During 2015, Baltimore reached agreement on its local contract but local bargaining continued in the Ports of Charleston and Mobile. USMX began discussions with the ILA to try to extend the 2012-2018 USMX-ILA Master Contract for a substantial period of time to alleviate the concerns of the shipping public after the prolonged 2014 West Coast longshore negotiations. The rising cost of medical care was a key component in the USMX-ILA contract-extension discussions, which were ongoing at year-end.

The 2014 labor difficulties on the West Coast led to a chorus of cries from the shipping public for a new approach to collective bargaining and to abandon the "hardnosed bargaining" employed by the parties that had imposed burdens and costs on the agricultural and retail industries, in particular, and on the general economy of the United States as well. The outcry from the shipping public was loud and clear and called for the federal government to enact measures to ensure that such a protracted period of labor unrest does not occur again. Several bills were introduced in the House and in the Senate in 2015, but they were met with pushback by labor.

One measure that did survive and that was signed into law in December 2015 provides for a port-performance-statistics program to quantify port-capacity and port-performance measures in the top 25 ports in the nation annually by tonnage, containers, and dry bulk. The legislation created a working group consisting of federal agency personnel and industry stakeholders that was to be in place in early 2016. This working group has one year to provide recommendations on measuring port performance and to devise a methodology to collect data.

MASTER CONTRACT ISSUES

USMX v. ILA Local 333 (Baltimore Strike/Enforcement Arbitration)

On July 1, 2014, USMX commenced a joint action with the Steamship Trade Association of Baltimore in the federal district court in Maryland to confirm the $3.9 million Arbitration Award issued on January 24, 2014 by Arbitrator M. David Vaughn and to obtain a judgment against ILA Local 333 for the full amount of the Award.

After Baltimore reached agreement on its local contract in March 2015, USMX agreed to stay execution on the Arbitration Award as long as Baltimore did not violate the no-strike clause in the Master Contract through September 30, 2018. Several dissident ILA Local 333 members then filed suit to invalidate the local-contract-ratification vote.

That civil action was dismissed in October 2015 and was before the Court of Appeals for the Fourth Circuit at year-end. The district-court action to confirm the $3.9 million Arbitration Award was stayed during 2015, pending a decision by the court of appeals on the local-contract-ratification vote.

Chassis: Port of New York and New Jersey (PONY/NJ)

During 2015, USMX continued its efforts to develop a portwide chassis pool that will provide for the seamless interchange of chassis among users and also ensure the preservation of work for those employees covered by the local PONY/NJ collective bargaining agreements.

Port of Mobile

Local negotiations between one employer and the ILA longshore and clerical locals in the Port of Mobile continued throughout 2015. The April 2015 arbitration to recover the damages inflicted by the July 2014 one-day work stoppage in Mobile was adjourned without date pending the conclusion of local-contract negotiations.

USMX-ILA Technology Committee

During 2015, the USMX-ILA Technology Committee received requests from several ports to review the elements of their new technology plans in order to determine the impact of this new technology on the ILA workforce. Proposed technology enhancements covered gate operations, container movement, container handling, and container-tracking systems, and the monitoring of damaged containers by a remote-satellite system that will notify shoreside operations of the need for repairs in advance of a vessel's arrival in port.

Master Contract Administration and Enforcement

Throughout 2015, Counsel represented USMX and its members in the following matters related to the administration and enforcement of the Master Contract:

- Preparation of pleadings on two separate occasions to enjoin anticipated work stoppages in Bayonne, New Jersey;
- Participation in an arbitration that resolved manning issues related to the safety pads for truckers at landside RMG receipt-and-delivery zones in Bayonne, New Jersey;
- Representation of USMX Members in Local Industry Grievance Committee hearings in Philadelphia, Baltimore, Houston, Hampton Roads, and New Orleans; ▶

- Representation of USMX and several maintenance-and-repair vendors in the South Atlantic before the National Labor Relations Board; and
- Representation of USMX and its members at meetings with the ILA to discuss and to review issues related to the USMX-ILA South Atlantic Maintenance & Repair Contract.

FEDERAL JUDICIAL, LEGISLATIVE, AND REGULATORY ACTIVITY

SUPREME COURT OF THE UNITED STATES

Retiree Health Benefits Are Not Vested

In its January 2015 decision in *M&G Polymers USA, LLC v. Tackett*, the Supreme Court of the United States resolved a decades-old split among the circuit courts of appeals and held by a 9-0 vote that absent explicit contractual language in a collective-bargaining agreement, retiree health benefits do not "vest."

Federal-Agency Interpretive Rules Are Not Subject to Notice-and-Comment Rulemaking

In another unanimous decision in March 2015, the Supreme Court of the United States overturned almost 20 years of precedent in *Perez v. Mortgage Bankers Association* and held that a governmental agency's interpretation of its own regulation is not subject to the notice-and-comment process set forth in the *Administrative Procedure Act*.

Accommodations for Pregnant Employees

In March 2015, by a 6-3 vote in *Young v. United Parcel Service, Inc*. the Supreme Court held that a pregnant worker can establish a *prima facie* case of employment discrimination under the federal *Pregnancy Discrimination Act* by establishing that her employer did not provide a work accommodation to her but did provide work accommodations to non-pregnant disabled employees with work limitations who are "similarly situated" in their inability to work. This decision represents a significant transition in the law because it renders pregnancy a disability, whereas previously employers were prohibited from treating pregnancy as a disability to be accommodated.

EEOC's Conciliation Efforts Are Subject to Judicial Review

In its April 2015 unanimous decision in *Mach Mining, LLC v. Equal Employment Opportunity Commission*, the Supreme Court held that Title VII of the Civil Rights Act of 1964 permits limited judicial review of the efforts by the Equal Employment Opportunity Commission (EEOC) to satisfy its statutory duty to conciliate before filing a lawsuit against an employer. The Court also held that when the EEOC fails to conciliate, the appropriate remedy is not dismissal of the lawsuit but an order requiring the EEOC to conciliate before going forward.

Religious Accommodations for Employees and Prospective Employees

In June 2015, by an 8-1 vote the Supreme Court held in *Equal Employment Opportunity Commission v. Abercrombie & Fitch Stores, Inc*. that a job applicant alleging religious discrimination need not show that the employer had actual knowledge of the applicant's need for accommodation of a religious practice (that is, the wearing of a headscarf by a female Muslim) but only that the need for a religious accommodation was a motivating factor in the employer's decision. In the absence of a legitimate safety concern, an employer may not prohibit the wearing of a headscarf, especially since the Court found that federal discrimination law gives religious practices favored treatment.

CIRCUIT COURTS OF APPEAL

Effective Accommodations for Disabilities

In *Noll v. International Business Machines Corp*. the plaintiff had alleged that his employer had not reasonably accommodated his hearing disability because it failed to provide captions or transcripts with the audio and video files stored on its intranet. In May 2015, the Court of Appeals for the Second Circuit affirmed the decision of the district court and rejected plaintiff's argument that the American Sign Language interpreters were not as effective as captioning because in determining whether a reasonable accommodation was made, the law requires only an effective accommodation, not the one that is preferred by the employee and not the one that is most effective for each employee.

Expansion of FMLA Interpretation

In its June 2015 decision in *Hansler v. Lehigh Valley Hosp. Network*, the Court of Appeals for the Third Circuit reversed the district court and held that an employer's obligation upon receipt of insufficient medical certification is to advise the employee in writing of the certification's deficiencies and to allow the employee at least seven days to remedy the filing before denying the leave. The employer's failure to do so violated the Family and Medical Leave Act. ▶

Facebook Criticism of an Employer and Profanity May Be "Protected Activity"

In its October 2015 decision in *Three D, LLC v. NLRB*, the Court of Appeals for the Second Circuit affirmed the National Labor Relations Board's finding that a sports bar violated the National Labor Relations Act (Act) when it terminated two employees for commenting on and "liking" a Facebook post that was critical of the bar's owners and contained profanity. The Facebook post concerned an ongoing dispute over income-tax withholding from the employees' paychecks and the employees' potential tax liability.

The Board and the Second Circuit found the comments and the criticism of the employer on social media to be "protected concerted activity" under the Act because they dealt with terms and conditions of employment, namely, the employer's tax-withholding policy. Both terminated employees were reinstated with back pay. The Second Circuit's decision is unpublished, thereby depriving it of precedential value. Nevertheless, employers should be cautious when deciding whether to take action against employees for their social media postings, even when obscenities are involved.

FEDERAL LEGISLATION

Surface Transportation Reauthorization and Reform Act of 2015 [Fixing America's Surface Transportation (FAST) Act]

The FAST Act is a five-year surface transportation re-authorization of federal-highway, transit, highway-safety, motor-carrier-safety, hazardous-materials, and passenger-rail programs. The bill provides for a port-performance statistics-program to quantify port-capacity and port-performance measures in the top 25 ports in the nation annually by tonnage, containers, and dry bulk.

The legislation creates a working group consisting of federal agency personnel and certain industry stakeholders that is to be in place within 60 days of enactment. This working group has one year to provide recommendations on measuring port performance and to devise a methodology to collect data. The bill was signed into law at year-end.

PENSION BENEFIT GUARANTY CORPORATION (PBGC)

In March 2015, the PBGC issued a report, *PBGC's Multiemployer Guarantee*, which found that more than half of the workers and retirees in terminated multiemployer pension plans will face a reduction in their pension benefits under the current PBGC guarantees, if their plans run out of money. The study examined how the PBGC's guarantee limits will impact the pension income of workers and retirees in multiemployer plans that will receive financial assistance from the PBGC.

It has been projected that the PBGC will exhaust its reserves within the next ten years, despite the enactment of the *Multiemployer Pension Reform Act of 2014*, which provides additional methods for financially-troubled multiemployer plans to avoid running out of money.

The PBGC released its *Annual Report* in the fall of 2015, showing that it paid $5.7 billion to more than 800,000 people in failed pension plans, similar to the amount of payments that it made in FY 2014. The PBGC's multiemployer-insurance program reported a deficit of $52.3 billion, compared with $42.4 billion last fiscal year-end. The larger deficit is due to changes in the PBGC's interest factors that increased multiemployer-program liabilities. The interest factors are used to measure the value of future benefit payments.

The increased deficit was also the result of the identification of 17 additional multiemployer plans that are newly-terminated or are projected to run out of money within the next 10 years. In FY 2015, the PBGC paid $103 million in financial assistance to 57 multiemployer pension plans, covering the benefits of 54,000 retirees (compared to $97 million in FY 2014).

NATIONAL LABOR RELATIONS BOARD (NLRB)

Revised Arbitration Deferral Standard

In February 2015, the NLRB issued a report that provides guidance to NLRB Regional Offices regarding the amount of deference the NLRB should afford arbitrations and grievance settlements, when resolving unfair labor practice (ULP) charges under sections 8(a)(1) (interference with an employee's right to engage in protected activity, such as self-organization, joining a union, or bargaining collectively through a chosen representative) and 8(a)(3) (discrimination against an employee for a union affiliation) of the *National Labor Relations Act*. The memorandum can be found at www.nlrb.gov/reports-guidance/general-counsel-memos. The memorandum was issued in response to a 2014 NLRB decision that created a new standard for deferring to arbitration awards. Under the new standard the Board will defer to the arbitration process and an arbitration decision only when:

- The parties explicitly authorized the arbitrator to decide the ULP charge at issue; ▶

- The arbitrator was presented with and considered the ULP charge; and
- NLRB law "reasonably permits" the arbitration award.

The new standard modifies not only post-arbitration deferral practices but also pre-arbitration deferral procedures and reviews of settlements resulting from the grievance-and-arbitration process. The Board will no longer defer ULP charges to the arbitration process, unless the parties have explicitly authorized the arbitrator to decide the statutory issue underlying the ULP charge either in the relevant collective-bargaining agreement or by specific agreement in a particular case. The Board will also review pre-arbitration settlement agreements to ensure that the parties intended to settle the ULP issue, that the parties addressed the statutory issue in the settlement agreement, and that Board law reasonably permits the settlement method.

Employers Cannot Restrict Employee Discussions Regarding Investigations

In June 2015, the NLRB held in *Banner Health Systems d/b/a Banner Estrella Medical Center* that employees have a right under Section 7 of the *National Labor Relations Act* to discuss at work workplace investigations into alleged employee misconduct (in this instance, insubordination) involving themselves or their co-workers, unless the employer can demonstrate that it has a legitimate and substantial business justification for the restriction that outweighs the employees' Section 7 rights to discuss matters that may affect the terms and conditions of their employment.

Witness Statements Are No Longer Confidential

In June 2015, the NLRB reversed its longstanding rule of 37 years in *American Baptist Homes of the West d/b/a Piedmont Gardens* and held that witness statements obtained during company investigations will no longer be treated as confidential and exempt from production to union representatives processing employee grievances, unless the employer can establish that its legitimate and substantial interest in confidentiality outweighs the union representative's need for the information. The new standard will be applied prospectively.

Definition of "Joint Employer" is Broadened

In August 2015, the NLRB significantly expanded the definition of a "joint employer" in *Browning-Ferris Industries of California, Inc.* to include employers who have minimal or only indirect control through an intermediary over the working conditions of employees or who merely reserve the right to exercise such control. Under this revised standard two or more entities could be found to be joint employers of a single work force, if they share or co-determine those matters governing the essential terms and conditions of the employees' employment, such as hiring, firing, discipline, supervision, direction of work or hours, and wages.

In September 2015, legislation was introduced in both the House and the Senate to overrule the NLRB's joint-employer decision that would hold a company liable for labor-law violations committed by a contractor. The *Protecting Local Business Opportunity Act* provides that two or more employers may be considered joint employers only if each both shares and exercises actual, direct, and immediate control over the essential terms and conditions of employment. Hearings on the bills were later held by the House and Senate. The legislation was pending at year-end.

Employer Cannot Terminate Dues Checkoff Upon Contract Expiration

In August 2015, the NLRB overturned 53 years of precedent in *Lincoln Lutheran of Racine* and held that an employer's obligation to check off union dues continues after the expiration of a collective-bargaining agreement that establishes such an arrangement. The decision will be applied prospectively.

PORT SECURITY/TRANSPORTATION WORKER IDENTIFICATION CREDENTIAL (TWIC)

Cyber-Related Security

During 2015, the United States Coast Guard sought public comments from the maritime industry and other interested parties on how to identify and to mitigate potential vulnerabilities of cyber-dependent systems, so as to avoid a "Transportation Security Incident," which is defined as "a security incident resulting in a significant loss of life, environmental damage, transportation system disruption, or economic disruption in a particular area." Comments were due by April 15, 2015.

Enrollment

At year-end there were 3.639 million TWIC enrollments with 2.139 million active TWIC cards in use. Effective July 1, 2015, TWIC applicants who were born in the United States and who claim United States citizenship must provide specific documents to prove their citizenship. Enrollment centers are now issuing TWIC cards that contain several changes, which are intended to assist personnel in identifying authentic, unaltered credentials. The security features of the card remain unchanged, such as holograms and color-shifting ink. ▶

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION (OSHA)

Occupational-Injury-and-Illness-Recording-and-Reporting Requirements

Effective January 1, 2015, all employers subject to federal OSHA jurisdiction, even those that are exempt from maintaining injury-and-illness records (*e.g.*, any employer with ten or fewer employees or certain low-hazard industries), must report to OSHA

- within eight hours all work-related fatalities, if the fatality occurs within 30 days of the incident, and
- within 24 hours all work-related, in-patient hospitalizations (including those due to a heart attack, if the heart attack is work-related), amputations, and losses of an eye, if the reportable event occurs within 24 hours of the incident.

Previously, employers were only required to report to OSHA within eight hours any work-related incident that resulted in an employee's death or the in-patient hospitalization of three or more employees.

Increased Eye-and-Face Protection

In March 2015, OSHA published a Notice of Proposed Rulemaking in the *Federal Register* to update its marine-terminal and longshoring eye-and-face-protection standards by incorporating the most recent version of the standards issued by the American National Standards Institute (ANSI or "national consensus standard"). Comments were due by April 13, 2015.

New Guidance on Restroom Access for Transgender Employees

In June 2015, OSHA issued a memorandum entitled, *BestPractices: A Guide to Restroom Access for Transgender Workers*. The core principle of the memorandum is that all employees, including transgender employees, should have access to restrooms that correspond to their gender identity. A person who identifies as a male should be permitted to use a men's restroom; a person who identifies as a female should be permitted to use a women's restroom. The employee should determine the most appropriate and safest option. Additional options for employers to consider include:

- Single-occupancy, gender-neutral (unisex) facilities; and
- Use of multiple-occupant, gender-neutral restroom facilities with lockable, single-occupant stalls.

Employees should not be asked to provide any medical or legal documentation of their gender identity in order to have access to gender-appropriate facilities. In addition, no employee should be required to use a segregated facility apart from other employees because of their gender identity or transgender status.

Increase in OSHA Penalties

The new, two-year budget signed into law in late 2015 requires OSHA to raise its citation penalties for the first time in 25 years. The new rates go into effect on August 1, 2016, and are as follows:

- Other than serious violations: $ 12,471
- Serious violations: $ 12,471
- Willful violations: $124,709
- Repeat violations: $124,709

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (EEOC)

Updated Pregnancy Discrimination Guidance

In June 2015, the EEOC issued an update of its July 2014 *Enforcement Guidance on Pregnancy Discrimination and Related Issues* to reflect the March 2015 decision by the Supreme Court of the *United States in Young v. United Parcel Service, Inc*. The *Young* case is described earlier in this report.

The updated guidance incorporates the Court's holding that women may be able to prove unlawful pregnancy discrimination, if their employer accommodated some workers but refused to accommodate pregnant women. The Court further held that an employer's policy that is not intended to discriminate on the basis of pregnancy may still violate the *Pregnancy Discrimination Act*, if the policy imposes significant burdens on pregnant employees without a sufficiently-strong justification.

"Sex" Encompasses Sexual Orientation Under Title VII of the Civil Rights Act of 1964

In July 2015, the EEOC issued a decision that overturns 50 years of consistent application of Title VII, the federal statute that prohibits employment discrimination. In *Complainant v. Foxx*, the EEOC found that current Title VII law prohibits sexual-orientation-based discrimination, despite the fact that Title VII does not explicitly include sexual orientation as a protected class. "Sex" is a protected class under the statute, and

the EEOC reasoned that sexual orientation is inherently a sex-based consideration. The EEOC concluded that an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII.

This decision marks the first time that the EEOC has formally declared that sexual-orientation discrimination violates Title VII. The decision may have limited effect, however. Since the case involved an appeal from a federal-agency decision (that is, the Federal Aviation Administration) to the EEOC, it is not binding on any federal court. ▲

ABOUT THE LAMBOS FIRM, LLP

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