NLRB Enhancement of Union Organizing: How Employers Should Respond Now

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What’s Most Important at the NLRB Today?

Current Members of Board:
Mark Pearce – Chair – Dem
Brian Hayes – Rep
Richard Griffin – Recess – Dem
Sharon Block – Recess – Dem
Terrence Flynn – Recess – Rep

▪ Was the Senate in recess or not?
▪ If not, are all actions of this Board invalid for absence of a quorum under New Process Steel?
What’s Most Important at the NLRB Today?

Notice of Union Organizing Rights

- New rule covering most private employers enjoined on April 17, 2012 by D.C. Circuit unless and until D.C. U.S District Court decision of March 2 (Judge Berman) is affirmed (Fall court of appeals decision likely)
- S.C. U.S. District Court (Judge Norton) held on April 13 that NLRB exceeded it’s authority under Administrative Procedure Act. NLRB appealing to 4th Circuit.
- On April 17, NLRB announced its regional offices will not implement the rule until the court of appeals rules
- Rule would require Employers to post notice of union organizing rights, actions by employer that would illegally interfere with such rights ("TIPS" and discharges, etc.), and message that employees should contact NLRB to protect their rights
- 11 by 17 inch notice required in conspicuous locations
- Under D.C.D.Ct. decision, knowing and willful noncompliance may constitute evidence of unlawful motive in an unfair labor practice case in which motive is an issue
- Issue could end up in the U.S. Supreme Court
What’s Most Important at the NLRB Today?

NLRB Website on Non-Union Employees’ Concerted Activity

- Announced on March 23, 2012
- Will roll out by mid-April, 2012
- NLRB’s effort to educate 93% of private industry that is non-union
What’s Most Important at the NLRB Today?

NLRB Website on Non-Union Employees’ Concerted Activity

- Designed to educate non-union employees about their legal rights to engage in “protected concerted activity” – i.e., to communicate with one another and band together to present issues to their employer concerning their wages, benefits and working conditions
- Will give employees examples of how they might band together at the work-site or through email, Facebook or other social media sites
What’s Most Important at the NLRB Today?

Specialty Healthcare Case, 356 NLRB No. 83 (issued 8/26/11)

• Certified nursing assistants at nursing home permitted to vote without inclusion of other nonprofessional employees, even though larger group shared community of interest with union’s hand-picked voting unit.

• For larger unit to control, employer must show “an overwhelming community of interest” of larger unit with employees in union’s proposed unit.
What’s Most Important at the NLRB Today?

- Ruling effectively allows ad hoc gerrymandering of voting unit by union in every union election.
- May poker dealers vote without blackjack dealers, check out clerks without sales clerks, city drivers without road drivers, night shift without day shift? Etc. Probably. On 1/06/12, in *DTG Operations*, NLRB ruled 31 Thrifty car rental service agents at Denver’s airport could vote without the 78 other bus drivers, mechanics, vehicle shuttlers and staff assistants working with them there.
- Union wins toehold with rights to bargain and uses as base for further organization within facility.
- Will take a test of certification by an employer for this issue to be addressed by a U.S. Court of Appeals.
What’s Most Important at the NLRB Today?

Plan to Ease Way for Unions

Labor Board Proposes Speeding Up Organizing Votes; Employers, GOP Cry Foul

By Melanie Trotman
And Kris Maher

The National Labor Relations Board Tuesday proposed the most sweeping changes to the federal rules governing union organizing elections since 1947, giving a boost to unions that have long called for the agency to give employers less time to fight representation votes.

The NLRB’s proposals would likely compress the time between a formal call for a vote by workers on whether to join a union, and the election itself. It is the latest in a series of actions by the board and other agencies controlled by Obama administration appointees that respond to labor leaders’ calls for more union-friendly federal labor policies.

The rules governing organizing are the focus of a power struggle between unions and employers after decades of declining union membership. Only 6.9% of private sector workers belonged to unions in 2010, and just 11.9% of all U.S. workers, according to the Labor Department. In 1983, unions represented 20.1% of all workers.

“This is another not-so-cleverly disguised effort to restrict the ability of employers to express their views during an election campaign,” said Randy Johnson, the U.S. Chamber of Commerce’s senior vice president of labor, immigration and employee benefits.

Some companies say cutting the lead time before an election would make it harder for them to build a case for opposing a union, because union campaigns often begin months earlier without an employer’s knowledge.

Unions failed during the years when Democrats had control of Congress to win passage of a remake of union organizing rules. Please turn to page A4

The Organized
Percentage of employed workers who are in a union

Source: Labor Dept.
Rulemaking on Representation Elections:

- Final rule effective on April 30, 2012.
- Republican action in Congress unlikely to derail the new rule
- Will U.S. District Court for District of Columbia enjoin?
- Balloting could occur 15 to 30 days after a petition is filed
- **Acting General Counsel and Deputy have labeled this “one of its highest priorities” and promised guidance and training to regional offices to ensure the rule works as anticipated already on May 1, 2012**
- Chairman has announced plan to finalize the original rule that would have resulted in balloting within 10 to 20 days after a petition is filed
- How the federal court rules in the current U.S. Chamber/Coalition for A Democratic Workplace lawsuit will impact NLRB’s plans to finalize the original rule to further reduce employer campaign to 10 to 20 days
Why Does the Quick Election Rule Matter?

- Pre-election hearing held in 7 to 14 days
- No post hearing briefs; rapid Regional Director decision and direction of election
- Employer provides “Excelsior List” of voters within 7 days of direction
- Union may waive right to have Excelsior List for 10 days prior to vote
- No right of pre-election appeal to Board; rather, challenged ballots will be impounded at time of election, etc.
- Election occurs within 15 to 30 days of filing of petition
Why Does the Quick Election Rule Matter?

- Dissenting NLRB Member Hayes wrote: “Make no mistake, the principal purpose for this radical manipulation of our election process is to minimize, or rather, to effectively eviscerate an employer’s legitimate opportunity to express its views about collective bargaining.”

- The U.S. Chamber of Commerce said: “This new rule has no conceivable purpose but to make it easier for unions to win elections.”
Why Does the Quick Election Rule Matter?

Today messages are reinforced over 5 or 6 weeks in various mediums:

- Paid “captive” meetings
- Progressive postings and/or emails
- Progressive letters to the home
- Relaxed one on one communications
- Time for employees to question and absorb messages
- Builds good will
- Hard to do this in 15 to 30 days
Why Does The Quick Election Rule Matter?

- If employer rushes actions, messages and meetings without full deliberation and planning with an attorney—flagrant legal violations may occur, and a **bargaining order** (based on U.S. Supreme Court precedent in *Gissel* case) may result, **even if union loses**
Off Site Elections

- 2 Sisters Food Group
- Controversial NLRB Decision Giving Greater Weight to Union Preference When Deciding Where an Election is Conducted
  - Undermines presumption of workplace election
  - Tremendous discretion given to NLRB Regional Director
Voting in the Workplace

Current Practice
Utilize employer premises absent Employer objection

Rationale:
1. Maximize employee participation
2. Ease of conducting election
3. Control Cost of Election
Factors for Off-Site Elections

- Union Objection/Employer Preference
- Extent of Prior Unfair Labor Practices and/or Objectionable Conduct
- Advantage to Employer (if held at workplace) or Union if off-site
- Evaluation of Alternative Voting Locales
Historical Perspective

- The Board’s Casehandling Manual (Section 11302.2) dictates that an election should be held “on an employer’s premises.”
- This is not an absolute mandate, as Regional Director’s have had the authority to mandate mail ballot elections.
- The Casehandling Manual recognized that elections might be conducted off premises where there have been egregious or historical unfair labor practices committed by the employer.
In light of the 2 Sisters ruling, a union request is now a factor, arguably a decisive factor, in where an election is held.

The Regional Director still must get input from the employer.
The second factor mandated by the Board in determining whether to conduct an off-site election is prior Employer unlawful conduct.

Coincidentally, the Board majority NEVER mentions unlawful or objectionable conduct by a union.

Election day misconduct seems to carry significant weight for this factor.
Advantages Available to Employer

- The third 2 Sisters factor is by far the most troubling and controversial – if the Employer chooses to actively campaign against union organizing, they presumptively have an advantage if the election is conducted on premises it owns or controls.

- Board Member Becker’s partial dissent would have gone farther, banning all mandatory employer meetings with employees.
Alternative Sites

- The final requirement is assessment for the appropriateness of any suggested alternative site.
- The Board’s most common “alternate” site is a rented vehicle parked at a nearby location.
- Nowhere in the decision is a directive to consider the impact on voter turnout.
Bottom Line

- Unions are likely going to seek to take full advantage of this new discretion granted to Regional Directors.

- Off-site elections greatly favor the unions because
  - Any employer activity at an off-site locale will be challenged as unlawful surveillance.
  - Union representative will blanket the off site location because there is no restriction on their participation outside the polling area.
  - Union supporters will go to great lengths to vote and with suppressed voter turnout this could prove to be a decisive advantage.
Bottom Line

- Faster Elections
- Off-site elections
- Notice Posting of Rights
- Changes to appropriate bargaining units

Employer’s Beware!!!
Implications of NLRB Social Media Decisions/Guidance for Union Organizing

- SOCIAL MEDIA: WHAT IS IT?
- Twitter
- Facebook
- LinkedIn
- MySpace
- Google +
- Blog (web log)
Rights of Employees

§ 7. [§157.] Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [section 158(a)(3) of this title].
Who is Covered?

- Section 7 rights apply to both union and non-union employees.
- Non-union employers could be met with unfair labor practice charges in Social Media cases and have no idea what hit them.
“PROTECTED”

To be protected, posts must be about employees’ terms and conditions of employment.

Most common: wages/benefits
treatment by supervisors
work assignments
discipline of employees
Protection or Griping?

- **“CONCERTED”**
- Social media communication must normally involve 2 or more employees
- **NOT** “griping” or solely for the benefit of one individual
- **COULD** be a posting by 1 individual – may be posting a group complaint if previously discussed with other employees
- The Board has found calling supervisors “liar and a bitch,” “an egotistical f__k” and a “f__king son of a bitch” protected!
HISPANICS UNITED OF BUFFALO (03-CA-027827)

Complaints by employee about other employee job performance; others criticized her for her complaints she posted.

Employer terminated those critical of the employee posts as “bullying” and “harassment.”

ALJ: Criticism was “protected, concerted activity.” Employees don’t lose protection of the Act by engaging in misconduct during the course of their protected activity (made during non-work hours on personal computers).
Cases

- Knauz BMW
- Sales employee at a BMW dealership posts criticism of management for a sales event with hot dogs and bottled water.
- Same employee shows a photo from a mishap at a next door dealership where a 13 year old boy had driven a car into a canal. The next door dealership was owned by the same group.
- An Administrative Law Judge ruled that the postings about the hot dogs were protected, by the photo from next store was neither concerted, nor protected and was not related to conditions of employment.
Cases

- G4S USA
- Security company had a policy that prohibited employees from commenting on work related legal matters without first obtaining permission from the legal department. The policy had a disclaimer that nothing was intended to restrict employee Section 7 rights.
- An administrative law judge found that there was no express interference with Section 7 rights. However, the court found that employees would reasonably construe the policy as constraining comments on working conditions.
- Case indicates a very activist NLRB policy at evaluating these policies.
What’s Next for Employers

- Will “place of discussion” affect NLRB analysis?
- Does it matter if employees post while at work v. non-work time?
- Does it matter if using company v. private computer?
- Scrutinizing work rules.
Best Practices to Counter Union Social Media Tactics

- Daily Monitoring and Response if Needed
  - Union Web Page
  - Union Twitter Handles
  - Union Facebook Page (Public Page)
  - Union Blogs (if not password protected)
  - Employee Forums
Best Practices to Counter Union Social Media Tactics

- Do Not Monitor
  - Password Protected Interactive Sites
  - Facebooks of Employees (Even if “friended” by hourly employee, coercive effect and other legal issues—best practice for management not to “friend” hourly employees)
  - Study Analogous Section 8(a)(1) violations
    - See Sprain Brook Nursing, 351 NLRB 1190 (2007) (employer violated NLRA when administrator observed employees engaged in union meeting in employers parking lot)
    - See Loudon Steel, 340 NLRB 207 (2003) (employer violated NLRA when supervisor approached vehicles that were being hand billed by union on employer property)
Best Practices to Counter Union Social Media Tactics

- *US Coachworks*, 334 NLRB 955 (2001) (creating impression of surveillance violates section 8(a)(1) and test is whether employee would “reasonably assume” from employer’s action that his/her “union activities had been placed under surveillance”)

  - Don’t use any site to Question/Interrogate Employees
Best Pre-Petition Practices to Prevent Unionization

Question:
- What is the cornerstone of non union status?

Answer:
- Business success that is shared with every employee incrementally over time, and fairness

To Elaborate:
- Every employee wants to know - what’s in it for me and my family?
- Employees must feel they have a stake in the company’s success and understand their roles
- Must trust their roles will be recognized and rewarded
- Simple fairness and respect - from senior management to local supervisors - is also critical
1. **Create Employee-Oriented Vision: Communicate Consistently**

   a) Reasons that nonunion status is best way for your company to become most successful company at satisfying shareholders and customers through customer service and cost control,

   b) Why companies that are most successful in satisfying customers and controlling costs are able, over time, to have best jobs, wages, benefits, job security and job satisfaction, and

   c) How your company is delivering on this vision of success for the company and for each individual employee, year after year

   Do you agree?
2. Communicate Importance Of Employees’ Stake In Customer Service and Cost Control

- Do not underestimate importance of employees’ appreciation of their stake in successful business and what must be done to achieve success
- Do you agree?
3. Hold Semiannual Senior Management Meetings With All Employees At Every Location Concerning Progress Towards Vision And Business Success:
   • Report to employees and answer questions about specific business progress of company, business problems that must be addressed for success, and improvements for employees – tie discussion to company vision and focus areas
   • If needed, from time to time, address positives of nonunion status, disadvantages of unionization, and meaning of signing union authorization cards
   • During one meeting a year, show detail on incremental wage and benefit improvements year after year due to success
   • Does this make sense for your company?
Best Pre-Petition Practices to Prevent Unionization

4. **Train/Retrain All Supervisors Now Concerning Union Organizing And Best Supervisory Practices To Prevent Employee Interest In Unions**

   - Why employees join unions
   - Company’s position on unions- why company doesn’t want a union
   - Election process and union organizing tactics
   - Signs of union organizing and card signing
   - How to communicate about unions
   - Management actions prohibited by labor laws
   - TIPS and more -- no-solicitation, no-distribution, and no-trespassing rules
   - Importance of fairness and completely consistent enforcement of company policies and rules
   - Positive Employee Relations Practices—Four Steps to Building “Family Spirit”: Building employee identification with company; Recognition of employees, Communications with employees, and Careful management of local working conditions

**Consult With Counsel Concerning This Training**
5. Prepare Materials And Train Dedicated Management Communicators Now For Times Of Union Organizing Activity

- In advance, prepare legally defensible PowerPoints for employee meetings, management response team training materials, mailings to home/postings, “Did You Know?” emails, and company handouts for management’s dedicated communicators to use in pre-petition campaigns and in 15 to 30-day election campaigns

- Train/role play with dedicated communicators selected by management to travel to imperiled facilities on short notice and “live there” to communicate in pre-petition campaigns and election campaigns the meaning of signing union authorization card (if petition for representation not yet filed), positive progress of company toward employee-oriented vision and business objectives, and disadvantages of unionization

- Counsel can prepare these materials for you now if you want

- Set up all materials on password protected internet site for easy access by campaign team

Consult With Counsel on All of These Tasks
6. Union Vulnerability Assessments

- Select and train ombudspersons among current managers to interview all employees individually at each location at least once a year;
- Ombudspersons should file written reports and recommend action items to senior management concerning: local employee morale and relations with management; and safety, equipment and facility conditions;
- COO/Senior Management should approve actions and hold field management accountable during monthly one-hour conference call with top field management;
- Avoid turning process into illegal witch hunt and violating NLRA;
- Mini-assessment with field management only can be made part of supervisor training discussed previously—such training and mini-assessment can be completed in 4 or 5 hours at local facility.
7. Benchmark Wages And Benefits/Compare to Union Carriers

- Prepare to Address:
  - Union Wage/Benefit differentials
  - Would Union wage and benefit programs make your company uncompetitive?
8. Require HR And/Or Legal Review And Advice On Every Final Warning/Suspension/Discharge Decision

- Builds employee morale and prevents interest in union organizing
- Standard list of questions for the local manager to answer each time
- When local manager does homework in advance, counseling goes smoothly and quickly
- Pays Enormous dividends – wards off corporate campaign

Counsel Can Help Even A Small Company To Devise A Simple Review Process
9. Establish Peer Review Boards For Approval Of Suspension/Discharge/Seniority Date Decisions

- Not a union grievance process – will not cause employers to start to “think union.”
- Will cause employees to think company is taking every step to manage their livelihoods fairly and will build trust that union is not necessary.
- Pays enormous dividends in the fairness and trust department – wards off corporate campaign.

Very Simple, Effective Processes Can Be Designed For You By Counsel
10. Establish Open Doors To Management At All Levels For Suggestions And Rapid Resolution Of Complaints

- Most non-union companies claim to have "open door" policy, but not all take all of these steps:
  - Open doors at all levels, including your own
  - Ok to suggest discussions with immediate supervisor first, but do not mandate that this must occur in every case
  - Ok to skip levels or bring to top
  - Ensure response within pre-established number of days
  - Make sure process works as advertised
  - Do you agree?
11. Maximize Communication Mediums

- Research on communication shows repetition of communication is helpful to process – say the same thing in more than one medium
- Letters, emails, magazines, newsletters, newspapers all help management to reinforce key messages
- Local Mgmt deliver key Senior Mgmt messages and report Q&A up chain
- Use also for employee recognition and teambuilding: stories about employees, pictures of families and outings, employee milestones (birthdays, years of service, children’s graduation, photos, etc.)
- Help build “family spirit”
- Do you agree?
12. Employees Handbooks And/Or Written Policies At A Minimum, Cover Following:

- Spell out preference for union-free operations
- Procedures to ensure diversity in the workplace
- Fair and progressive discipline
- Management of absenteeism
- Promotions/transfers
- Seniority (if desired)
- Solicitation/Distribution on company property
Best Pre-Petition Practices to Prevent Unionization

13. Orientation Meetings For All New Employees
   • For hourly employees
   • For new management
   • Discuss reasons union is not in the long term interests of company or employees
   • No exceptions to orientation process

Consult Counsel In Preparation
THANK YOU

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