

Labor and Employment Law Topics In The Transportation Industry

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Office of Labor Management Standards (OLMS)

- Michael Hayes – Director of OLMS
 - Presentation on November 12, 2014
- OLMS must decide whether to “certify” applications for federal grants and funds to pay for mass transit projects, including subways, light rail, commuter rail, bus systems, and even van services.
- NO federal funds without OLMS’s certification.

OLMS - Federal Transit Law, 49 U.S.C. § 5333(b)

- Formerly identified as Section 13(c) of the Federal Transit Act and/or 13(c) of the Urban Mass Transit Act
- An employer who receives Federal mass transit funds must protect all covered mass transit employees affected by the use of the Federal money.

OLMS – Protecting Covered Mass Transit Employees

- For covered employees, the arrangement includes:
 - Preserving their rights and benefits;
 - Protecting them against a worsening of their employment conditions;
 - Continuing their collective bargaining rights;
 - Assuring jobs for employees of acquired mass transit systems;
 - Providing priority of reemployment if the employee is laid off or his job is eliminated; and
 - Providing paid training.

OLMS – Caution!!

- You will hear about this again as politicians continue to discuss funding the retirement of state and local government employees.
- In 2013, the California legislature and Governor Jerry Brown signed a temporary exemption from the Public Employee Pension Reform Act (PERPA) for transit employees covered by Section 13(c).

Illinois Ban the Box

- Governor Quinn signed Ban the Box legislation on July 14, 2014
- Went into effect January 1, 2015
- Employers with 15 or more employees prohibited from inquiring about criminal record or criminal history on application or in initial discussions

Illinois Ban the Box

- Can only ask after the applicant has been found to be qualified and notified that they have been selected for an interview
- If no interview then only after qualified offer of acceptance
- This is part of a larger national trend that has grown to 14 states and many, many large cities

Exceptions in Illinois:

- (1) when required by federal or state law to exclude applicants with specific types of convictions;
- (2) when a standard fidelity bond or an equivalent bond is required and one or more specific criminal convictions would disqualify;
- (3) when the employer employs workers covered by Illinois' Emergency Medical Services Systems Act

Penalties for Violation

- There are four levels of civil penalties, ranging from written warnings for the first offense through \$1,500 for every 30 days that pass without compliance.
- At present, there is no statutory private right of action for aggrieved job applicants.

Ban the Box in Missouri

- While the State of Missouri has no such regulation, many cities have enacted so-called “ban the box” ordinances.
- These include Columbia, Missouri.
- St. Louis has no such ordinance, but has applied this policy in City hiring, as has Kansas City, Missouri.

National Labor Relations Board

- National Labor Relations Act (“NLRA”)(1935)
 - Protects workers’ right to engage in “concerted activities”
 - Protects workers right to advocate and join unions
 - Definition of “concerted activities” has continued to expand
 - Not limited to employers with a unionized workforce
 - Enforcement:
 - The National Labor Relations Board (“NLRB”)
 - 5 Members (3 for Quorum)
 - Separate General Counsel

Taft-Hartley and Independent Contractors

- Taft-Hartley Amendments to NLRA (1947)
- Section 2(3) of NLRA – definition of “employee”
 - Excludes “any individual having the status of an independent contractor”
- Independent contractors do not have the right to organize; lack other NLRA protections

NLRB Definition of “Independent Contractor”

- Uncertainty about whether workers were “employees” or “independent contractors” existed from the passage of Taft-Hartley Act and continues today.
- NLRB as adjudicator:
 - NLRB is the ultimate appeal in NLRA labor disputes.
 - But NLRB decisions can be reviewed by federal courts.
 - Potential (and actual) inconsistency between NLRA interpretation of statutes and that of reviewing courts.

NLRB Definition of “Independent Contractor”

- The Supreme Court weighs in:

"The obvious purpose of [the Taft-Hartley] amendment was to have the [National Labor Relations] Board and the courts apply general agency principles in distinguishing between employees and independent contractors under the Act."

NLRB v. United Insurance Co. of America, 390 U.S. 254, 256 (1968)

- Defers to NLRB's analysis of factors concluding that insurance workers were not independent contractors because of substantial control exercised by the company over their duties and terms of employment.

NLRB Definition of “Independent Contractor”

- Recent NLRB trends away from focus on “right of control” to more weight on other factors suggesting employer-employee relationship
 - Expansion of NLRB regulatory authority
- *Roadway Package System*, 326 NLRB 842 (1998)
 - Pickup and delivery drivers working for Roadway, a nationwide package delivery company, were deemed “employees” because of the financial support from the company, required display of the corporate logo on their vehicles, along with the company’s control over schedules and the drivers’ manner of performing their work.
- *Dial-A-Mattress*, 326 NLRB 884 (1998)
 - Delivery drivers were “independent contractors”, based on the company’s lack of control over how drivers performed work, the drivers’ ownership and control of their vehicles, and the drivers’ control over who delivered goods.

NLRB Definition of “Independent Contractor”

Corporate Express Delivery Systems v. NLRB (2002)

- United States Court of Appeals for the District of Columbia upheld as reasonable the Board's decision:

“[T]o focus not upon the employer's control of the means and manner of the work but instead upon whether the putative independent contractors have ‘a significant entrepreneurial opportunity for gain or loss.’”

NLRB Definition of “Independent Contractor”

FedEx Home Delivery v. NLRB (2009)

- FedEx had purchased Roadway
- Organizing attempt; FedEx argued its drivers were “independent contractors” and therefore could not organize under the NLRA
- NLRB found FedEx drivers “employees”
- FedEx appealed to the U.S. Supreme Court

U.S. Ct . Appeals D.C. Circuit overruled NLRB:

- FedEx’s many constraints on drivers were driven merely by “customer demands and government regulations,”
- Factors supporting employee status were “clearly outweighed by evidence of entrepreneurial opportunity.” *Corporate Express Delivery Systems v. NLRB (2002)*

“Independent Contractor” in the Future

St. Joseph News-Press, 345 NLRB 474 (2005)
(Three member Board)

- 2 Republican appointees decide newspaper carriers and haulers were independent contractors; rejected any focus on the carriers’ asserted lack of bargaining power.
- Member Liebman (D) dissented:
“[I]t is entirely appropriate to examine the economic relationship ... to determine whether the carriers are economically independent business people, or substantially dependent on the Respondent for their livelihood.”
- Argued increasing use of “contract labor” and other “nontraditional” relationships “makes the question of labor law coverage worthy of a **fresh evaluation.**”

“Independent Contractor” in the Future

- Dissent in *St. Joseph News-Press* may become the majority opinion of the NLRB soon.
- Likely focus on “economic dependence” or “economic realities”
 - More likely to find “employee” relationship

“Independent Contractor” in the Future

- Advice Memorandum: **Super Shuttle Los Angeles, Inc.** (May 13, 2013)
 - Shared-ride airport shuttle drivers servicing LAX, other airports
 - Drivers used to be “employees” – represented by Teamsters
 - 2002 – drivers sign Unit Franchise Agreement – agree to become “independent contractors”
 - Drivers must pay “substantial up-front franchise fee”
 - Drivers use their own vans (Co. provides specifications: make, model, size, etc.)
 - Drivers “bid” on scheduled rides or wait in lot – but need not take work
 - Drivers can work as much as they want in a day; or not at all
 - No minimum level of compensation
 - Drivers encouraged to incorporate, and may hire “relief drivers”

“Independent Contractor” in the Future

- Advice Memorandum: **Super Shuttle Los Angeles, Inc.** (Cont’d)
 - General Counsel decides drivers are “independent contractors”
 - Cites “common-law agency test” from *NLRB v. United Ins. Co. of America*
 - **Significant entrepreneurial opportunity**
 - **Company does not exert meaningful control over manner and means of work**
 - **Parties clearly intended to create “independent contractor” relationship**
 - Fact that drivers “performance of crucial and stable part of [Co] operations” outweighed by other factors
 - Also finds its decision consistent with California Unemployment Insurance Appeals Bd.

NLRB Issued Quickie Election Rules

- Final Rule was published on December 15, 2014
- Rule aims to shorten minimum time in which an election may be held
- Unions seek to hold shorter elections to provide employer with less time to explain their position, thereby increasing the Union's chance of success
- The pretext for this rule is to reduce delays, but actual goal is to limit time for opposition

Ambush Election Rule (Cont'd)

- Pre-election hearing is to be held eight days from the filing of the Petition.
- Voter eligibility issues are to be deferred to post-election challenges instead of being addressed at a pre-election hearing.
- Board will serve notice of hearing and notice of petition for election, employer must post notice of petition within two business days of service
- Parties are required to complete “Statement of Positions” and state their position on the unit issues before evidence is heard at a pre-election hearing.

Ambush Elections (Cont'd)

- Employees are required to provide a preliminary voter list to the union before the pre-election hearing.
- Employers are required to provide final voter list within two days after the election is scheduled.
- Parties are required to wait until after the election to appeal a regional director's ruling in directing an election.
- Post-election disputes are to be heard within 14 days of the election and appeal rights to the Board are discretionary.

Micro Units

- The Board has made it easier for unions to win elections by allowing unions to fragment workforces and cherry-pick the unit of employees most likely to support unionization.
 - In *Specialty Healthcare* (2011), the Board substantially altered its traditional community of interest analysis for unit determinations ... no longer “sufficiently distinct” from other employees to warrant a separate unit.
 - Now, the Board assumes employees performing the same job at the same facility are presumptively appropriate, and the burden shifts to the employer to demonstrate that the excluded employees share an “overwhelming community of interest” with the included employees.

Micro Units (Cont'd)

- *Specialty Healthcare* was not industry specific.
 - *Macy's, Inc.* – Retail Industry
 - *Fraser Engineering Co.* – Construction Industry
 - *Frontier Airlines* – Transportation Industry
 - Could apply to just about any industry!
- Unions that previously lost elections may attempt to hand-pick smaller units and carve up the units to win elections.

NLRB Attack on Work Rules

- The Board, through various case decisions and advice memoranda, has continued its attack on employer work rules
- Cover a wide range of issues such as handbooks, social media and the “at-will” employment doctrine

NLRB Advice Memorandum – *Cox Communications*

- Two step inquiry to determine if work rules reasonably tend to chill employees in the exercise of their Section 7 rights:
 - *Explicitly* restricts Section 7 protected activities, or
 - (1) Employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.

NLRB Advice Memorandum – *U.S. Security Associates, Inc.*

- Released on September 19, 2014 but prepared in 2012
- Prong 1 – “employees would reasonably construe the language to prohibit Section 7 activity”
 - “[t]he ultimate question in these cases is whether employees reading [the disputed rule] would reasonably construe [it] as precluding them from discussing their terms and conditions of employment with other employees or a union, or would they reasonably understand that the [disputed rule] was designed to protect their employer’s legitimate proprietary business interest.”

NLRB Advice Memorandum – *U.S. Security Associates, Inc. (Cont'd)*

- Rules are to be given a reasonable reading, particular phrases are not to be read in isolation, and there is no presumption of improper interference with employee rights.
- Any ambiguity in the rule will be construed against the employer.
- Conversely, work rules that clarify their scope by including examples of non-Section 7 or clearly illegal conduct that is prohibited are lawful.

U.S. Security Associates, Inc. – Characterizing the Work Day

- The employer's use of the phrase "on duty" in several challenged rules, as opposed to "working time," made the rules unlawful.
 - "On duty" could mean from the time an employee came on duty or began their shift, including during breaks or meal periods.
 - Use "working time" instead of "on duty," "company time," "business hours," and "working hours" because these phrases are ambiguous and could reasonably be construed to include an employee's non-working time after a shift begins.

Social Media Policies

Costco Wholesale Corporation

- The NLRB found that employees would reasonably construe the following work rule as one that prohibits Section 7 activity:
 - Any communication transmitted, stored or displayed electronically must comply with the policies outlined in the Costco Employee Agreement. Employees should be aware that statements posted electronically (such as to online message boards or discussion groups) that damage the Company, defame any individual or damage any person's reputation, or violate the policies outlined in the Costco Employee Agreement, may be subject to discipline, up to and including termination.
- The language was impermissible because it “clearly encompasses” concerted communications protesting Costco's treatment of its employees and it did not specifically exclude protected communications under Section 7 of the Act.

At-Will Doctrine

American Red Cross (Arizona)

- An administrative law judge took exception to:
 - “I further agree that the at-will employment relationship cannot be amended, modified or altered in any way.”
- The language suggests:
 - Employees cannot act in concert to change their employment status by seeking union representation.
- Ordered to rescind or revise the language and advise its employees in writing of the change.

Confidentiality Provisions

Flex Frax Logistics, LLC

- The Employer's policy stated:
 - “Employees deal with and have access to information that must stay within the Organization. Confidential Information includes, but is not limited to, information that is related to: our customers, suppliers, distributors; our organization management and marketing processes, plans and ideas, processes and plans; our financial information, including costs, prices; current and future business plans, our computer and software systems and processes; personnel information and documents, and our logos, and art work. No employee is permitted to share this Confidential Information outside the organization, or to remove or make copies of any of our records, reports or documents in any form, without prior management approval. Disclosure of Confidential Information could lead to termination, as well as other possible legal action.”

Confidentiality Provisions

Flex Frax Logistics, LLC (Cont'd)

- Majority of the Board found the policy was unlawful because “employees would reasonably believe that they are prohibited from discussing wages or other terms and conditions of employment with nonemployees, such as union representatives – an activity protected by Section 7 of the Act.”

Controlling Off-Duty Employees' Access To The Workplace

- *Sodexo American, LLC* changed four decades of precedent
 - The hospital maintained a policy that prohibited off-duty employees from accessing the workplace except to conduct hospital-related business, visit a patient, or receive medical care.
- After several employees were disciplined for violating the policy, the NLRB found the policy was overly broad because it could prohibit access for union activity.

Controlling Off-Duty Employees' Access To The Workplace (Cont'd)

- *Marriott International, Inc.*'s policy violated the NLRA
 - “Occasionally, circumstances may arise when you are permitted to return to interior areas of the hotel after your work shift is over or on your days off. On these occasions, you must obtain prior approval from your manager. Failure to obtain prior approval may be considered a violation of Company policy and may result in disciplinary action. This policy does not apply to parking areas or other outside nonworking areas.”
- Unlawful because it required “employees to secure managerial approval, giving managers absolute discretion to deny access for any reason, including to discriminate against or discourage Section 7 activity.”

Employer Investigations

Banner Health Systems

- Employee was requested not to discuss a matter under investigation with their coworkers while the investigation was pending.
- The NLRB held the policy “has a reasonable tendency to coerce employees” and constituted an unlawful restraint on their Section 7 rights.
- The NLRB rejected the Employer’s concerns about integrity and confidentiality of the investigation.
- Employer’s burden “to first determine whether in any given investigation witnesses needed protection, evidence was in danger of being destroyed, testimony was in danger of being fabricated, or there was a need to prevent a cover up.”

Employer Investigations

Verso Paper

- In 2013, the NLRB identified language that it considered lawful at that time:
 - “Verso has a compelling interest in protecting the integrity of its investigations. In every investigation, Verso has a strong desire to protect witnesses from harassment, intimidation and retaliation, to keep evidence from being destroyed, to ensure that testimony is not fabricated, and to prevent a cover-up. Verso may decide in some circumstances that in order to achieve these objectives, we must maintain the investigation and our role in it in strict confidence. If Verso reasonably imposes such a requirement and we do not maintain such confidentiality, we may be subject to disciplinary action up to and including immediate termination.”

Walking Off The Job

Ambassador Services, Inc.

- NLRB found that the Employer's walking off the job rule violated the NLRA because it reasonably could be construed to prohibit Section 7 activity. Specifically, the NLRB concluded that "walking off" was synonymous with "strike," and thus, a rule prohibiting "walking off the job" would reasonably be construed as prohibiting Section 7 activity.

Access to Email

- In *Purple Communications* the NLRB ruled that employees must be given access to employer's email system for organizing purposes
- Only employees already allowed access to email must be given access for organizing
- Must take place outside of work time
- Policies limiting access may be held to violate the NLRA

Other Handbook Topics Of Interest To The NLRB

- Policies prohibiting communication with the media and/or law enforcement
- Complaint policies requiring employees to follow internal grievance procedures
- Dress codes prohibiting union insignia from being worn
- Policies requiring “respectful,” “courteous,” and “appropriate” conduct
- Policies prohibiting solicitation and distribution during time outside of work or off company premises
- Non-disparagement policies
- Policies prohibiting “gossiping” and/or “fraternization” by employees
- Bullying policies that can be applied broadly to prohibit speech

NLRB – Topics Of Interest

- NLRB General Counsel Richard Griffin directed the following issues be submitted to the Division of Advice:
 - The applicability of Weingarten principles in non-unionized settings
 - “At-will” provisions in employer handbooks
 - The rights of contractor employees, who work on another employer’s property, to have access to the premises to communicate with co-workers or the public
 - Mandatory arbitration agreements with a class action prohibition

Employee Discipline While Negotiating First CBA

- The National Labor Relations Board ruled that, even before an employer and a labor union had reached a collective bargaining agreement regarding how employees would be disciplined and the process for challenging discipline, employers must bargain with the union before imposing discretionary discipline.

Alan Ritchey, Inc. and Warehouse Union Local 6, International Longshore and Warehouse Union, AFL-CIO, 359 NLRB No. 40 (Dec. 14, 2012).

Dues Checkoff

- **Dues Checkoff** = Requirement that employer deduct dues from employees paycheck and give to union
 - Bargained for in Collective Bargaining Agreement

- Old Rule:

No contract = No Dues Checkoff without Collective Bargaining Agreement

- New Rule:

NLRB overturned more than 50 years of its own precedent and decided that dues checkoff must be continued even after/during expiration of contract.



WKYC-TV, Inc., 359 NLRB No. 30 (Dec. 12, 2012).

Missouri Worker's Compensation Retaliation

- April 15, 2014, *Templemire vs. W&M Welding*
- Missouri Supreme Court overturned past precedent and established a new standard for work comp retaliation claims
- Standard is now “contributory factor” standard
- To succeed on a claim, an employee need only show that having filed work comp “contributed to” an adverse employment action

Missouri Worker's Compensation Retaliation(Cont'd)

- This is a VERY LOW standard, easy to get to a jury
- Brings work comp retaliation with Discrimination and retaliation claims brought under the Missouri Human Rights Act

