From Touch-up Paint to New Additions:

2020 Labor Update for the Construction Industry

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Day 4: 2020 Labor Law Update

Speaker Introductions

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Private Sector Labor Law and Regulators Change With Administrations in Washington

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- Public sector workers and their unions and employers are governed by state law and regulators. Airline and railway workers are covered by the Railway Labor Act, administered by the National Mediation Board.
- Most other private sector employers, workers, and their unions are subject instead to the federal National Labor Relations Act ("the Act"), which in many ways preempts state regulation of private sector workplaces.

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- There are exceptions to preemption, where state law can apply:
  - Such as trespass, property destruction, and assault by unions and strikers
  - For instance, recently held not preempted: claims against Teamsters Local 174 for property damage by calling for a work stoppage at the start of a strike by concrete truck drivers just when the hardening concrete could not be salvaged

Private Sector Labor Law and Regulators Change With Administrations in Washington

- But mainly, the balance between unions and management is struck in the other Washington—at the headquarters of the National Labor Relations Board, which enforces the Act
- So, we begin with the big news on that front of 2020—the Trump Board and its roll-back of Obama Board labor-leaning rules—and the equally big news that the rebalancing may not long survive a new Biden Board

Example - Trump Board Reinstatement of Pre-Obama Rule About Allowing Use of Company Email for Union Organizing

- In *Argos USA*, 369 NLRB No. 268 (2020), the Trump Board allowed a ready-mix concrete company to prohibit cell phones in heavy-duty trucks and restrict use of company email
  - The safety risks of a distracted driver of a 70,000 pound concrete truck outweighs the right of employees who have other ways and times to discuss employment conditions and unions
  - Employees are not guaranteed the right to use every method of communication available to them for such discussions, including company email

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Trump Board Reinstatement of Pre-Obama Rule About Allowing Use of Company Email for Union Organizing

Key Takeaway

- Beware: Expect a Biden Board to more aggressively protect workers' rights to use company email to communicate with each other, reverting to prior doctrine. So, employers, if you have a policy restricting personal use of company email, scrutinize it now. And before enforcing business-only email rules, take the then-current Board's temperature first, and confirm that your rules are not ignored except for Section 7 communications.

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Pre-Hire Union Recognition and Union-Only Subcontracting

- In other industries, employers can't "recognize" and bargain with a union without majority support among the workers. And they can't agree to subcontract only to unionized companies.
- But in the construction industry, there are special exceptions allowing employers to do both. NLRA Sections 8(f) (pre-hire agreements) and 9(e) (proviso allowing union-only subcontracting of work done at a construction site)

Project Labor Agreements ("PLA"s)

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- A PLA is a CBA between a construction project owner and building trades unions covering contractors wanting to work on the project. Typical PLAs:
  - Prohibit contracting project work covered by the PLA to employers who have not agreed to the terms of the PLA;
  - Require covered employers to source their workers on the project through union hiring halls;
  - Require non-union workers to pay union dues for the length of the project; and
  - Require employer contributions to multi-employer union pension and health and welfare trusts during the term of the project.

Project Labor Agreements ("PLA"s)

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- King County and the City of Seattle have "Community Workforce Agreements" ("CWA") which are local PLAs covering public works projects. The City's one-page summary of its CWAs is attached to our outline.

Union Pressure to Sign False Acknowledgments Of Worker-Majority Support

- The goal: Converting what began as an Section 8(f) pre-hire arrangement (not based on a showing of majority support) to a full Section 9(a) majority-based collective bargaining relationship

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Union Pressure to Sign False Acknowledgments Of Worker-Majority Support

- Why? Because a Section 9(a) employer has a bargaining obligation that does not terminate with the end of the project
- And Section 8(f) CBAs don't bar employee petitions for a decertification election to oust an unwanted union

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Conversion of Section 8(f) Agreements to Section 9(a) Majority-Supported CBAs

- Effective July 31, 2020, the Board's amended Rules and Regulations now state that conversion to a Section 9(a) relationship will require actual evidence of majority support
  - Conversion cannot be based on contract language reciting support alone

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Conversion of Section 8(f) Agreements to Section 9(a) Majority-Supported CBAs

Takeaway

- Even if a Biden Board does not do an about-face, cautious construction industry employers should resist signing union agreements falsely acknowledging union majority support by their workers

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NLRA And FLSA "Joint Employment" Standards Tightened by the Board and DOL

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- When should one company be regarded as a "joint employer" responsible for treatment of another company's workers?
- **Old Obama-era standards**
  - Formerly, for example, if the owner of a manufacturing plant outsourced its janitorial work to a contractor
  - But retains some authority under its contract to influence hiring and firing decisions, or to supervise or control the employees of the contractor
  - It would be a "joint employer" whether or not these controls were ever actually exercised to any substantial degree

NLRA And FLSA "Joint Employment" Standards Tightened by the Board and DOL

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- **The Trump-era standards**
  - Under the new standards, actual exercise of such control to substantial degree is required to find "joint employment."

The New Rules Require Actual Control to a Substantial Degree to Find "Joint Employment" Make Particular Sense on Construction Sites

- Where the owners monitor progress of the work
- And where many different trades and employers on the same project have some control over the work being done
  - A general contractor might be providing direction to subcontractors
  - And subcontractors may do some directing of overlapping work activities by employees of other subcontractors

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The Board and DOL Nailed It . . . But Federal Judges Have the Hammer

- The new standards make sense—but not to a federal judge in New York who vacated the new DOL standards in September
- Saying that the DOL did not adequately justify departure from the existing broad definitions of who is an "employer"
- Appeal? Stay tuned!

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"Dual Shops"/"Double-Breasting"

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- "Alter ego," "single employer," and "joint employer" doctrines impose liabilities of one company on another related company
- In the construction industry, "double-breasted" operations of two related companies – one which has a CBA doing union jobs and the other non-union jobs – are not uncommon

"Dual Shops"/"Double-Breasting"

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- It can be costly to maintain two genuinely separate operations, which is required, and **failing to keep them in reality separate can spell disaster for the open-shop company:**
  - Getting stuck with staggering bills for unpaid union health & welfare benefits and pension fund contributions
  - Finding itself bound by the other company's union contracts
  - Responsibility for pension fund withdrawal liability if shutting down the union company

"Dual Shops"/"Double-Breasting"

- Two recent federal cases in New York City demonstrate best versus dangerous practices in structuring and operating union and open shop construction companies at the same time

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"Dual Shops"/"Double-Breasting"

- *Salgo v. New York Concrete Corp.*, 447 F. Supp. 3d 136 (S.D.N.Y. 3/20/2020) (best), contrasting *Moore v. Navillus Tile*, 276 F. Supp. 3d 110 (S.D.N.Y. 9/20/2017) (fatal).
- In *Navillus Tile*, the trustees of fringe benefits trusts established alter ego status—two facially separate companies that in reality were the same entity—ending up in a $73.4M judgment against the construction companies and bankruptcy court (*In re: Advanced Contracting Solutions*, 582 BR 285 (1/31/2018)).

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"Dual Shops"/"Double-Breasting"

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Key Takeaway

- It may be tempting to operate double-breasted or stop doing union jobs and use an open shop company to compete for lower cost private sector non-union work. **But careful structuring and operating of union and non-union construction companies is a must. Planning and operating "double-breasted" is no job for amateurs.**

Multi-Employer Fringe Benefits Plans: Beware of Increases in Pension and Health & Welfare Contribution Rates and Potential Withdrawal Liability

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- An employer withdrawing from an underfunded multi-employer plan is liable for that employer's share of the plan's unfunded vested benefits. How big the tab might be depends on the plan's funding and benefits obligations. Multi-employer plans are funded primarily by employers (through contributions and withdrawal liability payments) and return on investments.

Multi-Employer Fringe Benefits Plans: Beware of Increases in Pension and Health & Welfare Contribution Rates and Potential Withdrawal Liability

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- In these COVID-19 times, financially strapped employers may struggle to make the required contributions, and plans may experience significant investment losses
- Likely results? Larger contribution rates and a bigger tab for withdrawing employers

Multi-Employer Fringe Benefits Plans: Beware of Increases in Pension and Health & Welfare Contribution Rates and Potential Withdrawal Liability

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- **A conditional exemption from withdrawal liability** protects construction industry employers who:
  - Cease to perform any work of the type for which contributions were previously required, and
  - Do not resume such work on a non-covered basis within the jurisdiction of the CBA during the following five years

Multi-Employer Fringe Benefits Plans: Beware of Increases in Pension and Health & Welfare Contribution Rates and Potential Withdrawal Liability

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Key Takeaway

- An employer relying on this exemption to avoid withdrawal liability can expect multi-employer pension and health & welfare fund trustees to be on the lookout for continuation or resumption of covered work by it, or a related company, during the five-year period. If they discover some, expect the plan to go after the employer and related companies for withdrawal liability.

Washington State Paid Sick Leave Law: Options for Construction Industry Employers

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- **Accrual, use and carry forward of benefits.** A Washington paid sick leave law requires employers to accrue one hour of sick leave for every 40 hours worked by an employee. Paid sick leave can be used when missing work for qualifying reasons, beginning the 19th month after starting employment. Workers can carry over to the following year a maximum of 40 hours.

Washington State Paid Sick Leave Law: Options for Construction Industry Employers

- **The construction industry: square peg/round hole?** How does this work in the construction industry, where a unionized worker may be sent from hiring halls to multiple employers, and may not be employed by any single employer for 18 months, so can't use his accrued benefits? Construction workers may have several employers and have multiple accrued sick leave banks. Can they carry forward 40 hours a year from each employer? And when that worker gets sick, which of his multiple employers pays out the benefits?

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Legislative Help for the Industry

- A change in the law last year now excludes unionized construction workers, **if** a CBA provision waives the state statutory benefits and substitutes a contractual plan providing portable, comparable benefits for construction workers employed by multiple employers

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Legislative Help for the Industry

- How to make this work?
  - A possible solution: construction industry employers could pay their workers accruing sick leave contributions into a multi-employer sick leave trust, which pays benefits regardless of which employer's individual account might have applied to the specific absence
  - And the trust, through a third-party administrator, could do the recordkeeping, accounting, and disbursing of sick leave payments to qualifying workers

When Travel Time is Compensable

- A November 3, 2020 federal DOL opinion letter discusses when a construction company must pay for travel time where its trucks are kept at the company's principal place of business, a worker must pick up a truck there, drive it to the jobsite, use the truck to transport tools and materials around the jobsite, and return the truck to the company at the end for the day
- A copy of the Wage and Hour opinion letter is attached to our outline

When Travel Time is Compensable

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- **Key Takeaway**
  - **Always remember**
    - **State law must also be considered when evaluating a wage and hour question (in Washington, RCW 49.46 and WAC 296-126-002(8)) and,**
    - **Whether travel time is compensable depends on the specific facts.** State L&I policy, in the wake of the Washington Supreme Court's 2007 decision in *Stevens v. Brink's Home Security*, clarified that an employee who is not on duty and is performing no work—such as communicating with dispatchers or foremen about the day's work assignments—while commuting in a company vehicle between home and the first or last jobsite of the day, is not "working" and does not have to be paid

Thank You!

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