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Access Denied: NLRB Allows Employers to Bar Nonemployees Access to Property for Protests, Picketing, or Boycotts

By Patrick J. Hoban*

In a recent win for employers, the National Labor Relations Board ("NLRB") ruled that if a nonemployee is engaged in protests, picketing, or boycotts on an employer's property, the employer can have the nonemployee removed and bar the nonemployee from the property. *Kroger Limited Partnership I Mid-Atlantic*, 368 NLRB 64 (2019). This is true even if the employer allows non-protesters on its property for certain types of other activities, such as collecting donations.

The *Kroger* case arose after managers of a supermarket called the police to remove nonemployee union representatives from the supermarket's parking area. The union representatives were collecting customers' signatures for a petition protesting the transfer of union members employed by the supermarket. The supermarket previously permitted other groups and organizations to utilize the parking area to collect donations and provide information to customers. Accordingly, a NLRB Administrative Law Judge ("ALJ") found that the supermarket illegally discriminated against the union representatives by singling them out and barring them from obtaining signatures merely because they were union representatives.

On appeal, the NLRB reversed the ALJ's decision and found that the ALJ improperly relied upon a 1999 decision that contained a flawed and overly broad definition of "discrimination." The NLRB clarified that under the appropriate standard, discrimination is defined as "unequal treatment by employers of activities that are 'similar in nature.'" Using this standard, the NLRB held that employers may bar someone who is protesting, picketing, or boycotting from employer property while still permitting non-protesters on the property. Importantly, the NLRB ruled that employers specifically can bar nonemployees from access to company property for union purposes so long as the employer also bars "comparable organizational activities" by nonunion groups.

In reaching its decision, the NLRB explained that protesting and boycotting are not sufficiently similar activities to charitable, civic, or commercial activities. Without the sufficiently similar link, no finding of discrimination based on disparate treatment can occur. To successfully argue discrimination based on disparate treatment, the union would need to prove that the supermarket previously allowed other nonemployees to encourage customers to boycott or protest the store.

This NLRB decision provides significant reinforcement of employer property rights and useful clarification as to what constitutes discrimination against union representatives. As the NLRB continues to define employer rights, employers should consult with counsel regarding the legal implications of their actions, including enforcing their property rights.

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Fingerprints and Legal Settlements: The Evolving Law of Biometric Technology

By Tiffany Henderson*

Biometric technology involves the use of body measurements and calculations of physical characteristics, such as a person's fingerprint, voiceprint, or face scan, for identification, security, and other purposes. The use of biometric technology to monitor and manage employer workforces has become increasingly common, especially for time-tracking purposes. As technology and the law develop, employers that use or plan to use biometric technology should pay close attention to privacy laws that implicate the use of biometric technology. Although Ohio has not enacted a law governing employers' use of biometric technology, court decisions applying laws in other states have illustrated the issues and liabilities facing employers in this evolving area.

For example, a federal district court rejected an employer's attempt to dismiss an employee's lawsuit alleging violations of Illinois' Biometric Information Privacy Act ("BIPA"). *Rogers v. CSX Intermodal Terminals, Inc.*, No. 1:19 C 2937, 2019 U.S. Dist. LEXIS 151135 (N.D. Ill. Sep. 5, 2019). BIPA requires private employers in Illinois to protect employees' "biometric identifiers," i.e., "retina or iris scans, fingerprints, voiceprints, or scans of hand or face geometry," and employee's "biometric information," which includes any information, regardless of how it is captured, that is based on an individual's biometric identifier and is used to identify an individual. The law specifically requires employers to: (1) provide prior notice of the purpose for which the data is collected and the length of time that it will be used or stored; (2) establish a written policy explaining the retention schedule and develop guidelines for permanently destroying the information; and (3) obtain written consent before collecting biometric information. For negligent violations, employers may have to pay liquidated damages of $1,000 or actual damages, whichever is greater. Intentional or reckless violations may result in liquidated damages of $5,000 or actual damages, whichever is greater.

In *Rogers*, the employer required its truck drivers to scan their fingerprints to gain access to its facilities in order to pick up and deliver freight. According to the lawsuit, prior to obtaining and using its employees' fingerprints, the employer did not provide notice or a written policy, nor did the employer obtain employees' written consent. Based on these allegations, one of the company's former truck drivers filed a class action lawsuit alleging violations of BIPA. In response, the employer filed a motion to dismiss arguing, in part, that the employee's rights were not violated because he voluntarily provided his fingerprints.

Relying on a recent decision by the Illinois Supreme Court, the *Rogers* Court rejected the employer's arguments and explained that the purpose of BIPA is to impose safeguards before problems occur. Notably, in order to assert a viable claim under BIPA, the Court held "an individual need not allege some actual injury or adverse effect, beyond a violation of his or her rights under BIPA." Accordingly, even though the employee knew his fingerprints were being collected and could have withheld his consent if he wanted, the Court found this to be irrelevant to the issue of whether he could pursue a claim for a violation of his rights. The Court noted that "biometrics are unlike other unique identifiers because they are biologically unique to the individual and once compromised, the individual has no recourse."

The *Rogers* decision provides important guidance for employers as to the potential risks associated with the use of employee biometric data. Other states, including Texas and Washington, have statutes similar to BIPA which govern the use of biometric data. In addition, it is likely that more states will implement similar laws. To ensure compliance with these laws, employers should consult with counsel and consider implementing safeguards. This may include developing and maintaining a written policy governing the use and storage of biometric data, explaining the purpose for using the data, and setting forth a schedule for the retention and destruction of the data. Likewise, prior to collecting any biometric data, employers should provide written notice to employees and obtain employees' written consent to collect and use their biometric data. Employers also should develop security procedures to protect employee information, including implementing safeguards and protocols in the event of a data breach. Even in states that currently lack laws directly governing the use of employee biometric data, employers may reduce the risk of future litigation by applying these tips.

***Tiffany Henderson** practices in all areas of labor and employment law. If you have questions about biometric information or other employment issues, please contact Tiffany at tsh@zrlaw.com or (216) 696-4441.

Get "Giggy" With It: California Governor Signs Worker Misclassification Bill into Law

By Jantzen D. Mace*

On September 18, 2019, California Governor Gavin Newsom signed into law a bill limiting when businesses and companies can classify employees as independent contractors. "Assembly Bill 5 is landmark legislation for workers and our economy. It will help reduce worker misclassification – workers being classified as 'independent contractors' rather than employees," Governor Newsom said. The author of Assembly Bill 5, Assemblywoman Lorena Gonzalez of San Diego, said in a statement: "As one of the strongest economies in the world, California is now setting the global standard for worker protections for other states and countries to follow."

But not everyone is happy. Gig companies like Uber, Lyft, and DoorDash, which rely on thousands of independent contractors, plan to spend upwards of $90 million combined on a ballot initiative to overturn the law. While this is no small price, the companies could ultimately spend much more if forced to reclassify their workers as employees who are entitled to set wages and benefits.

Assembly Bill 5, effective January 1, 2020 codifies the California Supreme Court's 2018 decision in *Dynamex Operations West v. Superior Court*, 4 Cal. 5th 903 (2018). The *Dynamex* lawsuit involved claims that the company unlawfully classified its delivery drivers as independent contractors as the company previously classified drivers as employees. The Court applied the "ABC test" and ruled in the drivers' favor, finding that companies could no longer reclassify workers at their discretion. With the signing of Assembly Bill 5, the ABC test became a state-mandated test for worker classification in California.

Under the ABC test, workers are presumed employees unless they pass each of the three branches of the test: (A) the worker is free from the control and direction of the hiring entity in connection with the performance of the work; (B) the worker performs work outside the usual course of the hiring entity's business; and (C) the worker is customarily engaged in an independently-established trade, occupation, or business of the same nature as the work performed. If the worker "passes" these three requirements, then a company can classify them as an independent contractor.

A number of professions are exempt from reclassification under this new law, including cosmetologists, commercial fishermen, and real estate agents. Importantly, this list does not include gig workers. Additionally, the California legislature approved a companion bill, Assembly Bill 170, which offers a one-year exemption for newspaper distributors and carriers who are under contract with a publisher. Governor Newsom approved the bill on October 2, 2019 and signed it into law in the same week as a number of other worker-friendly laws aimed at improving worker conditions and combating sexual harassment at work.

These new laws also end mandatory arbitration provisions in California workers' contracts. Assembly Bill 51 now makes it a criminal misdemeanor to require workers to waive their right to sue over violations of employment statutes as a condition of employment. Also among the bills signed into law are Assembly Bill 547 and Senate Bill 530, which require state agencies to create sexual violence and harassment prevention training requirements in the construction industry and for janitorial employers. The Governor also approved other bills including: Senate Bill 142, which requires employers to provide a lactation room for mothers, and Assembly Bill 9, which extends the deadline to file workplace harassment or discrimination claims from one year to three years. This series of pro-worker laws came just weeks after Governor Newsom signed Assembly Bill 5.

While Assembly Bill 5 only applies in California, both labor groups and gig companies anticipate it having national implications. Ohio, like many other states, uses a "totality of the circumstances" multi-factor analysis to determine whether an employer may classify a worker as an independent contractor. Ohio courts look to the following six factors: (1) the permanency of the relationship; (2) the degree of skill required; (3) the worker's investment in equipment; (4) the worker's opportunity for profit or loss; (5) the degree of the employer's control; and (6) whether the service rendered is integral to the employer's business. With the signing of Assembly Bill 5, employers in Ohio and other states should collaborate closely with employment counsel as worker classification laws continue to develop.

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New Year, New Wages: Minimum Wage Increases in Several States

By Julia G. Ross*

At the beginning of the New Year, several states, including Ohio, will increase their minimum wage. In Ohio, the minimum wage will increase by fifteen cents per hour from $8.55 to $8.70 for non-tipped employees and by five cents per hour from $4.30 to $4.35 for tipped employees. Ohio's law applies to employers with gross revenue of $319,000.00 or more. Ohio employers grossing less than $319,000.00 are only required to pay the federal minimum wage, which is $7.25 per hour for non-tipped employees and $2.13 per hour for tipped employees. Additionally, Ohio employers only are required to pay minors age fifteen or younger the federal minimum wage.

Some states will not wait for the New Year to increase wages. On December 31, 2019, New York fast food employees outside of New York City will see a minimum wage increase to $13.75 per hour, and other New York employees will see an increase to $11.80 per hour. Other states will see increases later in 2020. For example, Delaware's minimum wage will increase to $9.75 per hour on October 1, 2020.

Recently, states have been moving towards the "Living Wage" and "$15 Minimum Wage Initiative." A number of states, including California, Maryland, Massachusetts, New Jersey, and New York have passed bills that will increase their minimum wage to approximately $15.00 per hour in the coming years.

Employers also should be aware that some municipalities have local laws setting higher minimum wages than the state minimum wage.

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The following table includes increases to state minimum wages in 2020 (unless otherwise noted, all increases are effective January 1, 2020):

STATE	NON-TIPPED	TIPPED
Alaska	$10.19	$10.19
Arizona	$12.00	$9.00
Arkansas	$10.00	$2.63
California	$13 for larger employers; $12 for smaller employers	$13 for larger employers; $12 for smaller employers
Colorado	$12.00	$8.98
Connecticut (effective 9/1/20)	$12.00	$6.38
Delaware (effective 10/1/20)	$9.75	$2.23
District of Columbia (effective 7/1/20)	$15.00	$5.00
Florida	$8.56	$5.54
Illinois	$9.25	$5.55
Maine	$12.00	$6.00
Maryland	$11.00	$3.63

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State Minimum Wage Increases in 2020 | Continued from page 4

STATE	NON-TIPPED	TIPPED
Massachusetts	$12.75	$4.95
Michigan	$9.65	$3.67
Minnesota	$10.00 for larger employers; $8.15 for smaller employers	$10.00 for larger employers; $8.15 for smaller employers
Missouri	$9.45	$4.73
Montana	$8.65	$8.65
Nevada (effective 7/1/20)	$9.00 for employees without healthcare benefits; $8.00 for employees with healthcare benefits	$9.00 for employees without healthcare benefits; $8.00 for employees with healthcare benefits
New Jersey	$11.00 for larger employers; $10.30 for seasonal, agricultural, and small employers	$3.13
New Mexico	$9.00	$2.35
New York (effective 12/31/19)	$13.75 for fast food employees; $11.80 for other employees	$7.85 for food service employees; $9.85 for other service employees
Ohio	$8.70 for large employers; $7.25 for small employers	$4.35
Oregon (effective 7/1/20)	$13.25 for Portland metro area; $12.00 for urban counties; $11.50 for rural counties	$13.25 for Portland metro area; $12.00 for urban counties; $11.50 for rural counties
South Dakota	$9.30	$4.65
Vermont	$10.96	$5.48
Washington	$13.50	$13.50

Upcoming Speaking Engagements

April 17, 2020

Jonathan J. Downes presents *"Workplace Challenges: Civility, Bullying, Harassment, and Discrimination"* at the State Personnel Board of Review ("SPBR") Conference. The SPBR Conference will take place at the Crowne Plaza Columbus North-Worthington in Columbus, Ohio. Information regarding the SPBR Conference can be found via the following link: https://serb.ohio.gov/wps/portal/gov/serb/news-and-events/all-events/SPBR_Conference

Z&R SHORTS

Please join Z&R in welcoming David Posner, Julia Ross, and Jantzen Mace to its Employment and Labor Groups

David Posner is a trial lawyer that has litigated numerous jury trials to completion during his illustrious career. For over 30 years, he has represented publicly-traded and privately-owned companies in all aspects of employment and labor law including discrimination, retaliation, harassment, wrongful discharge, and wage and hour matters. He has extensive experience litigating cases involving the misappropriation of trade secrets and violations of non-compete and non-solicitation agreements under state and federal law. David also has a broad range of experience counselling employers and drafting employment related agreements. David is certified by the Ohio State Bar Association as a specialist in Labor and Employment Law. Best Lawyers in America© has recognized him in the areas of labor and employment litigation as well as management-side employment law. He is a recognized practitioner in labor and employment law in Ohio by Chambers USA and has been named a "Super Lawyer" since 2012.

Julia Ross practices out of Z&R's Cleveland office. She represents public and private sector employers in all aspects of labor and employment law. Julia graduated from the University of Rochester in 2016 and received her Juris Doctor from Case Western Reserve University School of Law in 2019. As a law student, Julia was an Executive Notes Editor for Health Matrix: Journal of Law-Medicine, was the President of the Jewish Law Students Association, and worked in the public, private, and health-care law sectors with a focus on employment law. Julia was also the Noah Webster Law Scholar and the Eudese and Elmer Paull Prize Winner.

Jantzen Mace practices out of Z&R's Columbus office. His practice encompasses all aspects of labor and employment law. Jantzen graduated from Miami University (OH) in 2012 and received his Juris Doctor from the Ohio State University Moritz College of Law in 2019. As a law student, Jantzen earned a Certificate in Alternative Dispute Resolution through his completion of additional classes and work experience in Arbitration, Negotiation, and Mediation.

Please join Z&R in congratulating its attorneys for the following achievements:

CONGRATULATIONS

Ohio Super Lawyers Top 100 List and Cleveland Top 50 List | 2020
Andrew Zashin

Super Lawyers List | 2020
George Crisci, Jon Dileno, Deanna DiPetta, Jonathan Downes, Michele Jakubs, Drew Piersall, David Posner, Christopher Reynolds, Jonathan Rich, Patrick Watts, Jeffrey Wedel, Andrew Zashin, Stephen Zashin

Rising Stars List | 2020
Amy Keating, David Vance, Kyleigh Weinfurtner