Labor & Employment Issues
In Focus
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NLRB COVID ADVICE MEMOS LEAVE LABOR COUGHING, SHORT OF BREATH AND NEEDING VENTILATORS

A recent flurry of Advice Memoranda from the National Labor Relations Board ("NLRB" or "Board") General Counsel Peter Robb signals a green light for employers to unilaterally change terms and conditions of employment and punish complaining employees during the current COVID-19 pandemic.

The current Board outbreak follows close upon the early warning of *Mercy Health General Campus*, 07-CA-258425 (June 10, 2020). In that case, GC Robb advised that an employer did not violate Section 8(a)(5) of the National Labor Relations Act (the "Act") by not bargaining with a union prior to unilaterally changing its work from home and attendance policies. "[E]ven assuming that the Employer's implementation of these two policies constituted unilateral changes," opined Robb, "it is the General Counsel's view that an employer should be permitted to, at least initially, act unilaterally during emergencies such as COVID-19 so long as its actions are reasonably related to the emergency situation."

GC advice on how employers can further avoid bargaining followed quickly. In *ABM Business and Industry*, 13-CA-259139 (July 9, 2020), GC Robb advised that an employer refusing to provide information to a union in connection with a COVID-related layoff grievance did not violate Section 8(a)(5) of the Act because the information was not "presumptively relevant" and the union did not sufficiently explain the relevancy of its requests. Then, in *Crowne Plaza O'Hare*, 13-CA-259749 (July 20, 2020), the GC likewise saw no 8(a)(5) violation where the employer refused to provide information concerning COVID layoffs where the requests related less to employee terms and conditions and more to the employer's finances and decision to close. Finally, an employer properly refused to bargain regarding COVID related hazard pay and sick leave because those subjects were addressed generally in the parties' collective bargaining agreement which also contained a "zipper" clause. *Memphis Ready Mix*, No. 15-CA-259794 (July 31, 2020).

Employees complaining about their employer due to COVID fared no better in the eyes of the Board's GC. Thus, in *Marek Bros. Drywall Co.*, 16-CA-258507 (July 20, 2020), an employer did not violate the no anti-union discrimination prohibition of Section 8(a)(3) of the Act because, although his complaints at a group meeting were protected, he failed to provide evidence of animus connecting his complaints to his soon following COVID layoff. Capping the month, two nurses refusing to work because the employer insisted they share gowns and other unsafe conduct had no claim, according to the GC, because their complaints were not clearly for mutual aid and protection. *Hornell Gardens, LLC*, 03-CA-258740 and 03-CA-258966 (July 31, 2020).

GC Advice memoranda are not law and these issues may well come to the Board's three Republican and one Democrat members for actual decision. However, the curve is apparent and not at all flat. Employers and NLRB Regions will take guidance from such Advice, and unions must too.

COURT RULES CUNY CAN TAKE "CARES" MONEY WHILE ADJUNCTS TAKE WALKING PAPERS

The Coronavirus Aid Relief and Economic Security Act ("CARES") (March 2020) endowed colleges and universities with $13.9 billion dollars in aid to weather the COVID crisis, provided the institution "shall *to the greatest extent practicable* continue to pay its employees ..." (Emphasis added). The City University of New York ("CUNY") received $251 million under CARES, directing it all to student services and none to job retention. Following failed negotiations with their union, the Professional Staff Congress ("PSC"), CUNY declined to renew contracts for 2,800 of the 14,000 PSC represented adjuncts. PSC sued CUNY for violating the CARES Act and moved for a preliminary injunction to renew the contracts for Fall 2020. US District Court Judge Jed S. Rakoff denied the motion, ruling that PSC was not likely to succeed because it (and its adjuncts) lacked a right to sue. *The Professional Staff Congress/CUNY v. Rodriguez, CUNY*, S.D.N.Y. No. 20 Civ. 5060-JSR (Aug. 12, 2020)

Judge Rakoff found that PSC lacked two of three critical elements to infer a private right of action. First, Judge Rakoff ruled that the language of CARES did not manifest an "unambiguous intent" to confer "individualized rights" on each employee but rather only "a generalized duty imposed on the institution," thereby falling short of creating an implied right of action. Second, even if such a right could be inferred, it would be "so vague and amorphous that its enforcement would strain judicial competence." Unlike the CARES provisions concerning aid to students, "the CARES Act provides no statutory guidance as to how a funding recipient should determine the 'practicability' of retaining its employees." Adding death blow to injury, Judge Rakoff not only denied the injunction but invited CUNY to move to dismiss the entire action.

Judge Rakoff's decision means that providing jobs under CARES "to the greatest extent practicable" is not very great at all, at least not for colleges and universities. What CARES means for other employers remains to be seen.

FEDERAL COURT ENJOINS TRUMP'S ANTI-LGBTQ RULES

On August 17, 2020, United States District Judge Frederic Block issued a temporary injunction delaying the implementation of new rules written by the Trump administration which would eliminate discrimination protections for LGBTQ people in health care. The lawsuit in the Eastern District of New York, *Walker v. Azar*, 20 CV 2834 (FB)(SMG), will now proceed to determine whether the Trump administration's proposed regulations are constitutional.

Specifically, the new rules, which were set to take effect the day after the injunction was issued, would have reversed Obama-era Affordable Care Act ("ACA") regulations which stated that discrimination protections "on the basis of sex" under Section 1557 of the ACA should apply to transgender people. The Obama regulations categorize sex stereotyping and gender identity discrimination as discrimination on the basis of sex. The Trump Department of Health and Human Services ("HHS") had finalized the regulations in June, only to have the U.S. Supreme Court three days later rule that federal nondiscrimination protections "because of sex" include gay and transgender employees in the workplace. The Supreme Court justices held that such discrimination "has always been prohibited by Title VII's plain terms," and that "that should be the end of the analysis."

The *Walker* court's decision did not address the rule's remaining provisions, including its elimination of the prohibition on categorical exclusions, elimination of language access protections for people with limited English proficiency, and incorporation of religious exemptions.

In granting the injunction, Block said it appears HHS acted "arbitrarily and capriciously" in developing the rule change. "When the Supreme Court announces a major decision, it seems a sensible thing to pause and reflect on the decision's impact," Block wrote. "Since HHS has been unwilling to take that path voluntarily, the Court now imposes it."

Walker is an early decision interpreting the Supreme Court's holding in *Bostock v. Clayton County* and expanding it beyond the workplace, but not the first. Earlier this month, the United States Circuit Court of Appeals for the 11th Circuit relied heavily on the Supreme Court decision in permitting a suburban Florida school district to allow a transgender student access to the restroom that matches his gender identity. Numerous other cases seeking to expand *Bostock* to other settings are pending.

The injunction delivers a blow to the Trump administration's ongoing efforts to roll back protections for the LGBTQ community. Last month, the administration published a rule allowing single-sex homeless shelters to exclude transgender people from facilities that correspond with their gender identity. The administration has also banned transgender people from enlisting or serving in the military and revoked Obama-era guidance that allowed transgender students to use bathrooms of their choice or participate in sports corresponding with their gender identity.

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