FEDERAL SUMMARY

JANUARY 2015

1. **National Transportation Safety Board Affirms FAA Jurisdiction Over Commercial UAS Operators – NTSB Punts on Lack of Regulations for the Commercial UAS Industry:** The National Transportation Safety Board held that the Federal Aviation Administration was authorized to assess a $10,000 penalty against a commercial UAS operator and that UAS satisfy the statutory definition of aircraft. *Huerta v. Pirker*, NTSB CP-217 (Nov. 18, 2014).

   The NTSB's decision is noteworthy because in the commercial aviation industry, the FAA has the discretion to assess penalties against the employee, the aircraft operator, or both. That UAS are in fact aircraft, subject to FAA regulations, will allow the agency to apply the same discretionary enforcement scheme towards the UAS industry, both operators and employees, as to the commercial aviation industry.

   Further, the FAA is two years behind schedule in publishing UAS regulations, thus there are no regulatory standards for commercial UAS operators. At present, the FAA has a general prohibition against commercial UAS operations, but it has granted individual waivers to specific UAS activities on an ad hoc basis (the details of this are outlined under the FAA part 333 exemption process). The requirements for the waivers varied based on the nature and location of the activity.

   For more information, see the Jackson Lewis Legal Update at http://www.jacksonlewis.com/resources.php?NewsID=5015.

2. **What to Watch for at National Labor Relations Board in 2015:** *The National Labor Relations Board has not been shy about making news with controversial decisions during 2014. Holding franchisors liable for unfair labor practices allegedly committed by franchisees and finding violations of the National Labor Relations Act in routine contract and policy language are, perhaps, a harbinger of key decisions to come. Here are some major subjects on which employers should expect NLRB action in the coming new year, if not sooner.*

   "Quickie Election" Rule

   After an unsuccessful attempt in 2011, the Board again, at the beginning of 2014, proposed major changes to its representation case rules ("quickie election" rule). Although the notice-and-comment period ended in April 2014, the Board still has not acted on the proposed rule. There has been widespread speculation that the final rule will be issued before the end of 2014. However, recent developments suggest a final version rule may not be forthcoming until 2015. (For more on this, see Substantial Doubt Cast on Imminence of 'Quickie Election' Rule.) The quickie election rule would have a dramatic impact on union organizing and we will keep a close watch on this issue in the coming year.

Joint-Employer Standard

In *Browning-Ferris Industries* (Case 32-RC-109684), the Board could change the "test" for determining whether two entities are joint employers, and therefore, among other things, liable for the unlawful acts of each other under the NLRA. One obvious concern is that franchisors, which provide trademarks and franchise systems, but typically have little involvement in the day-to-day management of a franchisee, will become liable for unfair labor practices that are beyond their control. Because the franchise business model is designed in part as a buffer against risk and liability, if the NLRB decides that franchisors are jointly liable with their franchisees, franchisors may have to rethink their business strategy and rely on company-owned locations, rather than franchisees, for greater certainty and control. As one witness declared during a September 9, 2014, Congressional hearing, "Such a rule change could completely upend the franchise model and have devastating consequences for franchising as an economic force in the United States …. [I]ndividual entrepreneurs would be deprived of the opportunity to own their own business, franchisors would be denied the opportunity to expand their business, and millions of jobs will be lost."

We anticipate that in 2015, the NLRB General Counsel will continue to press for Board findings of joint employer status in cases that present that issue. . We will be watching closely given the potentially far-reaching effects of expanded joint employer liability.

Scholarship Student-Athletes as Employees

Student-athletes across the nation have been pushing for "employee" status under a variety of laws. In addition to a recent class action filed against universities for alleged violations of the Fair Labor Standards Act (for more on this, see our Collegiate and Professional Sports Law blog), student-athletes at Northwestern University persuaded the Regional Director of NLRB Region 13, based in Chicago, that undergraduate members of the football team receiving grant-in-aid scholarships were "employees" under of the Act. Some of the Northwestern football players are seeking to have the newly formed College Athletes Players Association represent them, and the Regional Director directed an election.

Northwestern University filed a Request for Review (an appeal) of the decision with the Board. The Board is reviewing the case and, recognizing its possible impact, accepted amicus briefs.

If the NLRB upholds the determination that Northwestern's student-athletes receiving grant-in-aid scholarships are "employees," it would create significant new representation rights for student-athletes at private universities and could raise issues under other labor laws.

Use of Employer Communications Systems for Protected Concerted Activity

In 2007, the Board in *Register Guard*, 351 NLRB 1110 (2007), held that an employer could forbid employees from using company electronic communication systems (including email) for non-business purposes. The Board stated, "[E]mployees have no statutory right to use the[ir] employer's email system for Section 7 purposes." The decision was controversial at the time, and the current Board, now controlled by members

aligned with a different, union-friendly political party, decided this year to review the issue in the *Purple Communications, Inc.*, 21-CA-095151.

When the Board released an opinion on September 29, 2014, however, it held the issue of employee use of company electronic communications for further consideration. Employers should watch for the second *Purple Communications* decision. If the Board overturns or limits the *Register Guard* electronic communications use rule to force employers to allow at least some employee use of employer email, it will make employees' ability to engage in union and protected concerted activity at work much easier. It also may result in an increase in employee "down-time" when they should be working.

Arbitration Agreements with Class or Collective Action Limitations

In *D.R. Horton*, 357 NLRB No. 184 (Jan. 3, 2012), the Board found a violation of the Act when an employer required employees to sign arbitration agreements prohibiting class or collective action lawsuits absolutely, because, in the Board's view, such lawsuits are a form of protected concerted activity under the NLRA. That decision has been roundly criticized by employers and has been rejected by several Circuit Courts of Appeals. The NLRB nevertheless reaffirmed *D.R. Horton* in its recent *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (Oct. 28, 2014), again holding that class-action lawsuits are protected under the Act and agreements prohibiting them unlawful. In the coming year, we may see which of these conflicting views will prevail.

Handbooks and Policies

In its bid to make the NLRA more relevant, the NLRB has been policing aggressively employee handbooks and other policies that it believes "chill" employee rights under the Act. A bevy of decisions from Administrative Law Judges and the Board have called into question seemingly innocuous policies, such as those requiring "courteous" communications between employees or forbidding "insubordination" generally. In addition, restrictions on sharing a company's confidential information have been declared unlawfully overbroad because terms and conditions of employment could be considered "confidential." A prohibition against using intellectual property without authorization also was found to be overbroad because it could prohibit, for example, picketers from placing a company's logo on their signs. We anticipate that ALJs and the Board will continue to interpret the Act broadly to declare seemingly acceptable handbook and policy language unlawful. Employers should watch carefully for these decisions so their policies can be adjusted accordingly.

Social Media

The Board also has been broadening its reach into social media. It recently held, for example, that clicking the "Like" button on Facebook was protected concerted activity. On the other hand, it has found unprotected a profanity-laced rant against an employer by two employees who advocated multiple insubordinate acts. Because of the pervasive use of social media, we anticipate many more rulings in 2015 about whether employee activity on social media is protected. They may have a significant impact on social media policies and actions an employer may take against employees for these activities.

For more information, see the Jackson Lewis Legal Update at http://www.jacksonlewis.com/resources.php?NewsID=5019.

3. **Supreme Court: Security Screening Time Not Compensable Under FLSA:** Unanimously reversing the Ninth Circuit court of appeals, the U.S. Supreme Court has held that time spent by warehouse workers undergoing security screenings was non-compensable under the Fair Labor Standards Act because that time did not constitute a "principal activity" nor was it "integral and indispensable" to the workers' other principal activities. *Integrity Staffing Solutions, Inc. v. Busk*, No. 13-433 (Dec. 9, 2014).

The Court explained that an activity is "integral and indispensable" to the principal activities that an employee is employed to perform only if it is an "intrinsic element of those activities and one with which the employee cannot dispense if he is to perform his principal activities." The Court found this test was not met because undergoing a security screening was not an intrinsic element of the workers' principal activities of pulling products from warehouse shelves and packing them for shipment, and the security screenings were not "indispensable" to their work because the employer could have eliminated the security screenings without impairing the employees' ability to complete their work.

For more information, see the Jackson Lewis Legal Update at http://www.jacksonlewis.com/resources.php?NewsID=5023.

4. **NLRB Issues Quickie Election Rule:** The National Labor Relations Board (3-2) issued its long-awaited final rule governing the conduct of representation elections, reducing the time between the filing of a representation petition and the election through procedural changes. The rule will take effect April 14, 2015.

The rule was first issued in 2011 but later was invalidated by a federal court because the Board lacked a quorum when it was enacted. *Chamber of Commerce of the U.S. v. NLRB*, 879 F.Supp.2d 18 (D.D.C. 2012). The Board issued a more extensive proposal in early 2014, which became final today.

Highlights of the rule include:

- An employer must submit a "Statement of Position" within *seven days* of receipt of the election petition. Failure to raise a particular issue in this filing would preclude it from presenting evidence or cross-examining a witness on the issue at the representation hearing.
- Any pre-election hearing must be scheduled to open *eight days* following the region's notice of petition.
- The right to file a post-hearing brief following the pre-election hearing has been eliminated.
- Regional Directors normally must schedule the election through a direction of election rather than permitting the parties to agree on a date.
- The automatic *25-day* stay of election following the Regional Director's decision and direction of election is eliminated.

- Employers must produce the list of voters ("Excelsior List") within *two days, instead of seven,* following the direction of election. The List must contain not only the names and addresses of voter, but also their personal telephone numbers and e-mail addresses, if available.

For more information, see the Jackson Lewis Legal Update at http://www.jacksonlewis.com/resources.php?NewsID=5024.

5. **DOL Releases Regulations Extending Protections to Lesbian, Gay, Bisexual, and Transgender Employees, Applicants:** Final regulations implementing the July 21, 2014, Presidential Executive Order prohibiting federal contractors and subcontractors from discriminating against lesbian, gay, bisexual, and transgender (LGBT) employees and applicants were published in the *Federal Register* ("the Rule" or regulations).

The Rule will become effective April 9, 2015, 120 days after its publication, and will apply to federal contracts entered into or modified on or after this date.

The Rule prohibits covered employers from discriminating on the bases of sexual orientation and gender identity and requires that they take affirmative action to ensure that applicants are employed, and employees are treated, without regard to their sexual orientation or gender identity. The regulations modify Executive Order 11246 (which generally provide for affirmative action on the bases of race and sex) by substituting the phrase "sex, sexual orientation, gender identity, or national origin" for "sex or national origin" wherever the latter phrase appears in the regulations implementing Executive Order 11246.

For more information, see the Jackson Lewis Legal Update at http://www.jacksonlewis.com/resources.php?NewsID=5026.

6. **Labor Board Adopts Presumption that Employees Can Use Employer's Email System to Engage in Protected Activity:** The National Labor Relations Board has held that, absent special circumstances that justify specific restrictions, employers must permit employees who have been provided access to their employer's email system to use that system for statutorily protected communications on their non-working time under the National Labor Relations Act. *Purple Communications, Inc.*, 361 NLRB No. 126 (Dec. 11, 2014). The 3-2 decision applies retroactively.

For more information, see the Jackson Lewis Legal Update at http://www.jacksonlewis.com/resources.php?NewsID=5027.

7. **Passage of Small Business Efficiency Act Gives Professional Employer Organizations Federal Certainty:** Congress passed the Small Business Efficiency Act ("SBEA") on December 16, 2014, bringing federal legislative certainty to the PEO industry as to the services offered by PEOs, including payment of wages, payroll tax collection authority, and other critical employment-related responsibilities. President Barack Obama is expected to sign the bill.

The SBEA authorizes changes to the Internal Revenue Code to establish "Certified Professional Employer Organizations" or "CPEO." The IRS must issue regulations to implement the SBEA by July 1, 2015. Any additional regulations implementing the SBEA must be issued no later than January 1, 2016. The SBEA becomes effective on January 1, 2016.

For more information, see the Jackson Lewis Legal Update at http://www.jacksonlewis.com/resources.php?NewsID=5031.

8. **NLRB Announces New Standard for Exercising Jurisdiction Over Religiously Affiliated Colleges and Universities – Board Also Announces New Standard for Determining Whether Faculty are Managers Excluded from Collective Bargaining:** In what is certain to be a controversial decision that could spark widespread organizing of faculty in private colleges and universities, the National Labor Relations Board adopted new standards for determining whether to exercise jurisdiction over self-identified religious colleges and universities under the U.S. Supreme Court's decision in *NLRB v. Catholic Bishop*, 440 U.S. 490 (1979), and for determining the managerial status of faculty pursuant to the U.S. Supreme Court's decision in *NLRB v. Yeshiva University*, 444 U.S. 672 (1980). *Pacific Lutheran University*, 361 NLRB No. 157 (Dec. 16, 2014).

For more information, see the Jackson Lewis Legal Update at http://www.jacksonlewis.com/resources.php?NewsID=5038.

9. **U.S. Supreme Court Clarifies Procedures for Removal to Federal Court Under Class Action Fairness Act:** In a divided 5-to-4 opinion, the U.S. Supreme Court has held that defendants seeking to remove a case to federal court under the Class Action Fairness Act ("CAFA") need only allege in the notice of removal an amount in controversy in excess of the $5 million threshold and need not attach evidence to the notice of removal proving the amount in controversy. *Dart Cherokee Basin Operating Co., LLC v. Owens*, No. 13-719 (Dec. 15, 2014).

For more information, see the Jackson Lewis Legal Update at http://www.jacksonlewis.com/resources.php?NewsID=5039.

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