

2024 EXECUTIVE HEALTHCARE LABOR & EMPLOYMENT LAW CONFERENCE



CHOPPY WATERS – An Overview of Recent NLRB Decisions Impacting Healthcare Employers

Rob Entin, FordHarrison LLP - Chicago
Marc Sugerman, FordHarrison LLP - Orlando
Mollie Wildmann, FordHarrison LLP - Memphis

FEBRUARY 29 AND MARCH 1, 2024 | JW MARRIOTT BUCKHEAD | ATLANTA, GA

WiFi: Network - FordHarrison | Password - FH2024

1

2024 EXECUTIVE HEALTHCARE LABOR & EMPLOYMENT LAW CONFERENCE




The Choppy Waters Needing Navigation (aka, what is this about?)

- *Cemex Construction Materials Pacific, LLC*, 372 NLRB No. 130 (2023).
- The new (kind of old) joint employer rule
- The new (and somewhat kind of old) election rule
- Protected concerted activity
- Recent healthcare-related decisions



WiFi: Network - FordHarrison | Password - FH2024

2

2024 EXECUTIVE HEALTHCARE LABOR & EMPLOYMENT LAW CONFERENCE 


Cemex Construction Materials Pacific, LLC, 372 NLRB No. 130 (2023) and November 2, 2023 Guidance Memorandum

- 52 years of precedent flushed down the drain
- New law as it pertains to voluntary recognition
- New remedy for election objections and ULPs committed during election campaign
- Retroactive application

WiFi: Network - FordHarrison | Password - FH2024

3

2024 EXECUTIVE HEALTHCARE LABOR & EMPLOYMENT LAW CONFERENCE 

Joint Employer Rule

- **Rule:** two or more entities may be considered joint employers of a group of employees if:
 - each entity has an employment relationship with the employees, and
 - the entities share or codetermine one or more of the employees' essential terms and conditions of employment
- **Essential terms and conditions of employment are defined as:**
 - wages, benefits, and other compensation;
 - hours of work and scheduling;
 - the assignment of duties to be performed;
 - the supervision of the performance of duties;
 - work rules and directions governing the manner, means, and methods of the performance of duties and the grounds for discipline;
 - the tenure of employment, including hiring and discharge; and
 - working conditions related to the safety and health of employees.
- **Effective Date:** February 26, 2024

WiFi: Network - FordHarrison | Password - FH2024

4



New Election Rules

- December 26, 2023
- Quickie elections about to become more quickie
- Goal was to “meaningfully reduce the time from petition filing to election and expedite the resolution of any post-election litigation”
- Pre-election hearings will be scheduled to start 8 calendar days after petition’s filing (decrease by about 10 days)
- SOP is due 7 calendar days (as opposed to 10)
- No requirement for Union to file RSOP. Union can verbally respond at QCR hearing. Currently, Union must file RSOP three days before hearing.

WiFi: Network - FordHarrison | Password - FH2024

5



New Election Rules (cont'd)

- Postponements of hearing/SOP by only two business days upon showing of special circumstances, and two more if extraordinary circumstances (currently, good cause).
- Notice of Petition for Election to be filed within two business days (as opposed to five).
- Limited hearing issues (e.g., only issues necessary to determine whether election should be conducted).
- Eligibility and inclusion issues only at post-election hearing.
- Limited opportunities to file briefs.

WiFi: Network - FordHarrison | Password - FH2024

6

New Election Rules (cont'd, cont'd)

- All employees can vote (even if subject to challenge)
- Elections scheduled on “earliest date practicable” as opposed to 20 day waiting period
- Net effect of new rules...

Deck is stacked against Employers




2024 EXECUTIVE HEALTHCARE LABOR & EMPLOYMENT LAW CONFERENCE 

Protected Concerted Activity

- Video plays

WIFI: Network - FordHarrison | Password - FH2024

9

2024 EXECUTIVE HEALTHCARE LABOR & EMPLOYMENT LAW CONFERENCE 

Protected Concerted Activity

- *Lion Elastomers LLC II* (May 2023)
 - Overruled *General Motors LLC* (2020)
 - Rejected *Wright Line* and returned to “setting-specific” standard for evaluating misconduct occurring in the course of protected concerted activity
- *Miller Plastic Products, Inc.* (August 2023)
- PCA depends on “totality of the circumstances” and can apply to actions by statutory employees (including job applicants) when advocating for non-employees - like contractors and interns
- NLRB will scrutinize facts to identify any evidence that might convert individual activity to actual or potential group (“concerted”) activity
- Job applicants are deemed statutory employees for purposes of NLRA, and a person’s immigration status is “immaterial” to his or her rights as statutory employee

WIFI: Network - FordHarrison | Password - FH2024

10



Heightened Scrutiny of Handbooks/Rules

- *Stericycle, Inc. (Aug. 2023)*
 - Stricter (and more nebulous) standard for evaluating employer work rules
 - Overruled Boeing Co. (2017) and LA Specialty Produce Co. (2019)
 - 2 Step Analysis
 - A challenged rule that has a reasonable tendency to chill employees from exercising their rights is presumptively unlawful
 - Employer may rebut presumption by proving that the rule advances a legitimate and substantial business interest and that the rule can't be replaced with a more narrowly tailored rule that serves the same purpose.

WiFi: Network - FordHarrison | Password - FH2024

11



Rules During Union Campaigns (*Garten Trucking*)

- *Limiting the use of captive audience meetings altogether*
- *Expanding employee rights to use employer communications for organizing purposes, reinstating the previous Purple Communications standard*
- *Overruling the Wynn Las Vegas decision, which would allow for employee conversations concerning unionization and other forms of solicitation while on the clock*
- *Softening the current standards for establishing and proving a claim of retaliation*

WiFi: Network - FordHarrison | Password - FH2024

12



MICRO-UNITS/UNIT CLARIFICATION

- Limiting the use of captive audience meetings altogether
- Expanding employee rights to use employer communications for organizing purposes, reinstating the previous Purple Communications standard
- Overruling the *Wynn Las Vegas* decision, which would allow for employee conversations concerning unionization and other forms of solicitation while on the clock
- Softening the current standards for establishing and proving a claim of retaliation

WiFi: Network - FordHarrison | Password - FH2024

13



RECENT HEALTHCARE RELATED DECISIONS

- *Heartwood Extended Health Care and Service Employees International Union, Local 775.*
 - Employer medical facilities' decision to conduct a raffle of 2-3 televisions, laptop computer, \$100 gift cards, and stereo speakers to boost morale of nurses during COVID-19 pandemic was objectionable.
- *Metrohealth, Inc. d/b/a Hospital Metropolitano Rio Piedras and Unidad Laboral De Enfermeras(os) Y Empleados De La Salud and National Building Maintenance Corp., a division of NBM/ABM.*
 - Employer acute-care hospital decided to contract out the services for its cleaning department without first bargaining with the union that included the cleaning department employees.
- *New York Presbyterian Hudson Valley Hospital and New York State Nurses Association.*
 - NLRB found that employer-hospital unlawfully terminated a RN who left an operating room during surgery.
- *Alaris Health at Boulevard East1 and 1199 SEIU United Healthcare Workers East. (attached).*
 - Examination of pay raises during COVID-19 pandemic – “special hourly rate bonus” – NLRB discusses the violation of unilaterally rescinding these bonuses.

WiFi: Network - FordHarrison | Password - FH2024

14



Other Issues You May See and Continue to Face in 2024

- Employee Agreements (*McClaren Macomb* & GC's Stance on Non-Competes)
- Desired Expansion of *Weingarten*
- Easier for NLRB to Bring ULPs (*Intertape Polymer Corp.* (Aug. 2023))
- Easier Solicitation While at Work (*Harbor Freight Tools* (December 2023))

WiFi: Network - FordHarrison | Password - FH2024

15

16

2024 EXECUTIVE HEALTHCARE LABOR & EMPLOYMENT LAW CONFERENCE



Thank you!

Scan for Details



Rob Entin, FordHarrison LLP – Chicago
rentin@fordharrison.com

Scan for Details



Marc Sugerman, FordHarrison LLP – Orlando
msugerman@fordharrison.com

Scan for Details



Mollie Wildmann, FordHarrison LLP – Memphis
mwildmann@fordharrison.com

FEBRUARY 29 AND MARCH 1, 2024 | JW MARRIOTT BUCKHEAD | ATLANTA, GA

WiFi: Network - FordHarrison | Password - FH2024