



Welcome

Ninth Annual Tennessee Hospitality and Tourism Law Symposium

July 16, 2020

BAKER DONELSON

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Welcome Remarks



Rob Mortensen
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Union Organizing in the Age of COVID



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Today's Topics

1. Union Organizing in the Age of COVID
2. Union-Backed Reinstatement Ordinances
3. CARES Act Neutrality Requirement
4. The Fight for \$15 Joins With SEIU to Address COVID
5. Remote Organizing
6. AFL-CIO COVID Suit Against OSHA
7. NLRB Joint Employment Rule

Union Organizing in the Age of COVID

- No need to look any further than what the unions are saying about COVID.
 - “Of all the injustices exposed by the pandemic, the risks faced by non-union workers have become the most apparent. Non-union workers are being asked to risk their safety with little or no protections of their own. This is why we’re seeing a groundswell of strikes and walk-offs from delivery drivers and other workers on the front lines.”

Gary Perinar

Executive Secretary of Chicago Council of Carpenters

Chicago Sun Times April 30, 2020

Union Organizing in the Age of COVID

(continued)

- “All workers deserve a safe and healthy workplace, a voice on the job, and an environment free from retaliation. This is even more imperative during moments of crisis such as this...Corporations like Amazon have billions of dollars, but as workers our greatest power is solidarity. The New York Teamsters stand in solidarity with workers in New York and across the country who are collectively demanding that our lives be put ahead of corporate profits.”

George Miranda

Teamsters Joint Council 16 President

March 31, 2020

Union Organizing in the Age of COVID

(continued)

- “This [COVID] is a cataclysm...This crisis has been the glue for workers to come together, blue-collar and white-collar, not just union members. It sounds corny, but we’re moving towards a worker rebellion.”

Kurt Petersen

Co-president of Unite Here Local 11 in Los Angeles

Los Angeles Times/May 1, 2020

Union Organizing in the Age of COVID

(continued)

- Issues that Unions are Organizing Around During the Pandemic
 - Health and safety protocols
 - Hazard pay
 - Paid sick leave/pandemic leave
- Why the pandemic is a good organizing opportunity
 - Never let a good crisis go to waste
 - Employees literally have their lives on the line based on issues that affect them collectively
 - Employers are focused on survival – not defending against organizing

Union Organizing in the Age of COVID

(continued)

- How to protect against union organizing
 - Train managers and supervisors
 - Positive employee relations
 - Legal rules on responding to protected activity
 - Remember the TIPS. You cannot:
 - **Threaten**
 - **Interrogate**
 - **Promise**
 - **Spy**

Union Organizing in the Age of COVID

(continued)

- Don't just tell employees that they do not need a union – show them why they do not need a union.
 - Highlight open door policy
 - Conduct roundtables
 - Be transparent
 - Match donations to employee relief funds up to a threshold
 - Communicate about health and safety in a way that is not just about keeping the customer safe; it is about keeping the employees safe

Union-Backed Recall Ordinances

- Require employers to “recall” workers laid off due to COVID, in order of seniority, before hiring new employees
- Directed toward travel and tourism industries
- Have only passed in certain California municipalities (Los Angeles, San Francisco, Glendale)
- The Los Angeles ordinance was literally drafted by UNITE

CARES Act Neutrality

- CARES Act authorized loans to mid-size employers (500-1,000 employees)
 - One condition of receiving funds is a certification to remain neutral on union organizing for the term of the loan
 - So far, this program has not been implemented by the Treasury Department, but it is in the legislation
 - Does not apply to PPA payments or Main Street Lending Provisions

Fight for \$15 Joins With SEIU to Address COVID

- SEIU and Fight for \$15 Launched: *Protect All Workers*
 - <https://protectallworkers.org/>
- Demands:
 - Fully-funded and accessible health care for every worker in America, including paid leave and 100%-paid testing and treatment for COVID-19
 - Job, wage, and economic security for every worker
 - An immediate investment in the health and safety of every worker
 - Putting working families at the center of every emergency relief package

Fight for \$15 Joins With SEIU to Address COVID (continued)

- “The responsibility for our national response at this moment should not fall solely on the shoulders of taxpayers and government. We demand that the largest, wealthiest and most powerful corporations and industries show leadership by looking past their bottom lines to ensure the health, safety and financial security of all workers.”

Mary Kay Henry

SEIU International President

- #WalkoutWednesday

Responding to a Walkout

- Be receptive to employees' concerns, even if you do not have a solution
- DO
 - Ask employees why they are leaving
 - Ask employees to stay until you can resolve the issue
 - Ask employees to clock out before they leave
 - Reiterate the steps you have taken to ensure health and safety
 - Stress the importance of direct communication
 - Continue to operate with temporary replacements

Responding to a Walkout (continued)

- DO NOT
 - Fire employees for walking out if you know it was based on protected activity
 - Threaten adverse consequences for engaging in protected activity
 - Call the police on employees engaged in protected activity, unless they are engaged in vandalism or violence
 - Photograph or video employees engaged in protected activity

Remote Organizing

- Less “water cooler talk” with remote work
 - Both positive and negative from an employer perspective
 - More organizing conversations are online and on social media, so employers are less likely to have a sense of organizing that occurs
 - Potentially more awkward to track a co-worker down online vs. natural conversation in the workplace
- Picket lines and social distancing can be inconsistent with COVID-related social distancing requirements

How the NLRB is Dealing with COVID

- Mail-in elections
- Video conference hearings
- NLRB has accepted electronic authorization cards since 2015
- An authorization supported by electronic signature must include:
 - The signer’s name, email address or social media account, and telephone number
 - The actual “authorization” language to which the employee assents, the date of the submission, and the name of the employer

AFL-CIO COVID Suit Against OSHA

- AFL-CIO sued OSHA in May for denying its request that OSHA establish an emergency temporary standard for infection control in the workplace
- AFL-CIO's proposed standard would make all of OSHA's guidance mandatory and enforceable, require employers to submit an exposure control plan to OSHA, require training, and require reporting of all positive COVID tests to OSHA
- Both the District Court and D.C. Circuit Court of Appeals rejected the AFL-CIO's suit, citing deference to OSHA as an administrative agency

NLRB/Joint Employment

- New NLRB rule impacts whether franchisor and franchisees can be considered joint employers
- Effective April 27, 2020
- Overturned the NLRB's 2015 decision in *Browning Ferris*
 - Allowed joint employment findings based on indirect control and contractually reserved control

NLRB/Joint Employment (continued)

- NLRB's New Rule
 - Specifies that a business is a joint employer of another employer's employees only if the two employers share or codetermine the employees' essential terms and conditions of employment
 - Clarifies the list of essential terms and conditions: wages, benefits, hours of work, hiring, discharge, discipline, supervision, and direction
 - Provides that to be a joint employer, a business must possess and exercise such substantial direct and immediate control to meaningfully affect matters relating to the employment relationship

NLRB/Joint Employment (continued)

- Makes clear that joint-employer status cannot be based solely on indirect influence or a contractual reservation of a right to control that has never been exercised

Questions

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Performing a Quick Check Up on the Health of Your IP



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Intellectual Property

Performing a Health Checkup on your Intellectual Property



Trade Secrets

Trademarks

Copyrights

Confidential Information

Trade Secrets

- Are you using **nondisclosure agreements** with suppliers, employees, and in certain situations customers?
- Are you including appropriate language in **employee handbook**?
- Are you utilizing **non-compete agreements** with



Trade Secrets (continued)



- Are you restricting **physical and electronic access**?
- Are you allowing employees to access information **outside of the office** or from **non-company computers**?

Trademarks

- **Are you continuing to use the mark?**
- **Registrations:**
 - Don't forget about the renewal periods or the registration will lapse
 - At year 5 and year 10 – file paperwork to maintain
 - 6 month grace period
- **Applications:**
 - Pay attention to office action and statement of use deadlines
 - 2 month period to revive unintentionally abandoned application
- **Are you watching/policing your core trademarks?**

Be weary of filing mills

- **U.S. REG. NO. 3,748,170**
 - LegalZoom hired an attorney to file application for U.S. Registration.
 - Should you hire an attorney to file a new trademark application?



Copyrights

- Are you registering works likely to be copied by competitors?
 - **Registration** provides potential for statutory damages and attorneys fees.
- Do you have the **right language** in agreements with **employees** depending on their job duties and **independent contractors**?
 - Work for hire agreements / assignments
- Are you **playing music** at your location?
 - Do you need a **license** from a performing rights organizations?
- Have the right to **make copies** or **display** on your website?



Confidential Information

- Are you restricting access to **confidential information** to employees who have a **need to know**?
- Are you requiring execution of **confidentiality agreements** prior to disclosing **confidential information** to potential business partners or vendors?
- Are you paying attention to expiration dates for **confidentiality agreements** to determine whether the term needs to be extended?
- Are you requiring a sufficiently lengthy term of protection for your **confidential information**?



Questions

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Privacy and Data Protection



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Data Privacy/Security Update

- Issues involving data privacy and security continue to grow in the U.S. and internationally
- Compliance obligations are becoming more complex
- Enforcement by federal, state, and international governments/regulators and private litigation is on the rise
- Cyber threats continue to increase
- New privacy considerations with COVID-19

What Is Data Privacy?

- There is no universal definition of “privacy” in the data protection context
 - “Privacy” means different things in different countries, states, industries, etc.
- In general, privacy is concerned with proper handling of data
 - Concepts are centered on data governance, access, use, and disclosure

What Is Data Security?

- “Security” generally refers to the safeguards in place to protect data from unauthorized access, acquisition, use, and disclosure
 - Includes technical, physical, and administrative safeguards

Types of Cyber Attacks

- Types of Incidents
 - Phishing
 - Malware
 - DDos attack
 - Business email compromise
 - Zero-Day exploit
 - Man In the Middle attack
 - SQL injection
 - Cross site scripting

Types of Cyber Attacks (continued)

- Threat Actors
 - Cyber terrorists
 - Nation-state/government sponsored
 - Organized crime
 - Hacktivists
 - Insider threats - intentional and user error

Mitigating Cyber Risks

- Data mapping
- Information technology controls, including IR plan
- Risk assessment; vulnerability and penetration testing
- Risk mitigation and remediation plans
- Vendor contracting
 - Procurement program
 - Termination program
 - Accountability
- Employee training
 - Threat exercise/training

COVID-19 Considerations

- Screening questions and procedures
 - Employees and customers
- Recordkeeping requirements
- Safeguarding data
- Limiting secondary uses of information
- Updated privacy notices

Internal Controls and Notices

- Provide notice and document permissible legal basis where required
- Review and update privacy notices at least annually
 - Update for new practices (*e.g.* COVID-19)
 - Identify and address ongoing changes in laws
 - Know and understand uses of personal information and other protected data as defined under applicable laws

Questions

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Paycheck Protection Program Overview & Update on Forgiveness



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Paycheck Protection Program Recap

- **Paycheck Protection Program (PPP) created as part of the CARES Act enacted on March 27th**
 - Forgivable loan program for certain businesses, veterans organizations, and 501(c)(3) non-profits with less than 500 employees and other businesses meeting SBA's small business criteria
 - Maximum loan amount is 2.5 X average monthly payroll
 - In addition to payroll costs, loan may be used for:
 - Mortgage interest (debt obligations secured by real or personal property)
 - Utilities (electricity, water, gas, internet access, transportation)
 - Rent (leases of real or personal property)

Paycheck Protection Program Recap

(continued)

- **Initially \$349 billion appropriated to PPP under CARES Act**
 - Applications first available on April 3, 2020
 - Initial funds completely used up by April 16, 2020
- **On April 24, the PPP and Health Care Enhancement Act added an additional \$310 billion**
 - Made total program \$659 billion
 - Approximately \$130 billion remains as of July 15, 2020
 - Deadline to apply for loans is August 8, 2020

Paycheck Protection Program Recap

(continued)

Changing Regulatory Landscape

- Twenty-Two (22) new regulations (Final Rules) issued since March 27th
- Forty-Nine (49) Frequently Asked Questions answered with regulatory significance
 - Last FAQ updated on June 25th
- Three (3) major statutory amendments
- Will not cover all of these changes in our short time

Paycheck Protection Program Loan Forgiveness

General Rules:

- Loan proceeds must have been used for an approved purpose during the 8 weeks or 24 weeks following loan origination (referred to as the “covered period”)
 - Incurred or paid during the covered period
- At least 60 percent of the forgivable amount must have been used for payroll costs
- Must maintain a specified number of employees (calculated based on FTEs)
- Must not reduce salaries/wages by more than 25% for employees who made less than \$100,000 in 2019

What is Eligible to be Forgiven?

- **Payroll costs Includes (60% of Forgivable Amount):**
 - Salary, wage, commission or similar compensation
 - Payment of cash tip or equivalent
 - Allowance for dismissal or separation (severance)
 - Employer cost of group health insurance premiums
 - Employer contribution to retirement benefits
 - State or local taxes assessed on the compensation of employees
 - Bonuses and “hazard pay”
- **Does not include**
 - Cash compensation to any employee in excess of \$100,000 (annualized)
 - Amounts imposed or withheld for FICA, federal income tax, etc.
 - Credit received under Families First Coronavirus Response Act

What is Eligible to be Forgiven?

- **Other Non-Payroll Allowable Expenses**
 - Payments of interest on any existing mortgage (real or personal property)
 - Rent under existing leases (real or personal property)
 - Utilities (electricity, natural gas, transportation, internet access)
 - Each must have been in place on February 15, 2020

Important Threshold For Loans Over/ Under \$2 Million

- **SBA will perform forgiveness review for loans of more than \$2 million (aggregate among affiliated borrowers)**
 - Likely to perform some review of certification that loan is “necessary to support ongoing operations”
 - No enforcement proceedings if borrower repays the loan following a determination by SBA that the borrower lacked “adequate basis for the certification”
- **Lenders will perform forgiveness review on loans of \$2 million and less**
 - SBA will deem certification that the loan is “necessary to support ongoing operations” to have been made in good faith for loans of \$2 million and less

Forgiveness Applications & Appeals

- **On June 17, SBA issued two new forgiveness applications and instructions**
 - Much simpler form for many borrowers (“EZ” Form)
- **Know Your Appeal Rights**
 - Borrowers can appeal the full or partial denial of loan forgiveness (likely under 13 C.F.R. § 121.1001, et. seq.)
 - Contact your lawyer if you obtain an adverse decision, or believe that you will
- **Rules and Background on Dept. of Treasury’s Website**
 - <https://home.treasury.gov/policy-issues/cares/assistance-for-small-businesses>

Questions

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Closing Remarks



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