Labor & Employment Issues
In Focus
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For Clients and Friends
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NLRB ISSUES FINAL RULE UNDERCUTTING REFORMS IN REPRESENTATION CASE PROCEDURES

Taking a scalpel to the existing procedural rules for representation cases, the National Labor Relations Board ("Board" or "NLRB") issued a final rule on December 15, 2019 eviscerating reforms enacted by the previous Board in 2014 that had cut down on excessive litigation and lengthy delays between the filing of election petitions and the elections. The changes in the final rule were sought by business groups. The rule is effective April 14, 2020.

Significantly, the Board issued the final rule without Notice and Comment. When the 2014 amendments were enacted, the Board issued a Proposed Notice of Rulemaking and accepted comments over a 140 day period and conducted two public hearings lasting a total of 14 days. To avoid that, this Board concluded that its changes are procedural and therefore exempt from the Notice and Comment requirements in the Administrative Procedure Act. Further, it asserted that, even if the previous Board followed notice and comment procedures in the 2014 representation case rules, U.S. Supreme Court case law says that an agency is not required to do so when it amends or repeals rules.

Among the changes are:

- The time period for scheduling any pre-election hearing is extended to 14 business days from the current 8 calendar days;
- The employer will have 5 business days to post at the workplace the Notice of Petition for Election rather than the current 2 business days;
- The employer's statement of position will be due 8 business days after the service of the notice of pre-election hearing (rather than one day before the hearing date) and regional directors can extend that for good cause;
- A new requirement forces the petitioner, normally the union, to file and serve a written response to the employer's statement of position 3 business days before the pre-election hearing. Under the current rules, the response could be made orally at the start of the hearing;
- Expanded the scope of the pre-election hearing to include issues of supervisory status, voter eligibility, and unit scope, returning to the pre-2014 Board procedures. Under the current rules, voter eligibility, including supervisory status, could be deferred until after the election when they could become moot or resolved by parties' agreement after the election;
- Returning to the old rules allowing parties to file post-hearing briefs which can be due up to 15 days after the hearing. Under current rules, post-hearing briefs are allowed only by special permission of the regional director;
- Allowing regional directors to decide to issue a separate Notice of Election, rather than including the election details in the direction of election after a hearing which is the practice under the existing rules;
- Providing that normally an election will not be scheduled before the 20th business day after the date of the direction of election, instead of the earliest date practicable, thereby,

according to the Board, permitting it to rule on requests for review (normally filed by employers) prior to the election;

- Reinstating the pre-2014 automatic impoundment of ballots where the employer has filed a request for review within 10 days of the direction of election, thus preventing the parties from knowing the election results until the request for review is decided;
- Allowing the employer 5 business days after the direction of election, rather than the current 2 days, to provider the voter list to the union; and
- Stopping the issuance of a certification of results if a request for review is pending or before the time for filing a request has expired. Under the old rules, a regional director could certify the results immediately which allowed the successful union to demand bargaining and file unfair labor practice charges for refusals to bargain.

The Board's new rule will lengthen the time it takes to obtain an election and, if the union is successful, to issue a certification of representation, which the Board itself admitted in its announcement of the rule. The Board noted that its statistics show the success of the 2014 rules in speeding up the process – under the old rules, the median number of days from petition to election was 59 days in contested cases; that was reduced to 36 days under the 2014 rules. However, the Board concluded that these "gains in speed have come at the expense of other relevant interests" which focused primarily on providing greater opportunity for pre-election litigation of any and all issues before a union is certified.

U.S. DEPARTMENT OF LABOR PROPOSAL EXPANDS FINANCIAL DISCLOSURE AND REPORTING REQUIREMENTS TO PUBLIC SECTOR LABOR UNIONS

In another reversal of Obama Administration labor regulations, the U.S. Department of Labor, on December 17, 2019, the United States Department of Labor's Office of Labor-Management Standards (the "Department") published a Notice of Proposed Rulemaking, that, if promulgated, would impose on intermediate labor bodies that do not have private sector members the onerous private sector union financial disclosure and reporting requirements if those intermediate bodies are subordinate to a national or international labor organization that includes private sector workers. Those intermediate bodies, which include district councils and joint councils, would need to file annual financial disclosure reports, Forms LM-2, LM-3 and LM-4, that are required of private sector unions by the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA). The LM forms require unions to itemize expenditures, list officer salaries, number of union members, and types of dues that members pay.

In 2010, the under the Obama Administration, the Department promulgated a rule that interpreted the LMRDA to *exclude* intermediate labor organizations that contained no local labor organizations that represented private sector workers. This rule was a change from the rule promulgated in 2003 by the Department that *included* such bodies in the required financial reporting under the LMRDA. In the current rule-making, the Department reverses course again with the simple assertion that "[b]ecause [it] is of the opinion that it was correct in 2003 and incorrect in 2010," it proposes to adopt the 2003 interpretation and reject the 2010 interpretation.

Behind this simple statement is the Department's expressed concern that private sector employees' dues might be disbursed by national or international labor organizations to public sector intermediate labor organizations, citing the increase in public sector unionization.

Pointing specifically to the "ballooning" costs of public employee wages, benefits and pensions, and citing (for no apparent reason) the U.S. Supreme Court's decision in *Janus v. AFSCME Council 31*, the Department claims that private sector union members and the public have an interest in how labor unions, including intermediate bodies, spend their union member dues. The Department asserts, "And this interest is no less great when the money is spent in ways that affect political activities, state electoral outcomes, and state budgets."

In a lengthy dissertation of the reasons for its proposed rule, the Department claims that the LMRDA's "remedial purposes" are not served by excluding intermediate labor bodies because union members who are "concerned about payments to and from public sector intermediate labor organizations" do not have access to that information and thus they know less about the governance of their unions and cannot monitor the spending of their dues monies. Also, the public does not enjoy the transparency that they have with covered labor organizations, according to the Department. The Department further points out that, with reporting, the Department will have full investigatory authority over those intermediate labor bodies. The Department also cites what it calls the interrelatedness and structural complexity of labor unions and the financial complexity created by the relationships between and among unions as reasons for the rule. It says that it seeks to avoid a situation among labor unions similar to a parent corporation could disguise its assets in an undisclosed subsidiary so that the "cloak of structural and financial complexity" is lifted. As examples of the problems it seeks to correct, the Department's notice focuses in particular on the American Federation of Teachers, the Fraternal Order of Police, the National Education Association, and the International Association of Fire Fighters – unions which according to the Department disburse funds to non-covered intermediate bodies in large amounts.

The Department has also requested comments on whether to raise the threshold for filing a LM-2 form from $250,000 in annual receipts for intermediate bodies covered by the rule. It has estimated that 139 intermediate labor bodies would be affected by the rule, and 115 have receipts over $250,000 annually. For all 139 intermediate bodies, the Department has estimated the total annual cost of compliance would be over $4.2 million.

The Department will be accepting comments only through the Federal eRulemaking Portal http://www.regulations.gov (identified by RIN 1245-AA08), which must be submitted no later than 11:59 PM on February 18, 2020.

LAYOFF OF NON-UNION MEMBERS IN BARGAINING UNIT NOT SUBJECT TO FIRST AMENDMENT STRICT SCRUTINY PROTECTION

In a ruling illustrating the unexpected advantages of union membership post *Janus*, the U.S. Court of Appeals for the Second Circuit held that the strict scrutiny protections of the First Amendment right to association extend to union members who claim to be targeted for layoffs on account of union membership, but not to non-union members based on union representation alone. *Donahue v. Milan*, 2d Cir. No. 17-2832/2833 (Nov. 18, 2019). As public sector labor unions continue to fight the effects of *Janus*, *Donahue* offers a powerful reason for governmental workers to join and stay in a union.

The New York State Thruway Authority (the "Authority") sought contract concessions from Teamsters Local 72 and Local 1000 AFSCME ("Unions"). When the Unions balked, the Authority reduced the unit workforce by 218 union members and 13 agency fee payers ("AFP"),

all represented by the Unions. The Unions sued in federal court, alleging that the Authority sought to punish all 231 workers for their union association in violation of the First Amendment. The Unions relied on *State Employees Bargaining Agreement Coalition v. Rowland*, 718 F.3d 126 (2d. Cir. 2013) which held that union activity is protected by the First Amendment right to freedom of association and that heightened scrutiny applies to decisions that target an employee based on union membership. Granting the Unions summary judgment, the district court applied *Rowland* to both union members and non-members in the unit because they are both represented by the Unions during collective bargaining.

Judge Lohair, writing for the unanimous three judge panel, agreed as to members but not the AFPs, and so vacated and remanded the AFP portion of the decision. While acknowledging that "collective bargaining activities implicate the First Amendment right of association," the Appeals Court declined to conclude that "anyone who is represented during collective bargaining is for that reason alone entitled to First Amendment protection." Rather, "AFPs who affirmatively disassociated with a union" but who continued to be represented by the unions by operation of law could not claim interference with their right of association because they never sought to associate with the unions. On the other hand, held the Court, "union members clearly enjoy a First Amendment right to associate in labor unions." Therefore, "if the Authority terminated the union members because of their union membership … then strict scrutiny applies to its employment decision."

D.N.J. COURT FACES IN TWO DIRECTIONS POST JANUS: UPHOLDS UNION BUT PANS LEGISLATION

Based on the Supreme Court's decision in *Janus v. AFSCME Council 31*, 138 S. Ct. 2448 (2018), right-wing groups like the National Right to Work Foundation and the Freedom Foundation filed lawsuits across the country seeking back fees for nonmembers. The lawsuits vary but, in addition to requests for back dues for members, often include challenges to dues checkoff and to exclusive representation. To date, these actions have been unsuccessful, rejected by dozens of federal district courts and most recently in the Seventh Circuit. *See Janus v. AFSCME Council 31,* 942 F.3d 352 (Nov. 5, 2019). In *Smith v. New Jersey Education Association*, 18-10381 (D. N.J. Nov. 27, 2019), the District Court of New Jersey reached the same result as prior federal courts, but its criticism of New Jersey State law designed to help unions provides novel guidance for unions and their opponents.

In *Smith*, certain New Jersey public school teachers, following *Janus*, objected to the continued payment of dues to their unions. Member plaintiffs previously signed dues authorization forms requiring them to opt out in writing, effective on January 1 or July 1 of each year, whichever was sooner, identical to then-existing state law. In May of 2018, likely in anticipation of *Janus*, New Jersey enacted the Workplace Democracy Enhancement Act ("WDEA"). The WDEA, among other things, replaced the prior opt out procedure with a yearly revocation period of 10 days following the anniversary date of an employee's employment. The WDEA does not specifically state what impact it had on already signed cards.

Member plaintiffs argued that: (1) the authorization cards were invalid because employees were not afforded the option of abstaining from paying when signed; (2) the First Amendment gives employees a right to withdraw from a union at any time, without restriction; and (3) New Jersey's revocation requirements, as amended, violate the First Amendment. Additionally, two non-member teachers sought a refund of fees paid prior to the *Janus* decision.

Initially, the court concluded that the pre-*Janus* authorization cards remained valid, recognizing that changes to law do not invalidate a contract. Judge Reneé Marie Bumb noted that while *Janus* offered a new, appealing option for plaintiffs, the existence of a better alternative was not sufficient to invalidate their voluntarily signed authorization cards. The court found no support in *Janus* for invalidation, nor did the court find support in the decision for a broad right to cease collection of fees at any time. With respect to fee refund, Judge Bumb concurred with all prior courts in holding that the fees were deducted in good faith reliance on Supreme Court precedent and therefore need not be returned.

Regarding the WDEA, however, Judge Bumb derided its inclusion of a "draconian requirement that employees can only [opt out] by submitting written notice in a very specific 10-day window (which would be unique to each employee)." She expressed concern that the WDEA obligated a "perfectly-timed written notice." Judge Bumb concluded, without citing any precedent, that in the absence of additional opt out dates and "a more reasonable notice requirement," the WDEA's revocation procedure would unconstitutionally restrict an employee's First Amendment rights. The court declined to determine the parameters of a constitutionally permissible opt out procedure, however, because the unions in this case did not strictly enforce the WDEA. Instead, the unions permitted employees to opt out using either the old or new statutory language. Thus, the court found that the plaintiffs lacked standing to challenge the constitutionality of the WDEA revocation language, rendering her analysis dicta. Judge Bumb, however, issued a stern warning to unions, stating that a union's reliance on the WDEA or incorporation of WDEA procedure into an authorization card as the sole method of resigning membership would be unconstitutional.

As this case suggests, unions should carefully review dues authorization cards and resignation restrictions. State law, despite the best of intentions, may not serve to shield a union from liability.

As this eventful year winds to a close,
Pitta LLP extends warm holiday greetings
to our clients, colleagues, and friends!

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