



# Labor & Employment Issues In Focus

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For Clients and Friends  
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*“All that serves labor serves the Nation. All that harms labor is treason to America. No line can be drawn between these two. If any man tells you he loves America, yet hates labor, he is a liar. If any man tells you he trusts America, yet fears labor, he is a fool. There is no America without labor, and to fleece the one is to rob the other.”*

*Abraham Lincoln*

## **SECOND CIRCUIT APPROVES TRUMP BOARD’S “CONTRACT COVERAGE” STANDARD EASING UNILATERAL EMPLOYER CHANGES**

Labor’s happiness with the shift to Biden Administration appointees at the U.S. National Labor Relations Board (“NLRB” or “Board”) should be tempered by decisions like *IBEW Local Union 43 v. NLRB and ADT LLC*, No. 20-1163-ag (2d Cir. Aug. 12, 2021). In *ADT*, a three-member panel of the U.S. Court of Appeals for the Second Circuit upheld the rationale of a 2019 Trump Board decision, *MV Transportation*, which replaced the Board’s longstanding “clear and unmistakable waiver” rule with a “contract coverage” standard that effectively expands the ability of employers to unilaterally change terms and conditions of employment.

Prior to the ascension of President Trump’s appointees to a majority of members on the NLRB, the Board analyzed whether a collective bargaining agreement permitted an employer to make a unilateral change by requiring the agreement to “clearly and unmistakably waive” the union’s rights to bargain over the issue. In *MV Transp.*, 368 NLRB No. 66 (Sept. 10, 2019) the Republican majority jettisoned that longstanding rule in favor of a “contract coverage” analysis that asked only whether the labor agreement could be read to allow the unilateral change, usually on the basis of a broad management rights provision, even if not clear and unmistakable. When ADT unilaterally went to a 6-day schedule to meet emergency demand, the Union filed unfair labor practice charges with the Board which, applying *MV Transp.*, found no violation of the National Labor Relations Act (“NLRA”) duty to bargain. The Union appealed.

Circuit Judge Walker, joined by Judges Leval and Chin, upheld the “contract coverage” standard as “thorough and carefully reasoned,” but vacated and remanded the Board’s application in *ADT* back to the Board. Acceptance of the *MV Transp.*’s contract coverage rule was expected under the Court’s general practice of deference to the Board. Indeed, the Union had argued the case under *MV Transp.*, not prior laws. However, the Second Circuit went further, explaining that while the courts defer to the Board on interpretation of the NLRA, the courts remain the primary authority on interpreting contract. In that regard, Judge Walker agreed with *MV Transp.* Board’s finding that the “clear and unmistakable waiver” rule “tended to undermine contractual stability” by limiting

employers in rights they might otherwise have under the labor agreement. Conversely, Judge Walker rejected the Trump Board's application of *MV Transp.* because the Republican Board had read the general scheduling and broad management rights provisions to permit unilateral employer action, but the Court deemed the specific procedures on scheduling to require bargaining before ADT could act. Accordingly, the Court of Appeals vacated ADT's win and remanded the case to the Board for further treatment consistent with the Court's opinion.

As a result of *ADT*, parties negotiating their labor agreements should therefore try to include helpful language. In the meantime, the incoming Biden Board will likely seek to overturn *MV Transp.* and restore the prior rule, regardless of the opinion of the appellate courts.

### **THIRD CIRCUIT REVIVES CLASS ACTION INTERPRETING USERRA IN FAVOR OF SERVICEMEMBERS**

Earlier this month, the U.S. Court of Appeal for the Third Circuit ("Third Circuit") overturned a decision by the U.S. District Court for the Eastern District of Pennsylvania ("EDPA") involving a class action complaint filed by a plaintiff, a Petty Officer in the United States Navy and Naval Reserve, against his employer, Federal Express, alleging that he was not receiving the same benefits as other employees on leave. The EDPA dismissed the plaintiff's action, but on appeal, the Third Circuit reversed and remanded. See *Travers v. Federal Express Corp.*, Case No.: 20-2073 (3<sup>rd</sup> Cir. August 10, 2021)

The plaintiff alleged that the defendant improperly applied the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"), when the defendant refused to provide the plaintiff with paid leave for short-term periods of time when he was on orders with the Navy, as per his reservist commission. According to § 4316(b)(1) of USERRA, an employee who is absent from his/her job due to military service is "entitled to such other rights and benefits not determined by seniority as are generally provided by the employer of the person to employees having similar seniority, status, and pay who are on furlough or leave of absence." According to § 4303(2) of USERRA, "rights and benefits" are defined as "the terms, conditions, or privileges of employment, including any advantage, profit, privilege, gain, status, account, or interest (including wages or salary for work performed) that accrues."

The gravamen of the plaintiff's complaint was that the defendant provided paid, short-term leave to employees who were absent from work due to other reasons, such as jury duty, sick leave, and pregnancy, but refused to provide the plaintiff similar paid leave for his standard, routine reservist obligations. The EDPA determined that paid time off did not fall within the scope contemplated in §§ 4303 and 4316 of USERRA. However, the Third Circuit determined that the lower court's interpretation of these statutory provisions was inaccurate and failed to fulfill the true purpose behind this law. According

to the Third Circuit: “Best explained, USERRA does not allow employers to treat servicemembers differently by paying employees for some kinds of leave while exempting military service.” This Court also stated that the language set forth in § 4316(b)(1) should not be read as an exclusive list of benefits for military members when they are absent from work due to service-related obligations, Rather, “the ordinary understanding of the words in the list easily reaches a wide range of benefits including payment during [military] leave.”

The Third Circuit’s decision is the second recent instance the federal appellate courts have upheld an expansive definition of the benefits guaranteed under USERRA. A decision out of the U.S. Court of Appeals for the Seventh Circuit in *White v. United Airlines, Inc.*, 987 F.3d 616 (7<sup>th</sup> Cir. 2021) held that short-term military leave is covered under USERRA.

### **AFL-CIO ELECTS LIZ SHULER PRESIDENT – SHATTERING LABOR’S GLASS CEILING**

On August 20, 2021, the AFL-CIO’s executive council voted to elect Liz Shuler to serve as president following the death of Richard Trumka earlier this month.

Shuler started her career in organized labor after attending the University of Oregon. While in college, Shuler spent her summers working as a non-union clerical worker at Portland General Electric (“PG&E”) while her father, an electrical lineman at PG&E was an active member of the International Brotherhood of Electrical Workers (“IBEW”) Local 125. Upon graduation, Shuler accepted a job as an organizer for the IBEW and successfully organized the clerical workers at PG&E.

In 1997, Shuler became a lobbyist for the IBEW representing the union in the Oregon legislature and worked to stop the deregulation of the state’s electricity market. Building upon her success in Oregon, Schuler led the AFL-CIO’s successful efforts to defeat a California ballot proposal to deny dues check-off to the state’s public employees. Her achievement in California earned Shuler a promotion to work in IBEW’s Political/Legislative Affairs Department in Washington, DC.

In 2004, the IBEW appointed Shuler the executive assistant to IBEW President Edwin Hill, making her the highest-ranking woman in the history of the IBEW. In 2009, then AFL-CIO Secretary-Treasurer Richard Trumka selected Shuler to be his running mate as Secretary-Treasurer while seeking the AFL-CIO presidency. Since then Shuler served as AFL-CIO Secretary-Treasurer.

Shuler said that she will focus her presidency on organizing workers under the age of 35 to join labor unions to help move the labor movement into the future and fix the AFL-CIO’s finances. Shuler assumes the role of AFL-CIO president while organized labor is

working with President Joe Biden's administration to pass a national infrastructure package that promises to create millions of jobs across the country.

Fred Redmond, international vice president of the United Steelworkers was elected to serve as the secretary-treasurer of the AFL-CIO. Redmond is the first African American to hold the AFL-CIO's second-ranking office.

We wish President Shuler and Secretary-Treasurer Redmond the best of luck in their new positions.

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