time. And they still get quarterly performance bonuses."

DIVERSITY

HEARING DATE ON EEO-1 DEADLINE: Attorneys representing the Office of Management and Budget and the Equal Employment Opportunity Commission will be in court April 16 for a hearing regarding the deadline for when businesses with 100 or more employees will be required to submit pay data broken down by race, ethnicity, and gender. An Obama-era requirement that the EEOC collect this demographic information was stayed by the Trump administration, but then reinstated by a DC federal court in March. The government said earlier this month that it could manage a September 30 deadline, but Judge Tanya Chutkan hasn't decided whether that will do. Chutkan wasn't pleased to learn that the agency didn't move quickly to alert businesses to the reinstated reporting requirements.

The National Women's Law Center, which challenged the Trump administration's stay of the new pay reporting requirements, has urged Chutkan to reject the EEOC's request. Meanwhile, the American Society of Employers and the DirectEmployers Association have urged Chutkan to put off the deadline to next year, and the Chamber of Commerce has asked Chutkan give employers 18 months to comply. Read the order here.

IMMIGRATION

TRUMP TRIED TO DUMP DETAINEES IN SANCTUARY CITIES : At least twice in the past six months, the Trump White House tried to persuade U.S. Immigration and Customs Enforcement to release detainees in sanctuary cities, Rachael Bade and Nick Miroff report for the Washington Post. One proposed target was Nancy Pelosi's district in San Francisco. "Senior Trump adviser Stephen Miller discussed the proposal with ICE, according to two DHS officials. Matthew Albence, who is ICE's acting deputy director, immediately questioned the proposal in November and later circulated the idea within his agency when it resurfaced in February, seeking the legal review that ultimately doomed the proposal."

"The extent of this administration's cynicism and cruelty cannot be overstated," Pelosi spokeswoman Ashley Etienne told the Post. "Using human beings — including little children — as pawns in their warped game to perpetuate fear and demonize immigrants is despicable." More here.

MCCONNELL SAYS LETS TALK IMMIGRATION: Senate Majority Leader Mitch McConnell said Thursday "it's way past time" to have an "adult bipartisan

discussion" with Democrats "about our immigration laws," POLITICO's Marianne LeVine reports.

"I'm willing to enter into a negotiation to see what we can do to fix the problems," the Kentucky Republican said. The Senate last year crafted a bipartisan immigration bill that would have given as many as 1.8 million young undocumented immigrants a path to citizenship while spending $25 billion on border security, but Trump wouldn't support it and the bill died. McConnell stipulated that any alterations to existing law would have to address border security and asylum. More here.

JOBS, JOBS, JOBS

UNEMPLOYMENT CLAIMS DROP TO HISTORIC LOWS: Only 196,000 people filed initial unemployment benefit claims during the week ending April 6, the lowest level since 1969, the Labor Department reported Thursday. But the Associated Press' Christopher Rugaber points out that the historic numbers aren't due *only* to a tight labor market. "Many states have imposed stricter rules on their unemployment insurance programs — from making it harder to qualify to reducing the duration of benefits to cutting payouts," he writes.

The Labor Department published a proposal last year that would allow states to require a broad swath of applicants for unemployment insurance to pass drug tests. Under the 2012 Middle Class Tax Relief and Job Creation Act, Congress gave states the authority to impose drug tests, but that bill passed at a time when unemployment was high. Democrats agreed to the drug-test provision to secure Republican votes to extend emergency spending for unemployment insurance. The Obama administration then implemented a regulation that limited sharply the population that could be subjected to the drug tests. Then the Trump administration broadened that population, even as unemployment dropped below 4 percent. More from POLITICO's Rebecca Rainey here.

UNIONS

TRUMP SAYS HE'S STILL FRIENDS WITH LABOR: At an event Wednesday in Crosby, Texas, Trump promised the International U nion of Operating Engineers that labor "will always have a friend at the White House," the Washington Examiner's Sean Higgins reported. "Under this administration we have ended the war on energy .... and we've put thousands and thousands of patriotic union

members like you to work building our energy future," the president said.

But in a March event in Lima Ohio, Trump sang a very different tune. "I sort of don't want to meet" with union leaders , Trump told that crowd. "Because the heads of the union are not honest people. They're not honest." Trump blamed the closing of GM's Lordstown plant on high union dues ("You're paying too much dues"), which didn't make a lot of sense because union dues comes out of workers' pockets, not management's. More from Higgins here.

WAGES

DUKE DOCTORAL STUDENTS WIN $15 AN HOUR: Doctoral candidates at Duke University will be paid the equivalent of $15 an hour starting in 2022, the university said in an email Thursday. "While the majority of our Ph.D. students already receive year-round funding, we believe that providing 12-month stipends, at the full rate, will enhance the experience for all graduate students." Each grad student will receive $31,160 per academic year (the equivalent of $15 per hour for a full-time employee).

The announcement follows a yearlong effort by the Duke Graduate Students Union. "Duke is not an easy campus to organize on. We live in the right-to-work South," said Claire Ravenscroft, a union leader and fifth-year doctoral candidate. "Every campus worker across the country should know that if we can fight and win in this condition they can fight and win in theirs."

Emory University announced a similar pay raise last year. Nationally, stipends for funded graduate students range from about $13,000 a year to $34,000 a year, according to Inside HigherEd.

WORKER SAFETY

REPORT: TESLA SUPPRESSED WORKERS COMP CLAIMS: A new investigation by Reveal from The Center for Investigative Reporting found that automaker Tesla's workers' compensation manager routinely pressured Dr. Basil Besh, who ran the factory injury clinic, "to make sure Tesla wasn't on the hook for certain injured workers." Will Evans reports that the car company "coordinated behind the scenes in an arrangement that financially benefited both the carmaker and the doctor." One former clinic employee told Rewire that Besh "ordered his medical staff to reverse course and change diagnoses and job restrictions to make

the automaker happy."

"He would say, 'I'm not losing the contract over this - get this case closed,'" according to the former employee. Besh told Reveal that Tesla doesn't pressure him to dismiss injuries and that his determinations are "only based on what the patient needs." More here.

STRIKES

STOP AND SHOP STRIKE: "As many as 31,000 workers at Stop & Shop grocery stores in New England went on strike Thursday after contract negotiations stalled between management and the United Food & Commercial Workers," POLITICO's Ian Kullgren reports. "The union says it is fighting proposed benefit cuts at the same time that Ahold Delhaize, the corporation that owns Stop & Shop, voted to give shareholders an 11 percent dividends increase." More here.

TEACHERS STRIKES:

Illinois: After bargaining for nearly a year, more than 93 percent of University of Illinois-Chicago United Faculty members voted to authorize a strike, the union announced Thursday. "The administration admitted they don't have a plan to invest in faculty for the sake of our students," said Janet Smith, UICUF president. "Our faculty clearly think it's time to address that." The union argues that the administration has not "adequately" addressed the issue of compensation while enrollment has increased

California: Some 3,000 members of the Sacramento City Classroom Teachers Association , went on strike Thursday over what they said was the Sacramento City Unified School District's failure to fulfill the terms of a contract it reached with teachers in 2017. "This strike is to ensure that SCUSD management keeps its promises to our students," said association president David Fisher. "The Sacramento City Teachers Association is the third major teachers union in California to strike this year, following those in Los Angeles and Oakland — all of whom have called for more school funding, smaller class sizes, and support services," POLITICO's Mackenzie Mays reports. More here.

Illinois: Loyola University Chicago graduate workers plan a sit-in Monday to protest the institution's failure to reach a "fair contract" with their union.

COFFEE BREAK

— "Drug Tests Show Marijuana Use at 14-Year High Among Workers," from The Wall Street Journal

— "Dems torn over response to Trump's immigration crackdown," from POLITICO

— "'Lack of enthusiasm' leaves Herman Cain's Fed nomination all but dead," from POLITICO

— "Trump trumpets revival of manufacturing, but factory wages lag behind," from The Los Angeles Times

— "What Do The Changes To H-2B Visas Mean For Maryland Crabs?" from Forbes

THAT'S ALL FOR MORNING SHIFT!

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Cc:	Habenstreit, David
Subject:	FW: 17-1226 Hendrickson Trucking, Judgment fld.pdf
Date:	Friday, April 12, 2019 10:51:50 AM
Attachments:	17-1226 Hendrickson Trucking, Judgment fld.pdf

The DC Circuit issued the attached decision today. The Court was reviewing the Board's decision and order in Hendrickson Trucking, 365 NLRB 139 (2017). (Miscimarra, Pearce, McFerran).

Marjorie Lassiter
Legal Assistant
Enforcement Litigation
(202)273-3855

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-1226 **September Term, 2018**

FILED ON: APRIL 12, 2019

HENDRICKSON TRUCKING COMPANY,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT

INTERNATIONAL BROTHERHOOD OF TEAMSTERS (IBT), LOCAL 1038,
INTERVENOR

Consolidated with 17-1234

On Petitions for Review and Cross-Application
for Enforcement of an Order of
the National Labor Relations Board

Before: HENDERSON, SRINIVASAN and MILLETT, *Circuit Judges*.

JUDGMENT

This petition for review and cross-application for enforcement were considered on the record from the National Labor Relations Board, as well as on the briefs of the parties. We have accorded the issues full consideration and determined that they do not warrant a published opinion. *See* D.C. CIR. R. 36(d). It is

ORDERED AND ADJUDGED that the petition for review be denied and the cross-application for enforcement be granted. As explained in the Board's thoroughgoing and persuasive briefing, the Board's decision hewed to settled law and its factual findings and credibility judgments were amply supported in the record.

Petitioner Hendrickson Trucking Company is a trucking business based in Jackson, Michigan. The Company provides a hauling service for aggregate materials like sand and gravel on a seasonal basis, running between April and November. In 2012, Hendrickson Trucking and the union representing its employees, the International Brotherhood of Teamsters, Local 1038, entered into negotiations to replace their expiring collective bargaining agreement. The National

Labor Relations Board found that, in the course of those failed negotiations, Hendrickson Trucking committed numerous unfair labor practices in violation of Sections 8(a)(1), 8(a)(3), and 8(a)(5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1), (3) & (5). In particular, the Board found that Hendrickson Trucking wrongly (i) withheld pertinent information about business operations requested by the Union; (ii) unilaterally implemented the terms of its final offer without first bargaining to impasse; (iii) refused to resume bargaining at the Union's request; and (iv) failed to reinstate employees who had engaged in an unfair labor practice strike. *Hendrickson Trucking Co.*, 365 N.L.R.B. No. 139 (Oct. 11, 2017). Hendrickson Trucking petitions this Court for review and the Board, joined by the Union as intervenor, cross-applies for enforcement.

The rocky course of negotiations for a new collective bargaining agreement that gave rise to this litigation began in February 2012 with the first of seven bargaining sessions. At the outset, there appeared to be a substantial gap between Hendrickson Trucking's and the Union's positions, with Hendrickson Trucking looking to curtail its expenses, and the Union seeking to increase wages and benefits. At their second meeting in April, Hendrickson Trucking explained that it could not expand benefits because the Company needed to stem financial losses. That representation prompted the Union's president, Alan Sprague, to request "detailed cost-savings calculations" relating to the Company's economic proposals, including its proposals to rollback overtime and its 401(k) match, and to increase the employees' share of insurance premiums. J.A. 58. The Company "threw numbers out," but Sprague insisted that the Union needed concrete substantiation of the amounts the Company would save. J.A. 223.

Hendrickson Trucking did not provide the requested financial information. Instead, at the parties' third meeting, the Company withdrew many of its initial proposals and reduced the employees' proposed share of insurance premiums. The Union rejected the offer, and then voted both to pre-ratify a one-year contract that largely preserved the status quo and to strike if necessary.

Hendrickson Trucking's and the Union's recollections of the fourth meeting diverge. The Company's chief financial officer testified that this meeting was the first occasion on which Sprague requested cost-saving information related to Hendrickson Trucking's proposals. The Company says that it then provided a spreadsheet documenting the business's finances. But Sprague testified that he had no recollection of ever seeing such a document, and that he had asked for the relevant financial information two meetings earlier. The administrative law judge and the Board credited Sprague's version of events because the chief financial officer "waivered [sic] in his testimony" and was "not entirely forthcoming." J.A. 66, 67 n.17. The administrative law judge also concluded that, in any event, the spreadsheet was "an insufficient response as it did not include cost savings calculations or data for each of those economic proposals." J.A. 74.

At the fifth meeting, Sprague reminded Hendrickson Trucking that the Union was still awaiting the cost-saving information. No response came.

At the sixth meeting, Hendrickson Trucking presented what it denominated its "LAST BEST OFFER." J.A. 486–515. When the Union rejected that offer, Hendrickson Trucking declared a bargaining impasse. Sprague instantly disagreed. Hendrickson Trucking subsequently conveyed a "Revised Proposal and [another] Last, Best, and Final Offer," J.A. 516–579, which the Union rejected.

At the seventh and last meeting, the Union presented its "Final Proposal." That proposal offered Hendrickson Trucking three options: (1) implement the one-year pre-ratified offer; (2) implement a slightly altered offer; or (3) "Work Stoppage." J.A. 582. The administrative law judge found, and the Board agreed, that the Union "did not intend to end negotiations with [its] final offer." J.A. 69.

The Union waited for Hendrickson Trucking's response. But it never came. Instead, Hendrickson Trucking unilaterally implemented its own last offer. Upon learning of that, the Union instituted a strike in June 2012. A month later, the Union filed a grievance with Hendrickson Trucking and requested information about its use of trucks bearing the name AGG Trucking, LLC during the strike period.

At the end of November, the Union made an unconditional request to return to work, and also expressed a willingness to "meet and bargain in good faith" if Hendrickson Trucking would rescind its unilateral changes to the agreement and provide the requested information about the use of AGG Trucking vehicles. J.A. 71, 594. Hendrickson Trucking refused to reinstate the employees, relying instead on replacement workers.

In late December, the Union sent a second grievance letter to Hendrickson Trucking that challenged the Company's hiring of replacement workers and renewed both of the Union's still-unanswered information requests. Hendrickson Trucking responded with a letter asserting that "Hendrickson Trucking and AGG Trucking are a single employer." J.A. 72, 609.

In the aftermath of the failed negotiations, the Board's General Counsel issued a complaint against Hendrickson for (i) unilaterally implementing the terms of a final offer without bargaining to a valid impasse; (ii) refusing to provide the Union with the information it requested related to AGG Trucks; (iii) refusing to resume bargaining after the strike ended; and (iv) failing to reinstate the striking workers after they made an unconditional offer to return to work.

Following a two-day hearing, the administrative law judge sustained all of the General Counsel's charges. Hendrickson filed exceptions to the Board, challenging both the ALJ's substantive findings and her authority to preside over the case under *NLRB v. Noel Canning*, 573 U.S. 513 (2014). That case held that the Board had lost the quorum required to operate as of January 4, 2012. The Board did not regain a quorum through valid appointments until August 2013, several months after the administrative hearing in this case. In addition, the Board had not ratified the ALJ's appointment until after her initial decision had issued.

In light of *Noel Canning*, and "without concluding or suggesting that the judge lacked the authority to issue the May 16, 2014 decision," the Board remanded the case to the ALJ to "consider anew the issues presented now that her appointment has been ratified by a fully confirmed five-member Board," in the hope that would "remove any lingering questions." J.A. 52. On remand, the ALJ "fully reviewed" her prior decision and ruled that it was correct "[i]n its entirety." J.A. 61.

The Board again affirmed in all relevant respects. The Board ordered Hendrickson

Trucking to: (i) rescind the unilateral changes it had made in June 2012; (ii) make unit employees and strikers whole for any losses occasioned by the unilateral changes; (iii) offer full reinstatement to those who had engaged in the strike in response to the Company's unfair labor practices; and (iv) bargain with the Union upon request. Hendrickson Trucking then petitioned this court for review, arguing that the Board's findings are not supported by substantial evidence and that the ALJ lacked the legal authority to adjudicate the case.

Under the National Labor Relations Act, an employer commits an unfair labor practice if it "refuse[s] to bargain collectively with the representatives of [its] employees," 29 U.S.C. § 158(a)(5), or if it "discriminat[es] in regard to hire or tenure of employment or any term or condition of employment" as a way to "encourage or discourage membership in any labor organization," *id.* § 158(a)(3). An employer's failure to abide by either requirement also violates Section 8(a)(1) of the Act, which prohibits "interfer[ing] with, restrain[ing], or coerc[ing] employees in the exercise of the right[]" under the Act to "bargain collectively through representatives of their own choosing," 29 U.S.C. § 157. *Enterprise Leasing Co. of Fla. v. NLRB*, 831 F.3d 534, 546 (D.C. Cir. 2016) (first, second, and third alterations in original) (quoting 29 U.S.C. § 158(a)(1)) (explaining that a violation of 29 U.S.C. § 158(a)(5) produces a derivative violation of § 158(a)(1)); *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983) (same for 29 U.S.C. § 158(a)(3)).

Hendrickson Trucking raises five challenges to the Board's determination that it committed multiple unfair labor practices. None of them succeeds.

First, Hendrickson Trucking challenges the Board's finding that it impermissibly imposed new terms of employment without first bargaining with the Union to impasse. But the Board's holding that Hendrickson Trucking could not declare an impasse because it had failed to provide the Union the financial information it needed to evaluate the Company's representations was grounded in settled law. This court has long recognized that an employer's failure to provide requested information that affects negotiations generally "preclude[s] the Company from declaring an impasse." *United States Testing Co. v. NLRB*, 160 F.3d 14, 22 (D.C. Cir. 1998) (citations omitted); *accord E.I. Du Pont de Nemours & Co. v. NLRB,* 489 F.3d 1310, 1315 (D.C. Cir. 2007) ("'[I]mpasse cannot exist where the employer has failed to satisfy its statutory obligation to provide information needed by the bargaining agent to engage in meaningful negotiations.'") (quoting *Decker Coal Co.,* 301 N.L.R.B. 729, 740 (1991)); *id.* at 1316 (Union "entitled to inspect the data relied on by an employer and does not have to accept the employer's bald assertions or generalized figures at face value[.]").

Hendrickson Trucking disputes the facts, arguing that it did provide the relevant financial information when (in its view) it was first requested at the fourth meeting. But substantial evidence supports the Board's contrary factual findings that (i) Sprague asked for the information repeatedly before that meeting; (ii) the requested information was never provided; and (iii) the spreadsheet that was belatedly provided was not responsive to the Union's specific requests. Plus Hendrickson Trucking has not come close to meeting the weighty burden of discrediting the underlying credibility determinations made by the ALJ and adopted by the Board. *See Inova Health Sys. v. NLRB*, 795 F.3d 68, 80 (D.C. Cir. 2015) ("[W]e accept all credibility determinations

made by the ALJ and adopted by the Board unless those determinations are 'patently insupportable.'") (citations omitted).

Second, Hendrickson Trucking disputes the Board's finding that it committed an unfair labor practice by failing to timely furnish information that the Union requested about the use of trucks from AGG Trucking, which the Board found was "relevant and necessary for the Union to carry out its representative function." J.A. 80; *see also Public Serv. Co. of New Mexico v. NLRB*, 843 F.3d 999, 1005 (D.C. Cir. 2016). Hendrickson argues that its January letter satisfied the Union's July request, and that in any event the Union accepted it as adequate and thereby waived its objection. Hendrickson Trucking Br. 38–39.

Those arguments fall flat. For starters, the Board found that, even assuming it were adequate, Hendrickson Trucking's reply was unreasonably delayed. That by itself constitutes an independent basis for sustaining the finding of an unfair labor practice under the Act—and it is a rationale to which the Company has voiced no objection here. *See Monmouth Care Ctr.*, 354 N.L.R.B. 11, 51 (2009), *reaffirmed and incorporated by reference*, 356 N.L.R.B. 152 (2010), *enforced* 672 F.3d 1085 (D.C. Cir. 2012).

In any event, the Board found that the cursory January letter was insufficiently responsive to the Union's numerous, granular information requests about the Company's use of AGG trucks. *See, e.g.*, *KLB Indus., Inc. v. NLRB*, 700 F.3d 551, 556 (D.C. Cir. 2012) (rejecting the argument that some disclosed material sufficed because "any requested information that has a bearing on the [collective] bargaining process *must* be disclosed") (emphasis added) (citations and quotations omitted). Once again, Hendrickson Trucking offers no meaningful response. And Hendrickson Trucking's waiver contention baldly flouts the record evidence documenting that the Union never abandoned its more detailed information requests. J.A. 322 (testimony from Hendrickson Trucking's counsel that the Union's attorney made clear he "wasn't waiving anything" with respect to "information requests").

Third, Hendrickson Trucking contests the Board's finding that it unlawfully rebuffed the Union's November 30th request to resume negotiations. The "duty to bargain survives" impasse, and requires that employers "stand ready to resume collective bargaining" upon a union's reasonable request. *See Brown v. Pro Football, Inc.*, 518 U.S. 231, 244 (1996). Hendrickson Trucking accepts that legal rule, raising only a factual dispute over whether it was the Union, rather than the Company, that resisted the resumption of bargaining. Hendrickson Trucking Br. 34–35. Hendrickson Trucking points to testimony from its counsel, Tim Ryan, stating that he called Sprague in early December with an offer to resume bargaining. *Id*.

The problem for Hendrickson Trucking is that the ALJ did not believe Ryan's version of events. The ALJ instead credited Sprague's contrary testimony that, to his recollection, no such call took place. The ALJ discredited Ryan's testimony both because he could not remember the circumstances of the call, and because Ryan's version of events was inconsistent with basic facts about when the Company's "busy season" and "winter slowdown" take place. J.A. 72, 316–323. Hendrickson Trucking has provided us no basis to upset that credibility judgment. *See Inova Health Sys.*, 795 F.3d at 80.

Fourth, Hendrickson Trucking objects to the Board's finding that the strike was in response to its own unfair labor practice. By deeming the strike to be unjustified, the Company asserts that it had no obligation to reinstate the employees when they unconditionally offered to return to work. Hendrickson Trucking is wrong on both fronts.

The law is settled that an employer violates the National Labor Relations Act if it fails to reinstate strikers who have made an offer to return to work following a strike that was taken in response to an employer's unfair labor practice. *Spurlino Materials, LLC v. NLRB*, 805 F.3d 1131, 1137 (D.C. Cir. 2015). A strike will be found to have arisen out of an unfair labor practice if the strike is motivated "in part" by the unfair labor practice. *Teamsters Local Union No. 515 v. NLRB*, 906 F.2d 719, 723 (D.C. Cir. 1990) (citation omitted). The unfair labor practice need not be the "sole or even the major cause" of the strike. *Id.* (citation omitted).

Hendrickson Trucking's chief argument is that the strike was motivated purely by economics and was not in response to unfair labor practices. Hendrickson Trucking Br. 35–38. But substantial evidence supports the Board's contrary conclusion. The timeline of relevant events itself contradicts the Company's argument. The Union voted to strike in late April, and again at the end of May. In so doing, the Union expressly conditioned the strike on Hendrickson Trucking first committing the unfair labor practice of "implement[ing] [its] offer" unilaterally. J.A. 244. True to those words, the strike commenced on June 25 *after* the Union learned that the Company had unilaterally implemented its own proposed terms and conditions. That more than suffices to show that Hendrickson Trucking's unfair labor practice motivated the strike at least in part.

In response, Hendrickson Trucking cites inapt cases where (i) the unfair labor practices occurred after the decisive strike vote, *Mobile Homes Estates, Inc.*, 259 N.L.R.B. 1384 (1982), *enforced on other grounds*, 707 F.2d 264 (6th Cir. 1983); (ii) the union put into writing the purely economic reasons for its strike, *Facet Enters., Inc.*, 290 N.L.R.B. 152 (1988), *enforced on other grounds*, 907 F.2d 963 (10th Cir. 1990); or (iii) the unfair labor practices were never "specifically mentioned" during strike-vote deliberations, *Reichhold Chems. Inc.*, 288 N.L.R.B. 69, 79 (1988), *rev'd*, 906 F.2d 719 (D.C. Cir. 1990), *on remand*, 301 N.L.R.B. 706 (1991). Here, by contrast, the Union expressly conditioned its strike on Hendrickson Trucking's commission of an unfair labor practice, which makes the causation question quite straightforward.

Fifth, and finally, Hendrickson Trucking argues that it was entitled to a hearing before a new administrative law judge because the ALJ who conducted the hearing was appointed at a time when the Board lacked the legally required quorum. Hendrickson Trucking Br. 39–43. In particular, Hendrickson Trucking notes that the Board did not have a proper quorum until several months after the ALJ's hearing, and the Board did not ratify her appointment until after she had already issued her initial decision. The Board then remanded the case so that the same ALJ could "consider anew the issues presented now that her appointment has been ratified by a fully confirmed five-member Board." J.A. 52. On remand, the ALJ "fully reviewed" her prior decision and reaffirmed it "[i]n its entirety." J.A. 61.

Hendrickson Trucking argues that the remand was invalid because the ALJ had a "closed mind," and the rules prohibit ALJs' acting with "actual bias," "deep-seated favoritism[,] or

antagonism" to one side. Hendrickson Trucking Br. 40–43 (citations omitted). Neither the law nor the record supports the Company's challenge. In *Wilkes-Barre Hospital Co. v. NLRB*, 857 F.3d 364 (D.C. Cir. 2017), we held that an invalidly appointed Regional Director could lawfully ratify his own prior actions after a properly constituted Board ratified his appointment, *id*. at 371. *Wilkes-Barre* emphasized that "no evidence suggest[ed] that [the Regional Director] failed to make a detached and considered judgment or that he was 'actually biased' against [the losing party]." *Id.* at 372 (quoting *FEC v. Legi-Tech, Inc.*, 75 F.3d 704, 709 (D.C. Cir. 1996)). So too here. The ALJ on remand carefully reviewed the evidence and formulated a reasoned opinion, without displaying any bias toward the parties or pre-judgment as to the outcome.

For all of those reasons, we deny Hendrickson Trucking's petition for review and grant the Board's cross-application for enforcement.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or rehearing en banc. *See* FED. R. APP. P. 41(b); D.C. CIR. R. 41(a)(1).

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk

From: Martin, Andrew
Subject: Take a Child to Work Day: YOUR CHANCE TO BE AN AVENGER!
Date: Friday, April 12, 2019 2:45:19 PM
Attachments: image001.png

Yeah, you work for the NLRB, that makes you a Superhero already. But in your heart of heart, you've secretly wanted to be a SPECIFIC Super Hero. Maybe Iron Man, or Black Widow, or Captain America.

WELL HERE IS YOUR CHANCE!

This year's Take A Child to Work Day, on April 25th, will be AVENGERS themed, and we need actors to play the various roles. Want to put on an eye patch and play Nick Fury? (Looking at you, Eric Marks) Shave your goatee into an amusing shape and make sarcastic quips? (CoughElliotbeckercough) Slather on the green body paint and flex while bellowing "HULK SMASH!? (WAY too many people to mention for this roll.) If you would like to be part of our amateur dramatics, in which the Avengers debate the wisdom of joining a Union, please contact **Andrew Martin**.

And if you'd like to help out but don't want to appear on stage, we need plenty of volunteers to help check kids in, hand out goody bags, serve pizza, and escort groups throughout the building. Please let us know if you'd like to help out.

We also need Avengers and Avengers-adjacent props, costumes, and decorations. So if you have a Mjolnir, a Captain America shield, action figures, posters, etc. that you're willing to lend us for the day, we'll be incredibly grateful.

Registration for TACTWD is open until **FRIDAY APRIL 19th.** To register, please add your child's name and other requested information to **this spreadsheet.** Please fill it out with all the appropriate info, including your **cell phone number**, and put a 1 on the track you think your child will want to attend. The Younger Kids track is designed for ages up to 7, and the Older Kids track for 8 and up. However, children may attend whichever track they prefer, and may

want to stay with a younger sibling or be more intrigued by the activities on a different track.

Please let us know about any allergies or special needs. We want all kids to participate and have a great time, so if there are any special accommodations we should provide or circumstances of which we should be aware, please reach out to us and let us know. **We realize this event will take place during Passover**, and if you have dietary needs related to that, we will be happy to accommodate them.

We anticipate that the cost of the program will be approximately $9 per child. Donations are welcome, but are not required to participate. This will cover the cost of activities, juice boxes, pizza, and goody bags. We also welcome donations in kind, if you have a bunch of juice boxes or a metric ton of construction paper left over from your kids' birthday.

We are accepting donations by PayPal to Andrew at drybrarian@gmail.com. You can also drop off donations with any of the following coordinators:

- 4th Floor: Polly Misra (4026) & Sarah Posner (4090),
- 5th Floor: Cristina von Spiegelfeld (5024) & Mark Eskenazi (5015)
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Andrew Martin
Chief Librarian
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To: Ring, John
Subject: Daily Labor Report Highlights
Date: Friday, April 12, 2019 4:34:45 PM

Bloomberg Law

DAILY LABOR REPORT®

Highlights

Print/Download These Articles

TOP STORIES

GNC Can't Shake Fired Worker's Age Bias Win, 3d Cir. Says

By Patrick Dorrian

A General Nutrition Corp. store manager who was fired at age 57 and replaced by a worker in his 20s can keep the $258,926 he was awarded for discrimination, the Third Circuit ruled.

EEOC Gets Bias Trial for Worker Fired After Panic Attacks

By Patrick Dorrian

An Arkansas auto dealer must face trial on claims by the EEOC that it failed to accommodate and fired a worker who had panic attacks at work, a federal judge ruled.

Blacklisting Ex-Trump Officials Could Put Firms at Legal Risk

By Genevieve Douglas

Civil rights groups recently called on businesses not to hire officials who served in the Trump administration. But if a state or city bars political affiliation discrimination, employers that blacklist the ex-aides could find themselves facing lawsuits.

DISCRIMINATION

Former Wafra Real Estate Head Sues Over Age Discrimination

By Gillian Tan

The former head of real estate at Wafra Investment Advisory Group Inc. sued the Kuwait-backed firm and its Chief Executive Officer Fawaz Al-Mubaraki claiming he was illegally fired because of his age.

WAGE & HOUR

P.F. Chang's Server's Wage Class Revived in Massachusetts (Corrected)

By Aaron Nicodemus

Massachusetts' highest court April 12 revived a class action against P.F. Chang's China Bistro Inc., finding sufficient evidence that the restaurant chain shortchanged its workers who were dismissed early from scheduled shifts.

HARASSMENT & RETALIATION

Black Associated Wholesale Grocers Worker Gets Retaliation Trial

By Patrick Dorrian

A jury must decide whether Associated Wholesale Grocers terminated a black employee for complaining about race discrimination at the company's Pearl River, La., warehouse, a federal judge ruled.

STATE & LOCAL LAWS

Illinois Bans Local Right-to-Work Ordinances

By Michael J. Bologna

Illinois freshman Gov. J.B. Pritzker (D) drove a stake in the previous administration’s scheme for municipal right-to-work zones, signing legislation

April 12 barring local units of government from restricting collective bargaining.

Colorado May Ban Asking Job Applicants About Criminal History

By Tripp Baltz

Employers in Colorado would be prohibited from asking about criminal histories on initial job applications under a bill that received final approval in the state Senate.

NLRB

NLRB Weekly Summary of Cases, Dated April 1-5, 2019

Summary of NLRB Decisions for Week of April 1-5, 2019

LABOR RELATIONS

Striking New England Stop & Shop Workers Cause Delays, Closures

By Aaron Nicodemus

The first full day of a strike by 31,000 Stop & Shop workers has wreaked havoc on the supermarket chain, leading to closures, delays, and empty stores.

Mexico to Ensure Enforcement of Labor Reform, Top Lawmaker Says

By Nacha Cattan

Mexico's new labor reform has ample safeguards in place to ensure that workers will finally be represented by their unions, Mario Delgado, the lower house majority leader, said in an interview.

IMMIGRATION

H-1B Petitions Rise 6 Percent, First Increase in Three Years

By Laura D. Francis

Employers last week submitted 201,011 petitions for a total 85,000 H-1B visas

available in fiscal year 2020.

Haitians' Immigration Protections Must Continue, Court Says (2)

By Laura D. Francis

Another federal judge has ordered the Trump administration to keep in place temporary immigration protections for nationals of Haiti, adding to a long list of similar court decisions.

LEGAL PROFESSION

Sanford Heisler, The Firm Helping Female Lawyers Sue Big Law

By Stephanie Russell-Kraft

When associate Nilab Rahyar Tolton left Jones Day in early 2018, she was still reeling from the effects of what she called implicit and explicit biases against women at the firm.

HEALTH CARE & BENEFITS

Labor Department Wants Court Time in Lockheed Worker's Appeal

By Jacklyn Wille

The Labor Department wants court time to argue in support of a retired Lockheed Martin Corp. worker who accused the company of misrepresenting his ability to grow his pension benefits after leaving the company and returning.

New York Fund Sues Kentucky Pension System Over Worker Complaint

By Jef Feeley

Prisma Capital Partners LP sued Kentucky's $18 billion pension system over its support for state employees who claim the fund failed to deliver promised returns while raking in exorbitant fees.

Tax Group Renews Challenge to California's Auto-Retirement Plan

By Jacklyn Wille

California's retirement program for employees who don't have access to employer-sponsored benefits faces a renewed legal challenge after a federal judge upheld the program last month.

SAFETY & HEALTH

Contractor Can't Sue Valero for Chemical Burns, Retaliation

By Sam Pearson

A contractor injured when chemicals spilled on him at a Louisiana Valero Energy Corp. oil refinery in May 2018 can't sue the company or one of its employees, a federal judge ruled.

Manslaughter Charges Filed in Maine Roofer's Fatal Fall

By Bruce Rolfsen

Manslaughter charges were brought against a Maine contractor for the December death of a roofer who allegedly fell because he wasn't wearing fall protection gear.

ALSO IN THE NEWS

'Game of Thrones' Secrecy Spotlights NDAs in Worker Contracts

By Erin Mulvaney

Cast members have been careful not to leak spoilers in the run-up to the final season of "Game of Thrones," the fantasy HBO series, dropping only cryptic, tantalizing clues to eager fans.

Uber IPO Filing Warns That Drivers Will Be Even Less Happy

By Joshua Brustein and Josh Eidelson

Uber drivers have complained over the years that they'll get nothing when the

company goes public, generating a windfall for its already-wealthy stockholders. That's not entirely true.

PRACTITIONER INSIGHTS

INSIGHT: Human Rights Risks in the Supply Chain— Tips for Global Corporate GCs

Global corporate general counsel are facing scrutiny of their supply chains in relation to business conduct issues, including corruption, modern slavery and other human rights violations. In Part I of a two- part series on the role of GCs by London-based Linklaters, partner Rachel Barrett offers tips and trends on what GCs can do to more effectively manage human rights issues in their supply chains.

LATEST CASES

Case: Disability Discrimination/'Regarded As' (6th Cir.)

A property damage repair company in Kentucky was not entitled to judgment on a former employee's claim that he was fired based on his heart conditions in violation of disability law, even though his failure to call an expert witness to explain the medical jargon in his diagnosis prevents him from establishing that he was actually 'disabled.' He can still show that the company believed he was disabled, because it told him he was fired "due to [his] health issues and doctor's appointments," it knew that he had a heart catheter and a heart monitor, and it knew that he had been to the emergency room and had CAT scans due to his heart problems. The case is Baum v. Metro Restoration Servs., Inc., 2019 BL 129468, 6th Cir., 18-5699, unpublished 4/11/19.

Case: Individual Employment Rights/Wrongful Discharge (Ind. Ct. App.)

A hospital police officer appeals a grant of summary judgment to Memorial Hospital of South Bend on his allegations of wrongful discharge against public policy. The officer contends that he was fired because, believing he was subpoenaed, he testified at a co-worker's unemployment benefits appeal hearing. The hospital argued that the officer was an at-will employee, he was

never actually subpoenaed to testify, and that he was legitimately fired for stealing biscuits and gravy from the hospital cafeteria. A court accepts as true, that the officer was fired for testifying at a co-worker's unemployment hearing, but finds he didn't have a duty or a statutory right to testify. The case is Perkins v. Mem'l Hosp. of S. Bend, 2019 BL 129470, Ind. Ct. App., No. 18A-CT-1340, 4/11/19.

Case: Wage & Hour/Class Actions (Mass.)

Massachusetts P.F. Chang's employees didn't show that a more lenient class certification standard applies to wage claims, rather than the usual standard requiring a showing of numurosity and commonality, among other factors. The fact that the state wage law authorizes an employee to bring an action on behalf of others 'similarly situated' merely permits a standard class action, and there is nothing in the wage law specifying a unique procedure for bringing one; however, the court below erred in denying the employees class certification based on the restaurant's deficient time records. The case is Gammella v. P.F. Chang's China Bistro, 2019 BL 131004, Mass., No. SJC-12604, 4/12/19.

Case: Wage & Hour/Overtime Exemptions (E.D.N.Y.)

Drivers for a company that transported money between New York grocery stores and banks are subject to the motor-carrier exemption from New York overtime requirements. Even though the state department of labor said that the federal exemption for motor carriers doesn't apply to the state law, that determination isn't entitled to deference because the state wage law explicitly states that it is subject to all federal wage law exemptions. The case is Hayward v. IBI Armored Servs., Inc., 2019 BL 130409, E.D.N.Y., No. 17-CV-02944, 4/11/19.

Case: Wage & Hour/Limitations (N.D. Ala.)

A transportation supervisor for the Sylacauga, Alabama, school board gave enough information to support that his claim, arguing that he was misclassified as an overtime-exempt managerial employee, falls within the three-year statute of limitations for willful federal wage violations, because he received his last allegedly miscalculated paycheck within the past three years, and he said that

the board was aware that he was misclassified under federal wage law and regulations. The case is Seals v. Sylacauga City Sch. Bd., 2019 BL 130405, N.D. Ala., No. 1:19-cv-156-ACA, 4/11/19.

Case: Wage & Hour/Minimum Wages (E.D.N.Y.)

A delivery person for a Queens, New York, Japanese restaurant may recover unpaid state minimum wages, because his work schedules show that, while his flat $375 weekly pay met the federal minimum wage rate, it didn't satisfy the state minimum wage rate when taking into consideration his overtime premiums and the extra hour of wages he was entitled to when he worked shifts that exceeded 10 hours. The case is Haifeng Xie v. Sakura Kai I Inc., 2019 BL 130413, E.D.N.Y., No. 17-CV-7509 (ILG) (JO), 4/11/19.

Case: Individual Employment Rights/Whistleblowing (Me.)

A part-time code enforcement officer for the town of Denmark, Maine failed to state a claim that the town violated Maine's Whistleblowers' Protection Act by suspending him. The employee didn't engage in "protected activity" when he informed the town that it had breached his employment contract, complained that a new town manager had "illegally" directed him not to report to the board of selectmen, in violation of his contract, and objected to the suggestion that a new contract could be imposed on him. An employee must report something other than an ordinary breach of an employment contract to bring himself under the protection of the WPA, the court said. The case is Lee v. Town of Denmark, 2019 BL 130773, Me., Docket: Oxf-18-248, 4/11/19.

Case: Disability Discrimination/'Disability' (E.D. Ark.)

A former Crain Automotive employee in Arkansas can show that her anxiety, depression, and panic attacks 'disabled' her within the meaning of federal disability law for purposes of her discrimination claim, after Crain told her she was fired "due to [her] health." Although she could handle complex tasks and sometimes worked through her panic attacks, a reasonable jury could find she was disabled because her conditions could make her feel paralyzed and unable to care for herself, and they made it difficult for her to breathe, communicate, or think clearly, the court said. The case is EEOC v. Crain Auto. Holdings LLC, 2019 BL 130400, E.D. Ark., 4:17CV00627 JLH, 4/11/19.

Case: Disability Discrimination/Qualified Individual (9th Cir.)

A federal district court in California improperly granted judgment to a disabled former Costco employee, because it found that he was qualified for his job, despite his lifting restrictions, without determining what the essential functions of his job actually were. The court sent the case back to the district court to determine what core duties a Front End Assistant had to be able to perform, and what reasonable accommodations could allow the employee to perform them. The case is Matkovich v. Costco Wholesale Corp., 2019 BL 129841, 9th Cir., 17-56440, unpublished 4/11/19.

Case: Labor Relations/Benefit Contributions (E.D.N.Y.)

Trustees of a union pension and welfare fund are entitled to confirmation of an arbitration award arising from a dispute over unpaid benefit contributions in the amount of $69, 698, including interest, liquidated damages and the arbitrator's fee, against Sabre Tile Corp., which doesn't oppose their motion. The case is Trs. of Ne. Carpenters Health, Pension, Annuity, Apprenticeship, & Labor Mgmt. Cooperation Funds v. Sabre Tile Corp., 2019 BL 129530, E.D.N.Y., No. 2:18-cv-02773 (ADS)(SIL), 4/8/19.

Case: Discrimination/Promotion (M.D. La.)

A black trooper/detective with the Louisiana State Police may not proceed with his claim that the State of Louisiana didn't promote him to a polygraphist position because of his race. He wasn't qualified for the position because he hadn't completed a required course and board examination; additionally, his allegation that the minimum standards for the potion changed so that the selected candidate would be qualified is immaterial since he wouldn't have met either the original or modified version of the requirements. The case is Sulcer v. Louisiana, 2019 BL 130175, M.D. La., 17-167-RLB, 4/10/19.

Case: Discrimination/Retaliation (E.D. La.)

A black order selector may proceed with his claim that a grocery wholesaler in Louisiana fired him in retaliation for complaining about racial discrimination, rather than for a poor employment record and abandoning his job. He was fired nine days after he complained to the wholesaler, and his allegations, including

that he attempted to return to work but his badge was deactivated, could show that the wholesaler's reasons for termination were pretextual. The case is Johnson v. Associated Wholesale Grocers, Inc., 2019 BL 130280, E.D. La., 18-5919 SECTION "F", 4/11/19.

Case: Discrimination/Discharge (D.N.J.)

A distribution supervisor may not proceed with his claim that an industrial gas distributor in New Jersey fired him because of his age, rather than for failing to check the timekeeping system before sending a driver out who was close to exceeding the distributor's "hours requirement." No one in the firing decision making process made comments about his age, and he admitted to failing to check the system. The case is Norton v. Praxair Distrib., Inc., 2019 BL 129707, D.N.J., No. Civ. No. 17-6897, unpublished 4/10/19.

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To: Ring, John
Subject: Employers Seek To Fortify Trump Regs Against Court Attacks
Date: Monday, April 15, 2019 4:02:37 AM

EMPLOYMENT

Monday, April 15, 2019

TOP NEWS

Analysis

Employers Seek To Fortify Trump Regs Against Court Attacks

Business advocates are gleaning lessons from a series of court rulings that struck down Obama-era and early Trump administration employment regulations as they look to insulate more recent, employer-friendly rules against anticipated court challenges.

Read full article »

Analysis

As Lyft, Uber Go Public, Drivers' Status Is Still Murky

Lyft and Uber have offered their drivers cash bonuses so they can share in initial public offerings. The move, necessitated by U.S. Securities and Exchange Commission rules barring companies from offering equity to independent contractors, raises old questions about drivers' employment status.

Read full article »

Walmart Owes $6M In Meal Break Suit, Jury Says

Walmart must pay $6.1 million to a class of employees for not providing meal breaks when it required workers to go through anti-theft metal detectors every time they wanted to leave the building, a California federal jury decided Friday.

Read full article »

2 Policy Developments Employers Need To Know

Congressional Democrats led by Sen. Patty Murray, D-Wash., have floated a sweeping proposal to overhaul civil rights law to give victims of workplace harassment more resources to step forward, and New York City lawmakers recently barred employers from screening job applicants for marijuana use. Here, Law360 offers a rundown of two key employment policy developments.

Read full article »

Incorrect Notices Lead Judge To Toss Class Settlement

A California federal court judge has vacated a $480,000 settlement in a class action over unauthorized background checks and unpaid overtime after she learned that more than 300 class members received notices of the settlement with incorrect information.

Read full article »

Free-Phone Sellers Can't Get OT Under FLSA, 2nd Circ. Says

A group of workers who signed low-income people up for a free federal cellphone program aren't owed overtime because they are "outside salespeople" under the Fair Labor Standards Act, the Second Circuit said Friday in a ruling affirming judgment for a Sprint contractor.

Read full article »

DISCRIMINATION

Law360 Pro Say Podcast

Listen to our new podcast here

New Cases

Discrimination (51)
ERISA (19)
Labor (47)

LAW FIRMS

Arnold & Porter
Baker McKenzie
BakerHostetler
Blumenthal Nordrehaug
Bruce S. Rogow PA
Chamberlain Hrdlicka
Coane & Associates
Conrad & Scherer
DLA Piper
Davtyan PLC
Epstein Becker Green
Eversheds Sutherland
Faegre Baker
Fair Work PC
Fernandez & Lauby
Fisher Phillips
Fisher Taubenfeld
Fried Frank
Geyser PC
Gibson Dunn
Gordon & Rees
Greenberg Traurig
Herring & Panzer
Hughes Arrell

Worker With Anxiety Should've Had Extra Breaks, Jury Finds

Pennsylvania-based Premier Comp Solutions LLC violated the Americans With Disabilities Act when it denied a worker extra breaks to deal with her anxiety, a federal jury found Friday, awarding her a total of $285,000 in back pay and damages.

Read full article »

3rd Circ. Lets Ex-GNC Manager's Age Bias Verdi ct Stand

The Third Circuit on Friday upheld a nearly $260,000 award won by a former GNC store manager in a suit accusing the company of illegally firing him because of his age, saying a jury had enough evidence in hand that younger workers were treated more favorably to reach its conclusion.

Read full article »

PPG Wants Fired Scientist's $2.2M Verdict Tossed

PPG Industries urged a Pennsylvania federal judge on Friday to throw out a $2.2 million verdict in a sex discrimination suit, arguing the evidence didn't support the jury's conclusion that the company wrongfully terminated a female scientist.

Read full article »

ConocoPhillips Escapes Expat Engineer's Fi ring Suit

ConocoPhillips has defeated a suit brought by an American engineer who claimed the company illegally fired him from a job assignment in Australia to replace him with a worker from that country and then wrongfully denied him severance benefits.

Read full article »

Stanford, Job Applicant Drop Backg round Check Class Action

Stanford University and a job applicant who accused it of running background checks on her and a class of job hopefuls based on illegal forms have dropped the dispute, according to an order filed Friday in California federal court.

Read full article »

WAGE & HOUR

Top Mass. Court Revives Wage Act Suit Agai nst PF Chang's

Massachusetts' highest court revived a proposed class action Friday by a P.F. Chang's employee who alleges the restaurant chain failed to comply with the so-called three-hour wage requirement, saying it didn't matter that the restaurant had offered to pay damages to the class representative.

Read full article »

7-Eleven Can't Get Workers' Tax Returns In Wage Dispute

7-Eleven Inc. cannot compel employees who brought a proposed class action over unpaid wages to divulge their personal income tax returns because the company has not shown a compelling need for them, a New York federal magistrate judge ruled Friday.

Read full article »

Mich. Lawn Co. H2-B Workers Get Back Pay After DOL Probe

A Michigan lawn care company has paid more than $140,000 to resolve claims that it didn't pay H2-B workers the wages required under the visa program or comply with the Fair Labor Standards Act's overtime requirements, the U.S. Department of Labor announced Friday.

Read full article »

LABOR

Union Contract Preempts BIPA Suit, Hotel Chain Says< /a>

Choice Hotels argued Friday that federal labor laws preempt its workers from

Jones Day
Katten Muchin
Kaufman Dolowich
Kellogg Hansen
Kingsley & Kingsley
Kirkland & Ellis
Latham & Watkins
Lichten Liss-Riordan
Littler Mendelson
Mayer Brown
McDermott Will
McGuire Law PC
Miles & Stockbridge
Mintz Levin
Morgan Lewis
Nesenoff & Miltenberg
Norton Rose Fulbright
Obermayer Rebmann
Ogletree Deakins
Outten & Golden
Perlman Bajandas
Quinn Emanuel
Ropes & Gray
Simpson Thacher
Skadden
Smyser Kaplan
Spiro Harrison
Stanley M. Stein PC
Stember Cohn
Verrill Dana
White & Case
Wilk Auslander
Willkie Farr
Winston & Strawn
Yoon Law
Zuckerman Spaeder

COMPANIES

7-Eleven Inc.
Academy Mortgage Corp.
Amazon.com Inc.
American Benefits Council
American Express Co.
American Petroleum Institute Inc.
Bristol-Myers Squibb Co.
Broadcom Ltd.
CCS Medical Holdings Inc.
Center for American Progress
Choice Hotels International, Inc.
Citigroup Inc.
Coloplast A/S
ConocoPhillips Co.
DeLaval Inc.

pursuing a class action over the chain's allegedly improper gathering of fingerprint data, saying the claims implicate a union agreement.

Read full article »

NONCOMPETES

Sports Apparel Co. Sues Ex-Worker, Rival F or Poaching

A former sales representative and competitor engaged in a “persistent, well-orchestrated and wrongful campaign” to entice other employees and customers away from sports equipment company Riddell Inc., according to a lawsuit filed in Illinois federal court Thursday.

Read full article »

TRADE SECRETS

Superior Energy Unit Gets $72M In Su it Against Ex-COO, CFO

A Superior Energy Services Inc. unit has secured a $72 million judgment against its former chief operating officer and chief financial officer, who were accused of conspiring to defraud the company out of that amount through a complex self-dealing scheme.

Read full article »

WHISTLEBLOWER

Adult Diaper Co. Must Pay For Worker Retaliation In FCA Suit

Coloplast Corp., which makes adult diapers and other incontinence products, will have to pay just over $760,000 for retaliating against a worker after she and others filed a whistleblower suit against the company and some of its distributors, a federal jury in Massachusetts said on Friday.

Read full article »

KBR Seeks Illinois Judge's Recusal From Ki ckback Case

KBR Inc. on Friday sought that an Illinois federal judge recuse herself from a case in which the defense contractor is accused of mismanagement and accepting kickbacks, noting her prior work as an assistant U.S. attorney.

Read full article »

BANKRUPTCY

Fired Sizmek Employee Files Class Action In Ch. 11 Case

Bankrupt advertising tech firm Sizmek Inc. has been hit by a proposed class action complaint in New York bankruptcy court claiming it laid off dozens of employees from its Manhattan office without warning in January.

Read full article »

EXPERT ANALYSIS

The Art Of Using Preemption To Defen d Wage-And-Hour Cases

As large-scale cases proliferate under federal and state wage-and-hour laws, there is more and more reason to study preemption as a potential defense, says Michael Giambona of McDermott.

Read full article »

How FCA Circuit Split Is Playing Out In Di strict Court

While there is no proof yet of a tsunami of government dismissal motions in False Claims Act qui tam cases following the Granston memo, a spate of recent filings has forced lower courts to weigh in on the review standards for such motions, raising a constitutional question in the process, say attorneys at Fried Frank.

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Dynamex, Inc.
EMD Serono Inc.
Emulex Corporation
Facebook
Fifth Third Bancorp
Fortune Brands Home & Security Inc.
Gilead Sciences Inc.
GoPro Inc.
Google Inc.
GrubHub Inc.
Guardian Life Insurance
HBR Consulting LLC
Honeywell International Inc.
Indivior PLC
Institute for Policy Integrity
International Business Machines Corp.
International Franchise Association
KBR Inc.
Lyft Inc.
Microsoft Corp.
Mobile TeleSystems OJSC
Monsanto Co.
NFL Enterprises LLC
National Association of Broadcasters
National Basketball Association
National Employment Law Project
National Restaurant Association
New York Times Co.
New York University
Oracle Corp.
P.F. Chang's China Bistro Inc.
PPG Industries Inc.
Parker Drilling Company
Payoneer Inc.
Penske Corp.
Peppercomm Inc.
Practising Law Institute
Riddell Sports Group Inc.
SeaWorld Entertainment Inc.
SkyWest Inc.
Spotify Technology SA
State Bar of Texas
Superior Energy Services Inc.
Tetra Laval International SA
Texas Trial Lawyers Association
The ERISA Industry Committee
Twitter Inc.
U.S. Chamber of Commerce
Uber Technologies Inc.
Vonage Holdings Corp.
Wal-Mart Stores Inc.

Revamping Your Approach To Client Development

As a former general counsel for both public and private companies, my advice to law firm attorneys who want to attract and keep clients is simple — provide certain legal services for free, says Noel Elfant, founder of General Counsel Practice.

Read full article »

LEGAL INDUSTRY

Analysis

Moving In-House? It's Full Of Surprises, GCs Sa y

While GCs must provide sound legal advice to a company, they also play a key role outside of the law realm, and in a series of interviews conducted since the fall, some told Law360 that going in-house was eye-opening because they knew little about the corporate world.

Read full article »

Analysis

Move By Trump's Sister Draws Atte ntion To Judicial Loophole

Former Third Circuit Judge Maryanne Trump Barry is the latest powerful federal judge to escape an ethics inquiry with her pension intact by stepping down from the bench, drawing further attention to the limited scope of judicial misconduct proceedings.

Read full article »

Gregory Craig Pleads Not Guil ty To Lying Over Ukraine Work

Ex-Skadden partner Gregory Craig pled not guilty on Friday to lying to federal officials about a report produced by his former BigLaw firm as part of Paul Manafort's foreign lobbying effort for the Ukrainian government.

Read full article »

Analysis

Up Next At High Court: Dirty Tradem arks, Pleading Standards

The first week of the U.S. Supreme Court's final oral argument session this term will feature a busy lineup of civil cases involving everything from trademarks for dirty words to wage-and-hour protections for offshore drilling employees. Here's what to expect.

Read full article »

Extortion Claimed In $10M Bid T o Stop Judge's Blackmail Suit

Florida trial firm Conrad & Scherer LLP has accused another firm of extorting it with a $10 million request to stop a lawsuit accusing Conrad & Scherer's managing partner of blackmailing a judge with intimate photographs during a custody hearing.

Read full article »

Texas Senate Passes Bill Cracking Down On Leg al Ads

The Texas Senate on Thursday passed a bipartisan bill prohibiting intentionally misleading legal services advertisements concerning health care, which backers say often prey on vulnerable Texans and can harm public health. Meanwhile, opponents warn a ban could keep consumers from discovering the dangers of certain drugs.

Read full article »

GC Cheat Sheet: The Hottest Corporate New s Of The Week

Bank CEOs said the Dodd-Frank Act has helped to make their industry safer, while Democrats contended there's more work to do, and lawmakers introduced a bill that would ban social media platforms from using deceptive methods that get users to hand over their personal data. These are some of the stories in legal news you may have missed in the past week.

Read full article »

Washington Post Co.

Zebra Technologies Corp.

GOVERNMENT AGENCIES

California Supreme Court

European Commission

Federal Aviation Administration

Federal Bureau of Investigation

Federal Communications Commission

Federal Motor Carrier Safety Administration

Federal Trade Commission

Food and Drug Administration

Information Commissioner's Office

Internal Revenue Service

Massachusetts Supreme Judicial Court

National Labor Relations Board

New York City Council

North Carolina Department of Revenue

Office of Federal Contract Compliance Programs

Securities and Exchange Commission

Texas House of Representatives

Texas State Senate

U.S. Attorney's Office

U.S. Department of Homeland Security

U.S. Department of Justice

U.S. Department of Labor

U.S. Department of Transportation

U.S. Patent and Trademark Office

U.S. Supreme Court

United States Bankruptcy Court for the Southern D istrict of New York

United States Court of Appeals for the Third Circuit

United States District Court for the Eastern Di strict of Pennsylvania

Wage and Hour Division

In Case You Missed It: Hottest Firm s And Stories On Law360

For those who missed out, here's a look back at the law firms, stories and expert analyses that generated the most buzz on Law360 last week.

Read full article »

Podcast

Law360's Pro Say: Jones Day Is Opaque, On Purpose

Jones Day, one of the most prestigious law firms in the world, prides itself on a secretive pay scale and powerful leadership. But now those structures are at the center of a new lawsuit that says the firm underpays women.

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JOBS

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McCormack Schreiber Legal Search
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NYC Big-Law litigation assoc (3-4 yrs exp)
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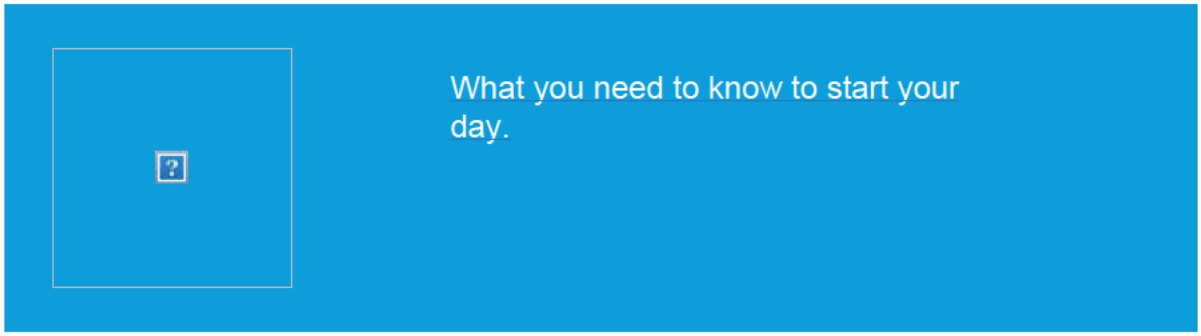
From: Bloomberg Law Daily Labor Report
To: Ring, John
Subject: First Move: Volkswagen Union Showdown May Offer Insight on Vote
Date: Monday, April 15, 2019 7:09:50 AM



Volkswagen Union Showdown May Offer Insight on Vote

By Patricio Chile

A pre-election hearing on Wednesday may provide some insight on the upcoming union vote at a Volkswagen plant in Chattanooga, Tenn.

- **Calendar Check:** The **United Auto Workers** wants to start voting by the end of the month, but VW is likely to ask for more time. Although limited in how far it can push back the election date, Volkswagen can make moves to ensure as many workers as possible lodge ballots, Chris Opfer and Jaclyn Diaz report in Punching In.

- **Neutrality Question:** Volkswagen publicly remained neutral during a 2014 vote in which plant workers narrowly rejected unionizing under the UAW banner. The company has yet to say whether it will stay on the sidelines again.

Machines weld a Volkswagen AG 2012 Passat at the body shop in company's factory in Chattanooga, Tenn., June 1, 2011.
Photographer: Mark Elias/Bloomberg via Getty Images

CALIFORNIANS STAY LOCAL WITH CLAIMS

It's not a stretch to say California's laws and courts are viewed as more friendly to workers in comparison to federal alternatives. That may explain why workers in the state file more sexual harassment charges with the state's fair employment office than with the federal Equal Employment Opportunity Commission.

- **Easier Option:** California's Department of Fair Employment and Housing gives workers the option of having the agency investigate their claim, or requesting a **"right-to-sue" notice** and filing a lawsuit on their own. That

could make the state a more enticing option for potential claimants, Paige Smith reports.

- **More State Filings:** Workers in California filed less than 350 harassment charges with the EEOC in fiscal 2018, according to **enforcement data** released last week. The state agency says it received 683 sexual harassment complaints in 2017, as well as 3,698 requests for right-to-sue letters from sexual harassment claimants.

WHAT ELSE WE'RE WATCHING

- **Contract Transparency:** A database of **collective bargaining agreements** negotiated by federal agencies and their labor unions will be online this year, the government's chief HR agency says. Federal employee unions say they're OK with the concept but suspicious of Trump administration motives. Louis LaBrecque has the story.

- **LGBT Workers:** The U.S. Supreme Court will release orders at 9:30 a.m. On the radar again are three appeals asking the justices to decide whether a federal law prohibits discrimination based on **sexual orientation** and gender identity.

- **Franchise Agreements:** Carl's Jr. Restaurants and one of its franchise operators settled a former store manager's challenge to their **"no poach"** clauses, Mike Leonard reports.

- **Right-to-Work Ban:** Illinois Gov. J.B. Pritzker signed legislation Friday barring local units of government from restricting **collective bargaining**, Michael Bologna reports.

DAILY RUNDOWN

Top Stories

GNC Can't Shake Fired Worker's Age Bias Win, 3d Cir. Says
A General Nutrition Corp. store manager who was fired at age 57 and replaced by a worker in his 20s may keep the $258,926 he was awarded for discrimination, the Third Circuit ruled.

EEOC Gets Bias Trial for Worker Fired After Panic Attacks
An Arkansas auto dealer must face trial on claims by the EEOC that it failed to accommodate and fired a worker who had panic attacks at work, a federal judge ruled.

Blacklisting Ex-Trump Officials Could Put Firms at Legal Risk
Civil rights groups recently called on businesses not to hire officials who served in the Trump administration. But if a state or city bars political affiliation discrimination, employers that blacklist the ex-aides could find themselves facing lawsuits.

Wage & Hour

P.F. Chang's Server's Wage Class Revived in Massachusetts
Massachusetts' highest court April 12 revived a class action against P.F. Chang's China Bistro Inc., finding sufficient evidence that the restaurant chain shortchanged its workers who were dismissed early from scheduled shifts.

Harassment & Retaliation

Black Associated Wholesale Grocers Worker Gets Retaliation Trial
A jury must decide whether Associated Wholesale Grocers terminated a black employee for complaining about race discrimination at the company's Pearl River, La., warehouse, a federal judge ruled.

State & Local Laws

Colorado May Ban Asking Job Applicants About Criminal History
Employers in Colorado would be prohibited from asking about criminal histories on initial job applications under a bill that received final approval in the state Senate.

Labor Relations

Striking New England Stop & Shop Workers Cause Delays, Closures
The first full day of a strike by 31,000 Stop & Shop workers has wreaked havoc on the supermarket chain, leading to closures, delays, and empty stores.

Immigration

H-1B Petitions Rise 6 Percent, First Increase in Three Years

Employers last week submitted 201,011 petitions for a total 85,000 H-1B visas available in fiscal year 2020.

Haitians' Immigration Protections Must Continue, Court Says
Another federal judge has ordered the Trump administration to keep in place temporary immigration protections for nationals of Haiti, adding to a long list of similar court decisions.

WORKFLOWS

Fisher Phillips announced the addition of six attorneys to the firm from Jackson Kelly in Denver and Pittsburgh | **Dentons** has hired nine lawyers in Phoenix from Steptoe & Johnson LLP, which is closing its Phoenix location | **Quarles & Brady** added four patent attorneys to the intellectual property groups in Madison, Wis., Milwaukee, and Minneapolis | **Sidley Austin** picked up a pair of private equity partners from Cooley in Los Angeles.

For all of today's Bloomberg Law headlines, visit Daily Labor Report

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From: Access to Justice Law360
To: Ring, John
Subject: "Streamline" Speeds Ahead Amid Trump"s Border Crackdown
Date: Monday, April 15, 2019 7:36:16 AM

Access to Justice

Operation-Streamline_5.jpg

'Streamline' Speeds Ahead Amid Trump's Border Crackdown

A recent U.S. Department of Homeland Security shake-up and President Donald Trump's "tougher" approach to immigration policy could mean the expansion of Operation Streamline, a program that has raised due process concerns over its method of criminally charging border-crossers in mass hearings.
Read full article

Analysis

Migrants' Fate Unclear Amid 'Remain In Mexico' Turmoil

President Donald Trump's "Remain in Mexico" policy all but assured that migrants would not have access to the legal counsel necessary to bolster their asylum claims, but even after a California federal court froze the policy, it is not clear what will happen to those who were affected, attorneys said.
Read full article

Sex Offenders Win Shot At Release From Indefinite Prison

Monday, April 15, 2019

LAW FIRMS

BakerHostetler
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Conrad & Scherer
Corette Black
DLA Piper
Epstein Becker Green
Eversheds Sutherland
Geyser PC
Gibson Dunn
Herring & Panzer
Jones Day
Katten Muchin
Kellogg Hansen
Kirkland & Ellis
Latham & Watkins
Mayer Brown
McKool Smith
Miles & Stockbridge
Morgan Lewis
Perlman Bajandas
Quarles & Brady
Quinn Emanuel
Ropes & Gray
Skadden
White & Case
Wilk Auslander
Willkie Farr
Zuckerman Spaeder

COMPANIES

Amazon.com Inc.
American Bar Association
American Benefits Council
American Civil Liberties Union
American Express Co.
American Immigration Lawyers Association

If you're a convicted child sex offender in America, your state or local government probably restricts the places where you can live. But dealing with the ensuing lack of housing by keeping sex offenders in prison indefinitely, according to a recent federal court ruling, is an "unconstitutional" solution.
Read full article

Closing Housing Justice Gap Needs More Than Lawyers

A daunting justice gap facing low-income people threatened with home evictions demands a "wrap around" response by volunteer lawyers backed by social services and other kinds of assistance, pro bono advocates said Tuesday.
Read full article

Driver's Licenses May Offer Path To More Inclusive Juries

Research shows a lack of diversity on juries is a national problem, but one Texas federal court could soon become the latest jurisdiction to alter its jury selection system in an effort to make those panels more representative of the community.
Read full article

DOJ Called Out For Protecting Corrupt Prosecutors

The U.S. Department of Justice should end the secrecy surrounding federal prosecutors who commit misconduct and make their names public, a libertarian scholar said in discussing a new documentary screened at the Heritage Foundation on Thursday.
Read full article

Program Aims To Empower Rape Victims With Kit Tracking

Rape victims in Harris County, Texas, will soon be able to electronically track their rape kits under a pilot program expected to expand this fall to other parts of the state.
Read full article

Pro Bono Spotlight

Katten Helps Abandoned Girl Reach New Family

When a baby girl abandoned on a roadway near Los Angeles three years ago was adopted by a relative in recent months, it came with the help of a Katten Muchin Rosenman LLP associate who worked pro bono to guide the family through a delicate legal process.
Read full article

Perspectives

The Role Of Data In An Access To Justice Movement

To change the system, we need the wider community to see beyond personal stories of injustice to the "complete picture" of the lack of access to civil justice. Collecting data, indexing it and making it comprehensible is a key part of painting that picture, say James Gamble and Amy Widman of Fordham Law School's National Center for Access to Justice.
Read full article

American Petroleum Institute Inc.
Bristol-Myers Squibb Co.
Broadcom Ltd.
Cato Institute
Center for American Progress
Choice Hotels International, Inc.
Citigroup Inc.
Emulex Corporation
Facebook
Federalist Society
Fifth Third Bancorp
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Google Inc.
Guardian Life Insurance
HBR Consulting LLC
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Indivior PLC
International Business Machines Corp.
Microsoft Corp.
Mobile TeleSystems OJSC
Monsanto Co.
NFL Enterprises LLC
National Association of Broadcasters
New York Times Co.
New York University
Parker Drilling Company
Payoneer Inc.
Peppercomm Inc.
Practising Law Institute
SeaWorld Entertainment Inc.
Southern Poverty Law Center
Spotify Technology SA
State Bar of Texas
Texas Trial Lawyers Association
The ERISA Industry Committee
Twitter Inc.
U.S. Chamber of Commerce
Washington Post Co.

GOVERNMENT

AGENCIES

European Commission

Executive Office of the President

Federal Bureau of Investigation

Federal Communications Commission

Federal Trade Commission

Food and Drug Administration

Information Commissioner's Office

Legal Services Corp.

National Science Foundation

North Carolina Department of Revenue

Office of Federal Contract Compliance Programs

Securities and Exchange Commission

Texas House of Representatives

Texas State Senate

U.S. Attorney's Office

U.S. Census Bureau

U.S. Customs and Border Protection

U.S. Department of Homeland Security

U.S. Department of Justice

U.S. Immigration and Customs Enforcement

U.S. Patent and Trademark Office

U.S. Supreme Court

United Nations

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From: Martin, Andrew
Subject: Legal News FYI 04-15-19
Date: Monday, April 15, 2019 8:58 56 AM
Attachments: image001.png

Monday, April 15, 2019

Punching In: Volkswagen Fixin' for a Union Election Fight?
BloombergLaw - Daily Labor Report 15 Apr 2019 06 07

By Chris Opfer and Jaclyn Diaz Monday morning musings for workplace watchers Chattanooga Two Step | Paging Cheryl Stanton | EEOC's Pay Data Blues Chris Opfer: We could get a better idea of how Volkswagen plans to play the upcoming union election at the...

Can You Terminate An Employee For Facebook Posts Criticizing Your Company?
Lexology 12 Apr 2019 19:44

Disciplining an employee for social media posts criticizing a company can be a tricky area to navigate from a legal standpoint. The National Labor Relations Board (NLRB) has been aggressive in terms of ordering the reinstatement of workers terminated for...

U.S. Government Agencies' Fast Track Changes to Legal Standards (Part 1)
National Law Review 12 Apr 2019 18:49

Article By Wi h the Trump Administration now in its 27 th month (half-way through the first term), Federal agencies seem to be picking up the pace of fundamentally altering the legal landscape in which manufacturers operate. Keeping up with these changes...

Marquette University faculty, graduate workers may unionize
Milwaukee Business Journal (Milwaukee, WI) 12 Apr 2019 17:19

Marquette University's non-tenure track faculty and graduate workers are asking the school's administration for a "fair process" to unionize. The Service Employees International Union said in a news release the graduate workers and non-tenure track...

Illinois Bans Local Right-to-Work Ordinances (1)
BloombergLaw - Daily Labor Report 12 Apr 2019 16:27

• Gov. Pritzker signs Collec ive Bargaining Freedom Act • Law bars local right-to-work ordinances, imposes penalties for violations By Michael J. Bologna Illinois freshman Gov. J.B. Pritzker (D) drove a stake through he previous administra ion's scheme...

Gov. Pritzker Signs Collective Bargaining Freedom Act
State of Illinois News 12 Apr 2019 13:48

Springfield, Ill. — Making good on his promise to put Springfield back on the side of working families, Gov. JB Pritzker signed the Collective Bargaining Freedom Act (SB 1474), protecting the right of employers, employees, and their labor organizations...

Harvard's graduate student union demands better sexual harassment protections
Washington Post (Washington, DC) 12 Apr 2019 13:28

By -Gabriel Danielle Douglas-Gabriel Reporter covering the economics of education Email Bio Follow April 12 at 1:20 PM Harvard University is at odds wi h its graduate student union over the way the school handles sexual harassment claims, a fight that...

The Future of Unions Is White-Collar
Slate Magazine 12 Apr 2019 13 05

When Sen. Elizabeth Warren announced her bid for the White House, she showed her loyalty to unions by selecting the backdrop of Everett Mills in Lawrence, Massachusetts, the site of the 1912 Bread and Roses strike by textile workers. The strike is...

Workers accuse DuPont of union busting in Pasadena
Laredo Morning Times (Laredo, TX) 12 Apr 2019 10:11

DuPont employees at the Bayport plant in Pasadena are accusing the company of intimidation and attempting to interfere with their efforts to unionize. DuPont officials encouraged employees to vote against joining the International Union of Operating...

NLRB LIBRARY Your Primary Source

Legal News FYI monitors news, cases, and legislative developments of interest to the NLRB. To be added to or removed from the distribution list contact Andrew Martin. Please note that these are external links and the Agency takes no responsibility for their content.

From: Morning Shift
To: Ring, John
Subject: POLITICO"s Morning Shift: Harassment allegations at AccuWeather — Union to writers: Fire your agents — Graham will propose asylum overhaul
Date: Monday, April 15, 2019 10:04:45 AM

View online version

2018 Newsletter Logo: Morning Shift

04/15/2019 10:00 AM EDT

By TED HESSON (thesson@politico.com; @tedhesson)

Editor's Note: This edition of Morning Shift is published weekdays at 10 a.m. POLITICO Pro Employment & Immigration subscribers hold exclusive early access to the newsletter each morning at 6 a.m. To learn more about POLITICO Pro's comprehensive policy intelligence coverage, policy tools and services, click here.

QUICK FIX

— A federal investigation reported widespread sexual harassment at AccuWeather when Trump's OSHA nominee was chief executive.

— The Writers Guild of America told TV and film writers to fire their agents.

— Senate Judiciary Chairman Lindsey Graham will introduce legislation on asylum.

GOOD MORNING! It's Monday, April 15, and this is Morning Shift, your daily tipsheet on labor and immigration news. Send tips, exclusives and suggestions to rrainey@politico.com, thesson@politico.com, ikullgren@politico.com , and tnoah@politico.com. Follow us on Twitter at @RebeccaARainey, @tedhesson, @IanKullgren, and @TimothyNoah1.

DRIVING THE DAY

HARASSMENT ALLEGATIONS AT ACCUWEATHER: A federal investigation uncovered allegations of widespread sexual harassment at AccuWeather, the Washington Post's Michael Brice-Saddler reported Friday. The chief executive at the time was Barry Myers, who is President Donald Trump's nominee to lead the National Oceanic and Atmospheric Administration.

The report, issued in January 2018 by the Office of Federal Contract Compliance Programs, said more than two dozen witnesses alleged sexual harassment at the company. "AccuWeather was aware of the sexual harassment but took no action to correct the unlawful activity," OFCCP said. Multiple witnesses said one "high-profile male employee" in a digital media and operations department engaged in unwanted touching, hugging, and kissing. The report also said several senior male managers maintained sexual relationships with female subordinates whose careers were advanced as a result.

AccuWeather denied the allegations, but said it cooperated with OFCCP "in order to further enhance [its] strong programs to promote the highest standards of workplace inclusion and diversity." The Post reported in February that AccuWeather agreed to pay $290,000 as part of a settlement related to the investigation.

Trump first nominated Myers to lead NOAA in 2017, but despite Myers clearing a

committee vote three times (most recently on April 3) he has never made it to the Senate floor. Myers left AccuWeather Jan. 1, according to the Post.

UNIONS

UNION TO WRITERS: FIRE YOUR AGENTS: "The Writers Guild of America late Friday told its 15,000-strong membership of television and movie writers to fire their agents after it was unable to convince the majority of Hollywood's talent agencies to halt practices the union alleges are unethical and illegal," Joe Flint and R.T. Watson report in the Wall Street Journal.

One sticking point was "packaging fees" that agencies receive from studios when they bundle writers, directors, and actors together into business deals. The writers' union contends that the when agents collect these fees from studios they're compromising their loyalty to individual clients. A new WGA code of conduct for agents bars packaging fees.

The standoff may continue for some time, one senior manager told Variety. "We are in total uncharted territory," the manager said. "These things are relatively easy to get into but not out of. I predict this will go on for a couple of months at a minimum." More from the Journal h ere and from Variety here.

IMMIGRATION

GRAHAM READIES ASYLUM OVERHAUL: Senate Judiciary Chairman Lindsey Graham (R-S.C.) will introduce asylum legislatio n meant to discourage Central American migrants from trekking to the U.S.-Mexico border, according to an interview with Fox News Channel's *Sunday Morning Futures*.

The legislation would address several core Trump concerns, according to Graham. It would raise the bar to obtaining asylum; extend beyond 20 days the time federal authorities may detain children; and allow U.S. authorities to remove unaccompanied Central American children from the U.S. more rapidly, he said.

Graham suggested the legislation could be part of a broader immigration deal. "The administration is going around Congress talking to Democrats about what they want if we do change the laws, what would they like in return," he said. "I'm going to try to find a compromise here." But a deal won't be easy. The Senate engaged in a freewheeling immigration debate in February 2018, only to see the

White House torpedo those bills that had the broadest bipartisan support. Trump's preferred plan failed, 39-60, with only three Democratic ayes (two of whom lost reelection in November). More from Fox News here.

VISA UPDATE

H-1B PROGRAM BOOSTS ADVANCED DEGREE HOLDERS: A change to the H-1B lottery system led to an 11 percent increase in the number of selected applicants with U.S. master's degrees or higher, according to U.S. Citizenship and Immigration Services. That's a big jump, but a lower one than the 16 percent spike that USCIS had expected. "We are fulfilling the President's mandate under the Buy American and Hire American Executive Order to ensure H-1B visas are awarded through a more meritorious selection process," the agency tweeted Friday.

The news comes amid reports that USCIS Director Francis Cissna will be pushed out by White House senior adviser Stephen Miller, who has grown impatient with the pace of efforts to restrict legal immigration. Sen. Chuck Grassley (R-Iowa) and immigration hard-liners raced to defend Cissna (who managed to survive through last week).

Related read: "Trump immigration shakeup lowers DHS morale," by POLITICO's Ted Hesson. Find it here.

LABOR

MURRAY, KAINE PRESS FOR EPSTEIN REPORT: Sens. Patty Murray (D-Wash.) and Tim Kaine (D-Va.) on Friday "asked the Justice Department to release findings from an investigation into Labor Secretary Alexander Acosta's role in brokering a 2008 plea deal for billionaire pedophile Jeffrey Epstein," POLITICO's Ian Kullgren reports. "In a letter to the DOJ's Office of Professional Responsibility, the senators asked investigators to 'publish all of its findings without delay' when the review is complete." More here.

IN THE COURTS

'REMAIN IN MEXICO' RULING ON HOLD: The 9th Circuit on Friday temporarily paused a lower court's ruling to block Trump's "remain in Mexico" policy, which forces certain non-Mexican asylum seekers to wait in Mexico until the resolution of their cases. The ACLU must submit a brief by Tuesday at noon that argues why the policy should be blocked. DOJ can submit a response a day later. More from the AP

here and the order here.

LAHASKY TAPPED FOR WH ROLE: Rosemary Lahasky, an official in DOL's Employment and Training Administration, will join th e White House office of economic initiatives, according to an announcement Friday. POLITICO reported last year that she would head to the White House to handle workforce issues. Bloomberg Law later reported Lahasky was working with Ivanka Trump on her apprenticeship efforts.

REPORT: CAPITOL JANITORS WERE HARRASSED: Custodial staff in the U.S. Capitol encountered harassment while working in lawmaker offices, according to a newly released inspector general's report. The report, first reported by Roll Call, examined sexual harassment complaints over the past decade at the Architect of the Capitol, the agency tasked with maintaining the building.

"Some staff have reported overhearing harassing conversations, being the target of harassment, and observing materials such as pornography, but do not speak up due to fear of losing their jobs," the report reads. Read more from Roll Call's Katherine Tully-McManus here, and re ad the report here.

DEMOCRATS TO TRUMP: MIGRANTS WELCOME: Washington Gov. Jay Inslee, a candidate for the Democratic presidential nomination, knocked Trump's threat to bus migrants to Democratic areas around the country. "You can't threaten somebody with something they're not afraid of," he said. "And we're not afraid of diversity in the state of Washington. We relish it."

Inslee was one of several Democrats who countered Trump's threat with a welcoming message. Trump tweeted Friday that his administration was "giving strong considerations to placing Illegal Immigrants in Sanctuary Cities only" — a move that followed a Washington Post story on White House efforts to ship migrants to Democratic strongholds.

Seattle Mayor Jenny Durkan said in a Washington Post op-ed that her city doesn't fear immigrants and refugees. "What does scare us? A president and federal government that would seek to weaponize a law enforcement agency to punish perceived political enemies," she wrote. Read more on Inslee in POLITICO here and Durkan's op-ed here.

Related read: "White House messaging falls in line with Trump's sanctuary cities proposal," by POLITICO's Quint Forgey. Find it here.

COFFEE BREAK

— "Trump's new attorney general launches fresh changes to immigration courts," from the San Francisco Chronicle

— "As Hollywood E mbraces Diversity, Jobs for Female Directors Remain Sparse," from the New York Times

— "Trump's immigration policies have been a failure. Neither he nor Democrats have much of a solution to the current problem," from the Washington Post

— "Stop & Shop Workers Are on Strike at Over 240 Stores in New England," from the New York Times

— "Torres Small navigates border politics in swing district," from the Washington Post

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From:	Roberts, Tracey
To:	Ring, John; Lucy, Christine B.
Subject:	FW: FOIA Case No. NLRB-2019-000440
Date:	Monday, April 15, 2019 11:30:22 AM
Attachments:	NLRB-2019-000440 Emanuel final records.pdf

Please see the below from Chris Opfer.

I'm happy to ask Member Emanuel's staff about the gap in his outlook calendar.

Tracey Roberts
Office of Congressional and Public Affairs
National Labor Relations Board
202-273-0187

From: Opfer, Christopher <copfer@bloomberglaw.com>
Sent: Monday, April 15, 2019 11:21 AM
To: Roberts, Tracey <Tracey.Roberts@nlrb.gov>
Subject: FW: FOIA Case No. NLRB-2019-000440

Hi Tracey. I recently submitted a FOIA request for the board members' and general counsel's official calendars. The request for Member Emanuel's calendar (attached) came back with about a two-month gap from November to February. There's no sign that he was on any sort of extended leave, but the FOIA folks say there's nothing in his calendar for the entire period. I'm planning to mention it in our Monday morning Punching In column. Possible to get a comment?

Thanks.

>>>>>>>>>>>>>>>>>>>>>>>>>>>

Chris Opfer
Deputy Team Leader, Labor & Employment

Bloomberg Law

Desk: 646.324.2059
Cell: 571.236.4850
copfer@bloomberglaw.com

From: Lane, Rosetta B. [mailto:Rosetta.Lane@nlrb.gov]
Sent: Wednesday, April 03, 2019 6:40 AM
To: Opfer, Christopher <copfer@bloomberglaw.com>
Subject: FOIA Case No. NLRB-2019-000440

Good Morning,

I checked with our FOIA Officer and she ran the search again in Outlook 365 and the results were the same. She has contacted our IT Department (OCIO) and asked them to look into the issue.

It is possible that no entries were made for that time period.

I will provide you with an update as soon as possible.

In the meantime, if you have any questions, please let me know.

Sincerely,

Rosetta

Rosetta Lane
Attorney-Advisor
NLRB, FOIA Branch
(202) 568-3526

May 8, 2018
Tuesday

All Day **11:00 Presub:** (b) (5) (b) (5), (b) (7)(A)

May 9, 2018
Wednesday

2:00 PM - 2:30 PM (b) (5)

May 10, 2018
Thursday

All Day **11:00 Presub:** (b) (5), (b) (7)(A)

All Day **2:00 - Meeting w/ Michael from HR**

All Day (b) (5), (b) (7)(A)

May 11, 2018
Friday

All Day **No meetings scheduled**

May 15, 2018
Tuesday

8:00 AM - 8:30 AM **11:00: Presub:** (b) (5), (b) (7)(A)

May 16, 2018
Wednesday

2:00 PM - 3:00 PM **Discussion** (b) (5), (b) (7)(A) **-- Board Agenda Room**
Exchange Server re-created a meeting that was missing from your calendar.

Sent by Microsoft Exchange Server

2:00 PM - 2:30 PM **Discussion** (b) (5), (b) (7)(A) **-- Board Agenda Room**

May 17, 2018
Thursday

1:00 PM - 1:30 PM **Photo Shoot -- Board Hearing Room - 6th floor**

2:00 PM - 2:30 PM **Presub Discussion:** (b) (5), (b) (7)(A) (b) (5) **-- Bd Mbr. Emanuel Office**

May 18, 2018
Friday

All Day — **No meetings scheduled**

May 21, 2018
Monday

All Day — **2:00 Presub:**

All Day — **CDT DAY OFF**

All Day — (b) (5)

May 22, 2018
Tuesday

All Day — **11:00 Presub** (b) (5), (b) (7)(A) (b) (5)

May 23, 2018
Wednesday

4:00 PM - 6:30 PM — **Cancelled: Invitation to EEOC Senior Leadership Reception**

Please excuse me but I inserted this into my outlook calendar and now it appears as if I am the meeting coordinator, which I am not! I am cancelling this from my calendar and starting over. Please do not interpret that as a cancelation of the reception. My humble apologies for this confusion.
Mark Pearce

May 24, 2018
Thursday

All Day — **10:30 - Presub:** (b) (5), (b) (7)(A)

May 25, 2018
Friday

All Day — **No meetings scheduled**

May 28, 2018
Monday

All Day — **Closed - Memorial Day**

May 30, 2018
Wednesday

All Day — **WJE -** (b) (6)

May 31, 2018
Thursday

All Day **WJE-**(b) (6)

June 1, 2018
Friday

All Day **WJE-**(b) (6)

June 4, 2018
Monday

All Day **CDT -OFF**

June 6, 2018
Wednesday

All Day **10:00** (b) (5) **meeting w/** (b) (6)

June 11, 2018
Monday

All Day **2:00 Presub:** (b) (5), (b) (7)(A)

June 12, 2018
Tuesday

All Day **111:00 Presub:** (b) (5), (b) (7)(A)

June 13, 2018
Wednesday

All Day **10:00 Budget Mtg**

All Day **2:00 Presub:** (b) (5) (b) (5), (b) (7)(A)

June 14, 2018
Thursday

10:00 AM - 11:00 AM **Budget meeting continued -- Conf Rm 5065 (34) Board Agenda Room**
This meeting will take the time slot of the previously scheduled Board Agenda meeting, to allow for continued FY 2018 budget discussion.

No Board case discussion is planned for this meeting.

.....

→ Join Skype Meeting

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June 14, 2018 Continued
Thursday

Join by phone

(b) (6) (East) English (United States)

(b) (6) (East) English (United States)

Find a local number

Conference ID: (b) (6)

Forgot your dial-in PIN? | Help

June 18, 2018
Monday

All Day **CDT - Off**

All Day **No meetings scheduled**

June 19, 2018
Tuesday

All Day **Presub:** (b) (5)

June 20, 2018
Wednesday

All Day **2:00 Presub:** (b) (5), (b) (7)(A) (b) (5), (b) (7)(A)

June 21, 2018
Thursday

All Day **2:00 LGBT Pride Month Program**

June 22, 2018
Friday

All Day **No meetings scheduled**

June 25, 2018
Monday

All Day **No meeting scheduled**

June 27, 2018
Wednesday

All Day	**1:30 2018 Honoray Award Ceremony in the Bd Hrg Room**
All Day	**2:30 - Bi-Weekly Bd meeting**

June 28, 2018
Thursday

All Day	**3:00 FOIA Mering**

June 29, 2018
Friday

All Day	**scheduled**

July 2, 2018
Monday

All Day	**11:00 Presub:** (b) (5), (b) (7)(A)

July 3, 2018
Tuesday

All Day	**No meetings scheduled**

July 4, 2018
Wednesday

All Day	**4th of July HOLIDAY**

July 5, 2018
Thursday

All Day	**LZ-Off**
All Day	**No meetings scheduled**

July 6, 2018
Friday

All Day	**DF - Off**
All Day	**LZ-Off**
All Day	**No meetings scheduled**

July 9, 2018
Monday

All Day **LZ -Off**

All Day **No meetings scheduled**

July 10, 2018
Tuesday

All Day **LZ-Off**

All Day **No meeting scheduled**

July 11, 2018
Wednesday

All Day **11:00 Presub:** (b) (5), (b) (7)(A); (b) (5), (b) (7)(A)

July 12, 2018
Thursday

All Day **No meetings scheduled**

July 13, 2018
Friday

All Day **No meetings scheduled**

July 16, 2018
Monday

All Day **CDT - Off**

July 17, 2018
Tuesday

All Day **WJE - Off**

July 19, 2018
Thursday

All Day **WJE - Off**

July 20, 2018
Friday

All Day **WJE - Off**

July 23, 2018
Monday

All Day **No meetings scheduled**

July 24, 2018
Tuesday

All Day **11:00: Presub:** [redacted]

July 25, 2018
Wednesday

All Day **11:00: Presub:** [redacted] (b) (5) ; [redacted]

July 26, 2018
Thursday

All Day **No meetings scheduled**

July 27, 2018
Friday

All Day **No meetings scheduled**

July 30, 2018
Monday

All Day **10:00 Meeting with Anissa and Teresa for computer and iphone**

All Day **CDT - Off**

August 8, 2018
Wednesday

2:00 PM - 3:00 PM **cancelled**

August 15, 2018
Wednesday

2:00 PM - 3:00 PM **Demo of BNA's Daily Labor Report and legal research platform -- Jones-Laughlin Room (3054)**

Please join us for a brief demo of the newly revamped and improved Daily Labor Report platform. BNA has launched a new labor law resource that includes treatises such as the Developing Labor Law, How Arbitration Works, and How to Take a Case Before the NLRB.

Our BNA rep, Julie Coriarty, will be there to show us their spiffy new platform and answer any questions. If you're not in the office but would like

to attend, let me know and I'll make sure the meeting is available remotely.

Thanks!

Andrew

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→ Join Skype Meeting

Trouble Joining? Try Skype Web App

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(b) (6) [redacted] # (East)	English (United States)
(b) (6) [redacted] # (East)	English (United States)

Find a local number

Conference ID: (b) (6)

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[!OC([1033])!]

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September 12, 2018
Wednesday

2:00 PM - 3:00 PM **Weekly Board Meeting -- Conf Rm 5065 (34) Board Agenda Room**
UPDATING INVITE TO WEEKLY BOARD MEETING

September 12, 2018 Continued
Wednesday

Also adding Skype info for those who need to attend any of the meetings remotely.

→ Join Skype Meeting

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October 22, 2018
Monday

All Day **2:00 pm Presub discussion: (b) (5), (b) (7)(A): (b) (6), (b) (7)(C)**

October 23, 2018
Tuesday

All Day **No meetings scheduled**

October 24, 2018
Wednesday

11:00 AM - 12:00 PM **Weekly Board Meeting -- Conf Rm 5065 (34) Board Agenda Room**

MOVING THIS WEEK'S MEETING DUE TO SCHEDULE CONFLICT

Also adding Skype info for those who need to attend any of the meetings remotely.

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(b) (6) (East) English (United States)

Find a local number

Conference ID: (b) (6)

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October 24, 2018 Continued
Wednesday

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October 25, 2018
Thursday

All Day **2:00 Presub discussions:** (b) (5), (b) (7)(A) (b) (6), (b) (7)(C) (b) (5), (b) (7)(A) (b) (6), (b) (7)(C)

October 26, 2018
Friday

All Day **No meetings scheduled**

October 29, 2018
Monday

All Day

October 31, 2018
Wednesday

1:30 PM - 2:00 PM **Canceled: Meeting re: ABA Conference - Ethics review & CCSLB guidance -- Conf Rm 5065 (34) Board Agenda Room**

Discussion with Lori Ketcham, Nancy Platt & Dawn Goldstein re: ABA Conference, to follow the regular weekly Board meeting.

3:30 PM - 4:00 PM **Canceled: ABA Conference - CCSLB guidance on speaking re: upcoming rulemaking efforts -- Conf Rm 5065 (34) Board Agenda Room**

Nancy Platt and Dawn Goldstein will discuss the upcoming ABA Conference panel presentation with the Board, specifically with regard to what can be said about Board rulemaking efforts.

I'm including Lori Ketcham as an optional invitee in case she thinks it would be helpful for her to attend this meeting as well.

November 2, 2018
Friday

All Day **Bill: Travel to SF, then to** (b) (6)

November 3, 2018
Saturday

12:00 AM - 12:00 AM (b) (6)

November 4, 2018
Sunday

All Day (b) (6)

Please See Above

November 5, 2018
Monday

12:00 AM - 12:00 AM (b) (6)

Please See Above

November 6, 2018
Tuesday

12:00 AM - 12:00 AM **ABA Meeting/speeches in SF**

November 7, 2018
Wednesday

All Day **ABA Meeting/speeches in SF**

Please See Above

12:00 AM - 12:00 AM **ABA Annual Labor & Employment Law Conference -- San Francisco**

2:00 PM - 3:00 PM **Weekly Board Meeting -- Conf Rm 5065 (34) Board Agenda Room**

UPDATING INVITE TO WEEKLY BOARD MEETING

Also adding Skype info for those who need to attend any of the meetings remotely.

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November 8, 2018
Thursday

All Day **ABA Meeting/speeches in SF**

Please See Above

November 8, 2018 Continued
Thursday

All Day — **ABA Annual Labor & Employment Law Conference -- San Francisco**
Please See Above

1:00 PM - 1:30 PM — **William Emanuel - Car Service to Morgan Lewis -- Picked up at The Hilton San Fran Union Square, 333 O'Farrell Street**

When: Thursday, November 08, 2018 1:00 PM-1:30 PM (UTC-05:00) Eastern Time (US & Canada).

Where: Picked up at The Hilton San Fran Union Square, 333 O'Farrell Street

Note: The GMT offset above does not reflect daylight saving time adjustments.

~~*~*~*~*~*~*~*~*~*

William,

Per our conversation yesterday, you will be picked up at the Hilton San Francisco Union Square, 333 O'Farrell Street, San Francisco, CA 94102 at 10:00 am on Thursday morning to be brought to Morgan Lewis's San Francisco office for the Labor Law West Conference.

Should you have any questions at all, please feel free to call the car service directly at 415-476-5268 (M&J Limousine and Sedan Service, LLC), or you can reach me at (b) (6) [redacted] @morganlewis.com.

Thank you!

(b) (6)

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copy or distribute this message. If you have received this communication in error, please notify us immediately by e-mail and delete the original message.

8:30 PM - 10:00 PM

Region 20/32 Happy Hour -- Mikkellar Bar - 34 Mason Street - Open for full details

Invitation message from Edris Rodriguez Ritchie, Region 32 Field Attorney:

Region 20 and 32 will be having a joint happy hour starting at **5:30 p.m.** on **Thursday, November 8, 2018** at **Mikkellar Bar** located at **34 Mason Street** (Between Turk Street and Market Street) in San Francisco for happy hour.

If you are attending the conference at the Hilton Union Square, you will need to exit the hotel and go south on Mason Street towards Market Street. Mikkellar is located approximately 1.5 – 2 blocks from the Hilton Union Square, depending on which exit you take.

If you are interested in learning more about Mikkellar and their wonderful local draft beer selection, you can visit here: https://www.yelp.com/biz/mikkeller-bar-san-francisco

Our conference attire will likely give us away for those looking for us and I will try to introduce myself to the Board members after their panel so they know to look for me.

Please contact me or Yaro Ralph (of Region 20) if you have any questions. We look forward to seeing you on November 8.

Edris W.I. Rodriguez Ritchie

November 8, 2018 Continued
Thursday

Field Attorney

National Labor Relations Board

Region 32

1301 Clay Street, Suite 300N

Oakland, CA 94612

Tel: 510-671-3041

Fax: 510-637-331

November 9, 2018
Friday

All Day **ABA Meeting/speeches in SF**
Please See Above

All Day **ABA Annual Labor & Employment Law Conference -- San Francisco**
Please See Above

November 10, 2018
Saturday

12:00 AM - 12:00 AM **ABA Meeting/speeches in SF**
Please See Above

12:00 AM - 12:00 AM **ABA Annual Labor & Employment Law Conference -- San Francisco**
Please See Above

November 11, 2018
Sunday

All Day **Return Travel to DC from SF**

November 14, 2018
Wednesday

All Day **Out part of day for speech**

2:00 PM - 3:00 PM **Weekly Board Meeting -- Conf Rm 5065 (34) Board Agenda Room**
UPDATING INVITE TO WEEKLY BOARD MEETING

Also adding Skype info for those who need to attend any of the meetings remotely.

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November 14, 2018 Continued
Wednesday

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November 15, 2018
Thursday

12:00 AM - 12:00 AM **Tentatively out for meetings**

November 16, 2018
Friday

12:00 AM - 12:00 AM **Tentatively out for meetings**

Please See Above

February 13, 2019
Wednesday

11:00 AM - 12:00 PM **Reminder -- Board-side Town Hall -- Conf Rm 6001 (111) Margaret A. Browning Board Hearing Room**

Please plan to join Chairman Ring and Board Members McFerran, Kaplan and Emanuel for a Board-side "town hall" meeting next Wednesday, February 13 from 11-12. The meeting will be held in the Board Hearing Room. We hope to see you there.

2:00 PM - 3:00 PM **Weekly Board Meeting -- Conf Rm 5065 (34) Board Agenda Room**

UPDATING INVITE TO WEEKLY BOARD MEETING

Also adding Skype info for those who need to attend any of the meetings remotely.

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From:	Lassiter, Marjorie
To:	Robb, Peter; Lesesne, Katherine; McFerran, Lauren; Colwell, John F.; Krafts, Andrew J.; Waters-Burnett, Yolanda C.; Giannasi, Robert (ALJ); Meyers, Mary; Zick, Lara S.; Merberg, Elinor; Vazquez, Laura T.; Sophir, Jayme; Carlton, Peter J.; Murphy, James R.; Lennie, Rachel G.; Kaplan, Marvin E.; Emanuel, William; Free, Douglas; Kraus, Grant; Ring, John; Stock, Alice B.; Kyle, John; Platt, Nancy; Lucy, Christine B.; Rothschild, Roxanne L.; Barham, Jeffrey; Rappaport, Steve; Jacob, Fred; Coleman, Jocelyn
Cc:	Habenstreit, David
Subject:	FW: 18-70029 Unite Here! Local 5, Memorandum.pdf
Date:	Monday, April 15, 2019 1:59:44 PM
Attachments:	18-70029 Unite Here! Local 5, Memorandum.pdf

The Ninth Circuit issued the attached decision today. The Court was reviewing the Board's decision and order in Unite Here! 365 NLRB No.169 (2017). (Miscimarra, Pearce, McFerran).

Marjorie Lassiter
Legal Assistant
Enforcement Litigation
(202)273-3855

NOT FOR PUBLICATION

FILED

APR 15 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITE HERE! LOCAL 5, Petitioner, v. NATIONAL LABOR RELATIONS BOARD, Respondent.	No. 18-70029 NLRB Nos. 20-CB-163657 20-CB-166055 20-CB-171212 MEMORANDUM*
NATIONAL LABOR RELATIONS BOARD, Petitioner, v. UNITE HERE! LOCAL 5, Respondent.	No. 18-70324 NLRB Nos. 20-CB-163657 20-CB-166055 20-CB-171212

On Petition for Review of an Order of the
National Labor Relations Board

Argued and Submitted March 15, 2019
San Francisco, California

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Before: WALLACE, SILER,** and McKEOWN, Circuit Judges.

Unite Here! Local 5 (the "Union") appeals the National Labor Relations Board's ("NLRB") decision finding that the Union violated the National Labor Relations Act ("NLRA"). In affirming two Administrative Law Judges' ("ALJ") decisions, the NLRB found that the Union's picketing activities at the Aston Waikiki Beach Hotel (the "Aston" or the "hotel") blocked or impeded hotel employees, or others while employees were present, from entering or exiting the hotel, in violation of the NLRA. We deny the Union's petition and affirm the NLRB's order.

The Union sponsored pickets near the hotel numbering 12-200 individuals on a regular basis for several months, which spanned the hotel's entrance at its *porte cochere*—a one-way, U-shaped covered driveway. Picketers would march in an oblong circle on the sidewalk where it intersected the *porte cochere*. When a vehicle approached, it was stopped to allow the picketers to continue marching; for smaller picket lines, the delay was generally for two more full rotations of the line, and for one rotation during larger picket lines, to draw attention to the picketing. After 1-4 minutes, the picketers would stop on either side of the driveway to allow the vehicle(s) to pass; this timing, however, was discretionary. In addition to the picket line delaying cars driven by the hotel's valet drivers, Aston employees at the nearby

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** The Honorable Eugene E. Siler, Jr., United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

valet stand were also able to observe the picket line stopping cars driven by taxi drivers or guests.

The Aston's operators filed charges against the Union, prompting the NLRB's General Counsel to issue two complaints, alleging violations of Section 8(b)(1)(A) of the NLRA for blocking or impeding hotel employees, or others while employees were present, from entering or exiting the hotel. After separate hearings, both ALJs found that the Union had violated the NLRA as alleged. On review of the consolidated cases, the NLRB affirmed the ALJ decisions and adopted the recommended Orders with modifications.

The NLRB bears "primary responsibility for developing and applying national labor policy." *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786 (1990); *see also Glendale Assocs., Ltd. v. NLRB*, 347 F.3d 1145, 1150-51 (9th Cir. 2003) (citation omitted). "So long as the Board's interpretation [of the Act in a case] is 'rational and consistent' with the statute, its rulings are afforded 'considerable deference.'" *Glendale Assocs.*, 347 F.3d at 1151 (citation omitted). The NLRB's findings of fact are conclusive if they are supported by substantial evidence on the record as a whole. 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). As to a factual finding, the "court may not 'displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo.'" *United Nurses*

Ass'ns of Cal. v. NLRB, 871 F.3d 767, 777 (9th Cir. 2017) (quoting *Universal Camera*, 340 U.S. at 488). Given the NLRB's "special expertise" in the field of labor relations, we "defer to the reasonable derivative inferences drawn by the Board from credited evidence." *NLRB v. Carson Cable TV*, 795 F.2d 879, 881 (9th Cir. 1986) (citation omitted).

Section 7 of the NLRA grants employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. It also guarantees employees "the right to refrain from any or all of such activities." *Id.* Section 8(b)(1)(A) makes it "an unfair labor practice for a labor organization or its agents . . . to restrain or coerce . . . employees in the exercise of the rights guaranteed in section [7 of the Act]." 29 U.S.C. § 158(b)(1)(A); *see also Int'l Longshoremen's and Warehousemen's Union, C.I.O.* (*Sunset Line and Twine Co.*), 79 NLRB 1487, 1504 (1948). Determining the existence of a restraint or coercion turns on "whether the misconduct is such that, under the circumstances existing, it may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act." *NLRB v. Serv. Emps. Int'l Union, Local 254, AFL-CIO*, 535 F.2d 1335, 1337-38 (1st Cir. 1976) (internal quotation marks and citations omitted); *see also Plumbers Local 38* (*Bechtel Corp.*), 306 NLRB 511, 518 (1992).

Substantial evidence supports the NLRB's finding that the Union had "deliberately, repeatedly, and persistently blocked numerous vehicles" driven by employees for 1-4 minutes at a time, and "engaged in similar conduct" by "temporarily blocking numerous vehicles in the presence or view of the hotel valet and bell employees." The NLRB—in adopting the underlying ALJ conclusions—rejected the Union's argument that its conduct was "brief and merely inconvenienced vehicles" and was "minor or de minimis," and distinguished the Union's actions from cases that involved only a few affected employees during months of picketing. Short delays, occurring regularly over the course of months and affecting workers during their performance of work duties, as well as others in the presence of employees, is sufficient to reasonably find that such actions violated the NLRA. The explanations of the NLRB's legal position, through the adoption of the ALJs' conclusions, were therefore not "inadequate, irrational or arbitrary." *See Local Joint Exec. Bd. of Las Vegas v. NLRB*, 309 F.3d 578, 583 (9th Cir. 2002) (quoting *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 364 (1998)).

PETITION DENIED; ORDER ENFORCED.

From: Bloomberg Law Daily Labor Report
To: Ring, John
Subject: Daily Labor Report Highlights
Date: Monday, April 15, 2019 4:33:58 PM

Bloomberg Law

DAILY LABOR REPORT®

Highlights

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TOP STORIES

Black HR Partner at Westlake Subsidiary to Get Race Bias Trial

By Patrick Dorrian

A jury must decide whether Royal Building Products Inc. fired the human resources partner for its Marion, Va., and Bristol, Tenn., manufacturing plants because he is black and complained about racial harassment, a federal judge ruled.

Citigroup's Arbitration Win Against Outsourced Worker Upheld

By Patrick Dorrian

A former Citigroup Inc. employee whose job was outsourced to India failed to convince a federal judge to overturn an arbitrator's rejection of her job bias claims.

California Workers Alleging Harassment Turn to Locals Over Feds

By Paige Smith

Workers in California are filing more sexual harassment charges with a state civil rights agency than with the federal Equal Employment Opportunity Commission, according to government data.

DISCRIMINATION

SBA Employee Failed to Exhaust Bias, Retaliation Claims

By Patrick Dorrian

A finance director in the Small Business Administration's Denver office can't pursue claims that she was subjected to sex discrimination and retaliation, the Tenth Circuit ruled April 15.

Goldman Says Some Women in Gender Bias Class Must Arbitrate (1)

By Patrick Dorrian and Erin Mulvaney

Goldman Sachs asked a federal judge to force more than 1,000 women from a gender discrimination class action to arbitrate their claims, but attorneys for the women say they shouldn't be kept out of court.

WAGE & HOUR

Loan Officers' $2M Overtime Class Settlement Gets Initial Nod

By Perry Cooper

Home Point Financial Corp. will pay $2.2 million to resolve class and collective action overtime claims by employees under a deal that won preliminary approval April 12.

LABOR RELATIONS

SAG-AFTRA Board Approves Deal With Advertisers

By David McAfee

SAG-AFTRA's national board unanimously approved a tentative deal with the advertising industry featuring across-the-board wage increases, the actors guild announced April 13.

Connecticut Nursing Home Workers Threaten Strike Over Pay

By Aaron Nicodemus

About 2,500 Connecticut nursing home workers say they'll walk off the job May 1 unless the state Legislature agrees to increase their pay.

Tyson Workers in Georgia Tout Pay, Health Care Wins in New Deal

By Chris Marr

About 1,800 workers at a Tyson Foods poultry plant in Georgia will get guaranteed annual pay raises and lowered health-care costs under a new three-year contract, according to their union.

Hollywood Writers Union Instructs Members to Fire Their Agents

By Lucas Shaw

Hollywood screenwriters are firing their agents.

Federal Labor Contracts to Go Online This Year

By Louis C. LaBrecque

The government's chief HR office anticipates that a public database of federal employee union contracts will be online later this year. It's been nearly five months since the Office of Personnel Management asked agencies to submit their data.

HEALTH CARE & BENEFITS

Small Business Health Plans Get Lawmaker Lifeline After Court Loss (1)

By Madison Alder

Thousands of people covered by small business health insurance options that a federal judge said violate the Affordable Care Act would get protection under a new bills in each house.

ALSO IN THE NEWS

Big Money, No Debt: The Blunt New Pitch for Blue-Collar Workers

By Michael Sasso

Like other college prep schools, Bishop McLaughlin Catholic High School north of Tampa, Florida, touts its 100 percent college acceptance rate to burnish its image and recruit students.

Carl's Jr., Franchise Operator Settle More 'No Poach' Claims

By Mike Leonard

Carl's Jr. Restaurants LLC and one of its fast food franchise operators have settled a former store manager's challenge to their "no poach" clauses.

Punching In: Volkswagen Fixin' for a Union Election Fight?

By Chris Opfer and Jaclyn Diaz

Monday morning musings for workplace watchers

LATEST CASES

Case: Individual Employment Rights/First Amendment (N.D. Ill.)

Several former employees of the village of Dolton, who at one time or another reported to the mayor, may continue to pursue their First Amendment claims alleging that the village and its board of trustees eliminated their positions in retaliation for their political speech in favor of the mayor, and their association with the mayor. The village and board argued that the plaintiffs' claims weren't viable because the employees are "policymaking" employees of the village. The village only provided the employees' job titles, a reference from the village website, and a LinkedIn profile to support its contention that the employees were policy makers, and dismissal based on their job title alone isn't appropriate, the court said. The case is Blacher v. Vill. of Dolton, 2019 BL 131550, N.D. Ill., No. 18 C 7053, 4/12/19.

Case: Discrimination/Discharge (2d Cir.)

A federal district court in New York improperly granted judgment to the New York City Health and Hospitals Corporation on a race discrimination claim brought by a former employee of Egyptian descent who was fired for poor performance, because one decision-maker's comment that she knew "how to terminate this stupid Egyptian guy," combined with other discriminatory comments, can show that his work performance was not the true reason he was fired, the court said. The case is Moza v. N.Y.C. Health & Hosp. Corp., 2019 BL 132889, 2d Cir., 17-1051-cv, 4/15/19.

Case: Discrimination/Discharge (E.D.N.Y.)

A Hispanic former employee for a health care and assisted care facility in New York can't proceed with her race-based discrimination and retaliation claims, because even if she was fired—which isn't clear—she had an ankle injury and shoulder surgery that made her physically incapable of performing her duties, the court said. The case is United States v. Northern Metro. Found. for Healthcare, Inc., 2019 BL 132690, E.D.N.Y., 13-CV-4933 (MKB), 4/14/19.

Case: Disability Discrimination/Exhaustion (S.D. Ala.)

An Alabama credit union employee properly exhausted her administrative remedies on her claim that she was fired in retaliation for requesting an accommodation for her pancreatic cancer. Although she premised her EEOC charge on a discrimination claim and didn't check the 'retaliation' box on the form, her allegations in the charge—including that she was disciplined shortly after she requested medical leave and was fired after she told a supervisor that she would need further time off for surgery—also support a retaliation theory. The case is Payne v. Navigator Credit Union, 2019 BL 131848, S.D. Ala., No. CIVIL ACTION 19-0003-WS-MU, 4/12/19.

Case: Discrimination/Damages (3d Cir.)

General Nutrition Corporation must pay just shy of $124,000 in back pay, $60,000 in front pay, and $75,000 in emotional distress damages to a protected-age former store manager that it fired for poor performance after he showed that his replacement was significantly younger and that younger store managers with similar performance ratings were not fired. The sales job GNC

offered him was not substantially similar to his prior managerial position, even if it paid more, he now works a lower-paying job after unsuccessfully searching for a similar job with online resources and a staffing agency, and he showed the ordeal caused him to experience depression and anxiety to justify his emotional distress damages. The case is Andujar v. Gen. Nutrition Corp., 2019 BL 131320, 3d Cir., No. 18-1715, unpublished 4/12/19.

Case: Individual Employment Rights/Whistleblowing (Ky. Ct. App.)

The University of Louisville won't have to pay a jury award of $201,000 in damages for mental anguish, or interest on the award, to a whistleblower under the Kentucky Whistleblower Act. On remand from the Kentucky Supreme Court, the trial court's judgment is reversed as to that award, because jury instructions were unclear and damages for mental anguish weren't recoverable under the KWA. The case is Univ. of Louisville v. Harper, 2019 BL 130917, Ky. Ct. App., No. 2014-CA-000724-MR, 4/12/19.

Case: Labor Relations/Fair-Share Fees (C.D. Ill.)

A public school teacher in Illinois who objected to the payment of fair-share fees doesn't have a claim for reimbursement of such fees she paid before the U.S. Supreme Court held that state laws compelling non-member public employees to pay fair-share fees are unconstitutional. Although the legal landscape has shifted and the union may not have spent the teacher's funds as she would have, there is no allegation that the union failed to provide services to her and others similarly situated as required by state law, and she would gain their benefit twice if restitution were allowed, a federal district court holds. The case is Mooney v. Ill. Educ. Ass'n, 2019 BL 131223, C.D. Ill., 1:18-cv-1439, 4/11/19.

Case: Discrimination/Discharge (W.D. Va.)

A black former Senior Human Resources Business Partner for Royal Building Products, a building materials and plastics manufacturer, can go to trial on his claim that he was fired because of his race, because there was evidence that two plant managers he worked with were racially biased and played a role in the decision to fire him. As the only black manager-level employee, the plant mangers excluded him from meetings and social events, he heard that the

plant managers used racial slurs to refer to him and wanted him fired because he was black, one plant manager used the N-word in saying they were "finally free of [him]" immediately after he was discharged, and there's evidence that the decision to fire him included those managers' input. The case is Hairston v. Royal Bldg. Prods., Inc., 2019 BL 131076, W.D. Va., 1:18CV00003, 4/12/19.

Case: Wage & Hour/Res Judicata (S.D.N.Y.)

The Just Salad restaurant company didn't show that two of its delivery employees' claims for unlawful tip retention and other New York wage violations are barred by the resolution of a previous lawsuit. The federal court in that lawsuit declined to exercise jurisdiction over the state-law claims, so there was never a final judgment on them. The case is Tecocoatzi-Ortiz v. Just Salad LLC, 2019 BL 132669, S.D.N.Y., 18CV7342 (JGK), 4/12/19.

Case: Wage & Hour/Overtime Exemptions (2d Cir.)

Sales agents who sold mobile phones and services for Credico were outside salespeople exempt from overtime requirements and other wage-and-hour protections. The fact that they secured customer applications for services is sufficient to establish that they made sales, even though they didn't have the authority to ultimately approve the applications, and their level of compensation isn't relevant to whether they are covered by the exemption. The case is Vasto v. Credico (USA) LLC, 2019 BL 131080, 2d Cir., No. 17-3870, unpublished 4/12/19.

Case: Wage & Hour/Collective Certification (D. Ariz.)

Customer service representatives for a facility maintenance company may not proceed as a collective with their claim that they were misclassified as overtime-exempt administrative employees. They didn't establish that they are similarly situated, because 12 of the representatives gave inconsistent testimony as to whether they exercised sufficient independence to fall within the exemption. The case is Guanzon v. Vixxo Corp., 2019 BL 131449, D. Ariz., No. CV-17-01157-PHX-DWL, 4/12/19.

Case: Individual Employment Rights/Sarbanes-Oxley Act (S.D.N.Y.)

Vladek, Raskin & Clark, P.C., a law firm that met with a former employee of

Invesco to discuss his claims against the company, can't avoid his legal malpractice action, which is based on VRC's failure to file his Sarbanes-Oxley claim within the statute of limitations. The law firm argued that its former client can't establish negligence based on its failure to timely bring his SOX claim because he "never wanted to be perceived as a whistleblower." Evidence showed that he had reported his concerns about the gift of a $4,000 bottle of wine to a Japanese banking executive, and VRC was aware of his willingness to assert a whistleblower claim. The case is Prout v. Vladeck, 2019 BL 131811, S.D.N.Y., No. 18 Civ. 260 (JSR), 4/12/19.

Case: Labor Relations/Refusal to Bargain (N.L.R.B.)

An industrial electroplating company unlawfully failed to engage in, and to provide a union with certain requested information necessary to prepare for, effects bargaining over its decision to close its business. The company didn't answer the unfair-labor-practice complaint, the general counsel filed a motion for default judgment that it didn't answer, and the allegations in his motion are undisputed. The case is UNY LLC d/b/a General Super Plating, 2019 BL 129706, N.L.R.B., 03-CA-152609, 4/11/19.

Case: Labor Relations/Information Request (N.L.R.B.)

Barnard College didn't unlawfully refuse to provide a union, which represented a unit of its "contingent faculty," with requested information about why it didn't reappoint certain faculty in 2017. An administrative law judge found that Bernard provided a substantive response to the union's information request, and that the parties had a misunderstanding about its scope. The case is Barnard College, 2019 BL 131401, N.L.R.B., 02-CA-200574, 4/12/19.

Case: Individual Employment Rights/Due Process (N.J. Super. Ct. App. Div.)

A probationary police officer with the N. J. Transit Corp. was properly discharged without a pre-termination hearing for making racially and sexually offensive remarks in front of witnesses. The fired officer was an at-will, probationary employee who could be discharged at any time for any reason under a labor contract that governed his employment relationship, so he lacked a property interest in continued employment, and he wasn't entitled to a pre-

termination hearing. However, NJT must give him a post-discharge hearing consistent with his constitutional liberty interest in clearing his name, and removing allegations from his employee personnel file that may harm his ability to seek future employment, a court said. The case is S.B. v. State, 2019 BL 131033, N.J. Super. Ct. App. Div., A-2930-16T1, 4/12/19.

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From: Employment Law360
To: Ring, John
Subject: High Court Gives Thumbs-Down To 3 Employment Cases
Date: Tuesday, April 16, 2019 3:39:31 AM

<

EMPLOYMENT

/td>

Tuesday, April 16, 2019

TOP NEWS

High Court Gives Thumbs-Down To 3 Employment Cas es

The U.S. Supreme Court on Monday refused to take up a trio of employment-related cases, including one in which a former United Airlines captain asked the justices to clarify the legal standard for filing hostile work environment claims. Here, Law360 looks at three cert petitions in employment cases that the justices turned aside.

Read full article »

Goldman Angles To Force Sex Bias Claim s Into Arbitration

More than 1,000 women in a conditionally certified sex bias class action against Goldman Sachs must arbitrate claims the company underpaid them and gave them fewer chances for advancement than similar men, the bank has told a New York federal court.

Read full article »

Sex Talk, Not Bias, Got Boeing Worke r Punished, Judge Says

A Seattle federal judge gave Boeing a win in a mechanic's gender bias suit that accused the aerospace giant of blowing off his harassment complaint because he was male, finding the worker was punished for bragging about his sexual prowess and not for reporting a female colleague pinching his nipples.

Read full article »

2nd Circ. Revives Egyptian Hospital Worker's B ias Suit

The Second Circuit on Monday revived a suit accusing a New York City Health and Hospitals Corp. facility of firing an administrator on the basis of his national origin, finding that the lower court missed a key piece of evidence.

Read full article »

Analysis

Uber IPO Docs Warn Of Legal Woes, Gov't Probes

Amid preparations for a highly anticipated initial public offering, ride-hailing giant Uber said it's facing an array of government investigations, civil lawsuits and compliance risks. Here, Law360 takes a look at a few of Uber's most notable disputes and lawsuits.

Read full article »

IN-DEPTH

Feature

Wall Of Secrecy Surrounds Se xual Harassment In State Courts

Is sexual harassment a systemic problem in the state judiciary? Law360 reviewed data from 50 states and the District of Columbia

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New Cases

Discrimination (32)
Labor (45)

LAW FIRMS

Baker McKenzie
Barnes & Thornburg
Beasley Allen
Boies Schiller
Brownstein Hyatt
Clausen Miller
Cole Schotz
Covington & Burling
Dentons
Freed Kanner
Garvey Schubert
Gordon & Rees
Gustafson Gluek
Hartley LLP
HeplerBroom LLC
Jackson Lewis
Joseph Saveri Law Firm
Kruzhkov Russo
Lieff Cabraser
Lite DePalma
McDermott Will
Morgan & Morgan
Morgan Lewis
Morrison & Foerster

and found the answer is more elusive than it seems. (This article is part of a series examining sexual harassment in state courts).
Read full article »

By the Numbers

Discipline Rare For State Judg es In Sexual Misconduct Cases

If raising a sexual harassment complaint against a state judge is uncommon, seeing a complaint go through the disciplinary process and result in a public determination is almost unheard of. (This article is part of a series examining sexual harassment in state courts).
Read full article »

DISCRIMINATION

NYC Union's $11M Sex, Race Bias Deal Gets Green Light
An Empire State federal judge has given initial approval to an $11 million deal between New York City and the union representing its administrative workers, which aims to resolve claims the city underpaid more than 1,500 nonwhite female employees by thousands of dollars a year.
Read full article »

WAGE & HOUR

Elevator Maker To Pay $1.7M To Wrap Up Wage Suit
Nidec Motor Corp. has agreed to pay $1.69 million to settle a proposed class action brought by employees who claim the freight elevator manufacturer violated California law by rounding down their hours and failing to provide them with 30-minute meal breaks.
Read full article »

USF Reddaway Inks $1.5M Deal In Truckers' Wage, Break Suit
Logistics company USF Reddaway Inc. agreed to pay roughly $1.5 million to settle a proposed class action alleging it stiffed about 1,170 truckers on wages and meal and rest breaks, according to documents filed Friday in California federal court.
Read full article »

LABOR

NLRB Judge Orders Food Co. To Pay Axed Workers $305K
A National Labor Relations Board judge has ordered food distributor Marquez Brothers Enterprises Inc. to pay two workers who were illegally fired for union activity a combined $305,000 in back pay and expenses.
Read full article »

NONCOMPETES

Jackson Hewitt Slammed With 'No-Poach' Consp iracy Suit
Just in time for tax day, Jackson Hewitt, the second largest consumer tax preparer in the U.S., was hit with a lawsuit by former employees who say franchisees of the company agreed not to hire one another's employees or employee candidates in a wide-ranging no-poach policy.
Read full article »

TRADE SECRETS

Trade Secrets Suit Against Mitsui Severely Trimmed
A Florida federal judge on Monday slashed a research and development

Norton Rose Fulbright
Ogletree Deakins
Outten & Golden
Paul Hastings
Paul LLP
Paul Weiss
Quantum Legal LLC
Querrey & Harrow
Quinn Emanuel
Steinman & Rodgers
Sullivan & Cromwell
The Spivak Law Firm
Troutman Sanders
Tycko & Zavareei
Weil Gotshal
Werman Salas

COMPANIES

American Airlines Group Inc.
American Arbitration Association
American Federation of Labor and Congress o f Industrial Organizations
Bridgestone Corp.
British American Tobacco PLC
CVS Health Corp.
Cisco Systems Inc.
Credit Suisse Group AG
DISH Network Corp.
Edgeworth Economics LLC
Eli Lilly and Co.
Expedia Inc.
Exxon Mobil Corp.
Facebook
Goldman Sachs Group Inc.
Google Inc.
H.I.G. Capital LLC
HP Inc.
International Brotherhood of Teamsters
L'Oreal SA
Lawyers for Civil Justice
Leadership Council on Legal Diversity
Legal Momentum
Lionbridge Technologies, Inc.
McDonald's Corp.
McKesson Corp.
MetLife Inc.
Mitsui Chemicals
NYC Health and Hospitals Corp.
National Healthcare Corp
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company's lawsuit accusing Mitsui Chemicals Inc. of stealing its secret plant irrigation system in violation of their nondisclosure agreements.

Read full article »

TransPerfect Hits Rival Lionbridge Wit h $300M Secrets Suit

TransPerfect Global has sued rival translation company Lionbridge Technologies and private equity firm H.I.G. Capital for $300 million, claiming in Manhattan federal court that they exploited a court-ordered sale of TransPerfect equity to lift trade secrets.

Read full article »

WRONGFUL TERMINATION

Fired Dish Worker Wins $189K Award On Retaliation Claim

A former technician who claimed Dish Network violated Florida law by firing him because he filed for workers' compensation has won $189,343 after persuading an arbitrator that the company's explanation for terminating him didn't hold water.

Read full article »

WHISTLEBLOWER

DOJ Sees 'Arbitrary' FCA Dismissal Bid Rejected

An Illinois federal judge on Monday rejected one of the U.S. Department of Justice’s high-profile bids to derail a dozen False Claims Act suits filed by a professional whistleblower, finding that the DOJ barely investigated the allegations of drugmaker kickbacks.

Read full article »

ARBITRATION

High Court Won't Review Who OKs Class Ar bitration Bids

The U.S. Supreme Court on Monday declined to hear a challenge to an Eleventh Circuit ruling that an arbitrator should decide whether consumers can arbitrate their dispute with prison contractor JPay Inc. as a class because of language in the company's terms of service.

Read full article »

WORKER SAFETY

Jointly Liable Employers Can't S plit Interest, Ill. Court Says

While the employer of a man who was hurt working on a project for an event planning company must contribute to a $22 million judgment entered against the contractor, that’s not true of interest the award accrued, an Illinois appellate court ruled Friday.

Read full article »

WORKER PRIVACY

Little Caesars Wants Ill. Biometric Privac y Suit Tossed

Little Caesars has asked an Illinois federal court to throw out a proposed Illinois Biometric Information Privacy Act class action claiming the pizza chain failed to obtain workers' written consent to collect their fingerprint data, arguing the lead plaintiff gave her written OK for collection.

Read full article »

EXPERT ANALYSIS

DOL's Overtime Rules: What To Expect F or High-Paid Workers

Proposed updates to the U.S. Department of Labor's overtime rules require that employees earning between $100,000 and $147,414 meet stricter

Nidec Motor Corp.
Novartis AG
PepsiCo Inc.
The Boeing Co.
TransPerfect Global Inc.
UCB SA
Uber Technologies Inc.
United Continental Holdings Inc.
Walt Disney Parks & Resorts Worldwide Inc.
Yale University

GOVERNMENT AGENCIES

Equal Employment Opportunity Commission
Fish and Wildlife Service
Illinois Supreme Court
National Labor Relations Board
New York State Division of Human Rights
New York State Unified Court System
Securities and Exchange Commission
U.S. Department of Justice
U.S. Department of Labor
U.S. Department of the Interior
U.S. Environmental Protection Agency
U.S. Senate
U.S. Supreme Court
United Nations

standards to qualify for exemption. Stephen Bronars and Deborah Foster of Edgeworth Economics discuss jobs that may be affected and why the threshold will likely continue to grow.

Read full article »

Series

Judging A Book: Conrad Reviews 'The Jury Crisis'

In "The Jury Crisis," jury consultant and social psychologist Drury Sherrod spotlights the vanishing jury trial, providing a fascinating canary-in-the-coal-mine warning for lawyers, litigants and society at large, says U.S. District Judge Robert Conrad of the Western District of North Carolina.

Read full article »

LEGAL INDUSTRY

Baker McKenzie Global Chair Dies Duri ng Exhaustion Leave

Baker McKenzie has said that its global chair, Paul Rawlinson, died unexpectedly on Friday, six months after he took a leave of absence due to exhaustion.

Read full article »

What GCs Really Want From Their Outside Counsel

General counsel want their law firms to proactively suggest new and exciting ideas that create more value in the attorney-client relationship and not firms that simply say, “We’ll do whatever you want,” according to a Monday presentation at the Association of Legal Administrators' annual conference.

Read full article »

Jury Trial Decline Wreaks Havoc On Pr ofession, Judges Say

Federal judges are at a loss over how to stem the declining number of jury trials, a drop that is a blight on both the future of the legal profession and the mental health of lawyers, jurists told a California conference.

Read full article »

High Court's Light Docket K eeps Circuits Split, Legal Pros Say

The U.S. Supreme Court's decision to take up fewer cases over the years has resulted in more unresolved circuit splits and raised questions about whether the high court is deciding the right cases, attorneys and a federal judge said Friday at a judiciary reform symposium.

Read full article »

DOI Head Under Investigat ion For Alleged Conflicts Of Interest

The head of the U.S. Department of the Interior is being investigated over allegations of conflicts of interest related to work he did while he was a partner at Brownstein Hyatt Farber Schreck LLP, the agency's inspector general said in a letter Monday.

Read full article »

Dentons Names First Female US Managing Partner

Dentons has selected a health care partner who previously headed up its Chicago office to become its first female U.S. managing partner, a role that had been vacant since 2017, the firm announced Monday.

Read full article »

Gordon & Rees Says It's Fir st To Have Offices In All 50 States

With the opening of its Honolulu office, Gordon & Rees LLP said Monday it has become the first law firm to have a brick-and-mortar presence in all 50 states, the culmination of a strategic march across the country over the last 45 years.

Read full article »

Corporate Deposition Changes Move F orward Without ID Duty

A federal judicial committee on civil procedures has voted to change the rule governing depositions of corporate representatives but will not impose a new obligation on companies to identify them beforehand.

Read full article »

Interview

15 Minutes With MetLife's General Counsel

Stephen Gauster, who in May will mark his one-year anniversary as the general counsel at MetLife, believes building relationships with professionals outside of the legal industry, in areas such as the art or nonprofit world, is critical for lawyers. Here, he shares how the company is navigating changes in the insurance industry and the trait critical for any top corporate lawyer.

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From: Bloomberg Law Daily Labor Report
To: Ring, John
Subject: First Move: Offshore Oil Rig Pay Laws Get High Court Look
Date: Tuesday, April 16, 2019 7:09:45 AM

What you need to know to start your day.

Offshore Oil Rig Pay Laws Get High Court Look

By Patricio Chile

The U.S. Supreme Court will hear arguments today in *Parker Drilling Management Services v. Newton,* over whether offshore oil rig workers—who typically have 14-day shifts miles from the coast—should be governed by state or federal wage-and-hour law under the Outer Continental Shelf Lands Act.

- **California Laws:** California's worker-friendly wage-and-hour laws guarantee that workers would get a minimum wage of $11 an hour and be paid for rest and break time, among other benefits.

- **Wider Scope:** Business groups say an outcome for the workers could potentially extend to all state laws and create industry uncertainty, Erin Mulvaney reports.

The U.S. Supreme Court will hear oral arguments over whether California or federal wage laws apply to offshore oil rig workers.
Photographer: Tim Rue/Bloomberg via Getty Images

TESLA ARGUES FOR ARBITRATION IN BIAS ROW

Tesla Inc. will be in a federal appeals court in San Francisco today to argue that a former employee's race discrimination lawsuit belongs in arbitration rather than a public courtroom.

- **Arbitrating Rights:** The case tests whether workers who bring race bias claims under a 150-year-old civil rights law are bound by mandatory arbitration agreements, Robert Iafolla reports.

- **Private Proceedings:** Forcing employment disputes into private arbitration

robs the public of a view into a company's workplace issues, the worker's attorney said.

WHAT ELSE WE'RE WATCHING

- **Labor Relations:** The United Auto Workers said it's disclaiming a unit of maintenance workers that it organized at Volkswagen's Chattanooga, Tenn., plant in 2015, Andrew Wallender reports.

- **Safety Penalties:** A roofing company outside of L.A. faces potential civil penalties over $1 million for safety issues for which it was cited nearly three years ago. The lawsuit reflects the fallout from a landmark state supreme court ruling that gave prosecutors the ability to sue employers and seek millions in punitive fines for workplace injuries under the state's business code. Fatima Hussein reports.

- **Post-White House:** Where do former members of President Trump's administration land when they leave? Megan R. Wilson and Michaela Ross take a look at where former officials have ended up.

- **UPS Contract:** A national contract covering about 230,000 United Parcel Service Inc. workers could be finalized soon, with a crucial vote by Teamsters locals set for April 28. Read more in this week's "Unions at Work."

- **Contract Approval:** Harley-Davidson Inc. workers at two Wisconsin facilities approved a five-year contract covering more than 1,000 employees at the iconic motorcycle manufacturer, Andrew Wallender reports.

- **Pay Data:** Lawyers for the White House Office of Management and Budget are scheduled to go before a federal judge in Washington today to explain how the Equal Employment Opportunity Commission plans to comply with a recent court ruling reviving Obama era pay data disclosure requirement for companies with 11 or more workers.

- **Industrial Production:** The Federal Reserve releases its March industrial production report at 9:15 a.m.

PRACTITIONER INSIGHTS

Present Your Best Case to the Jury—Tell a Good Story
Every trial is a battle between attorneys over who can tell the most compelling story, A2L Consulting CEO Ken Lopez writes. Lopez gives tips on how to make your client's story dramatic and convincing to the jury or judge.

DAILY RUNDOWN

Top Stories

Black HR Partner at Westlake Subsidiary to Get Race Bias Trial
A jury must decide whether Royal Building Products Inc. fired the human resources partner for its Marion, Va., and Bristol, Tenn., manufacturing plants because he is black and complained about racial harassment, a federal judge ruled.

Citigroup's Arbitration Win Against Outsourced Worker Upheld
A former Citigroup Inc. employee whose job was outsourced to India failed to convince a federal judge to overturn an arbitrator's rejection of her job bias claims.

California Workers Alleging Harassment Turn to Locals Over Feds
Workers in California are filing more sexual harassment charges with a state civil rights agency than with the federal Equal Employment Opportunity Commission, according to government data.

Discrimination

SBA Employee Failed to Exhaust Bias, Retaliation Claims
A finance director in the Small Business Administration's Denver office can't pursue claims that she was subjected to sex discrimination and retaliation, the Tenth Circuit ruled April 15.

Goldman Says Some Women in Gender Bias Class Must Arbitrate
Goldman Sachs asked a federal judge to force more than 1,000 women from a gender discrimination class action to arbitrate their claims, but attorneys for the women say they shouldn't be kept out of court.

Wage & Hour

Loan Officers' $2M Overtime Class Settlement Gets Initial Nod
Home Point Financial Corp. will pay $2.2 million to resolve class and collective action overtime claims by employees under a deal that won preliminary approval April 12.

Labor Relations

SAG-AFTRA Board Approves Deal With Advertisers
SAG-AFTRA's national board unanimously approved a tentative deal with the advertising industry featuring across-the-board wage increases, the actors guild announced April 13.

Connecticut Nursing Home Workers Threaten Strike Over Pay
About 2,500 Connecticut nursing home workers say they'll walk off the job May 1 unless the state Legislature agrees to increase their pay.

Tyson Workers in Georgia Tout Pay, Health Care Wins in New Deal
About 1,800 workers at a Tyson Foods poultry plant in Georgia will get guaranteed annual pay raises and lowered health-care costs under a new three-year contract, according to their union.

WORKFLOWS

Troutman Sanders has hired Steven Khadavi, former managing partner of Dorsey & Whitney's New York office, to the corporate practice in New York | **Norton Rose Fulbright** announced that renewable energy tax lawyer David K. Burton has joined as a partner in New York from Mayer Brown | **Crowell & Moring** added A. Marisa Chun as a partner in the Litigation Group in San Francisco from McDermott Will & Emery | **Wilson Sonsini Goodrich & Rosati** added Georgia C. Ravitz and James "Jamie" R. Ravitz to the firm's life sciences practice as partners in Washington

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From: Martin, Andrew
Subject: Legal News FYI 04-16-19
Date: Tuesday, April 16, 2019 8:32:55 AM
Attachments: image001.png

Tuesday, April 16, 2019

Tesla's Bid to Arbitrate Race Bias Claims Gets 9th Cir. Test
BloombergLaw - Employment Law News 16 Apr 2019 06:46

• Ninth Circuit to hear oral argument April 16 • Trial court sent claims to arbitration based on circuit precedent By Robert Iafolla A former Tesla Inc. employee will try to convince a federal appeals court that his racial discrimination lawsuit should...

AFL-CIO staffers fight back against planned furloughs
The Hill (Washington, DC) 15 Apr 2019 20:29

Staffers at the AFL-CIO's Washington, D.C., headquarters are fighting back against management at the massive union as they negotiate a collective bargaining agreement, HuffPost reported Monday. Hourly employees including secretaries, accountants and...

UAW, While Seeking Plant-Wide Vote At Chattanooga VW Plant, Withdraws From Representing Maintenance Workers
Chattanoogan (Chattanooga, TN) 15 Apr 2019 18:49

The United Auto Workers, while pushing for a plant-wide vote at he Chattanooga Volkswagen plant, said it is pulling back from representing a unit of maintenance workers. The UAW lost a factorywide vote in 2014, but won the right the next year to...

United Auto Workers labor union wants to disclaim 2015 win in place of new election at Volkswagen's
Chattanooga Times/Free Press (Chattanooga, TN) 15 Apr 2019 18:46

This story was updated Monday, April 15, 2019, at 6:42 p.m. with more informa ion. United Auto Workers Local 42 in Chattanooga wants to disclaim a 2015 vote that created a unit of maintenance workers at the Volkswagen plant in order to clear he way for...

Aiming for Clarity, DOL Proposes to Update the FLSA's "Joint Employer" Regulations
BNA - Labor & Employment Blog 15 Apr 2019 17:51

The Fair Labor Standards Act ("FLSA") requires covered employers to pay nonexempt employees at least the federal minimum wage for all hours worked and overtime wages for all hours worked in excess of 40 hours in a workweek. Since 1939, he Department of...

UAW Steps Away From Volkswagen Union Ahead of New Vote (1)
BloombergLaw - Daily Labor Report 15 Apr 2019 17:16

• Move meant to speed up new, plant-wide organizing bid • Union, Volkswagen will attend an NLRB hearing on April 16 By Andrew Wallender The United Auto Workers said it is disclaiming a unit of maintenance workers that it organized at Volkswagen 's...

Blog Post: NLRB Judge Orders Food Co. To Pay Axed Workers $305K
LexisNexis Legal Newsroom : Workers Compensation Law (Blog) 15 Apr 2019 15:47

A National Labor Relations Board judge has ordered food distributor Marquez Bro hers Enterprises Inc. to pay two workers who were illegally fired for union activity a combined $305,000 in back pay and expenses. .. read more

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NLRB Authorizes Reduction In Use Of Investigative Subpoenas To Expedite Investigations
JD Supra: Labor & Employment Law 15 Apr 2019 15:02

Memorandum 19-05, issued by the NLRB Division of Operations Management of the Office of the General Counsel in March 2019, gives Regional Directors a new tool to expedite cases when a charged party fails to cooperate with an unfair labor practice... By:...

NLRB Finds Cursing About Customers in Restroom at Work Not Protected Activity
National Law Review 15 Apr 2019 14:45

In recent years, the National Labor Relations Board (NLRB) has decided a number of cases regarding employee conduct that most employers consider inappropriate or unsavory, often finding it to be protected activity beyond employers' disciplinary reach. In...

Illinois Bans Local Right-to-Work Ordinances (Corrected)
BloombergLaw - Construction Labor News 12 Apr 2019 16:18

• Gov. Pritzker signs Collective Bargaining Freedom Act • Law bars local right-to-work ordinances, imposes penalties for viola ions By Michael J. Bologna Illinois freshman Gov. J.B. Pritzker (D) drove a stake through the previous administration's scheme..

Legal News FYI monitors news, cases, and legislative developments of interest to the NLRB. To be added to or removed from the distribution list contact Andrew Martin. Please note that these are external links and the Agency takes no responsibility for their content.

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From: Morning Shift
To: Ring, John
Subject: POLITICO"s Morning Shift: Are Dems listening to labor? — Hearing today over EEO-1 reporting deadline — Travel restrictions target visa overstays
Date: Tuesday, April 16, 2019 10:02:41 AM

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2018 Newsletter Logo: Morning Shift

04/16/2019 10:00 AM EDT

By REBECCA RAINEY (rrainey@politico.com; @RebeccaARainey)

With help from Ted Hesson

Editor's Note: This edition of Morning Shift is published weekdays at 10 a.m. POLITICO Pro Employment & Immigration subscribers hold exclusive early access to the newsletter each morning at 6 a.m. To learn more about POLITICO Pro's comprehensive policy intelligence coverage, policy tools and services, click

here.

QUICK FIX

— Union leaders wonder whether 2020 Democrats' platforms can win over their rank and file.

— Court hearing today over EEOC's deadline to collect pay data broken down by race, ethnicity, and gender.

— The White House may make it harder for foreigners from countries with high visa overstays to travel to the U.S.

GOOD MORNING! It's Tuesday, April 16, and this is Morning Shift, your daily tipsheet on labor and immigration news. Send tips, exclusives and suggestions to rrainey@politico.com, thesson@politico.com, ikullgren@politico.com, and tnoah@politico.com. Follow us on Twitter at @RebeccaARainey, @tedhesson, @IanKullgren, and @TimothyNoah1.

DRIVING THE DAY

LABOR LEADERS SAY 2020 DEMS LACK UNION MESSAGE: Union leaders say the 2020 Democratic presidential contenders' focus on issues like the Green New Deal and "Medicare for all" risks disenchanting working class voters, the Associated Press reports. "They've got to pay attention to kitchen table economics," said Ted Pappageorge, president of the Las Vegas Culinary Union, which represents 60,000 hotel and casino workers. "We don't quite see that."

Ken Broadbent, business manager of the Pittsburgh-based Steamfitters Local 449, also said: "Jobs is where we've got to keep things focused." More from the AP here.

DIVERSITY

HEARING ON EEO-1 DEADLINE: The District Court for the District of Columbia will hold a 2 p.m. hearing today to consider whether certain businesses should be required to comply with a May 31 deadline to submit pay data to the EEOC broken down by race, ethnicity, and gender. The Obama-era requirement that the EEOC collect this information was stayed by the Trump administration and then reinstated by District Court Judge Tanya Chutkan in March. But the government told Judge Chutkan earlier this month that it needed the deadline to be extended to

September 30.

Chutkan has signaled that she may not be flexible on the deadline. She argued in her March order that affected businesses "were on notice that the stay could be withdrawn at any time" — and that prior to the stay, the changes were originally slated to go into effect in March 2018. Chutkan also scolded EEOC for failing to alert businesses immediately to the reinstated reporting requirements.

Present at today's hearing will be EEOC Chief Data Officer Samuel Haffer and OIRA Deputy Administrator Dominic Mancini, according to an April 15 court filing.

AT THE BORDER

TRAVEL RESTRICTIONS TARGETED AT VISA OVERSTAYS: "The White House is weighing travel restrictions for nationals of countries with high rates of overstaying visas in the United States," POLITICO's Ted Hesson reports. Some of the countries with the highest rates of overstaying temporary visas are in Africa, although they send relatively small numbers of travelers to the U.S. each year, according to Hesson. The White House may issue a related presidential proclamation as soon as this week. More from Hesson here.

TRUMP STOKES SANCTUARY CITY PLAN: President Donald Trump signaled Monday that he wants to move forward with his plan to release undocumented immigrants in sanctuary cities, potentially thwarting bipartisan immigration reform talks, POLITICO's Caitlin Oprysko amd Burgess Everett report. "Those Illegal Immigrants who can no longer be legally held (Congress must fix the laws and loopholes) will be, subject to Homeland Security, given to Sanctuary Cities and States!" Trump tweeted. Top House Democrats Monday announced an investigation into the White House's consideration of the plan. More here.

CBP STAFFERS IN THE MIX FOR DHS ROLES: Several current and former CBP staffers could move to DHS with new acting Secretary Kevin McAleenan, a former department official told Morning Shift. Under consideration for DHS roles are Patrick Flanagan, who was CBP chief of staff until February (for DHS chief of staff); Valerie Boyd, CBP deputy chief of staff (for deputy or senior counselor); and Andrew Meehan, CBP assistant commissioner for public affairs (for DHS public affairs or senior counselor). DHS did not immediately respond to a request for comment.

UNIONS

UAW v. VW: The United Autoworkers said Monday that it won't include in its proposed bargaining unit for a Chattanooga, Tenn., Volkswagen plant a unit of maintenance workers who organized in 2015. Workers at the Chattanooga plant filed a union election petition with the NLRB last week, their third in five years. UAW Local 42 President Steve Cochran said the move is "clearing the way for a speedy election." More here from The Chattanoogan.

DEMOCRATS URGE STOP & SHOP BACK TO BARGAINING TABLE: Members of the Connecticut delegation urged Stop & Shop President Mark McGowan Monday to revisit negotiations with a United Food & Commercial Workers local after as many as 31,000 workers in New England went on strike last week . "Stop and Shop and the communities it serves benefit from workers who are paid living wages and receive other compensation benefits that allow the workers to care for their families and provide a future for their children while understanding the need for Stop and Shop to thrive in the competitive retail market," read a letter signed by Rep. Rosa DeLauro, Sen. Richard Blumenthal, and others.

The strike, which enters its sixth day today, has prompted some stores in Massachusetts, Rhode Island and Connecticut to close or reduce hours ahead of the Passover/Easter weekend. Presidential hopeful Sen. Elizabeth Warren (D-Mass.) joined the picket line on Fr iday, telling the crowd "Unions built America's middle class — unions will be rebuilding Americans' middle class," according to the Boston Globe. More from The Connecticut Post here . Read the letter here.

Related: "Stop & Shop and unions still negotiating Monday evening as strike continues in dispu te over health care and benefits for future workers," from The Hartford Courant

PITT GRAD STUDENTS HOLD UNION ELECTION: Nearly 2,000 University of Pittsburgh graduate student workers began voting Monday on whether to be represented by the United Steelworkers Union, Sarah Schneider reports for 90.5 WESA. The workers say they are unionizing for fair salaries, child care benefits, and due process rights. The Pitt grad students face opposition from the university administration, which maintains that the students aren't employees. But the Pennsylvania Labor Relations Board ruled in March ruled that they are. More from NPR here< /a>.

EYE ON TAXES

FEW FANS OF TRUMP'S TAX CUT: White House officials may have dubbed this week "Tax Cut week" as the first deadline to file taxes under the new GOP tax law passes, but most Americans say they don't approve of the tax overhaul, POLITICO's Ben White reports. A NBC/Wall Street Journal poll found that just 17 percent of Americans believe their taxes went down as a result of the 2017 Tax Cuts and Jobs Act; another CBS News poll found that 32 percent said their taxes went up, and only 25 percent said they went down.

"The widespread unpopularity of the tax-cut legislation has offered Democrats running for president a giant opportunity to roast the president as showering benefits on corporate America while doing far less for average citizens he promised to help," White writes. Democratic presidential candidates are starting to campaign on this theme. Sen. Elizabeth Warren (D-Mass.) last week proposed adding a 7 percent tax on corporate profits over $100 million, and Sen. Bernie Sanders (I-Vt.) has floated funding "Medicare for All" by canceling some of Trump's tax cuts. More from White here.

Related: "Bonuses are up one cent in 2018 since the GOP tax cuts passed," from the left-leaning Economic Policy Institute

COFFEE BREAK

— "American Airlines Devising Extra Simulator Training for Boeing 737 Cockpit Crews," from The Wall Street Journal

— "What w ould a universal basic income mean for America? Stockton thinks it has the answer," from The Los Angeles Times

— "Border cities scramble to provide care to migrants after Trump policy shif t," from POLITICO

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Subject: Horseshoe Casino, 15-CA-218097, Section 10(j) case
Date: Tuesday, April 16, 2019 12:07:39 PM
Attachments: ILB.internalresults.15-CA-218097.Horseshoe.jls.elm.docx
Horseshoe Bossier district court decision denying injunction.pdf

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On October 24, 2019, the Board authorized the institution of Section 10(j) proceedings in this case involving, among other things, the Employer's discharge of a single employee for engaging in union activity. The Region was directed to seek, inter alia, a cease and desist order as well as an affirmative order requiring the Employer to reinstate the discharged employee.

On April 10, 2019, after briefing but without hearing oral argument, the district court denied the petition for injunctive relief. In the attached order, the court found that there was reasonable cause to believe that the Employer violated the Act. However, the court further found that injunctive relief would not be just and proper because there was not a sufficient showing "that the Employer's alleged conduct and the alleged harm to the employees and union resulting from such conduct are concrete, egregious, or otherwise exceptional."

UNITED STATES GOVERNMENT

memorandum

NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL

DATE: April 16, 2019

TO: Peter B. Robb
General Counsel

FROM: Jayme L. Sophir
Associate General Counsel

SUBJECT: Horseshoe Casino
Case 15-CA-218097

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/s/
J.L.S.

Attachment

cc: The Board
Solicitor's Office
Executive Secretary
Operations Management

H:injlit/10j/ILB.internalresults.15-CA-218097.Horseshoe.jls.elm

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

M. KATHLEEN McKINNEY, Regional Director of Region 15 of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD,	CIVIL ACTION NO. 18-1450
VERSUS	JUDGE S. MAURICE HICKS, JR.
HORSESHOE BOSSIER CITY HOTEL & CASINO	MAGISTRATE JUDGE HORNSBY

MEMORANDUM RULING

Before the Court is a Petition/Motion for Temporary Injunction filed by Plaintiff M. Kathleen McKinney on behalf of the National Labor Relations Board (collectively "the NLRB") pursuant to Section 10(j) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 160(j), against Defendant Horseshoe Bossier City Hotel & Casino ("Horseshoe"). See Record Document 1. Horseshoe opposes the Petition. See Record Document 38. For the reasons set forth below, the NLRB's motion is hereby **DENIED**.

I. BACKGROUND

This action concerns a petition for temporary injunctive relief by the NLRB in which it alleges that Horseshoe committed various acts, or unfair labor practices ("ULPs"), in violation of the NLRA. See Record Document 1 at 1. While the Petition alleges several ULPs by Horseshoe, which are described herein, the primary act on which the Petition is focused is Horseshoe's termination of one of its employees, Judy Murduca ("Murduca"). See Record Document 36 at 15; Record Document 38 at 10.

Horseshoe is a hotel and casino located in Bossier City, Louisiana and employs approximately 1,400 employees. See Record Document 38 at 9. The primary job

classifications concerned in this action, other than management positions, are table games dealers and Dual Rate Dealer Supervisors ("DRDSs"),[1] the latter of which was the position held by Murduca. See id. at 9–10. The Petition alleges that in early February and March of 2018, Horseshoe engaged in a variety of actions designed to halt and discourage the unionization efforts of some of its employees. See Record Document 1 at 4–5; Record Document 36 at 8. Specifically, the Petition alleges, *inter alia*, that Horseshoe changed terms and conditions of employment to affect employee support for union efforts, made unlawful statements to employees at meetings held to address employees' union activity, discriminatorily applied its non-solicitation and name badge policies against employees involved in union activity, and discriminatorily terminated Murduca in retaliation for her union activities and to discourage other employees from supporting such activities. See Record Document 1 at 5.

In response, Horseshoe wholly refutes the NLRB's claims that any of its alleged actions were motivated by anti-union animus, and that even as alleged in the Petition, all of the alleged acts were one-time occurrences and are not presently ongoing in order to be enjoined. See Record Document 38 at 13, 19. Regarding the alleged ULPs, Horseshoe points to various portions of the record evidence for its position that no employees were negatively affected by the alleged changes, if any, to their conditions of employment, did not make unlawful or coercive statements as the only ones it admits making were statements explaining to employees their potential rights and obligations under a union

[1] DRDSs, as described in the record evidence, split their time between supervising table games dealers and dealing in a non-supervisory capacity. See Record Document 36-5 at 75.

contract, and, further, consistently enforced its policies without regard to employees' union involvement. See id. at 11–13, 13–14.[2]

With respect to its discharge of Murduca, Horseshoe asserts that Murduca's termination had nothing to do with her union involvement but rather was based on numerous workplace violations she had committed prior to her involvement with the union, as well as her low performance rating. See id. at 15–18. Additionally, Horseshoe contests the NLRB's assertion that Murduca was the alleged leader of the union's organizing campaign, see id. at 18–19, and, further, offers evidence to dispute the NLRB's related claim that Murduca's termination has discouraged other employees from supporting the union and has effectively "nip[ped] [the] organizing campaign in the bud," id. at 30.

Beginning on December 4, 2018, a six-day hearing was held before a NLRB Administrative Law Judge in which evidence was presented as to the underlying merits of the ULP proceeding, some of which is cited to by the parties for purposes of the instant Section 10(j) Petition. See id. at 7; Record Document 36 at 7. Regarding the NLRB's requested relief, the Petition seeks, *inter alia*, immediate reinstatement of Murduca, a cease-and-desist order to prevent (as alleged) further violations by Horseshoe, and that such order be read to its employees and posted during the pendency of the administrative proceedings so as to reassure employees of their rights. See Record Document 36 at 28–29; Record Document 1-5 at 2–3.

[2] For instance, Horseshoe maintains that one of the alleged ULPs in the Petition involving its non-solicitation policy does not warrant injunctive relief because Horseshoe neither punished the employees involved in distributing the flyers nor interfered with later distributions of union literature. See Record Document 38 at 13.

II. LAW AND ANALYSIS

A. Standards for Injunctive Relief Under NLRA Section 10(j)

Courts within the Fifth Circuit, along with several other circuits, apply a two-part test to requests for injunctive relief under Section 10(j). See, e.g., McKinney v. Creative Vision Resources, LLC, 783 F.3d 293, 296 (5th Cir. 2015). First, however, the Court notes the relevant statutory language of Section 10(j), which provides as follows:

> The Board shall have power, upon issuance of a complaint . . . charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

29 U.S.C. § 160(j). Under the aforementioned test adopted by the Fifth Circuit, Section 10(j) relief is warranted only when (1) "the Board, through its Regional Director, has reasonable cause to believe that unfair labor practices have occurred, and (2) whether injunctive relief is equitably necessary, or, in the words of the statute, 'just and proper.'" Creative Vision, 783 F.3d at 296–97 (quoting Boire v. Pilot Freight Carriers, Inc., 515 F.2d 1185, 1188–89 (5th Cir. 1975)).

In Creative Vision, the Fifth Circuit further elaborated on this framework when it incorporated the Third Circuit's explanation of the same two-part test. See id. at 297 (citing Chester v. Grane Healthcare Co., 666 F.3d 87, 98 (3d Cir. 2011)). There, the Fifth Circuit observed that an analysis under this test is informed, in part, by the more traditional four-part test, adopted by the Supreme Court, that courts apply in general requests for equitable relief outside the Section 10(j) context. See id. (noting that Supreme Court

precedent requires that "[a] plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest" (quoting Winter v. Natural Resources Defense Council, 555 U.S. 7, 20, 129 S. Ct. 365, 374 (2008))); see also Overstreet v. El Paso Disposal, L.P., 625 F.3d 844, 851 (5th Cir. 2010) (stating that equitable principles such as irreparable harm inform the Section 10(j) analysis).[3]

In determining whether reasonable cause exists to believe the Act has been violated, courts may not decide the merits of the case. See Pilot Freight, 515 F.2d at 1191. Instead, courts ask whether the Regional Director's "theories of law and fact are not insubstantial or frivolous." Id. at 1189; Overstreet, 625 F.3d at 850. In addition, courts should not attempt to resolve conflicts in the evidence or the credibility of witnesses in making this determination. See Arlook v. S. Lichtenberg & Co., Inc., 952 F.2d 367, 372–73 (11th Cir. 1992). "Whether reasonable cause exists, of course, depends upon the facts and circumstances of the particular case." Pilot Freight, 515 F.2d at 1189.

Regarding the test's second (and more demanding)[4] requirement that injunctive relief be "just and proper," courts consider two additional principles: (1) whether the employer's alleged NLRA violations and the harm to the employees or union are concrete and egregious or otherwise exceptional; and (2) whether those harms, as a practical

---

[3] Pilot Freight, 515 F.2d at 1192–93 (noting that "[al]though traditional rules of equity may not control the proper scope of § 10(j) relief, some measure of equitable principles come into play").

[4] See Pilot Freight, 515 F.2d at 1192; see also Creative Resources, 783 F.3d at 300–01 (reaffirming requirement from caselaw that "injunctive relief must be affirmatively *more* effective than a decision from the NLRB").

matter, have not yet taken their adverse toll, such that injunctive relief could meaningfully preserve the status quo that existed before the wrongful acts. McKinney v. Creative Vision Resources, LLC, 783 F.3d 293, 298 (5th Cir. 2015). As to the first principle, in determining whether the alleged ULPs are "egregious," the Fifth Circuit holds that "the NLRB must show, and the district court must find, that the unfair labor practice, in the context of that particular case, has caused identifiable and substantial harms that are unlikely to be remedied effectively by a final administrative order from the NLRB." Id. at 299. In addition, the alleged conduct "must lead to exceptional injury, as measured against other unfair labor practices." Id. The caselaw is also clear that "the NLRB's administrative procedures should generally control and that measures to short-circuit the NLRB's processes should be sparingly employed." Id. (quotation omitted).

With respect to the second principle, this Circuit has held that Section 10(j) relief is only appropriate when "any final order of the NLRB would be meaningless and the remedial purposes of the Act will be frustrated without an injunction to preserve the status quo." Overstreet v. El Paso Disposal, L.P., 625 F.3d 844, 851 (5th Cir. 2010). Accordingly, injunctive relief should issue only "when harms are ongoing, yet incomplete and likely further to harm the union or its supporters in the workforce." Creative Vision, 783 F.3d at 299. In sum, a district court should only issue Section 10(j) relief "that is necessary and must issue specific findings of fact that suggest harm requiring [such] relief." Overstreet, 625 F.3d at 851.

B. Whether the NLRB has Established that Injunctive Relief Is Warranted

At the outset, the Court first addresses whether the NLRB has satisfied the first requirement that "reasonable cause" existed to believe that ULPs have occurred. Here, it

is arguably a close call whether the NLRB met this requirement with respect to each alleged ULP by Horseshoe. However, for the sake of argument, the Court assumes that this requirement is met because it finds that the test's second requirement that injunctive relief be "just and proper" is clearly not met as to any of the alleged conduct in this case. See infra; see also Kinard v. Dish Network Corp., 890 F.3d 608, 612 (5th Cir. 2018) (noting that only issue on appeal was whether injunctive relief was "equitably necessary" since district court's assumption that reasonable cause existed was not challenged).

Regarding the first "principle" under the test's second step, the NLRB has not met its burden in showing that Horseshoe's alleged conduct and the alleged harm to the employees and union resulting from such conduct are concrete, egregious, or otherwise exceptional. See supra. First, the NLRB's evidence is insufficient to support its claim that Horseshoe's allegedly discriminatory discharge of Murduca has "had an outsize impact" on the other employees and union activity due to Murduca having allegedly been the leader of the union organizing effort. Record Document 1-3 at 25. In fact, the record evidence suggests that Murduca's termination had little, if any, impact on the union activities of other employees. See, e.g., Record Document 38 at 27–28 (citing testimony by Murduca stating herself that "[she is] not the leader of this [organizing effort]," as well as statements by other employees that Murduca's termination had little or no impact on their union involvement). Even if it were accepted that Murduca's discharge had some impact, the alleged violations are not so egregious or "flagrant" enough to warrant injunctive relief, as the cases have held. Fleishut v. Avondale Industries, No. 94-3500, 1995 WL 27464, at *5 (E.D. La. Jan. 23, 1995) (concluding that, despite its finding that the reasonable cause requirement was met, the employer's actions "[were] not flagrant

enough, in light of the size of [its] work force and its routine policies and procedures, to constitute egregious violations of the Act").

Nor does the evidence warrant a finding that the other alleged violations by Horseshoe are egregious or otherwise exceptional. Regarding its alleged unlawful changes to terms and conditions of employment, even if it is assumed that reasonable cause existed to believe such changes constituted ULPs, it can hardly be said that such changes meet the "egregious" standard required for injunctive relief, especially considering that none of the changes negatively affected the employees' pay or benefits they were currently receiving. See Record Document 38 at 11–12. Likewise, the alleged statements made by Horseshoe's management do not rise to the level of "egregious" violations, and the NLRB has failed to show what, if any, "identifiable and substantial harms" have resulted from such statements. Id. at 14–15; see, e.g., Record Document 36-2 at 265.

Regarding the second principle under the test's "just and proper" prong, it is equally clear from the record that none of the alleged violations by Horseshoe necessitate the issuance of injunctive relief in order to "preserve the status quo." See supra. First, with respect to the NLRB's request that Murduca be reinstated, the caselaw is clear that the issue of reinstatement is "generally left to the administrative expertise of the Board." Boire v. Pilot Freight Carriers, Inc., 515 F.2d 1185, 1192 (5th Cir. 1975); Malone v. Carpet Transport, Inc., No. 89-2588, 1989 WL 106479, at *4 (E.D. La. Sept. 12, 1989) ("The fact that a union negotiator has been terminated, absent evidence of a pattern of such activity by the employer or proof of a deterrent effect on other employees, is insufficient to entitle the petitioner to injunctive relief."). Further, as noted above, the evidence does not support

the NLRB's claim that Murduca's termination "effectively nip[ped] an organizing campaign in the bud." Record Document 1-3 at 24.

In addition, none of the other alleged violations by Horseshoe warrant immediate injunctive relief as none are currently ongoing and the evidence does not suggest that such violations are likely to harm the employees or union in the future. See Record Document 38 at 19. For example, nearly all of the alleged unlawful statements by Horseshoe's management were made at meetings that took place in March of 2018 or earlier and have not reoccurred since that time. See id. at 30; Record Document 36-1 at 87. Regarding Horseshoe's alleged discriminatory enforcement of its policies, such as its name badge and non-solicitation policies, both of the alleged violations concerning these policies did not result in any significant punishment, if any, and were also one-time occurrences. See Record Document 36-1 at 166.

Lastly, the Court notes that while Horseshoe terminated Murduca on April 7, 2018, see Record Document 38 at 17, the NLRB did not file its petition for injunctive relief until November 6, 2018, approximately seven months later. See Record Document 1; Record Document 38 at 30. The caselaw has held that such a delay in seeking relief is a factor that weighs against issuing an injunction under Section 10(j) as it is evidence that the ULP's alleged detrimental effect has already taken its toll, rendering it too late to try to preserve the status quo. Boire v. Pilot Freight Carriers, Inc., 515 F.2d 1185, 1193 (5th Cir. 1975) (affirming district court's denial of reinstatement of two discharged employees where "[t]he Board waited three months before petitioning the district court for temporary relief"). Moreover, the NLRB's delay in seeking an injunction weakens its claim that such

relief is necessary or that Murduca's reinstatement must be "immediate." Record Document 36 at 28.

III. CONCLUSION

The Court finds that the NLRB has not shown that Section 10(j) relief is warranted in the present action. Therefore, based on the foregoing reasons, the NLRB's Petition/Motion for Temporary Injunction (Record Document 1) is hereby **DENIED**.

A judgment consistent with the terms of the instant Memorandum Ruling shall issue herewith.

THUS DONE AND SIGNED, in Shreveport, Louisiana, this 10th day of April, 2019.

S. MAURICE HICKS, JR., CHIEF JUDGE
UNITED STATES DISTRICT COURT

From: Bloomberg Law Daily Labor Report
To: Ring, John
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By Erin Mulvaney

The U.S. Supreme Court appeared divided April 16 over whether California's offshore oil rig workers should be subject to the state's more rigorous wage and hour law or the federal standard.

Old Dominion Must Face Trial Over 'No Weapons' Policy Firing

By Patrick Dorrian

An Old Dominion Freight Line Inc. sales manager may be able to convince a jury the company lacked good cause and violated its own policies when it fired him for allegedly failing to enforce its "no weapons" rule, a federal judge ruled.

Lane Bryant Loses Bid for Certification Hearing in Overtime Suit

By Porter Wells

Lane Bryant Inc. failed to convince a federal judge to set a hearing to weigh whether a group of workers' collective action for unpaid overtime wages should be conditionally certified.

DISCRIMINATION

Grocery Bag Maker Can't Force Worker to Arbitrate Bias Claims

By Patrick Dorrian

A Spanish-speaking packing production manager with a plastic bag manufacturer may take her age and religious discrimination claims to court, the California Court of Appeal ruled.

Tucson Paramedic Wins $3.8M in Breastfeeding Rights Case (1)

By Genevieve Douglas and Patrick Dorrian

A federal jury awarded a Tucson, Ariz., paramedic $3.8 million after finding she was denied a private place to express breast milk and otherwise mistreated when she returned from pregnancy leave.

WAGE & HOUR

Personal Care Aides Win in Overtime, Worker Classification Suit

By Porter Wells

The Department of Labor has prevailed in a lawsuit claiming that 44 home care aids were misclassified as independent contractors and not paid overtime wages.

HARASSMENT & RETALIATION

Phoenix Officer Gets More Time to Defend $1.5M Retaliation Win

By Patrick Dorrian

A Phoenix police sergeant has until April 26 to respond to the city's attempt to overturn a jury verdict awarding him $1.5 million for supporting a female subordinate's sexual harassment complaint.

Teacher in New York Prison Gets Sex Harassment Win Upheld

By Porter Wells

A federal judge declined to overturn a jury's finding that the New York Department of Corrections and Community Supervision subjected one of its female employees to a hostile work environment.

'Sexual Playthings': #MeToo Moment for Anadarko's Denver Office

By Catherine Traywick

Soon after Robin Olsen left her job in the Denver office of Anadarko Petroleum Corp., she drafted a letter with her lawyer's help.

STATE & LOCAL LAWS

Crump's Law: Six Months of Cancer Leave for Arkansas Firefighters

By Paul Stinson

Little Rock, Ark., firefighter Nathaniel Crump battled against Stage 4 colon cancer and fires all at once, after being told he needed to return to work after exhausting his leave.

LABOR RELATIONS

Union Official Admits to Embezzling From Iowa Local, Mail Fraud

By Christopher Brown

The business manager for a union local in Des Moines, Iowa, pleaded guilty to embezzling thousands of dollars from the union and a local charity, the Justice Department said.

UAW Steps Away From Volkswagen Union Ahead of New Vote (1)

By Andrew Wallender

The United Auto Workers said it is disclaiming a unit of maintenance workers that it organized at Volkswagen's Chattanooga, Tenn., plant in 2015.

Harley-Davidson Workers in Wisconsin Ratify 5-year Contract

By Andrew Wallender

Harley-Davidson workers at two Wisconsin facilities approved a five-year contract covering more than 1,000 employees at the iconic motorcycle manufacturer, according to the union.

Unions at Work: UPS Contract Vote, Stop & Shop Sympathy Strike

By Louis C. LaBrecque

Keep up to date with a roundup every Tuesday of union initiatives, bargaining developments, leadership changes, and other labor news.

LEGAL PROFESSION

Yale Law Women Report Shows Even Best Firms Can Improve Ranks

By Stephanie Russell-Kraft

Major law firms are gaining in promoting and advancing women and offering family friendly policies but improvement is slow, the annual Yale Law Women report showed on Tuesday.

HEALTH CARE & BENEFITS

Brown University Gets Nod for $3.5M Retirement Plan Settlement

By Jacklyn Wille

Brown University received preliminary court approval for its $3.5 million settlement with employees who challenged the structure and fees of its retirement plans.

Challenge to Union Workers' 401(k) Plan Settles for $8.75M

By Jacklyn Wille

The trustees of a 401(k) plan covering tens of thousands of union workers will

pay $8.75 million to settle a proposed class action claiming the plan charged excessive fees and offered bad investments.

SAFETY & HEALTH

California Employers Fear Pricey Verdicts for Safety Violations

By Fatima Hussein

California employment attorneys are beginning to see the potentially costly fruits of a Supreme Court ruling that allows employers in the state to be sued under state unfair business practice law after workers are injured on the job.

California Wildfires Prompt Worker Smoke-Protection Proposal

By Bruce Rolfsen

Workers in California would have to be issued air-filtering masks or protected by building ventilation systems on days when air quality is unhealthy under an emergency rule proposed by the state's workplace safety agency.

ALSO IN THE NEWS

U.S. Factory Output Stalled in March as Auto Production Dropped

By Reade Pickert

U.S. factory production stalled in March as motor-vehicle output declined, adding to signs of headwinds for manufacturing and economic growth around the world.

PRACTITIONER INSIGHTS

INSIGHT: Present Your Best Case to the Jury—Tell a Good Story

Every trial is a battle between attorneys over who can tell the most compelling story, A2L Consulting CEO Ken Lopez writes. Lopez gives tips on how to make your client's story dramatic and convincing to the jury or judge.

LATEST CASES

Case: Wage & Hour/Overtime Exemptions (S.D. Tex.)

A production supervisor for Lincoln Manufacturing in Magnolia, Texas, is exempt from overtime requirements as an executive employee. The court found that his primary duties were supervisory, because he was the highest-ranking employee during the night shift, he set employee schedules and advised them on safety issues, and testified that he spent 85 to 90 percent of his shifts ensuring operations were running smoothly. The case is Saunders v. Lincoln Mfg., Inc., 2019 BL 134473, S.D. Tex., H-18-1746, 4/15/19.

Case: Discrimination/Retaliation (S.D. Tex.)

A female fired employee may proceed with her claim that a specialty contractor in Texas retaliated against her for reporting sexual harassment by giving her more physically demanding tasks. Despite the contention that all of the tasks she was given were within her job description, her allegation that she performed seated monitoring work before the report but after it was given more hard labor duties and physical tasks which she had never previously performed could show that the contractor acted in a retaliatory manner. The case is Ramos v. Performance Contracting Inc., 2019 BL 133911, S.D. Tex., No. CIVIL ACTION H-17-2852, 4/15/19.

Case: Discrimination/Arbitration (Cal. App. 2d Dist.)

A packaging production manager doesn't have to arbitrate her state-law age and religious discrimination claims against a California plastic supplier pursuant to an alleged arbitration agreement written in Spanish. She never signed the Spanish agreement and an acknowledgment form for an English dispute resolution agreement which contained her signature didn't create an agreement to arbitrate because it only referenced that the signatory “agreed to comply with and be bound by" that English agreement which she never received. The case is Segura v. Crown Poly, Inc., 2019 BL 134153, Cal. Ct. App., 2d Dist., B287170, unpublished 4/15/19.

Case: Discrimination/Promotion (D. N.J.)

A Filipino-American female former digital marketing manager may not proceed

with her New York state law claim that a health information and marketing services company didn't promote her because of her race and gender. Despite her contention that the company promoted Caucasian males instead of her after similar lengths of employment, she didn't show that she ever applied for a promotion or that they were either automatic or available. The case is Siroy v. Jobson Healthcare Info. LLC, 2019 BL 133970, D.N.J., No. Civ. No. 2:16-cv-04523-CLW, 4/15/19.

Case: Labor Relations/Refusal to Bargain (D.C. Cir.)

The NLRB didn't err in finding that a hauling company unlawfully implemented its own last best offer in bargaining with a Teamsters local. The D.C. Circuit has long recognized that an employer's failure to provide requested information that affects bargaining generally precludes it from declaring an impasse, and there was substantial evidence that the union's president repeatedly asked for the information before a meeting at which the company provided a spreadsheet that wasn't responsive to the union's specific requests. The case is Hendrickson Trucking Co. v. NLRB, 2019 BL 133663, D.C. Cir., 17-1226, 4/12/19.

Case: Individual Employment Rights/Contracts (N.D. Cal.)

An employee alleging that his employer General Electric Company discharged him in retaliation for his objections to the employer reneging on its promise to pay commission to his sales team can go forward with his claim that GE breached the implied covenant of good faith and fair dealing, because his implied contract claim hasn't been sufficiently pled, and at this early stage it cannot be said with certainty that his implied covenant claim is superfluous. The case is Jones v. Gen. Elec. Co., 2019 BL 134243, N.D. Cal., No. 18-cv-07086-EMC, 4/15/19.

Case: Discrimination/Retaliation (D. Neb.)

A female employee may proceed with her claim that a gas station in Nebraska fired her in retaliation for reporting sexual harassment, rather than for a series of disciplinary problems. Her allegations, such as that many of the disciplinary reprimands she received were mischaracterized and that one was directly related to her harassment complaint, could show that the station acted in a

retaliatory manner. The case is Alford v. Petrol Iii, LLC, 2019 BL 133367, D. Neb., 8:17CV92, 4/15/19.

Case: Wage & Hour/Overtime Exemptions (W.D. Ark.)

An Arkansas hatchery established that one of its employees is an agricultural worker exempt from state and federal overtime laws, because her job duties, including grading and vaccinating baby chicks, and janitorial work, all fall within the regulatory definition of exempt hatchery operations. The case is Cea v. Cobb-Vantress, Inc., 2019 BL 134513, W.D. Ark., 5:19-CV-05024, 4/15/19.

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Cc:	Morgan, Terry A.; Kerwin, Elizabeth; Boren, Dennis R.
Subject:	D.C. Circuit decision in Hendrickson Trucking Company, Board Case 07-CA-086624 (reported at 365 NLRB No. 139)
Date:	Tuesday, April 16, 2019 4:51:37 PM
Attachments:	17-1226 Hendrickson Trucking Judgment fld.pdf Hendrickson Trucking Company_17_1226_Final Brief.pdf (1).pdf

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In an unpublished judgment that issued on Friday, April 12, 2019, the D.C. Circuit enforced the Board's order issued against this trucking company that hauls aggregate materials, such as sand and gravel, on a seasonal basis from a facility in Jackson, Michigan, where the International Brotherhood of Teamsters, Local 1038, represents a unit of 20 of its drivers and mechanics. The Board's order remedies unfair labor practices committed during the parties' negotiations for a successor collective-bargaining agreement in 2012. Specifically, the Board found that the employer violated Section 8(a)(5) and (1) of the Act by unilaterally implementing the terms of its final offer without bargaining to a valid impasse, by refusing to provide the union with requested information, and by later refusing to bargain when the union requested that negotiations be reopened. The Board also found that the employer violated Section 8(a)(3) and (1) of the Act by refusing to reinstate employees who engaged in an unfair-labor-practice strike that resulted from the employer's unlawful implementation of its final offer.

Without hearing oral argument, the court upheld the Board's unfair-labor-practice findings, noting that, "[a]s explained in the Board's thoroughgoing and persuasive briefing, the Board's decision hewed to settled law and its factual findings and credibility judgments were amply supported in the record."

The court also rejected the employer's claims that the administrative law judge, whom the Board appointed when it lacked a quorum, did not have authority to preside over the hearing, and that her ratification of her earlier decision, after a properly constituted Board had ratified her appointment, could not cure any defect caused by her initially invalid appointment. The court held that neither the law nor the record supported those claims. Rather, the court held that, after her appointment was ratified and the Board remanded the case for her reconsideration, the judge "carefully reviewed the evidence and formulated a reasoned opinion, without displaying any bias toward the parties or pre-judgment as to the outcome." As supporting precedent, the court cited *Wilkes-Barre Hospital Co. v. NLRB*, 857 F.3d 364, 371 (D.C. Cir. 2017) (holding an invalidly appointed regional director could lawfully ratify his own prior actions after a properly constituted Board ratified his appointment).

The court's unpublished judgment, and the Board's brief to the court, are attached.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-1226 **September Term, 2018**

FILED ON: APRIL 12, 2019

HENDRICKSON TRUCKING COMPANY,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT

INTERNATIONAL BROTHERHOOD OF TEAMSTERS (IBT), LOCAL 1038,
INTERVENOR

Consolidated with 17-1234

On Petitions for Review and Cross-Application
for Enforcement of an Order of
the National Labor Relations Board

Before: HENDERSON, SRINIVASAN and MILLETT, *Circuit Judges*.

JUDGMENT

This petition for review and cross-application for enforcement were considered on the record from the National Labor Relations Board, as well as on the briefs of the parties. We have accorded the issues full consideration and determined that they do not warrant a published opinion. *See* D.C. CIR. R. 36(d). It is

ORDERED AND ADJUDGED that the petition for review be denied and the cross-application for enforcement be granted. As explained in the Board's thoroughgoing and persuasive briefing, the Board's decision hewed to settled law and its factual findings and credibility judgments were amply supported in the record.

Petitioner Hendrickson Trucking Company is a trucking business based in Jackson, Michigan. The Company provides a hauling service for aggregate materials like sand and gravel on a seasonal basis, running between April and November. In 2012, Hendrickson Trucking and the union representing its employees, the International Brotherhood of Teamsters, Local 1038, entered into negotiations to replace their expiring collective bargaining agreement. The National

Labor Relations Board found that, in the course of those failed negotiations, Hendrickson Trucking committed numerous unfair labor practices in violation of Sections 8(a)(1), 8(a)(3), and 8(a)(5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1), (3) & (5). In particular, the Board found that Hendrickson Trucking wrongly (i) withheld pertinent information about business operations requested by the Union; (ii) unilaterally implemented the terms of its final offer without first bargaining to impasse; (iii) refused to resume bargaining at the Union's request; and (iv) failed to reinstate employees who had engaged in an unfair labor practice strike. *Hendrickson Trucking Co.*, 365 N.L.R.B. No. 139 (Oct. 11, 2017). Hendrickson Trucking petitions this Court for review and the Board, joined by the Union as intervenor, cross-applies for enforcement.

The rocky course of negotiations for a new collective bargaining agreement that gave rise to this litigation began in February 2012 with the first of seven bargaining sessions. At the outset, there appeared to be a substantial gap between Hendrickson Trucking's and the Union's positions, with Hendrickson Trucking looking to curtail its expenses, and the Union seeking to increase wages and benefits. At their second meeting in April, Hendrickson Trucking explained that it could not expand benefits because the Company needed to stem financial losses. That representation prompted the Union's president, Alan Sprague, to request "detailed cost-savings calculations" relating to the Company's economic proposals, including its proposals to rollback overtime and its 401(k) match, and to increase the employees' share of insurance premiums. J.A. 58. The Company "threw numbers out," but Sprague insisted that the Union needed concrete substantiation of the amounts the Company would save. J.A. 223.

Hendrickson Trucking did not provide the requested financial information. Instead, at the parties' third meeting, the Company withdrew many of its initial proposals and reduced the employees' proposed share of insurance premiums. The Union rejected the offer, and then voted both to pre-ratify a one-year contract that largely preserved the status quo and to strike if necessary.

Hendrickson Trucking's and the Union's recollections of the fourth meeting diverge. The Company's chief financial officer testified that this meeting was the first occasion on which Sprague requested cost-saving information related to Hendrickson Trucking's proposals. The Company says that it then provided a spreadsheet documenting the business's finances. But Sprague testified that he had no recollection of ever seeing such a document, and that he had asked for the relevant financial information two meetings earlier. The administrative law judge and the Board credited Sprague's version of events because the chief financial officer "waivered [sic] in his testimony" and was "not entirely forthcoming." J.A. 66, 67 n.17. The administrative law judge also concluded that, in any event, the spreadsheet was "an insufficient response as it did not include cost savings calculations or data for each of those economic proposals." J.A. 74.

At the fifth meeting, Sprague reminded Hendrickson Trucking that the Union was still awaiting the cost-saving information. No response came.

At the sixth meeting, Hendrickson Trucking presented what it denominated its "LAST BEST OFFER." J.A. 486–515. When the Union rejected that offer, Hendrickson Trucking declared a bargaining impasse. Sprague instantly disagreed. Hendrickson Trucking subsequently conveyed a "Revised Proposal and [another] Last, Best, and Final Offer," J.A. 516–579, which the Union rejected.

At the seventh and last meeting, the Union presented its "Final Proposal." That proposal offered Hendrickson Trucking three options: (1) implement the one-year pre-ratified offer; (2) implement a slightly altered offer; or (3) "Work Stoppage." J.A. 582. The administrative law judge found, and the Board agreed, that the Union "did not intend to end negotiations with [its] final offer." J.A. 69.

The Union waited for Hendrickson Trucking's response. But it never came. Instead, Hendrickson Trucking unilaterally implemented its own last offer. Upon learning of that, the Union instituted a strike in June 2012. A month later, the Union filed a grievance with Hendrickson Trucking and requested information about its use of trucks bearing the name AGG Trucking, LLC during the strike period.

At the end of November, the Union made an unconditional request to return to work, and also expressed a willingness to "meet and bargain in good faith" if Hendrickson Trucking would rescind its unilateral changes to the agreement and provide the requested information about the use of AGG Trucking vehicles. J.A. 71, 594. Hendrickson Trucking refused to reinstate the employees, relying instead on replacement workers.

In late December, the Union sent a second grievance letter to Hendrickson Trucking that challenged the Company's hiring of replacement workers and renewed both of the Union's still-unanswered information requests. Hendrickson Trucking responded with a letter asserting that "Hendrickson Trucking and AGG Trucking are a single employer." J.A. 72, 609.

In the aftermath of the failed negotiations, the Board's General Counsel issued a complaint against Hendrickson for (i) unilaterally implementing the terms of a final offer without bargaining to a valid impasse; (ii) refusing to provide the Union with the information it requested related to AGG Trucks; (iii) refusing to resume bargaining after the strike ended; and (iv) failing to reinstate the striking workers after they made an unconditional offer to return to work.

Following a two-day hearing, the administrative law judge sustained all of the General Counsel's charges. Hendrickson filed exceptions to the Board, challenging both the ALJ's substantive findings and her authority to preside over the case under *NLRB v. Noel Canning*, 573 U.S. 513 (2014). That case held that the Board had lost the quorum required to operate as of January 4, 2012. The Board did not regain a quorum through valid appointments until August 2013, several months after the administrative hearing in this case. In addition, the Board had not ratified the ALJ's appointment until after her initial decision had issued.

In light of *Noel Canning*, and "without concluding or suggesting that the judge lacked the authority to issue the May 16, 2014 decision," the Board remanded the case to the ALJ to "consider anew the issues presented now that her appointment has been ratified by a fully confirmed five-member Board," in the hope that would "remove any lingering questions." J.A. 52. On remand, the ALJ "fully reviewed" her prior decision and ruled that it was correct "[i]n its entirety." J.A. 61.

The Board again affirmed in all relevant respects. The Board ordered Hendrickson

Trucking to: (i) rescind the unilateral changes it had made in June 2012; (ii) make unit employees and strikers whole for any losses occasioned by the unilateral changes; (iii) offer full reinstatement to those who had engaged in the strike in response to the Company's unfair labor practices; and (iv) bargain with the Union upon request. Hendrickson Trucking then petitioned this court for review, arguing that the Board's findings are not supported by substantial evidence and that the ALJ lacked the legal authority to adjudicate the case.

Under the National Labor Relations Act, an employer commits an unfair labor practice if it "refuse[s] to bargain collectively with the representatives of [its] employees," 29 U.S.C. § 158(a)(5), or if it "discriminat[es] in regard to hire or tenure of employment or any term or condition of employment" as a way to "encourage or discourage membership in any labor organization," *id.* § 158(a)(3). An employer's failure to abide by either requirement also violates Section 8(a)(1) of the Act, which prohibits "interfer[ing] with, restrain[ing], or coerc[ing] employees in the exercise of the right[]" under the Act to "bargain collectively through representatives of their own choosing," 29 U.S.C. § 157. *Enterprise Leasing Co. of Fla. v. NLRB*, 831 F.3d 534, 546 (D.C. Cir. 2016) (first, second, and third alterations in original) (quoting 29 U.S.C. § 158(a)(1)) (explaining that a violation of 29 U.S.C. § 158(a)(5) produces a derivative violation of § 158(a)(1)); *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983) (same for 29 U.S.C. § 158(a)(3)).

Hendrickson Trucking raises five challenges to the Board's determination that it committed multiple unfair labor practices. None of them succeeds.

First, Hendrickson Trucking challenges the Board's finding that it impermissibly imposed new terms of employment without first bargaining with the Union to impasse. But the Board's holding that Hendrickson Trucking could not declare an impasse because it had failed to provide the Union the financial information it needed to evaluate the Company's representations was grounded in settled law. This court has long recognized that an employer's failure to provide requested information that affects negotiations generally "preclude[s] the Company from declaring an impasse." *United States Testing Co. v. NLRB*, 160 F.3d 14, 22 (D.C. Cir. 1998) (citations omitted); *accord E.I. Du Pont de Nemours & Co. v. NLRB,* 489 F.3d 1310, 1315 (D.C. Cir. 2007) ("'[I]mpasse cannot exist where the employer has failed to satisfy its statutory obligation to provide information needed by the bargaining agent to engage in meaningful negotiations.'") (quoting *Decker Coal Co.,* 301 N.L.R.B. 729, 740 (1991)); *id.* at 1316 (Union "entitled to inspect the data relied on by an employer and does not have to accept the employer's bald assertions or generalized figures at face value[.]").

Hendrickson Trucking disputes the facts, arguing that it did provide the relevant financial information when (in its view) it was first requested at the fourth meeting. But substantial evidence supports the Board's contrary factual findings that (i) Sprague asked for the information repeatedly before that meeting; (ii) the requested information was never provided; and (iii) the spreadsheet that was belatedly provided was not responsive to the Union's specific requests. Plus Hendrickson Trucking has not come close to meeting the weighty burden of discrediting the underlying credibility determinations made by the ALJ and adopted by the Board. *See Inova Health Sys. v. NLRB*, 795 F.3d 68, 80 (D.C. Cir. 2015) ("[W]e accept all credibility determinations

made by the ALJ and adopted by the Board unless those determinations are 'patently insupportable.'") (citations omitted).

Second, Hendrickson Trucking disputes the Board's finding that it committed an unfair labor practice by failing to timely furnish information that the Union requested about the use of trucks from AGG Trucking, which the Board found was "relevant and necessary for the Union to carry out its representative function." J.A. 80; *see also Public Serv. Co. of New Mexico v. NLRB*, 843 F.3d 999, 1005 (D.C. Cir. 2016). Hendrickson argues that its January letter satisfied the Union's July request, and that in any event the Union accepted it as adequate and thereby waived its objection. Hendrickson Trucking Br. 38–39.

Those arguments fall flat. For starters, the Board found that, even assuming it were adequate, Hendrickson Trucking's reply was unreasonably delayed. That by itself constitutes an independent basis for sustaining the finding of an unfair labor practice under the Act—and it is a rationale to which the Company has voiced no objection here. *See Monmouth Care Ctr.*, 354 N.L.R.B. 11, 51 (2009), *reaffirmed and incorporated by reference*, 356 N.L.R.B. 152 (2010), *enforced* 672 F.3d 1085 (D.C. Cir. 2012).

In any event, the Board found that the cursory January letter was insufficiently responsive to the Union's numerous, granular information requests about the Company's use of AGG trucks. *See, e.g.*, *KLB Indus., Inc. v. NLRB*, 700 F.3d 551, 556 (D.C. Cir. 2012) (rejecting the argument that some disclosed material sufficed because "any requested information that has a bearing on the [collective] bargaining process *must* be disclosed") (emphasis added) (citations and quotations omitted). Once again, Hendrickson Trucking offers no meaningful response. And Hendrickson Trucking's waiver contention baldly flouts the record evidence documenting that the Union never abandoned its more detailed information requests. J.A. 322 (testimony from Hendrickson Trucking's counsel that the Union's attorney made clear he "wasn't waiving anything" with respect to "information requests").

Third, Hendrickson Trucking contests the Board's finding that it unlawfully rebuffed the Union's November 30th request to resume negotiations. The "duty to bargain survives" impasse, and requires that employers "stand ready to resume collective bargaining" upon a union's reasonable request. *See Brown v. Pro Football, Inc.*, 518 U.S. 231, 244 (1996). Hendrickson Trucking accepts that legal rule, raising only a factual dispute over whether it was the Union, rather than the Company, that resisted the resumption of bargaining. Hendrickson Trucking Br. 34–35. Hendrickson Trucking points to testimony from its counsel, Tim Ryan, stating that he called Sprague in early December with an offer to resume bargaining. *Id*.

The problem for Hendrickson Trucking is that the ALJ did not believe Ryan's version of events. The ALJ instead credited Sprague's contrary testimony that, to his recollection, no such call took place. The ALJ discredited Ryan's testimony both because he could not remember the circumstances of the call, and because Ryan's version of events was inconsistent with basic facts about when the Company's "busy season" and "winter slowdown" take place. J.A. 72, 316–323. Hendrickson Trucking has provided us no basis to upset that credibility judgment. *See Inova Health Sys.*, 795 F.3d at 80.

Fourth, Hendrickson Trucking objects to the Board's finding that the strike was in response to its own unfair labor practice. By deeming the strike to be unjustified, the Company asserts that it had no obligation to reinstate the employees when they unconditionally offered to return to work. Hendrickson Trucking is wrong on both fronts.

The law is settled that an employer violates the National Labor Relations Act if it fails to reinstate strikers who have made an offer to return to work following a strike that was taken in response to an employer's unfair labor practice. *Spurlino Materials, LLC v. NLRB*, 805 F.3d 1131, 1137 (D.C. Cir. 2015). A strike will be found to have arisen out of an unfair labor practice if the strike is motivated "in part" by the unfair labor practice. *Teamsters Local Union No. 515 v. NLRB*, 906 F.2d 719, 723 (D.C. Cir. 1990) (citation omitted). The unfair labor practice need not be the "sole or even the major cause" of the strike. *Id.* (citation omitted).

Hendrickson Trucking's chief argument is that the strike was motivated purely by economics and was not in response to unfair labor practices. Hendrickson Trucking Br. 35–38. But substantial evidence supports the Board's contrary conclusion. The timeline of relevant events itself contradicts the Company's argument. The Union voted to strike in late April, and again at the end of May. In so doing, the Union expressly conditioned the strike on Hendrickson Trucking first committing the unfair labor practice of "implement[ing] [its] offer" unilaterally. J.A. 244. True to those words, the strike commenced on June 25 *after* the Union learned that the Company had unilaterally implemented its own proposed terms and conditions. That more than suffices to show that Hendrickson Trucking's unfair labor practice motivated the strike at least in part.

In response, Hendrickson Trucking cites inapt cases where (i) the unfair labor practices occurred after the decisive strike vote, *Mobile Homes Estates, Inc.*, 259 N.L.R.B. 1384 (1982), *enforced on other grounds*, 707 F.2d 264 (6th Cir. 1983); (ii) the union put into writing the purely economic reasons for its strike, *Facet Enters., Inc.*, 290 N.L.R.B. 152 (1988), *enforced on other grounds*, 907 F.2d 963 (10th Cir. 1990); or (iii) the unfair labor practices were never "specifically mentioned" during strike-vote deliberations, *Reichhold Chems. Inc.*, 288 N.L.R.B. 69, 79 (1988), *rev'd*, 906 F.2d 719 (D.C. Cir. 1990), *on remand*, 301 N.L.R.B. 706 (1991). Here, by contrast, the Union expressly conditioned its strike on Hendrickson Trucking's commission of an unfair labor practice, which makes the causation question quite straightforward.

Fifth, and finally, Hendrickson Trucking argues that it was entitled to a hearing before a new administrative law judge because the ALJ who conducted the hearing was appointed at a time when the Board lacked the legally required quorum. Hendrickson Trucking Br. 39–43. In particular, Hendrickson Trucking notes that the Board did not have a proper quorum until several months after the ALJ's hearing, and the Board did not ratify her appointment until after she had already issued her initial decision. The Board then remanded the case so that the same ALJ could "consider anew the issues presented now that her appointment has been ratified by a fully confirmed five-member Board." J.A. 52. On remand, the ALJ "fully reviewed" her prior decision and reaffirmed it "[i]n its entirety." J.A. 61.

Hendrickson Trucking argues that the remand was invalid because the ALJ had a "closed mind," and the rules prohibit ALJs' acting with "actual bias," "deep-seated favoritism[,] or

antagonism" to one side. Hendrickson Trucking Br. 40–43 (citations omitted). Neither the law nor the record supports the Company's challenge. In *Wilkes-Barre Hospital Co. v. NLRB*, 857 F.3d 364 (D.C. Cir. 2017), we held that an invalidly appointed Regional Director could lawfully ratify his own prior actions after a properly constituted Board ratified his appointment, *id*. at 371. *Wilkes-Barre* emphasized that "no evidence suggest[ed] that [the Regional Director] failed to make a detached and considered judgment or that he was 'actually biased' against [the losing party]." *Id.* at 372 (quoting *FEC v. Legi-Tech, Inc.*, 75 F.3d 704, 709 (D.C. Cir. 1996)). So too here. The ALJ on remand carefully reviewed the evidence and formulated a reasoned opinion, without displaying any bias toward the parties or pre-judgment as to the outcome.

For all of those reasons, we deny Hendrickson Trucking's petition for review and grant the Board's cross-application for enforcement.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or rehearing en banc. *See* FED. R. APP. P. 41(b); D.C. CIR. R. 41(a)(1).

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk

Final Brief Oral Argument Not Yet Scheduled

Nos. 17-1226 & 17-1234

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

HENDRICKSON TRUCKING CO.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 1038

Intervenor

ON PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), the National Labor Relations Board certifies the following:

A. Parties and Amici

1. Hendrickson Trucking Co. was the respondent before the Board (Case No. 07-CA-086624) and is the Petitioner/Cross-Respondent before the Court.

2. The Board is the Respondent/Cross-Petitioner before the Court; its General Counsel was a party before the Board.

3. International Brotherhood of Teamsters, Local 1038, was the charging party before the Board and is the Intervenor before the Court.

B. Rulings Under Review

The case under review is a Decision and Order of the Board, issued on October 11, 2017, reported at 365 NLRB No. 139.

C. Related Cases

This case has not previously been before the Court. The Board is not aware of any related cases either pending or about to be presented before this or any other court.

s/ Linda Dreeben

Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570
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Dated at Washington, DC
this 29th day of June, 2018

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GLOSSARY

"A__" ..... Joint Appendix

"the Board" ..... National Labor Relations Board

"Br." ..... Company's opening brief

"D&O" ..... Board's Decision and Order, *Hendrickson Trucking Co.*, 365 NLRB No. 139, 2017 WL 4571184 (Oct. 11, 2017)

"the Act" ..... National Labor Relations Act, 29 U.S.C. § 151, et seq., as amended

"the Company"..... Hendrickson Trucking Co.

"the Union" ..... International Brotherhood of Teamsters, Local 1038

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 17-1226 & 17-1234

HENDRICKSON TRUCKING CO.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 1038

Intervenor

ON PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF JURISDICTION

This case is before the Court on the petition of Hendrickson Trucking Co. ("the Company") for review, and the cross-application of the National Labor Relations Board for enforcement, of an Order issued against the Company,

reported at 365 NLRB No. 139, 2017 WL 4571184 (Oct. 11, 2017) ("A57-83.)[1] The International Brotherhood of Teamsters, Local 1038, ("the Union") is the successor bargaining representative to the International Brotherhood of Teamsters, Local 164, which was the charging party before the Board.

The Board had jurisdiction over this matter under Section 10(a) of the National Labor Relations Act ("the Act," 29 U.S.C. §§ 151, 160(a)). The Board's Decision and Order is final under Section 10(e) and (f) of the Act. 29 U.S.C. § 160(e) and (f). The Court has jurisdiction over this proceeding pursuant to Section 10(f) of the Act, 29 U.S.C. § 160(f). The petition and cross-application were timely; the Act imposes no time limit on such filings.

STATEMENT OF ISSUES

1. Does substantial evidence support the Board's finding that the parties did not bargain to a valid impasse, so the Company violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1), when it unilaterally implemented its final offer?

2. Does substantial evidence support the Board's finding that the Company violated Section 8(a)(3) and (1) of the Act by refusing to immediately

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[1] "A__" refers to the Joint Appendix. "Br" refers to the Company's opening brief. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

reinstate employees, who had engaged in an unfair-labor-practice strike, after they made an unconditional offer to return to work?

3. Does substantial evidence support the Board's finding that the Company violated Section 8(a)(5) and (1) of the Act by refusing to furnish the Union with relevant requested information?

4. Does substantial evidence support the Board's finding that the Company violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to resume bargaining?

5. Did the Board properly reject the Company's argument that the administrative law judge was invalidly appointed and thus lacked authority to preside over the hearing and issue the decision and recommended order?

RELEVANT STATUTORY PROVISIONS

The Addendum contains relevant statutory provisions.

STATEMENT OF THE CASE

In this case, which arose from the parties' negotiations for a successor collective-bargaining agreement in 2012, the Board found that the Company violated the Act by implementing its final bargaining offer without bargaining to a good-faith impasse, failing to provide the Union with relevant information it requested, refusing to reinstate employees who engaged in an unfair-labor-practice strike that resulted from the Company's implementation of its offer, and refusing to

resume bargaining upon request of the Union. The Company has challenged not only those findings, but also the authority of the administrative law judge who presided over the hearing in this matter and issued a decision and recommended order. The Board's factual findings, and conclusions and order rejecting the Company's arguments, are as follows.

I. THE BOARD'S FINDINGS OF FACT

A. The Parties' Bargaining History

The Company, operating from its facility in Jackson, Michigan, is a trucking company that hauls aggregate materials including sand and gravel. (A62; A359 ¶2.) Since about 1977, the Union has represented the Company's drivers, mechanics, mechanics helpers, and parts/utility employees. (A62; A360 ¶¶7,8.) The Company operates seasonally, with most employees working from April 1 through December 1 each year. (A62; A123-24,325.) During the relevant time period, the Union represented about 20 employees. (A62; A211.)

The parties successfully negotiated collective-bargaining agreements in 2002, 2005, and 2008. (A62, 76; A360 ¶8.) In prior bargaining, the Union stood its ground before eventually agreeing to wage and other concessions sought by the Company. (A76; A242, 243, 254.) It also historically used the threat of a strike to advance its bargaining position without reaching impasse or failing to ratify a contract. (A76; A164-65,230, 231-32, 238-39.) Prior to the strike at issue in this

case, the Union last went on strike in 2002, which lasted for 7 days. (A76; A107. 230.)

B. The Parties Undertake Negotiations for a Successor Collective-Bargaining Agreement; the Union Requests Information

The parties' 2008 agreement was effective through the end of March 2012. (A62; A364-80.) As its expiration neared, the parties undertook negotiations for a successor agreement. (A62; A381, 382-83.) The parties met on seven occasions between February and June 2012. (A63; A227-28.) At all bargaining sessions, the Union was represented by business agent Al Sprague and steward/recording secretary Tom Mathews, and the Company was represented by In-House Counsel Tom Hendrickson, Mechanic Supervisor Ryan Hendrickson, and Chief Financial Officer/Treasurer Jack Durbrow. (A63 & n.5; A117-18.)

1. February 27 Bargaining Session

The parties spent the first bargaining session, held on February 27, exchanging and explaining their initial bargaining proposals. (A63; A227-28, A384-94, 395-96.) The Company's proposals included the following, which would prove to be the main points of contention throughout bargaining:

- Eliminating final and binding arbitration and providing grievances would be resolved through "trial." (A384-85.)
- Requiring that employees pay 25 percent of contributions paid to the Michigan Conference of Teamsters Welfare Fund for health and welfare insurance. (A388.)

- Discontinuing the Company's match to employees' contributions to their 401(k) accounts. (A388-89.)

- Changing the calculation of overtime from daily overtime after 8 hours to weekly overtime after 40 hours. (A392.)

The Company's other proposals included eliminating payroll dues deduction. (A384); freezing wages (A392); and changing the vacation policy (A387).

The Union's proposals included revising the arbitration provision to require that unresolved grievances be heard by the Western Michigan Industrial Board, increasing wages, and eliminating the super-seniority provision afforded to union stewards. (A63-64; A395-96.)

The Company explained, as it did throughout bargaining, that it needed to save money and "stop the bleeding" from recent losses. It sought to have employees contribute toward their health-and-welfare fund premiums for the first time. (A63-64; A129-30.) The Union sought to restore lost wages and benefits that it had sacrificed in previous years to help the Company save money. (A63; A150, 242, 254.)

In response to the Company's claimed need to save money, the Union asked to review the Company's financial records, and the Company agreed. (A64; A135-36.) The Union's accountant met with Durbrow to review the Company's books and 2008-2010 tax returns. The accountant provided the Union a report explaining

that the Company had made a small profit in 2008 and 2010 and had a small loss in 2009, information that the Union relayed to its members. (A64; A598-602.)

2. April 10 Bargaining Session

During the next session, held April 10, the Company presented the same proposal as it had previously. (A64; A397-408.) The parties reached tentative agreements on minor issues and the Company withdrew several proposals about vacation days. (A64; A397-408.) The Company had no response to the Union's proposals. (A65; A147-48.) It reiterated that it was not profitable and needed to save money, and the Union expressed frustration that it had made wage and other concessions in prior contracts. (A64; A149.) The Union asked the Company how much money it anticipated saving with its proposals, including its proposed overtime-calculation revision and elimination of its match to employees' 401(k) contributions. (A64; A148.) Sprague asked "what do you need? $25,000, $50,000, $175,000?" and Durbrow responded that $75,000 "sounds good." (A64; A148, 222.) Sprague asked for specific amounts of savings, and Durbrow said that the Company would save about $20,000 eliminating the 401(k) match, $25,000 revising the overtime-pay calculation, and $40,000 on health-and-welfare fund premiums. (A64; A149-50, 222-23.) Concerned that the Company was "just throwing out numbers," he asked Durbrow for documentation and underlying numbers to support those figures. (A64; A149-50.)

The Union also proposed that the Company allow employees to opt out of the health-and-welfare plan in exchange for a $1.00 per hour wage increase. (A65; A152-53.) The Company believed that would be too complicated and involve too much paperwork. (A65; A153.)

Several days later, the Union faxed the Company a proposal for a 1-year contract that would freeze wages and require the Company to pay increases to health-and-welfare fund premiums, and otherwise maintain the status quo. (A65 & n.14; A155, 409-11.) The proposal was an attempt to reach an agreement before the Company's busy season began and provide additional time for the Company to provide cost-savings information associated with its proposals. (A65; A155-57.)

3. April 25 Bargaining Session

At the next bargaining session, held on April 25, the Company updated its offer. (A65; A160, A412-40.) It withdrew a number of proposals, including eliminating payroll dues deductions, (A65; A413), and agreed to the Union's proposal to eliminate the super-seniority provision. (A65; A414.) It revised its health-and-welfare proposal to reduce employees' proposed contributions from 25% to 20% for drivers and 15% for mechanics. (A65; A421-23.) Rather than eliminate the 401(k) match, it proposed suspending the match until the Company returned to profitability. (A65; A424, 256-57.) With respect to the grievance process, the Company stated it was waiting for additional information about

resolving grievances through the Western Michigan Industrial Board and it wanted to attend an Industrial Board hearing. (A65; A160, 415.)

The Union asked again for documentation showing the estimated cost savings of the Company's proposals to eliminate the 401(k) match, revise its overtime-calculation method, and require employees to contribute toward health-and-welfare fund premiums. (A65; A161, 236.) The Company responded that it needed to "stop the bleeding" and asked the Union what it was going to do to help. (A65; A265.) Several days later, the Company sent the Union a nearly identical proposal, except it proposed revising how it would determine which employees were entitled to employer-paid health-and-welfare fund contributions. (A65; A441-70.)

Several days later, the Union held a meeting at which employees voted on several matters. First, they rejected the Company's most recent proposals. (A66; A164.) Second, they voted to pre-ratify a proposal that would then be submitted to the Company. That proposal was for a 1-year contract at the status quo except employees would pay approximately $15 per week toward health-and-welfare premiums. (A66; A165-66.) Third, they authorized the Union to strike if necessary, which was intended to prompt the Company to seriously consider the Union's proposal. (A66; A164, 239.) The Company was not interested in that proposal. (A66; A167.)

4. May 16 Bargaining Session

At the next bargaining session, held May 16, the parties met for the first time with a federal mediator. (A66; A169-70.) The parties separately discussed their proposals with the mediator but did not exchange new proposals. (A66; A169-70.)

5. May 21 Bargaining Session

The parties met again with the mediator on May 21. (A67; A226.) The Company provided a new proposal that reverted back to its initial proposal of resolving grievances in federal district court. (A67; 170, A472-73.) The Union objected, and the Company responded by suggesting that if that proposal was all that stood in the way of a contract, it could be taken care of. (A67; A171-72.) The Union stated that there were still a lot of other issues on the table. (A67; A172.) The Company also further reduced its proposal on employee health-and-welfare fund contributions from 20% to 15% for drivers and from 15% to 13% for mechanics. (A67; A475-77.) It also proposed that new hires would not be eligible for insurance until employed for 180 days. (A67; A475.)

During that meeting, the Union submitted information from the health and welfare fund about the opt-out proposal and informed the Company that fund representatives were willing to assist the Company with implementing the proposal. (A67; A172, 228-29, 277.) The Company rejected the opt-out process as too difficult to administer. (A67; A172.) They also discussed the Company's

proposal to eliminate the 401(k) match. (A67; A173.) The Union stated that only a few employees participated so the proposal would not result in a significant savings, while the Company believed about half of the bargaining-unit employees participated. (A67; A175-76.) The Company explained that the proposals on eliminating the 401(k) match and requiring that employees contribute toward health-and-welfare premiums would apply to all employees, not just those in the bargaining unit. (A67; A283-85.)

The Union reminded the Company that it had not yet provided cost-savings information related to its proposals. (A67; A173.) The Company continued to state that it needed to save money but again did not provide the Union with the requested information. (A67; A173.)

On May 23, the Company faxed to the Union two options regarding the health-and-welfare fund contributions. (A67; A478-85.) The first required employees to contribute 13% and 15% toward their premiums, and to pay into a separate fund for laid-off employees. (A67; A479.) The second required employees to pay set amounts and limited their insurance during layoffs. (A67; 483-84.) The Union rejected both options. (A67; A177-78.)

6. May 30 Bargaining Session

On May 30, the Company presented the Union with its "LAST BEST OFFER," which was to take effect June 4. (A67; A486-515.) It included the same terms as the May 21 offer except for health-and-welfare contributions, with the Company inserting option one from its May 23 proposal. (A67; A497-99.) Again, it provided no documentation to support its claimed cost-savings estimates. (A67; A179-81.) The Union rejected the offer. Tom Hendrickson stated "it looks like we're at impasse," to which Sprague responded that he did not believe they were, and that "[w]e still have a lot of stuff on the table here." (A67-68; A180-81.) The Union members met and voted to reject the Company's offer and to strike if the Company implemented the offer. (A68; A244.)

The Company did not implement that offer, but instead, on June 4, sent the Union a "Revised Proposal and Last, Best, and Final Offer," to take effect June 11. (A68; A516-79.) The only change from its previous proposal was that rather than requiring that parties take grievances to federal court, parties could resort to "whatever judicial remedies" were available. (A68; A521-22.)

In a June 8 letter, the Union informed the Company that its members had rejected the June 4 offer. (A68; A580-81.) It reminded the Company that the Union had offered to have employees contribute $15 each week to healthcare premiums, and pointed out that the Union had tentatively agreed to nine of the

Company's contract proposals on April 10 whereas the Company had not tentatively agreed to any of the Union's proposals. (A68; A580-81.) The Union offered to resume negotiations on June 13. (A68; A580-81.)

7. June 13 Bargaining Session

The parties met again on June 13. The Union provided the Company with its "Final Proposal," which included three options. (A68; A582.) The first was a 1-year contract extension of the expired agreement but with employees contributing $15 each week to health-and-welfare fund premiums. (A68; A582.) The second was similar to the first but also included the health-and-welfare fund opt-out provision and required the parties to use the Industrial Board's arbitration and grievance process. (A68; A582.) The third option read "Work Stoppage." (A68; A582.) The Union stated that the employees would not accept the Company's offer and that it needed feedback on the economic proposals since the Company had not yet provided any guidance or anything in writing. (A68; A190-91.) The Union also warned that it may strike in order to push negotiations. (A68-69; A190.) The Company responded that it would not change its offer or discuss their proposals any further. (A69; A191-92.) The Union did not intend to end negotiations with their final offer and wanted to continue working on reaching an agreement. (A69; A190.)

C. The Company Implements Its Last Offer; The Union Strikes

Following the June 13 session, Sprague informed Union members that the Company would not change its mind about imposing its last offer. (A69; A192.) They decided not to strike and instead wait to see whether the Company would do so. (A69; A192.)

Around June 23, several employees, upon receiving their paychecks, learned that the Company had implemented its overtime-calculation proposal. (A69; A193, 245-46.) As a result, the Union decided to strike beginning on June 25. (A69; A194, 232-33, 244-45.)

While the strike continued, the parties met on July 26 along with the federal mediator. (A69; A197-246.) Neither party submitted any new proposals. (A69; A197.)

D. The Company Operates as AGG Trucking, LLC; the Union Requests Information

After the strike began, the Company changed the names on some of its trucks to "AGG Trucking, LLC." (A69; A247.) Mathews found on the internet that AGG appeared to be a Hendrickson company. (A80; A248.)

On July 31, the Union filed a grievance with the Company over its decision to operate as AGG, and requested information about AGG and its drivers. (A69-71; A586-91.) The Company did not respond. (A71; A108-09.)

E. The Union Makes an Unconditional Offer for the Strikers To Return to Work and Requests Bargaining

On November 30, the Union sent the Company several letters. In one, it stated that the Union had stopped its picketing and strike activity and offered to return to work on December 3. (A71; A592.) In a separate letter, it informed the Company that it was prepared to resume negotiations and asked the Company to provide dates it was available for bargaining. (A71; A594.) That letter also asked the Company to rescind the unilaterally implemented changes it made in June 2012, and reiterated its July 31 request for information about AGG. (A71; A594.) The Company responded that there would be no work for returning strikers on December 3, and that it would evaluate its needs and get back in touch with the Union. (A71; A595.)

On December 10, the Company advised the Union that it had hired permanent replacement workers during the strike, that they would handle all available work during the winter slowdown, and that the strikers would be placed on a preferential hire/recall list and would be contacted once business picks up. (A71; A596.) The Union responded on December 11, reiterating that its members had been prepared to return to work on December 3 and stating that the replacement employees should be placed at the bottom of the seniority list for the purposes of recall. (A71-72; A597.) On December 27, the Union submitted a grievance to the Company challenging the Company's use of replacement

employees and requested information about the replacement employees and the Company's financial records. (A72; A603-06.) In a January 9, 2013 letter, Company counsel Tim Ryan denied the December 27 grievance, partially responded to the information request about the replacements, and stated that the Company did not dispute that Hendrickson Trucking and AGG Trucking are a single employer. (A72; A607-09.)[2]

II. PROCEDURAL HISTORY

A. The Complaint and the Administrative Law Judge's Decision

Acting on unfair-labor-practice charges filed by the Union, the Board's General Counsel issued a complaint alleging that the Company violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1), by unilaterally implementing the terms of its final bargaining offer without bargaining to a valid impasse; refusing to provide the Union with information it requested in July and November 2012; and refusing to bargain after the Union made a request to do so on November 30; and violated Section 8(a)(3) and (1) of the Act, 29 U.S.C. § 158(a)(3) and (1), by refusing to reinstate unfair-labor-practice strikers after they made an unconditional offer to return to work. (A61.) On May 16, 2014,

[2] Although the Company argues (Br. 15) that it provided the information requested by the Union on December 27, the complaint did not allege a violation arising from that request. (A71.)

Administrative Law Judge Donna Dawson issued a decision and recommended order finding that the Company violated the Act as alleged.[3] (A61-83.)

B. The Administrative Law Judge's Appointment

Before the Board, the Company excepted to not only Judge Dawson's findings, but also to her authority to serve as a judge in the proceeding. (A60.) Specifically, it argued that, under the Supreme Court's decision in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), the Board lacked a quorum when it appointed Judge Dawson in April 2013, so her appointment, and the decision she issued in this case, were invalid. (A60-61.)

On July 18, 2014, a validly constituted Board ratified "all administrative, personnel and procurement matters approved by the Board or taken by or on behalf of the Board from January 4, 2012 to August 5, 2013, inclusive." *See* Minute of Board Action (July 18, 2014), Attachment 1, available at: https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-3302/7-18-14.pdf (last visited May 4, 2018). In doing so, the Board expressly authorized certain actions of the Board, including "[t]he selection of…Donna Dawson as Administrative Law Judge[]." *Id*.

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[3] Though not alleged in the complaint, Judge Dawson also found that the Company violated Section 8(a)(5) and (1) by failing to provide the requested cost-savings information. (A75.)

The Board maintained that its ratification "resolve[d] any uncertainty regarding Judge Dawson's appointment as an administrative law judge." (A51.) Nevertheless, "in an effort to remove any lingering questions" about her appointment, on April 6, 2016, the Board issued an Order remanding the case to her to "decide whether or not to ratify her prior actions." (A61; A52.)

On April 12, 2006, Judge Dawson issued an order ratifying and adopting her previous decision. (A60-61.) The judge explained that she fully reviewed her prior decision and determined that the decision – including her findings of fact, analysis, credibility determinations, conclusions, and recommended order – are based on the entire record and that it remains correct. (A61.)[4]

III. THE BOARD'S CONCLUSIONS AND ORDER

On October 11, 2017, the Board (Chairman Miscimarra and Members Pearce and McFerran), affirmed the judge's rulings, findings, and conclusions, amended the remedy, and adopted the recommended Order as modified. (A57.)[5]

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[4] In its remand Order, the Board notes that the Company challenged the authority of the Regional Director and General Counsel to prosecute this case. The Board rejected both arguments (A50 n.2, 52 n.4; A57 n.1) and the Company has abandoned them by not raising either contention in its opening brief. *See N.Y. Rehab. Care Mgmt., LLC v. NLRB*, 506 F.3d 1070, 1076 (D.C. Cir. 2007) (citing Fed. R. App. P. 28(a)(9)) (presently Rule 28(a)(8)(A)).

[5] In affirming the judge's findings, the Board explained (A58) that, because the General Counsel did not allege that the Company's failure to furnish the cost-savings information was a separate unfair labor practice, the judge's finding of a violation was a mistake. Nevertheless, the Board explained (A58) that the judge

To remedy those violations, the Board ordered the Company to cease and desist from changing employees' terms and conditions of employment without first providing the Union notice and an opportunity to bargain; refusing to immediately reinstate unfair-labor-practice strikers upon their unconditional offer to return to work; refusing to furnish relevant and necessary information that the Union requested; refusing to bargain on request with the Union; and in any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act, 29 U.S.C. § 157. (A58.)

Affirmatively, the Board ordered the Company to rescind the changes that it unilaterally implemented on about June 23, 2012; make unit employees whole for any loss of earnings and other benefits suffered as a result of the unlawful unilateral changes; make all contractually required contributions to the Union's health, welfare, and other funds on behalf of eligible employees that it has failed to make since its unlawful unilateral changes, and reimburse employees for any expenses ensuing from the failure to make the required payments, with interest; offer full reinstatement to all unfair-labor-practice strikers who were not immediately reinstated upon their unconditional offer to return to work; make the

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appropriately relied on the failure to furnish information as evidence that the Company did not bargain in good faith to a valid impasse. Also, because the complaint did not allege that the Company violated Section 8(a)(5) by bargaining in bad faith, the Board (A58) disavowed the judge's statements to that effect in the 2014 and 2016 decisions (A61, 75).

unfair-labor-practice strikers whole for any loss of earnings or other benefits suffered as a result of the Company's unlawful discrimination against them; compensate the affected employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award; furnish to the Union the information it requested on July 31, 2012, and November 30, 2012; on request, bargain with the Union; and post a remedial notice. (A58-59.)

SUMMARY OF ARGUMENT

Substantial evidence supports the Board's finding that the Company violated its duty to bargain in good faith with the Union when it unilaterally implemented its final bargaining proposals in June 2012. The Board, relying on two separate grounds, properly rejected the Company's claim that the parties were at impasse. First, the Board found that the Company failed to furnish the Union with information it requested during bargaining to corroborate the Company's claims that its bargaining proposals would achieve its cost-savings goals. Under settled law, that failure precludes impasse. The Board properly rejected, on credibility grounds, the Company's claim that the Union asked for the information only once and that the Company provided a spreadsheet detailing cost savings. The Board further found that, even accepting the Company's assertion as true, the Union did not have to make multiple requests to trigger the Company's obligation to provide the information, and the spreadsheet, even if provided, was insufficient to

corroborate the Company's asserted cost savings. In the alternative, the Board found that if the Company's failure to furnish information did not preclude impasse, the totality of the circumstances established that the parties were not, in fact, at impasse. As such, the Company violated Section 8(a)(5) and (1) by unilaterally implementing its bargaining proposals.

After the Company's implementation, the employees went on strike. Because they voted to strike only if the Company implemented its proposals, and ultimately waited to strike until it confirmed that the Company had done so, the Company's unlawful implementation was, at the least, a contributing factor to the strike decision. Thus, the Board properly found that the employees engaged in an unfair-labor-practice strike and were entitled to reinstatement when they unconditionally offered to return to work on November 30. Therefore, the Company's refusal to reinstate them violated Section 8(a)(3) and (1).

While the strike continued, on July 31 the Union requested information from the Company about its decision to change the name on its trucks from Hendrickson Trucking to AGG Trucking. It renewed that request on November 30. The Company provided no response until January 9, when it advised the Union only that Hendrickson and AGG are a single employer. The Company's unreasonably delayed and insufficient response violated Section 8(a)(5) and (1).

Once the strike ended, the Union notified the Company that it was prepared to bargain, and asked the Company to provide available bargaining dates. The Board properly credited the Union's witnesses to find that the Company did not respond until March 25. While the Company challenges that finding, it acknowledges that it did not provide bargaining dates. Substantial evidence thus supports the Board's finding that the Company refused to bargain with the Union between the Union's November 30 request and the Company's March 25 response, violating Section 8(a)(5) and (1).

Finally, the Company's argument that Administrative Law Judge Dawson lacked authority to ratify and adopt her previous decision should be rejected. It is established in this Court, most recently in *Wilkes-Barre Hosp. Co. v. NLRB*, 857 F.3d 364, 371 (D.C. Cir. 2017), that a properly appointed official, through ratification, can remedy a defect arising from the decision of an improperly appointed officer. In accord with that precedent, Judge Dawson, after conducting an independent evaluation of the merits, ratified her earlier decision, removing any lingering questions about her authority to issue that decision. Ignoring that body of caselaw, the Company claims that Judge Dawson merely rubberstamped her prior decision, acted with bias, and violated various codes of conduct, but it offered no evidence supporting those contentions.

STANDARD OF REVIEW

The Court accords adjudications by the Board "a very high degree of deference." *Bally's Park Place, Inc. v. NLRB*, 646 F.3d 929, 935 (D.C. Cir. 2011). The Board's findings of fact are "conclusive" when supported by substantial evidence. 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951). The Court will "abide [the Board's] interpretation of the Act if it is reasonable and consistent with controlling precedent." *Brockton Hosp. v. NLRB*, 294 F.3d 100, 103 (D.C. Cir. 2002); *accord Holly Farms Corp. v. NLRB*, 517 U.S. 392, 398-99 (1996). And this Court accepts credibility determinations unless they are "hopelessly incredible, self-contradictory, or patently unsupportable." *Stephens Media, LLC v. NLRB*, 677 F.3d 1241, 1250 (D.C. Cir. 2012) (citation omitted). Thus, the "Board is to be reversed only when the record is so compelling that no reasonable factfinder could fail to find to the contrary." *Allied Mech. Servs., Inc. v. NLRB*, 668 F.3d 758, 772 (D.C. Cir. 2012) (quoting *Bally's*, 646 F.3d at 935).

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDINGS THAT THE PARTIES DID NOT BARGAIN TO A VALID IMPASSE, SO THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT WHEN IT UNILATERALLY IMPLEMENTED ITS FINAL OFFER

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer to "refuse to bargain collectively with the representatives of [its] employees." 29 U.S.C. § 158(a)(5). An employer violates Section 8(a)(5) and (1) by unilaterally implementing terms and conditions of employment without first bargaining to impasse or agreement. *NLRB v. Katz*, 369 U.S. 736, 743 (1962); *accord Teamsters Local Union No. 639 v. NLRB*, 924 F.2d 1078, 1084 (D.C. Cir. 1991).[6] As discussed below (29-31), a lawful impasse cannot exist where an employer has failed to satisfy its statutory obligation to provide information relevant to the matters on which the parties are divided. *See, e.g., U.S. Testing Co. v. NLRB*, 160 F.3d 14, 22 (D.C. Cir. 1999). Moreover, if impasse is not precluded, it exists only when "good-faith negotiations have exhausted the prospects of concluding an agreement and there is no realistic possibility that continuation of discussion would be fruitful." *Monmouth Care Ctr. v. NLRB*, 672 F.3d 1085, 1088 (D.C. Cir. 2012) (quotation cleaned up).

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[6] A violation of Section 8(a)(5) of the Act produces a "derivative" violation of Section 8(a)(1). *See, e.g.*, *Exxon Chem. Co. v. NLRB*, 386 F.3d 1160, 1163-64 (D.C. Cir. 2004).

It is undisputed that the Company unilaterally implemented the terms of its revised final proposal in June 2012. While the Company claims the parties were at impasse, substantial evidence supports the Board's findings that impasse was precluded by the Company's failure to furnish relevant information pertaining to issues dividing the parties. And even if that failure did not preclude impasse, substantial evidence support the Board's finding that under the totality of the circumstances the parties did not reach a lawful impasse. Accordingly, under either basis the Company's unilateral implementation was unlawful.

A. The Company Failed To Provide the Union With Requested Relevant Cost-Savings Information, Precluding a Valid Impasse

1. An employer must provide a union with requested, relevant information

An employer's duty to bargain in good faith includes the obligation "to provide information that is needed by the bargaining representative for the proper performance of its duties." *Pub. Serv. Co. of N.M. v. NLRB*, 843 F.3d 999, 1005 (D.C. Cir. 2016) (quoting *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 435-36 (1977)). The critical question in determining whether information must be produced is that of relevance to the union's bargaining duties. The "Board's relevance standard is 'a liberal discovery-type standard.'" *E.I. DuPont de Nemours & Co. v. NLRB*, 489 F.3d 1310, 1316 (D.C. Cir. 2007) (citation omitted); *accord Acme Indus.*, 385 U.S. at 437 & n.6. Under that standard "[t]he fact that the information is of

probable or potential relevance is sufficient to give rise to an obligation…to provide it." *Crowley Marine Servs., Inc. v. NLRB*, 234 F.3d 1295, 1297 (D.C. Cir. 2000) (citation and quotation marks omitted). The Board's "relevancy-based, pro-disclosure standard…allows a union to request specific information to verify a company's stated position" made at the bargaining table. *KLB Indus., Inc. v. NLRB*, 700 F.3d 551, 556-57 (D.C. Cir. 2012). Finally, "[b]ecause Congress has determined that the Board has the primary responsibility of marking out the scope of the statutory duty to bargain, great deference is due to the Board's determination[] of the scope of an employer's obligation to provide requested information to a union…." *Pub. Serv. Co. of N.M.*, 843 F.3d at 1004 (internal quotation and citations omitted).

2. The Company refused to furnish the Union with the requested relevant information

Throughout negotiations, the Company asked the Union to accept contract proposals that would save money and thereby "stop the bleeding" it was experiencing financially. Those proposals included eliminating its match to employees' 401(k) accounts, requiring that employees contribute toward their health-and-welfare premiums, and changing the calculation of overtime. The Company claimed that these proposals would result in annual savings of about $20,000 from 401(k) contributions, $40,000 in health-insurance premiums, and $25,000 in overtime wages. (A64; A149-50, 222-23.) Skeptical of those figures,

the Union asked the Company to provide information that would corroborate its estimated savings and help the Union determine how else savings might be achieved. (A67.) The Company maintained that its estimates were based on payroll and other historical financial data, but refused to furnish that information. (A74; A281-83.)

Substantial evidence supports the Board's findings that the requested information was relevant to the parties' negotiations. As the Board explained (D&O 18), the Company put into issue the cost-savings information when it asserted that its proposals were necessary to save money. Having done so, it cannot then claim that the Union did not need that information to determine how to respond to the Company's proposals. *See KLB Indus.*, 700 F.3d at 557 ("a claim of pending competitive ruin generally requires some external verification before a union can reasonably rely upon it in deciding how to structure its negotiating strategy") (internal citation omitted); *U.S. Testing Co.*, 160 F.3d at 19 (agreeing with Board that employer violated Act by failing to furnish health-insurance information in response to employer's proposal that employees contribute 30% towards premiums).

The Company does not challenge the Board's finding that the requested information was relevant, waiving that argument.[7] *See N.Y. Rehab.*, 506 F.3d at 1076. Instead, it insists (Br. 6) that the Union only asked for the information once, and that it provided a spreadsheet (A603-06) containing that information. But as the Board found (A75), the Company's concession that the Union requested the information on May 16 was sufficient to trigger the Company's obligation to furnish that information; the Union was not required to repeat its request or put it in writing.[8] *See Brewers & Maltsters, Local Union No. 6 v. NLRB*, 414 F.3d 36, 45-46 (D.C. Cir. 2005) (request need not be repeated); *NLRB v. Harvstone Mfg. Co.*, 785 F.2d 570, 578-79 (7th Cir. 1986) (request need not be repeated or made in writing). And the Board also found (A66) that the spreadsheet the Company claimed to provide was not responsive, as it provided only a summary of the Company's tax returns and past profits and losses and did not include information

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[7] Likewise, the Company has abandoned its argument, made to the Board (A73-74), that it had no duty to provide the requested information because it never asserted an inability to pay the benefits in question. As explained by the Board (A74), and discussed by this Court in *KLB Industries*, 700 F.3d at 555-56, while an employer need only "open its books" to the union requesting information if it raises an "inability to pay" defense during bargaining, it remains obligated to furnish relevant information, including specific financial information, necessary to the Union's performance of its bargaining duties.

[8] While the Board found that the Company acknowledged the May 16 request, the Company also concedes (Br. 19) that the Union's bargaining notes reflect that the Union requested the information on May 30.

establishing how the Company arrived at its estimated cost savings from its bargaining proposals. (A66, 74; A110, 286, A603-04.)

Moreover, the Board credited the Union's witnesses over the Company's witnesses in finding that the Union requested the cost-savings information on numerous occasions and that the Company did not provide the spreadsheet to the Union. Specifically, the judge found (A64-68) Sprague provided more detail about the bargaining sessions than the Company's witnesses, and (A75.17) that Chief Financial Officer Durbrow "waivered in his testimony, and was not entirely forthcoming." In addition, while the Company has argued that Sprague's and Mathews' affidavits provided to the Board, and the Union's bargaining notes, did not reference repeated requests for the information, the judge explained that neither Sprague nor Mathews claimed to recall all of the details of the bargaining sessions and that both credibly testified that their affidavits and bargaining notes were not meant to be comprehensive with respect to everything that was said during the negotiation sessions. Having credited the Union's witnesses, the Board found (A64-68) that the Union also requested the cost-savings information on April 10 and May 21, and that the Company did not, as it claims, provide the Union with the spreadsheet. The judge's findings, which she based "[o]n the entire record, including [her] observation of the demeanor of all witnesses," (A61), and which the Board "carefully examined" and left undisturbed (A61 n.2), are not to be

reversed unless they are "hopelessly incredible, self-contradictory, or patently unsupportable." *Stephens Media, LLC v. NLRB*, 677 F.3d 1241, 1250 (D.C. Cir. 2012) (citation omitted).

In sum, substantial evidence supports the Board's finding that the Union requested cost-savings information that would have allowed it to assess and respond to the Company's proposals, and that the Company failed to respond.

3. The Company's failure to provide requested cost-savings information precluded a valid impasse

The duty to provide information relevant to issues on the bargaining table is a "fundamental obligation" that is "predicated on the need of the union for information that will promote intelligent representation of the employees." *Oil, Chemical & Atomic Workers Local Union No. 6-418 v. NLRB*, 711 F.2d 348, 358-59 (D.C. Cir. 1983) (internal quotation omitted). Access to information in an employer's possession ensures that a union is not required to evaluate and respond to the employer's bargaining proposals, and possibly agree to concessions on behalf of its members, in the dark. *Acme Indus.*, 385 U.S. at 438 n.8; *accord Beyerl Chevrolet, Inc.*, 221 NLRB 710, 721 (1977). Consequently, the Board, with court approval, has long recognized that "impasse cannot exist where the employer has failed to satisfy its statutory obligation to provide information needed by the bargaining agent to engage in meaningful negotiations." *Decker Coal Co.*, 301 NLRB 729, 740 (1991); *see also, e.g.*, *Monmouth*, 672 F.3d at 1093. As the

Board explained here (A58), that is true whether or not the General Counsel has alleged that the failure to furnish information constituted a separate violation of Section 8(a)(5). *Id*.

As demonstrated above, the record amply supports the Board's finding that impasse was precluded by the Company's refusal to furnish the Union with requested, relevant information corroborating its claimed need to eliminate the 401(k) match, require employee contributions to health-and-welfare premiums, and adopt a less employee-favorable overtime-calculation method. The Board found (A75) that the Company's "outright failure" to do so "[wa]s of particular concern given the division between the parties on th[os]e issues…." By contrast, *Detroit Typographical Union No. 18 v. NLRB*, 216 F.3d 109, 121 (D.C. Cir. 2000), which the Company asserts is "particularly instructive," (Br. 33), did not involve an employer's failure to provide information, as the Company claims, but whether a separate, unremedied unfair labor practice precluded impasse. The Court found that the prior violation did not preclude impasse because it related to a bargaining proposal that was "relatively unimportant" to negotiations. *Id*.

It thus follows that the parties never reached impasse. Consequently, as found by the Board (A75), the Company violated Section 8(a)(5) and (1) by unilaterally implementing its revised final bargaining proposals in June 2012.

B. Under the Totality of the Circumstances, the Parties Did Not Reach Impasse

Although the Board found that the Company's failure to furnish the Union with requested relevant information precluded a bargaining impasse, it went on to find that the parties had not, in fact, bargained to "the end of their rope," so the Company's unilateral implementation of its bargaining proposals was in any event unlawful. That finding is supported by substantial evidence and reasonable, and entitled to deference. *See Monmouth*, 672 F.3d at 1089. After all, as this Court has recognized, "in the whole complex of industrial relations, few issues are less suited to appellate judicial appraisal than evaluation of bargaining processes or better suited to the expert experience of [the Board,] which deals constantly with such problems." *Id*. (quoting *Wayneview Care Ctr. v. NLRB*, 664 F.3d 341, 348 (D.C. Cir. 2011) (internal quotations omitted).

1. An employer cannot unilaterally implement its bargaining proposals unless the parties have bargained to impasse

Because impasse is an affirmative defense, the burden of proof rests with the party asserting it. *Wayneview*, 664 F.3d at 347. A party seeking to establish impasse must establish that further bargaining would have been futile, not merely that there existed "frustration, discouragement, or apparent gamesmanship" during bargaining. *Daycon Prods. Co.*, 357 NLRB 1071, 1081 (2011), *enforced*, 494 F. App'x 97 (D.C. Cir. 2012) (internal quotation omitted). More specifically,

impasse exists only when "good-faith negotiations have exhausted the prospects of concluding an agreement and there is no realistic possibility that continuation of discussion would be fruitful." *Monmouth*, 672 F.3d at 1088 (quotation cleaned up). Put another way, there can be no impasse unless "both parties…believe that they are at the end of their rope." *Oak Harbor Freight Lines, Inc. v. NLRB*, 855 F.3d 436, 444 (D.C. Cir. 2017).

"The Board considers a number of factors to determine whether the parties have reached impasse, including the bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, and the contemporaneous understanding of the parties as to the state of negotiations." *Monmouth*, 672 F.3d at 1088-89 (internal quotation and citation omitted). One or two factors alone, however, may be sufficient to demonstrate the absence of impasse. *See id.* at 1084.

2. The Company failed to establish that the parties reached impasse

Substantial evidence supports the Board's finding, discussed below, that the parties were not at impasse when the Company unilaterally implemented its bargaining proposals in June 2012.

a. Bargaining History

The parties had a history of successful collective bargaining, having ratified previous agreements in 2002, 2005, and 2008. During prior negotiations, the

Union agreed to cost-savings concessions. The Union also stood its ground and used strike votes as part of its bargaining strategy, and on one occasion engaged in a brief work stoppage. But as the Board explained (A58), the Union's unwillingness to roll over and accept the Company's offers does not mean that it believed further negotiations would not be fruitful. *See Ead Motors E. Air Devices, Inc.*, 346 NLRB 1060, 1064 (2006) (finding union's recommendation that members not ratify proposed contract, which members followed, was not indicative of impasse; there was no evidence that in prior bargaining parties had been unable to reach agreement after union refused to ratify a final offer).

b. Lack of good-faith bargaining

The Board found (A76-77) that the Company's refusal to provide cost-savings information, and its insistence on resolving grievances in court rather than arbitration, showed a lack of good-faith bargaining. As the Board explained, (A58 & n.6, 76), the Company's failure to produce relevant information itself constitutes a failure to bargain in good faith. *See Acme Indus.*, 385 U.S. at 435-36; *accord Oil, Chemical & Atomic Workers*, 711 F.2d at 358.

Substantial evidence also supports the Board's finding (A76-77) that the Company's various proposals insisting that the parties resolve grievances through "TRIAL" (A384-94), in federal court (A412-40), or through whatever judicial remedies might be available (A516-579), rather than arbitration, was unreasonable

and supported finding a lack of good-faith bargaining. The Board properly found (A76-77) that the Company's asserted reasons for eliminating the right to pursue grievances in arbitration "defied logic." As the Board noted (A77), federal labor policy establishes arbitration as an essential part of collective bargaining. Indeed, the Supreme Court has explained that "the grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government," and within that system, "[a]rbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties." *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581 (1960); *see also id.* (in resolving labor disputes "arbitration is the substitute for industrial strife").

Against that background, the Board properly found that the Company's inability to substantiate its claimed desire to eliminate arbitration tainted the bargaining process. The Company's proposal for requiring grievances go to a trial court in lieu of arbitration ran contrary to its goal of controlling costs. While the Company claimed that arbitration is more expensive than litigation, it acknowledged (A76; A106) that its cost of using a non-judicial system of resolution in the past was fairly minimal. And while In-House Counsel Hendrickson testified that he could help minimize costs by representing the

Company in court, and that he had more experience in court than arbitration, he did not explain why he was ill-prepared to handle arbitration. Hendrickson also believed that he could not represent the Company before the Industrial Board, which the Union proposed they use, and that the Industrial Board was biased towards unions, but the Company provided proof of neither. Moreover, the Union alternatively proposed proceeding to arbitration through the American Arbitration Association, and no evidence was presented that Hendrickson could not represent the Company in that forum or that the Company had even an unsupported belief that the AAA was biased.

The Board also found (A77) it troubling that by eliminating arbitration, and requiring all disputes to be resolved in court, the Company seemed to limit or bar employees from filing Board charges and instead require that they resolve those disputes in court as well. The Board explained that while it did not find that was a separate violation, it nonetheless supports a finding that the Company did not bargain in good faith.

The Company (Br. 27-30) challenges the Board's assessment of the Company's grievance proposals, arguing the Board "second-guess[ed]" the Company's judgment. But while the Board may not compel acceptance of a bargaining proposal, it nevertheless "has wide latitude to monitor the bargaining process." *McClatchy Newspapers, Inc. v. NLRB*, 131 F.3d 1026, 1031 (D.C. Cir.

1997) (citing *Charles D. Bonanno Linen Serv., Inc. v. NLRB*, 54 U.S. 404 (1982)). Accordingly, although the Board's evaluation of "substantive terms of a proposal always must be drawn with caution," a party's "rigid adherence to disadvantageous proposals" and "insist[ing] on terms that no self-respecting union could brook" are relevant in deciding whether an employer is bargaining in good faith. *Teamsters Local Union No. 515 v. NLRB*, 906 F.2d 719, 726 (D.C. Cir. 1990) (internal quotations and citations omitted). Here, the Company's insistence that the Union give up its right to take disputes to arbitration, without providing convincing reasons supporting the proposal, showed a lack of good faith by the Company, which was evident when T.J. Hendrickson indicated a quick willingness to cast aside that proposal if that was all that was standing in the way of agreement. (A76; A172.)

In any event, even if the Court agrees that the Company's proposal to abandon arbitration did not show a lack of good faith, the Board's impasse finding still stands because the Board would reach the same result even absent the Company's insistence on court-based dispute resolution. Specifically, then-Chairman Miscimarra (A58 n.5) disagreed that the Company demonstrated a lack of good faith by refusing arbitration as a dispute mechanism yet nevertheless agreed that the parties had not reached impasse. And Member McFerran (A58 n.5) explained that while she agreed that the Company unreasonably insisted on

resolving grievances in court, even absent that finding she "would conclude that [the Company] failed to establish that the parties reached a valid impasse."

c. Contemporaneous understanding of the parties

The Court has explained that "[i]f either negotiating party remains willing to move further toward an agreement, an impasse cannot exist: the parties' perception regarding the progress of the negotiations is of central importance to the Board's impasse inquiry." *Teamsters Local Union No. 639 v. NLRB*, 924 F.2d 1078, 1084 (D.C. Cir. 1991). Here, substantial evidence supports the Board's finding (A77-78) that the Company failed to establish that a contemporaneous understanding existed.

The parties made continued, albeit at times slow, progress towards an agreement. They reached tentative agreements on certain provisions, and each showed a willingness to make concessions. For instance, on April 25, the Company withdrew several of its initial proposals and agreed to eliminate super seniority. (A65, 77.) While the Company initially proposed terminating its 401(k) match, it later proposed only suspending the match until it resumed profitability. (A65, 77.) It also revised its proposal on health-and-welfare contributions, lowering its initial proposal that employees pay 25% of premiums to 20% for drivers and 15% for mechanics and mechanics helpers, then, on May 21, lowered those amounts to $15% and 13%, respectively. (A65, 67, 77.) And on May 23 it

offered additional options with respect to healthcare, proposing under one such option that employees would contribute a set dollar amount between $17 to $32 each week, with increases over the life of the agreement. (A67, 77.)

While the Union did not agree to those specific proposals, it agreed that the employees would make health-and-welfare contributions for the first time, and proposed that they would pay $15 each week. And it proposed reinstating the opt-out provision which would allow eligible employees to opt out from coverage and instead receive a $1 per hour wage increase. It also proposed a 1-year, status quo agreement that included a wage freeze, which was a huge concession after years of flat wages, except the employees would pay the $15 weekly contribution. (A66, 68, 77.) Those advancements show that the Union did not hold to a fixed bargaining position but instead maintained its flexibility and desire to continue bargaining. *Compare Monmouth*, 672 F.3d at 1090-91 (union's concessions and willingness to compromise, including status-quo proposal to allow more bargaining time, demonstrated flexibility showing parties were not at impasse), *with Laurel Bay Health & Rehab. Ctr. v. NLRB*, 666 F.3d 1365, 1374 (D.C. Cir. 2012) (impasse reached where parties "remained steadfastly fixed in their respective positions" on benefit-fund contributions).

The facts listed by the Company (Br. 32) in support of its claim that the parties were at impasse do not establish that there was no further ground to be

gained. The strike votes did not evince unwillingness to continue negotiations. *See Bonanno Linen*, 454 U.S. at 414 (noting strikes "often occur in the course of negotiations prior to impasse" and are not "necessarily associated with impasse"); *see also Huck Mfg. Co. v. NLRB*, 693 F.2d 1176, 1187 (5th Cir. 1982) (explaining judge "could have found…the strike was designed to soften the Company's rigid position in ongoing negotiations and was not an indication of deadlock"). Rather, the evidence establishes that the Union commonly utilized strike votes to get the Company to take it more seriously, (A66, 78), and here voted to strike only if the Company unilaterally implemented its terms. (A68 n.18.)

The parties' exchange of "final" bargaining proposals also did not support an impasse finding. The Company submitted several "final" offers and the Union merely provided the Company with several options, and alternatively stated that the Union could strike, which does not demonstrate an intractable position. Likewise, when the Union rejected the Company's final offer on May 30, Sprague responded to Hendrickson's statement "it looks like we're at impasse," by stating in no uncertain terms that they were not. (A68; A180-81.) While not dispositive, such declarations "manifest that one party did not view the negotiations as having reached impasse; they provide substantial evidence to support the Board's finding of no impasse" that the Court will not disturb. *Teamsters Local Union No. 639*, 924 F.2d at 1084. Finally, the Company suggests (Br. 32) that the Union's actions

at the July 26 meeting further demonstrate impasse, but "the Board may not premise its impasse finding on events occurring after the declaration of impasse." *Id*. at 1084 n.6.

d. Number of Bargaining Sessions

Finally, the Board found that the six bargaining sessions held by the parties before the Company implemented its revised final proposal, including one in which the parties merely exchanged and explained their proposals, and another in which they explained their proposals to a mediator, was insufficient to establish impasse. *See U.S. Testing Co.*, 324 NLRB 854, 860-61 (1997), *enforced*, 160 F.3d 14 (D.C. Cir. 1998). While the Company (Br. 30) asserts that the parties negotiated on 12 occasions, which included exchanging correspondence and talking on the phone, the Board reasonably found (A78) that those actions, without any discussion or meeting among the bargaining representatives, did not constitute bargaining sessions.

In sum, substantial evidence supports the Board's finding that the parties had not reached impasse. Accordingly, both because the Company's failure to provide the Union with information precluded impasse, and because the totality of the circumstances fail to show impasse, the Company violated Section 8(a)(5) and (1) by unilaterally implemented its final bargaining proposals.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDINGS THAT THE COMPANY VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY REFUSING TO IMMEDIATELY REINSTATE EMPLOYEES, WHO HAD ENGAGED IN AN UNFAIR-LABOR-PRACTICE STRIKE, AFTER THEY UNCONDITIONALLY OFFERED TO RETURN TO WORK

After the Union learned that the Company unilaterally implemented its final offer, the employees went on strike. Because the Company's unlawful implementation was a contributing factor to the employees' decision, they were engaged in an unfair-labor-practice strike. Accordingly, they retained the right to return to work upon unconditionally offering to return, even if the Company had hired replacement employees in the interim. The Company's refusal to reinstate them after the Union made such an offer on November 30, 2012, violated Section 8(a)(3) and (1).

A. An Employer Must Reinstate Unfair-Labor-Practice Strikers Upon Their Unconditional Offer To Return to Work

When employees covered by the Act go on strike, their right to return to work depends on whether they engaged in an "economic strike" to obtain favorable employment terms or an "unfair-labor-practice strike" taken in response to an employer's violation of the Act. *Spurlino Materials, LLC v. NLRB*, 805 F.3d 1131, 1137 (D.C. Cir. 2015). In differentiating between the two, "[t]he dispositive question is whether the employees, in deciding to go on strike, were motivated *in part* by the unfair labor practices committed by their employer, not whether,

without that motivation, the employees might have struck for some other reason." *Teamsters Local Union No. 515*, 906 F.2d at 723. "The employer's unfair labor practice need not be the sole or even the major cause or aggravating factor of the strike; it need only be a contributing factor." *Id*. The Board's determination that a strike is an unfair-labor-practice strike is a factual determination that must be upheld if supported by substantial evidence. *Id*.

Unfair-labor-practice strikers retain their status as employees and are entitled to immediate reinstatement upon their unconditional offer to return to work. *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 278 (1956); *accord Spurlino Materials*, 805 F.3d at 1137. As the Supreme Court explained in establishing that principle, "failure of the Board to sustain the right to strike against [unlawful] conduct would seriously undermine the primary objectives of the Act." *Mastro Plastics*, 350 U.S. at 279. As such, employers are required to discharge replacement workers, if necessary, to make room for the reinstatement of unfair-labor-practice strikers. *See George Banta Co. v. NLRB*, 686 F.2d 10, 20-21 (D.C. Cir. 1982). Failure or refusal to reinstate unfair-labor-practice strikers upon their unconditional offer to return therefore constitutes "discrimination in regard to hire or tenure of employment or any term or condition of employment to…discourage membership in any labor organization," in violation of Section

8(a)(3) of the Act, 29 U.S.C. § 158(a)(3).[9] *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967); *accord Alwin Mfg. Co. v. NLRB,* 192 F.3d 133, 141 (D.C. Cir. 1999).

B. The Employees Struck Over the Company's Unlawful Unilateral Implementation, Rendering Them Unfair-Labor-Practice Strikers Entitled to Reinstatement Once They Offered To Return to Work

Substantial evidence supports the Board's findings (A78-79) that the employees engaged in an unfair-labor-practice strike and were therefore entitled to reinstatement when they made an unconditional offer to return to work. As the Board explained (A78), there is no dispute that the employees did not go on strike until they had proof that the Company had implemented its final offer. While the employees had voted to authorize a strike in April, they voted again in early June to strike only if the Company implemented its proposal. As credited by the Board (A79), around June 13 or 14 union representatives met with the employees and discussed the Company's unwillingness to continue negotiations based on its impasse declaration, and the employees decided not to strike until the Company actually implemented its last offer. Nearly two weeks later, after learning through their paychecks that the Company revised its overtime-calculation method as proposed during bargaining, the employees made good on their decision and went

[9] A violation of Section 8(a)(3) produces a "derivative" violation of Section 8(a)(1). *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

on strike. Accordingly, the Company's unlawful declaration of impasse and implementation of its final offer were contributing factors to the strike decision, so the employees engaged in an unfair-labor-practice strike.

The Company challenges that finding, arguing that "the Union's strike *vote* was based solely on economic factors." (Br. 36 (emphasis added)). But as discussed (p. 39-40), the evidence showed that on May 30, the employees only voted to strike *if* the Company implemented its offer. More importantly, when the employees finally decided to strike weeks later, it was prompted to do so by the Company's declaration of impasse and implementation of its final offer. (A79.) That finding is consistent with *Reichhold Chemicals, Inc.*, 288 NLRB 69 (1988), *reversed sub nom. Teamsters Local Union No. 515*, 906 F.2d 719, despite the Company's suggestion otherwise (Br. 35-36). There, the Board explained that the information on which employees acted when they voted to strike was crucial in characterizing the strike that ensued immediately thereafter, and found the strike was an economic one. Reversing that finding, this Court explained that "the obvious flaw in the Board's reasoning [wa]s that it simply ignore[d] evidence that proves the point on causation," and that "[t]he dispositive criterion…is the real and actuating motivation for the strike." *Teamsters Local Union No. 515*, 906 F.2d at 724. Here, as discussed, the employees' motivation to strike was the Company's unlawful declaration of impasse and implementation. The other cases relied on by

the Company (Br. 35) in arguing that the employees engaged in an economic strike are distinguishable on their facts, for in those cases employees voted to strike, and ultimately did so, based solely on economic considerations. *See Mobile Home Estates, Inc.*, 259 NLRB 1384, 1402 (1982) (employees did not discuss unfair labor practices during strike votes or the strike itself), *enforced on other grounds*, 707 F.2d 264(6th Cir. 1983); *Facet Enters., Inc.*, 290 NLRB 152, 155 (1988) (finding economic strike where union sought strike authorization from employees based on economic issues alone), *enforced*, 907 F.2d 963 (10th Cir. 1990).

Having determined that the employees engaged in an unfair-labor-practice strike, the Board (A79) reasonably found that the Company violated Section 8(a)(3) and (1) by refusing (A595) to reinstate the strikers upon their November 30 unconditional offer to return to work. While the Company maintains (Br. 37) that the employees were engaged in an economic strike, and that it was therefore entitled to retain the permanent replacement workers it hired during the strike, that argument lacks merit because it is contrary to the established precedent discussed above, and the Company has asserted no other defense of its actions. Accordingly, the Board's finding that the Company's failure to reinstate the strikers violated the Act is reasonable and supported by substantial evidence.

III. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO FURNISH INFORMATION ABOUT AGG TRUCKING

As discussed above (p. 25-26), an employer is obligated to furnish information that is "needed by the bargaining representative for the proper performance of its duties." *Pub. Serv. Co. of N.M. v. NLRB*, 843 F.3d 999, 1005 (D.C. Cir. 2016). An employer violates Section 8(a)(5) and (1) of the Act "not only by refusing to provide…relevant information but also by not providing it in a timely manner." *Brewers & Maltsters, Local Union No. 6 v. NLRB*, 414 F.3d 36, 45-46 (D.C. Cir. 2005) (6-month delay unlawful). Here, substantial evidence supports the Board's finding (A80) that the Company violated Section 8(a)(5) and (1) by refusing to provide the Union with information it requested about AGG Trucking.

On July 31, after the name "AGG Trucking, LLC" appeared on Company trucks, and the Union found information on the internet suggesting AGG was affiliated with the Company, the Union requested information about AGG Trucking, including why it was opened during the strike, what type of work it performed, and who it employed. It repeated that request on November 30. The Board properly found (A80) that the Union had a reasonable belief that AGG was the Company's alter ego and that others were performing the strikers' work, and therefore the information sought about AGG was relevant and necessary for the

Union to carry out its representative function. As explained by the Board (A80), the Company violated the Act both through its unreasonable 6-month delay in responding, which "far exceeds the delays found acceptable by the Board," and the eventual "inadequate" response that it provided on January 9 (A607-09), in which it merely advised the Union that the Company and AGG were a single employer without responding to the Union's specific requests.

In its opening brief, the Company has not challenged the Board's finding that the information sought was relevant, or that its unreasonable delay in responding was itself a violation of the Act. Accordingly, it has waived any such argument. *See N.Y. Rehab.*, 506 F.3d at 1076. Instead, it insists (Br. 37) that its January 9 response was sufficient. In support of that contention, the Company states (Br. 16,37) that the Union acknowledged the sufficiency of those responses, when Union attorney John Canzano and Company Counsel Ryan were discussing outstanding information requests and Canzano requested only payroll information. But the Company fails to acknowledge Ryan's testimony (A322) that although Canzano asked for the payroll information "as soon as [Ryan] could get it to him," Canzano also said he "wasn't waiving anything or giving up; he wasn't saying he didn't ultimately want more stuff."

Likewise, the Company argues (Br. 16,37) that Mathews waived the right to receive additional information by testifying (A224) that he "didn't need the

information anymore" after receiving the January 9 response. But again, the Company selectively cites the record, omitting the fact that Mathews immediately clarified his testimony by explaining (A224) that the Union still needed "to know if AGG exists," and that he did not "know what[] happened to AGG"; and concluding "They [the Company] haven't given me anything. I don't know if it still exists, if it's gone; I don't know what's going on with AGG. With not knowing what's going on with it, I guess I would still want the information…." In short, the Company failed to justify its refusal to furnish the Union with the detailed information that it requested on July 31 and November 30, and thereby violated Section 8(a)(5) and (1).

IV. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING THE UNION'S REQUEST TO RESUME BARGAINING

As discussed, Section 8(a)(5) and (1) makes it an unfair labor practice for an employer to "refuse to bargain collectively with the representatives of [its] employees." 29 U.S.C. § 158(a)(5). That obligation persists even if an employer unilaterally implements bargaining proposals following negotiation to a good-faith impasse. *See Brown v. Pro Football, Inc.*, 518 U.S. 231, 244 (1996).

On November 30, the Union sent the Company a letter (A593) stating the strike was over and unconditionally offering to return employees to work, and a separate letter (A594) stating it was prepared to meet and bargain and asking the

Company to provide available dates to resume bargaining. Although the Company immediately responded that it would not allow the employees to return to work, the Board found, based on Sprague's credited testimony, that the Company waited until March 25 to communicate with the Union about potential bargaining dates. (A71-72, 80; A216-19.)

The Company insists (Br. 33-34) that Company counsel Ryan contacted Sprague by phone shortly after receiving the letter to discuss bargaining. The judge (A80), however, credited Sprague's testimony that he could not recall that conversation. As the judge explained, Ryan could not remember the circumstances of the call. Ryan's testimony was also troubling because he insisted that he later tried to contact Sprague to obtain bargaining dates in March and April, which was the Company's "slow season" and the Company was ready to resume negotiations. The "slow season," however, began in December—when the original request had been made but ignored by the Company. (A72; A316, 323.) The Company has failed to overcome the high hurdle of establishing that the judge's credibility determination was "hopelessly incredible, self-contradictory, or patently unsupportable," and therefore must be reversed. *Stephens Media*, 677 F.3d at 1250. Regardless, the judge explained that even if Ryan spoke with the Union, he acknowledged that he did not propose bargaining dates during that call, or thereafter, until March 25. (A80; A323-24.) Substantial evidence thus supports

the Board's finding (A80) that the Company refused to bargain with the Union between the Union's November 30 request to do so and the Company's eventual response on March 25.

V. THE BOARD PROPERLY REJECTED THE COMPANY'S ARGUMENT THAT THE ADMINISTRATIVE LAW JUDGE WAS INVALIDLY APPOINTED AND THUS LACKED AUTHORITY TO TAKE ANY ACTION IN THIS PROCEEDING

Finally, the Company (Br. 24, 38-42) challenges the Board's Order by arguing that, having been appointed by a Board that lacked a quorum, Administrative Law Judge Donna Dawson lacked authority to preside over the hearing in this matter, and that her ratification of her earlier decision cannot cure any defect caused by her invalid appointment. The Company's argument must be rejected.

In *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2578 (2014), the Supreme Court held that the Board lacked a valid quorum between January 4, 2012, and August 5, 2013, which called into doubt the validity of the Board's April 2013 appointment of Judge Dawson. On July 18, 2014, however, the Board, consisting of five members whose appointments were indisputably valid, ratified all personnel and administrative actions taken during that time frame, and "expressly authorize[d]" appointments made by the invalid Board, including Judge Dawson's.[10] The Board

[10] The Company has not challenged the Board's July 18 ratification, and in any event this Court has held that "the properly constituted Board's ratification" of its

subsequently remanded this case to Judge Dawson. On April 12, 2016, she ratified and adopted her previous decision, explaining (A61) that she had "fully reviewed" her prior decision, which she "adopted in its entirety."

This Court's "precedents establish that ratification can remedy a defect arising from the decision of 'an improperly appointed official…when…a properly appointed official has the power to conduct an independent evaluation of the merits and does so.'" *Wilkes-Barre Hosp.*, 857 F.3d at 371 (quoting *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 796 F.3d 111, 117-21, 124 (D.C. Cir. 2015) (citations omitted)); *accord Doolin Sec. Sav. Bank, FSB v. Office of Thrift Supervision*, 139 F.3d 203, 213-14 (D.C. Cir. 1998) (upholding official's cease-and-desist order, finding it implicitly ratified prior action of a possibly improperly appointed "acting" official); *FEC v. Legi-Tech, Inc.*, 75 F.3d 704, 707 (D.C. Cir. 1996) (holding reconstituted FEC could properly ratify decisions made when it was unconstitutionally constituted). Other courts have reached the same conclusion. *See Advanced Disposal*, 820 F.3d at 602-05 (holding Board's Regional Director validly ratified his earlier action); *CFPB v. Gordon*, 819 F.3d 1179, 1190-92 (9th Cir. 2016) (director of Consumer Financial Protection Bureau validly ratified

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prior personnel actions "remedied any defect arising from the quorum violation." *Wilkes-Barre Hosp. Co. v. NLRB*, 857 F.3d 364, 371 (D.C. Cir. 2017); *see also Advanced Disposal Servs. East v. NLRB*, 820 F.3d 592, 604 (3d Cir. 2016) (finding the Board's July 18 ratification of personnel matters was proper).

actions taken when serving under unconstitutional recess appointment), *cert denied*, 137 S. Ct. 2291 (2017).

Here, Judge Dawson properly ratified her prior decision after conducting an independent evaluation of the merits, thereby removing any question about the validity of the decision. (A61 (quoting A50-52.)) As she explained in her order ratifying and adopting that decision (A61), she "fully reviewed [her] decision in light of the…allegations and Respondent's defenses" and "determined that [her] decision (including the findings of fact, analysis, credibility determinations, conclusions and recommended order) is based on the entire record, and that it remains correct and should stand on its entirety." Her actions were in accord with this Court's decisions, most notably *Wilkes-Barre Hospital*, 857 F.3d at 371-72. There, the Court held that, after a properly constituted Board ratified the appointment of a Regional Director by the invalid Board, that Regional Director validly ratified his own actions. *Id*. at 371. The Court rejected claims that the Regional Director's ratification of his own actions was improper, finding that it should take his ratification "at face value and treat it as an adequate remedy." *Id*. at 372 (*Legi-Tech*, 75 F.3d at 709). Likewise, here Judge Dawson's ratification of her prior actions was a proper method – and one approved by this Court – of correcting any alleged infirmities in her authority to issue her earlier decision.

Without addressing that body of caselaw, and without providing supporting evidence, the Company variously argues (Br. 39-42) that Judge Dawson's act of ratifying her earlier decision amounted to a "rubber-stamp approval of her previous opinion," (Br. 39), created the "appearance of a partisan tribunal," (Br. 38), and established that she was "biased by her prejudgment of the case" (Br. 39-41). Those unsupported assertions, however, are insufficient to overcome the long-established "presumption of regularity" under which courts presume that public officials have properly discharged their official duties absent "clear evidence to the contrary." *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (quoting *United States v. Chem. Found.*, 272 U.S. 1, 14-15 (1926)); *see also Allied Mech. Servs., Inc. v. NLRB*, 668 F.3d 758, 770-71 (D.C. Cir. 2012) (affording presumption to actions of Board's General Counsel); *see also San Miguel Hosp. Corp. v. NLRB*, 697 F.3d 1181, 1186-87 (D.C. Cir. 2012) (acknowledging presumption of regularity applies to Board decisions; dismissing employer's claim that Board action was improper because taken within days after court remand).

The Company has failed to offer any evidence, much less the sort of "clear evidence to the contrary," *Chem. Found.*, 272 U.S. at 14-15, that would overcome that presumption and warrant setting aside Judge Dawson's ratification of her prior decision. The Company baldly asserts (Br. 39) that Judge Dawson "rubberstamp[ed]" her previous decision, but this unsubstantiated assertion does

not disprove Judge Dawson's claim that she "fully reviewed" her prior decision and determined that it "remains correct and should stand on its entirety." *See Advanced Disposal*, 820 F.3d at 605 (presumption of regularity cannot be defeated by unsupported claim that ratification is a "rubberstamp"). Moreover, this Court and others have suggested that, absent specific evidence that a valid official either "failed to make a detached and considered judgment" or was "actually biased," "ratification may be sufficient even if the subsequent decision rubberstamped the previous decision." *Wilkes-Barre Hosp.*, 857 F.3d at 372 (discussing *Intercollegiate Broad. Sys.*, 796 F.3d at 118 & n.1; *Legi-Tech*, 75 F.3d at 709); *see also Andrade v. Regnery*, 824 F.2d 1253, 1257 (D.C. Cir. 1987) (finding properly appointed official with final authority, but who had been in office only three days, ratified and implemented program extensively planned by his improperly appointed predecessor); *accord Advanced Disposal*, 820 F.3d at 605; *Gordon*, 819 F.at 1191-92.

The Company has also neither substantiated its claim that Judge Dawson was biased against the Company, nor established any prejudice that resulted from the earlier defect in her appointment. While the Company (Br. 40) quotes various codes of conduct addressing impartiality, it fails to explain how Judge Dawson ran afoul of those requirements. Instead, it relies on "the sheer multiplication of innuendo," which this Court has explained cannot "overcome the strong

presumption of agency regularity." *La. Ass'n of Indep. Producers & Royalty Owners v. FERC*, 958 F.2d 1101, 1111 (D.C. Cir. 1992). It is the failure to provide specific evidence of bias or prejudice that sets this case apart from those relied on by the Company (Br. 38-39, 41). *See Dayton Power & Light Co.*, 267 NLRB 202, 202-03 (1983) (administrative law judge's statements before hearing opened indicated he predetermined case and approached case with closed mind); *New York Times Co.*, 265 NLRB 353, 353 (1982) (ALJ "impugned the good faith of the Union and questioned whether the General Counsel and the Charging Party were abusing the Board's processes"); *Ctr. for United Labor Action*, 209 NLRB 814, 814 (1974) (ALJ's statements indicated prejudgment); *Indianapolis Glove Co.*, 88 NLRB 986, 986 (1950) (trial examiner questioned witnesses in "hostile manner in an over-zealous effort to attack their credibility"). Lacking any evidence that raises even the appearance of impropriety by Judge Dawson, it was appropriate for her to remedy any alleged defect in her initial appointment by ratifying her prior actions once the Board ratified her appointment and she considered those actions anew.

The Company has also failed to establish that Judge Dawson's involvement in the case before her appointment was ratified amounted to prejudgment that would warrant her disqualification, as the Company seeks (Br. 39, 41). *See United Steelworkers of Am. v. Marshall*, 647 F.2d 1189, 1208-09 (D.C. Cir. 1981)

(explaining presumption not overcome by "mere proof that [a decisionmaker] has taken a public position on an issue; disqualification only required through public statements revealing she has "adjudged the facts as well as the law of a particular case in advance of hearing it"). Lacking such evidence, "the better course" is to take Judge Dawson's ratification "at face value and treat it as an adequate remedy." *See Wilkes-Barre Hosp.*, 857 F.3d at 372.

Finally, there is no merit to the Company's claims (Br. 40-41) that Judge Dawson ran afoul of the Administrative Procedure Act's provision prohibiting an individual who participates or advises in an adjudicatory decision of an administrative agency from also performing "investigative or prosecuting functions." 5 U.S.C. § 554(d). The plain language of that provision restricts the ability of a person who has served in a prosecutorial role in a particular matter from subsequently serving in an adjudicative role in the same or a factually related matter. That Judge Dawson's initial appointment was subsequently called into question does not, as the Company appears to claim (Br. 41-42), transform her earlier actions in conducting the hearing and issuing a decision into an investigation of the underlying unfair-labor-practice charges or the prosecution of those charges against the Company so as to prevent her from issuing a decision in this case. *See generally Withrow v. Larkin*, 421 U.S. 35, 56 (1975) (explaining individuals do not run afoul of Section 554(d) of the APA by receiving results of

investigations then participating in hearings or by deciding questions a second time after initial decision reversed on appeal). Thus, the Company has failed to meet its burden of showing that Judge Dawson's ratification is insufficient to cure any alleged defect in her appointment.

CONCLUSION

The Board respectfully requests that the Court deny the petition for review and enforce the Board's Order in full.

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National Labor Relations Board
June 2018

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

HENDRICKSON TRUCKING CO.	)	
	)	
Petitioner/Cross-Respondent	)	
	)	
v.	)	Nos. 17-1226 & 17-1234
	)	
NATIONAL LABOR RELATIONS BOARD	)	Board Case Nos.
	)	07-CA-086624
Respondent/Cross-Petitioner	)	07-CA-095591
	)	
and	)	
	)	
INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 1038	)	
	)	
	)	
Intervenor	)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its brief contains 12,845 words of proportionally-spaced, 14-point type, the word processing system used was Microsoft Word 2010.

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Dated at Washington, DC
this 29th day of June, 2018