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THE JOHNSON + KROL NEWSPAPER

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FEDERAL JUDGE RULES IN FAVOR OF UNION ON PROHIBITED EMPLOYMENT ISSUE

Aracich appealed Judge Bruccetti's decision to dismiss his lawsuit in its entirety to the Second Circuit, which appeal remains pending.

On September 20, 2022, Judge Vincent L. Bruccetti of the U.S. District Court for the Southern District of New York granted a Motion to Dismiss a complaint filed against the Employee Benefit Fund of Heat & Frost Insulators Local 12 Union ("Union"); the Pension Fund of the Union ("Pension Fund"); the Welfare Fund of the Union ("Welfare Fund" and together with the Pension Plan, the "*Plans*"); as well as the Boards of Trustees of the Union and the Plans; the manager of the Plans, Al Wassell; and ten unidentified defendants constituting the trustees, plan administrators, and/or fiduciaries of the Plans.[1]

The $10 million lawsuit was filed by the Union's former Business Manager, Matthew Aracich, and included counts for Breach of Fiduciary Duty, Benefit Interference, Impermissible Cutback in Accrued Benefits under ERISA, and the allegation that the defendants wrongfully denied his request for benefits in violation of state law and the Employee Retirement Income Security Act of 1974 ("ERISA").[2]

BACKGROUND:

Matthew Aracich is a third-generation member of the Union; both his father and grandfather were also members. As the Union's Business Manager, Aracich was responsible for negotiating contracts, securing work opportunities, and representing the interests of the Union in all capacities.[3]

Aracich began his work at the Union as a commercial diver before going to work for the federal agency now known as the United States Geological Survey ("U.S.G.S."). Aracich then moved on to serve as a Heavy Equipment Operator in the U.S. Navy, later receiving promotions for mechanic and then Foreman. In 1999, Aracich became President of the Union. Subsequently, Aracich held the position of Financial Secretary, before finally securing the positions of Business Manager and Financial Secretary in 2011. Aracich continued his duties as Business Manager until 2018, when he became the President of the Building and Construction Trades Council of Nassau and Suffolk Counties ("the Council").[4] At that time, the Union and the Council signed an agreement that allowed Aracich to continue receiving Union contributions ("Contributions Agreement").[5]

In January of 2021, the Council terminated the Contributions Agreement and engaged another benefits provider for Aracich. In a letter to Aracich in February of 2021, the Union Plan Manager confirmed the Council's termination of the Contributions Agreement. At that time, Aracich was sixty years old and had accrued more than thirty years of service credits with the Union under the Plans' governing documents. Shortly after receiving the letter from the Plan Manager, Aracich announced his retirement from the Union, indicating that he expected his retirement to include pension and retiree health benefits from the Union. Aracich remained employed as Council President.[6]

In March of 2021, the Plans' Trustees denied Aracich's retirement application, citing his lack of eligibility for benefits under the Pension Plan's Summary Plan Description ("Pension Plan SPD") as a result of his continued work for the Council. The Pension Plan SPD explicitly provides, "[t]o be considered retired, a Participant must have separated from Covered Employment" and a participant "must stop working" before pension benefits could begin. (The Welfare Plan shares the Pension Plan's definitions and requirements for retirement eligibility).[7]

"Covered Employment" is defined as "employment of an Employee by an Employer" including "full-time service as an officer or employee of . . . a state or local central labor council provided that contributions are made to the Fund with respect to such service."

"Employee" means "any person employed by an Employer," including "employees of . . . a state or local central labor council provided the contributions for such employees are made in accordance with the Fund."

"Employer" and "Contributing Employer" both mean "any employer obligated by its collective bargaining agreement . . . to contribute to the fund" and includes "a state or local central labor council if contributions for its employees are made."[8]

In Sum: Because Aracich remained "continuously employed" by the Council, he was not eligible to receive retirement benefits from the *Plans*.

ARACICH APPEALS:

In May of 2021, Aracich appealed the adverse benefit determination regarding his retirement benefits, which the Trustees subsequently denied, stating that although Aracich was "no longer working in Covered Employment as defined by the Plan document," he had "not experienced a *separation* from employment." (Emphasis added.) Consequently, Aracich had "not 'retired' as required under the terms of the Plan and applicable law."[9]

The Trustees provided additional insight as to the Plans' requirement for a participant to "stop working" before becoming eligible for pension and retirement welfare benefits, stating it was to ensure the Plans remained in compliance with U.S. Department of Treasury Regulations and Internal Revenue Service guidance, which state that "a qualified pension plan is generally not permitted to pay benefits [to a participant] before retirement." By "allowing a participant who has not legitimately retired to commence receiving a benefit" the pension plan would violate section 401(a) of the Internal Revenue Code, and risk the disqualification of the Plans' tax status.[10] Following the Trustees' denial of his appeal, Aracich filed suit as described above, which Judge Bruccetti dismissed in its entirety on September 20, 2022.

HIGHLIGHTS OF ARACICH'S TEXTUAL ARGUMENT:

Among Aracich's many arguments was an assertion that the Plan Administrator's refusal to grant him benefits was arbitrary and capricious. Aracich maintained that the Plan was unclear as to what exactly constituted "separat[ion] from Covered Employment." Additionally, Aracich pointed out that the term "retirement" was not defined in the Plan Document despite its ambiguous nature and asserted that therefore, "retirement" could have multiple meanings and interpretations. Aracich concluded that the Plan Administrator chose to interpret the terms "separate" and "retirement" narrowly so as to deny him benefits.

The Trustees responded that their determination was based on the terms of the *Plans*' governing documents,[11] the Pension Plan SPD;[12] and their concern that providing benefits to Aracich prior to his actual separation from employment would jeopardize the Pension Plan's tax-exempt status.[13] Ultimately, the Court held:

> Although summary plan descriptions "do not necessarily constitute the terms of the plan," ERISA "contemplates that the summary plan description will be an employee's primary source of information regarding employment benefits, and employees are entitled to rely on the descriptions contained in the summary." It was therefore reasonable for the Trustees to interpret ambiguous Plan terms in a manner consistent with the Pension Plan SPD. In addition, it was reasonable, and consistent with the Trustees' obligations to Plan participants, to interpret the Plans in a manner that will maintain the pension fund's tax-qualified status. Thus, the pleadings reflect reasoned bases for the Trustees' decision, and the Court cannot find the decision was arbitrary or capricious.[14]

WHERE THINGS ARE AT

On October 11, 2022, Aracich appealed Judge Bruccetti's decision to dismiss his lawsuit in its entirety to the Second Circuit, which appeal remains pending.[15]

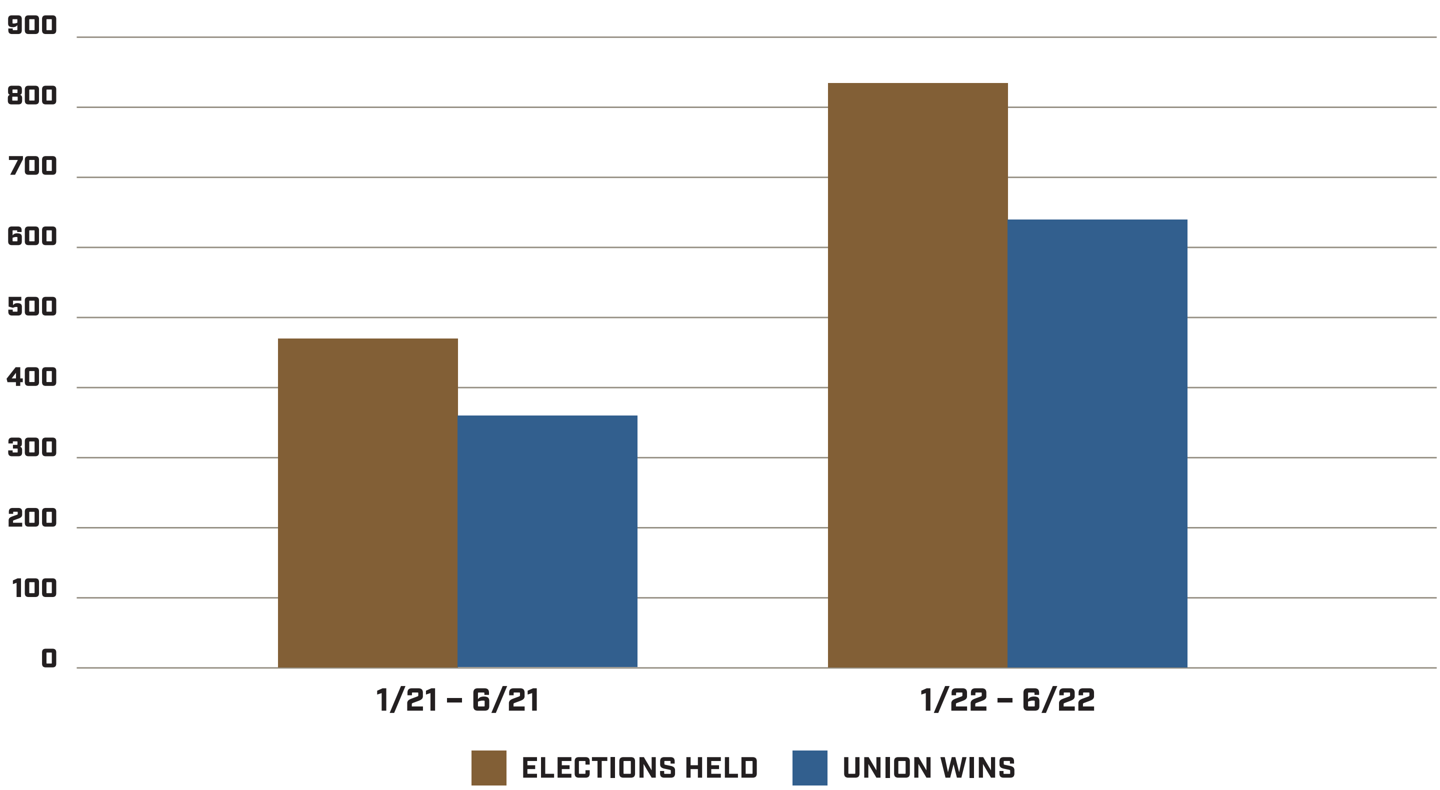
[1] *Aracich v. Bd. of Trs.*, 2022 U.S. Dist. LEXIS 169877.
[2] Emily Brill, *Union Benefit Funds Escape Official's $10M ERISA Suit*, LAW 360 (Sep. 20, 2022, 6:51PM), https://www.law360.com/articles/1532262.
[3] *Matthew Aracich Joins United Way of Long Island's Board of Directors*, United Way of Long Island, https://www.unitedwayli.org/matthew-aracich-joins-united-way-long-islands-board-directors (last visited Oct. 22, 2022).
[4] Matthew Aracich (@matthew-aracich-5614301b5), LINKEDIN, https://www.linkedin.com/in/matthew-aracich-5614301b5 (last visited Oct. 22, 2022).
[5] *Aracich*, at 4.
[6] *Id.* at 5.
[7] *Id.* at 5-7.
[8] *Id.* at 3-4 (citing the Union's Pension Plan Document).
[9] *Id.* at 6.
[10] *Id.* at 6-7 (citing the Appeal Denial) (defining "retirement" as "when [a participant] stops performing service for the employer.").
[11] *Aracich*, at 12 (citing the Pension Plan Document) (requiring a participant to "separate" from employment to retire).
[12] *Aracich*, at 12-13 (citing the Pension Plan SPD) (providing "[y]ou must stop working" for benefits to commence).
[13] *Aracich*, at 13.
[14] *Aracich*, at 13 (citing *Halberg v. United Behav. Health*, 408 F. Supp. 3d 118, 133 (E.D.N.Y. 2019).
[15] PacerMonitor, *Aracich v. the Board of Trustees of the Employee Benefit Fund*, https://www.pacermonitor.com /public/case/46496045/Aracich_v_The_Board_of_Trustees_of_The_Employee_Benefit_Fund (last visited Oct. 22, 2022).

MID-YEAR 2022 NLRB REPRESENTATION ELECTION DATA REVEALS UNIONIZATION SURGE

From national brands like Starbucks and Amazon to smaller employers throughout the country, Union organizers saw some of the highest election win totals at the National Labor Relations Board (NLRB) during the first half of this year in nearly two decades. According to Bloomberg Law's NLRB Election Statistics report, Unions prevailed in 641 by the midyear point of 2022. That is 372 more elections than what was held during the same timeframe last year.

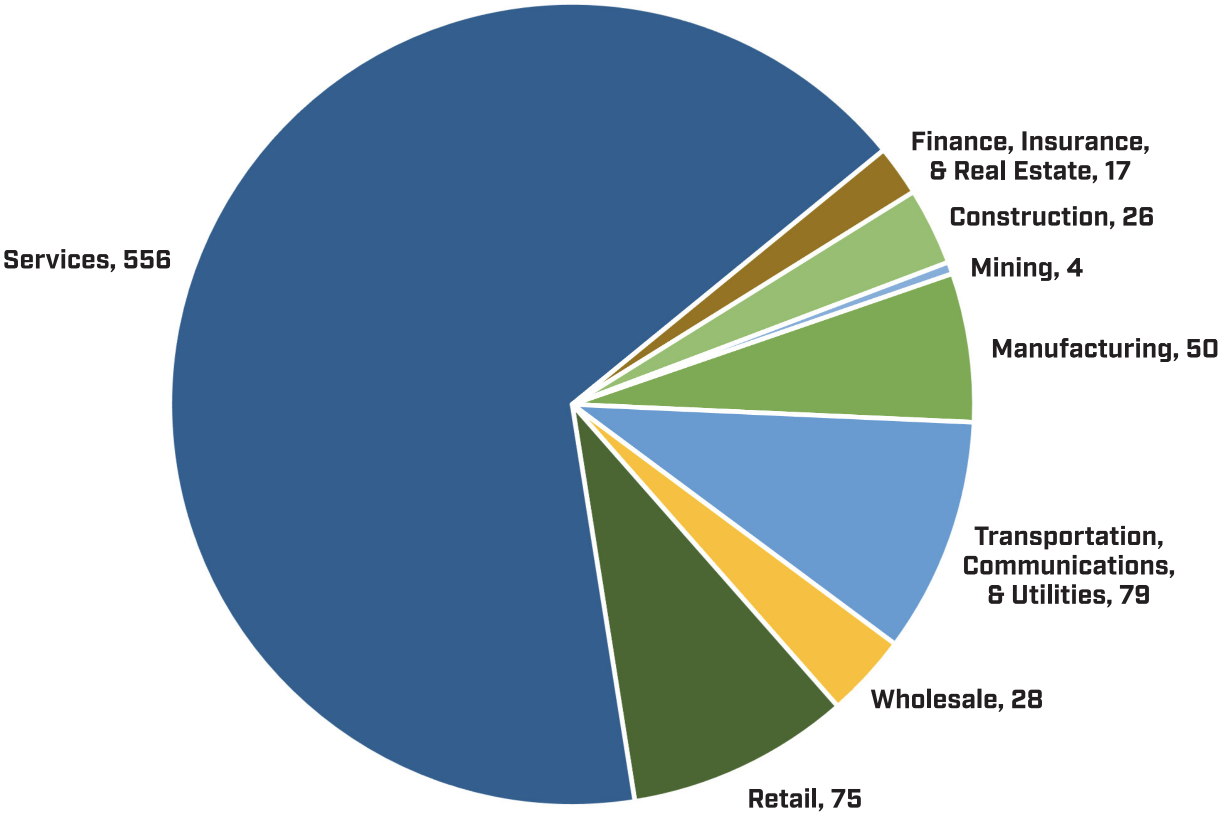
Although the number of elections in 2022 increased dramatically, unions have maintained their election success and slightly surpassed their win percentage from the first half of 2021. More specifically, during the first six months of 2022, 837 NLRB representation elections were held with Unions winning 76.6 percent of those elections. By comparison, during the first six months of 2021, 465 elections were held with unions winning 354 of those. That equates to 76.1 percent win percentage

NLRB REPRESENTATION ELECTIONS



Source: Bloomberg Law Labor Data

MID-YEAR NLRB ELECTIONS BY INDUSTRY, 2022



Source: Bloomberg Law Labor Data

for the first half of 2021.

Which industries are causing this uptick in representation elections? The services industry is leading the way by far with 556 elections held in the first half of 2022, followed by the Transportation, Communication & Utilities industry with 79.

While the volume of elections and election wins are clearly important for unions, the number of new union members resulting from those victories is just as significant. In the first half of 2022, 43,150 workers were successfully organized following election wins, which is more than double the 18,912 workers organized in the first half of 2021. Based on the NLRB's data, it is evident that 2022 will be one of the most successful years for unionization in recent history. It will be interesting to monitor the continued labor gains for the remainder of this year as well as whether this success can be carried over into 2023.

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EXCESSIVE FEES CASE SHOWS IMPORTANCE OF QUALITY AND SERVICES OF VENDORS

On August 29, 2022, the Seventh Circuit affirmed a trial court's dismissal of a Participant's ERISA fiduciary claims against a 401(k) Plan.[1] The Participant alleged a breach of the duties of prudence and loyalty.

As background, plan participants and beneficiaries are provided a private right of action for the breach of a fiduciary duty under ERISA. In other words, if a participant believes his plan's fiduciaries have breached their fiduciary duties, he may sue the plan himself. Plan fiduciaries are required to discharge their duties "with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use." Further, the duty of loyalty requires fiduciaries to "discharge their duties with respect to a plan solely in the interest of the participants and beneficiaries."[3]

In this case, a participant sued his former employer and other plan fiduciaries for mismanaging its retirement plan. Specifically, he claimed that they had breached their fiduciary duties by permitting the plan to pay unreasonably high recordkeeping and administration fees. He also claimed that the fiduciaries failed to make prudent investment options and continued to utilize investment advisors and consultants that had higher fees and worse performance histories.

The District Court dismissed the lawsuit, stating that the participant (1) failed to allege that the fees were excessive in relation to the services that the vendors provided and (2) failed to show that a lower-cost alternative would have provided comparable services.[2]

The Seventh Court affirmed the dismissal. The Court noted that the Participant identified comparable plans with similar demographics and asset values that had significantly lower fees ($32-35 per participant as provided in the comparable plans' Form 5500s, versus the $85 per participant of the Defendant plan). Notwithstanding, the Court found that the Participant failed to demonstrate whether the comparable plans had a higher, similar or lower quality than that of the Defendant Plan. The Court also found that the fees disclosed in the Forms 5500 of the comparable plans are not an accurate reflection of the fees paid because Form 5500s do not require that plans disclose the details of their revenue streams. In other words, it was insufficient to say the comparable plans paid lower fees without also claiming that the quality and types of services provided were also better than those provided to the Defendant Plan.

This case is interesting because it highlights that type and quality of service are also important, not just price. If you have any questions, please contact our office.

[1] Andrew Albert v. Oshkosh Corporation, et al. 47 F. 4th 570, 7th Cir. 2022 (August 29, 2022).
[2] EBIA Staff. Seventh Circuit Affirms Dismissal of Excessive Fee Claims Where Quality and Extent of Services Relating to Fees Were Ignored. September 22, 2022.
[3] 29 USC § 1104.

DOL'S INDEPENDENT CONTRACTOR TEST SET TO CHANGE…AGAIN

In October of 2022, President Biden's Department of Labor ("DOL") issued a proposal on how it will approach independent contractor status under federal wage law, which is its second attempt to undo the Trump-era standard. The proposal clarifies when workers should be classified as independent contractors, who are in business for themselves, or as employees, who are afforded the full minimum wage, overtime, and other protections provided under the Fair Labor Standards Act. The proposed rule was officially published in the Federal Register on October 13, 2022 and the DOL is presently soliciting comments from the public on the impact of the proposed rule. Once the comment period is closed, the Final Rule will issue.

When determining a worker's status, the Biden DOL proposes using a multi-factor economic realities test that considers various factors of the working relationship to determine whether the worker is truly in business for themselves. The proposed change returns to the previous "totality-of-the circumstances" analysis, that would consider all the factors involved in the working relationship equally. This contrasts with the standard under President Trump that gave greater weight to two specific factors, namely how much control workers have over their job duties and their opportunities for profit or loss when determining whether a worker is an employee or an independent contractor.

The Trump standard was widely considered to be a win for employers, especially those in the "gig economy" such as Lyft, Uber, and Door Dash. This reversal is predicted to have wide-ranging impacts, including most directly on labor costs, as well as worker income and quality of life. The gig economy will be expressly impacted as it depends on the independent contractor business model for its success. News sources were quick to observe that the stock market responded accordingly, as shortly after the standard was announced shares of Lyft, Uber, and Door Dash fell approximately 10%.

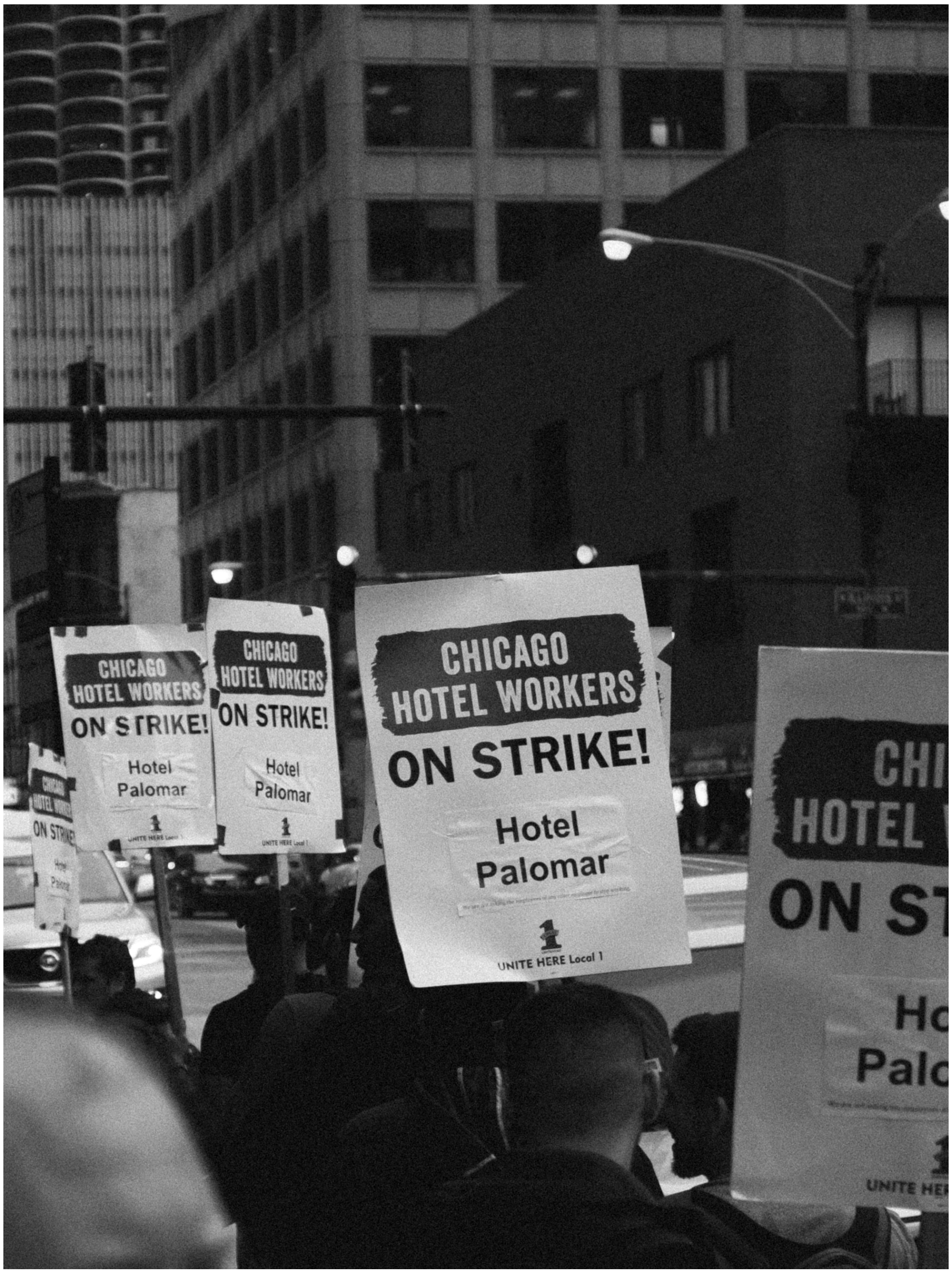
The Final Rule will certainly face legal challenges in the courts as almost all predecessor formulations of the independent contractor rules have. In fact, this is the second time the Biden DOL has tried to rescind the rule promulgated by the Trump Administration. The Trump standard was reinstated after a Federal Court in Texas ruled in March that the DOL failed to consider meaningful policy alternatives before revoking the rule. Shortly after that ruling, the Biden DOL began formulating the present version of the rule.

Regardless of what standard one favors, there is a serious concern whether this cyclical changing of the independent contractor standard is good for anyone. The reality is that the Biden independent contractor standard is, for the most part, reinstating the Obama standard which was reversed in the Trump administration. And as noted above, the Trump standard was in effect, not in effect, then back in effect during the Biden administration. The confusion is compounded even further by the fact that the National Labor Relations Board's definition of independent contractor changes in a similar fashion, also dependent on the political leaning of its members. This begs the question as to how many businesses and employees are expected to react when an individual could be an employee one day and an independent contractor the next day depending on which political party is in control and depending on the statute at issue. In many regards, a rule that is constantly changing with profound impact is an evil unto itself.

ARE LABOR STRIKES REALLY ON THE RISE?

Strikes are still fairly uncommon compared to other countries and compared to the 20th century in the U.S.

As news of the potential railway strike took center stage in the U.S., there is an increased national interest in labor strikes. After last October was dubbed "Striketober" by the world press, the question is—are labor strikes really on the rise? The answer is yes in the short term, but, at least in the U.S., strikes are still fairly uncommon compared to other countries and compared to the 20th century in the United States.



THE PROCESS TO STRIKE UNDER THE NATIONAL LABOR RELATIONS ACT

The National Labor Relations Act ("NLRA"), which applies to all private employers[1] (other than those subject to the Railway Labor Act) in the United States, governs employees' right to strike. There are different categories of strikes, including representational, unfair labor practice strikes, area standards strikes and, those most familiar to the general public, economic strikes. Each category of strike has different rules, and employees, labor unions and employers must be cognizant of the purpose of the strike before engaging in any type of action. Many collective bargaining agreements have "no strike clauses." Therefore, the strikes that we see on the news are those that happen after a collective bargaining agreement has expired when the parties are in the process of negotiating a new CBA.

The NLRA governs the right to strike, and it is important that any job action follows the law, because if the strike is deemed illegal by the National Labor Relations Board ("NLRB"), employees on strike lose protection and Unions can face dire economic consequences. For instance, a strike that violates a CBA's "no strike" clause will not be protected. A strike when the Union has failed to follow the notice requirements of 29 USC 158 (d)—giving notice to the Employer at least sixty days before the expiration of the CBA and giving notice to FMCS and the applicable state agency—can render the strike unlawful if the union is the initializing party. There are also different regulations for employees in the health care industry. These are just a few ways strikes can go wrong and is not intended to be an exhaustive list.

THE PROCESS TO STRIKE UNDER THE RAILWAY LABOR ACT

The Railway Labor Act ("RLA") was passed in 1926, before the NLRA, and was the first federal law that gave employees in the United States the right to form unions. Broadly stated, the RLA covers freight and commuter railroads, airlines and related companies. The RLA is administered by the National Mediation Board ("NMB"). Like the NLRA, a party who desires to bargain to change terms and conditions of employment must send a notice to the other party, under the RLA it is known as a "Section 6" notice. Unlike the NLRA, the RLA differentiates between Major Disputes and Minor Disputes. Major Disputes concern collective bargaining, Minor Disputes concern the application of the collective bargaining agreement, i.e., grievances. The process to strike for Major Disputes is explained below; unions may not strike over Minor Disputes.

The parties must meet and bargain and if they are unable to come to an agreement, they can invoke the services of the NMB. The NMB can keep the parties in mediation indefinitely, but only if it reasonably believes mediation may result in an agreement. If there is no agreement in mediation, the NMB will attempt to get the parties to agree to binding arbitration. If either party rejects arbitration, the parties must keep the status quo for a 30-day "cooling-off period." If, in that time, the NMB determines the dispute may "substantially interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service," the NMB will contact the President of the United States who may create a Presidential Emergency Board. It is only after all these steps have been accomplished that a union may go on strike or in the words of the RLA, engage in "self-help."

WORK STOPPAGES IN HISTORY

Compared to recent history, strikes certainly seem to be on the rise. But even getting the data can be difficult. Before 1982, the Bureau of Labor Statistics (BLS) tracked all work stoppages, but during the Reagan administration, that was changed to only tracking work stoppages that involved 1,000 people or more. While we may be more familiar with workers going on strike, work stoppages can also include owner lockouts. The 1994 Major League Baseball work stoppage was a strike called by the players' union, whereas the 2021-2022 Major League Baseball work stoppage was a lockout precipitated by MLB's owners.

According to the Cornell University Labor Action Center, as of September 2022, there have been more strikes already in 2022 than there were in 2021. The first six months of 2022 saw 180 strikes involving over 78,000 workers. However, while Cornell reported 225 labor stoppages in 2021, the BLS only reported 16. Even accepting Cornell's numbers, strikes are still significantly lower than decades past. In 1970, the BLS reported 381 strikes involving 248,000 people. In 1970, more than 25% of US workers were unionized. Whereas today, that number is closer to 10%.

Of note though, according to Gallup, support for labor unions and unionized labor is at the highest it has been since 1965, with 71% of people reporting they approve of labor unions. Barely over a decade ago, in 2009, the same poll found support below 50%.

RAILWAY STRIKE

For the last six months, the country has been watching the potential for a massive country-wide railway strike. Pursuant to the process described above, in July, President Biden convened the Presidential Emergency Board. The Board issued recommendations and the parties continued to bargain, and with the help of Labor Secretary Marty Walsh, a former Union Business Rep, came to a tentative agreement in September 2022. While some of the unions, including the largest group of engineers, voted to ratify the tentative agreement, several, including the members of SMART-TD, the largest union which represents over 28,000 conductors, voted to reject the tentative agreement. The largest sticking point all along has been the lack of paid sick days for bargaining unit employees.

However, the entire fight was rendered moot when, at President Biden's urging, Congress passed a bill making the potential rail strike illegal. Congress is given the authority to pass this legislation under the Interstate Commerce Clause of the U.S. Constitution. The House of Representatives passed two versions of the bill, one with the guaranteed sick leave the workers had been seeking and the other sticking to the tentative agreement the parties had reached in September. The version with the added sick days did not pass the Senate, so in the end, President Biden signed a bill that adopted the tentative agreement. Many employees of the impacted unions felt betrayed by "Union Joe", who had vowed to be the most union-friendly president in decades. However, President Biden maintained that action had to be taken to save the economy from disaster. When signing the bill, Biden cited statistics showing as many as 765,000 Americans potentially losing their jobs had the rail strike occurred so close to the holidays, and the rail industry estimated a potential loss to the U.S. economy of $2 billion per day.

CONCLUSION

Whether strikes are on the rise, or simply the press coverage of workers is more positive because of public opinion and a response to the COVID-19 pandemic, will become clearer as time goes on. If we see an economic downturn, as many experts are predicting, public sentiment may swing back. But one thing is clear, unions and unionized contractors are in a great spot to capitalize on public sentiment to build good relationships for the future, even if those relationships have a few bumps along the way.

[1] Public employees' ability to strike is governed by state and local laws. Some states give certain unions the right to strike, but not others (i.e., Illinois gives public employees the right to strike with the exception of public safety officers, like police and fire) and most states do not allow public employees to strike at all.

> *"The Sixth Circuit reaffirmed that should it be proven there is no contract, any claims must be brought in front of the NLRB and cannot be brought in federal court."*

SIXTH CIRCUIT REAFFIRMS NEED FOR CLEAR CONTRACTUAL DOCUMENTS IN ERISA MATTERS

In 2022, the United States Court of Appeals for the Sixth Circuit reaffirmed the basic jurisdictional lines between the Federal Courts and the National Labor Relations Board when evaluating an employer's fringe benefit contribution obligation during contract negotiations. *Operating Engineers' Loc. 324 Fringe Ben. Funds v. Rieth-Riley Constr. Co.*, 43 F. 4th 617, 618-19 (6th Cir. 2022). The underlying case also serves as a reminder of the need for unions and their associated fringe benefit funds to maintain clear contractual documents evidencing an employer's signatory status and updating those documents when necessary. The *Rieth-Riley* case principally centered on the difference between an employer's duty to make contributions pursuant to the Employee Retirement Income Security Act ("ERISA") of 1974 and its duty to make those contributions pursuant to the National Labor Relations Act's ("NLRA") "status quo" doctrine during contract negotiations.

Normally, an employer's contribution obligation is governed by ERISA, the statute governing employee benefit funds, regulating their maintenance, and protecting workers' interests. 29 U.S.C. § 1001 (a). When an employer fails to make a "promised contribution" to one of the funds to which it is obligated to contribute, it often breaches a contract. See *Laborers Health & Welfare Tr. Fund for N. Cal. v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 549 (1988). And when such a breach occurs, ERISA grants federal subject matter jurisdiction for the breach of contract claim. Section 515 of ERISA tells employers to "make contributions in accordance with the terms and conditions of plan or agreement." 29 U.S.C. § 1145. Another provision, Section 502(g), gives funds a cause of action to enforce Section 515 against "employers who are delinquent in meeting their contractual obligations." *Advanced Lightweight*, 484 U.S. at 547. Finally, Section 502(e), vests "district courts of the United States" with "exclusive jurisdiction" to hear a fund's ERISA claim. 29 U.S.C. § 1132 (e)(1).

An employer's obligation to contribute to fringe benefit funds becomes more complicated during periods when the underlying CBA is no longer in effect, such as during a period of extended contract negotiations. The NLRA requires employers and unions to bargain "in good faith with respect to wages, hours, and other terms and conditions of employment." 29 U.S.C. § 158 (d). Of course, bargaining becomes difficult "if, during negotiations, an employer is free to alter the very terms and conditions that are the subject of those negotiations." *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991). Thus, the NLRA gives unions and employers another duty: They must "freez[e] the status quo" and "honor the terms and conditions of an expired collective bargaining agreement" as they negotiate a new one. *Advanced Lightweight*, 484 U.S. at 539 n.6. When an employer "effects a unilateral change" to the status quo by halting its contribution payments, it commits an "unfair labor practice" under Section 8 of the NLRA. Litton, 501 U.S. at 198. This is subject to the exclusive jurisdiction of the NLRB. See *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 245–46 (1959). That status quo obligations includes bargained-for contributions to employee benefit funds, which are normally governed by ERISA and not directly by the NLRA.

When an employer stops contributing to an employee benefit fund while the status quo is in effect, the where and how of any remedial lawsuit will depend on the source of the employer's contribution duty. If the duty stems from a live contract, ERISA gives funds a claim for delinquent contributions in federal district court. But if the duty comes solely from the employer's statutory obligation to maintain the status quo, the NLRA provides an unfair labor practice at the NLRB if the employer fails to fulfill it. This is the question that the Sixth Circuit was called to answer in *Rieth-Riley*.

Rieth-Riley was signatory to a CBA with the Operating Engineers' Local 324 through its agreement with an employer association. After the CBA expired, Rieth-Riley was required to maintain the status quo in accordance with the principles cited *supra*, which included the obligation to contribute to the associated fringe benefit funds. For reasons that are beyond the scope of this article, the Funds eventually accused Rieth-Riley of missing some payments during the status quo period and sought to impose an audit on the company. Rieth-Riley refused to cooperate with the audit, and the Funds sued under Section 515 of ERISA and Section 301 of the Labor Management Relations Act (LMRA) in Federal Court.

Rieth-Riley moved to dismiss on the basis that no contract existed, and that the presence of a live contract was a jurisdictional prerequisite to Plaintiffs' ERISA suit. This meant that the claim should have been brought under the NLRA status quo doctrine, over which the National Labor Relations Board had exclusive jurisdiction. The district court agreed and dismissed the suit without prejudice, holding that it lacked jurisdiction to hear the Plaintiffs' claim. The Sixth Circuit reversed, stating that the presence of a live contract is not an essential jurisdictional fact in an action brought under Section 515 of ERISA, the presence of a live contract goes to the merits of Plaintiffs' ERISA claim. A fringe benefit fund merely has to allege the existence of a contract in its initial Complaint—whether there actually is one should be borne out during the lawsuit. The Sixth Circuit also reaffirmed that should it be proven there is no contract, any claims must be brought in front of the NLRB and cannot be brought in federal court.

The Sixth Circuit's holding in *Rieth-Riley* should remind unions and fringe benefit funds that their remedies for enforcing the status quo doctrine lie at the NLRB not the federal courts. Many of the remedies that are available in a standard ERISA collection action are simply not available at the NLRB. Alternatively, Trust Funds can avoid the problem entirely by having participation agreements in place that cover these gap periods so that normal collection remedies are preserved. Please contact us if you have any interest in this alternative.

FINAL "NO SURPRISE BILLING" RULE

On August 19, 2022, the Departments of Health and Human Services, Labor and the Treasury issued a Final Rule regarding key provisions of the No Surprises Act ("NSA"), a law protecting consumers against surprise medical bills. The Rule finalizes the two-part interim-final rules that the Departments previously published in July and October of 2021.

As background, the NSA prevents out-of-network providers from balance billing patients for out-of-network emergency care, certain ancillary services provided by out-of-network providers at in-network facilities, out-of-network care provided at in-network facilities without the patient's informed consent, and air ambulance services. To protect against surprise medical bills for these services, the NSA provides that patients cannot be charged more than the in-network cost-sharing amount, or the qualifying payment amount ("QPA"). If the payor and the provider disagree on the amount charged, they can enter into a 30-day negotiation period. If the negotiation period is unsuccessful, the NSA provides for a federal independent dispute resolution ("IDR") process.

The first interim final rule, issued in July 2021, outlined patient protections and established the methodology for calculating the QPA. The second interim final rule, issued in October 2021, outlined the federal IDR process that payors and providers use in determining the out-of-network rate for services to which the NSA applies. The rule required that certified IDR entities select the offer closest to the QPA, unless the certified IDR entity determined that any additional credible information submitted by the parties demonstrated that the QPA was materially different from the appropriate out-of-network rate.

Following the two-part interim final rules, stakeholders criticized the rule establishing the QPA as the primary factor in the IDR entity's decision-making process. Several lawsuits followed, and the United States District Court for the Eastern District of Texas vacated the portions of the interim final rules related to payment determinations under the federal IDR process.

The **Final Rule**, among other things, clarifies QPA disclosure requirements and revisits how certified IDR entities should weigh the QPA in their determinations. Most notably, the Final Rule provides that the QPA will no longer be the "presumptive factor" toward final payment determinations. Rather, the Final Rule specifies that certified IDR entities should select the offer that best represents the value of the item or service under dispute after considering both the QPA and all permissible information submitted by the parties. The Final Rule outlines the range of factors that can be considered and provides guidelines for considering them. For example, the additional information must be related, credible, and properly evaluated in order to avoid double counting.

Along with the Final Rule, the Departments also issued a process status update on the federal IDR process and a set of FAQs regarding implementation of certain provisions of the NSA. The Final Rule is generally effective for plan years on or after January 1, 2022.

The Final Rule, among other things, clarifies QPA disclosure requirements and revisits how certified IDR entities should weigh the QPA in their determinations.

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