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Illinois Plaintiffs' Attorneys Find New Tool in Old Genetic Privacy Law

BY FRANCIS X. NOLAN, IV & IAN N. JONES

Although the Illinois Genetic Information Privacy Act (GIPA), 410 ILCS 513/1, et seq. was largely ignored by plaintiffs' attorneys until this year, its substantial statutory penalties and recent case law make it an enticing option for plaintiffs' class action lawyers. GIPA is no longer flying under the radar, with nearly 50 GIPA class actions filed since early 2023. Insurance companies and Illinois employers of all types should pay close attention to GIPA's requirements to avoid exposure to significant litigation risk.

Background on GIPA

GIPA was originally enacted in 1998 to encourage voluntary and confidential

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Illinois Employment Update 2024

BY PATRICK F. MORAN, SUSAN J. BEST, & BRIAN ROTH

Illinois employers should start getting ready for changes coming in 2024. Here are some of the highlights:

- PAID LEAVE FOR ALL WORKERS

The new Illinois law provides eligible employees with up to 40 hours of paid leave per year to be used for any reason. This new law applies to all private employers and includes recordkeeping and notice requirements. The new paid leave provisions prohibit requiring employees to submit documentation or other proof to support a request for leave.

- CHICAGO'S PAID LEAVE AND SICK LEAVE ORDINANCES

The City of Chicago passed (on November 9, 2023) its own paid leave ordinance by amending its exiting paid sick leave ordinance. Employers in Chicago will earn both paid leave and paid sick leave of up to 40 hours each, or 80 total. While the state paid leave law does not require payment of accrued leave at separation, the Chicago ordinance might, typically

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genetic testing by limiting the involuntary disclosure of genetic information and prohibiting discriminatory use of genetic test results. The statute protects "genetic information," which includes an individual's genetic tests, an individual's family members' genetic tests, the manifestation of a disease or disorder in an individual or his family members, and any request for or receipt of genetic services. It prohibits anyone from disclosing the results of genetic tests and the identity of persons tested, except under limited circumstances. The statute also places additional restrictions on employers and insurers.

Restrictions on Employers

Employers cannot request, require, or purchase genetic testing as a condition of employment. GIPA also provides workplace protections similar to Title VII. Employers cannot use genetic information as a basis for changing the terms of employment, terminating employment, or adversely affecting the employee's status. And employers cannot retaliate against an employee for bringing or participating in a GIPA claim. Employers and prospective employers are also prohibited from offering any pay or benefit in exchange for a person taking a genetic test. Even workplace wellness programs benefiting employees must meet certain requirements for use of genetic testing to be permissible.

Restrictions on Insurers

GIPA also prohibits insurers from using genetic information in certain ways. Most significantly, it prohibits insurers from using or disclosing genetic information for "underwriting purposes." "Underwriting purposes" include determining eligibility for benefits, changing a deductible, computing premiums or contributions, applying pre-existing condition exclusions, and other activities related to the creation, renewal, or replacement of health benefits or insurance contracts. In connection with an accident or health insurance policy, GIPA prohibits insurers from seeking genetic information or using such information for a nontherapeutic purpose unless the information is voluntarily submitted and favorable to the individual.

Statutory Penalties and Class Action Filings

Employers, insurers, and others who violate GIPA face steep statutory penalties. GIPA imposes a statutory penalty of $2,500 on each negligent violation and a statutory penalty of $15,000 on each intentional or reckless violation. In addition, violators are on the hook for attorneys' fees. GIPA provides a private right of action to "any person aggrieved by a violation."

For the first two decades after GIPA was enacted, only a few GIPA cases were filed. The Illinois Biometic Privacy Act (BIPA) was a more popular tool for plaintiffs' firms, with thousands of BIPA cases being filed since 2015. BIPA was enacted in 2008, and sat relatively dormant for years, similar to GIPA. BIPA provides a private cause of action, and in *Rosenbach v. Six Flags Entertainment Corp.*, 2019 IL 123186, the Illinois Supreme Court held that plaintiffs need not have suffered actual harm to bring a claim under BIPA. Instead, a mere procedural violation is sufficient to bring a claim. This development allowed for expansive BIPA class actions.

A recent case in the Southern District of Illinois, *Bridges v. Blackstone Group, Inc.*, 2022 WL 2643968 (S.D. Ill. July 8, 2022), may have spurred the wave of GIPA cases by extending Rosenbach's reasoning to GIPA. Like BIPA, GIPA provides a right of action to "any person aggrieved by a violation" of the Act "against an offending party." Because BIPA and GIPA have identical enforcement provisions, the Bridges court found it appropriate to apply Rosenbach's broad reading of "aggrieved person" to GIPA. So under GIPA, the court concluded, a plaintiff does not need to show actual injury; a procedural violation is sufficient.

Whether Illinois state courts agree with this interpretation of GIPA remains to be seen. Since *Bridges* was decided in July, plaintiffs have filed more than 40 GIPA class

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actions.

Both employers and insurers have been targets. For example, dozens of complaints have been filed against employers that allegedly solicited, requested or required a pre-employment physical. These physicals allegedly included inquiries into plaintiffs' family medical histories and genetic predisposition to certain diseases. The plaintiffs allege these inquiries violated GIPA's requirement that employers not condition employment on a prospective employee submitting to genetic testing.

Plaintiffs in these cases typically seek to represent proposed classes of people who applied for employment with, or were employed by, a company that asked for applicants' genetic information within the past five years. These plaintiffs are typically seeking $15,000 for each violation. For large employers with major operations in Illinois, the potential exposure is massive.

A few large insurers have been named in putative class action complaints alleging the insurers improperly used genetic information as a part of their underwriting process. In these cases, the plaintiffs allege that they applied for life insurance policies, and, as a condition for coverage, were required to undergo a physical examination. These examinations allegedly covered topics like family medical histories and genetic predisposition to certain diseases. The plaintiffs allege this information was then used to determine their eligibility and premiums for life insurance coverage. The plaintiffs seek to represent classes consisting of all persons who applied for insurance coverage in Illinois from the insurer defendants and were requested to submit to a family medical history or other genetic test. They seek $15,000 in damages for each violation.

Conclusion

Certain insurers may be able to seek dismissal under statutory language that does not apply to other entities. But both insurers and employers should be preparing for a wave of GIPA litigation if they request family medical history as part of their insurance or employment application process. If BIPA litigation is any indication, the 50 GIPA cases filed so far this year is just the beginning of a trend. Bridges suggests GIPA's right of action may be as broad as BIPA's. And the maximum statutory damage under GIPA is triple the maximum under BIPA.

With the Illinois legislature considering a bill that would further expand GIPA, companies need to get up to speed on GIPA immediately. Plaintiffs' attorneys already have.■

Illinois Employment Update 2024

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depending on the employer's size.

- VICTIM CRIME BEREAVEMENT

The Illinois Victims' Economic Security and Safety Act (VESSA) already provides eligible employees up to 12 weeks of unpaid, job-protected leave per year. This year the scope of leave reasons has expanded to include the following for individuals whose family or household member(s) are killed in a crime of violence: (1) to attend a funeral or wake; (2) to make arrangements for a funeral or wake, and (3) to grieve.

- CHILD EXTENDED BEREAVEMENT LEAVE

Beginning January 1, 2024, companies employing 250 or more full-time workers must offer up to 12 weeks of unpaid leave to employees who have lost a child due to suicide or homicide. Employers with 50-249 full-time employees must offer up to 6 weeks of leave.

- DAY AND TEMPORARY STAFFING CHANGES

Already in place during 2023, the amended law imposes new obligations on both temporary labor service agencies and third-party clients to disclose and train temporary workers regarding safety hazards at the worksite. There is pending legislation that, effective April 1, 2024, requires temporary labor service agencies to pay temporary workers who are assigned to a third-party client for more than 90 days wages and benefits (or the cash value of such benefits) equal to the lowest-paid comparable direct-hire employee at the third-party client. Third-party clients must share with temporary labor service agencies information of direct-hire employees to accomplish the equal pay requirement.

- TRANSPORTATION BENEFITS

Beginning January 1, employers with 50 or more "covered employees" (working at least 35 hours per week) in Cook County and surrounding townships must furnish pre-tax commuter benefits to employees so that they may purchase a public transit pass with pre-tax dollars. Employers must offer covered employees the pre-tax commuter benefits on their first full pay period after the employee's 120th day of employment.

- FREELANCE WORKERS

Beginning July 1, 2024, freelance workers (independent contractors who contract to provide products/services worth at least $500) must be paid all compensation due under a contract within 30 days of the worker completing their contracted services (or such earlier date as identified in the parties' contract). The new law prohibits conditioning timely payment on the freelance worker's acceptance of less compensation once the freelance worker begins performing the contracted services.

- LIABILITY TO EMPLOYERS UNDER THE GENDER VIOLENCE ACT

The Illinois Gender Violence Act (GVA) has long supplied victims of gender-related violence with a channel to recover damages and injunctive and other relief from alleged perpetrators. Beginning January 1, 2024, employees will also be able to sue employers whose employees or agents commit gender-related violence in the workplace, so long as the violence arises "out of and in the court of employment with the employer."

- ELECTRONIC DISTRIBUTION OF EMPLOYEE NOTICES

Employers have long been required to post employee notices and summaries under the Illinois Minimum Wage Law, Illinois Equal Pay Act, Illinois Wage Payment and Collection Act, and Illinois Child Labor

Law. However, for employees who do not regularly report to a physical worksite, employers must now distribute the notices via email or by posting the materials to the employer's website or internet site if regularly used.

- SALARY DISCLOSURE POSTING REQUIREMENTS

Finally, coming in 2025, employers must disclose pay scale, benefits, and other compensation information in job postings for positions that either (i) will be performed partly or wholly in Illinois or (ii) report to a supervisor, office, or worksite in Illinois. In addition, employers must disclose promotional opportunities for certain positions to current employees within 14 days of externally posting the opportunity.■

Dueling Challenges to NLRB's New Joint Employer Rule Succeed in Extending Effective Date of Rule

BY EMILY HARBISON & HEATHER RAUN

On October 26, 2023, the National Labor Relations Board issued a final rule that dramatically lowered the standard for companies to qualify as joint employers. You can read more about the rule here. In short, the new rule provides that even reserved, unexercised, or indirect control, such as through an intermediary, over one or more of the rule's seven enumerated terms or conditions of employment is sufficient to establish joint employment. There is no doubt that implementation of the new rule will drastically expand when companies will be considered joint employers and create additional costs and obstacles for employers.

The rule was originally set to take effect on December 26, 2023, but the Board recently extended the effective date to February 26, 2024 in response to legal challenges. Employers should prepare to comply with the new rule in anticipation of February 26. However, the pending legal challenges could alter the rule's application. The two current legal challenges have been brought by:

1. Service Employees International Union

The first challenge stems from an unlikely source, the Service Employees International Union (SEIU).

On November 8, 2023, the SEIU filed a petition for review in the U.S. Circuit Court of Appeals for the District of Columbia Circuit. The SEIU's petition aims to strengthen the new rule.

2. U.S. Chamber of Commerce and Coalition of Business Groups

The second challenge is more predictable. On November 9, 2023, a coalition of business groups led by the U.S. Chamber of Commerce filed a lawsuit in the U.S. District Court for the Eastern District of Texas.

The complaint alleges that the new rule is unlawful and should be struck down by the courts for being arbitrary and capricious. Specifically, the coalition argues that implementing the new rule will negatively affect businesses and, thus, the economy. The new rule will work to the detriment of the franchise business model and contractor relationships because it will "disrupt long-established operational methods" and "many [employers] will need to change or eliminated their quality-control practices—risking the diminishment of their image and brand reputation." In other words, the rule change could cost employers "billions of dollars in liability and costs" as they must "reevaluate virtually every contractual relationship" to determine whether a joint employer relationship exists. The business groups forming the coalition have over 300,000 members.

The outcome of the challenges is unknown and uncertain, but it could impact the actions companies need to consider taking in response to the rule. Therefore, employers should prepare to comply with the new rule in February while also keeping an eye on the status of both pending challenges.■

‘Every One of Us Can Make a Difference!’

BY MICHAEL S. JORDAN

The Labor and Employment Law Section of the ISBA consists of lawyers who regularly appear not only in state and federal courts, but before various administrative agencies of local and state agencies as well as federal agencies dealing with issues safeguarding the rights of workers and employers and citizens generally. As a service to their respective clients and to the public at large, these same lawyers and others in the section council monitor the agencies to ensure those administrative agencies interact with people in such a way that will best create fairness and efficiency in the fulfillment of their missions. Individually and jointly, the many agencies play a major role in the lives and welfare of all. In addition, on more than one occasion, the workings of any one agency may play a major role in molding history. I will tell of one such instance.

I look back in my own career to a time in 1968 when I served the Chicago Commission on Human Relations as counsel. A complaint was brought to the Commission under its authority to investigate, prevent, and sanction discrimination in housing. The particular complaint alleged discrimination based upon religion.

While most of the complaints at the Chicago Commission on Human Relations, (CCHR), like those at most agencies, are brought by unrepresented, unsophisticated, poor people, the agencies are available for all, including the rich and powerful. Sure enough, in 1968, the president of the Exchange National Bank in Chicago, represented by a well-respected law firm, turned to the CCHR for help when the bank president and his wife believed their offer to buy a co-operative apartment at 209 East Lake Shore Drive, Chicago was not approved because they were Jewish. They claimed that there was a 10 percent quota system in place in that Gold Coast building. The board members for the building relied upon one member of the board to determine who would be allowed into the building under their quota and who would not be allowed when they suspected the applicant buyer was Jewish.

The complainants, William Samuel Sax and his wife, believed their offer and the owner of the unit’s acceptance were rejected by the co-op board only because of the Sax’s religion. Sax wanted to be sure, however, that no other factor played a role in his rejection such as the operation of his bank. Sax and his private lawyers told me they did not want to proceed unless discovery first took place showing the sole basis for his rejection was his religion. After his complaint was investigated by the staff of the CCHR and the members of the Commission appointed by the mayor of Chicago voted to accept the complaint based upon that investigation, I began a process of deposing each member of the co-op board. Each deposed member of the board admitted that there was a 10 percent quota administered by a member of their board designed to limit the number of Jewish people living in the building. No other reason or reasons were given as the basis for rejecting the Sax family.

The day after I took depositions of several co-op board members, in the presence of Sax’s lawyers, the admissions were reported to Sax who advised Senator Charles Percy, who, in turn, notified President Richard Nixon that his then pending nominee for an opening on the Seventh Circuit Court of Appeals was no longer supported by the senior senator from Illinois. The nominee was a board member who admitted his role in the scheme. Nixon only knew Percy withdrew his support and probably was not told the details of the nominee being party to an antisemitic scheme. The co-op board member, the very next day, had a press conference asking that his nomination be withdrawn so he could spend more time with his family.

There still remained a federal judicial vacancy on the 7th Circuit Court of Appeals. John Paul Stevens had just finished his investigation of possible corruption on the Illinois Supreme Court involving the dismissal of criminal charges against the state revenue director, resulting in the resignations of two supreme court justices. Stevens’ well publicized investigation had been commissioned by the Illinois State Bar Association and the Chicago Bar Association. Stevens was now on everyone’s radar. John Paul Stevens was shortly thereafter nominated and confirmed for the position on the 7th Circuit. He served well in that position for about five years creating a sterling record. When the next opening presented itself on the U.S. Supreme Court, President Gerald Ford appointed Stevens to that opening giving our nation one of its finest and, fortunately, one of the nation’s longest serving justices. Many believe that without the appointment to the 7th Circuit judgeship, Stevens would not have had the opportunity to be considered for the highest court.

What happens at even a local administrative agency, like the Chicago Commission on Human Relations, can greatly change the course of history. In the book I authored: *Becoming A Judge: An Inside Story***,** more of the details of that case and the names of people involved can be learned. Each participant contributed to change the course of history.

One of the several themes of my book is that every one of us can be a force for change, for the good or for the bad; and all of us have to work to protect the guardrails of our democracy. I urge you to read the book. You will see how your own work is so very important not just for your clients, but for the greater society.■

NLRB Announces Most Expansive Definition of Joint Employment Yet, With Potential Significant Implications for Franchisors, Staffing Agencies, and More

BY CAROLINE BURNETT, JT CHARRON, WILLIAM F. DUGAN, KIMBERLY FRANKO, AUTUMN SHARP, & WILL WOODS

On October 25, 2023 the National Labor Relations Board issued a final joint employer rule (accompanied by a fact sheet) making it easier for multiple companies to be deemed "joint employers" under the law. This legal classification can have profound consequence by making independent entities now liable for labor law violations as well as obligations to negotiate with unions.

The New Standard Casts a Wider Net for "Joint-Employer" Status

Under the new rule, an entity may be considered a joint employer of a group of employees if the entity shares or codetermines one or more of the employees' "essential terms and conditions of employment." The Board defines the essential terms and conditions of employment as:

1. wages, benefits, and other compensation;
2. hours of work and scheduling;
3. the assignment of duties to be performed;
4. the supervision of the performance of duties;
5. work rules and directions governing the manner, means, and methods of the performance of duties and the grounds for discipline;
6. the tenure of employment, including hiring and discharge; and
7. working conditions related to the safety and health of employees.

How the New Rule Dramatically Shifts Away From the 2020 Rule

In issuing the final rule, the NLRB rescinded the prior 2020 joint employer rule (a remnant of the Trump-era Board), which provided that a business is a joint employer only if it both possesses and exercises substantial direct and immediate control over one or more essential terms and conditions of employment-with "substantial" meaning control that is not exercised on a "sporadic, isolated, or de minimis basis." The 2020 rule's higher threshold meant a lower likelihood that businesses would be considered joint employers. The new rule's impact on employers could be wide-ranging, and particularly difficult for non-unionized employers who are not used to navigating typical union activity such as being required to show up at the bargaining table, handling unfair labor practice charges, or dealing with picketing by a vendors' employees (which would have previously been considered an illegal secondary boycott).

No Direct (or Even Exercised) Control Required

The new rule rejects the previous rule's focus on "direct and immediate control." Instead, now, indirect or reserved control is sufficient to establish joint employer status. Thus, if a company has contractual authority over certain employment terms but never acts on that authority, that may be enough to establish a joint employer relationship. The same goes for a company that exercises authority over another company's workers through a "go-between" company or intermediary, or a company requiring a vendors' employees to follow certain health and safety rules while on-premises. In these instances, liability under the National Labor Relations Act, including the requirement to negotiate with a union, could ensue.

Implications for the Modern Workforce

In recent years, employers are increasingly utilizing a number of different types of engagement options, including using staffing agencies, employee leasing companies and engaging third-party suppliers to provide on-site or off-site workers. Employers who engage in alternative staffing arrangements and use third-party suppliers should review these relationships with counsel to evaluate whether the arrangement reserves authority to control or indirectly control at least one (and probably more than one) essential employment term such that modifications or changes should be considered.

Franchisors Beware

Franchisors will need to be extremely careful under the new rule, which will make it easier for them to be considered joint employers. Board Member Marvin Kaplan (the lone member of the Board dissenting on the new rule) highlighted that the rule's "vast reach" creates "significant risk" that franchisors can be held liable as joint employers of their franchisees' employees.

Concerns (voiced by various parties during the rule's comment period) include that:

- Typical franchisees have unrestricted discretion to hire, assign work, set wages, benefits and schedules, and engage in day-to-day supervision, but franchise systems often require franchisees to follow strict brand standards. Under the new rule, these forms of control utilized to protect brands (or trade or service marks) could be considered material to the

employment relationship, increasing the likelihood that a franchisor will be deemed a joint employer. (That said, the Board majority stated that many such forms of control will "typically not be indicative of a common-law employment relationship.")

- Franchisors' monitoring of franchisees' cleanliness and hygiene protocols to protect brand standards could make franchisors joint employers of their franchisees' employees under the rule, under either (or both) the "work rules and directions governing the manner, means, or methods of work performance" and/or "working conditions related to the safety and health of employees" prongs.

There are also concerns about how franchisors may respond:

- Some may exert increased control over their franchisees, undermining (or worse) the independence of franchisees (which is viewed as a fundamental benefit of the franchise model by many franchisees) and effectively turning them into "glorified managers."
- Some may drive distance between themselves and their franchisees, resulting in less guidance to help franchisees develop the skills necessary to manage successful businesses, and may curtail the provision to franchisees of helpful materials such as training and recruitment materials, or general educational materials on new regulations.

How Does This Relate to a U.S. Department of Labor Joint Employer Rule?

The NLRB's new rule does not impact joint-employer tests applied under other employment laws, such as a Fair Labor Standards Act (FLSA) joint employer rule that may be issued by the US Department of Labor. Early in the Biden Administration, the DOL rescinded a Trump-era FLSA joint employer rule which considered four factors-the ability to hire / terminate, supervise and control schedules, maintain employment records, and set pay rates-and required companies to actually exercise control over one of the factors to be a joint employer. Though the Biden Administration said it would return to a "totality of the circumstances" economic realities approach for a new FLSA joint employer rule, at an April 2023 hearing then Labor Secretary nominee Julie Su reportedly confirmed that an FLSA joint employer rule was not on the DOL's regulatory agenda. Currently, whether an employer is a joint employer under the FLSA is determined by a multifactor economic realities test that varies between judicial circuits.

Next Steps for U.S. Employers and Franchisors

The new rule will be applied prospectively to cases filed after its December 26, 2023 effective date. We expect the rule to be challenged in litigation given the critical nature of the joint employer question. We will continue to monitor and report updates here.

On the legislative front, US Senators Bill Cassidy (R-LA) and Joe Manchin (D-WV) have already announced they will introduce a Congressional Review Act resolution to overturn the joint employer rule. This bipartisan measure needs 51 votes in the Senate to pass.

In the meantime, employers should review their business practices and contracts to ensure they comply with the final rule, and train managers on the rule to better avoid inadvertently performing tasks that could give rise to joint employer allegations.

We recommend partnering with counsel to conduct a joint employer risk audit, a detailed examination of business operations and the company's contractual arrangements with staffing agencies, suppliers and others to allow employers to assess and protect against liability before facing a claim.

NLRB and OSHA Announce Partnership Over Worker Safety Protections

BY HEATHER L. MCDOUGALL, KAISER H. CHOWDHRY, DAVID R. BRODERDORF, JOHN F. RING, MICHAEL K. TAYLOR, & MEGAN L. LIPSKY

The National Labor Relations Board (NLRB) and Occupational Safety and Health Administration (OSHA) executed a Memorandum of Understanding (MOU) on October 31 regarding a partnership designed to strengthen their efforts to protect workers who either speak out about health and safety working conditions or engage in potential protected activity that triggers anti-discrimination and/or whistleblower protection under both federal labor law and health and safety laws.

The MOU announced that the two agencies will work together to enhance information sharing and referrals, training, and outreach. The MOU illustrates the Biden administration's "whole of government" approach—involving executive orders, memoranda of understanding, interagency task forces, initiatives, agency rulemaking, federal funding, and a concerted enforcement strategy to extend federal protections as broadly as possible and promote employee and union organizing efforts. Now that federal labor and workplace safety officials have entered a partnership, employers face even more scrutiny from multiple agencies and should prepare for increased labor and safety enforcement efforts.

Under the five-year partnership, the information sharing will support each agency's enforcement mandates. This information sharing may include complaint referrals and information in complaint or investigative files relating to alleged violations of the NLRA and the laws enforced by OSHA. For example, if, during an investigation, OSHA encounters potential victims of unfair labor practices who have not filed a charge with the NLRB, OSHA will provide them or their collective bargaining representative with the NLRB's phone number and website.

More directly, the MOU states that if an employee who is the potential victim of an unfair labor practice files an untimely Section 11 (c) complaint with OSHA (i.e., beyond the 30-day limitations period), OSHA will expressly advise the complainant that they may file a charge with the NLRB up to six months after the protected activity, and recommend that the complainant contact the NLRB "as soon as possible" to discuss their rights, while again providing the NLRB's phone number and website to the complainant.

Likewise, the NLRB will share with OSHA information related to workers currently or likely exposed to health or safety hazards or related to suspected violations of the laws OSHA enforces. The MOU also provides that the NLRB may encourage the affected individuals, their representatives, or labor organizations to "promptly" contact OSHA via phone or by filing an online safety and health or whistleblower complaint via OSHA's website. Employers should assume the two agencies will cooperate with each other moving forward and freely share information.

In addition to sharing information, the MOU explains that "in appropriate cases and to the extent allowable under law," the agencies may decide to conduct coordinated investigation and inspections if doing so would facilitate enforcement action. In matters where both agencies find overlapping statutory violations, the agencies will confer to determine what enforcement actions are appropriate for each agency to pursue. Such coordination may not only increase enforcement activity but will, in practice, provide greater leverage to unions attempting to organize employees or engage in collective bargaining by citing to safety-related issues, safety-related complaints, and coordinated government action to investigate and/or prosecute the targeted employers.

The MOU also establishes an agreement to engage in reciprocal training and education whereby each agency will provide ongoing training to appropriate personnel from the other agency. This training between the NLRB and OSHA will focus on specific, limited topics. Appropriate NLRB personnel, likely Board agents and field examiners, will be trained on OSHA standards, recordkeeping and reporting regulations, the general duty clause, and whistleblower protections.

Appropriate OSHA personnel, such as compliance safety and health officers and whistleblower investigators—including those in states that operate their own occupational safety and health programs under an OSHA-approved state plan (e.g., California, Michigan, and Virginia) will be trained on which activities constitute concerted activity under Section 7 of the NLRA, what constitutes an unfair labor practice under Section 8(a) of the NLRA, and on the basic procedures for investigating and adjudicating unfair labor practice charges.

Finally, the MOU states that, when appropriate, OSHA and the NLRB shall jointly engage in various public-facing outreach efforts, such as attendance at conferences and events, posts on social media, and co-developing joint policy statements and other guidance materials. Indeed, the agencies released a joint resource, Building Safe & Healthy Workplaces by Promoting Worker Voice, which provides federally endorsed tools for employers and employees on efforts to create and maintain safe workplaces.

Key Takeaways

Employers faced with OSHA-related investigations should involve labor law counsel when submitting any responses and/or engaging with agency officials on employee complaints and/or disciplinary situations that easily could trigger unfair labor practice charges under the NLRA.

Statements or admissions made in one forum will impact the other. With the NLRB generally deeming all forms of employee advocacy at work, even a single employee raising a purported group safety concern or issue, as legitimate protected, concerted activity, employers should anticipate that the interagency dealings will result in dual-tracked investigation and/or litigation over the same conduct.

This MOU also could take on much broader implications if OSHA finalizes its proposed rule, Worker Walkaround Representative Designation Process, where OSHA seeks to amend 29 CFR § 1903.8, Representatives of employers and employees ("walkaround rule"). The proposed walkaround seeks to empower OSHA compliance safety and health officers to designate union organizers, community activists, or any other third-party representatives to accompany OSHA on an inspection of a workplace simply on the basis of an employee request.

Evaluating the strength of safety and health programs and identifying areas of proactive enhancement will offer protections from the coordinated enforcement efforts of OSHA and the NLRB, and employers will benefit from knowing their rights during OSHA inspections and investigations.■

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The NLRB Ends August 2023 With a Bang

BY RICHARD A. RUSSO

"***August slipped away into a moment in time, 'cause it was never mine.***" - Taylor Swift, "August" (2020).

After the issuance of several pro-union/employee decisions by the National Labor Relations Board ("NLRB") in Washington D.C. on August 25 and 26, 2023, employers may be sharing similar sentiments of sorrow and mourning. Unfortunately for employers, these cases are just a few of many pro-union/employee decisions issued by the President Biden NLRB in the last couple of years.

The groundwork for the myriad of pro-union/employee decisions was laid by NLRB General Counsel Jennifer Abruzzo in a memorandum issued on August 12, 2021 (GC 21-04). In GC 21-04, Abruzzo provided a list of cases that she wanted to be addressed by the NLRB. This included a number of cases issued by the President Trump NLRB between 2017 and 2020 that Abruzzo was looking to have overturned by the Biden NLRB. Amongst the list of cases on Abruzzo's wish list are a couple of the cases discussed below.

Cemex Construction – New Standard for Union Organizing

On August 25, 2023, the NLRB, in *Cemex Construction Materials Pacific, LLC*, 372 NLRB No. 130 (2023), issued a decision that drastically changes the playing field for employers faced with a union-organizing campaign and essentially authorizes card check for unionization of private sector employers. In *Cemex*, the NLRB created a new standard for when an employer is presented by the union with a petition and/or union authorization cards signed by a majority of bargaining unit employees and a demand by the union to recognize the union as the employees' bargaining representative.

In doing so, the NLRB overturned *Linden Lumber*, 190 NLRB 718 (1971) and over 50 years of precedent. Under *Linden Lumber* and its progeny, if an employer were presented evidence by the union of the attainment of majority status by the union, the employer was lawfully free to refuse to accept such evidence and require the union to file a petition with and obtain an election through the NLRB as a precondition to the employer recognizing and bargaining with the union.

Now, under the same circumstances, pursuant to the *Cemex* decision, an employer is required to recognize and bargain with the union, unless the employer promptly files a RM petition with the NLRB to test the union's majority status or the appropriateness of the bargaining unit through the NLRB election process. If the employer fails to promptly file the petition (within 14 days) or the employer engages in unfair labor practices that would require setting aside the election, then the employer is required to recognize and bargain with the union. If the employer fails to do so, then it will need to defend its actions and test the union's majority status in a subsequently filed unfair labor practice case.

Wendt Corp & Tecnocap – Revised Standard for Employer Bargaining Before Changing Terms and Conditions

On August 26, 2023, in *Wendt Corp.*, 372 NLRB No. 132 (2023) and *Tecnocap LLC*, 372 NLRB No. 136 (2023), the NLRB issued two decisions to overturn the Trump NLRB's decision in *Raytheon Network Centric Systems*, 365 NLRB No. 161 (2017). In doing so, the NLRB further restricted employers' unilateral power to change terms and conditions during a contract hiatus based on past practice.

Under *Raytheon*, an employer could lawfully make a unilateral change in terms and conditions of employment informed by discretion, so long as the change was similar in kind and degree to changes made in connection with the employer's past practice of such changes. The NLRB, in *Wendt*, overruled *Raytheon* and held that unilateral changes are permitted only when the employer has shown the conduct is: (1) consistent with a longstanding past practice and (2) is not informed by a large measure of discretion. The NLRB described such unilateral changes as automatic in nature rather than discretionary and the showing of regularity and frequency sufficient to establish a past practice is an annually or similarly recurring event over a significant period of years.

Under *Raytheon*, an employer could also lawfully establish a past practice of unilateral changes developed under a collectively bargained management rights or other such clause that was part of the expired collective bargaining agreement. The NLRB, in *Tecnocap*, overruled *Raytheon* and held that a past practice developed under a management-rights clause authorizing unilateral employer action can no longer constitute a term and condition of employment that permits continued unilateral conduct following expiration of the collective bargaining agreement containing the clause.

Miller Plastic Products – Expanded Standard for Concerted, Protected Activity

On August 25, 2023, in *Miller Plastic Products*, 372 NLRB No. 134 (2023), the NLRB Board reversed another Trump NLRB decision, *Alstate Maintenance, LLC, 367 NLRB No. 68 (2019)*, finding that the Board in in *Alstate Maintenance* unduly restricted what constitutes concerted activity. The NLRB, in *Miller Plastic Products*, imposed a more expansive legal test for determining what actions are considered protected concerted activities.

Under the Trump NLRB decision in *Alstate*, to constitute protected concerted activity, an employee's statement to management had to either: (1) bring a truly group complaint regarding a workplace issue to management's attention, or (2) the totality of circumstances must support a reasonable inference that in making the statement, the employee was seeking to initiate, induce or prepare for group action. The Board provided a list of five factors that would support such an inference: (1)

the statement was made in an employee meeting called by the employer to announce a decision affecting wages, hours, or some other term or condition of employment; (2) the decision affects multiple employees attending the meeting; (3) the employee who speaks up in response to the announcement did so to protest or complain about the decision, not merely … to ask questions about how the decision has been or will be implemented; (4) the speaker protested or complained about the decision's effect on the work force generally or some portion of the work force, not solely about its effect on the speaker himself; and (5) the meeting presented the first opportunity employees had to address the decision, so that the speaker had no opportunity to discuss it with other employees beforehand.

In *Miller Plastic Products*, the NLRB rejected use of the five-factor approach for the totality of circumstances test and held that the test is instead simply fact specific. In doing so, the NLRB made it clear that activity that at inception involves only a speaker and listener can be concerted "for such activity is an indispensable preliminary step to employee self-organization" and for conduct to qualify as concerted activity, "it must appear at the very least it was engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of the employees."

Conclusion

For the remainder of President Biden's current term, the NLRB will continue to hear and rule on remaining cases on General Counsel Abruzzo's wish list from GC 21-04. In doing so, it is fully expected that the NLRB will issue a number of additional pro-union/employee decisions and overturn perceived pro-employer Trump Board decisions.■

ILLINOIS STATE BAR ASSOCIATION

2023 Joint Midyear Meeting

ILLINOIS JUDGES ASSOCIATION

DECEMBER 7-8, 2023
JW Marriott Chicago

Highlights:

Thursday

✳ MEMBER APPRECIATION RECEPTION

Friday

✳ JOINT LUNCHEON

SPEAKER: Justice Ellis: First District Appellate Court Justice, author, and the House Prosecutor in the Governor Blagojevich impeachment trial

✳ YLD CLE PROGRAMMING

Beyond Objection: Using Theatre Techniques for Effective Counsel
Presented by the ISBA Young Lawyers Division

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RESERVATION DEADLINE: November 15

2023 RATE $200 for single or double occupancy, plus applicable taxes

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Reservations received after the deadline will be subject to availability. The deposit will be forfeited for all no-shows, early departures, and cancellations less than 48 hours prior to arrival.

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