WorkSmarts Virtual Seminar
Looking Back, Looking Forward
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Agenda

- NLRB Memorandum GC 23-08
  - Effect on noncompete agreements.
  - NLRB complaint against Harper Holdings, LLC.
  - *Is this a precursor for the Proposed Ban?*
- Confidentiality and Non-Disparagement Clauses
  - Brief update on *McLaren Macomb* and NLRB Memorandum GC 23-05.
  - SEC's Order imposing $10M fine for violating SEC whistleblower protections.
- Title VII and the adverse employment action prong of the prima facie case
  - *Hamilton v. Dallas*
  - Effect on bringing claims under Title VII.
  - Impact on litigation and settlement strategy.
  - *Muldrow v. City of St. Louis*
- The Not So Good News from The National Labor Relations Board
- *Cemex Construction Materials Pacific, LLC*
- NLRB Issues Final Rule on the Standard for Determining Joint Employer Status
- NLRB "Quickie Elections" Return

NLRB Memorandum GC 23-08

NLRB General Counsel Jennifer A. Abruzzo releases Memorandum 23-08 on May 30, 2023

- [Non-compete] agreements interfere with employees' exercise of rights under Section 7 of the National Labor Relations Act."
  - Section 7: protects employees' "right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."
  - It is an unfair labor practice in violation of Section 8(a)(1) for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [S]ection 7."

- *"Non-compete provisions … reasonably tend to chill employees in the exercise of Section 7 rights, when the provisions could reasonably be construed by employees to deny them the ability to quit or change jobs by cutting off their access to other employment opportunities that they are qualified for based on their experience, aptitudes, and preferences as to type and location of work."*

Non-Competes Chill Employees from Engaging in Five Specific Types of Protected Activity

1. Chilling employees from concertedly threatening to resign.
   - Threats would be futile given lack of other employment opportunities and threats of litigation.
2. Carrying out concerted threats or concertedly resigning.
3. Concertedly seeking or accepting employment with a competitor to obtain better working conditions.
4. Soliciting co-workers to a local competitor as part of protected concerted activity.
5. Seeking employment which allows them to engage in protected activity with other workers.

Special Circumstances "Defense"

- Noncompetes violate "Section 8(a)(1) unless the provision is narrowly tailored to **special circumstances** justifying the infringement on employee rights.
  - A desire to avoid competition? → No.
  - Business interest in retaining employees? → No.
  - Protecting investments in training employees? → No.
  - Desire to protect proprietary or trade secret information? →No…but can be addressed in other agreements.
- Employer's justification unreasonable for low-wage or middle-wage workers who lack access to trade secrets.
- GC 23-08 does not disturb the Act's general exclusion of supervisors, managerial personnel, and independent-contractors.
- *"Moreover, there may be circumstances in which a narrowly tailored non-compete agreement's infringement on employee rights is justified by special circumstances."* **What?**

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Harper Holdings, LLC – The Test Case

On September 1, 2023, NLRB Region 9 issued a complaint against Harper Holdings, LLC d/b/a Juvly Aesthetics, a cosmetic services spa, alleging, among other things, that Juvly's use of **noncompete** and **nonsolicitation** provisions violated the NLRA.

- The NLRA could not have picked a better case to advance its position.

- Two-year noncompete within 20 miles of any Juvly location.
- Training repayment of up to $105,000 if employee leaves in first two-years or violates NC.
- Two-year nonsolicit/no-recruit with a $150,000 penalty per employee, $25,000 per client.
- Confidentiality prohibiting compensation and evaluation discussions, post-employment whereabouts, and any information regarding employment with Juvly.
- Mutual nondisparagement prohibiting negative comments.

The Proposed Ban

On January 5, 2023, the Federal Trade Commission (FTC) published a proposed rule calling for the absolute ban of non-compete agreements. This essentially was the first step in the crusade against restrictive covenants witnessed in 2023.

- The Proposed Rule would also require employers to rescind existing noncompete agreements and notify current and former employees that their noncompetes are no longer in effect.
  - That's an awkward call.
- With over 27,000 comments as of this past summer, the FTC postponed the final vote to April 2024.

Confidentiality and Nondisparagement Clauses

The crusade continues…

Update Regarding *McLaren Macomb*,
372 NLRB No. 58 (February 21, 2023) and GC 23-05

- NLRB ruled an employer violates Section 8(a)(1) of the Act when offering severance agreements with overly broad confidentiality and non-disparagement provisions.
- On March 21, 2023, GC expressed her views in GC 23-05 stating:
  - The mere offer of a severance agreement alone, irrespective of the employees' voluntary agreement, is inherently unlawful;
  - Confidentiality provisions must be narrowly tailored and time-limited, restricting only dissemination of proprietary or trade secret information;
  - Settlement agreements may limit confidentiality to financial terms;
  - Non-disparagement clauses may only limit maliciously untrue statements that meet the definition of defamation;
  - The ruling applies retroactively;
  - Savings Clause specifically protecting Section 7 rights is insufficient.

NLRB Urged the Sixth Circuit to Enforce *McLaren Macomb*

On September 18, 2023, The Chamber of Commerce of the U.S. (and others) filed *amicus curiae* to vacate the decision.

- *"The Board's new rule is the latest dramatic overreach in a torrent of decisions radically re-interpreting the NLRA."*

- *"In sum, consistent with the current Board's cavalier approach to past precedent and interpreting the NLRA, the Board has entirely disregarded employer interests, and as well as employee interests…"*

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The SEC is Also Cracking Down on Employment Agreements

On September 29, 2023, The Securities and Exchange Commission settled charges against investment advisor D. E. Shaw & Co., L.P. for $10M for requiring employees to sign agreements with confidentiality provisions that did not expressly include SEC whistleblower protection language.

- The SEC found that the agreement violated Rule 21F-17 of the Securities Exchange Act. Rule 21F-17 prohibits any person from taking "any action to impede an individual from communicating directly with the Commission staff about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement."
- Agreements containing broad exception language, i.e., "except as may be require by applicable law or by order of a court…" are insufficient. Must expressly allow confidential disclosures to the SEC, regulators, commissions, as well as federal, state, or local governmental agencies.

Rule 21F-17 applies to any employer, not just investment advisers or broker-dealers.

Restrictive Covenants Under Siege…A Recap

1. Memorandum 23-08 wants to invalidate nearly all noncompete agreements.
2. The complaint against Harper Holdings, LLC seeks to push 23-08's limit allowing invalidation of an agreement that also contains non-solicit/no-recruit language.
3. Proposed Ban seeks absolute invalidation on noncompetes.
4. *McLaran Macomb* seeks to curtail confidentiality and nondisparagement clauses.
5. SEC needs whistleblower protection in any employment agreements.

Adverse Employment Action Under Title VII

Hamilton v. Dallas County,

No. 21-10133, 2023 WL 5316716, at *1 (5th Cir. Aug. 18, 2023)

For 30 years, the adverse employment action prong in the Fifth Circuit required claimants to show they suffered an "ultimate employment decision" which included hiring, firing, demoting, promoting, compensating, and granting leave. *Thompson v. City of Waco, Tex.*, 764 F.3d 500, 503 (5th Cir. 2014).

- In *Hamilton*, the Dallas County Sheriff's Department argued that its policy resulting in only male detention officers being allowed days off during the weekend, though "facially discriminatory," was not an adverse employment action as it did not affect an ultimate employment decision.
- The District Court granted the Department's 12(b)(6) motion to dismiss.

Hamilton v. Dallas County,

No. 21-10133, 2023 WL 5316716, at *1 (5th Cir. Aug. 18, 2023)

On appeal the Firth Circuit reversed and remanded:

- *"Nowhere does Title VII say, explicitly or implicitly, that employment discrimination is lawful if limited to non-ultimate employment decisions. To be sure, the statute prohibits discrimination in ultimate employment decisions—"hir[ing]," "refus[ing] to hire," "discharg[ing]," and "compensation"—**but it also makes it unlawful for an employer "otherwise to discriminate against" an employee "with respect to [her] terms, conditions, or privileges of employment."***

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Terms, Conditions, or Privileges of Employment…

- *Hamilton* makes clear that the days and hours one works are "quintessential "terms or conditions" of one's employment." But what is the harm if, as the Department argued, "Title VII liability does not extend to 'de minimis' discrimination."
- *[W]hatever standard we might apply, it is eminently clear that the Officers' allegations would satisfy it at the pleading stage."*
- The concurring judges argued that *"the question left hanging by the majority is what kind of "term or condition" of employment creates an actionable Title VII discrimination claim."*

The Practical Ramifications of *Hamilton*

- The precedent routinely used in position statements, motions to dismiss, and motions for summary judgment, at least in LA, MS, and TX, for now, will need revision as our 30-year reliance on ultimate employment decisions is no more.
- *Hamilton* undoubtedly changes the pleading standard and makes it easier to bring claims.
- Workplace policies affecting terms, conditions, or privileges of employment must be reviewed to ensure they are evenly applied.

The Practical Ramifications of *Hamilton*

- An easier pleading standard means more claims.
- More claims means more settlements and an altered litigation strategy.
- The judicial uncertainty behind what constitutes terms, conditions, or privileges of employment, or actionable harm, will weigh in favor of claimants for the foreseeable future.
- Will take several years to redevelop usable precedence.

Muldrow v. City of St. Louis Missouri,

30 F.4th 680, 689 (8th Cir. 2022), cert. granted in part, 143 S. Ct. 2686 (2023)

Conversely, the Eighth Circuit affirmed that a lateral transfer, allegedly due to gender, did not constitute a “tangible change in working conditions that produce[d] a material employment disadvantage” because the officer’s pay, rank, and duties remained the same.

- The U.S. Supreme Court granted certiorari and will decide next year whether a lateral transfer is an adverse employment action.

The Not So Good News from The National Labor Relations Board

- In the past few months, the Democrat-controlled National Labor Relations Board (NLRB), and its General Counsel, have issued significant rulings that make it:
  - Dramatically easier for unions to organize employees because of “quickly elections.”
  - Forcing employers to bargain with a union even though the union did not win an election.
  - Greatly expanded the definition of what constitutes a joint employer relationship and the adverse consequences of being a joint employer.

Cemex Construction Materials Pacific, LLC
August 25, 2023

- The Board announced a new framework for determining when employers are required to bargain with unions when a secret ballot election has not been held.
  - According to the Democrat-dominated NLRB, this approach "will both effectuate employees' right to bargain through representatives of their own choosing and improve the fairness and integrity of Board-conducted elections."
  - This "new" rule applies whenever a union makes a demand for recognition claiming that it has the support of a majority of employees in an appropriate bargaining unit. The employer has two choices:
    1. Accept the union's claim and agree to recognize the union as the representative of employees in the bargaining unit designated by the union, or
    2. Promptly file an RM petition for a secret ballot election for employees in the union-designated bargaining unit.

Cemex Construction Materials Pacific, LLC
August 25, 2023

- However, if an employer files an RM petition and commits any unfair labor practice that would require setting aside the election, the petition will be dismissed, and – rather than re-running the election – the Board will order the employer to recognize and bargain with the union.
- In the current Board's view, this significantly different process, which the Board abandoned more than 40 years ago, "represents an effort to better effectuate employees' right to bargain through their chosen representative, while acknowledging that employers have the option to invoke the statutory provision allowing them to pursue a Board election."
  - When employers pursue this option, the new standard will promote a fair election environment by more effectively disincentivizing employers from committing unfair labor practices.

Cemex Construction Materials Pacific, LLC August 25, 2023

- *In Cemex*, the Board found that the employer engaged in more than 20 instances of objectionable conduct during the critical period between the filing of the election petition and the election.
- Accordingly, the Board ordered the employer to bargain with the union.
- The ballots were never opened or counted.

NLRB Issues Final Rule on the Standard for Determining Joint Employer Status

- On October 26, 2023, the Biden Board issued yet another significant change in federal labor law when is made substantial changes to the test it uses to determine what constitutes a joint employer relationship.
  - The Rule will have a significant impact on union organizing and employee representation under the National Labor Relations Act.
- The Rule will have far reaching implications because it could affect every employer that uses supplemental workers such as independent contractors and staffing agencies. When an entity is deemed a "joint employer" under the new Rule, that entity will likely be liable for those contracted workers and potentially liable for the conduct of the joint/primary employer.) In Scrooge-like fashion, this draconian rule takes effect the day after Christmas: December 26, 2023.

NLRB Issues Final Rule on the Standard for Determining Joint Employer Status

- Under the new rule, an entity may be considered a joint employer with another entity *if each entity has an employment relationship with an individual and the entities share or codetermine one or more of the employee's essential terms and conditions of employment.* The Rule defines essential terms and conditions as:
  - Wages, benefits and other compensation;
  - Hours of work and scheduling;
  - The assignment of duties to be performed;
  - The supervision of the performance of duties;
  - Work rules and directions governing the manner, means and methods of the performance of duties and the grounds for discipline;
  - The tenure of employment, including hiring and discharge; and
  - Working conditions related to the safety and health of employees.

NLRB Issues Final Rule on the Standard for Determining Joint Employer Status

- In 2020, the Board established a rule whereby entities were joint employers if they exercised direct control of essential terms and conditions of employment.
- The 2020 standard was based on the principle that to be considered an employer an entity must exercise control over employees. This new standard significantly moves away from that position.

NLRB Issues Final Rule on the Standard for Determining Joint Employer Status

- The new Rule presents significant questions regarding its application. Entities can be considered joint employers under the NLRA if they "share or codetermine" essential terms and conditions of employment.
- However, the Rule provides no clarity or guidance regarding what constitutes "sharing or codetermining."
- Moreover, there are questions regarding the impact on existing independent contractor agreements, staffing agreements and franchise agreements. Every entity that uses supplemental labor in its operations should evaluate each situation in which there are individuals providing services who also are providing services to another entity and assess whether the Labor Board's new rule creates a joint employer relationship. If so, employers should assess such relationships and potential changes that can be made to reduce the risk of being deemed a joint employer under the new Rule.

NLRB "Quickie Elections" Return

- In another belated Christmas gift to organized labor, the NLRB returns to "Quickie Elections" effective December 26. The changes will:
  - Make it easier for unions to circumvent the Board's election procedures through a demand for recognition; and
  - Issue a Final Rule amending (and expediting) current election procedures.
- Prior Boards have championed its role to ensure "that all employees are fully informed about the arguments concerning representation and can freely and fully exercise their [legal] rights."
- Quickie elections are fundamentally inconsistent with this commitment.
- It is highly advisable for employers to take action now to prepare for potential union organizing threats, assess their risk of being a union target.

NLRB “Quickie Elections” Return

- The Board announced a Final Rule amending its representation election procedures. The August 25 amendments reestablish tight timelines on hearing dates and elections, which shorten the amount of time employers have to respond to union election petitions. Under these rules, pre-election litigation is limited to specific issues and, when there is a hearing, it will held on a shorter timeline, post-hearing briefing will be limited, a decision will be issued, and the election held as quickly as possible after a petition is filed.
- The effect of these changes will be significant.
- Employers will have significantly less time to respond to a union election, communicate critical information to employees about the potential adverse consequences of union representation, and train managers on NLRB rules regarding lawful/ unlawful statements.
- The likely outcome will be unions winning significantly more representation elections under these new procedures.

NLRB “Quickie Elections” Return

- The Board’s August 25 decision makes it far more likely that employees may never have the chance to vote in a secret ballot Board election.
- When there is an election, the Board’s focus on the “prompt resolution” of election matters will often be at the cost of employee informed choice.
- It is critical that employers take immediate steps to prepare to respond quickly and effectively by training their management team on legal rights and responsibilities, preparing to litigate on extraordinarily short notice bargaining unit and supervisory issues, and preparing to communicate with employees lawfully and effectively about the arguments concerning representation and to respond to their questions.

Thank You

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