Labor Day reflections on labor law and the labor movement

By Andrew B. Prescott and Jessica Schachter

Labor Day provides an opportunity to reflect on the state of the American labor movement and labor law. Since Labor Day became an official U.S. holiday in 1887, the organized labor movement and the American workplace have undergone dramatic changes. This year has seen significant developments worth noting as we pause collectively to commemorate the holiday.

Noel Canning v. NLRB and its aftermath

In June 2014, the U.S. Supreme Court ruled that President Obama’s January 2012 recess appointments of three individuals to the National Labor Relations Board (“NLRB” or “Board”) were unconstitutional and therefore invalid. Because the appointments were invalid, the Board lacked the necessary quorum to decide cases for approximately one and a half years. Undaunted, the NLRB issued hundreds of decisions that changed labor law in many ways, including several which promote union organizing and which strengthen workers’ rights under the National Labor Relations Act (“Act”). Decisions invalidated by Noel Canning include rulings prohibiting employers from routinely requiring witnesses in workplace investigations to keep the investigation and facts confidential; mandating that an employer bargain with a union before imposing discipline prior to agreement on an initial collective bargaining agreement; requiring an employer to provide witness statements to a union; and continuing to deduct union dues from employees’ paychecks after contract expiration. The invalidation of these and other important Board decisions leaves many important labor law issues uncertain. The current Board will likely look for opportunities to restore as many of these rulings as possible before next Labor Day.

NLRB signals changes to joint employer standard

In July 2014, the NLRB authorized numerous complaints against McDonald's USA LLC and its franchisees as “joint employers.” The Board has invited comment on whether it should abandon its current standard for determining joint employer status in favor of a standard which would result in that status being more frequently found. Although these initial steps have not yet changed the law, many companies are expecting that the standard will be changed and are reassessing their operations. A new standard will not only impact franchise employers, but every employer who is significantly integrated with another employer.
Social media: an escalating battlefield

With increasing frequency, employees post and tweet negative comments about their employers and workplaces. Unions use social media to organize employees and to disseminate organized labor’s world view. Union corporate campaigns using social media communicate labor’s propaganda beyond employees to the general public and the Board room. The NLRB has issued many decisions involving the use of social media, including its August 2014 holding in Three D, LLC d/b/a Triple Play Sports Bar and Grille, where the Board agreed that the sports bar had violated the Act by terminating an employee for “Liking” a Facebook post about workplace issues.

Union election rules and restrictions on employer counsel

The NLRB is likely to continue its push for “quickie” elections—a so-called streamlined process that will most likely result in more union election wins. The Board’s approval of micro-bargaining units will also make it easier for unions to organize employees. At the same time, the U.S. Department of Labor will likely re-interpret an exception to the persuader rules which will make it much more difficult and complicated for employers to obtain professional assistance in opposing union organizing efforts.

Living wage campaigns and increases to minimum wages

This year also saw various campaigns to address what workers and organized labor portray as a disparity between the minimum wage and a “living wage.” Fast-food workers in major cities staged protests in order to garner support for their cause. So far in 2014, more than half of the states have considered increases to their minimum wage and 10 states and the District of Columbia passed such increases. Seattle passed a bill that will steadily increase the city’s minimum wage to $15 per hour over time. San Francisco—which currently boasts the highest minimum wage in the country—will let voters decide this November if the city should enact a similar increase to its minimum wage. At the federal level, President Obama issued an executive order which will increase the minimum wage for federal contractors to $10.10 effective January 2015.

Such minimum wage increases may result in more worker migration to higher minimum wage areas from neighboring lower minimum wage areas, but may reduce the number of jobs made available by low-margin businesses. Increased labor costs may also hasten the move to increase automation, including the use of robots.

With more than 100 million people in the U.S. Labor force, every day is Labor Day. As the law continues to change, both employers and employees will have to change and adapt.

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