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RISA L. LIEBERWITZ
CORNELL UNIVERSITY, SCHOOL OF INDUSTRIAL AND LABOR RELATIONS

DEVELOPMENTS IN LABOR AND EMPLOYMENT LAW IN THE UNITED STATES

I - United States Supreme Court

The appointments of three Supreme Court justices under the Trump Administration has moved the Court far to the political right. This was reflected in the Court's 6-3 decision in *Cedar Point Nursery v. Hassid*[1], striking down a California state regulation that authorized union organizers to enter agricultural employers' private property for up to three hours a day during non-working time, 120 days per year, to talk with the employees about working conditions and unionization. The Court held that the state law violated the « takings clause » of the Fifth Amendment of the US Constitution, which allows the government to appropriate private property for a public use if the government pays just compensation to the private owner. The majority concluded that the state law's grant of access to the union organizers gave them a « right to invade » the agricultural employers' property, which constituted an uncompensated « physical taking » by the state government.

The three dissenting justices criticized the implausible use of the « takings clause » in this decision. The state regulation did not appropriate private property. Rather, it was a governmental regulation of the employer's « right to exclude » union organizers from access to its property for the purpose of talking with employees about their rights to unionize.

Most private sector employees are covered by the National Labor Relations Act (NLRA)[2], the federal law that establishes their rights to unionize, collectively bargain, and engage in other concerted activity to improve their working conditions. California could adopt the state regulation considered in *Cedar Point Nursery* because agricultural employees are excluded from coverage under the NLRA. In two earlier decisions, the US Supreme Court interpreted the NLRA to allow private employers to bar access to their property by union organizers, unless the organizers had no alternative means to reach the employees away from the workplace, or unless the employer discriminated against unions in its property access policies[3].

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1 141 S.Ct. 2063 (2021).

2 29 U.S.C. Sec. 151, et seq.

3 *Lechmere, Inc. v. NLRB*, 502 U. S. 527 (1992); NLRB v. Babcock & Wilcox Co., 351 U. S. 105 (1956).

This judicial interpretation of the NLRA has been criticized for the imbalance of power it gives to employers to create obstacles to employees' rights to unionize. Yet, the conservative Court in *Cedar Point Nursery* chose not to apply even this restrictive approach to interpret the scope of the California state regulation, opting instead to strike it down completely under a strained interpretation of the Fifth Amendment's takings clause.

In a decision concerning student athletes, the US Supreme Court held that the National Collegiate Athletic Association (NCAA) and its member institutions violated federal anti-trust law by restricting education-related compensation, such as graduate student scholarships, that colleges and universities may offer the student-athletes who play for their teams[4]. However, the Supreme Court did not address the NCAA's rules limiting undergraduate athletic scholarships and other compensation related to athletic performance. Given the commercial benefit that colleges and universities receive from inter-collegiate sports competition, the NCAA's assertions that their rules protect amateurism in college sports have worn thin[5].

It seems likely that pressure will build on NCAA to change its rules to allow colleges and universities to offer other forms of compensation to student athletes. The labor-related implications of such changes include the potential for student athletes to assert their rights to unionize as employees under the NLRA or state public employment statutes[6].

II - National Labor Relations Board

As of August 28, 2021, three of the five-members on the National Labor Relations Board are Democratic appointments. The two new members, appointed by President Biden and confirmed by the Senate, are former labor union attorneys. Additionally, Biden appointed and the Senate confirmed a new General Counsel of the NLRB, who has issued a memorandum identifying issues that she is prioritizing in cases that may come before the current Board[7]. These issues include recent decisions by the Trump-era Board restricting employee rights under the NLRA and overruling earlier Board precedents. Among the recent Board decisions that the General Counsel seeks to change are two cases restricting the scope of employees covered by the NLRA.

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4 *NCAA v. Alston*, 141 S.Ct. 2141 (2021).

5 See A. Liptak and A. Binder, « Supreme Court Backs Payments to Student Athletes in N.C.A.A. Case », *New York Times*, Aug. 6, 2021.

6 D. Wolken, « Opinion : Allowing College Athletes to Unionize Could be the Answer to the NCAA's Problems », *USA Today*, May 27, 2021: https://www.usatoday.com/story/sports/columnist/dan-wolken/2021/05/27/allowing-college-athletes-unionize-could-help-solve-ncaa-problems/7476234002/

7 J. A. Abruzzo, General Counsel, *Mandatory Submissions to Advice*, Memorandum GC 21-04 (Aug. 12, 2021): https://www.nlrb.gov/es/guidance/memos-research/general-counsel-memos

In *Supershuttle DFW, Inc.*[8], *the Board made it easier for employers to classify workers as independent contractors excluded from the definition of employees under the NLRA.*

In Bethany College[9], the Board adopted a legal test that will exempt virtually all religiously-affiliated colleges or universities from jurisdiction of the NLRB. As a consequence of this decision, even faculty teaching secular subjects in religiously-affiliated colleges or universities will have no rights to unionize under the NLRA.

Other precedents of interest to the General Counsel include decisions from the Trump-era Board restricting employees' rights to communicate with each other and with unions about workplace issues, including their rights to organize.

In *Caesars Entertainment d/b/a/ Rio All-Suites Hotel and Casino*[10], *the Board held that employers may prohibit employees from using employer-owned information-technology, including employer-owned email, for non-work-related communications.*

In *The Boeing Co.*[11], the Board adopted a standard that expands the power of employers to adopt rules, policies and employee handbook provisions that limit the ability of employees to express themselves at work or on social networks, including employer rules requiring them to respect « basic standards of civility ». These issues relate, as well, to defining the scope of protected concerted activity, which was narrowed by Trump-era Board decisions[12.]

Other issues that the General Counsel may ask the current Board to revisit concern Trump-era Board decisions placing excessive weight on employer private property interests to the detriment of employee rights under the NLRA.

These cases include *UPMC*[13], where the Board held that an employer may bar union representatives from access to public areas of the workplace, such as a hospital cafeteria where the organizers might have lunch with hospital employees and discuss unionization.

In *Bexar County Performing Arts Center Foundation*[14], the Board held that a private business owner may refuse access to its private property by off-duty employees of a contractor business if the contractor's employees do not work regularly and exclusively on the property and if those off-duty employees have a reasonable alternative means to communicate their message.

8 367 NLRB no. 75 (2019).
9 369 NLRB no. 98 (2020).
10 368 NLRB no. 143 (2019).
11 365 NLRB no. 154 (2017).
12 See, e.g., Altstate Maintenance, LLC, 367 NLRB no. 68 (2019).
13 368 NLRB 2 (2019).
14 2019 NLRB LEXIS 468 (2019).

III - COVID-related Issues at the Workplace

One pandemic-related workplace legal issue receiving attention is whether employers may require employees to be vaccinated for Covid-19. Given the way in which vaccinations have become politicized in the US, this is an issue of great interest. The federal Equal Employment Opportunity Commission (EEOC) has issued a guidance stating that employers may require employees to be vaccinated, although employers must also comply with anti-discrimination laws that obligate employers to provide accommodations to employees who are not vaccinated due to a disability or based on a « sincerely held religious belief »[15].

In such cases, wearing a mask or working remotely are examples of possible accommodations. Rather than requiring vaccinations, some employers have adopted incentive programs, such as paid time off to get a vaccination or a bonus for being vaccinated, although such programs must also comply with federal anti-discrimination law[16].

In a unionized workplace, employers have a duty to bargain with the union over an employer proposal to make vaccinations a condition of employment, as well as a duty to bargain over the effects of such a requirement[17].

15 EEOC, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws

16 *Ibid*.

17 P. Brown and A. Volberding, « Labor Law, Union Implications for Employer-Mandated Covid Vaccines, *Bloomberg Law News*, Jan. 21, 2021.

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DE DROIT COMPARÉ
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Manuscripts submitted for publication in the **Comparative Law Review of Labour and Social Security** [Revue de Droit Comparé du Travail et de la Sécurité Sociale] should be sent by e-mail or by post before **February, the 1st** of each year (for the Studies, the Comparative Social Jurisprudence and the International Social Jurisprudence) and before **June, the 1st** of each year for the Thematic Chapter. About the contributions to the International Legal News, they must be sent before **February, the 1st** (for the first issue) and before **September, the 1st** (for the third issue).

The opinions expressed in the articles are the sole responsibility of the authors. When translation is carried out in French, it is under the responsibility of the Chief Editor and members of the Editorial Board.

Every manuscript is submitted, without mentioning the name of the author, to two readers for evaluation and publication notice.

A subsequent publication in another journal would require authorization express of the Direction of the Review.

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The article must be submitted preferably in French. English or Spanish are also admitted.

Texts should include:

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• **25 000 characters** - including footnotes and spaces - for topics «**Comparative Social Jurisprudence**» and «International Social Jurisprudence» regardless of the language of submission of the article;

• **15 000 characters** - footnotes and spaces included - for the rubric «**International Legal News**» when submitted in French. The limitation is set at **12 000 characters** when submitted in English or Spanish.

In addition, all manuscripts must be accompanied by the following elements:

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• the institution of attachment, the title, and the postal and electronic address of the author;
• the title of the article.

Manuscripts for the «**Studies**», «**Thematic Chapter**» and «**International Social Jurisprudence**» should also include:

• a summary, in French and in English (**400 characters** each);

• two publications to choose from.

Notes and bibliographical references

The annotations and bibliographic references of the works and articles cited must be integrated within the article and placed in footnotes.

Their presentation will be as follows:

• For books: initial of the First Name, Name, Title of the book, place, publisher, «collection», date, p.

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IALLJ CALL FOR PAPERS ~ 2022 MARCO BIAGI AWARD

To stimulate scholarly activity and broaden academic interest in comparative labour and employment law, the International Association of Labour Law Journals announces a **Call for Papers** for the 2022 Marco Biagi Award. The award is named in honor of the late Marco Biagi, a distinguished labour lawyer, victim of terrorism because of his commitment to civil rights, and one of the founders of the Association. The Call is addressed to doctoral students, advanced professional students, and academic researchers in the early stage of their careers (that is, with no more than three years of post-doctoral or teaching experience).

1. The Call requests papers concerning comparative and/or international labour or employment law and employment relations, broadly conceived. Research of an empirical nature within the Call's purview is most welcome.

2. Submissions will be evaluated by an academic jury to be appointed by the Association. Submitted papers should include an abstract.

3. The paper chosen as the winner of the award will be assured publication in a member journal, subject to any revisions requested by that journal.

4. Papers may be submitted preferably in English, but papers in French, or Spanish will also be accepted. The maximum length is 12,500 words, including footnotes and appendices. Longer papers will not be considered.

5. The author or authors of the paper chosen as the winner of the award will be invited to present the work at the Association's 2021 meeting which is to be announced soon on the website of the Association. Efforts are being undertaken to provide an honarium and travel expenses for the presentation of the paper. Until that effort bears fruit, however, the Association hopes that home institutional funds would be available to support the researcher's presentation.

6. The deadline for submission is 1 March 2021 (final date of submission). Submissions [and a short bio of the author] should be sent electronically in Microsoft Word both to Lavoro e diritto at lavoroediritto@unife.it and to Frank Hendrickx, the President of the Association, at frank.hendrickx@kuleuven.be and his secretariat: iar@kuleuven.be.

Prior Recipients of the Marco Biagi Award

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2019 **Giovanni Gaudio** (Bocconi University, Milan, Italy), «Dapting labour law to complex organisational settings of the enterprise. Why re-thinking the concept of employer is not enough».

2018 **Matteo Avogaro** (University of Milan, Italy), «New perspectives for worker organization in a changing techonological and social environment».

2017 **Nicolas Buenos** (University of Zurich, Switzerland, Insitute of Law), «From the right to work to the freedom from work».

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ABREVIATIONS LIST

(PUBLISHERS, JOURNALS, BOOKS)

AuR = Arbeit und Recht (Germany)
AJLL = Australian Journal of Labour Law (Australia)
AJP/PJA = Aktuelle juristische Praxis - Pratique juridique Actuelle (Suisse)
BCLR = Bulletin of Comparative Labour Relations (Belgium)
CLELJ = Canadian Labour & Employment Law Journal (Canada)
CLLPJ = Comparative Labor Law & Policy Journal (United States)
DRL = Derecho de las Relaciones Laborales (Spain)
DLM = Diritti Lavori Mercati (Italy)
E&E = Employees & Employers: Labour Law & Social Security Review (Slovenia)
EuZA =Europäische Zeitschrift für Arbeitsrecht (Germany)
ELLJ = European Labour Law Journal (Belgium)
DLRI = Giornale di Diritto del Lavoro e delle Relazioni Industriali (Italy)
ILJ = Industrial Law Journal (UK)
IJCLLIR = Giornale di Diritto del Lavoro e delle Relazioni Industriali (Italy)
ILR = International Labour Review (ILO)
JLR = Japan Labor Review (Japan)
JCP = Juris-Classeur Périodique (France)
LD = Lavoro e Diritto (Italy)
OIT = Revue internationale de travail
PMJK = Pécsi Munkajogi Közlemények (Pecs Labour Law Journal) (Hungary)
RL = Relaciones Laborales (Spain)
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PREVIOUS ISSUE 2021/3

Thematic Chapter

National labour law and social security systems through the lens of the Covid health crisis. Adaptations or fundamental changes?

Coordinated by Loïc Lerouge

With the contributions of:

Peter Andersson & Tonia A. Novitz (Sweden, United Kingdom), Valérie Flohimont (Belgium), Elizabeth Bluff & Richard Johnstone (Australia), Gabrielle Golding (Australia), Caroline Murphy & Lorraine Ryan (Ireland), Edoardo Ales (Italy), Vagelis Koumarianos (Greece), Lucie Lamarche (Canada), Claire Marzo (United Kingdom), Silvia Fernández Martínez (Spain).

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