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WHAT'S INSIDE

TAFT-HARTLEY REPORT

Employees May be Precluded from Using Email Systems to Discuss Unionization

On August 1, 2018, the National Labor Relations Board ("NLRB") called for public comment on whether to overturn a previous decision which forced employers to allow employees to utilize company email to assist in union organization. In 2014, the NLRB decided *Purple Communications*,[1] in which it specifically noted that employees should have the right under Section 7 of the National Labor Relations Act ("NLRA") to use company email to discuss unionization. In *Purple Communications*, the Communication Workers of America, AFL-CIO ("Union") was attempting to unionize employees at a sign language interpretation provider that resulted in Board elections at seven (7) call centers. The employees were bound by an electronic communications policy which prohibited them from using email to (1) engage in activities on behalf of organizations or persons with no professional or business affiliation with the company; and (2) send uninvited email of a personal nature. The Union filed an objection to the results of the elections alleging that the policy restricted the employees' freedom of choice.

The Administrative Law Judge ("ALJ") held that the policy was lawful due to the holding in *Register Guard*.[2] After review, the NLRB reversed the ALJ's decision setting a new precedent which allowed employees to use electronic communications to discuss union organization. The NLRB reasoned that the use of electronic communications for organizing purposes was in alignment with the goals of Section 7 of the NLRA which grants employees the right to engage in concerted activities for the purpose of collective bargaining. Specifically, the NLRB noted that Section 7 requires communication, and technology has changed the way employees communicate. Therefore, forbidding such communication via email would contradict Section 7.

Based on the NLRB's call for public comment on the issue, many believe that the NLRB is looking to reverse the decision in *Purple Communications* and revert to allowing employers to ban employees' use of email to communicate about organizing. Additionally, a new case involving workplace rules at a resort in Las Vegas may be the case

[1] 361 N.L.R.B. 1050.

[2] 351 N.L.R.B. 70.

the NLRB is targeting to use to revise its rule.[3] Briefs in that case are due October 5th. J&K will continue to monitor the NLRB's decision. If you have any questions, please contact our office.

More Trouble on the Horizon for Public Pensions after *Janus v. AFSCME*?

In June, the U.S. Supreme Court ruled against the American Federation of State, County and Municipal Employees ("AFSCME") in the much-anticipated case, *Janus v. AFSCME*. Writing for the majority, Justice Samuel Alito struck down state laws that allow public sector unions to charge nonunion members for the costs of bargaining and job protections. The majority reasoned that "significant impingement on First Amendment rights occurs when public employees are required to provide financial support for a union that takes many positions during collective bargaining that have powerful political and civic consequences."[4] The Court cited Illinois' current financial crisis as an example of how collective bargaining has the ability to affect budgetary concerns at every level of state government. In essence, the Court reasoned that union bargaining that requires spending money in one category (i.e., bargained-for employee wage increases) necessarily involves a policy decision to forego spending in another category (i.e., infrastructure improvements). Because union bargaining could result in resource allocations that an individual employee may not agree with, an individual cannot be compelled to subsidize the union through dues payments under First Amendment principles.

At oral argument and in its opinion, the Court—particularly Chief Justice Roberts—rejected anyone's attempt to articulate a single bargaining subject that did not impact public spending, and therefore a public employee's free speech rights. The apparent upshot is that the Court considers any matter which implicates the public coffers as impacting free speech rights under the First Amendment. The Court's logic is broad enough to introduce First Amendment scrutiny any time a public employee is forced to make an expenditure that has a connection to or impact upon public spending. The question becomes when and where does the Court's "spending as speech" logic stop?

Some commentators have expressed concern that the Court's reasoning in *Janus* is broad enough to allow public employees to object to participating in a public pension altogether. In the U.S., nearly all employees of state and local government are required to share in the cost of their retirement benefit. If a public employee cannot be compelled to pay dues to a union because of the impact bargaining may have on a state's finances, then why can't employees object to participating in a public pension altogether? The employee may disagree with the concept of defined benefit pensions for public employees' wholesale, or simply object to some of the investments the pension plan has made on moral grounds. In either case, the state is requiring the employee to subsidize spending with which they do not agree. This is the exact problem the Court targeted in *Janus*.

If the objection is allowed, the effect could be devastating. As the Teamsters Central States Pension Fund has demonstrated, a precipitous decline in active participating employees can decimate an otherwise healthy pension plan. However, the Wall Street Journal recently observed that the total pension shortfall for all U.S. cities and states is currently as large as the German economy. The existing system is unhealthy by any measure. Accordingly, only a small amount of pension objectors would be necessary to wreak havoc on an already distressed system. The Supreme Court has yet to pass on this issue, and there will no doubt be challenges to this effect coming through the courts. If successful, pension objectors will make an almost unworkable problem even worse.

DOL Releases Final Rule on Association Health Plans

On June 19, 2018, the U.S. Department of Labor ("DOL") released its Final Rule on Association Health Plans ("AHPs"). According to the DOL, the Final Rule expands access to affordable health coverage options for small businesses and their employees by allowing small businesses to group together by geography or industry to obtain coverage as if they were a single employer.

AHPs are group health plans that employer groups and associations offer to provide health coverage for employees.[5] AHPs provide small employers the opportunity to join together to buy types of coverage that are usually available only to large employers, which typically can be less expensive and custom-made to the needs of their employees. AHPs are also not subject to the consumer protections mandated per the Affordable Care Act ("ACA"), including the

[3] NRLB General Cousel's Office Calls for End to Union Email Rule, https://www.bna.com/nlrb-general-counsels-n73014482579/ (last visited September 17, 2018).

[4] *Janus v. AFSCME, 138 U.S. 2448, 2464 (2018).*

[5] *Expanding Access to Quality, Affordable Health Coverage for Millions of Americans Employed by Small Businesses*. https://www.dol.gov/general/topic/association-health-plans.

requirement that all individual and small group plans cover essential health benefits.

The Final Rule broadened the definition of "employer" under the Employee Retirement Income Security Act of 1974 ("ERISA"), by widening the pool of employers who are permitted to come together and sponsor group health coverage. What this means is that now there are other ways a group or association of employers that sponsor an AHP can be considered a single employer. This can be done by examining whether the group is in the same trade, industry, line of business or profession, or whether they have a principal place of business in the same state or metropolitan area. Also, the group or association must be controlled by the employer members, which includes maintaining formal organizational functions like established bylaws and the nomination of a board of trustees or directors. If the group meets the above standards, then they can band together and be considered a single employer to obtain more attractive health coverage.

In order to ensure that AHPs would continue to be employer-based plans and not be manipulated as a way to sell insurance to single employers, the DOL placed several safeguards in the Final Rule. A few of those safeguards include requiring the group to have one "substantial purpose unrelated to the provision of benefits," such as offering classes on business issues of interest to AHP members, or engaging in advertising on common issues of interest to its association members.[6] Moreover, the DOL reiterated that insurance issuers cannot be a sponsor of an AHP, and coverage is limited to employees, former employees and beneficiaries.

Additionally, the Final Rule specifically addresses sole proprietors who were previously unable to participate in AHPs because they did not have employees and thus could not be covered under ERISA. The Final Rule states that sole proprietors can qualify as both an employer and employee. This means that a sole proprietor can join an AHP as both an employer and also receive health coverage through the AHP as an employee.[7]

Eleven (11) states and the District of Columbia have since filed a federal complaint challenging the Final Rule. The complaint alleges that the Final Rule allows groups or associations comprised of small employers and individuals to sponsor association health plans and then treat the plans as large group plans not subject to ACA provisions. The complaint further alleges that the Final Rule is part of the current Administration's effort to undermine the ACA.

In short, the Final Rule allows small businesses and sole proprietors the opportunity to join together to create AHPs, either by purchasing large-group coverage or self-insuring. By opening this door, these groups of employers now have the opportunity to participate in large-group plans which have much less restrictive rules than small-group and individual plans. AHPs can provide employers and their employees access to plans with more comprehensive and affordable benefits than they would have normally been able to access.

If you have any questions on AHPs, please contact our office.

ERISA Retaliation Claim Goes On – *Stein v. Atlas Industries, Inc.*

In April 2018, the U.S. District Court of Appeals for the Sixth Circuit ("Court") affirmed the district court's dismissal of the plaintiff's claims for interference and retaliation under the Family and Medical Leave Act ("FMLA") but reversed the district court's dismissal as to the plaintiff's claims for interference and retaliation under the Employee Retirement Income Security Act of 1974 ("ERISA").[8] Robert Stein ("Stein"), the plaintiff, was employed by Atlas Industries, Inc. ("Atlas"), the defendant, when he tore his meniscus at work which required surgery. As a result, Stein took time off from work under FMLA. In addition, a month prior to Stein's injury, his son nearly died due to a rare neurological condition, which resulted in high healthcare costs to Atlas, which maintains a self-insured employee health and welfare plan.

During his recovery, Stein went in for a checkup. At that time, Stein was informed that he would not be released to work until August 10, but was released to perform light-duty work as of July 20. Stein was given a release slip stating the above; he provided that release slip to Atlas' workers' compensation office. Stein's medical provider also contacted Atlas regarding Stein's release and work restrictions. Atlas expected Stein to return to work the following Monday; however. Stein believed he was on leave for several more weeks.

Thereafter, when Stein did not show up to work on Monday and did not call in to excuse himself, Atlas fired him pursuant to the company policy on Thursday. The policy stated that an employee who

[6] Waxman, Jay Mark and Morgan J. Tilleman. *Association Health Plans – the Final Rule Is Issued.* Foley & Lardner LLP, July 10, 2018, https://www.foley.com/association-health-plans--the-final-rule-is-issued-07-10-2018/.

[7] *Id.*

[8] *Stein v. Atlas Industries, Inc.*, No. 17-3737, 2018 U.S. App. LEXIS 8874 (6th Cir. April 1, 2018).

missed three workdays without notification was subject to automatic termination, no exceptions. Consequently, Stein brought suit against Atlas for interference and retaliation under FMLA and ERISA. The district court disagreed with Stein and granted Atlas summary judgment. Stein appealed.

As to Stein's claim for interference and retaliation under FMLA, Stein alleged that Atlas denied him his FMLA rights when it fired him during his medical leave. The Court explained that while FMLA provides an employee up to twelve weeks of leave per year for a serious health condition, an employee still must comply with the employer's usual and customary notice and procedural requirements. Here, Atlas required its employees on medical leave to return to work or excuse themselves by calling in. Moreover, Atlas' policy stated that any three consecutive absences without permission or notice would result in an automatic discharge from employment. Because Stein failed to follow Atlas' policy by reporting to work or calling in, the Court found that FMLA did not protect Stein under these circumstances. Stein next argued that he was protected under FMLA's "unusual circumstances" exception, which protects an employee from being fired if he fails to give his employer notice due to unusual circumstances. Stein explained that he was in an "unusual circumstance" as he was unaware that he was cleared to performed light-duty work. The Court disagreed with Stein explaining that "[p]eople make mistakes – there is nothing unusual about that," but a misunderstanding "is not one that federal law can fix."[9] For these reasons, the Court held that Stein's claim under FMLA failed.

The Court then addressed Stein's claim against Atlas for interference and retaliation under ERISA. Stein argued that his firing was motivated in part by his son's recent and expected high healthcare costs. Stein pointed to evidence to suggest that Atlas was troubled with his son's high healthcare costs, such as Atlas' vice-president of operations directly advising Stein twice that his son's care was getting expensive to the company. Stein also pointed to evidence as to Atlas' history of selectively enforcing the absenteeism policy by calling certain employees to express concern of their absence but not others. Despite Stein's history of being a satisfactory employee, Atlas never followed up with him before firing him. For these reasons, the Court explained: "In combination with Atlas'[] documented concerns about skyrocketing health-care costs and its managers' purported comments about [Stein's son's] claims, this evidence permits an inference that Atlas was motivated at least in part by its desire to be free from a medical-cost albatross."[10] The Court further explained that "[a]t trial, Stein could paint a picture suggesting that Atlas, concerned about Jordan's medical expenses, simply bided its time and waited—Gotcha! style—for Stein to make a mistake" in order to "jump[] at the chance to cut him loose;" as a result, the Court determined that Stein should have the chance to tell his story.[11] Accordingly, the Court affirmed the district court's dismissal of Stein's FMLA interference and retaliation claims but reversed and remanded the district court's dismissal of Stein's ERISA interference and retaliation claims. This case shows why it is important to consistently follow the employee policies that are in place and not to speak with others about your employees' confidential information. If you have any questions about your policies, please contact our office.

Expanding Apprenticeships in America

On June 15, 2017, President Trump issued Executive Order 13801, Expanding Apprenticeships in America. As spelled out in the very first sentence, the order was issued to promote affordable education and rewarding jobs for American workers. Stating that the country's education systems and workforce development programs are in need of reform, that higher education is becoming increasingly unaffordable, and that colleges and universities are failing to provide students with the necessary skills to secure high-paying jobs in our modern workforce, the executive order goes on to state that reforming workforce development programs will help American workers develop relevant skills, obtain high paying jobs, and help match unemployed American workers with open jobs.

Among other things, the President's executive order roughly doubled to $200 million the money spent on learn-to-earn programs. However, perhaps more importantly, the executive order called for the formation of the Task Force on Apprenticeship Expansion within the U.S. Department of labor and required the Task Force to submit a report identifying strategies and proposals to promote apprenticeships. The Task Force was chaired by the Secretary of Labor (R. Alexander Acosta), and vice-chaired by the Secretaries of Education (Betsy DeVos) and Commerce (Wilbur Ross). The Task Force also included 20 individuals from labor, industry, government, education, and community organizations. The Task Force's report was issued on May 10, 2018.

The report begins by stating what many of our clients already know, and what the President alluded to in the executive order itself:

[9] *Id.* at **7.
[10] *Id.* at **18.
[11] *Id.* at **19.

that apprenticeship programs "when implemented effectively, provide workers with a career path featuring on-the-job training, skills development, and mentorship, while at the same time providing employers with a steady source of highly trained and productive workers." The Task Force concluded that such programs are currently underutilized. The Task Force's various subcommittees (Education and Credentialing; Attracting Business to Apprenticeship; Expanding Access, Equity, and Career Awareness; and Administrative and Regulatory Strategies to Expand Apprenticeship) issued a number of recommendations.

Nearly all of the recommendations revolve around Industry-Recognized Apprenticeship programs, as opposed to the existing Registered Apprenticeships. They include expansion of work-to-learn models to incorporate mastery of established skill sets rather than completion of courses or a set number of hours, performance assessments, and establishment of industry-recognized, nationally-portable credentials. The Task Force also recommended that apprentices under the proposed Industry-Recognized Apprenticeship programs cannot be considered as apprentices for purposes of the Davis-Bacon Act[12] wage requirements,[13] would not be required to follow specific wage progression rules, would be parallel and complementary to the current Registered Apprenticeship programs, and would be certified by a third-party certifier. In a nutshell, these Industry-Recognized Apprenticeship programs would be separated from existing Registered Apprenticeship programs, industry-led, and employer driven.

The Task Force sees attracting both job-seekers and employers to apprenticeships as a major challenge. For job-seekers, this involves convincing students of the need to value development of marketable skills and changing the ingrained societal mind-set that a traditional four-year bachelor's degree is the only pathway to success. As the Task Force recognized, many young Americans simply do not understand that apprenticeships are a viable track to a successful career. On the employer side of things, the challenge is convincing companies, especially small businesses, that such programs provide a good return on investment. Many are concerned that there is no guarantee that a trained worker will remain after the company makes the investment in them and the worker becomes productive. There are also employer concerns regarding regulatory challenges, which are seen as an impediment to the current Registered Apprenticeship programs.

There are also some recommendations aimed at the current Registered Apprentice programs. These include changes to the Workforce Innovation and Opportunity Act (WIOA)[14] including i) inclusion of waivers/set-asides to make it easier for sponsors to receive WIOA funding, which would allow sponsors to serve existing workers moving up the career ladder; ii) changes to WIOA outcome measures regarding earnings; iii) changes to WIOA outcome measures to better reflect the time it takes to complete an apprenticeship program; and iv) reforms to wage and hour rules, which would allow apprentices under 18 to work on the manufacturing floor, use hoists and lifts in healthcare settings, and the use of power tools and equipment when properly supervised and in non-high-risk occupations.

Overall, it seems that the Task Force recommendations do little to help labor unions and their existing apprenticeship programs and instead focus on the creation of the Industry-Recognized Apprenticeship programs. This is despite the President's initial claim that this would empower employers, unions, and trade groups to design their own apprenticeship programs outside the Labor Department's onerous regulations, and that these new apprentices would be the ones to "construct the roads and bridges that move our citizens, they will bend the metal and steel that shapes our cities." Perhaps the reason for this can be found in Secretary Acosta's comments issued on the day the President signed the order—that the building trades industry "understands the benefits of skilled workforce and is willing to pay to teach its workers."

N.D. Ill. Court Green-Lights ERISA Fund's Pursuit of an Individual Under Alter-Ego Doctrine

Judge Virginia M. Kendall recently denied a Defendant individual's motion to dismiss two counts of an ERISA Fund's complaint seeking to hold the Defendant personally liable for outstanding amounts owed under the terms of a collective bargaining agreement.[15] The Court's decision bolsters the ability of ERISA funds to pursue non-union entities for unpaid contributions in the Seventh Circuit.

[12] 40 U.S.C. § 3141 *et seq*.

[13] This recommendation suggests that employers working on federally funded projects who have employees in the proposed Industry-Recognized Apprenticeship programs would have to pay prevailing wage to these employees.

[14] 29 U.S.C. § 3101 *et seq.*

[15] *Carpenters Pension Fund of Ill. v. Martinak*, No. 17 C 08611,2018 U.S. Dist. LEXIS 110593 (N.D. Ill. July 2, 2018).

In *Carpenters Pension Fund of Ill. v. Martinak*, the Plaintiff ERISA Fund received contributions from the Defendant individual's construction company, which filed for bankruptcy in 2012. The Defendant "is also the grantor, trustee and sole beneficiary of the Martinak Trust, which owns property that [the construction company] rented from the Trust in order to operate its business."[16] The Plaintiff Fund pursued the construction company for withdrawal liability when it ceased making contributions in 2010. In 2013, the Plaintiff Fund successfully pursued the Martinak Trust on summary judgment for the company's withdrawal liability under the theory that the company and trust were under common control.

The Plaintiff Fund is now suing the Defendant Martinak individually as both the alter-ego of the trust and as the trustee so that he is personally liable for the company's withdrawal liability. Specifically, the Plaintiff Fund alleges that Martinak fraudulently shifted assets out of the Martinak Trust to avoid paying the Plaintiff Defendant Fund after the Court found the Martinak Trust to be liable for the company's withdrawal liability. The Defendant unsuccessfully sought dismissal of these claims.

In denying the Defendant's motion to dismiss, the Court found that the Plaintiff Fund was able to pursue Defendant Martinak individually for contribution obligations. This was because the Court in the 2013 case only found the company, the Martinak Trust, and the trustee—*not* the Defendant individually—to be members of a common control group. In analyzing the Plaintiff's alter-ego claim, the Court noted that the facts alleged by the Plaintiff, "if true," give rise to an alter-ego determination in the case.[17] The Court specifically noted that the facts alleged by the Plaintiff supported that the Defendant acted with fraudulent intent—a critical consideration in the alter-ego context—when he transferred monies from the Martinak Trust to his individual account and allowed property held by the Martinak Trust to be sold at a foreclosure sale to avoid individual liability.

The Court's opinion in *Martinak* is a persuasive addition to the relatively limited selection of alter-ego caselaw in the Seventh Circuit. J&K will continue to monitor the progression of this case. If you have questions regarding alter-ego liability, please contact J&K.

William P. Callinan Presents on Harassment in the Workplace

William P. Callinan
Member

Education
Juris Doctor (2007)
Michigan State College of Law, Magna Cum Laude

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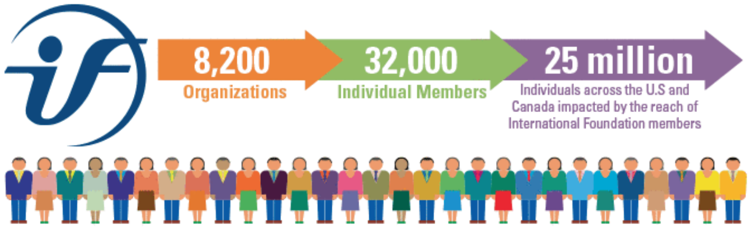
Over the past year, serious issues and allegations have arisen regarding harassment in the workplace and improper management of these complaints by employers and supervisors. Complaints of harassment in the workplace should not be taken lightly. Employers, unions, and funds should ensure that adequate training is available to their employees and apprentices so that they understand the nature of harassment in the workplace and how to address it.

Recently, William C. Callinan, Member of J&K, presented at the Plumbers and Pipe Fitters Local 23 Fund for Training Journeyman & Apprentices, the Chicago Roofers' Joint Apprenticeship and Training Fund, and the Illinois State Apprenticeship Committee & Conference. Mr. Callinan's presentation focused on understanding the state and federal regulations against harassment, the different types of harassment, and preventing and effectively dealing with harassment in the workplace. If you have any questions regarding harassment in the workplace or wish for Mr. Callinan to present on this topic, please contact our office.

[16] *Id.* at *2.

[17] *Id.* at *6-8.

International Foundation of Employee Benefit Plans



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New Orleans, LA
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Dennis R. Johnson, Managing Partner

TMP Advanced Leadership Summit

Sunday, October 14 8:00 AM-3:00 PM

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Monday, October 15 9:15 AM-10:30 AM
Repeated - Tuesday, October 16 2:45 PM-4:00 PM

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Nicollette L. Khuans Named "2019 Rising Star" by Thomson Reuters, National Leader of Legal Content, Expertise, and Technology

Johnson & Krol is pleased to announce Nicollette L. Khuans has been recognized as a 2019 Rising Star by Thomson Reuters. Since joining Johnson & Krol in 2015, Nicollette's practice concentrates in ERISA litigation and labor litigation. Nicollette also successfully represents Taft-Hartley benefit funds' interests in circuit court and in federal court, including in bankruptcy proceedings. In these settings, Nicollette advocates for J&K's clients through all phases of contentious litigation, including in the context of fact-intensive single employer, alter-ego, and successor liability claims. Nicollette also takes and defends depositions in addition to skillfully drafting and arguing complex motions. She identifies creative and advantageous avenues for settlement in order to negotiate agreements that ensure J&K's clients are protected in the event of default.

Congratulations, Nicollette on this prestigious award!