EDITION Nº THIRTY-EIGHT

NEWS WITH PURPOSE, DECISIONS THAT COUNT

STATE OF THE UNION

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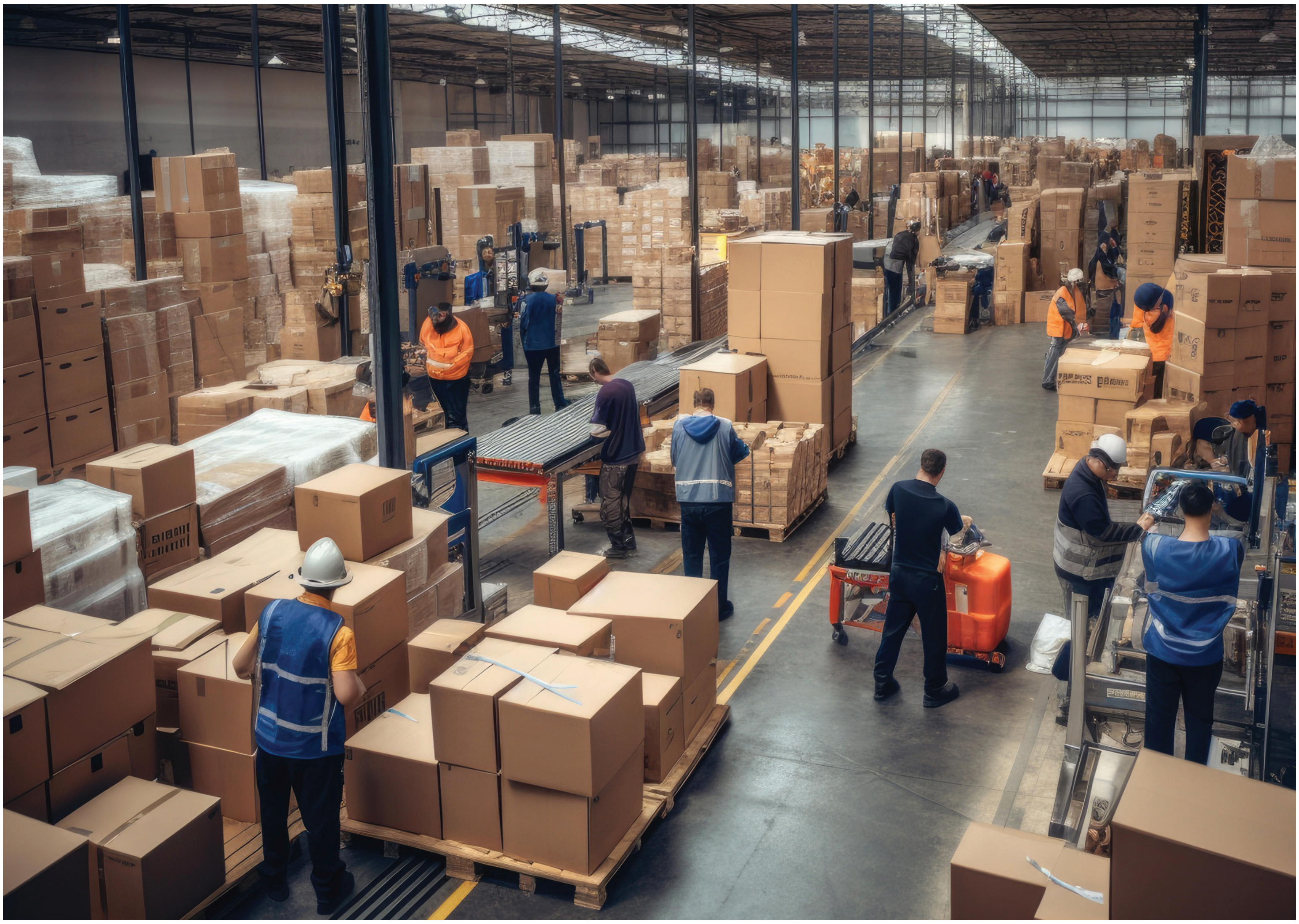

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NLRB'S CEMEX DECISION: NEW FRAMEWORK FOR EMPLOYER-UNION RELATIONS

On August 25, 2023, the National Labor Relations Board (NLRB) issued a significant decision in *Cemex Construction Materials Pacific, LLC,* (372 NLRB No. 130) unveiling a novel framework for determining when employers are obligated to engage in bargaining with unions without a representation election. This Decision marks a departure from the long-standing practice where employers could reject union demands for voluntary recognition, requiring unions to file petitions for elections. In this article, we will explore the key elements of the Cemex Decision and its implications for employers facing demands for recognition.

The Cemex Framework:

In the Cemex Decision, the NLRB has shifted the burden from unions to employers in moving the election process forward. Employers now have three options when confronted with a demand for voluntary recognition:

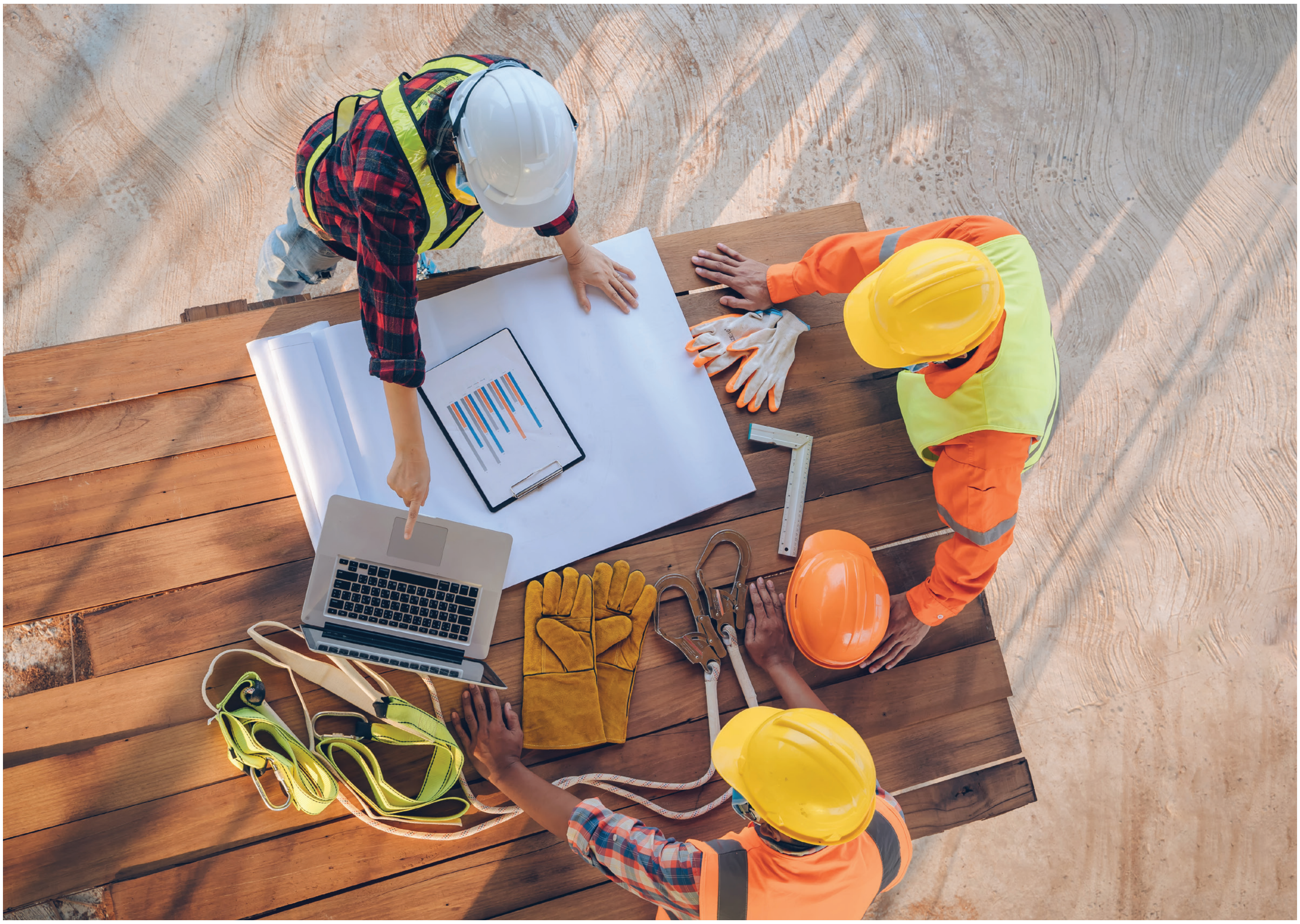
1. **Grant Voluntary Recognition**: Employers can choose to recognize the union, foregoing the NLRB secret-ballot election process.

2. **File an RM Petition for Election**: Employers can seek an election by filing an "RM petition" promptly, i.e., within two weeks of the union's demand for recognition. This filing tests the union's majority support and challenges the appropriateness of the proposed bargaining unit. Failure to file an RM petition within the specified timeframe forfeits the employer's ability to seek an election.

3. **Take No Action**: Employers may choose not to respond to a union demand for recognition, risking potential consequences. If the employer does nothing, the union can file an unfair labor practice (ULP) charge, claiming the employer unlawfully refused to bargain. Failure to prove the union lacks majority support or that the proposed bargaining unit is inappropriate results in an unlawful refusal to bargain, with the NLRB issuing a remedial bargaining order.

Cemex establishes that an RM petition is considered "promptly filed" if submitted within two weeks of the demand for recognition, barring unforeseen circumstances. However, engaging in unfair labor practices during the election process may lead to the dismissal of the petition. In such cases, instead of re-running the election, the NLRB will order the employer to recognize and bargain with the union. Additionally, if an employer fails to recognize the union or file an RM petition within two weeks of the demand for recognition, the union can file a charge alleging an 8(a)(5) violation. The General Counsel of the NLRB has issued a detailed guidance memorandum on the impact of the Cemex Decision which can be accessed by the NLRB's website.

The NLRB's Cemex Decision introduces a paradigm shift in employer-union relations, placing a greater burden on employers to act promptly in response to union demands. However, it remains to be seen what the long-term effect of the decision will be. As it stands now, the Biden NLRB has created an atmosphere that is favorable for union organizing. It is entirely likely that a Republican controlled NLRB will attempt to revert back to the previous standard if they gain control. If the Cemex standard is reversed, it remains to be seen whether union recognition gained under these standards would stand.



BIDEN ADMINISTRATION'S CHANGES FOR FEDERAL PREVAILING WAGE PROJECTS AND MANDATE FOR PROJECT LABOR AGREEMENTS

The Davis-Bacon Act of 1931 established the requirement for paying the local prevailing wage rate plus fringe benefits for work performed on public works projects. 40 U.S.C. § 3141 et seq. It applies to contractors and subcontractors performing work under federally funded or assisted contracts in excess of $2,000 for the construction, alteration, or repair of public buildings or public works. 40 U.S.C. § 3142. Congress has also included the Davis-Bacon prevailing wage requirements in numerous other statutes, including the Infrastructure Investment and Jobs Act of 2021, under which federal agencies assist construction projects through grants, loans, loan guarantees, insurance, and other methods.

Per the Department of Labor (DOL), by requiring the payment of minimum prevailing wages, Congress sought to ensure that Government construction and federally assisted construction would not be conducted at the expense of depressing local wage standards.

In August of 2023, the Biden Administration published updated rules implementing the Davis-Bacon Act, which became effective in October 2023. A summary of some of the important changes made by the updated rules, which appear to have the goal of making it easier to have the wage and fringe benefit rates negotiated by unions and employers in the area designated as the "prevailing wage," is as follows:

- The updated rules add language to include "solar panels, wind turbines, broadband installation, and installation of electric car chargers," as work that is subject to prevailing wage requirements. Therefore, work performed under the CHIPS Act will be subject to the Davis-Bacon Act's prevailing wage requirements.
- Under the prior rules, the DOL was only able to designate a rate as "prevailing" if more than 50% of workers in a certain area were paid at that amount. If the survey response was insufficient to achieve the 50%, the DOL would then rely on an average. However, under the updated rules, the DOL will be able to designate a rate as "prevailing" if at least 30% of workers receive that wage and fringe benefit package in the area. Furthermore, if no wage rate is paid to at least 30% of the workers responding to the survey, the DOL will use a weighted average of the wages paid to those employed in the classification.
- The updated rules allow the DOL to adopt prevailing wage rates set by state or local officials, even if the state or locality's methods or criteria for determining the prevailing wage are not precisely the same as the DOL's, provided that specified criteria are met.

Republican lawmakers and industry groups are challenging the authority of the DOL to issue updated rules given its lack of an affirmed Secretary of Labor. However, as of now, it remains to be seen how the courts react, and it appears that the DOL will be enforcing them.

Additionally, the General Services Administration (GSA) issued final rules in December 2023 amending the Federal Acquisition Regulations, which set rules for federal agency contracts, to include a project labor agreement (PLA) requirement for work orders valued at $35 million or higher. The new PLA mandate will go into effect in late January 2024.

I'VE GOT A GUY– YOUR PARTICIPANTS ARE ROLLING THEIR DC MONEY INTO IRAS

According to PEW Research, the typical balanced fund in a 401(k) plan has 0.19% lower fees than the average IRA. This seemingly small difference adds up to a lot of money.

Anyone who works with Defined Contribution retirement plans has had the conversation with a participant in which the participant tells you that their friend who is an "investment guy" could do a better job than the Trustees at choosing funds and investing money. According to a 2021 Pew survey,[1] about 46% of participants transfer their retirement savings into an IRA. In the same survey, 53% of the participants who rolled their money into an IRA cited access to management and advice as a reason they moved their money and 25% cited it as the most important reason for rolling their money out of the plan.

WHO IS GIVING PARTICIPANTS ADVICE ON IRAS?

Registered Investment Advisors

Registered Investment Advisors hold a Series 65 license from the Securities and Exchange Commission ("SEC"). They have a fiduciary duty to put the financial interests of their clients first. As of 2022, there are

approximately 15,000 Registered Investment Advisors in the United States. Most typically work on a fee-only basis or fee and commission basis.

Financial Planners

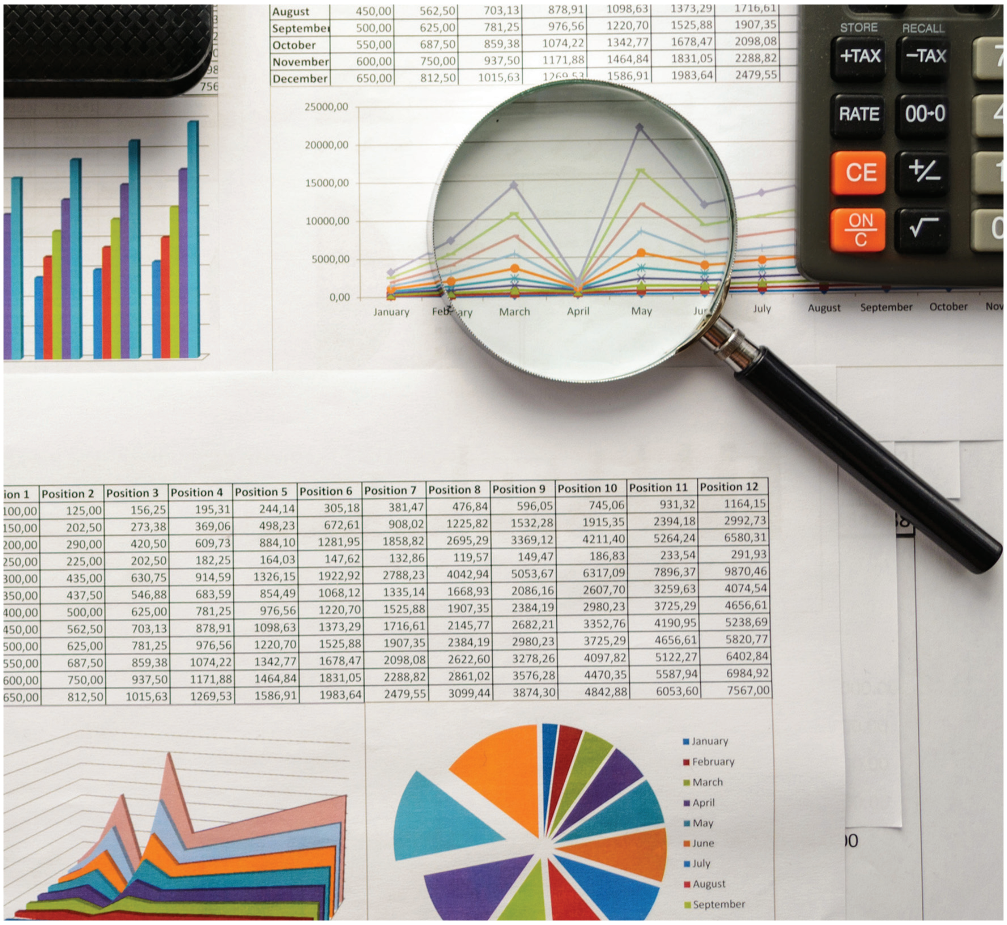
These are folks with a SEC Series 3, 6 or 7 licenses. They typically work only on commission. According to the US Census Bureau there were **383,361** personal financial advisors in the United States in 2021. Most importantly these folks ***DO NOT*** have a fiduciary duty to act in the best interests of their clients. The Biden Administration is trying, yet again, through rulemaking to impose fiduciary status on financial planners giving retirement savings advice. No one knows whether this latest attempt to eliminate what the Biden Administration calls "Junk Fees" will stick this time. Many questions abound and every previous attempt has failed. Maybe a better question to ask is can we fix the problem ourselves?

IMPACT OF ROLLOVERS ON YOUR PARTICIPANTS

So, 46% of your Participants are likely to roll their DC account into an IRA, of those the majority did so, at least in part, to gain access to management and advice, and they are likely to get that advice from a non-fiduciary. According to PEW Research, the typical balanced fund in a 401(k) plan has 0.19% lower fees than the average IRA. This seemingly small difference adds up to a lot of money. The Pew Research study showed that a person retiring at age 65 with $250,000 could have $20,500 more in retirements savings at age 90 with the lower fees.[2]

WHAT TO DO?

Most Taft-Hartley Boards of Trustees are reluctant to get into the advice business for good reason. We have been trained to choose a properly diverse array of investment options, choose from among those options a Qualified Default



Investment Alternative (QDIA) for participants who never make an election, regularly monitor the cost and performance of the array of options that were chosen and finally make sure participants have adequate information about the array of options. Pursuant to Section 404(c) of ERISA the liability for choosing from among the options selected then passes to the individual participant. Based on these baked in principles, Trustees have steered away from providing any advice to participants other than general educational information and approved planning tools.

The problem with this is that it has obviously left many participants unsure of what to do. Even if a participant uses the QDIA, upon retirement most participants find themselves unsure of how to proceed with retirement. Many do not know how much they can take out of their account each year, whether they should change their asset allocation, whether they can afford to use the money to buy a second home somewhere and so on and so on. In our opinion, this is why so many participants leave the safe haven of the Trustee protected plan and go talk to "Their Guy."

We think it may be time for Trustees to re-think their reluctance to allow professional advice within the plan. Most large 401(k) providers now offer personalized planning and advice services. Many Trustees have been reluctant to add these services because of the additional fees that come with them. However, is this just forcing many of your Participants to fend for themselves and end up with vastly less effective and more expensive advice?

We think it might. Why not at least look at the programs offered by your provider? Many Participants crave this personalized advice and hand holding. We may just be driving our Participants into less capable hands by ignoring this need.

[1] Survey last accessed at: https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2021/09/pew-survey-explores-consumer-trend-to-roll-over-workplace-savings-into-ira-plans.

[2] The Study assumed a 5% average annual rate of return and $1,000/month withdrawals.

DEADLINE FOR GAG CLAUSE PROHIBITION COMPLIANCE ATTESTATION IS FAST APPROACHING

The Consolidated Appropriations Act, 2021 (the "CAA"), which was signed into law on December 27, 2020, amended the Employee Retirement Income Security Act of 1974 ("ERISA"), the Internal Revenue Code ("IRC"), and the Public Health Services Act ("PHSA") to prohibit group health plans and health insurance issuers that offer group health insurance coverage from entering into prohibited gag clauses with their service providers. A prohibited gag clause is an agreement with a health care provider, network or association of providers, third-party administrator, or other service provider offering access to a network of providers that would, directly or indirectly, restrict the group health plan or health insurance issuer from:

1. providing provider-specific cost or quality of care information or data, through a consumer engagement tool or any other means, to referring providers, plan sponsors, participants, beneficiaries, or enrollees, or individuals eligible to become participants, beneficiaries, or enrollees of the plan; or

2. electronically accessing de-identified claims and encounter information or data for each participant, beneficiary, or enrollee in the plan upon request and consistent with the privacy regulations promulgated under the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), the Genetic Information Nondiscrimination Act of 2008 ("GINA") and the Americans with Disabilities Act of 1990 ("ADA"), including on a per claim basis—

   a. financial information, such as the allowed amount, or any other claim-related financial obligations included in the provider contract;

   b. provider information, including name and clinical designation;

   c. service codes; or

   d. any other data element included in claim or encounter transactions; or

3. sharing information or data described in (1) or (2), or directing such information be shared, with a business associate consistent with applicable privacy regulations promulgated pursuant to HIPAA, GINA and the ADA.

The Departments of Labor, Health and Human Services and Treasury (the "Departments") issued FAQs regarding the gag clause attestations on February 23, 2023, and concurrently launched a website for submitting the attestations. The Departments also issued instructions, a system user manual, and a reporting template for group health plans and health insurance issuers to submit the required attestation.

Group health plans and health insurance issuers should have identified their applicable vendors and reviewed their services agreements to confirm no gag clauses were present in those services agreements. Plans and issuers should have also determined who will submit the attestation. While a fully insured provider may submit the attestation on a plan sponsor's behalf, many self-funded group health plans remain responsible for filing their own attestation.

The first Gag Clause Prohibition Compliance Attestation was due by December 31, 2023, covering the period beginning December 27, 2020, through the date of attestation. Subsequent attestations, covering the period since the last preceding attestation, are due by December 31 of each year thereafter.

HHS REACHES FIRST HIPAA SETTLEMENT AGREEMENT INVOLVING A CYBER ATTACK

On October 31, 2023, the U.S. Department of Health and Human Services ("HHS") announced that its Office of Civil Rights ("OCR") reached a settlement under the Health Insurance Portability and Accountability Act (HIPAA) with Doctors' Management Services, a Massachusetts medical management company that offers a number of services, including medical billing and payor credentialing. This settlement is important because it is the first ransomware agreement that OCR has reached.

In April 2019, Doctor's Management Services filed a breach report with HHS, which stated that 206,695 individuals were affected when the Company's network server was infected with GandCrab ransomware. The first unauthorized access to itsnetwork happened on April 1, 2017, however the Company did not notice the invasion until December 2018, after ransomware was used to encrypt its data. Ransomware is a type of software that is created to deny access to a user's data—usually by encrypting the data with a password known only to the hacker who created the software, until a ransom is paid.

Thereafter, in April 2019, OCR began its investigation and found evidence of failures of the Company to have procedures in place to determine potential risks and vulnerabilities to its electronic protected health data. OCR also found inadequate monitoring and a lack of policies in place to implement the requirements of the HIPAA Security Rule "to protect the confidentiality, integrity, and availability of electronic protected health information."

The settlement, which amounted to $100,000.00, is the result of a large breach report regarding a ransomware attack that impacted the electronic protected health information of 206,695 individuals. The terms of the settlement provide that OCR will monitor the Company for three years to ensure compliance with HIPAA. The Company agreed to implement a corrective action plan, which includes (1) review and update its Risk Analysis to identify potential risks to the Company's data, (2) update its Company-wide Risk Management Plan to address and mitigate any security risks found in the updated Risk Analysis; (3) review and revise its written policies surrounding privacy and security and (4) provide better training to the workforce.

OCR recommends that entities covered by HIPAA take the following best practices to prevent cyber-attacks: (1) ensure that business associate agreements are in place that address breach obligations; (2) conduct risk analysis and risk management into business processes; (3) ensure audit controls are in place to examine security activity; (4) implement regular review of information system activity; (5) use multi-factor authentication; (6) encrypt electronic protected health information; and (7) provide regular training to employees.

If you have any questions about your obligations under the HIPAA rules, please contact our office.

> *"In August of 2023, Illinois passed the first law in the country (SB 1782) aimed at requiring children who appear in their family's social media posts to be compensated."*

ILLINOIS PASSES FIRST IN THE NATION LAW TO PROTECT CHILD INFLUENCERS

From the rise of the first "mom blogger" Heather Armstrong and her blog, Dooce, in 2004, there have been legal questions and concerns about children's privacy and their ability to consent to appear in social media postings. Many of the first parent blogs, including Dooce, were parents trying to speak the truth to a like-minded audience. In the twenty years since, parent blogs have evolved to include lifestyle content, social media influencers, YouTube families that broadcast their entire lives and even child influencers like, Ryan's World, a YouTube channel in which now thirteen year old Ryan Kaji gives toy reviews to over thirty-five million subscribers. In an attempt to keep up with technology, Illinois passed a first-of-its-kind labor law, requiring children who appear in their parents' influencer posts and videos to be compensated. The rise of parent influencers has created all sorts of legal questions from privacy, to work hours, to compensation, which are only beginning to be addressed.

In August of 2023, Illinois passed the first law in the country (SB 1782) aimed at requiring children who appear in their family's social media posts to be compensated. Governor Pritzker signed the law amending Illinois' Child Labor Law to provide that beginning on July 1, 2024, parents in Illinois are required to put up to 50% of the earnings from sponsored social media posts into a blind trust fund for their use when they turn 18. The law applies when, within a period of 12 months, a minor under the age of 16 appears: 1) "at least 30% of the vlogger's compensated video content produced within a 30-day period included the likeness, name or photograph of the minor"; and 2) "the number of views received per video segment on any online platform met the online platforms' threshold for the generation of compensation or the vlogger received actual compensation for video content equal to or greater than $0.10 per view."[1] If the minor child meets these criteria then they must be compensated based on the amount they appeared in the posts. For instance, if they appear in 100% of the posts, the parents must place 50% of the compensation for that post into a blind trust. If they appear in 50% of the posts, then 25% must be placed into the trust. The law does not apply to children who are the engaged in the work of vlogging themselves.

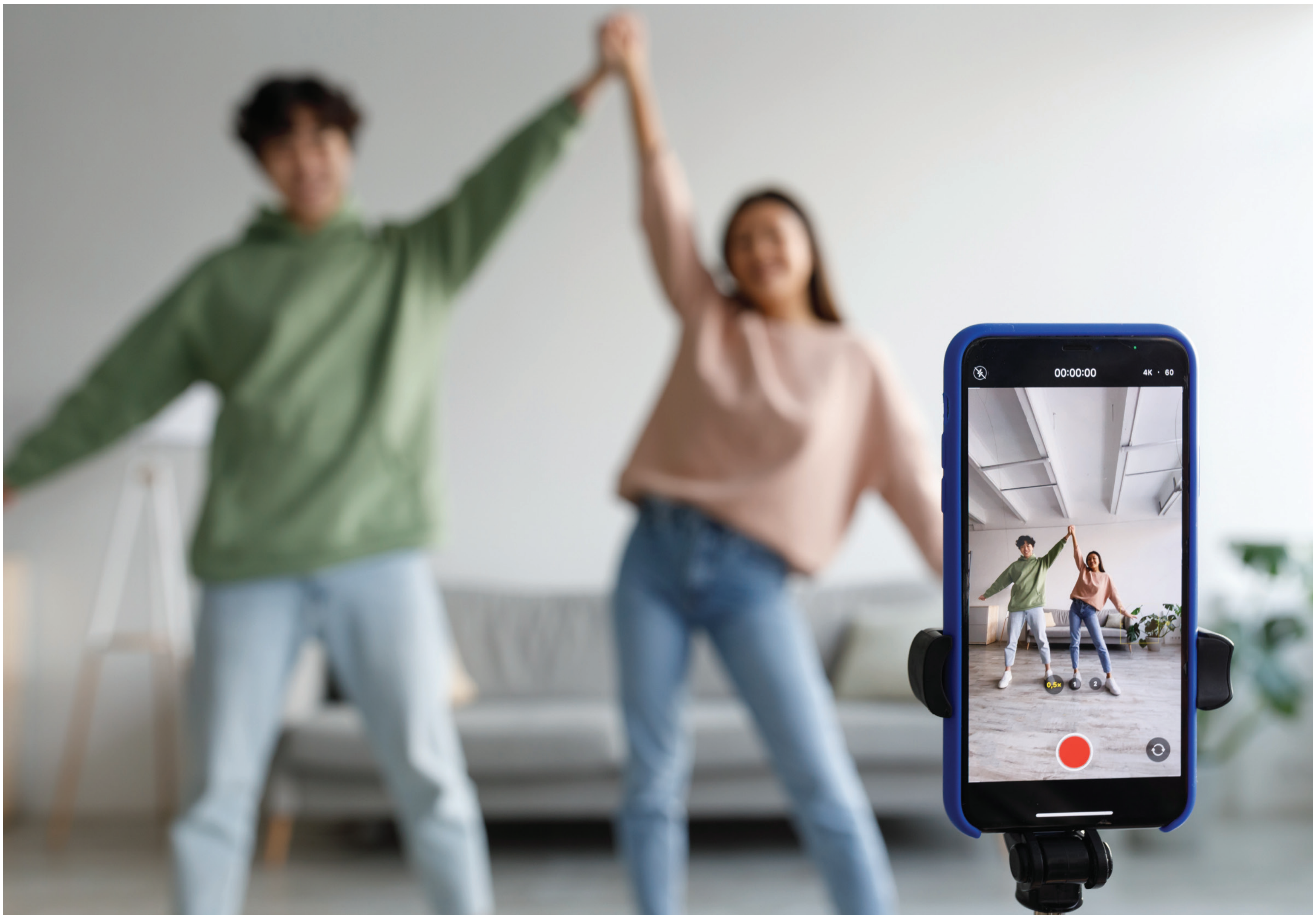
The history of paying children in the entertainment business goes back to the early days of Hollywood. Jackie Coogan, an early child star who appeared in silent movies with Charlie Chaplin discovered after turning 21 that his mother and stepfather had spent all the money he had earned as a child actor. In 1938, Coogan sued his parents for the revenue he had earned, which was approximately $3-$4 million; in today's dollars that would be between $61 and $82 million. Coogan recovered only $126,000, going virtually broke while paying for litigation. In response, in 1939, the California State Legislature passed the Child Actor's Bill, commonly referred to as Coogan's Law, which requires the child's employer to set aside 15% of all earnings to be put in a blind trust until the child turns 18. It also specified work hours, schooling and other labor protections. Other states, including Illinois, have passed their own versions of Coogan's Law.

But compensation is not the only concern. Many of the first children of these bloggers and influencers are becoming teenagers and adults and there has been serious backlash over privacy concerns. One such child gave an in-depth interview to Teen Vogue that she intends to go no-contact with her parents as soon as she turns 18.[2] Washington State is considering a law that, in addition to providing compensation, would allow children to request their digital footprint be erased when they reach the age of 18. HR 1627 would provide for children of influencers to demand the deletion of their names, likeness or any photos from "any internet platform or network that provided compensation to the individual's parent or parents in exchange for that content." The bill is currently stalled in the Washington State legislature.[3]

The irony of children being used to make money via social media when most platforms require users to be 13 in order to use social media should not be ignored. The United States Surgeon General, Vivek Murthy, has opined that social media is extremely harmful for children and that 13 is too young to engage in social media platforms. In addition, a federal lawsuit in California has been filed accusing social media companies of producing a product that is addictive to children. Lawyers pursuing the case have compared social media to marketing cigarettes and alcohol to children.

It is very likely that Illinois' law will be the first of many aimed at protecting child labor when being utilized by their influencer parents. While Illinois' law specifically addresses compensation, it is not clear how it may apply to work hours and other labor laws that generally apply to children in the entertainment industry. Many YouTube families film almost every moment of their children's lives. Will these all be considered work hours under either child labor laws or the Fair Labor Standards Act? One thing is certain, as is often the case, technology is moving faster than the law and while Illinois should be applauded for attempting to address these issues, it may, as often is the case, be an example trying to fit new technology into an old law.

[1] 820 ILCS 205/2.6
[2] Influencer Parents and The Kids Who Had Their Childhood Made Into Content, By Foresa Latifi, https://www.teenvogue.com/story/influencer-parents-children-social-media-impact
[3] https://app.leg.wa.gov/billsummary/?BillNumber=1627&Year=2023&Initiative=false



TARGET DATE FUND LITIGATION—A SURVEY OF PENDING CASES

In 2023, several courts around the country issued decisions in ERISA lawsuits challenging the decisions of 401(k) plan fiduciaries related to target date funds ("TDFs"). Most notably, decisions were issued in several lawsuits filed since July 2022 that alleged a breach of fiduciary duties related the offering of BlackRock TDFs, and their alleged underperformance as compared to other TDFs.

The cases filed against 401(k) plan fiduciaries over the last decade have generally focused on high fees. However, the lawsuits involving inclusion of the BlackRock TDFs challenged the performance of low-cost investment options rather than high-fee investment options. Specifically, the lawsuits involving the BlackRock TDFs alleged that the plan fiduciaries chased low fees, and would have selected more appropriate alternatives had they objectively evaluated the funds.

In early 2023, several of these lawsuits, including cases involving Microsoft,[1] Capital One,[2] and Booz Allen Hamilton,[3] were dismissed by federal district courts for failing to raise a plausible inference of underperformance. However, in September 2023, a judge in the Eastern District of Virginia concluded that the allegations raised by the plaintiffs were sufficient to proceed to trial. In that case, *Trauernicht v. Genworth*, E.D. Va., No. 22-cv-532, the court reasoned that the participants raised a reasonable inference of imprudence when they alleged the procedures for monitoring the funds in question were insufficient because they did not examine their performance against suitable alternatives and the plan fiduciaries never discussed how the BlackRock funds performed. The case was also different from other cases involving the BlackRock TDFs, including two cases from the same district, in that the plaintiff participants were permitted to amend their complaint twice prior to the court ruling on a motion to dismiss, and include facts learned during discovery.

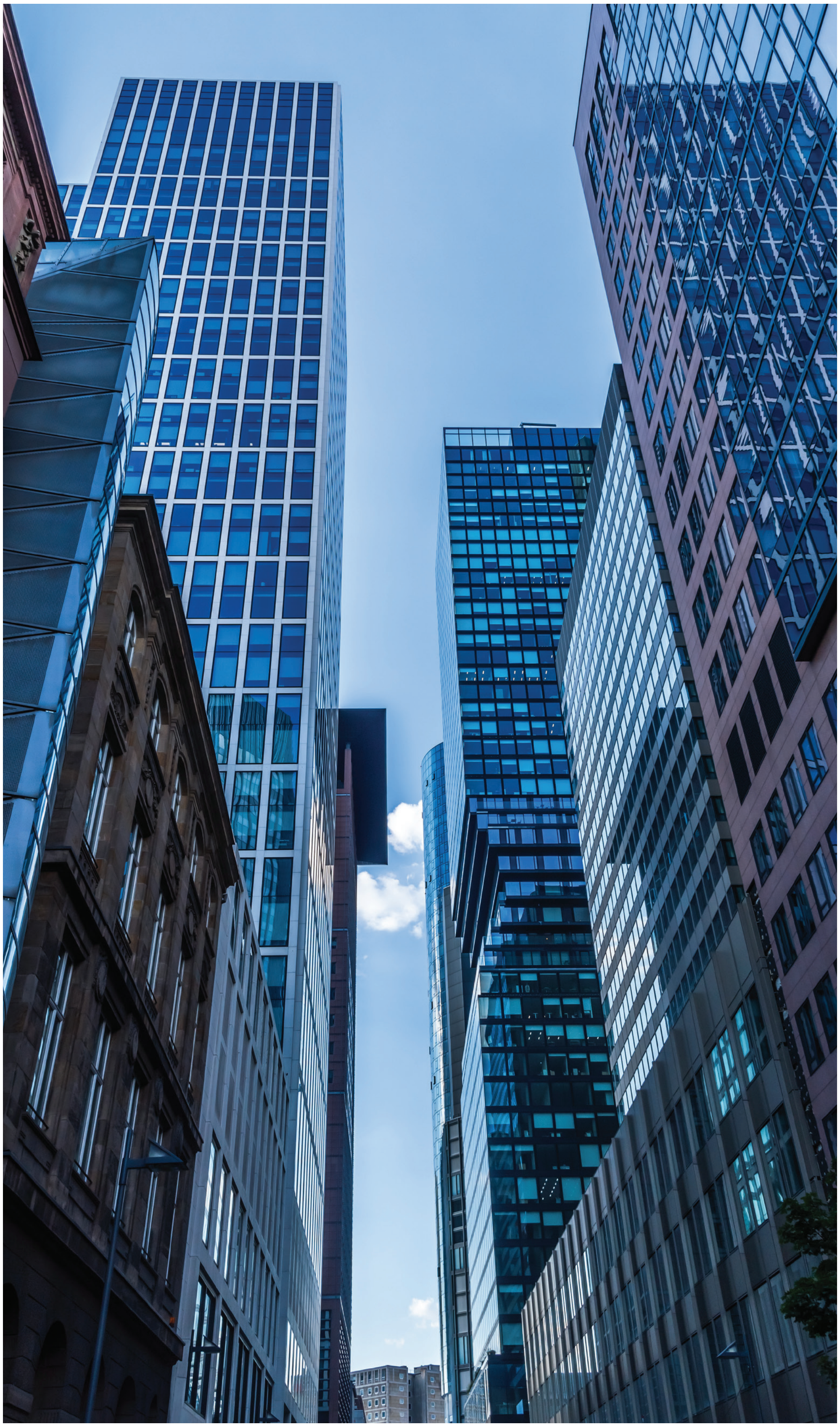
The litigation involving TDFs in 2023 was not limited to the appropriateness of low-cost options. In September 2023, a court in the Southern District of Texas denied a motion to dismiss and permitted a case involving the inclusion of actively managed TDFs offered by Fidelity to move forward. In that case, *Laliberte v. Quanta Services, Inc.*, S.D. Tex., No. 4:22-cv-3290, the plaintiffs alleged that the default investment option in the 401(k) plan were TDFs that were both risky and inappropriate for the average retirement investor. A split exists among the federal circuits as to whether plaintiffs challenging 401(k) funds must provide a "meaningful benchmark" for comparison purposes to advance beyond a motion to dismiss. The United States Court of Appeals for the Fifth Circuit, which includes the Southern District of Texas, has not weighed in on this issue, and Quanta Services, Inc. has asked the appellate court to address this issue immediately.

A court in the Northern District of Illinois also rendered an opinion in September 2023 regarding "meaningful benchmarks" and lawsuits involving TDFs. In *Baumeister v. Exelon Corp.*, N.D. Ill., No. 21-cv-6506, the court granted the defendants' motion to dismiss where the plaintiffs alleged breaches of the fiduciary duties of prudence and loyalty, failure to monitor, co-fiduciary liability, and prohibited transactions.

In *Baumeister*, the trustees decided to replace several Vanguard TDFs with custom, proprietary TDFs that became the new default option for the plan's participants. The defendants' decision to continue offering the proprietary TDFs, despite underperformance and excessive fees, formed the basis of the claims alleging imprudence. However, the court found that the TDFs offered by the Exelon plan generally performed in the second or third quartile when compared to the entire TDF market, and that this was insufficient to suggest imprudence. The *Baumeister* court also addressed the issue of what funds should be used for comparison in evaluating performance, and found that the plaintiffs failed to show why funds chosen for comparison should be used over other TDFs and failed to allege that the Exelon funds were out of step with the six funds the plaintiffs used for comparison.

As with the allegations concerning the duty of prudence, the court rejected the plaintiffs' claims regarding a breach of the duty of loyalty, excessive recordkeeping fees, and fees charged by the plan's service provider. Finally, the plaintiffs' claims regarding failure to monitor, co-fiduciary liability, and prohibited transactions were also dismissed because they depended on the duty of prudence and duty of loyalty claims and a determination that the fees paid for plan services were unreasonable or excessive.

In December 2023, a court in the Northern District of Ohio decided



yet another case involving TDFs, and whether plaintiffs must provide a meaningful benchmark. In *Johnson v. Parker-Hannifin*, N.D. Ohio, No. 1:21-cv-256, the plaintiffs' claims involved (1) the defendant's selection and retention of underperforming TDFs, (2) excessive fees, and (3) failure to monitor those appointed to make decisions regarding the plan.

The *Parker-Hannifin* court granted the plan's motion to dismiss because complaints involving a breach of fiduciary duty related to underperforming investments must contain sufficient context to demonstrate underperformance. Additionally, if a plaintiff chooses to provide context through comparisons to other funds, he or she must show that the challenged and comparator funds share the same investment strategies, risk profiles, and objectives. In other words, a plaintiff must show underperformance relative to a "meaningful benchmark." The plaintiffs failed to demonstrate such a comparison. The court also found that the plaintiffs failed to adequately plead that the defendants breached their fiduciary duty by failing to obtain the institutional shares with the lowest fees for two investment options because they did not allege the plan qualified for such shares. Finally, the court found that the plaintiffs could not prove a breach for failure to monitor when they could not prove the allegations related to underperformance and excessive fees.

[1] *Beldock v. Microsoft Corp.*, W.D. Wash., 2:22-cv-1082.
[2] *Hall v. Capital One Financial Corp.*, E.D. Va., 1:22-cv-857.
[3] *Tullgren v. Booz Allen Hamilton*, E.D. Va., 1:22-cv-856.

NOW MAY BE A GOOD TIME TO REVIEW YOUR SEVERANCE AGREEMENTS

The Board's decision in McLaren Macomb and the subsequent memo from the General Counsel make clear that the Board intends to closely review the language of employer communications to employees, including severance agreements.

The National Labor Relations Board's decision in *McLaren Macomb* has many employers rethinking the terms that they include in their standard severance agreements. In *McLaren Macomb*, the Board held that an employer violates Section 7 of the National Labor Relations Act ("Act") "when it proffers a severance agreement with provisions that would restrict employees' exercise of their NLRB rights" including agreements that contain overly broad confidentiality clauses and/or non-disparagement restrictions.

In *McLaren Macomb*, eleven union employees were permanently furloughed from their employment at a premier teaching hospital in Michigan. At the time the employees were furloughed, they were each offered differing severance benefits if they agreed to the terms of the hospital's severance agreement. The severance agreements contained a provision that prohibited the employees from making "statements to [other] employees or to the general public which could disparage or harm the image of the [Hospital]." Additionally, the severance agreements contained confidentiality provisions that prohibited the former employees from sharing, disclosing or discussing the terms of their respective severance agreements with any third party. The agreements provided for substantial monetary and injunctive sanctions against the employees if the confidentiality and/or non-disparagement provisions were breached. All employees signed the severance agreements.

The employee's union[1] later filed several charges against the hospital[2] which included a charge that the hospital violated Section 8(a)(1) of the Act by proffering severance agreements to the employees that contained overly broad non-disparagement and confidentiality clauses that restricted the employees' Section 7 rights.[3] After a hearing, the ALJ initially determined that the hospital did not violate the Act by including the non-disparagement and confidentiality clauses. In reaching its decision, the ALJ relied on several Trump-era Board rules for upholding confidentiality and non-disparagement terms in severance agreements.[4] However, the Board reversed the ALJ's decision and in doing so overruled the prior Trump-era precedent on confidentiality and non-disparagement clauses. Instead, the Board determined

that the broad non-disparagement and confidentiality clauses violate Section 8(a)(1) of the Act because they have a tendency to interfere with, restrain or coerce employees in the exercise of their Section 7 rights, which include the right to discuss the terms and conditions of employment with coworkers, the union, governmental agencies and other third parties.

Following the decision in *McLaren Macomb*, in March 2023, the Board's General Counsel issued a memorandum[5] clarifying the Board's holding in *McLaren Macomb*. In the memo, the General Counsel clarified that severance agreements are not categorically banned, but that any overly broad agreement that infringes upon Section 7 rights will be subject to significant scrutiny from the Board. In addition, the General Counsel clarified that the decision has a retroactive effect, meaning that even severance agreements entered into prior to the decision in *McLaren Macomb* that include overly broad language could be considered to violate the Act. The General Counsel suggested that employers should consider contacting previous employees who signed severance agreements with overly broad provisions and notifying them that the sections are null and void.

The General Counsel also explained that the reasoning of the *McLaren Macomb* decision is not limited only to severance agreements. The General Counsel explained that the restrictions will apply to "any employer communication" that unnecessarily infringes on restricts employees' rights under Section 7 of the Act. This can include preemployment or offer letters, noncompete agreements, non-solicitation agreements, waiver & release agreements, non-disclosure agreements and other employment agreements. Additionally, the General Counsel confirmed that the *McLaren Macomb* decision applies to all employees regardless of union status, with the exception of supervisors who are not covered by the Act.

The Board's decision in *McLaren Macomb* and the subsequent memo from the General Counsel make clear that the Board intends to closely review the language of employer communications to employees, including severance agreements. Employers should consider reviewing and updating their standard severance agreements to ensure that they don't contain overly broad confidentiality or non-disparagement restrictions that restrict employees' rights under Section 7 of the Act. It is better for employers to take action now than to wait until the Board is knocking at their door.

[1] Local 40 RN Staff Council, Office of Professional Employees International Union (OPEIU).
[2] The union also filed charges against the hospital for permanently furloughing the employees without first notifying the union and giving it an opportunity to bargain over the effects in violation of Section 8(a)(5) and (1).
[3] Section 7 of the NLRA gives employees the right to engage or refrain from: self-organization; forming, joining, or assisting labor organizations; collectively bargain; and engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.
[4] *See Baylor University Medical Center*, 369 NLRB No. 43 (2020); *IGT d/b/a International Game Technology*, 370 NLRB No. 50 (2020)
[5] GC Memorandum 23-05

DESPITE RETIREMENT GAINS, UNITED AUTO WORKERS FAIL TO REVIVE DEFINED BENEFIT PENSIONS FOR ALL EMPLOYEES

The historic strike of the United Auto Workers ("UAW") underscored the growing disparity between stagnant wages and ballooning living costs associated with everything from housing and college tuition, to basic necessities such as food and gas. The UAW's strike was successful in negotiating back many of the concessions made during the Great Recession, and in obtaining historic wage increases to offset inflationary pressures. However, retirement was one area where the strike failed to achieve all of the UAW's objectives.

Although the UAW successfully secured historic pay raises, the elimination of wage tiers, and big improvements for employee retirement savings plans, its attempt to bring back defined-benefit pensions for younger employees fell flat. As a result, the division between workers who started work before the fall of 2007 and have defined-benefit pensions, and those hired after who only have retirement savings plans, remains. Even though the strike failed to restore all of the retirement security that prior generations of auto workers enjoyed, the union nonetheless achieved some significant retirement gains.

As a compromise to the lack of defined-benefit pensions for all employees, the union successfully persuaded Ford Motor Company to increase its 401(k) match rate from 6.4% to (10%) of an employee's salary, which is three to four times what the average employer offers. The UAW also bargained for an employee option to convert their 401(k) to an annuity contract that would guarantee a stream of regular fixed payments in retirement. It is also important to note that the union did not forego pension benefits altogether. The negotiated terms include some improvements for retirees that are already receiving a defined-benefit pension. These terms will reportedly be mirrored in agreements reached with Stellantis and GM as well.

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