



Labor & Employment Issues In Focus

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For Clients and Friends
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“All that serves labor serves the Nation. All that harms labor is treason to America. No line can be drawn between these two. If any man tells you he loves America, yet hates labor, he is a liar. If any man tells you he trusts America, yet fears labor, he is a fool. There is no America without labor, and to fleece the one is to rob the other.”

Abraham Lincoln

NLRB ALLOWS THE RWDSU TO TAKE ANOTHER SWING AT AMAZON

This spring, the Retail, Wholesale and Department Store Union (“RWDSU” or “Union”) engaged in one of the most captivating and scrutinized organizing campaigns in the recent past: a hot shop Amazon distribution center in Bessemer, Alabama. Following a mail ballot election, the April 9, 2021 tally of ballots showed that of the approximately 5,867 eligible voters, 738 votes were cast for and 1,798 votes were cast against the Union, with 505 challenged ballots. The Union filed timely objections and the Acting Regional Director of the National Labor Relations Board (“NLRB”) in Region 10 ordered an evidentiary hearing. On August 2, 2021, Region 10 Hearing Officer Kerstin Meyers issued a thorough, 61-page Report on Objections (“Report”), recommending a second election. Case No. 10-RC-269250.

The Report initially explained that elections are not lightly set aside and that the test is whether the conduct of a party had “the tendency to interfere with employees’ freedom of choice.” RWDSU submitted 23 objections to the election, nine of which met this high standard.

Eight objections concerned the installation of a new USPS mailbox in the employee parking lot during the mail ballot election. The Report concluded that the totality of the circumstances created by installation of the mailbox undermined the laboratory conditions necessary to ensure a fair election. The Report explained that the mailbox installation was unauthorized by the NLRB. The Hearing Officer cast aside Amazon’s contention that no Board rule or precedent prohibited mailbox installation, retorting that “few, if any, employers have the means, the will, and the influence to cause the installation of a mail receptacle at their location in under six-weeks for the sole purpose of providing employees a method of returning their mail ballots.” The Report detailed the efforts of high-level USPS officials “jumping through hoops” to secure the mailbox, alter it to suit Amazon’s purposes, and install it quickly for use in the election. The Report found ample evidence demonstrating that employees reasonably believed Amazon was able to surveil the mailbox, noting multiple Amazon security cameras in the vicinity. Additionally, the Hearing Officer observed that the mailbox installation was intended as a convenience benefit to employees, implying that Amazon has the “will and means to cause federal agencies to bend to its will.” The Hearing Officer also found electioneering in Amazon’s placement of a sign with one of its anti-union campaign slogans near the mailbox. Based on all these factors, the Report recommended a second election.

The Hearing Officer also found merit in RWDSU's objection to Amazon's unlawful polling of employee sentiment during captive audience meetings. During these meetings, Amazon left free anti-union paraphernalia on a table in the back of the room. The Report concluded that this forced employees to make a choice whether to retrieve those materials under the observation of Amazon HR, and therefore could reasonably cause an employee to perceive that Amazon was trying to discern their support for, or against, the Union.

The remainder of RWDSU's objections were recommended for dismissal, including the Union's complaints about: (1) the content of captive audience meetings; (2) polling regarding job satisfaction; (3) maintenance of a list of those who voted; (4) isolation of Union supporters; (5) manipulation of a traffic light outside the facility; and (6) increased police presence.

Either party may file exceptions to the Report with the Acting Regional Director of Region 10 by August 16, 2021. Regional Directors do not typically reject hearing officer reports. But any appeal to the NLRB will likely be heard by a Democratic-majority Board, with Member Emanuel's term expiring on August 27, and his replacement, David Prouty, already confirmed by the United States Senate. As Amazon well knew, elections matter.

NATIONAL INFRASTRUCTURE BILL CLOSER TO REALITY AFTER UNITED STATES SENATE PASSES BIPARTISAN BILL

On August 10, 2021, the United States Senate passed a bi-partisan national infrastructure bill. The infrastructure bill, H.R. 3684, includes over \$1.2 trillion in core infrastructure spending for the nation's aging and crumbling roads, bridges, water pipes and electric grids, all expected to create huge job demands to the delight of labor unions. Passed by a margin of 69-30, the legislation will now go to the House of Representatives where it must clear some tricky political hurdles to become law.

If H.R. 3684 becomes law, it will be a signature achievement for President Joe Biden. Presidents Barack Obama, Donald Trump and others campaigned on passing such legislation, but it eluded them even as the nation's infrastructure has become outdated, and its poor condition creates danger for all Americans. The American Society of Civil Engineers ("ASCE"), a nonpartisan group, rates America's infrastructure at C-. The ASCE calculates that there is a water main break every two minutes in America and that an estimated 6 billion gallons of treated water is wasted each day. The ASCE also calculates that 43% of America's public roadways are in poor or mediocre condition.

H.R. 3684 reauthorizes the \$304 billion for the federal highway program and invests almost \$50 billion for transit. The bill will also send more than \$100 billion from the treasury to the Highway Trust Fund which faces a massive budget gap.

H.R. 3684 also contains more than \$550 billion in new federal funding for infrastructure over five years:

- \$110 billion of new funds for roads, bridges, and major projects
- \$73 billion to upgrade the electric grid
- \$65 billion for broadband internet access
- \$55 billion in spending for drinking water with dedicated funding to replace lead pipes
- \$25 billion for airports
- \$21 billion for cleanup of abandoned mines, superfund sites, and other brownfields.

President Biden campaigned on passing a bi-partisan infrastructure bill that he promised will help generate good union jobs to stimulate the economy. The Senate’s vote gets President Biden closer to fulfilling this campaign promise and fulfilling a lifelong dream for recently deceased AFL-CIO President Richard Trumka who worked closely with President Biden and Senate Majority Leader Charles Schumer on this package. The overwhelming majority of the funds in H.R. 3684 will be subject to Davis-Bacon requirements, which will help ensure that contractors pay workers prevailing wages. All energy infrastructure work, including the construction of EV charging stations on highways will be subject to prevailing wage as well as new jobs created in the clean energy industry – solar, wind, carbon capture and energy transmission. The Biden Administration said that it will work with organized labor to ensure that these new jobs “be good paying, union jobs.”

House Speaker Nancy Pelosi said that the House Majority will not consider H.R. 3684 until the Senate Democratic Majority passes a budget reconciliation bill that includes an expansion of the nation’s social safety net. In response, the Senate Democrats unveiled a \$3.5 trillion budget blueprint that includes boosts in spending on health care, child and elder care, education and climate change. Senate Republicans are not expected to support any budget reconciliation bill, but, to pass such legislation, the Senate Democrats only need a simple majority. The House of Representatives is out of session and is not expected to return until the Fall. The Biden administration vowed to work with the House to pass H.R. 3684 when the House returns from its recess.

**NYC LAW REGULATING USE AND COLLECTION
OF CUSTOMER BIOMETRIC INFORMATION IN EFFECT,
ALONG WITH MILLIONS OF DOLLARS IN POTENTIAL LIABILITY**

On July 9, 2021, New York City’s Biometric Identifier Information Law (“BIIL”), which regulates the “collection, use, and retention” of biometric identifier information, went into effect (the “Ordinance”). *See* 2021 NYC Local Law No. 3, NYC Admin. Code §§ 22-1201–22-1205. Biometric protection laws, such as the first of its kind in Illinois, have spawned a flurry of class action suits seeking to protect employees’ privacy interests from future data breaches and hacks, creating private rights of action and high statutory fees and damages. In fact, 2020 saw multiple settlements, ranging from \$1.8 million to an estimated \$650 million in value. *See, e.g., Martinez v. Nando’s Rest. Grp. Inc.*, No. 1:19-cv-07012 (N.D. Ill. June 22, 2020); *Patel v. Facebook, Inc.*, No. 3:15-cv-03747 (N.D. Cal. Feb. 26, 2021).

The Ordinance broadly defines biometric information as any identifiable physiological or biological characteristic, such as an individual’s retina, iris, fingerprint, voiceprint, or the geometry of the hand or face, that is used by a “commercial establishment.” NYC Admin. Code § 22-1201. It requires commercial establishments to notify “clearly and conspicuously” at “all customer entrances” and in “plain, simple language” that it may unilaterally collect, retain, convert, store, or share customers’ biometric identifier information. *Id.* This would include, for example, retail shopping malls that use facial recognition software to scan shoppers, identify suspected shoplifters, and alert security who will need to provide notice. While businesses may unilaterally collect this information, they are prohibited from “selling, leasing, trading, or sharing biometric identifier information “in exchange for anything of value,” or from profiting from the sale of biometric identifier information that it has collected. The language of the required signage must also conform to the type and manner prescribed by the New York City Department of Consumer Affairs Commissioner, which has yet to publish these regulations.

The Ordinance provides that individuals “aggrieved by” a violation may file a private right of action, but places some conditions on this right. Recovery can include up to \$500 for each negligent violation, \$5,000 for each intentional or reckless violation, injunctive relief, and attorneys and expert witness fees. However, before seeking judicial intervention, businesses alleged to have collected biometric information without making the required disclosures must first be notified of the individual’s intent to sue and given 30 days to cure the violation by placing clear and conspicuous notice at their establishment. This opportunity to cure only applies if the aggrieved individual limits the allegation to the improper collection of biometric information. If the business is alleged to also have “shared” the biometric information for “anything of value” or otherwise profited from the transaction, then no notice is required before an individual can bring a private right of action individually or as a class.

Businesses in New York City must be mindful of this new ordinance. However, establishments throughout New York State should not forget that the State’s New York Biometric Privacy Act (“BPA”) (AB 27), which carries greater penalties than the City version and requires written consent, is pending before the State Legislature.

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