THIS BOOKLET CONTAINS THE FILING INSTRUCTIONS AND PUBLICATION UPDATE

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National Labor Relations Act: Law and Practice, 2nd Edition

Publication 614 Release 22 December 2002

HIGHLIGHTS

Fully Updated

- *National Labor Relations Act: Law and Practice, 2nd Edition*, has been fully updated by author N. Peter Lareau with expert analysis of the numerous recent developments from the National Labor Relations Board and the courts that are vital to your labor relations practice.

Supreme Court Decisions

- See below regarding coverage of decisions of the U.S. Supreme Court in *BE & K Construction Co. v. NLRB*, 122 S. Ct. 2390, 153 L. Ed. 2d 499 (2002) (meritless litigation with retaliatory motive); *Hoffman Plastic Compounds, Inc. v. NLRB*, 122 S. Ct. 1275, 152 L. Ed. 2d 271 (2002) (backpay—undocumented aliens); and *US Airways, Inc. v. Barnett*, 122 S. Ct. 1516, 152 L. Ed. 2d 589 (2002) (seniority systems under ADA).

New Appendix—Memorandum GC 02-06

- This release includes a new Appendix L, containing NLRB General Counsel Memorandum GC 02-06 (July 19, 2002), Procedures and Remedies for Discriminatees Who May Be Undocumented Aliens after *Hoffman Plastic Compounds, Inc.*

Tests for independent contractor status modified. In *Corporate Express Delivery Systems v. NLRB*, 292 F.3d 777 (D.C. Cir. 2002) the Sixth Circuit accepted the argument of the Board's General Counsel that, in determining independent contractor status, the focus should be "not upon the employer's control of the means and manner of the work but instead upon whether the putative independent contractors have a 'significant entrepreneurial opportunity for gain or loss.' " See discussion in boxed note at § 2.03[4][d].

Supreme Court reverses NLRB holding that all meritless litigation filed with retaliatory motive is unlawful. In *BE & K*

Construction Co. v. NLRB, 122 S. Ct. 2390, 153 L. Ed. 2d 499 (2002), the Supreme Court reversed an NLRB decision that had held that an employer's federal lawsuit against unions had been without merit because: (1) all of petitioner's claims were dismissed or voluntarily withdrawn with prejudice; and (2) the suit had been filed to retaliate against the unions for engaging in protected activity. The Court concluded that the standard employed by the Board was too broad because it enabled the Board to conclude that all "reasonably based but unsuccessful suits filed with a retaliatory purpose" were unfair labor practices. See § 5.05[10][b], text at n. 245.6.

Fourth Circuit limits backpay award for "salt" unlawfully denied employment. Rejecting the NLRB's argument that a "salt" unlawfully denied employment is entitled to back pay for the entire period between the employer's refusal to hire and the Board's decision determining that such refusal was unlawful (a period of some 5 years), the Fourth Circuit limited backpay to the five-week period the salt actually worked after being offered employment pursuant to the Board's order. *Aneco Inc. v. NLRB*, 285 F.3d 326 (4th Cir. 2002). The case is discussed at § 8.02[4], text at n. 15.5.

Employer's proffer of settlement agreement violates NLRA. The NLRB found that an employer violated the Act by offering an unlawfully discharged employee a settlement agreement that precluded the employee from discussing his employment with anyone other than his family, attorney and accountant—even though the employee refused to sign. *Metro Networks, Inc.*, 336 NLRB No. 3 (2001), discussed at new § 8.08A.

Supreme Court holds undocumented aliens ineligible for backpay awards. In *Hoffman Plastic Compounds, Inc. v. NLRB*, 122 S. Ct. 1275, 152 L. Ed. 2d 271 (2002), the Supreme Court, reversing the NLRB and the D.C. Circuit, held that the Board may not award backpay to undocumented aliens. See discussion at § 8.13[2][d][ii].

NLRB General Counsel issues advice memorandum regarding *Hoffman*. In response to the Supreme Court's reversal of the NLRB's position regarding undocumented aliens, the Board's General Counsel issued a memorandum to all NLRB regional offices on the handling of cases in which issues regarding undocumented aliens arise. The substance of the memorandum is reported and analyzed in § 8.13[2][d][iii]. The text of the Memorandum itself is set forth at new Appendix L.

Two circuits criticize NLRB sympathy strike presumption. Both the Seventh and Ninth Circuits have criticized the NLRB's presumption that a general no-strike clause includes sympathy strikes. *Indianapolis Power & Light Co. v. NLRB*, 898 F.2d 524 (7th Cir. 1990) and *Children's Hosp. Med. Ctr. v. Cal. Nurses Ass'n*, 283 F.3d 1188 (9th Cir. Cal. 2002). See § 19.02[6][c][ii], text at nn. 33.1–33.2.

Sixth Circuit upholds Board's interpretation of Section 502 of the Act. Finding that the NLRB's interpretation of the NLRA's provision governing strikes over abnormally dangerous working conditions was a reasonable interpretation of the Act, the Sixth Circuit held that the interpretation is entitled deference. Nonetheless, the court refused to enforce the Board's order because of inexcusable delay in the processing of the case. *TNS, Inc. v. NLRB*, 296 F.3d 384 (6th Cir. 2002), discussed at § 19.02[9], text at n. 75.1.

Ninth Circuit affirms NLRB's decision on organizing expenses. Finding that the NLRB's decision was a reasonable interpretation of the Act, the Ninth Circuit upheld the Board's decision that organizing expenses are germane to collective bargaining and may be charged to objecting employees

subject to a union security clause under the NLRA. *UFCW, Local 1036 v. NLRB*, 284 F.3d 1099 (9th Cir. 2002), discussed at § 25.08[2][c][iii], text at n. 41.14.

Ninth Circuit requires independent audit of union's expenses. In *Harik v. California Teachers Association*, 298 F.3d 863 (9th Cir. 2002), the Ninth Circuit held that for purposes of determining the amount of union expenses that may lawfully be charged to objecting employees under a union security clause, the expenses must, at a minimum, be verified by an independent auditor. See § 25.08[6], text at n. 80.1a.

NLRB reverts to earlier ruling regarding presumption of union majority status applicable in successorship. Reverting to a rule that it had first adopted in 1975 in *Southern Moldings, Inc.*, and reversing its 1999 decision in *St. Elizabeth Manor*, the Board held that the presumption of a union's majority status that attaches upon voluntary recognition is not applicable in a successorship context. *MV Transportation*, 337 NLRB No. 129 (July 17, 2002), discussed at § 32.02[3][d][i], text at n. 40.10.

NLRB adopts firm requirement that parties be given at least 5 days notice of representation hearing. Although the NLRB Casehandling Manual has long suggested that regional directors give the parties 5-days notice of the opening of a representation hearing, the Board has now required such notice absent unusual circumstances or a clear waiver. *Croft Metals, Inc.*, 337 NLRB No. 106 (2002), discussed at § 32.03[5], text at n. 65.1.

Supreme Court rules on seniority systems under ADA. In *US Airways, Inc. v. Barnett*, 122 S. Ct. 1516, 152 L. Ed. 2d 589 (2002), the Supreme Court held that an employer need not violate a *bona fide* existing seniority system in order to accommodate an individual. See § 46.01[4][c], text at n. 86.1.

COMPOSITION RUN COMPLETED --- ERRORS: NONE --- PAGES: 4