Higher Education Legal Update Webinar

August 20, 2020

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NLRB Updates

- Union Access to the Employer's Property:
  - UPMC, 368 NLRB No. 2 (2019)
  - Kroger Limited Partnership I Mid-Atlantic, 368 NLRB No. 64 (2019)
- Religiously Affiliated Universities & Colleges:
  - Duquesne University of the Holy Spirit v. NLRB, No. 18-1063 (D.C. Cir. 2020)
  - Bethany College, 369 NLRB No. 98 (2020)
  - Our Lady of Guadalupe School v. Morrissey-Berru, 591 U.S. ___ (2020)

NLRB v. Babcock & Wilcox, Inc., 351 U.S. 105 (1956)

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- Employees have the right to engage in protected concerted activity under Section 7 of the NLRA
- Subject to certain exceptions, an employer cannot restrict employees' right to discuss self-organization, but does not apply to non-employee union agents
- General rule: an employer may deny access to its property by non-employee union agents
- Two exceptions to the general rule:
  - "inaccessibility"
  - "discrimination"

UPMC, 368 NLRB No. 2 (June 14, 2019)

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- Background:
  - two union organizers enter 11th floor cafeteria in UPMC hospital to discuss unionization with employees
  - An off-duty employee circulates union flyers to other employees in the cafeteria
  - Hospital security orders union organizers and certain employees to leave the cafeteria
  - Union organizers are escorted out by police
  - Unfair Labor Practice (“ULP”) charges are filed against UPMC
  - ALJ issues decision finding UPMC violated the Act

UPMC, 368 NLRB No. 2 (June 14, 2019)

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- Previous rule:
  - Non-employee union organizers cannot be denied access to cafeterias and restaurants open to the public if the organizers use the facility in a manner consistent with its intended use and are not disruptive.
- New rule:
  - An employer does not have a duty to allow non-employees to use their cafeterias or similar public spaces for promotional or organizational activities absent evidence of inaccessibility or activity based discrimination.
- Here, the Board overturned the ALJ’s decision in part, holding UPMC did not commit a ULP by ejecting union representatives from the cafeteria

Kroger Limited Partnership I Mid-Atlantic, 368 NLRB No. 64 (September 6, 2019)

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- Background
  - Management decided to close a unionized Kroger store
  - Two new Kroger Marketplace stores that are non-unionized were constructed nearby
  - Management offered employees transfer options to other unionized Kroger stores in VA, but not the new Marketplace stores which were closer
  - Non-employee union representatives circulate petition in parking lot protesting this decision
  - Union representatives are escorted out of parking lot by police
  - ULPs subsequently filed; ALJ rules in favor of union reps

Kroger Limited Partnership I Mid-Atlantic, 368 NLRB No. 64 (September 6, 2019)

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- Previous interpretation of the discrimination exception:
  - The Board had taken a broad view of what constitutes discrimination, the focus was whether the employer had permitted nonunion actors to engage in solicitation and distribution on its property, regardless of whether they were "similarly situated"
- New Rule:
  - ". . . [T]o establish that a denial of access to nonemployee union agents violated the Act under the Babcock discrimination exception, the General Counsel must prove that an employer denied access to nonemployee union agents while allowing access to other nonemployees for activities similar in nature to those in which the union agents sought to engage. Consistent with this standard, an employer may deny access to nonemployees seeking to engage in protest activities on its property while allowing nonemployee access for a wide range of charitable, civic, and commercial activities that are not similar in nature to protest activities. Additionally, an employer may ban nonemployee access for union organizational activities if it also bans comparable organizational activities by groups other than unions."

NLRA Jurisdiction over Religiously Affiliated Colleges & Universities

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- NLRB v. Catholic Bishop, 440 U.S. 490 (1979)
  - Absent clear expression of Congress' intent, the Court declined to construe the NLRA in a manner that would implicate questions arising out of the Religion Clauses of the First Amendment
- University of Great Falls v. NLRB, 278 F.3d 1335 (D.C. Cir. 2002)
  - An institution is exempt from NLRA jurisdiction if: (a) holds itself out to the public as a religious institution; (b) is nonprofit; and (c) is religiously affiliated.
- Pacific Lutheran University, 361 NLRB 1404 (2014)
  - The Board will exercise jurisdiction over faculty members at a college or university, unless the institution demonstrates, as a threshold matter, that it holds itself out as providing a religious educational environment, and that it holds out the petitioned-for faculty member's as performing a specific role in creating or maintaining the school's religious educational environment.

Duquesne University of the Holy Spirit v. NLRB, No. 18-1063 (D.C. Cir. 2020)

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- Background:
  - the United Steelworkers petition to represent a bargaining unit of adjunct faculty at Duquesne University
  - Employer refuses to bargain despite Board order to do so
- D.C. Cir rejects the NLRB's PLU test and reaffirms its adherence to the Great Falls test
- Petition for Rehearing En Banc currently pending

Bethany College, 369 NLRB No. 98 (June 10, 2020)

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- Background
  - Professors filed various ULPs with the NLRB against the College
  - Applying the PLU standard, the ALJ determined the College committed various ULPs
- NLRB adopts the Great Falls test, overturns the PLU standard
- Bethany College exempt from the Board's jurisdiction under the Great Falls test, the Board determined:
  - 1) the college held itself out to students, faculty, and the community as providing a religious educational environment;
  - 2) the institution was a 501(c)(3) non-profit institution; and
  - 3) the College was owned and operated by the Central States Synod and the Arkansas/Oklahoma Synod of the ECLA

Our Lady of Guadalupe School v. Morrissey-Berru, 591 U.S. ___ (July 9, 2020)

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- Context of case
  - Facts
    - parochial elementary school teachers file employment discrimination claims against their employers
  - Legal issue
    - Whether the First Amendment precludes courts from adjudicating employment discrimination claims brought by an employee against their religious employer when the employee carries out religious functions but is not a "minister"
  - Ministerial Exception
- Implications for Duquesne & Bethany College
  - USW is arguing that the court's holding supports PLU standard;
  - NLRB denied motion for reconsideration in Bethany College