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TOP 10 THINGS YOU NEED TO KNOW RIGHT NOW IN PRIVATE SECTOR LABOR & EMPLOYMENT LAW

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BACKGROUND--GENERAL COUNSEL MEMORANDUM 18-02

a. Shortly after his appointment, Peter Robb, the new General Counsel (GC) of the National Labor Relations Board (NLRB) issued GC Memorandum GC 18-02, which provided a road map on the priorities of the Trump NLRB. This Memorandum (https://www.employerlaborrelations.com/wp-content/uploads/sites/220/2017/12/GC-18-mandatory-advice.pdf), emphasized the GC's intention to revisit many decisions of the Obama-era NLRB.
b. GC 18-02 also rescinded several GC memoranda issued most notably by his predecessor, Richard Griffin, including memoranda that addressed employees' handbooks, joint employer status and e-mail communications.
c. GC Robb emphasized that he "will base decisions [about the issuance of unfair labor practices] on extant law". Also, any new cases that involve certain "significant legal issues" were to be referred to the GC's Division of Advice, ("Advice"). An exhaustive list of potential cases is listed in the memorandum.
d. Finally, "[C]ases that involve significant legal issues to be submitted to the Advice" were further defined to include "cases over the last eight years that overruled precedent and involved one or more **dissents."**

SIGNIFICANT LEGAL ISSUES DECIDED BY THE TRUMP BOARD AND GENERAL COUNSEL THAT HAVE REVERSED PRIOR DECISIONS AND INTERPRETATIONS OF THE NATIONAL LABOR RELATIONS ACT.

1. THE NLRB'S GENERAL COUNSEL WANTS THE RAT DEFLATED

A. It is the GC's view that the legally recognized use of an inflatable rat to protest employer practices is one of the labor issues that justifies reconsideration.
B. Courts and the NLRB have issued rulings for some period of time holding that inflatable rats are permitted under the NLRB as symbolic speech protected by the First Amendment. Nevertheless, it appears that the GC equates the rat with picketing or striking that can be considered coercive conduct under Section 8(b)(4) and 8(b)(7) of the Act.
C. The GC took the unusual step of directing NLRB attorneys in Region 13 to revive a charge and issue a complaint based on a charge filed by an Illinois excavation company. The Region previously dismissed the case based on extant precedent that the use of an inflatable rat is not picketing or coercive conduct under 8(b)(4)(B) or 8(b)(7) of the Act. Pursuant to the GC's directions, the Region has sought both injunctive relief in Federal Court and is proceeding administratively before an ALJ against the defendant charged party. The matters are pending. The NLRB case is **Local 150, International Union of Operating Engineers and Donegal Services, LLC**, Case 13-CP-22726.
D. In these actions, the General Counsel has asserted that "even if their conduct was not tantamount to picketing, it was nevertheless coercive". The General Counsel further acknowledged that prior precedent is to the contrary but asserts that these cases were wrongly decided.

2. THE IMPACT OF THE NLRB'S DECISION IN THE BOEING CASE-- <u>EMPLOYER HANDBOOKS/ POLICIES AND WORKERS SECTION 7 RIGHTS</u>

a. The NLRB's decision in **Boeing Company**, 365 NRLB 154 (2017), established a new standard for workplace policies that balances employee rights to engage in Section 7 protected concerted activity with an employer's right to maintain discipline and productivity and protect its property. It overruled prior Board law that analyzed employer work rules under the **Lutheran Heritage** standard which determined whether the employer work rule could reasonably be interpreted as chilling employees' Section 7 rights.

b. Thereafter, the GC issued a memorandum (GC 18-04) (https://apps.nlrb.gov/link/document.aspx/09031d45827f38f1) detailing how alleged improper employment policies are to be evaluated.

    i. Work rules were to be evaluated in three categories:
        1. Rules that are generally lawful to maintain;
        2. Rules warranting individualized scrutiny; and
        3. Rules that are plainly unlawful to maintain.

ii. The GC memo provides examples of work place policies that fall into one of these three groupings.

c. Under the memorandum, the NLRB would no longer interpret ambiguous rules against the drafter- and it would no longer inquire whether a rule could reasonably be interpreted as impacting Section 7 rights. Some commentators believe that this will result in fewer unfair labor practice charges filed as employees will be reluctant to engage in section 7 activities based upon their employers' work rules.

d. Recent NLRB Advice memorandum seems to underscore the complex nature of this issue, see for example, **ADT, LLC**, Case 21-CA – 209339. (Released to the public March 2019). In these Advice memoranda, the General Counsel has determined that certain work rules were permissible, some of which might have been found to be violative under the prior **Lutheran Heritage** analysis.

e. In a recent case**, Alstate Maintenance**, **LLC** 367 NLRB No. 68 (2019), the NLRB despite a vigorous dissent, dismissed a complaint where an employee was dismissed for protesting a tipping issue in a group context. In reaching its decision, the NLRB overturned prior case law and significantly narrowed the Obama Board's definition of concerted activity. Prior case law held that an employee's comment relating to terms and conditions of employment covering all of its employees that was uttered in the presence of other co-workers was deemed per se concerted activity. It was deemed to be said for the mutual aid and protection of the speaker and his or her co-workers and intended to initiate group action. Now the Board will look at the totality of the circumstances in determining whether the statement was concerted.

3. GC's MEMORANDUM 19-03 AND ITS IMPACT ON ARBITRATION OF CASES

a. The GC in his Memorandum 19-03 (https://apps.nlrb.gov/link/document.aspx/09031d4582a5c05e), revised the NLRB's deferral policy limiting the application of the Board's decision in **Babcock & Wilcox** to pre-arbitral deferrals where the Charging Party has chosen not to file a grievance but instead has filed an unfair labor practice charge alleging conduct is violative of either Sections 8(a)(1), (3) or 8(b)(1) A or 8(b)(2) of the Act. Under prior Board law where the facts relating to consideration of both the contractual and unfair labor practice issue were the same, deferral of these claims to the arbitration process was permitted based on prior Board cases, **Collyer Insulated Wire,** 192 NLRB, 837 (1971) and **United Technologies Corp**, 268 NLRB 557 (1984). The arbitrator's award was deferred to so long as the award considered the facts underlying both the contractual issue and the unfair labor practice and it was not "**repugnant or palpably wrong**" Contrast this with the Board's interpretation in **Babcock & Wilcox** that changed the pre-arbitral and post arbitral standard for review by initially requiring that the parties agree to have the arbitrator decide the unfair labor practice before it will defer to the arbitral process. Further, in its post arbitral review, it will only defer to the post arbitral award where the

arbitrator's consideration of the unfair labor practice is **reasonably based,** and the burden falls on the party asserting deferral is appropriate.

b. The prior GC Richard Griffin, in an earlier memo, GC 15-02 (2015) (https://apps.nlrb.gov/link/document.aspx/09031d4581c0c5cf) determined that the stricter deferral standard in **Babcock & Wilcox** should also apply to all cases where the Charging Party has filed both an unfair labor practice charge and a demand for arbitration under the collective bargaining agreement. Previously these cases were deferred under the earlier "**palpably wrong"** standard. See **Dubo Manufacturing,** 142 NLRB 431 (1963). Also, this less rigorous, palpably wrong, standard was applied to situations where the parties resolved both the unfair labor practice and the contract dispute by entering into a private settlement. See **Alpha Beta,** 273 NLRB1546(1985).

c. The current GC, Peter Robb believes that **Babcock & Wilcox** was wrongly decided and has issued a new memorandum, GC 19-03 (https://apps.nlrb.gov/link/document.aspx/09031d4582a5c05e) that reverses the prior GC interpretation. It limits the application of **Babcock & Wilcox** to situations where the Charging Party has not elected to file a grievance but has only filed an unfair labor practice charge. It directs NLRB regional offices to allow for deferral of future processing of all unfair labor practice cases where the parties have also filed a grievance alleging a contract violation of the same conduct under the **Dubo** standard of deferral. In these circumstances the GC will apply the earlier Board standard for deferral (set forth under Board cases, **Spielberg Manufacturing Corp**, 112 NLRB 1080 (1955) and **Olin Corp**,268 NLRB 573 (1984). Under this standard, where the matter in dispute is already being processed through the grievance procedure and there is a reasonable chance that the grievance procedure will resolve the issue, the GC will defer to the grievance arbitration process. Most notably, it will also defer to the award and dismiss the pending unfair labor practice charge if it is not **repugnant or palpably wrong**.

d. The memorandum, unlike Babcock & Wilcox also indicates that the burden of proof is on the party opposing deferral.

e. The less strict Spielberg-Olin standard will also be applied to settlements applying the Alpha Beta standard which will defer to a settlement agreement if the parties agree it resolves the alleged dispute and it is not repugnant or palpably wrong. See **Alpha Beta, Co**., 273 NLRB 1546 (1985)

TAKEAWAY-The Current GC's interpretation limits the application of **Babcock & Wilcox**.

> According to the General Counsel, the **Babcock and Wilcox** standard only applies in cases where a grievance has not yet been filed but the Regional Director determines that it is appropriate to defer to the parties' grievance procedure on the condition that the parties agree to have the arbitrator decide the unfair labor practice along with the alleged contract violation. Under this interpretation, the

stricter standard of Babcock & Wilcox will rarely be applied since it is unlikely that the Union will decide just to file an unfair labor practice and forego filing a grievance.

4. NLRB TO RECONSIDER ITS JURISDICTION OVER CHARTER SCHOOLS

a. On February 4, 2019, the NLRB granted a Union's request for a review of a Decision and Direction of Election issued by the Region 2 Director concerning a decertification petition filed by several teachers at a charter school. **Kipp Academy Charter School**, 02-RD-191760 (https://apps.nlrb.gov/link/document.aspx/09031d4582ac6cb2). In its determination, the NLRB invited briefs to be filed regarding whether it should decline jurisdiction over charter schools under section14 (c)(1) of the Act (discretionary decision not to assert jurisdiction where the effect of the dispute on commerce is not sufficiently substantial to warrant the exercise of jurisdiction) and modify or overrule its prior precedent. The dissent argued that the Board's change in composition was not a reason for changing this precedent.

b. The Board's consideration has legal consequences. If the Board declines jurisdiction, charter school employees lose protection of the Act. It is unclear whether PERB or State Agencies will then assert jurisdiction over these schools, although we think it is likely. It is unclear what will happen in states which limit the rights of public employees to unionize or have limited jurisdiction over such employees.

5. THE NLRB REVERSES ITS INDEPENDENT CONTRACTOR STANDARD

a. In **Super Shuttle DFW Inc.,** 367 NLRB No. 75 (2019), the Board reversed its independent contractor standard, and in so doing clarified the role entrepreneurial opportunity plays in its determination of independent-contractor status. The case involved airport shuttle van driver franchisees of the employer. The Board concluded the franchisees are not statutory employees under the Act, but rather, are independent contractors excluded from the Act's coverage. **Super Shuttle** reversed the 2014 Board decision in **Fed Ex Home Delivery**, 361 NLRB 610 (2014) and adopted the D.C.'s view that entrepreneurial opportunity by the drivers is a core element in determining independent contractor status.

b. Going forward, it should be easier for an employer to classify certain individuals as an independent contractor rather than an employee. In any event, many commentators believe that this precedent is beneficial for employers operating in the "gig" economy. – Uber and Lyft drivers also come to mind here – at least with respect to the NLRB. **Hot off the presses**: On April 29, 2019, the U.S. Department of Labor issued a wage and hour opinion letter discussing application of the Fair Labor Standards Act to certain individuals in the "on-demand" or "sharing" economy, finding that the particular workers were independent contractors, not employees. The link can be found here: https://www.dol.gov/whd/opinion/FLSA/2019/2019_04_29_06_FLSA.pdf.

c. In a related area, the NLRB has determined to use rulemaking to change its joint employer standard rather than reconsidering the issue by adjudication. Note that the Trump Board had earlier reversed the Board's decision under the Obama Board in **Browning-Ferris Industries**, 362 NLRB No. 186 (2015). In Browning-Ferris, the Board had re-expanded the definition of joint employer by finding joint employer status if an employer either had the potential to control or in fact exercised either indirect or direct control over the essential employment terms and conditions of employment. In a case called **Hy-Brand Industrial Contractors**, 365 NLRB No. 156 (2017) the Board reversed Browning -Ferris and returned to the previous standard requiring direct and immediate control over the essential employment terms of the other employees' terms and conditions of employment. As the Hy-Brand decision was vacated for procedural reasons, the Board has decided to use rule-making to define the standard. Interestingly, the DC Circuit approved the standard for joint employer in Browning-Ferris but remanded the case to the Board to reapply the standard to the facts of the case. 2018 WL 6816542 (D.C. Cir. Dec. 28, 2018) Instead the Board has decided to pursue rule-making and the Hy-Brand case is still pending before the Board.

6. NLRB CHANGES POSITION ON SUCCESSOR EMPLOYEES

a. In a recently issued decision, **Ridgewood HealthCare Center**, 367 NLRB No. 110 (2019), the Board overturned long standing precedent (**Galloway School Lines**, 321 NLRB 1442 (1996) and subsequent cases applying that precedent), on when a **Burns** successor is obligated to retain the prior terms of the predecessor's contract before bargaining for a successor agreement. This deals with the perfectly clear successor doctrine and the **Loves Barbecue** remedial doctrine. The majority in a 2-1 decision reversed the remedy of **Loves Barbecue** in denying the successor the right to set its own initial terms when it had unlawfully refused to hire some of its former employees in violation of Section 8 (a)(3) to avoid the majority and **Burns** bargaining obligation. The Board concluded that the prior ruling in Galloway went too far and held that there must also be evidence that the Employer intended to retain all or substantially all of the predecessor's employees. The decision narrowly interpreted the "perfectly clear" interpretation previously set forth in the long standing **Spruce Up** decision by requiring the successor to maintain the prior terms and conditions of employment only if it intended to retain all or substantially all of the predecessors' employees following the precedent set forth in the Supreme Court decision in **NLRB v. Burns Security Services, Inc**., 406 U.S. 272 (1972) which denied the Employer the right to set its own terms and conditions of employment only in situations where it expressed its intent to retain all of the predecessor's employees.

7. **THE LEGAL AND POLITICAL FALLOUT OF EPIC DECISION ON MANDATORY ARBITRATION OF SEXUAL HARASSMENT AND OTHER EMPLOYMENT RELATED ISSUES**

Since the issuance of the **Epic Systems Corp.** decision by the Supreme Court, that permits employers to enforce mandatory arbitration clauses that waive employees' rights to file employment related disputes in court whether as individual or as class or collective action lawsuits, there has been a backlash. There has been legislation recently passed by several states to carve out disputes that raise issues of sexual harassment from mandatory arbitration. In NYS, in October 2018 before the Supreme Court even issued its decision In **Epic,** Governor Cuomo signed into law, CPLR Section 7515 which prohibits future and declares null and void any contract provision that requires mandatory arbitration to resolve allegations of unlawful discriminatory practices of sexual harassment. Also, the alleged victim of sexual harassment can choose whether to agree to a non-disclosure settlement agreement.

Note that there is a savings clause that provides that this statute is lawful, "except where inconsistent with federal law" which will likely make this provision unenforceable under a pre-emption argument in view of the **Epic** decision.

Also, the U.S. House of Representatives recently Introduced legislation called the Forced Arbitration Injustice Repeal Act (FAIR ACT) that would prohibit pre-dispute arbitration agreements that mandate arbitration to resolve all employment disputes as well as disputes involving consumer, antitrust, or civil rights disputes.

Noteworthy, based on social media protests, some of the larger employers including Microsoft, Google, Uber, and Lyft have changed their mandatory arbitration policy to permit sexual harassment claims be filed in court.

Hot off the press: on April 22, 2019, another employment issue that the Supreme Court agreed to hear is whether Title 7 which forbids discrimination based on sex covers discrimination of employees because they are gay, lesbian or transgender. The cases are consolidated for hearing and they are **Altitude Express v. Zara** (2nd Circuit), **Bostock v. Clayton County**, **Georgia** (11th Circuit) and **Harris Funeral Home Inc. v. EEOC** (6th Circuit). Stay tuned!

8. **THE PEOPLES' LAWYER – THE ENHANCED ROLE OF STATE ATTORNEYS GENERAL AND LOCAL DISTRICT ATTORNEYS IN PROTECTING FAIR WAGES FOR WORKERS**

    a. The New York State Attorney General has been extremely effective in enforcing wage and hour and other worker protection laws – like wage theft. We have attached a thorough discussion of the role of state attorneys general in enforcing wage and hour and other work protection laws, in a report issued in May 2018 by the Economic Policy Institute. (https://www.epi.org/files/pdf/147025.pdf)

b. Increasingly, district attorneys in the New York metropolitan area have emphasized wage and hour and wage theft laws as appropriate for criminal prosecution. This conduct can be captured through penal laws, such as larceny or theft of services provisions. In addition, where workers are paid "off the books", other potential criminal issues come into play, such as filing a false document and maintaining false business records, or issues related to failure to comply with the workers compensation insurance or unemployment insurance requirements. In fact, the district attorneys in the five boroughs, as well as several district attorneys from the metropolitan area, are working with State Attorney's General Office and the State labor departments in a joint effort to combat wage theft. See, https://www.manhattanda.org/new-york-city-and-state-partners-announce-joint-effort-combat-wage-theft-construction/.

9. **MORE FROM THE NLRB ON BECK ISSUES**

a. The NLRB in **United Nurses and Allied Professionals** (**Kent Hospital**) 367 NLRB No. 94 (2019) held that non-member objectors cannot be compelled to pay for union lobbying expenses. The Board majority held that lobbying activity, although sometimes relating to terms of employment or incidentally affecting collective bargaining, is not part of the union's representational function and, therefore lobbying expenses are not chargeable to Beck objectors.
b. The GC in his Memo 19-04 is requiring more stringent notice requirement of savings for employees who choose to become Beck objectors. See https://apps.nlrb.gov/link/document.aspx/09031d4582b0d21e.

10. **THE RIZO CASE AND CLOSING THE GENDER PAY GAP**

The Federal Equal Pay Act requires employers to provide equal pay to men and women who do equal work. An employer can assert four statutorily-recognized defenses, by showing that the wage discrepancy is justified because it is based on: (1) a seniority system; (2) a merit system; (3) a system which measures earnings by quantity or quality of production; or (4) a differential "based on any other factor other than sex". The last of these has engendered (if you'll pardon the pun) substantial litigation.

On April 9, 2018, an *en banc* panel of the Ninth Circuit Court of Appeals in **Rizo v. Yovino**, in an opinion by Judge Reinhardt, held that using prior salary as a basis for awarding unequal pay was not "based on any other factor other than sex". However, on February 25, 2019, the U.S. Supreme Court vacated the *en banc* decision and remanded it. https://www.supremecourt.gov/opinions/18pdf/18-272_4hdj.pdf. The reversal was not based on the merits, but because Judge Reinhardt had died on March 29, 11 days prior to the issuance of the *en banc* decision. This was notwithstanding that the judge had fully participated in the case and authored the opinion and the voting was completed by the *en banc* court prior to his death. No substantive pronouncement on the merits of the case was made by the Supreme Court. Stay tuned!