GENERAL COUNSEL

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Introduction

The legal rights of the labor movement have continued to erode across the nation as the Trump Administration has marched forward in its efforts to weaken both labor unions and employees who seek to assert their rights. The National Labor Relations Board continues to reverse union-friendly decisions made during the Obama-era, much of which occurred this past December in a string of anti-worker decisions known as the "December Dump." The Department of Labor has enacted rules making it more difficult for unions and employees to seek protections under wage and hour laws, while OSHA has weakened its enforcement of workplace safety violations, and the Office of Labor Management Standards has sought to tighten restrictions on the internal governance on unions. By contrast, it is a new day in Illinois as Governor J.B. Pritzker has delivered on major promises that have benefited unions and employees throughout the State.

In addition, the COVID-19 pandemic has greatly affected the landscape of labor and employment law this past year. This report contains a separate section highlighting the important developments affecting organized labor's legal interests.

Seventh Circuit Court of Appeals

Janus v. AFSCME

Mark Janus is back in federal court, this time insisting that AFSCME should refund the agency fees deducted from his checks in exchange for union representation services throughout the entirety of his employment. The District Court denied his petition, and on November 5, 2019, the Seventh Circuit affirmed. In holding against Janus, the Seventh Circuit held that AFSCME had the right to rely in good faith on the law before 2018, and thus they should not be required to make the refunds. Prior to the 2018 court decision, the Supreme Court had already held that the requirement that non-union public employees pay agency fees to unions does not violate the First Amendment. For decades, AFSCME and other public sector unions relied on that decision. "The Rule of Law requires that parties abide by, and be able to rely on, what the law is, rather than what the readers of tea-leaves predict that it might be in the future," the court said. Currently, Janus has petitioned for a writ of certiorari, to have his new case heard in the Supreme Court. The Supreme Court has yet to grant or deny the writ.

Local 702, IBEW v. National Labor Relations Board

On August 9, 2019, the Seventh Circuit upheld the discharge of a 39-year employee in connection with her strike-related conduct. The employee was driving to participate in the strike when she saw a company truck on a public highway. The employee followed the truck, passed it and changed lanes to be in front of it, and then obstructed the truck from passing the employee by moving into the passing lane. The employee driving the truck, still behind the discharged employee, exited the highway. After the strike ended, the employee was terminated due to the highway incident and the union filed an unfair labor practice. The Board found that the employee's conduct was intended to intimidate non-striking employees, and was inherently dangerous. Thus, despite the absence of violence, the Board found that the employee's actions were not protected by the NLRA. On appeal, the Seventh Circuit agreed. The court held that because the employee planned to do more than follow the truck, the conduct was not protected by the Act.

Unions and striking employees should exercise caution when striking in light of the court's decision. Though it is well settled that violence is not protected within an employee's right to strike, conduct that is inherently dangerous may also lose the protection of the act. Employees should thus avoid conduct that would reasonably intimidate a non-striker.

Brock Industrial Services, LLC v. Laborers' International Union of North America

The Seventh Circuit confirmed that a grievance that arises from the reassignment of work from one union to another is, and should be adjudicated as, a jurisdictional dispute. In this case, the employer was party to a collective bargaining agreement with LIUNA, and the agreement stated that most grievances should be adjudicated by a bipartite arbitration procedure involving representatives of the union and the employer. The agreement stated that jurisdictional disputes, however, are to be decided using a tripartite procedure involving a representative from the employer, and a representative from each union. After the agreement became effective, the employer had assigned work away from LIUNA to a carpenters' local. LIUNA filed a grievance utilizing the bipartite procedure rather than the tripartite jurisdictional procedure that would have involved both unions and the employer. The arbitrator found that he had jurisdiction, and the district court agreed in a court challenge to the arbitrator's jurisdiction filed by the employer.

The Seventh Circuit reversed, determining that the general bipartite arbitration procedure was not appropriate because the underlying dispute was jurisdictional in nature because it involved the assignment of work from employees represented by one union to employees represented by another. The Seventh Circuit thus vacated the arbitration award. The court's decision in this case makes it clear that when a grievance arises from the re-assignment of work from one union to another, the grievance should be treated as a jurisdictional dispute, even if the grievance may implicate other claims. All unions should take care to use the proper grievance procedures.

Scabby The Rat Lives

In a case involving the Laborers Local 330 in Wisconsin, the Court noted that Scabby the Rat has returned for a second time on appeal. The small town of Grand Chute had an ordinance that prohibited the placement of signs in a public right-of-way and that such signs might obstruct vision or distract passing drivers. The Local had placed Scabby in the median of a public way across from a car dealership at which the union was protesting wages that were less than area standards. When the town's code enforcement officer requested the Local deflate the balloon, the Local filed a First Amendment suit in federal court, in which they argued that they were facing viewpoint discrimination because officials did not ask carriers of other signs in the public right-of-way be taken down.

The local union's representatives wisely took photos of all of the signs that had been erected around the town as evidence of the discrimination. The union lost that court round and filed an appeal. In the first appeal, the court noted that, "There is no doubt that the union's use of Scabby to protest employer practices is a form of expression protected by the First Amendment," but sent the case back for further information including a request for the trial court to determine the impact of the municipality's new ordinance on the case.

In the second round, the union appealed the denial of damages resulting from the town's order that the rat be removed from the median strip. The Court of Appeals rejected the union's damage claim, but noted an important point of First Amendment law on the use of signs and symbols such as inflatable rats by stating, "We may uphold a law that restricts even protected speech in a public forum, narrowly tailored to serve a significant governmental interest, and leaves open amply alternative ways to communicate the desired message." In essence, the Court upheld the town's ordinance as being an appropriate restriction based on its regulation of public property. The Court noted that placement of the rat on private property was not restricted by the ordinance.

This initial litigation focused on a 2014 ordinance, and the town a year later enacted a new one that regulated the size of the inflatables and stated that no part of a sign may be located in a public right-of-way unless allowed by Town Board approval because of unusual circumstances or unusual hardship. In noting that this new ordinance is not limited to signs in the public right-of-way leaves open the question of whether balloons of Spider-Man, Santa Claus, or some other character would be allowed. If they are allowed, the Court noted that the Town would have a hard time to justify barring a return of Scabby.

The Illinois Labor Disputes Act would likely prevent the kind of problem that occurred in Wisconsin because picketing in Illinois may include signs of a temporary nature that should be removed at the end of each day or shift. Ordinances that interfere with such displays and picketing are declared to be invalid, and home rule may not regulate picketing.

Inflatable signs have also drawn the attention of the new General Counsel of the NLRB, Peter Robb, who has made his hatred of Scabby well known. Despite three decades of NLRB and court rulings that the First Amendment protects Scabby, Robb attempted to take uncommon actions to outlaw Scabby. In December, Robb instructed Region 13, based in Chicago, to revive a previously dismissed complaint regarding Scabby lodged by an Illinois excavation company. In April 2020, the district court entered judgment for IUOE Local 150, the respondent in the complaint by the excavation company.

U.S. Department of Labor Wage and Hour Division

Overtime Salary Threshold Gets Tepid Increase

Under DOL regulations, an employer must satisfy two tests to exempt its employers from overtime pay under one of the white-collar exemptions. First, the employer must perform executive, administrative, or professional duties and second, the employee must be paid on a "salary basis." Under the current salary basis test, employees with a salary below $455 per week ($23,660 annually) had to be paid overtime if they work more than 40 hours per week. So, workers making at least this salary may be deemed exempt from receiving overtime based on their job duties. This salary level was set in 2004, and had not been updated since then.

The DOL issued new regulations increasing the overtime threshold from $23,660 to $35,308 (or $679 per week). This means that currently exempt executive, administrative, and professional employees who earn a salary that is less than $35,308 per year (but higher than $23,660 per year) will automatically be eligible for overtime regardless of the nature of their duties. The DOL claims that this proposed rule will make more than a million workers eligible for overtime.

The new rule surely comes as a sigh of relief for employers, as it is less than half of the salary threshold increase the Obama Administration had sought. In May 2016, the Obama Administration's DOL had issued a final rule increasing the threshold to $47,476 per year. At least four million additional employees would have been eligible for overtime pay with this threshold increase. The U.S. Chamber of Commerce filed suit, and received a permanent injunction from a district court in Texas just a few weeks prior to the effective date of the final rule. Following the Trump election, the litigation was stayed in the U.S. Circuit Court of Appeals for the Fifth Circuit, awaiting the outcome of the new proposal.

The new rule does not contain any of the automatic adjustments to the salary basis threshold that were included in the Obama Administration's proposed rule. Rather, it simply contemplates periodic reviews to consider updating the threshold and provides that any updates would require notice-and-comment rulemaking, a process that has historically stunted the development and increase of the salary basis threshold. In addition, the new rule allowed employers to count non-discretionary bonuses and other incentive payments (including commissions) that are paid annually or more frequently to satisfy up to 10 percent of the salary threshold.

Joint Employer Standard Under FLSA

On January 23, 2020, the DOL's Wage and Hour Division released a new rule on the joint-employer standard under the FLSA. The rule took effect in March. Under the FLSA, an employee of one company may be found to be the joint employee of a second company, all depending on the second employer's nature and extent of the control over the employee's work. The practical impact of the joint employer rule is that the second employer may be found jointly and severally liable with the first employer for overtime violations under the FLSA.

The new rule greatly restricts the ability of employees to make claims for earned overtime or minimum wages by using four factors to determine whether there is a joint employer relationship: (1) Whether the employer may hire or fire the employee; (2) whether the employer supervises and controls the employee's work schedule or conditions of employment to a substantial degree; (3) whether the employer determines the employee's rate and method of payment; and (4) whether the employer maintains the employee's employment records.

Importantly, the rule expressly provides that the use of a franchise business model does not mean that a franchisor is more likely to be the joint employer of its franchisee's employees. This provision comes as a significant relief to several fast food employers who pay employees low wages. In addition, the rule states that a general contractor requiring subcontractors to institute certain workplace policies, such as a sexual harassment policy, likewise does not increase the likelihood of a joint employer relationship.

This is the first time in 60 years that the joint employer rule has been changed, and it undoubtedly makes it more difficult for employees to adequately recover losses under the FLSA. Employers that are mere subcontractors or franchisees of a larger employer are less likely to be able to satisfy a judgment against them by an individual or class of employees who have been deprived of their wages.

National Labor Relations Board

Planet Beauty

The National Labor Relations Board issued its decision in Planet Beauty, in which the Board set out its views on what types of arbitration agreements are legal, in light of the U.S. Supreme Court's 2018 decision in Epic Systems v. Lewis. In that decision, the Supreme Court held that employers may bar employees from filing class action lawsuits and require them to take employment claims to individualized arbitration instead without violating the National Labor Relations Act. While doing so, they clarified that arbitration agreements may not prohibit employees from filing charges with the NLRB for unfair labor practices. In Planet Beauty, an arbitration agreement required employees to arbitrate before going to court. The agreement stated that employees give up "any right to a trial by jury and right to appeal and to submit any claims that either has against the other" to arbitration. In a unanimous decision, the Board held that this language would implicitly prevent employees from filing unfair labor practice charges with the Board because employees could reasonably construe the language to prohibit them from filing unfair labor practice charges in accordance with the Act, thus requiring them instead to submit labor disputes under the Act to arbitration, which is not permitted. The sole Democratic appointee on the Board at the time, Lauren McFerrran, argued that the Board should have gone one step further and held that the language was an explicit prohibition on filing Board charges.

Joint Employer Standard

On April 27, 2020, the Board implemented its final rule governing the highly contentious joint-employer standard. In doing so, they will restore the standard in place before the Board's 2015 decision in Browning-Ferris Industries. In Browning-Ferris, the Board broadened the definition of an employer to include a franchisor or general contractor that exercises some control over the terms and conditions of workers' employment, thus holding that larger employer jointly responsible for alleged violations of the Act. The new standard, as was the standard before Browning-Ferris, limits employers to only include the employer that directly employs the workers and exerts sufficient control over the terms and conditions of their employment.

The rule change comes after a number of ethical issues involving Board members prevented the Trump Administration's NLRB from overturning Browning-Ferris sooner. One member of the Board, in initially voting to overturn the Obama-era joint employer standard, was found to have had to recuse himself in voting on the issue because of his membership in a law firm that represented a party to the unfair labor practice charge. Another issue arose when a temp agency owed by a different Board member's spouse tasked with processing the comments submitted as part of the notice and comment rulemaking procedure.

The new rule stands to make it more difficult for unions and employees to seek accountability for unfair labor practices when only the direct employer can be found liable, even though different employers dictate part of the terms of workers' employment.

New E-Filing Policy

The National Labor Relations Board announced in October 2019 a new mandatory E-filing policy. Under the policy, all affidavits, correspondence, position statements, documentary or other evidence with unfair labor practice or representation cases processed in the Board's regional officers are to be submitted using their electronic filing system. Instructions on using the system, which was in place for two years prior to its mandated use, are on the Board's website.

M.V. Transportation

On September 10, 2019, the Board issued its decision in M.V. Transportation, in which the three Republican-appointed members of the Board overturned 70 years of precedent and adopted a new, management-friendly test to determine whether an employer has violated federal labor law when it unilaterally changes employees' working conditions. The NLRA imposes a duty to bargain in good faith on both the employer and the union. An employer violates its duty to bargain if it unilaterally changes terms or conditions of employment for its employees regarding a mandatory subject of bargaining without first negotiating with the union. Where a particular subject is addressed within the language of a collective bargaining agreement, the employer must honor that language and cannot make changes to it mid-contract without the union's consent.

For a subject that is not contained in the CBA, the employer can only make a unilateral change if it first bargains with the union to impasse. In cases where a union alleges an unlawful unilateral change to working conditions, employers often argue that the union has waived its right to bargain over the subject matter at issue. Since 1949, the NLRB has applied the "clear and unmistakable waiver" standard to this defense, which would only permit unilateral changes if the CBA specifically and unequivocally waived the union's statutory right to bargain over that particular issue.

In M.V. Transportation, the Board rejected this "clear and unmistakable waiver" standard, and instead adopted a "contract coverage" standard, which has been adopted by a minority of federal appellate courts. Under the new test, the Board will look to the plain language of a CBA to determine whether it allows an employer to make changes without bargaining with the union. In practice, this means that for any issues that fall under the broad language of a CBA's management rights clause – for example, scheduling and assigning work, making reasonable work rules, or even disciplining or discharging employees – employers will likely be able to make unilateral changes to working conditions, then rely on the "contract coverage" argument to justify those changes. Lauren McFerrin, the only Democratic Board member, noted in her dissent: "If a management-rights provision in a collective-bargaining agreement is sufficiently general, it will permit an employer to act unilaterally with respect to any specific term or condition of employment that plausibly fits within the general subject matters of the provision." General management rights clauses often were not sufficient to justify unilateral changes under the previous, "clear and unmistakable waiver" standard.

In light of the Board's decision, it is especially important for unions to negotiate strong contract language that protects against unilateral changes by the employer. Ideally, such language would involve placing more specific limitations on the scope of the management rights clause, as well as language providing that the union does not waive its right to bargain over any matters that are not specifically addressed in the CBA. In its decision, the Board suggested that the new standard encourages parties to anticipate and resolve potential issues through collective bargaining.

University of Pittsburgh Medical Center

On June 14, 2019, a three-member majority of the Board ruled that employers may ban union representatives who are not employees from promoting their union in public spaces within the employer's facilities. Union representatives entered a public cafeteria in the University of Pittsburg Medical Center's (UPMC) Presbyterian Hospital and met and ate lunch with hospital employees, discussed union organizational campaign matters, and displaying flyers and pins. A manager ordered the union representatives to leave, stating that the cafeteria was only for patients, their families and visitors, and employees. Police escorted out the union representatives.

Prior to the decision in UPMC, the Board had regularly applied precedent established by Montgomery Ward & Co., a 1981 Board decision that allowed nonemployee union representatives to utilize the public areas of an employer's workplace, such as public eating areas, to solicit for or promote their union membership, as long as they used the facilities in a manner consistent with their intended use and were not disruptive. Since that decision, the Board has consistently held that an employer violates the Act when it enforces a rule restricting public cafeteria access for nonemployee union organizers engaged in non-disruptive solicitation. In UPMC, the Board's majority overturned nearly 38 years of precedent and eliminated this "public space" protection for union solicitation, concluding that the employer's ejection of nonemployee union organizers did not violate the Act. Still, even after the UPMC decision, it is still unlawful for an employer to discriminate against only union solicitation. For example, if an employer allows for commercial solicitation in its public spaces by any other non-employees – such as allowing Girl Scouts to sell cookies in their lobbies, or allowing Salvation Army volunteers to collect donations in a cafeteria – then the employer cannot prohibit non-employee union representatives from soliciting in those spaces.

Board Member Lauren McFerran, who was then the sole Democrat member on the Board, dissented from the decision. She criticized the Republican majority on the Board for overturning longstanding precedent without any compelling justification; without submitting the issue to the public for comment and briefing; and without even finding a case that had a factual record that supported the new rule. Member McFerran noted that this ruling effectively allows employers to bar union organizers from their cafeteria simply for talking about the union. This new standard deals a blow to union organization efforts in industries such as hospitals, restaurants, hotels, and casinos, where organizers to solicit union membership often utilize public spaces. However, because an employer still cannot discriminate solely against union solicitation, this new rule may be difficult for employers to enforce, where the employer has allowed any other solicitation in its public spaces.

Electrolux Home Products, Inc.

In a 2-1 decision issued on August 2, 2019, the Board held that an employer who terminated an employee it knew it be a union supporter did not violate the NLRA, even though the Board found that the stated reasons for the termination were pretext for her union activity. The employee openly and actively supported and assisted an unsuccessful 2015 organizing drive and a successful organizing campaign in 2016. The employee was observed distributing union cards and flyers and wearing pro-union shirts. During the 2016 organizing campaign, two managers told the employee to "shut up" and "that she didn't know what she was talking about" when she spoke out against what the managers were saying in a company meeting with employees during the organizing drive. In May of 2017, the employee was terminated for "insubordination" for allegedly failing to follow her supervisor's order to complete a routine task.

Applying the Board's standard, the administrative law judge found that the employee had only and publicly engaged in union activity, which the employer was aware of, and that the employer harbored anti-union animus towards the employee based on the managers telling her to "shut up" and the employer's failure to explain why the employee was fired for insubordination when previous employees had received lesser discipline for the same type of behavior. The Board's standard requires evidence to support the inference that protected conduct was a motivating factor in the employer's decision to terminate the employee. The burden then shifts to the employer to demonstrate that the same action would have taken place without the union conduct.

The Board reversed the administrative law judge. While it agreed with the judge that the company's explanation for discharge instead of a lesser discipline was pretexual, the Board found that it was not proven that the employee's union activity was the motivating factor in the discharge. Board precedent had held that pretext alone was sufficient to show animus. The Board in Electrolux refused to find anti-union animus in the managers' comments. The Board also noted that the meeting happened eight months before the employee's discharge. The Board's decision in Electrolux increases the burden to prove anti-union animus under the Board's test.

Silvan Industries

In a 3-1 decision on October 26, 2018, the Board in Silvan Industries held that a collective bargaining agreement cannot bar an election petition that is filed prior to the agreement's effective date. In so holding, the Board clarified its position that an agreement's effective date, not the date of acceptance or execution, governs for purposes of a contract bar to an election petition.

Section 9(c)(1) of the NLRA empowers the Board to conduct secret ballot elections among employees in an appropriate unit and certify the results to resolve questions concerning representation. However, to promote stability in collective bargaining and labor relations, the Board will generally decline to process an election petition filed during the term of a collective bargaining agreement. To balance these competing considerations, the Board has formulated specific requirements before it will allow a collective bargaining agreement to serve as a bar to an election petition. These include that the agreement be in writing, signed by the parties, and specify on its face the effective date of the agreement so that employees and other unions are aware of the appropriate time for filing petitions.

In Silvan Industries, the employer and the union reached a tentative agreement on October 13 for an initial contract with an effective date of November 7. The union membership ratified the agreement on October 15, notified the employer of the ratification, and scheduled a meeting with the employer on October 25 to execute the agreement. On October 25, an employee presented the employer with a petition expressing opposition to continued representation by the union. The employer believed the petition raised a good-faith reasonable doubt as to the union's continuing majority status in the bargaining unit and filed a petition for election with the Board's regional office, while continuing to recognize the union as the exclusive representative and adhering to the terms of the agreement after November 7. The Regional Director administratively dismissed the employer's petition on the ground that it was filed after the union had accepted the employer's contract offer.

In finding the contract was not a bar to the election petition, the Board distinguished its precedent for when a contract would bar employers from withdrawing recognition of a union. Under Board contract precedent, an employer may not withdraw recognition and refuse to bargain with a union after an agreement has been reached based on after-acquired evidence that calls into question a union's majority status, even if the agreement's effective date is later. The Board reasoned that the employer in Silvan Industries did not withdraw recognition of the union and did not repudiate the agreement, but merely petitioned for an election to insure its employees were afforded free choice rights under the Act. The Board reinstated the petition for an election, finding that an election petition under these circumstances was less disruptive of labor relations than a withdrawal of recognition. This decision demonstrates the need for unions to be careful in writing collective bargaining agreements and selecting the effective date for them.

New NLRB Election Rules

On April 1, 2020, the Board issued yet another final rule dealing with union representation elections. This latest final rule makes three major amendments to the Board's election policies. First, the Board eliminated its "blocking charge" policy. Under the previous blocking charge policy, the filing of an unfair labor practice charge alleging employer misconduct related to an upcoming election would "block" the election until the charge was resolved and a fair election could be held. Under the Board's new rule, the filing of such a charge will no longer put the election on hold. Instead, the election will go forward (even where it is alleged that the employer's unlawful, coercive actions tainted the entire election). The votes will either be counted, or in some specific circumstances, impounded. The Board will then wait to certify the election results until after the charge is resolved. This new policy will give an air of legitimacy to elections that should have been delayed due to employer misconduct.

Second, the Board's new change makes it easier for employees to decertify their union representative after voluntary recognition by the employer. Previously, an employer's voluntary recognition would create a bar on the filing of any decertification petition for a reasonable period of time. But under the new rule, there is no protection against such petitions after voluntary recognition, or even during the life of the first contract, unless the employer posts a notice informing all employees of the voluntary recognition and advising them that they have 45 days to file a petition for an election to decide whether or not to reject the union. This rule change will likely force unnecessary elections where an employer has already agreed to recognize the union upon a sufficient showing of interest by bargaining unit employees.

Finally, the rule changes what is required in the construction industry in order to convert an 8(f) pre-hire arrangement into a full 9(a) bargaining relationship. Under the new rule, a voluntarily-created pre-hire bargaining relationship cannot be converted into a full bargaining relationship based solely on language in a collective bargaining agreement. Instead, the union will be required to make some contemporaneous showing of majority support from the bargaining unit employees. Like the other aspects of the new rule, this change simply seeks to make it harder for employees to choose their bargaining representatives, and makes it easier for union opponents to challenge existing representation relationships.

When the Board adopted this latest rule, it had previously put all union elections nationwide on hold in response to the coronavirus pandemic. The Board's suspension of union elections lasted through April 3, 2020. On April 1st, in response to criticism over its complete ban on elections and refusal to consider mail ballot elections as an alternative, the Board announced that it would not extend that suspension beyond April 3rd. The Board has indicated that its various Regional Directors will have the discretion to decide whether an election should go forward as a mail-ballot on in-person election.

By insisting on pushing forward with these pro-employer rule changes and making voluntary recognition of unions more difficult, while at the same time preventing any union elections from moving forward, the Trump Board once again confirmed that it has no interest in protecting workers' statutory rights to select their bargaining representatives. Instead, the Board's clear goal is to strip workers of any ability to improve their working conditions (and it is willing to take advantage of a national health emergency to achieve that goal). After an outpouring of criticism from labor advocates, the Board agreed on April 8, 2020, to delay the implementation of its newest rule until July 31, 2020, citing the ongoing coronavirus emergency as the reason for delay.

A legal challenge filed by the AFL-CIO has resulted in an injunction order by a federal court in the District of Columbia issued on May 30, 2020, and this order will block portions of the new rule as to: pre-election hearings; timing of the date of the election; voter list timing, election observer eligibility and timing of the Regional Director's certification of representative.

New Rules on Duty of Fair Representation Charges

It is imperative for private sector unions to be aware of the changes regarding duty of fair representation charges after Board's General Counsel Peter Robb's internal memo to the Regions. The memo and directive to the Regions greatly expands which activity may cause a union to be charged with a DFR violation.

Under Robb's directive, Regions are instructed to pursue charges against unions where, for example, employees complain of the union failing to return phone calls or losing an employee's complaint. In cases where a union has lost track, misplaced, or otherwise forgotten about a grievance, the memo states, "the union should be required to show the existence of established, reasonable procedures or systems in place to track grievances, without which, the defense should ordinarily fail." This is regardless of whether or not the union agreed to pursue the grievance. Despite this significant change in how the Board has historically handled charges of this nature, the Board and General Counsel have issued no memorandum or advice document with guidance to unions on how to comply with the new standards.

While the exact parameters of the change in enforcement have yet to be fully borne out, the language of the memo is incredibly broad. The immediate impact of this change is that unions should be prepared for an increase in duty of fair representation charges filed against them. Considering how active anti-union groups are in recruiting members for legal challenges, the chance to attack unions on this front as well will not go unmissed. It will be imperative that unions, if they do not already have it, set up a reliable grievance tracking system and provide workers with regular updates about their grievances. Another area of grievance processing that may be impacted by the memo is the union and employer's ability to settle grievances, possibly over the objection of the grievant. It is unclear what impact the memo will have on that process, but unions should be sure to keep grievants regularly appraised of the progress of their grievance.

Additional NLRB's Cases that were part of the "December Dump"

Apogee Retail LLC

In this decision, a Washington State corporation's employee rules contained a provision that prohibited employees who have been interviewed in connection with alleged employee misconduct from discussing their interview with others, and another provision that prohibits employees more broadly from discussing an investigation of alleged employee misconduct with other employees. The employees filed an unfair labor practice, alleging the rulebook provisions chill their Section 7 rights.

The Board held for the employer, and in doing so overruled the Obama-era Board decision, Banner Estrella Medial Center. Under the Banner Estrella standard, the Board observes the employer policies on a case-by-case basis to see if they have a chilling effect on Section 7 rights, and then puts the burden on the employer to show that there is a legitimate business purpose in maintaining the rule. As the Banner Estreslla Board observed, employees have a Section 7 right to discuss discipline or ongoing disciplinary investigations involving themselves or their coworkers. The Board criticized this approach for allegedly failing to properly balance employee rights with business interests.

The Board thus returned to the standard previously set in its Boeing decision, a convoluted standard in which the General Counsel first has the burden of showing that the employer work rule can be reasonably construed to prohibit rights protected under Section 7. If it cannot, there is no violation. But if there is, the Board will then look at whether the balance of interests favors the employer. If it does, there is no violation. If it does not, there is a violation. But if the Board finds that the context of the rule and the competing rights and interests involved are specific to that rule and that employer, the Board will require individualized scrutiny and will remand the matter back to an administrative law judge for hearing. The Board majority justified their rule, in part, by drawing a distinction between prohibiting employee discussion of an investigation that could lead to discipline and discipline itself, acknowledging that the latter is protected by Section 7 rights.

Board Member Lauren McFerran dissented, and argued that the "likely chilling effect on workers – who will feel compelled to choose safe silence over risky speech – is both obvious and alarming." McFerran contended that the practical effect of the rule will be that workers will be deterred from speaking up against employer misconduct, or seeking help from their bargaining representative or the Board itself.

Mike-Sell's Snack Food Company

In this decision, the Board expanded employer power to unilaterally impose new contract terms without bargaining with the union. The employer was a snack manufacturer that made deliveries to different locations around Ohio. A Teamsters local that had a 30-year bargaining relationship with the employer represented the delivery drivers. On just seven occasions over 17 years, the employer used independent distributors, not the union drivers, to make the deliveries. While the union did not grieve the first few occasions, they eventually did so, and at arbitration, it was held that the right to use the independent distributors was part of the collective bargaining agreement's management rights clause. After the arbitration award and contract expiration, the employer notified the union of its intent to sell additional routes.

The union issued a bargaining demand before filing an unfair labor practice.

The Board held in their previous decision in Raytheon that an employer may unilaterally impose new contract terms without bargaining with the union if the terms are part of a "past practice." But in this decision, the Board disregarded their own established definition of "past practice," meaning one that is "regular and consistent," to conclude that the employer's use of the independent distributors on just seven occasions over a 17-year period, was "regular and consistent," and thus a past practice.

This holding is yet another step by the Board to permit employers to impose their own contract terms without having to bargain with their employees' union. Under Mike-Sell's, it is now easier for employers to disingenuously point to a "past practice," one which they have sporadically engaged in before at some point in time, as a means of excusing themselves from having to bargain with the union. Unions are encouraged to make sure that employer contract violations are properly grieved so as to avoid employers from claiming past practices as a means of avoiding bargaining.

Caesar's Entertainment

In this decision, the Board overruled their Obama-era rule in Purple Communications, in which the Board had held that employees' use of employer-owned communications systems, such as an email server, for purposes of Section 7 activity, is protected by the NLRA. In this case, the employer was a Las Vegas hotel and casino that had an employee handbook prohibiting employees from using its IT systems for non-work-related communications. Employees challenged the policy as a violation of their Section 7 rights, citing to the Board's previous decision in Purple Communications.

The Board decided to overrule Purple Communications in favor of their former standard in Register Guard, which held that a work rule that prohibits employees from using employer-owned IT systems to communicate regarding Section 7 activity does not violate the NLRA. In doing so, the Board argued that employees have plenty of opportunities to confer in person, and that the property rights of the employer to control how its IT systems are used must be respected.

In her dissenting opinion, Member Lauren McFerran argued that the new rule is far more expansive in what employers may prohibit compared to what Purple Communications allowed, because Purple Communications pertained narrowly to employer-owned email, whereas the new decision is more expansive because it included the employer's prohibition on email servers, as well as Internet message boards, and online chat room. McFerran dismissed the Board's overruling of Purple Communications as out of touch with modern technological developments in the workplace, and pointed out the Board's decision to find the employers' property rights as to be given greater weight to be untenable with Board law that has consistently sought to strike a balance between employee Section 7 rights and employer property rights. McFerran argued that Purple Communications did just that, by prohibiting employers from refusing to allow their employees to utilize work email to engage in Section 7 activity, but also allowing employers an opportunity to show that a compelling employer prerogative justifies their prohibition. The Board's decision in this case therefore disregards longstanding principles of balancing rights as part of rulemaking in favor of a one-sided approach in favor of employers.

Valley Hospital Medical Center

The Board continued its march of reversing pro-worker Obama-era decisions in Valley Hospital Medical Center, which overruled the Board's 2015 decision in Lincoln Lutheran of Racine. In this case, an employer ceased checking off dues after a collective bargaining agreement, which contained a dues checkoff provision, had expired. The U.S. Supreme Court held in the landmark case NLRB v. Katz (1962) that an employer may only impose unilateral terms after a bargaining agreement expires once the parties have bargained in good faith until impasse. But here, the employer did not bargain with the union over the dues checkoff provision, and unilaterally decided to cease the checkoffs after the previous contract expired. The union brought a charge before the board against the employer for failing to bargain.

The Board previously held in Lincoln Lutheran of Racine that the employer has a continuing obligation to check off dues after an agreement expires. As Member Lauren McFerran wrote in her dissent, whether a collective bargaining agreement contains a dues checkoff provision is a mandatory subject of bargaining, and thus the unilateral imposition of a term (i.e., not checking off dues) without bargaining in good faith for it is an unfair labor practice. The Board overruled Lincoln Lutheran of Racine, disregarding the requirement to bargain by creating an arbitrary and artificial distinction between contract terms that can only be initially established with an agreement and terms that could be initially established by an employer alone (of which the employer may not change on contract expiration). McFerran argued that there is no such distinction, and such a rule runs counter to both the Supreme Court's ruling in Katz and the NLRA's policy of encouraging parties to bargain. Unions that are concerned that an employer will unilaterally cease checking off dues upon contract expiration and before a new contract is ratified should consider bargaining for express language requiring dues checkoffs to continue upon expiration of the agreement.

Wal-Mart Stores, Inc.

In this decision, the Board curtailed longstanding employee rights to wear union insignia in the workplace. The U.S. Supreme Court held decades ago that employees have a Section 7 right to wear union insignia while working. In this case, Wal-Mart employees wore pins on their uniforms that said "Our Wal-Mart," a reference to the organizing campaign for Wal-Mart employees. Wal-Mart issued a policy that did not outright prohibit union insignia, but imposed a size restriction on insignia no larger than an employee's nametag, which was 2.25 inches by 3.5 inches. Employees filed an unfair labor practice. The Board found the policy to be lawful with respect to employees on the floor around customers, but unlawful for employees in "employees only" areas of the shop. The Board credited testimony from the employer's witnesses who testified that loss prevention efforts, and the need for customers to be able to easily identify employees, demonstrated the employer's need to impose the size limitation.

Board Member Lauren McFerran dissented and criticized the majority for disregarding the U.S. Supreme Court's decision holding that an employer may only restrict employee rights to wear union insignia under "special circumstances." Instead, the Board impermissibly applied a "balancing test," based on a previous decision regarding another matter unrelated to wearing union insignia in the workplace, that balanced the Section 7 rights of the employees with the legitimate business interests of the employer. McFerran argued the use of this criteria runs counter to the Supreme Court's decision. McFerran also commented that the current Board will continue to use this balancing test to disregard methods the Board has fashioned (or is required to by the Supreme Court) in other types of cases, ostensibly to reach more favorable conclusions for employers.

Occupational Safety and Health Administration Changes

As Number of Inspections Decline, Workplace Fatalities and Injuries Rise

The number of Occupational Safety and Health Administration inspections due to workplace fatalities rose dramatically during FY 2018 – an indicator that fatalities themselves rose during the same period of time. Under the Trump Administration, OSHA has withdrawn a number of its responsibilities that had been designed to ensure that workplaces are safe for employees. Those include conducting inspections of workplaces, issuing enforcement related press releases as a deterrent, and more.

The Trump Administration has drastically scaled back OSHA enforcement activity. While OSHA reports a similar number of investigations over the past few years, the agency under the Trump Administration is engaging in a sleight of hand. OSHA revised the way it counts and measures enforcement activity. Because OSHA inspections can take anywhere from one day to several months, the agency decided to start assigning different inspections "enforcement units" based on how long they take. OSHA then reports the number of enforcement units were performed in a fiscal year, instead of the actual number of inspections performed. Even under the enforcement units standard, the number has declined. In FY 2016, OSHA measured a total of 42,900 enforcement units. In FY 2017, that number dropped to 41,829. In FY 2018, that number dropped to 41,478. In addition, OSHA has cut inspections on a number of high-impact safety risks, including workplaces with dangerous levels of heat, exposure to dangerous chemicals, and potential for explosions due to combustible dust. OSHA is also attempting to boost its inspection count by inspecting multiple subcontractors at a single worksite and count them each as a separate inspection. Finally, OSHA has cut the number of inspectors to its lowest number in the agency's half-century history. In 1982, OSHA had 1,003 compliance officers. In 2010, it had 1,016. But as of January 1, 2019, it has just 875.

The impact on worker safety has been tangible. When an employee of an Arkansas poultry plant suffered a work-related amputation in September 2018, OSHA did not conduct an inspection to evaluate plant safety. Three months later, another employee at the same plant suffered an amputation. OSHA again did not inspect.

In addition, OSHA under the Trump Administration has shirked its responsibility to deter OSHA violations. Because OSHA does not have the resources to inspect every workplace, it has used the publicity of its inspections and other enforcement activity as a deterrent to compel employers to comply with safety rules. In 2018, OSHA all but ended issuing press releases announcing enforcement actions against suspected and culpable employers, all at the urging of the Chamber of Commerce and other groups.

It is clear that the Trump Administration does not take workplace safety seriously and is willing to cut enforcement in order to help employers maximize profit at the expense of worker safety and health. The failures of the Trump Administration's OSHA to enforce the law adequately, unfortunately, increases the onus on labor unions and employees to demand better workplace protections at the bargaining table. AFL-CIO president, Richard Trumka at the end of April 30, 2020, wrote a critical letter about the lack of enforcement by OSHA stating:

A search of OSHA's enforcement database shows that OSHA has not issued a single citation related to COVID-19 for a violation of an existing standard or the general duty clause,… during the HIV/AIDS epidemic, OSHA issued more than 400 general duty clause citations to employers for failing to protect workers.

The Department of Labor has declined to issue a COVID-19 workplace rule. Trumka, along with Democrats and workers' advocates, have been urging OSHA to issue emergency infectious disease rules and withdraw guidance that they say gives employers a pass on reporting COVID-19 cases. Stawicki, K., AFL-CIO Chief Keeps Up Attack On DOL's Pandemic Response, Law 360, May 8, 2020.

Office of Labor-Management Standards Changes

OLMS Finds That Worker Centers Are "Labor Unions"

For the first time ever, the Department of Labor's Office of Labor-Management Standards (OLMS) determined that a workers' center meets the definition of a "labor union" under the Labor-Management Reporting and Disclosure Act, and is thus required to comply with the law's strict requirements. Centro de Trabajadores Unidos en Lucha ("Center of Workers United in Struggle") works in Minneapolis to compel Target and other retailers to hire union janitorial staff. Worker centers, which also include well-known groups like "Fight For $15" and "Our Walmart" do not engage in collective bargaining with employers, though similarly to unions they may and frequently do charge membership fees. They are seen as alternatives to unions in helping employees organize and exert financial pressure on employers. The Trump Administration's OLMS determined on August 15, 2019, that Centro de Trabajadores was a labor union, and are thus required to publicly disclose financial statements, officer salaries, and more.

Anti-union groups celebrated OLMS's action after pressuring the Department of Labor for years to apply more scrutiny towards them. "We view this as a positive development and, hopefully, an indication that this Department of Labor is ending the longstanding DOL practice of turning a blind eye to this area of the law," Patrick Semmens, vice president for public information at the National Right to Work Legal Defense Foundation, said.

Worker centers that advocate for better terms and conditions of employment should, moving forward, be extra careful to ensure that their books and records, as well as its internal governing structure, are in order so as to comply with the LMRDA's requirements. Penalties and fines for non-compliance with the LMRDA have shown to be steep, and the Trump Administration's Department of Labor has demonstrated a willingness to aggressively target perceived violations.

OLMS Imposes Stricter Reporting Requirements on Union Funds

On March 6, 2020, OLMS finalized a new regulation that would compel any labor union with total annual receipts of $250,000 or more to file a Form T-1 for each trust the union manages. The T-1 reporting requirements are triggered if, during the reporting period, the labor organization either alone or in combination with other unions, selects or appoints the majority of the members of the trust's governing board; or contributes more than 50 percent of the trust's receipts. Contributions in accord with a collective bargaining agreement are to be considered labor organization contributions under the rule. Labor unions are, however, permitted to file a Form T-1 on behalf of themselves and other unions that contribute to the same trust, where applicable.

The AFL-CIO has fought previous attempts to enact this rule for years. Labor Secretary Elaine Chao in 2003 sought to implement the rule, but the AFL-CIO won an appeal in the D.C. Circuit, where the court held that the language of the rule was too broad. The Bush Administration sought again to enact the rule, but the AFL-CIO successfully prevented its implementation because the Department of Labor failed to properly undergo the required notice and comment procedure for issuing regulations. Though the Department of Labor tried a third time, the incoming Obama Administration shelved the rule. It is unclear whether the new rule will survive a court challenge, but the rule is part of a longstanding pattern by the Trump Administration to impose additional restrictions and regulations on labor organizations.

Illinois Updates

Amendments to Public Labor Statutes in Light of Janus

On December 20, 2019, in response to the Janus decision, several amendments were made to the Illinois Public Labor Relations Act, Illinois Educational Labor Relations Act, the Freedom of Information Act, and the Pension Code that give collective bargaining representatives greater access to both current and newly-hired employees, and establish statutory requirements and procedures for payroll deductions of dues and similar fees and assessments.

Employers are now required to disclose to an exclusive bargaining representative the following information pertaining to each current and newly-hired employee: 1) Name; 2) Address; 3) Home and cell phone numbers on file; 4) Hire date; 5) Job title; 6) Worksite location; 7) Work telephone number; 8) Work identification number (if available); 9) Work email address; and 10) Personal email addresses on file.

Additionally, exclusive bargaining representatives now have the following rights regarding access to bargaining unit employees in the workplace: 1) Meet with employees at the worksite; 2) Conduct worksite meetings regarding representation or collective bargaining during breaks, and before and after shift; 3) Meet with newly-hired employees for up to one hour within the first two weeks after they are hired; 4) Use employer mailboxes and bulletin boards to inform employees of matters concerning the administration of the collective bargaining agreement and their rights; and 5) Investigate grievances and work-related complaints at the worksite.

Employers are prohibited from discouraging employees from either becoming or remaining members of a union. They are also prohibited from disclosing employee information, including employees' address, date of birth, home and personal phone numbers, personal email, personal identifying information concerning membership or member status in a union or other voluntary association affiliated with a union, and emails or other communications between an employee and exclusive bargaining representative.

Finally, the Illinois Public Labor Relations Act and the Illinois Educational Labor Relations Act now require employers to make payroll deductions of union dues, initiation fees, assessments, and the like. Both statutes were amended to establish procedures and requirements for dues deductions, and penalties for violations of those provisions. Additionally, the statutes provide that employers and unions can agree to a minimum ten-day window period in which members can revoke their dues deduction authorization. Finally, the statutes were amended to shield both labor organizations and employers from any claims that an employee is entitled to a reimbursement of dues as a result of the Janus decision.

Consolidation of Fire and Police Pension Funds

November 14, 2019, the Illinois legislature overwhelmingly passed and Governor J.B. Pritzker signed into law a bill amending the Illinois Pension Code to allow 649 downstate and suburban police and fire pension funds to pool funds for investment purposes into two statewide funds — one for fire and one for police. The individual police and fire funds would continue to remain in separate accounts within the statewide funds for purposes of benefit administration. Senate Bill 1300 is the result of recommendations from the bipartisan Governor's Pension Consolidation Feasibility Taskforce that released a report concluding that consolidating the plans' investment assets was the "single most impactful step" Illinois can take to address the chronic underfunding of police and fire pension funds. The 649 funds represent a combined $14 billion dollars in assets, but also collectively have $11.5 billion in unfunded liabilities. The asset consolidation aims to increase investment returns by pooling assets and reduce duplicative investment expenses and placing oversight under a 9-members board consisting of elected active and retired trustees as well as representatives of labor and management. The report estimated potential additional investment returns of between $820 million and $2.5 billion over the next 5 years. SB 1300 also reinstates surviving spouse benefits for "tier two" police officers and firefighters -those hired after January 1, 2011, who receive a lesser pension benefit. The bill also changes the formula for determining the final average pensionable salary calculation for tier two employees. Previously, a tier two employee's final salary would be determined by averaging their highest salary over 8 of the immediately previous 10 years. The new law changes that formula to an average of the highest 4 out of 5 years as well as increases the pensionable salary cap for these employees. Without these changes, the report warned, tier two pensions could in the future violate a federal "safe harbor" law requiring certain municipal employee retirement benefits to be at least equal to what they would get under Social Security.

Illinois Bans Local "Right to Freeload" Zones

The General Assembly and Governor Pritzker passed Public Act 101-003, which prohibits any local government in the State of Illinois from enacting laws or rules that restrict the use of union security agreements between labor organizations and employers. To further limit actions by local governments, the act specifically states that it is a denial and limitation of all home rule powers and functions under the Illinois Constitution. Any party aggrieved by a violation of this law has a private right of action against a local government that may be filed in the circuit court in the county in which the alleged violation occurred.

This important piece of legislation is designed to clarify Section 14(b) of Taft-Hartley, which provides that a state or territory may enact a law that prohibits union security agreements. In Kentucky, some counties have extended that concept under Section 14(b), by stating that the words "any state" include political subdivisions, such as counties or municipalities. The Sixth Circuit, which includes Kentucky, has upheld that concept, though the Seventh Circuit rejected it in Chicago. Nevertheless, the General Assembly believed that enacting a clear prohibition is in the best interest of unions and workers.

Comptroller Mendoza Signs EO Enforcing Prevailing Wage Act Requirements Against State Government Contractors

Illinois Comptroller Susana Mendoza signed an Executive Order that reaffirms the Comptroller's Office's role in ensuring compliance with the Illinois Prevailing Wage Act. As the State's chief fiscal officer, Comptroller Mendoza is responsible for accepting grants, contracts, and awards involving payments from the State of Illinois, and she is responsible for releasing funds to make payments on behalf of the State under public contracts. Comptroller Mendoza has long been a strong ally of organized labor.

The Prevailing Wage Act requires that any employees working for a contractor under a public works contract with any state or local government must be paid at least the prevailing rate of wages and fringe benefits. Prevailing rates are generally set by unionized employees' wage rates in each locality. This Act helps guarantee that workers, laborers, and mechanics receive fair wages for their work, and it also prevents contractors from cutting wages in order to underbid competitors for public works contracts.

Comptroller Mendoza's Executive Order 19-01 outlines steps that the Office of Illinois Comptroller will take to ensure that contractors comply with the requirements of the Prevailing Wage Act. This includes monitoring all grants awarded for the Rebuild Illinois program – a six-year, $45 billion legislative package signed by Governor Pritzker that provides for long-overdue repair and improvements to the State's infrastructure – and other public works programs. The order also directs the Comptroller's prevailing wage enforcement officer to address inquiries from labor about these contracts; provides for a prevailing wage inquiry form on the Comptroller's website; and provides support to the Illinois Department of Labor in reviewing and responding to potential violations of the Prevailing Wage Act.

Use of Artificial Intelligence in Job Interviews

A new Illinois law signed by Governor J.B. Pritzker on August 8, 2019, will regulate the use of artificial intelligence for conducting job interviews. The Artificial Intelligence Video Gaming Act, which will become effective January 1, 2020, was passed in response to the increasing frequency of employers utilizing artificial intelligence technologies through vendors such as Gecko, Mya, AutoView, and HireVue to screen job applicants. AI technology is being used to analyze facial expressions, gestures, and an applicant's choice of vocabulary to evaluate various qualities and character traits, such as professionalism, honesty, reliability, and work ethic. Critics contend that the use of AI poses a risk that algorithms used by employers and their vendors may generate biases on the basis of race, gender, national origin, disability, and other protected classes under federal and state law.

The new law takes a number of steps to protect job applicants against potential bias, as well as potential violations of their privacy. It requires that employers must inform applicants before an interview that artificial intelligence may be used to analyze their video interview and consider their employment. Employers must also provide applicants with information before the interview explaining the artificial intelligence program's methodology and what characteristics it weighs to evaluate applicants. The employer must obtain the consent of the applicant to use artificial intelligence before beginning the interview, and an employer may not analyze the applicant through the use of artificial intelligence without the applicant's consent.

To assuage privacy concerns, the new law prohibits employers from sharing applicant videos with anyone other than a person whose expertise or technology is needed in order to evaluate the applicant's fitness for the position. Finally, the law requires an employer, as well as any person who received the video, to destroy the video upon the request of the applicant, within 30 days after a job applicant's request. The new law is silent as to how it will be enforced and what damages and remedies job applicants may seek against employers who violate their rights. The courts will likely answer these questions in the coming years.

Amendments to Illinois Wage Theft Law

Governor J.B. Pritzker signed into law legislation sponsored by now-Chicago Treasurer Melissa Conyears-Ervin that amends the Illinois Wage Payment and Collection Act to impose new expense reimbursement requirements on all Illinois employers. The new law, which adds Section 9.5 to the IWPCA, requires that employers provide reimbursement for all expenses that employees incur in performance of their work duties. Because of the breadth of the language of the statute, this arguably includes reimbursement for cell phone data plans and related expenses, in addition to the more traditional mileage and travel reimbursements. The statute includes labor unions as employers. Because the language of the statute is vague, it is recommended that employers adopt written guidelines that establish procedures for reimbursement of necessary expenditures. If an employer already has written guidelines, these guidelines should be reviewed to make sure that they provide for repayment of necessary expenditures.

Illinois Supreme Court

1500 MP Road LLC v. Teamsters Local No. 700

Under the Illinois Property of Unincorporated Associations Act, unions must notify and obtain approval from their members before entering into agreements to lease or purchase real estate. In a recent case the Illinois Supreme Court decided on March 21, 2019, a Teamsters local union official signed a 15-year lease purchase agreement for union office space, but never had the agreement ratified by the general membership. Months later, the local went into emergency trusteeship and its members, assets, and liabilities were transferred to Local 700. The new local attempted to renegotiate the terms of the lease, but the property owner refused to respond, prompting the local to vacate the premises and default on the lease.

The property owner filed suit for breach of contract and claimed over $3 million in damages. The circuit court and appellate court held for the property owner, but the Illinois Supreme Court reversed. The Court held that the lease was void ab initio, or void from the beginning, as if it never existed. The Court found that without general membership approval, the union never had the legal authority to enter into the agreement. The Court further reasoned that the union's subsequent conduct of occupying the property and paying rent did not convert the deficient lease into one that was legally enforceable. Labor unions in Illinois should be sure to consult their attorneys before entering into real estate agreements.

Dynak v. Board of Education - Wood Dale School District 7

The Illinois Supreme Court recently held that a teacher who gave birth two days before the end of the school year could not use remaining additional sick leave for the birth at the start of the next school year. Writing for the Court, Justice Anne Burke held that "teachers may use up to 30 days of accumulated paid sick leave during the six-week period immediately following the birth," but once that six-week period elapsed, the teacher would not be able to use additional sick time for the birth without a physician's certificate.

At issue, was Section 24-6 of the Illinois School Code which grants teachers paid sick leave during the school year that can be accumulated to the next year when unused. The statute allows for teachers to use up to 30 days of accumulated paid sick leave "for birth" before requiring a doctor's certification. Wood Dale teacher Margaret Dynak was approved for 12 weeks of FMLA protection and gave birth to a child two days before the end of the 2015-16 school year. The school granted one and a half days of paid sick leave for the event at that time; however, at the start of the 2016-17 school year, Ms. Dynak sought to use her remaining 28 and ½ days of paid sick leave towards her FMLA time, but was denied by the school district. Ms. Dynak filed suit in the circuit court and lost. The appellate court affirmed the circuit court's decision before the case was taken up by the Illinois Supreme Court.

The Court analyzed the plain language of the statute, including the requirement for a physician's certificate, and reasoned that the legislature intended for the paid leave to "have a temporal connection" to the triggering event, here the birth of the child. While Ms. Dynak argued that there was no such language in the statute, the Court considered the underlying purpose for the leave and the physician's certificate requirement and held that allowing a teacher to take paid time off at their discretion and unconnected with the birth would lead to an absurd result that the legislature did not intend when passing the law. Ms. Dynak also argued that the Court's interpretation would give different levels of benefits to different teachers depending on when in the school year they gave birth. The Court also rejected this argument and reasoned that a teacher that didn't use her full 30 days because of giving birth late in the school year could still accumulate the earned sick days and use them in the future for another qualifying event.

COVID-19 DEVELOPMENTS

CARES Act

The CARES Act provides, for Americans with an annual income of $75,000 or less, a $1,200 check for each individual, or $2,400 per married couple if taxes were jointly filed. To obtain the rebate, you must first file your tax return for 2019. The government will look to your 2018 tax return if you have not filed the 2019 return. A person who has not filed their 2018 return is not eligible. This payment is subject to no garnishment other than child support payments. These payments are not subject to federal income tax.

The Act provides $15.5 billion for Supplemental Nutrition Assistance Program (SNAP) food stamps. $8.8 billion is allocated for the federal government's Child Nutrition Program, which provides school lunches to children in low-income families. $450 million is awarded to food banks. The CARES Act provides $3.5 billion for child care programs. The childcare funds must be used to maintain necessary operations, such as staffing. The funds are also provided to ensure that first responders (or essential workers) can maintain childcare.

Those with student loan debt are receiving relief. For direct (federal) student loans, all payments are suspended until September 30, 2020, and no interest will accrue during this time period. The CARES Act also provides that employers may offer up to $5,250 to employees to help repay their loans, which will not be counted as income for tax purposes.

The CARES Act provides eviction relief for renters by providing a suspension, through the end of July, on all evictions for failure to pay rent. The relief is for renters whose landlords have mortgaged properties secured by Fannie May, Freddie Mac, or another federal entity. In addition, homeowners with a federally backed mortgage are eligible for a 6-month forbearance on mortgage payments. Homeowners have to apply for the relief, but they will have to make mortgage payments after the 6-month period expires.

401 (k) withdrawals in the form of a loan are permitted under CARES without penalty from the IRS, and the employee can repay the loaned amount within a three-year period without regard to the annual contribution limits for their 401 (k) plans. Anyone who has contracted the virus, has had a spouse or a dependent who has contracted the virus, or has experienced financial hardship because of it, would be considered eligible. An employee can self- certify to the plan sponsors as to the financial impact from the coronavirus. An employee who takes this distribution as a coronavirus related distribution and who does not pay it back to the 401 (k) account will owe taxes on the amount and will be able to pay the taxes over a three-year period. The Act also allows waives the required minimum distributions for 2020 for persons about age 70 and1/2, meaning the money can remain in the 401 (k) account without the required withdrawal. A similar set of provisions applies to the IRA retirement accounts.

Unemployment insurance benefit improvements are a major feature of this legislation. Unemployed persons will receive an additional $600 per week of unemployment compensation between now (March 29, 2020) and July 31, 2020, under the Federal Pandemic Unemployment Compensation (FPUC). We strongly urge unemployed persons to apply as soon as possible because this benefit will not be available after July 31, 2020. The normal twenty-six week period of unemployment compensation benefits has been extended for thirteen more weeks through December 31, 2020, under a program known as Pandemic Emergency Unemployment Compensation (PEUC). This benefit will not carry over into January 2021, so we advise that persons not wait to apply for benefits. For example, if an unemployed person applies on April 2, 2020, a total of thirty-nine weeks will be paid if the person is unemployed for that period.

Independent contractors have traditionally been deemed to be ineligible to receive unemployment benefits, but under CARES the persons who lost work due to COVID 19 will be eligible to receive such benefits under the program known as Pandemic Unemployed Assistance (PUA), and this benefit will be backdated to January 27, 2020.

New Presidential Executive Order Calling Federal Agencies to Issue Deregulations and to Relax Enforcement in the Name of Economic Recovery

On May 19, 2020, President Trump issued an Executive Order entitled "Regulatory Relief To Support Economic Recovery," and it has the potential of enabling federal agencies to make major changes in regulations in order to diminish workers' rights. The stated purpose of the EO is to facilitate economic recovery following the devastation caused by the COVID-19 pandemic. In doing so, the EO calls for agencies to rescind, modify, waive, or provide exemptions from regulations that, in the judgment of the appropriate agency officials, inhibit economic recovery, in a manner not inconsistent with the law. The EO offers few specifics, though as a policy matter it states that agency action taken as part of the EO should give businesses, especially small businesses, "confidence they need to reopen by providing guidance on what the law requires; by recognizing the efforts of businesses to comply with often-complex regulations in complicated and swiftly changing circumstances; and by committing to fairness in administrative enforcement and adjudication."

Under the EO, agencies are directed to accelerate procedures for regulated entities to obtain pre-enforcement rulings, or advisory opinions, to help determine whether entities would be in compliance from their acts or omissions. Such rulings can be in the form of an advisory opinion, no-action letters, and informal guidance and letter rulings. Section 6 (a) of a prior Executive Order No. 13892 requires the agency to afford a person an opportunity to be heard in person or in writing before issuing a pre-enforcement ruling. However, this latest E.O. eliminates that requirement.

Agencies are also directed to establish parity in how regulations are enforced. Agency heads predisposed to decline enforcement of regulations would face pressure, under the EO's language, to decline to enforce regulations against a broader segment of violators in order to establish that parity. Finally, agency heads are given discretion under the EO to make suspensions of regulations they previously deemed temporary to be permanent, should they deem that it would assist with economic recovery efforts.

Under the language of the EO, federal agencies are free to relax enforcement of regulations if they believe that doing so would hasten economic recovery. A decision by agencies not to enforce regulations would give employers more immediate power to jettison their legal obligations to employees. This administrative strategy stands in comparison to undergoing the methodical and complicated "notice and comment" rulemaking process designed to alter or rescind regulations, as governed by the Administrative Procedure Act. Such a process takes months or even years. But agencies that decide not to enforce regulations in the first place while simultaneously moving to rescind or scale back regulations through notice and comment rulemaking could arguably do the most long-term damage to workers' rights.

Though the EO makes no mention of any specific agency, or any specific regulation, its mandate represents an existential threat to protections for workers under federal law. Federal agencies within the Department of Labor, such as the Occupational Safety & Health Administration, the Wage & Hour Division, the Employee Benefits Security Administration, and others, will be required to examine regulations that empower agencies to enforce the law by prosecuting noncompliance. For example, OSHA inspections can be reduced and non-enforcement letters can be issued in greater numbers to assist employers and remove protection of workers.

Even though the National Labor Relations Board fits into the definition of an "Agency" as described in the EO, as an independent agency it is not required to follow compliance with the EO. Their Board Members may only be removed for cause, as opposed to removal for any reason like Department of Labor officials. The Board may nonetheless take it upon themselves to move aggressively to limit worker and union rights in the name of economic recovery.

Also of importance is an ominous provision stating that the EO does not create a right among anyone to challenge an agency's action in furtherance of the EO in court. While the EO may claim that the legality of actions taken to enforce it cannot be questioned, this provision appears to exceed Executive authority. The President may not prohibit courts from hearing challenges to its actions. However, Congress may act to remove the court's jurisdiction to hear certain claims. They did so in most cases where employers have sought injunctions against strikes. But they have not done so here. This provision is therefore likely to be unenforceable.

It is too early to determine just how impactful this EO will be on undermining regulations intended to protect employees. The EO contains language indicating that top advisors to the President, including the Director of the Office of Management and Budget, the Assistant to the President for Domestic Policy, and the Assistant to the President for Economic Policy, will monitor departmental and agency leaders to ensure compliance, and issue memoranda where needed to assist agency leaders with compliance. Such a provision suggests proactive enforcement.

National Labor Relations Board

Maine Coast Regional Health Facilities

The National Labor Relations Board recently found in favor of a hospital employee who filed unfair labor practice charges against a hospital she was discharged from. The employee spoke to a local newspaper about the hospital's staffing shortages and the impact on her and her coworkers' working conditions. In doing so, she violated the hospital's written media policy. The employee had also spoken out in favor of the local nurses' union's efforts to improve staffing levels at the hospital. The hospital's media policy read, "No EMHS employee may contact or release to news media information about EMHS, its member organizations or their subsidiaries without the direct involvement of the EMHS Community Relations Department or of the chief operating officer responsible for that organization." Subsequent to terminating the hospital employee, the hospital amended the language by clarifying that it should not be construed to restrict employee rights under the National Labor Relations Act.

The Board found the media policy's language to violate Sections 8(a)(1) and (a)(3) of the National Labor Relations Act because of the chilling effect such a prohibition would have on employees' rights to engage in concerted activity for mutual aid and protection. In doing so, the Board first determined whether the media policy could be reasonably construed to restrict the right to engage in concerted activity for mutual aid and protection, and if so, whether the nature and extent of the impact on those rights was outweighed by the hospital's legitimate justifications for the rule. Finding that it was not, the Board affirmed the decision of the administrative law judge.

As a remedy, the Board ordered the hospital to reinstate the employee with back pay and other benefits incurred as a result of the discharge, with interest to be compounded daily. The Board also ordered the hospital to compensate the employee for any reasonable search-for-work and interim employment expenses, regardless of whether those expenses exceeded interim earnings. Because the Board found that the amended media policy was lawful, the Board ordered the hospital to post notices providing that the new media policy complies with the NLRA and replaces the previous policy, which was found to be a violation. The Board ordered the posting provide an explanation for why one policy is permitted while the other is not.

With hospitals and other health care employers facing staffing and supply shortages due to the COVID-19 pandemic, all health care labor unions and employees should be aware of the rights the National Labor Relations Act provides. As this Board decision demonstrates, hospital employees have a right to talk to the public about a lack of personal protective equipment, staffing shortages, and other aspects of their employment.

Morrison Health Care

In Morrison Healthcare, the Board determined that a Regional Director erred in ordering that a representation hearing involving witness testimony be held telephonically, and held that upon a showing of good cause based on compelling circumstances, i.e., COVID -19 social distancing requirements, such a hearing could be held via a videoconference. The union filed a petition to represent a unit of employees at the employer's hospital on March 11, 2020. While the Regional Director originally scheduled a pre-election hearing for March 9, 2020, the Regional Director on March 17, 2020, postponed the hearing indefinitely in light of the COVID-19 pandemic. On April 22, 2020, the Regional Director set the matter for hearing on April 30, 2020, stating that the hearing would be held telephonically. Thereafter, the employer filed a request for review with the Board and the Board, on April 30, 2020, issued an order staying the hearing.

In reviewing the Regional Director's decision to order that the hearing be held telephonically, the Board noted that while the Board's rules and regulations permitted the taking of video testimony in unfair labor practice hearings upon a showing of good cause based on compelling circumstances, no such similar rule existed in the context of representation hearings. Finding no reason to adopt a more restrictive approach in representation cases, the Board held that videoconference hearings involving witness testimony will be allowed in such cases "on a showing of good cause based on compelling circumstances, and under appropriate safeguards." In reaching this decision, the Board did not close the door to telephonic hearings in representation cases. It held that telephonic conferences will be permitted only where compelling circumstances exist and no witness testimony is involved.

The Board noted that its prior use of videoconferencing software for witness testimony in the ULP context satisfied the concerns articulated by the Board in Westside Painting, Inc. In Westside, the Board declined to permit the use of a telephonic hearing in the ULP setting on the ground that such hearings created several due process and procedural concerns by impairing a judge's ability to observe witnesses and make credibility determinations.

The Morrison Board stated that while credibility determinations are not made in pre-election hearings, the potential impairment of cross-examination or the inability to detect whether testimony is being guided by documents or coached by another individual remains salient in telephonic hearings. Thus, the Board concluded that the Regional Director erred in ordering a telephonic hearing.

Board Resumes Representation Elections

On April 1, 2020, the NLRB lifted its suspension of Board-conducted elections past April 3, 2020 and will instead resume conducting elections beginning Monday, April 6, 2020. On March 19, 2020, because of the extraordinary circumstances related to the COVID-19 pandemic, the Board had ordered the temporary suspension of all Board-conducted elections through April 3, 2020.

As explained when ordering the suspension, the Board took the extraordinary action to ensure the safety of Board employees and members of the public involved in elections. At the time, several of the Board's regional offices had been closed and other locations were operating with limited staffing such that the Board did not believe it was possible to effectively conduct elections.

Mail Ballot Elections

Previously, the Board suspended elections in order to evaluate how to hold elections during the COVID-19 pandemic. However, recently, the Board determined that conducting mail ballot elections was the best way to protect employees' statutory rights. Thus, in multiple recent cases, the Board upheld Regional Directors' decisions to order mail ballot elections over the employers' objections. The Regional Directors' decisions, which were based upon the health risks associated with COVID-19, were found to be a reasonable exercise of discretionary authority. This is great news for unions because it means that elections will proceed during the pandemic without further delay. Additionally, it is beneficial from an organizing campaign standpoint because employers, unlike unions, are generally prohibited from visiting employees at home. Unions during the pandemic are therefore in a much better position to have more direct contact with employees than their employer. The lack of direct employee contact will impede the employer's ability to run an effective opposition campaign.

Duty to Bargain During Emergencies

On March 27, 2020, the Board's General Counsel, Peter Robb, issued a memorandum providing what Robb described as "case summaries" dealing with parties' duty to bargain under the National Labor Relations Act during emergency situations. The memo was intended to provide guidance for employers and unions in light of the public health emergency caused by the coronavirus pandemic.

The memo first discusses cases dealing with the duty to bargain in public emergency situations. The cases cited note that an employer may be exempt from the duty to bargain during public emergencies where "economic exigencies compel prompt action." This exception is limited to "extraordinary events which are an unforeseen occurrence, having a major economic effect requiring the company to take immediate action," including evacuations from hurricanes, bankruptcy immediately following the September 11th attacks, and travel bans during severe ice storms. The memo then discusses cases dealing with emergency situations particular to an individual employer, such as a lack of financial credit or a shortage of materials. That second group of cases suggest that where an "emergency" only exists for a single employer, it will be more difficult for the employer to show that the extraordinary circumstances were unforeseen, and in any event employers will still need to bargain over the effects of unilateral decisions such as plant closures.

While General Counsel Robb does not take a direct position on what impact COVID-19 has on an employer's duty to bargain, this memo is likely meant to give employers support if they decide to act unilaterally during the current pandemic. Unions should push back against any claims that the duty to bargain is suspended indefinitely during this public health crisis and should demand to bargain over any and all changes resulting from COVID-19, as well as the effects of any managerial decisions.

Office of Labor-Management Standards

The COVID-19 crisis has placed added stress on the obligations of union officers to file the LM-2 reports required by the Labor Management Reporting and Disclosure Act, holding officer elections, and conducting union meetings. A March 17, 2020, advisory letter issued by OLMS answers some of the more pressing questions that union officers will have on these important issues:

1. Filing of LM reports – labor unions must make a good faith effort to file the required public disclosure reports, and the Department has jurisdiction to file a civil enforcement action if a labor union does not file a timely report. However, OLMS will not pursue a civil enforcement action with regard to a delinquent or deficient report when these reporting violations are attributable to COVID-19. A union wishing to take advantage of this relaxation of the enforcement policy should contact OLMS before the report is due. A local union should contact OLMS to describe the

circumstances necessitating additional time needed and provide a date certain by which the report can reasonably be submitted. There is some difficulty in placing phone calls to the OLMS offices to submit this information, so unions should send an email and a letter by U.S. Mail. The advisory further states that under these circumstances, OLMS will not lodge a civil enforcement action to obtain the delinquent or deficient report.

2. Most union constitutions require meetings to be conducted unless there is good cause to suspend them. The COVID-19 crisis is sufficient reason to cancel these meetings. However, under the Illinois Governor's Executive Order, critical union activities are exempt, and labor union meetings could be considered to be a labor union essential activity. To be in conformity with the Executive Order, in-person meetings should be limited to ten persons. To comply with this 10-person limit, meetings with a much larger group could be held through electronic video or audio means, if allowable under internal union governance.

3. Union elections that are scheduled to take place during this crisis may be postponed subject to guidelines from OLMS or a local union might be able to conduct a mail ballot election within the statutory time frame. Local union officer elections required by the LMRDA are to be held not less often than every three years.
    - OLMS has advised that labor unions affected by COVID-19 must still make a good faith effort to conduct officer elections within the required time frame. If OLMS receives a complaint regarding a union's ongoing failure to hold an election, and that failure is attributable to COVID-19, OLMS will promptly seek a voluntary compliance agreement with the union. The agreement would require the union to hold the election when practicable on a date certain. With such an agreement, OLMS will not seek a civil enforcement action based on the complaint, provided the election is held in conformance with the agreement.
    - An alternative approach could be to conduct an election and the nominations by mail ballot. It may be possible for the local union's executive board to take such action due to authority it has to act on behalf of the union between membership meetings. However, such action would require a review of the local union's constitution.
    - OLMS will under no circumstances approve the use of electronic voting.

Occupational Health & Safety Administration

Currently, there is no OSHA standard to deal with COVID-19, nor is there a standard for infectious disease. Because this situation, or something similar, is likely to occur again, the AFL-CIO filed a petition with the Department of Labor to ask for an infectious disease rule, and is currently lobbying for protective legislation. However, there are OSHA standards that are helpful in protecting workers from exposure:

1. Personal Protective Equipment (PPE): Employers are required to furnish proper respiratory and other equipment to avoid exposure.
2. General Duty Clause: Employers are required to furnish a workplace that is free from recognized hazards that are causing, or likely to cause, death or serious physical harm.
3. Bloodborne Pathogens: Although these standards do not typically include respiratory secretions that could transmit COVID-19, these standards can help control employees' exposure to bodily fluids.
4. Environmental Controls: These standards address proper sanitation in the workplace, and also protect employees from harm caused by cleaners and sanitizers.

OSHA's Guidance On Preparing Workplaces
For COVID-19 can be found at:
https://www.osha.gov/Publications/OSHA3990.pdf

Thus, whenever an employee believes that an employer is not adequately addressing workplace hazards, or providing proper supplies, the employee should file an OSHA complaint with the Illinois Department of Labor.

Employees are protected from retaliation for refusing, under certain circumstances, to perform work that would subject them to serious injury or death arising from the workplace hazard. In order to be protected under this provision, the employee must have a good faith belief that they will suffer serious injury or death based on workplace conditions that actually exist. Employees acting concertedly, as opposed to an individual acting alone, are on stronger ground to receive protection under this provision. However, individuals who meet the standard are also protected. Additionally, Section 20 of the Illinois Public Labor Relations Act provides that employees who refuse to work in the face of abnormally dangerous conditions are not engaged in an illegal strike. Section 502 (a) of the NLRA has the same language. However, it is advisable to caution employees not to exercise these protections lightly. If employees do not meet the standards, they could be terminated.

Equal Employment and Opportunity Commission

ADA Guidelines

The Equal Employment Opportunity Commission has been issuing ever-changing guidance on how workers and employers should respond to new issues arising from the COVID-19 pandemic. On May 5, 2020, the EEOC issued guidance under the Americans With Disabilities Act and the Rehabilitation Act, in which the EEOC seemed to suggest that employers could legally bar any employees with known medical conditions from the workplace if the employer reasonably believed that those medical conditions would create a "direct threat" to the employee's safety by increasing the likelihood of contracting COVID-19. Later that same day, the EEOC retracted its guidance, stating that its earlier guidance "was subsequently misinterpreted in press reports and social media. We have removed it and are revising the information to ensure that it is clear."

On May 7, 2020, the EEOC released updated guidance. This latest guidance clarified that even if an employer already knows about an employee's medical condition that could put that employee at risk of infection, it does not mean that the employer is free to send the employee home. Instead, the EEOC's legal counsel explained, the employer must do a "thorough direct threat analysis," considering the specific circumstances and determining whether the "direct threat" can be reduced or eliminated through a reasonable accommodation. Reasonable accommodations could include telework or a temporary job reassignment, among other options. This requires an interactive process between the employer and the employee to determine whether any reasonable accommodation would allow the employee to continue to safely perform their job.

Workers and unions should push back against any efforts by employers to bar employees from the workplace or force employees onto unpaid leave based solely on the employee's preexisting medical conditions. Additionally, it is important to note that the EEOC's guidance only deals with situations where an employee's medical condition is already known to the employer. Federal law does not allow for employers to ask employees who do not have Covid-19 symptoms to disclose information about their medical history to determine whether they are at greater risk of infection. These types of disability-related inquiries are generally prohibited under the ADA. The EEOC's current guidance is available at: https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws

WARN Act

Employees either laid off or furloughed without proper notice due to the COVID-19 coronavirus outbreak may have a claim against their employer. Under the federal Worker Adjustment and Retraining Notification (WARN) Act, an employer with at least 100 employees must give at least 60 days' notice before either laying off or furloughing 50 or more employees at a given worksite, or an operating unit within a worksite, for a period of 6 months or more. In addition, the number of furloughed or laid off employees must be at least 33 percent of the number of full-time workers at that employment site. Under Illinois' version of the WARN Act, employers with at least 75 employees must provide the 60-day warning.

Warning must be given to all employees subject to the layoff, as well as the chief executive or mayor of the municipality in which the work site is located, and the leader of the labor union representing the employees, if there is one. Employers found liable for WARN Act violations could owe back pay and benefits to unwarned employees, depending on how many days' notice were actually received. Employers may also be liable for a $500 fine per day until they are in compliance. The protections apply to both salaried and hourly employees, as well as supervisory and managerial employees.

Employers still have to comply with WARN Act requirements despite shelter-in-place and other COVID-19-related orders that result in temporary layoffs and furloughs lasting more than 6 months. Under the WARN Act, there is no distinction between a furlough and a layoff. The law provides exceptions for employers based on "unforeseen business circumstances." But employers who are aware of the impact of COVID-19 and continue to employ workers are less likely to enjoy the protection of the "unforeseen business circumstance" exemption, as more time passes where employers should be aware of the effects of the outbreak. Even when companies are considered to have made mass layoffs based on "unforeseen business circumstances," they must still provide notice, even if it is not the full 60 days.

The WARN Act does not apply to federal, state, and local public employers that provide public services. The U.S. Department of Labor is reviewing its WARN Act guidance in light of the COVID-19 outbreak.

Illinois Department of Employment Security

The Department of Employment Security has released emergency rules to ensure that those in need of unemployment insurance due to COVID-19-related issues may easily obtain it. The purpose of these new rules is to relax the tests for determining eligibility to obtain unemployment insurance benefits: searching for work; able to work; and available to work.

The Department encourages claimants to file online rather than by phone. About 80 percent of the claimants are filing online and the phone system is often clogged. It is preferred that the applicant file on a desktop computer rather than a hand held device.

The new rules permit individuals who have been laid off from their jobs, even temporarily, due to COVID-19 to obtain insurance without having to register with the IDES employment service to seek other work or to look for other work. In effect, an individual making a claim for insurance based on a COVID-19 layoff would be considered to be actively seeking work. In order for this presumption to apply, the individual would have to be prepared to return to his or her job as soon as the employer is able to reopen, meaning that the unemployment will be for a short period or that the person will be recalled within ten weeks.

For example, if an employer decides to temporarily lay off or furlough employees for 2 weeks, pay them for 1 week, and allow them to use their sick leave to be paid for the second week, temporarily laid off employees may file for unemployment for the second week, thus allowing them to conserve their accumulated sick leave.

Under the normal rules, an individual who left work to address childcare needs would be considered to have left work voluntarily, and therefore ineligible to receive insurance. But because of statewide school closures, the emergency rules permit parents who leave work to address childcare needs to be considered to have left work involuntarily. These employees would still need to meet the other requirements to be considered eligible. Among the requirements is that they would be available and eligible to perform work at home. If the claimant is able to work from the isolation of being at home, the "ability to work" test needed to be eligible for insurance would be met. Though the shelter-in-place order largely makes this rule moot, it may still have an effect on essential employees. This rule endures until the parent's child's school has reopened.

A construction worker can fulfill the work search requirement by calling into a union hiring hall. IDES left it unclear as to whether an individual may collect unemployment insurance if they leave their job due to safety concerns over COVID-19. In such a situation, the claimant should keep a record of the safety issues that concern the employee, such as lack of personal protective equipment, soap, or dirty bathrooms. The Department encourages employees who leave work for such reasons to file for unemployment compensation.

An individual who leaves work voluntarily without a good reason attributable to the employer is generally disqualified from receiving benefits. To obtain benefits in this scenario, claimants would have to show that they had a good reason for quitting, and that that reason is attributable to the employer. The former employee has a duty to make a reasonable effort to work with his or her employer to resolve whatever issues caused the individual to consider quitting before insurance may be obtained. IDES has offered no further guidance on COVID-19-related instances where a person may be denied benefits on these grounds.

The emergency rules protect individuals who have either (1) been diagnosed with COVID-19, (2) are staying at home to care for a spouse, parent, or child who has been diagnosed with COVID-19, or (3) because of a government-imposed or government-recommended quarantine. With Governor J.B. Pritzker having issued a "shelter in place" order confining all non-essential employees to their homes, most employees fit into either one of these categories. An individual in one of the categories is considered unemployed through no fault of their own, but is still required to meet the remaining eligibility requirements, including ability and availability for work and being registered with the state employment service (though, as stated above, this would not impact those laid off from their jobs due to COVID-19). A person is considered able and available for work if there is some work that they can perform at home.

The Emergency Rules provide that the usual one week waiting period to obtain a benefit has been waived. As of this time, no insurance is available to those who have already received the full 26 weeks of benefits for the current benefit year.