A Timely Analysis of Legal Developments

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The NLRB has announced multiple new initiatives, including enhanced enforcement efforts, increased penalties on employers, and changes to notice requirements, all of which appear likely to encourage increased union organizing.

NLRB Continues March Toward Administrative Implementation of Processes to Assist Union Organizing

By Jay Sumner

It is an open secret that as part of the Obama Administration's regulatory enforcement enhancement efforts, the National Labor Relations Board (NLRB) intends to ease perceived impediments to union organizing. This was also the underlying goal of the Employee Free Choice Act (EFCA), which met its demise during legislative debate. With a series of recent moves, the NLRB seeks to achieve through administrative means at least some of what EFCA was intended to accomplish.

Recent General Counsel memoranda announcing enhanced enforcement efforts and greater penalties for violations of the National Labor Relations Act (the Act), implement, in principle, some of the "enhanced penalties" provisions of EFCA. The NLRB's exploration of electronic voting and shortening of the campaigning period in a union election emulate some of the purposes of the "card check" provisions of EFCA. A recently proposed rule regarding mandatory posting of a notice of employees' right to organize, combined with the creation of a new unfair labor practice charge for the failure to post, seems consistent with the goal of stimulating organizing activity. Finally, the Department of Labor's Office of Labor Management Standards' anticipated proposed rule narrowing the advice exemption to persuader reporting is expected to impede an employer's ability either to educate employees on the facts about unionization or to express lawfully the employer's opinions on unionization. If such proposed rules are adopted, an increase in successful union organizing is likely.

Enhanced Penalties

The Acting General Counsel of the NLRB recently issued two memoranda giving regional offices direction on actions to take when violations of the Act are alleged during union organizing campaigns. The first memorandum (No.10-07) announced a plan to seek Section 10(j) injunctive relief from U.S. District Courts for all discriminatory discharges during organizing campaigns. The companion memorandum (No. 11-01) directs the regional offices to pursue Section 10(j) injunctive relief from U.S. District Courts for a variety of other violations of NLRA Section 8(a)(1), including non-discharge unfair labor practices. Historically, 10(j) injunctive relief has rarely been pursued for

either discharge-related unfair labor practice charges or for less significant unfair labor practice charges. The two memoranda, therefore, represent a significant shift in NLRB policy.

Below are specific examples of violations that, if alleged during an organizing campaign, could result in situations where regional offices vigorously pursue Section 10(j) injunctive relief on the basis of the General Counsel's Memoranda:

Traditional Hallmark Violations

- **Threats of Plant Closure**
- **Promise or Grant of Benefits**

Other Violations

- **Employer's Solicitation of Grievances:** The NLRB will focus in particular on instances where employee grievances were previously unsolicited or ignored.
- **Interrogation**
- **Surveillance or the Impression Thereof**
- **Interference with Employees' Ability to Communicate Between Themselves and with a Union:** The NLRB will focus on actions by an employer that limit discussion among employees about unionization, including overbroad company rules that may limit discussion even if the rules are not currently enforced. Stated differently, the NLRB is seeking to eliminate overbroad rules contained in handbooks and codes of conduct even if those rules have not been used to discipline employees.
- **Any of the Foregoing Conduct that Involves High-Ranking Officials and/or the Swiftness of an Employer's Response to an Organizing Campaign Relative to the Timing of the Filing of a Petition or Request for Recognition.**

The strategy of seeking injunctive relief is significant to employers. Having a federal district court order, as the result of a 10(j) injunction, reinstatement of a discharged employee or order the rescission of company rules before the merits of the underlying allegations have been fully litigated can put the employer at a serious disadvantage in an organizing campaign. Such a result could also undermine the employer's credibility during a campaign. At a minimum, unions now have a meaningful incentive to file more charges during the organizing process.

Remedies that Will Now Be Pursued More Often

In its most recent memoranda, the General Counsel also has instructed the regional offices to seek, in complaints they issue, the remedies described below.

- **Notice Reading:** Instead of simply posting manually or electronically a notice if the employer is found to have violated the Act, regional offices are now authorized to seek an actual reading of the notice to employees. If ordered, a management official, possibly the one who committed the offense, would be required to either read or be present while an NLRB official reads the notice to gathered employees. The General Counsel suggests this reading should be directed at the largest number of employees practical.
- **Union Access:** In cases where there has been some kind of "adverse impact" on employee and union communication, the General Counsel suggests a remedy that provides the union with direct access to the employees (also a separate and long-sought goal of organized labor). Types of access remedies include:
  - Access to employer bulletin boards;
  - Provision to the union of employees' names and addresses prior to the filing of a petition or the submission of an Excelsior list.
- **Other Access:** In cases where it is deemed appropriate due to a "severe" impact on union/employee communication, the General Counsel has instructed the regional offices to seek permission for additional access remedies including:

- Providing the union with access to non-work areas during non-work time;
- Providing the union with equal time to address employees;
- Allowing the union to address employees prior to the election regarding certain matters.

Even more significant is the fact that the General Counsel has directed the regional offices to seek these remedies through 10(j) injunctions. Thus, employers may be faced with the prospect of having to engage in notice reading and granting union access **before** having an opportunity to defend themselves in a full trial.

What Are Employers to Do?

Employers must be prepared for increased litigation during any union organizing effort and to anticipate that persuasive activity that was once permissible during an organizing campaign may now be challenged by unions through the filing of unfair labor practice charges and/or objections. Therefore, employers must assess the campaign tactics they use and the risk that certain tactics could lead to injunctive efforts. Employers also should conduct enhanced training to limit unintentional violations of the Act and review key policies (non-solicitation, non-distribution, confidentiality, non-disparagement, and open door policies) for technical compliance. Finally, employers should realize that the keys to union avoidance are not anti-union behaviors but long-term focus on smart and effective management, including employee empowerment, fair handling of employee issues, competitive pay and benefits, and creating effective leadership skills among even lower-level managers. These types of strategies will keep employees from seeking union assistance in the first place, without creating inadvertent violations of law.

Forthcoming Changes to Persuader Rules and the "Advice" Exception

Recently, Littler issued an ASAP regarding the anticipated changes to the rules on reporting of persuader activity and the so-called "advice" exemption. In light of the NLRB's heightened enforcement activity during organizing campaigns, the need for legal advice during an organizing campaign is more imperative than ever. Depending on the scope of the persuader rule changes eventually implemented, however, access to outside legal counsel could become more limited during an organizing campaign. The end result, in combination with increased enforcement activities by the NLRB, could be that some employers will decide that the exercise of their free speech rights during an organizing campaign is simply not worth the legal exposure. Cynics might contend that such a result is the unspoken purpose of the regulations.

New Proposed Rule Regarding Notice to Employees of Organizing Rights

To complete the picture, employers should take note of Proposed Rules by the NLRB that seek to require employers to post a Notice of Employee Rights under the Act identical to that required to be posted by federal government contractors covered by the Act. The issues raised by this proposed notice were covered in detail in Litter's ASAP about the rule covering federal contractors. The main problem with the Notice of Employee Rights is not that it lists employee rights, but that it provides what many consider to be a skewed explanation of those rights along with pro-organizing examples. In addition, the NLRB has proposed that failure to post the notice would be an unfair labor practice; that a failure to post the notice could be used as evidence of discrimination; and that failure to post would result in tolling the 6-month statute of limitations period for violations of the NLRA. Whether or not the NLRB has the authority to require employers to post the notice, and to use the failure to post to inflict additional penalties on employers, is an open question that is sure to be litigated.

Under the rule-making process, outside organizations have the right to offer comments to the NLRB about its proposed rules. Employers are invited to submit any comments or concerns about the NLRB's proposed rules to their Littler attorney or Jay Sumner. Littler will submit those comments and concerns to the U.S. Chamber of Commerce for consideration as part of the comments the Chamber intends to provide during the rulemaking process.

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