Whiplash? Agency Developments at the Department of Labor
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In the summer of 2019, the Department of Labor made headlines when Secretary of Labor Alexander Acosta resigned. As a result, the Agency is currently headed by Acting Secretary, Patrick Pizzella. Also in recent months, the Senate confirmed Cheryl Stanton as Administrator of the Wage and Hour Division.

Even while the leadership changes at the Department made headlines, the regulatory agenda of the Agency has been moving forward. In the spring of 2019, the Department of Labor ("DOL") published a long-awaited proposal for revising the regulations relating to the white collar exemptions from overtime and minimum wage under the Fair Labor Standards Act ("FLSA"). A short time later, DOL also published a proposal to clarify and update several regulations that that relate to what may be excluded from the "regular rate of pay" for purposes of calculating overtime when employees work in excess of 40 hours per week. Additional proposed rules are reported to be on the horizon as well. In late July, 2019, DOL sent a proposed rule relating to tip-pooling to the White House Office of Management and Budget. In August, DOL added a proposal relating to the fluctuating workweek to its regulatory agenda, stating that it proposes to revise the fluctuating workweek regulations to grant employers great flexibility to provide employees bonuses or other incentive-based pay consistent with the method. In addition to the formal regulations, DOL has also continued to issue multiple opinion letters throughout 2019. The topics covered in the 2019 Opinion Letters have been varied, and have included FLSA topics as well as multiple topics under the Family and Medical Leave Act. The specifics of the rulemaking proposals and many of the Opinion Letters are outlined below.

Salary Threshold

In its Notice of Proposed Rulemaking ("NPRM") published at the time the salary threshold proposal was first made, DOL has proposed increasing the threshold for certain white-collar exemptions to $679 per week, or $35,308 per year. In 2015, DOL had proposed increasing this threshold to over $47,000 per year ($913 per week). That proposal was blocked by a federal court in Texas in late 2016.

In addition to increasing the minimum salary amount, the newly-proposed regulations would allow up to 10% of the threshold amount to include non-discretionary bonuses and commissions which are paid at least annually. The NPRM also proposes increasing the "highly compensated" alternative level and standard from $100,000 per year to $147,414 per year. Finally, the NPRM provides for the establishment of a process for DOL to consider the need and feasibility for review of the salary-level every four years through a notice-and-comment process. The proposed regulations address only the threshold salary level for the executive, administrative, and professional exemptions from the FLSA.

DOL has also published additional information, including responses to Frequently Asked Questions about the proposal, on its website (the FAQ's are found here). After receiving more than 115,000 comments on the proposal, the comment period for the proposal closed in June. In August, DOL sent a final rule proposal to the Office of Management and Budget ("OMB"). The final rule is expected soon, and experts are predicting that the rule may become final before the end of 2019, depending on how quickly OMB acts.

Regular Rate of Pay

Under the Fair Labor Standards Act (FLSA), employers must generally pay non-exempt employees overtime at a rate of one and one half times the "regular rate" of pay when they work more than forty hours in a workweek. Overtime cannot be properly calculated unless the employer knows what to include in the regular rate. As benefits, bonuses, reimbursements and other elements of compensation have evolved, greater ambiguity has developed in determining what is included in and excluded from the regular rate. In March, 2019, DOL published a proposal (found here) to clarify and update several regulations that interpret the regular rate of pay requirement.

An employee's "regular rate" of pay is not necessarily a non-exempt employee's hourly rate or hourly rate equivalent. The term "regular rate" is not defined in the FLSA itself, and the FLSA regulations provide the primary source of how the term has been defined. However, those regulations have not been amended comprehensively for more than 50 years.

The proposed changes provide some modernization of the existing regulations that define "regular rate" and should assist employers by clarifying that a number of currently utilized workplace perks and benefits are not part of the regular rate calculation. In publishing the proposals, DOL stated that the proposed changes "would better define the regular rate for today's workplace practices."

Under the proposed rules, a number of commonly provided benefits and perks for employees would properly be excluded from the regular rate. This includes the value of wellness benefits like nutrition classes or gym access, along with programs such as employee discounts and tuition reimbursement. The proposal also clarifies that payments for unused paid leave (regardless of whether it is characterized as PTO, vacation, sick leave, or some other way) is excludable from the regular rate. Similarly, the proposed regulations seek to provide employers with more clarity regarding excluding reasonable travel and reimbursement expenses from the regular rate, and further clarify when items like discretionary bonuses and "show up" or "call back" pay may be excluded from overtime calculations. The proposed rule would not change the current regulations regarding inclusion of non-discretionary and production-based bonuses in the regular rate.

While the proposed regulations provide more clarity and modern examples of what items are excludable when determining the regular rate for overtime calculation purposes, the changes (at least as currently proposed) will probably not affect most employers' current pay practices in most situations. The comment period regarding these changes closed in June, 2019. A final rule, which may vary from the current proposal, is expected to be published later this year.

Joint Employment

In April, the Department of Labor ("DOL") published its third proposal in 30 days to revise regulations interpreting the Fair Labor Standards Act ("FLSA"). The April 1 proposed rule would revise and clarify the test for when multiple employers (known as "joint employment") can be held responsible for wages under the FLSA.

The proposed regulations would establish a four-factor test for joint employment, and that change would provide welcome relief to many who have been caught in a joint employment vortex over the past few years. The test focuses on "control," evaluating whether both potential employers do the following:

- hire or fire the employee;
- supervise and control the employee's work schedules or conditions of employment;
- determine the employee's rate and method of payment; and
- maintain the employee's employment records.

The proposal also states that other factors may also be relevant if the four factors above show that the potential joint employer exercises "significant control over the terms and conditions" of the employee's employment, or otherwise acts "in the interest of the employer in relation to the employee."

The proposed regulations contain sharp departures from the positions taken by the Obama-era Department of Labor. For example, the Obama-era DOL published administrative guidance that raised questions about the relationship between franchisors and franchisees under the FLSA. In contrast, the proposed regulations expressly state that the business relationship between two companies, such as a franchisor/franchisee relationship, has no bearing on whether joint employment exists.

In its Notice of Proposed Rulemaking ("NPRM"), DOL stated that its proposal would "promote fairness and predictability" in contrast to the multiple tests that courts currently use to evaluate joint employment. DOL further noted that its proposal could "promote innovation and certainty" in business relationships. As examples, the NPRM noted that concerns over joint employment might impact an entity's willingness to engage in various activities, such as:

- a franchisor might be less willing to provide a sample employee handbook to franchisees under a broader joint employment standard;
- a company may be reluctant to allow another company to operate a facility on its premises; and
- companies may be reluctant to require business partners to engage in certain practices, such as having sexual harassment policies or other measures designed to encourage compliance with law.

The NPRM also expressly acknowledges the recent public attention that joint employer status has drawn, noting the tremendous amount of "attention, concern, and debate" about joint employer status.

The proposed regulations, if adopted, would provide a simple and uniform test and specific examples of joint employer status. A final rule, which may vary from the current proposal, is expected to be published later this year and go into effect next year.

Opinion Letters

In June, 2017, then-Secretary of Labor Alexander Acosta announced that the Department of Labor would begin issuing new Opinion Letters. The practice of issuing formal Opinion Letters had been discontinued during the prior administration.[1] During calendar year 2018, the Department published 29 Opinion Letters, including several Opinion Letters that had been issued in mid-January, 2019 and later withdrawn. As of the end of August, 2019, the Department had issued 12 new Opinion Letters in 2019 under the Fair Labor Standards Act ("FLSA"), and two Opinion Letters under the Family and Medical Leave Act.

FLSA Opinion Letter Highlights

Several of the FLSA Opinion Letters issued to date in 2019 have been employer-friendly. Some the most significant guidance from DOL thus far in 2019 cover the following issues:

- In March, DOL issued an opinion letter discussing whether an employer's encouragement of employee participation in volunteer activities constituted "hours worked" under the FLSA. DOL concluded that the program in question was entirely voluntary, because the employer was not directing employees that they had to participate, or otherwise controlling the volunteer activities. DOL further concluded that the employer's provision of incentive compensation for the group of employees who made the most impact over the year did not change its analysis, noting that the employees who do not participate did not appear to suffer adverse consequences.

- In April, DOL issued an opinion letter discussing whether service providers who provide their services through a virtual marketplace company were employees or independent contractors. The Department's opinion concluded that the company's workers, who provide services to consumers through the company's virtual platform, are independent contractors. In issuing this guidance, DOL first defined a "virtual marketplace" as one that operates "on demand" or as part of what has widely been termed the "sharing economy." As in the opinion letter relating to volunteer activities, DOL's conclusion rested largely on its analysis of whether the company exerts control over the service providers, who are able to work when they want and pursue other external opportunities. In essence, the agency concluded that the workers are able to control their own profit/loss margin. Additionally, the Department of Labor noted that the most workers choose not to work full-time as they pursue other opportunities, or have other jobs outside the platform of the virtual marketplace company. In this respect, these workers are considered independent contractors and therefore are not subject to the FLSA's minimum-wage or overtime-wage protections.

[11] In general, Opinion Letters can be of assistance to employers in complying with the sometimes hard-to-understand regulations and authorities under the Fair Labor Standards Act. However, employers should use some caution in relying on these Opinion Letters, as the DOL's pronouncements are subject to challenge in court. *See, e.g., Cope v. Let's Eat Out, Inc.*, 354 F. Supp. 3d 976, 986 (W.D. Mo. 2019).

- In July, DOL issued an opinion letter discussing whether paralegals for a trade association are appropriately classified as exempt from overtime under the highly compensated employee exemption. The agency concluded that the exemption applied because the higher salary threshold (currently $100,000) was met, and the paralegals were engaged in non-manual work related to the general business operations of the trade association. The agency then discussed whether the paralegals "customarily and regularly" (more than occasionally) performed work that was exempt in nature, and concluded that they would be appropriately classified as exempt administrative employees under the highly compensated exemption.

- Also in July, DOL issued an opinion discussing whether time spent in a sleeper berth of a truck is compensable time under the FLSA. Prior DOL guidance had concluded that only up to 8 hours of sleeping time may be excluded from working time in a trip 24 hours or longer, and no sleeping time may be excluded for trips under 24 hours. In the July Opinion Letter, the agency concluded that the approach was overly burdensome for employers, and advised that it would now consider "sleeper berth time as non-working travel time, rather than on-duty sleeping time."

FMLA Opinion Letters

In its first Opinion Letter of 2019 discussing the Family and Medical Leave Act, the Department addressed whether an employer may allow an employee to decline the use of FMLA leave for FMLA-qualifying absences in order to preserve it for future use. In this Opinion Letter, DOL took the position that an employer *must* designate and count FMLA-eligible absences as FMLA leave and may *not* allow an employee to save up FMLA leave for a rainy day. Under the analysis set forth in this Opinion Letter, the Department considers the practice of delaying the designation of FMLA leave or permitting employees to save FMLA leave for future use to be an unlawful waiver of an employee's FMLA rights.

The issue discussed by this Opinion Letter has also been the subject of a few court cases. The 9th Circuit Court of Appeals has stated that an employee may use non-FMLA leave for an FMLA-qualifying reason and decline to use FMLA leave in order to preserve FMLA leave for future use. *Escriba v. Foster Poultry Farms, Inc.*, 743 F.3d 1236 (9th Cir. 2014). The 9th Circuit considers such a practice to be nothing more than a postponement of the exercise of a right the employee has, as opposed to a permanent waiver of that right. In its 2019 Opinion letter, the Department specifically stated that it disagrees with the 9th Circuit.

In the second 2019 FMLA Opinion Letter, the Department opined that leave taken by parents of a child with special needs for the purpose of attending a school meeting discussing the child's Individualized Education Program ("IEP").[2] In this Opinion Letter, the Department concluded that the need to attend an IEP meetings, which are designed to address "the educational and special medical needs of . . . children . . . who have serious health conditions as certified by a health care provider . . . is a qualifying reason for taking intermittent FMLA leave." Further, the Department

[2] An Individualized Education Program is a defined term under the Individuals with Disabilities Act, as noted in the DOL's letter. The definition of an IEP can be found here: https://www2.ed.gov/parents/needs/speced/iepguide/index.html

stated that a parent's attendance at these meetings is "care for a family member … with a serious health condition" under 29 C.F.R. § 825.100(a).

FMLA Forms

In August, DOL published a proposal to revise its optional FMLA certification forms. In its press release discussing the proposal, Wage and Hour Administrator Cheryl Stanton noted that the changes are designed to reduce the time needed for health care providers to provide information and help administrators review and communicate information to employees more clearly. One notable change to the forms would allow health care providers more options to "check the box" rather than requiring the narrative responses that current forms use. While many of the proposed changes as helpful for employers, some employers have expressed concerns that the new design could create confusion by asking health care providers to reach conclusions about whether particular conditions are serious medical conditions. The comment period for the new forms remains open through October 5, 2019.

What's Going On at the EEOC?

A Brief Review to Benefit In-House Counsel

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I. EEOC Enforcement and Litigation Data

The EEOC's annual release of enforcement and litigation data provides insight into those issues which both the EEOC and plaintiff's attorneys are focusing upon. A summary of the Fiscal Year 2018 (October 1, 2017 to September 30, 2018) statistics can be found here.[1] Detailed statistics, broken down by state and charge type, can be found here.[2] Finally, the EEOC's summary of its own litigation for the last ten years can be found here.[3] I am proud/dismayed to report that my home state, Alabama, ranks ninth in total EEOC charges filed, while ranking only twenty-fourth in total population.

The EEOC noted a 13.6 percent increase in total charges filed and suggested the #MeToo movement played a role in increasing the number of retaliation and sexual harassment charges. There is a statistical dead-heat on the types of claims being asserted in EEOC charges. Thirty-two percent of charges contain one or more allegations of retaliation, sexual harassment, disability discrimination and/or race discrimination. The total number of disability discrimination and race discrimination charges have decreased each year since fiscal year 2016.

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[1] https://www.eeoc.gov/eeoc/newsroom/release/4-10-19.cfm.
[2] https://www1.eeoc.gov/eeoc/statistics/enforcement/state_18.cfm.
[3] https://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm.

In fiscal year 2018, the EEOC filed 217 lawsuits and more than half of those (111) contained a Title VII claim. The EEOC claims that it attained a "successful outcome" in 95.7 percent of "district court resolutions." While the EEOC does not provide its definition of a "successful outcome," in some cases it issues press releases touting settlements for far less than the cost of litigation. *See, e.g.,* https://www.eeoc.gov/eeoc/newsroom/release/7-24-18.cfm ($25,000 settlement).

II. Just Because the EEOC Says It Doesn't Make It So.

While the EEOC is charged with enforcing most federal civil rights statutes, its interpretation of those statutes is the not the final word. Instead, federal courts have the final say-so. That reality hit home recently in *Texas v. Equal Employment Opportunity Comm.,* No. 18-10638, 2019 WL 3559629 (5th Cir. Aug. 6, 2019), which focused upon the EEOC's 2012 "Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII" ("the Guidance"). Generally, the Guidance found that employers' blanket bans on hiring individuals with criminal records disproportionately impact minorities. Thus, the Guidance found that Title VII prohibits restrictive criminal record screening policies and, in most cases, requires individualized review of each applicant's circumstances.

The State of Texas has long-excluded persons convicted of felonies from holding many state jobs. After an excluded individual filed a disparate impact complaint with the EEOC, Texas filed a two-count complaint. Count One asked the court to declare that Texas could enforce its no-felon policy and that the EEOC could not enforce its interpretation of Title VII. Count Two asked the court to set-aside the Guidance as exceeding the EEOC's authority.

Ultimately, the Fifth Circuit gave Texas half of its requested relief. The Court found that the Guidance was a "substantive rule" and that both the text of Title VII and precedent prevent the

EEOC from issuing substantive rules. As a result, the Fifth Circuit modified an underlying injunction to set-aside the Guidance. In short, the Court gave Texas everything that it requested in Count Two of the complaint. Nevertheless, the Fifth Circuit declined to address Count One, and issued no conclusions about whether Texas could enforce its no-felon policy or whether the EEOC could enforce its interpretation of Title VII. As a result, the EEOC may still pursue disparate impact claims based upon criminal background check policies. It simply cannot use the Guidance as binding authority in pursuing those claims.

III. Welcome to the Party! New Appointments at the EEOC

Sometimes, it's easy to forget that the EEOC is a commission. By statute, it is supposed to be composed of five members appointed by the President to five-year terms. In early 2019, politics got in the way of the Commission's operations. Two Commissioners' terms expired in 2018, and a third term, that of Democrat Chai Feldblum, was set to end on December 31. President Trump's administration nominated Ms. Feldblum and two Republicans to fill the vacancies, but Ms. Feldblum faced opposition from some Republicans. As a result, on January 3, 2019, Ms. Feldblum rolled-off the Commission, which was left without a quorum.

The Commission remained without a quorum until May 8, 2019 when the Senate confirmed Pennsylvania attorney Janet R. Dhillon as Chair of the EEOC. Ms. Dhillon's appointment (along with Victoria Lipnic) gave Republicans a 2-1 majority on the Commission. Prior to her nomination, Ms. Dhillon was General Counsel for Burlington Stores. Her career also includes time as General Counsel for J.C. Penney Company, Inc. and U.S. Airways Group, Inc.

On July 3, 2019, President Trump nominated Republican Keith Sonderling to the Commission. He is currently the Deputy Administrator of the U.S. Department of Labor's Wage and Hour Division. On July 3, President Trump also nominated Democrat Charlotte Burrows for re-appointment to the Commission until July 1, 2023. Ms. Burrows' nomination was confirmed by the Senate on August 1, 2019. Mr. Sonderling's nomination is still pending. As a result, for now, the EEOC is still composed of three Commissioners.

On August 1, the Senate also confirmed Sharon Fast Gustafson as the General Counsel of the EEOC. Ms. Gustafson was considered a surprise nomination when proposed by President Trump in 2018. Although she worked with Jones Day for four years after law school, she has been a solo practitioner for years, and one Bloomberg article noted that the majority of her federal cases involve representation of employees. Her career is most notable for representing the plaintiff in *Young v. United Parcel Service*, 135 S. Ct. 1338 (2015) in which the Supreme Court held that employers should provide the same reasonable accommodations to pregnant employees as are offered to other employees with similar restrictions. Ms. Gustafson's nomination was opposed by LGBT organizations because she declined to state during her confirmation hearing that discrimination motivated by a hostility toward an individual's sexual orientation or gender identity is a form of sex discrimination.

IV. Update on Pay Data Collection

Employers with 100 or more employees have long been required to submit the EEO-1 form detailing the number of employees it employs, sorted by 10 job categories, race/ethnicity and gender. In 2016, the Obama administration proposed to add "Component 2" to the EEO-1 form and require businesses to submit data on pay and hours worked. With President Trump's election, most observers believed the Component 2 requirements would be rescinded, but the above-referenced lack of a majority at the EEOC stopped any such effort. As a result, the Office of Management and Budget decided to step-in and suspend approval of the new EEO-1 form (which it was required to approve).

The National Women's Law Center sued to overturn the OMB's action. On March 4, 2019, United States District Court Judge Tanya S. Chutkan reinstated the form. On April 25, 2019, she ordered that employers must supply the Component 2 data by September 30, 2019. The EEOC's pay data reporting portal opened on July 15, 2019. On May 3, 2019, the United States Department of Justice filed an appeal of Judge Chutkan's order, but that appeal does not stay the data reporting requirements.

Component 2 is supposed to help gather data on the "wage gap" between men, women and different races. Nevertheless, observers have identified numerous flaws in that reasoning compared to the data requested, including:

1. Component 2 income information comes from Box 1 of an employer's W-2 reports. Yet, Box 1 W-2 income does not reflect total pay. For example, it does not include amounts employees contribute to a retirement plan. As a result, when an employee contributes to their 401k, the amount in Box 1 W-2 decreases. Thus, when male and female employees contribute disproportionately to their retirement plans, unreliable data may be reported in Component 2.

2. It is also difficult to accurately correlate the number of hours worked with income. It will be relatively easy to report a non-exempt employee's actual hours. But, those hours will not necessarily correlate to income if paid-time-off, sick leave and/or vacation leave are included in the Box 1 W-2 information.

3. For exempt employees, the problem with data reliability is even worse. Employers that do not track an exempt an employee's actual hours worked are only given two options 2,080 hours (i.e., 40 hours a week) for full-time employees or 1,040 hours (i.e., 20 hours a week) for part

time. Obviously, many exempt full-time employees work far more than 40 hours a week, and many part-time employee work more (and less) than 20 hours a week.

Agency Developments: What's new at the National Labor Relations Board?

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If you do not represent unionized employers, or work for a company that is unionized, it is easy to forget about the National Labor Relations Act (NLRA). But the NLRA applies to all employers. 2019 has proven to be an active year for the National Labor Relations Board (NLRB), the agency that interprets and enforces the NLRA. A few of the highlights are discussed below:

<u>What is concerted activity?</u>

In January, the NLRB narrowed the circumstances under which a complaint made by an individual employee will be considered "concerted activity" under Section 7 of the NLRA. *Alstate Maintenance, LLC*, 367 NLRB No. 68 (Jan. 11, 2019). In *Alstate*, the Board reaffirmed and applied the standard set forth in prior holdings and reiterated that "individual griping does not qualify as concerted activity solely because it is carried out in the presence of other employees and a supervisor and includes the use of the first-person plural pronoun."

Meyers Industries, 268 NLRB 493 (1984) (*Meyers I*) and *Meyers Industries,* 281 NLRB 882 (1986) (*Meyers II*).

Alstate also overturned the Board's decision in *Worldmark by Wyndham*, which held that a complaint made by an employee in a group setting was *per se* concerted activity.

Alstate Maintenance employed a number of skycaps at JFK International Airport, including Trevor Greenidge. The majority of the skycaps' compensation came from passenger tips. On July 17, 2013, Greenidge was informed by his supervisor that Lufthansa had requested skycaps to assist with a soccer team's equipment. In the presence of his fellow skycaps, Greenidge responded "we did a similar job a year prior and we did not receive a tip for it." When the skycaps were waived over by managers to assist, they walked away. As a result, Alstate terminated all of the skycaps who refused to assist with the soccer team's baggage.

Greenidge filed an unfair labor practice charge alleging he was discharged in violation of Section 7 of the NLRA because his complaint about the tipping habits of the soccer players constituted concerted activity. The ALJ dismissed the charge and the decision was affirmed on appeal.

The *Alstate* Board set out a five-factor test for determining whether there is a reasonable inference that in making a statement at a meeting, in a group setting, or with other employees present, the employee was seeking to initiate, induce or prepare for group action. The factors are as follows:

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 workforce generally or some portion of the workforce, not solely about its effect on the speaker him or herself; 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.

Not all five (5) factors have to be present to support a finding of protected, concerted activity.

The *Alstate* decision does not apply to instances where an employee acts with other employees or own their behalf as their authorized representative. It also does not address the situation where the employee who, although not expressly authorized to do so, "brings a truly group complaint to the attention of management."

The *Alstate* Board also found that even if Greenidge's activity was concerted, it was not protected, because customers' tipping habits "did not relate to the skycaps' wages, hours or other terms and conditions of employment." The Board held that the amount of tip given by a passenger is a matter between the passenger and the skycap and noted that there was no evidence that Greenidge was dissatisfied with the existing tipping arrangements set up by his employer, or wanted those arrangements to be modified.

Employers may lawfully prohibit non-employee union solicitation in public spaces on their private property.

In June, the NLRB overturned longstanding precedent and held that employers may lawfully prohibit non-employee union solicitation in public spaces on their property absent evidence of discriminatory enforcement. *UPMC*, 368 NLRB No. 2 (Jun. 14, 2019). The *UPMC* decision conforms NLRB law to Supreme Court precedent and overrules an NLRB created exception that had long been criticized and rejected by various federal courts.

In *UPMC*, security officers removed two (2) non-employee union representatives from the cafeteria at the University of Pittsburg Medical Center Presbyterian Shadyside. At the time they were removed, the non-employee union representatives were sitting at tables at which union pens and flyers were displayed and were discussing union organizational matters with employees. Security informed the union representatives that the cafeteria was only for the use of patients, their families and visitors and employees. In response, the union representatives pointed out that there was at least one other non-employee in the cafeteria waiting to eat lunch with a friend who was employed at the medical center. This did not change the security officers' stance, nor did security remove the other patron.

In *NLRB v. Babock & Wilcox Co.*, 351 U.S. 105 (1956), the Supreme Court held that an employer may deny access to its property by non-employee union organizers except in two (2) limited exceptions: (1) inaccessibility (such as company towns and other situations where employees are largely otherwise secluded) and (2) activity based discrimination (i.e. treating unions differently from other third parties engaged in similar activities). Despite this clear ruling, prior to *UPMC*, the Board had created an additional exception when deciding cases where union organizers sought access to a portion of an employer's private property that was open to the public.

In *Ameron Automotive Centers*, 265 NLRB 511, 512 (1982), the Board held that where an employer has opened up its property, such as with a cafeteria, the *Babcock and Wilcox* criteria did not need to be met, because non-employees could not be barred from patronizing the restaurant as a general member of the public.

In *UPMC*, the Board overruled *Ameron* and held as follows:

> An employer does not have a duty to allow the use of its facility by non-employees for promotional or organizational activity. The fact that a cafeteria located on the employer's private property is open to the public does not mean that an employer must allow any non-employee access for any purpose.

In applying this standard to the facts of the case, the Board held that removing the non-employee union organizers from the UPMC cafeteria was not a violation, because there was no evidence that UPMC had permitted any solicitation or promotional activity in its cafeteria. To the contrary, UPMC had a practice of removing all non-employees engaged in promotional or solicitation activities in or near the cafeteria. Likewise, the fact that the non-employee friend was not removed from the cafeteria did not create a violation, because the friend was using the cafeteria for its intended purpose, to eat, and not to engage in promotional or solicitation activities.

<u>Will Scabby the Rat go the way of the dinosaur?</u>

The NLRA protects a neutral employer from becoming entangled in a labor dispute between a union and another employer. However, this line becomes easily blurred through the practice of "informational picketing." With informational picketing, the union, in theory, is not targeting the neutral employer but is simply disseminating information about its dispute with the other employer that has a relationship with the neutral employer. A common use of informational picketing is when the union will set up a display near a place of business that is undergoing construction and the union has a dispute with the construction contractor or subcontractor. Often, these union informational displays will include an inflatable rat that has become known as "Scabby".

For many years, unions' use of Scabby and other similar displays have been routinely upheld by the Board. However, a recent memo from the NLRB's Division of Advice may signal a change in position -- at least by the Board's General Counsel. The memo concerned a construction site in Chicago where a union placed agents with a large banner and a large inflatable cat clutching a construction worker by the neck. The banner and inflatable cat indicated that the union had a labor dispute with the contractor.

Under a line of Board cases, the banner, the cat and Scabby the Rat had been considered to be stationary objects, even when accompanied by union agents, that do not create a physical or psychological barrier that would affect the business of the neutral employer. The new advice memo indicates that the Board's General Counsel will urge a change of this Board precedent.

In the memo, the Division of Advice found that the banner and the inflatable cat strangling a construction worker were tantamount to picketing, or constituted signal picketing. The General Counsel found that the conduct coerces employees, suppliers or vendors from entering the site to work for, or do business with, the neutral employer. Based on this reasoning, the Division of

Advice ordered that a complaint be issued and instructed NLRB attorneys handling the case to argue for the reversal of precedent on this topic.

This memo does not mean that Scabby is dead and has gone the way of the dinosaur. But, it does mean he is under attack from the NLRB's general counsel. As a result, the union's use of Scabby and similar displays may have to be limited in the future in order to survive Board scrutiny.

NLRB says changing arbitration agreements after being sued is legal.

On August 14th, the NLRB ruled that employers may lawfully update their mandatory arbitration agreements in response to workers participating in class or collective actions. The Board also held that employers can condition further employment on the new arbitration agreement being signed and warn employees that failure to agree will result in termination.

The Board reached these conclusions in a case accusing Cordua Restaurants, Inc. of violating the NLRA by firing workers for participating in a collective action alleging various wage violations. The Board held that employers do not violate the NLRA when they update their mandatory arbitration agreements to include class action waivers in response to workers filing wage and hour class or collective actions under the Fair Labor Standards Act or state wage laws. The Board also held that employers can legally warn workers that failure to sign those agreements will result in them being fired.

In reaching its decision, the Board relied on the Supreme Court's holding in *Epic Systems v. Lewis*, issued in 2018, which held that employers may include class action waivers in mandatory arbitration agreements. Consistent with *Epic Systems*, the Board held that an arbitration agreement that prohibits employees from opting into a collective action does not restrict the exercise of Section 7 rights.

This decision does not change the fact that an employer cannot terminate or take another adverse employment action against an employee for filing a class or collective action, or engaging in any other concerted activity.