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The NLRB Issues Revised Procedures for Addressing Immigration Status Issues Arising During Unfair Labor Practice Proceedings

The General Counsel of the National Labor Relations Board promulgated Memorandum GC 15-03, which made important changes to the Board's procedures for addressing immigration status issues arising during unfair labor practice proceedings.

Background

In 2002, the Supreme Court decided Hoffman Plastic Compounds, Inc. v. NLRB. There, the Court held that the Board could not award backpay or order reinstatement for undocumented workers discharged in violation of the National Labor Relations Act (NLRA). However, the Court also left undisturbed an earlier holding that undocumented workers are "employees" for the purposes of the NLRA, and it emphasized that the Board was free to impose "other significant sanctions" on employers who violate the Act in their treatment of such workers.

In the wake of Hoffman Plastic, the NLRB General Counsel released Memorandum GC 02-06 to provide "guidance as to procedures and remedies concerning employees who may be undocumented aliens." GC 02-06 made clear that in light of Hoffman Plastic, NLRB regions should not pursue backpay to remedy the discriminatory discharge of undocumented workers (although it concluded that backpay was still available in non-discharge situations, such as where an employer has made a unilateral change in working conditions). However, it also stressed that undocumented workers remain employees under the Act and reiterated the fact that the Court's holding had "no effect on 'other significant sanctions'" available to the Board to enforce the Act. It also instructed that "Regions generally should presume that employees are lawfully authorized to work" and that "they should refrain from conducting a sua sponte immigration investigation."
(Continued on page 4)

Also in this Issue:

Gov. Cuomo Signs Law Amending New York's Wage Theft Prevention Act

Gov. Andrew M. Cuomo signed legislation that strengthens employee protections under the state's Wage Theft Prevention Act and eliminates a reporting requirement that employers found burdensome. The law increases penalties for employers that violate the act and makes it more difficult for unscrupulous employers to evade enforcement. The law also eliminates a requirement that employers provide an annual notice to the state Department of Labor with a range of information on pay rates for their employees.

Additionally, the legislation increases penalties for violations from $50-$250 per week to $50-$250 per day and raises maximum penalties from $2,000 to $5,000, and establishes penalties of $1,000 to $20,000 for repeat violators and maximum liquidated damages are increased from $10,000 to $20,000.

Finally, the new legislation prevents employers from evading the act's requirements by dissolving a company and reopening under a different name. The owner of the new company, under the law, would be liable for the violations of the previous company.

Multiemployer Pension Reform Act of 2014

Severely distressed multiemployer pensions will be able to reduce benefits paid to retirees under an amendment to the omnibus spending bill. The pension measure, the Multiemployer Pension Reform Act of 2014, is intended to let deeply underfunded multiemployer plans avoid bankruptcy and termination, and by doing so to keep solvent the multiemployer pension insurance fund overseen by the Pension Benefit-Guaranty Corp. (PBGC), the federal pension insurance program.

The provisions apply only to multiemployer pensions. Multiemployer, or "Taft-Hartley," pension plans commonly are administered by labor unions on behalf of their members and funded by multiple employers in a given industry, subject to collective bargaining contracts with the union.

In November 2014 the PBGC issued a report indicating its multiemployer insurance program was almost certain to become insolvent in 10 years. Of the 1,400 multiemployer plans nationwide, 200 plans covering a total of 1 million participants are at risk of termination.

The measure will allow trustees of financially troubled multiemployer pensions to cut retiree benefits to prevent plan insolvency. Financially troubled plans are those that are expected to not have enough money to pay 100 percent of benefits in 10 to 20 years. In some cases, the cuts could exceed 60 percent of a participant's benefits.

Under the measure:

- Retirees who are age 80 or over, or are receiving a disability pension, are not subject to benefit cuts. Retirees ages 75-79 are subject to smaller cuts than retirees under age 75.
- Plan trustees have discretion in deciding how to allocate the cuts. For example, they can cut retirees' benefits more than those of active workers, and decide whether to reduce survivors' benefits.
- Plan trustees are exempt from fiduciary responsibility in making cuts.
- Trustees' decisions to cut benefits can be reversed only by the Department of Treasury, and then only if the Treasury determines that the trustees' decision to cut benefits or the extent of the benefit cuts is "clearly erroneous."
- There is no provision for automatic restoration of lost benefits if a plan's funding status improves.
- Plans with 10,000 or more participants must allow all participants to vote on cuts before they are implemented. A majority of all workers and retirees in a plan—not just a majority of the ones who vote—is required to block cuts. Ballots can be distributed by e-mail.
- Even if a majority of participants vote against cuts, the Treasury Department can override the vote and uphold the trustees' decision to make cuts, if it concludes that a plan poses a "systemic" risk to the PBGC.
- The insurance premiums that multiemployer plans pay to the PBGC are increased from $13 to $26 per participant per year. (In contrast, premiums paid to the single-employer plan program are between $57 and $475 per participant per year.)

Also relevant to employers, the new rules clarify that surcharges imposed pursuant to the Pension Protection Act do not count towards calculation of withdrawal liability payments as the 'highest contribution rate' against which annual payment limits are calculated. The new rules also provide that contribution increases mandated by a rehabilitation or funding improvement plan will be disregarded in certain withdrawal circumstances.

NLRB Finalizes Election Rule Amendments

The National Labor Relations Board Dec. 12 issued a final rule amending its regulations on representation cases and making major changes in the handling of questions concerning representation under the federal labor relations law. In its notice of the final rule published in the Dec. 15 Federal Register, the board said the rule changes will take effect on April 14, 2015, 120 days after publication.

The board's action is the culmination of rulemaking on a proposal that was reissued by the board in February. Pearce, Hirozawa and Schiffer voted to move forward on amendments to the NLRB's representation case rules that were first proposed in 2011, while Miscimarra and Johnson dissented. The original proposal, approved in December 2011 by Pearce and then-Member Craig Becker (D), was blocked when a federal district court in 2012 invalidated the action because the board's records did not show that three members had approved the rule. The board later agreed to drop an appeal of the court ruling. Instead, the agency issued a new notice of proposed rulemaking proposing the same changes it included in the 2011 proposal.

The final rule:

- Provides for electronic filing and transmission of election petitions and other documents;
- Ensures that employees, employers and unions receive timely information they need to understand and participate in the representation case process;
- Eliminates or reduces unnecessary litigation, duplication and delay;
- Adopts best practices and uniform procedures across regions;
- Requires that additional contact information (personal telephone numbers and email addresses) be included in voter lists, to the extent that information is available to the employer, in order to enhance a fair and free exchange of ideas by permitting other parties to the election to communicate with voters about the election using modern technology; and
- Allows parties to consolidate all election-related appeals to the Board into a single appeals process.

The board said the final rule will not only speed some elections but will add efficiency, fairness, transparency and uniformity to the process. The board defended the voter list disclosures change by stating that it believes any threat to the privacy interest of the individual employee is outweighed by the need to adapt the election process to modern communications. The board members acknowledged that even the disclosure of telephone numbers has never been required on voter lists, but that telephones have become so common that they provide an essential point of contact with individuals. The board wrote that the information will be disclosed to a "limited set of recipients" during pre-election periods that are of limited duration, and the privacy rights of employees will not likely be compromised. The board rejected calls for an opt-in or opt-out process as impractical.

The final rule will also require that a blocking charge be backed at the time of filing by a written offer of proof indicating the charge is not frivolous.

President Obama vetoed a congressional resolution seeking to overturn new unionization voting rules March 31, 2015, keeping in place these procedures.

NLRB Revised Procedures for Immigration Status
Continued from page 1

In2011, the Board supplemented GC 02-06 with Memorandum OM 11-62. This Memorandum reaffirmed the central premises of GC 02-06, but explained that "in certain cases where immigration status is of particular significance, the Agency may decide to seek the assistance of one of the three immigration agencies to advance the effective enforcement of the NLRA." Thus, if immigration status issues could "interfere with enforcement and effectuation of the NLRA by, for example, impacting the availabilities of discriminatees and important witnesses," seeking such assistance might be appropriate. The Memorandum instructed Regions to pay particular attention to situations where alleged unfair labor practices involve particularly egregious conduct, "such as physical coercion, involuntary servitude, blackmail, or violations of other laws." In such cases, the employers' conduct could make the discriminatees eligible for immigration remedies such as T Visas or U Visas, which are available to victims of trafficking and other qualifying crimes. (For prior coverage of U-Visas in the context of labor disputes see this post).

REVISED PROCEDURES UNDER GC 15-03

The Board's memorandum significantly expands the procedures employed to ensure that the Act is adequately enforced and that the workplace rights of undocumented workers are protected. It begins by reiterating what has been a consistent premise, that the "NLRA protects all employees covered by the Act regardless of immigration status." As a result, in an unfair labor practice case, the merit determination should be made "without considering employees' immigration status." Regional offices must also "continue the current practice of explaining to witnesses, alleged discriminatees and parties that an individual's immigration status is not relevant to the investigation of whether the Act has been violated."

The new Memorandum requires regional offices to contact the NLRB's Division of Operations-Management "as soon as they become aware, in any stage of a case, that immigration status issues may impact our ability to remedy or litigate a potential unfair labor practice violation." As under OM 11-62, the Board may, in such cases, consult with other agencies, including to "facilitate [the] process" of seeking a U or T visa or deferred immigration action. Moreover, in some cases the Board will consider "whether it is appropriate to refer the case to the Department of Justice's Office of Special Counsel for Immigration-Related Unfair Employment Practices."

The Memorandum also requires regional offices to explicitly consider alternative remedies to backpay and reinstatement in cases where Hoffman Plastic bars recourse to these remedies. Among the remedies that regions are directed to consider are bargaining orders, union access to employee contact information, reimbursement or organizing or bargaining expenses, and consequential damages.

Finally, because Hoffman Plastic made clear that even where reinstatement and backpay are unavailable the Board "may utilize the federal courts' power of contempt to ensure compliance and to deter future violations," the Memorandum directs regional offices to seek formal settlements in any cases where immigration status issues may play a role. Doing so "will enable the Agency to seek the immediate assistance of the federal courts in the event of noncompliance with the terms of the extant settlement and in the event of future violations."

New York Public Authorities Law Amended

On December 17, 2014, New York Governor Cuomo signed into law a bill to amend the New York Public Authorities Law, in relation to contractual claims and actions against the New York City School Construction Authority ("SCA"). The amendment adds an additional sentence to §1744(2) of the Public Authorities Law to provide that in the case of an action or special proceeding for monies due arising out of contract, accrual of such claim shall be deemed to have occurred as of the date payment for the amount claimed was denied.

Public Authorities Law §1744(2) is problematic to contractors engaged on SCA projects due to the three-month filing period from the "accrual of claims." Courts have interpreted the three-month period to commence when the contractor's damages are "ascertainable," and "ascertainable" has been interpreted to mean "once the work is substantially completed or a detailed invoice of the work performed is submitted." *See C.S.A. Constr. Corp. v. NYC School Constr. Auth., 5 N.Y.3d 189, 800 N.Y.S.2d 123 (2005).*

The failure to have a clear and precise point that determines when a claim accrues has led many contractors to lose a claim before it was denied by the SCA, or even before a contractor knew that the SCA disputed its claim. The purpose of the amendment is to establish an unambiguous point in time for the filing of a notice of claim against the SCA. Accordingly, the amendment establishes the accrual of a claim for notice of claim purposes as the point at which the claim is denied. The amendment will prevent the unintentional and unfair waiver of claims, and will reduce paperwork for both the SCA and its contractors.

The statute as amended brings §1744 of the NY Public Authorities Law into conformity with the similar notice of claim provisions of §3813 of the NY Education Law. Under §3813 of the Education law, the accrual date on any action or proceeding against a school district arising out of a contract shall be the date when payment was denied.

The amendment is effective only for SCA contracts signed on or after Dec 17, 2014. The text of NY Public Authorities Law § 1744(2) as amended.

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