Employment Flash: Special Edition

Skadden

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New Year, New Rules

A number of new laws became effective as of January 1, 2023, including:

- increases in the minimum wage for federal contractors;
- expansion of New York's paid family leave law to include sibling care;
- new privacy legislation and an expansion of existing privacy protections in California;
- expansion of leave legislation in California to allow for the care of non-relatives;
- additional pay transparency requirements in California;
- an expanded definition of "race" under Illinois human rights law;
- greater bereavement leave entitlements in Illinois;
- additional meal and day-of-rest requirements, as well as increased civil penalties for violations, in Illinois; and
- further restrictions on settlements of discrimination and harassment claims in Oregon.

Each of these developments is discussed in the December 2022 edition of the *Employment Flash*.

Also scheduled to become effective as of January 1, 2023, and covered in the December 2022 publication, was Local Law Int. No. 1894-A, passed by the New York City Council to amend the City's Administrative Code to include regulations on the use of automated employment decision tools. Due to the high volume of public comments, a second public hearing on the measure will be held on January 23, 2023 and enforcement of the law has been delayed until April 15, 2023.

Broad Ban on Worker Noncompete Clauses Proposed by FTC

On January 5, 2023, the U.S. Federal Trade Commission (FTC) proposed a far-reaching rule that would prohibit employers from entering into noncompete clauses with workers, and require employers to rescind existing noncompete clauses and actively inform their current and former workers that existing noncompete clauses are no longer in effect. The rule is likely to face legal challenges that question the FTC's authority to enact such a measure. See our January 9, 2023, client alert, "FTC Proposes Broad Ban on Worker Noncompete Clauses," for a comprehensive summary and analysis of the proposal.

New Federal Protections for Pregnant and Nursing Employees

The Consolidated Appropriations Act, 2023, a $1.7 trillion government funding bill signed into law by President Biden on December 29, 2022, includes new protections for pregnant and nursing employees through the creation of the Pregnant Workers Fairness Act and the Providing Urgent Maternal Protections for Nursing Mothers Act.

Pregnant Workers Fairness Act

The Pregnant Workers Fairness Act (PWFA), which will become effective on June 27, 2023, generally requires employers with 15 or more employees to make reasonable accommodations for applicants' and employees' limitations related to pregnancy, childbirth or related medical conditions, unless doing so would impose an undue hardship on the employer. These obligations are analogous to employers' reasonable accommodation obligations under the Americans with Disabilities Act (the ADA). In fact, the PWFA's definitions of "reasonable accommodation" and "undue hardship" are defined by reference to the same terms in the ADA and are to be construed consistent with the ADA. The PWFA also prohibits covered employers from denying employment opportunities to, or taking adverse action against, applicants and employees due to the need for a reasonable accommodation related to pregnancy, childbirth or a related medical condition.

Providing Urgent Maternal Protections for Nursing Mothers Act

The Providing Urgent Maternal Protections for Nursing Mothers Act (the PUMP Act) amends the Fair Labor Standards Act to require employers to provide all nursing employees (both exempt and non-exempt) with reasonable break time to express breast milk for nursing children up to one year of age, in a private space other than a bathroom. Employers will be required to compensate employees for this break time if they are not completely relieved of duty during the entirety of the break. Employers with fewer than 50 employees will be exempt from these requirements if compliance would impose an undue hardship by causing an employer significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer's business. The PUMP Act also contains exemptions for certain transportation industry employers. The PUMP Act generally became effective on December 29, 2022, except for the PUMP Act's remedies provisions, which will become effective on April 28, 2023.

National Labor Relations Board Updates

Our December 2022 edition of the Employment Flash highlighted, among other recent legal developments, two National Labor Relations Board (NLRB) developments. The first was the NLRB's September 30, 2022, decision in *Valley Hospital Medical Center, Inc. d/b/a Valley Hospital Medical Center*, 371 NLRB No. 160, in which the NLRB held that employers cannot unilaterally cease dues checkoff after the expiration of a collective bargaining agreement, overruling an earlier NLRB decision. The second was the NLRB's November 3, 2022, proposed "Fair Choice and Employee Voice" rule that would roll back a 2020 ruling that weakened union protections against decertification.

The NLRB continued to be active in the final month of 2022, issuing a number of decisions of importance to employers, several of which reversed significant precedents. These decisions are relevant to all employers, including those without unionized work forces.

NLRB Adds Consequential Damages as Remedy for Unfair Labor Practices

On December 13, 2022, in a 3-2 decision in *Thryv, Inc*., 372 NLRB No. 22, the NLRB expanded remedies for employees by adding consequential damages as a "make whole" remedy for unfair labor practices. Previously, the NLRB's "make whole" remedies — the purpose of which are to restore an affected employee to the place he or she would have been in had no wrongdoing taken place — were limited to backpay, reasonable search-for-work expenses and interim employment expenses, such as expenses for transportation or room and board incurred by an employee when commuting to, or relocating to obtain, interim employment.

In *Thryv*, a marketing and software company unlawfully laid off workers without first bargaining to impasse with their union. The NLRB found that the traditional make-whole remedies (backpay, reasonable search-for-work expenses and interim employment expenses) did not sufficiently compensate the impacted workers and ordered the employer to, among other things, compensate the employees for all direct or foreseeable pecuniary harms suffered as a result of their unlawful layoff. The NLRB made clear that compensating employees for "all direct or foreseeable pecuniary harms" stemming from labor law violations was not to be considered as an "extraordinary" remedy, but is available to any employee entitled to make-whole relief. "[O]ut-of-pocket medical expenses, credit card debt, or other costs simply in order to make ends meet" were noted by the NLRB as examples of the types of pecuniary harm an employee may suffer because of an unfair labor practice, and for which he or she must be compensated in order to be made whole.

The NLRB made clear that employees will be required to produce evidence in the form of receipts or other financial statements in order to demonstrate the harm suffered, and notably, declined to extend the remedies available to damages for pain and suffering or emotional distress, or to award punitive damages.

Obama-Era Bargaining Unit Test Restored

On December 14, 2022, in a 3-2 decision, the NLRB in *American Steel Construction, Inc*., 372 NLRB No. 23 restored the framework used during President Obama's administration (as set out in *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011)) for determining the appropriateness of a bargaining unit.

Under *Specialty Healthcare*, a petitioned-for bargaining unit is considered appropriate if the employees in the petitioned-for unit are readily identifiable as a group (based on job classifications, departments, functions, work locations, skills or similar factors) and share a "community of interest" that is sufficiently distinct from excluded employees. If a party wishes to include additional employees in the petitioned-for unit, the burden shifts to that party to demonstrate that the additional employees share an "overwhelming community of interest," and, as a result, there "is no legitimate basis" upon which to exclude such additional employees from the petitioned-for unit because the community of interest factors "overlap almost completely."

When assessing community of interest, the NLRB considers whether the employees:

- are organized into separate departments;
- have distinct skills and training;
- have distinct job functions and perform distinct work (including the amount and type of job overlap between classifications);
- are functionally integrated with the employer's other employees;
- have frequent contact with other employees;
- interchange with other employees; have distinct terms and conditions of employment; and
- are separately supervised.

American Steel reverses course on the NLRB's Trump-era decisions in *PCC Structurals, Inc.*, 365 NLRB No. 160 (2017) and *The Boeing Company*, 368 NLRB No. 67 (2019), particularly with respect to what it means for a petitioned-for unit to be "sufficiently distinct" from excluded employees. In contrast to the approach set out in *Specialty Healthcare* — that a petitioned-for unit is sufficiently distinct unless the excluded employees share an overwhelming community of interest with the petitioned-for employees — the approach under *PCC and Boeing* was that a petitioned-for unit is sufficiently distinct only if the employees excluded from the unit have meaningfully distinct interests in the context of collective bargaining that outweigh similarities with unit members.

The NLRB's return to *Specialty Healthcare* will place a heightened burden (back) on the party seeking to include additional employees in a bargaining unit and make "micro-units" (bargaining units comprised of fewer employees) easier to establish.

NLRB Upholds Standard Governing Employer Questioning in Unfair Labor Practice Charges

Since 1964, *Johnnie's Poultry*, 146 NLRB 770, has set the standard for the manner in which employers may question employees when preparing a defense against an unfair labor charge. In a 3-2 decision on December 15, 2022 in *Sunbelt Rentals, Inc*., 372 NLRB No. 24, the NLRB voted to maintain this standard.

In attempting to balance a worker's right to engage in protected activity with an employer's ability to prepare a defense against an administrative charge brought against it, *Johnnie's Poultry* established certain requirements for an employer investigating the facts relating to the charge, such as communicating to employees the purpose of any interviews; informing employees that participation is voluntary and that an employee may decline without penalty; assuring employees that no reprisal will occur as a result of their participation; and avoiding questions that are coercive in nature. Failure to comply with the requirements set out in *Johnnie's Poultry* will result in a finding that an employer violated the National Labor Relations Act (the NLRA). In upholding J*ohnnie's Poultry*, the NLRB confirmed its view that the decades-old decision still "appropriately balances the competing employee and employer interests at stake and best promotes the Board's institutional interest in effectively enforcing the [NLRA]."

NLRB Reverts to Prior Standard on Contractor Employees' Access to Property

On December 16, 2022, the NLRB issued a 3-2 decision in *Bexar County Performing Arts Center Foundation d/b/a Tobin Center for the Performing Acts*, 372 NLRB No. 28 (*Bexar II)*, holding that property owners may only exclude off-duty employees who regularly work on the property for an onsite contractor and who seek to engage in Section 7 activity on the property when the employees' activities "significantly interfere" with the use of the property, or when the owner has "another legitimate business reason" to exclude them. *Bexar II* reverses the Trump-era NLRB decision in *Bexar County Performing Arts Center Foundation d/b/a Tobin Center for the Performing Acts*, 368 NLRB No. 46 (2019) (Bexar I) and reverts to the standard for analyzing access rights to the standard described in the 2011 NLRB decision in *New York New York Hotel & Casino*, 356 NLRB. 907 (*New York New York*).

Bexar I and *Bexar II* involved unionized performers employed by the San Antonio Symphony who protested their employer's decision to utilize recorded music rather than live accompaniment at a performance that took place at the Bexar County Performing Arts Center (the Tobin Center) by distributing flyers in front of the main entrance. The Tobin Center — which was not the employees' employer — barred the musicians from leafletting on the property. In *Bexar I*, the NLRB held that the property owner was within its right to exclude the employees because the contractor's employees are not generally entitled to the same access rights as the property owner's own employees.

The employees appealed the *Bexar I* decision to the U.S. Court of Appeals for the District of Columbia Circuit, which held that the decision was arbitrary and internally inconsistent and remanded the case. Upon review in *Bexar II*, the NLRB agreed with the Court of Appeals' decision and reversed *Bexar I*. In balancing the competing rights and interests of property owners and contractor employees, the NLRB explained that the policies and purposes of the NLRA would be best served by abandoning the standard adopted in *Bexar I* and returning to the previous test set out in *New York New York* (namely, that property owners may only exclude from their property off-duty employees who regularly work on the property for an onsite contractor and who seek to engage in Section 7 activity on the property when the employees' activities "significantly interfere" with the use of the property or when the owner has "another legitimate business reason" to exclude them).

In this case, the NLRB found that the Tobin Center had not demonstrated that the leafleting would have significantly interfered with the use of its property or that it had another legitimate business reason for denying the contractor's employees access to the property, and consequently, found that the Tobin Center had violated the NLRA.