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**Around the Labor and Employment
World in 60 Minutes**

Thursday, July 30, 2020

L. Michael Zinser



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My Personal Motto: "Never, never, never, never give up."



OSHA Guidelines on Returning to Work After Coronavirus Shutdown



- On June 18, 2020, OSHA released a new publication titled *“Guidance on Returning to Work”* that Recommends reopening in 3 phases
- **Phase 1** – begins when the state or region satisfies the “gating criteria” (a 14 downward trajectory of symptoms & cases combined with sufficient healthcare & testing capacity.
 - Encourages employers to make telework available
 - Limit the number of personnel at the workplace to ensure social distancing
 - Provides special accommodations for particularly vulnerable employees
 - Limit non-essential business travel



OSHA Guidelines on Returning to Work After Coronavirus Shutdown



- **Phase 2** – OSHA recommends that Employers continue to make telework available and accommodate vulnerable employees.
 - It may be appropriate to allow non-essential business travel
 - It may be appropriate to ease limitations on the number of people in the workplace.
- **Phase 3** – Employers may resume unrestricted staffing in the workplace



OSHA Guidelines on Returning to Work After Coronavirus Shutdown



- Guidance sets forth **9 Principles** employers should consider. The **9 Principles** are:
 - Hazard Assessment
 - Hygiene
 - Social distancing
 - Identification & isolation of sick employees
 - Return to work after illness or exposure
 - Controls
 - Workplace flexibilities
 - Training
 - Anti-retaliation



OSHA Guidelines on Returning to Work After Coronavirus Shutdown



- OSHA's recommendations are advisory in nature and do not impose new legal obligations on employers
- Be sure to consult any state-specific orders or guidance



Independent Contractor Unemployment Claims

- Independent Contractors are eligible for the **\$600/week federal supplement**
- This comes from a separate fund appropriated by Congress
- Should companies contest unemployment claims filed by Independent Contractors? Absolutely!
- Dollars available for Independent Contractors will come from a fund especially set up for individuals who are ***not*** otherwise eligible for unemployment in the particular state.



Independent Contractor Unemployment Claims

- Your company should vigorously defend against eligibility for unemployment that would be counted against your company's account and experience rating.
- Be sure to take advantage of **specific exclusions** included in various state statutes, that exclude from the definition of employment the relationship between a Publishing Company and an Independent Contractor Newspaper Carrier
 - **Wisconsin example**
 - **Mississippi example**
 - **Georgia example**
 - **Oklahoma example**



U.S. Supreme Court Rules Title VII Prohibits Discrimination on the Basis of Sexual Orientation and Gender Identity

- On June 15, 2020, the U.S. Supreme Court ruled that **employment discrimination on the basis of sexual orientation or gender identity is sex discrimination based on sex and unlawful** under Title VII of the *1964 Civil Rights Act*.
- Decision resolves a longstanding split among the Federal Courts of Appeal.
- The Court stated by definition, “sexual orientation” or “gender identity” implicates sex.



U.S. Supreme Court Rules Title VII Prohibits Discrimination on the Basis of Sexual Orientation and Gender Identity

- While some states and localities have already protected these categories, the majority of states had not extended their anti-discrimination statutes to cover sexual orientation and/or gender identity.
- The ruling could precipitate future changes in other areas of the law.
 - Public Accommodations Law
 - Fair Housing Law



Polling Question #1

Does Title VII of the *Civil Rights Act of 1964* prohibit discrimination based on sexual orientation or gender identity?





National Labor Relations Act Developments



Civility in the Workplace

- What do the following have in common:
 - A pro-union employee said to black co-workers, “Go back to Africa” and “I smell fried chicken and watermelon”
 - An employee called a manager “a nasty motherf*****” and said “f*** his mother and his entire f***ing family.”
 - In front of co-workers, a union Vice President screamed at his manager, “you are a bastard, redneck son of a bitch.”
 - An employee, commenting to co-workers, called the Vice President of Production “a stupid f***ing moron.”



Civility in the Workplace

- What do they have in common? In each of these cases, the NLRB ordered the employer to reinstate the employee with backpay.
- The NLRB claimed that because these employees were engaged in union activity, they should be afforded leeway for impulsive behavior.



Civility in the Workplace

- On July 21, 2020, the current NLRB majority (all Trump appointees) brought civility back to the workplace.
- The NLRB ruled that it will no longer give special protection to offensive language or conduct in the workplace.
- New Decision eliminates the conflict with anti-discrimination laws and stops penalizing employers for complying with those laws.
- The new Decision ends the unwarranted protection for employees who engage in obscene, racist and sexually harassing speech not tolerated in almost any workplace today.



Employee Discipline in Advance of a First Contract

- On June 23, 2020, the NLRB overruled a 2016 Decision that changed an employer's duty to bargain over discipline with a newly certified union prior to reaching a first-time Collective Bargaining Agreement.
- The new case reinstates 80 years of precedent.



Employee Discipline in Advance of a First Contract

- That precedent was that employer's have no obligation to bargain before imposing discretionary discipline that is consistent with the employer's established policy or practice.
- The new Decision was very harsh and critical of the Decision it was overruling stating that the prior Decision misconstrued the Supreme Court's Unilateral Change Doctrine and opposed a complicated and burdened a bargaining scheme irreconcilable with NLRB caselaw.



Polling Question #2

Can an employee be fired
for directing profanity at a
manager?



NLRB Restores Employer's Right to Restrict Use of E-mail

- The NLRB overruled a Decision called *Purple Communications*.
- *Purple Communications* overruled a case called *Register Guard* and ruled that employees who have been given access to their employer's e-mail system for work related purposes, have a presumptive right to use that system for unionizing or union related purposes.



NLRB Restores Employer's Right to Restrict Use of E-mail

- The new case called *Caesar's Entertainment* reinstated the holding of *Register Guard*.
 - Employees do **not** have a statutory right to use the employer's e-mail and other information technology.
 - Employers have the right to control the use of their equipment, including their e-mail and other IT systems.
 - They may lawfully exercise that right to restrict the uses to which those systems are put.
 - This is a great recognition of the private property rights of employers everywhere.



NLRB Approves Greater Confidentiality at Workplace Investigations

- Work rules requiring confidentiality during the course of workplace investigations are presumptively lawful.
- Investigative confidentiality rules, limited to the duration of the investigation, are generally lawful.
- This is especially meaningful in a unionized workforce where an employer is investigating claims of sexual harassment.
 - Confidentiality is very important to get to the facts and the truth.



NLRB Restores Longstanding Union Dues Checkoff Rule

- An employer's statutory obligation to checkoff union dues ends upon expiration of the Collective Bargaining Agreement containing the Checkoff Provision.
- Dues Checkoff Provisions belong in the limited category of mandatory bargaining subjects that are exclusively created by contract.
- Enforceable only for the duration of the contract.



NLRB Restores Longstanding Union Dues Checkoff Rule

- No independent statutory obligation to checkoff and remit employees' union dues after the contract expires.
 - Even where the contract does not contain a Union Security Provision.
- The new case overrules a 2015 NLRB case.
- The Board now returns to precedent that had been in place since 1962.



Polling Question #3

Can an employer require confidentiality during an investigation of a sexual harassment complaint?



NLRB Implements Part of its New Election Rules

- NLRB had planned to implement on June 1, 2020, new election rules that were much more friendly to management and would have given management a much fairer opportunity to communicate the issues.
- The AFL-CIO filed a suit against the NLRB in U.S. District Court which issued a Partial Injunction with respect to the rules.



NLRB Implements Part of its New Election Rules

- The Injunction prevented 5 of the planned changes:
 - The right to litigate voting eligibility issues prior to an election
 - To normally not schedule an election prior to the 20th business day after the direction of election
 - Serving the Voter List within 5 business days instead of 2
 - Limiting election observers to employees in the voting unit
 - Instructing NLRB Regional Directors not to issue a certification of election results if a request for review was pending.
- The Court issuing the Injunction thought the above 5 rules were substantive rather than procedural.
- The NLRB plans to appeal the decision of the U.S. District Court.



NLRB Implements Part of its New Election Rules

- The Injunction did not halt the following rule changes:
 - The Pre-Election Hearing will generally be scheduled 14 business days from the Notice of Hearing.
 - The Statement and Position is now due 8 days from the Notice of Hearing, and the Response (a new requirement) is due 3 business days later.
 - Parties will be allowed to file Post-Hearing Briefs for Pre-Election and Post-Election Hearings as a matter of right.
 - Posting notices of election must occur within 5 business days instead of 2 calendar days.
 - All time periods will be in business days.



NLRB Implements Part of its New Election Rules

- These changes went into effect June 1, 2020.
- These changes preserve the employer's First Amendment right to fully communicate to its employees ***before*** the date of the election.



“Thank you for the opportunity to present for Media Finance Focus 2020!”

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