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LABOR LAW

NLRB General Counsel clamps down on union organizing strategies

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With the percentage of unionized workplaces at an all-time low, pure necessity has compelled unions to modernize their approach to organizing American workplaces. Especially in liberal communities where employers can be tagged with the political and economic stigma of being "antiunion," the modern union playbook gives union organizers many ideas for gaining an advantage in organizing workers.

Often through proxies, such as elected officials, unions pressure employers to make commitments that will provide passive or active assistance to organizing drives. These commitments can include remaining neutral about the union campaign, circumventing the NLRB's secret-ballot election process through a "card check" arrangement, giving the union preferential access to worksites, disclosing employees' personal contact information so union representatives can most readily reach out to potential recruits, and more.

All those commitments go beyond what the National Labor Relations Act (NLRA) requires employers to do. Under existing NLRB law, those sorts of commitments haven't ordinarily been viewed as contributing unlawful support or assistance to unions. But in a September 5, 2020, guidance memorandum that is binding on NLRB regional offices nationwide, the Board's General Counsel established a new clear-cut test. Now employers can't give unions more than "ministerial" assistance in their organizing campaigns—a high standard that parallels the "strict neutrality" employers must maintain when workers or another union petitions to decertify the exclusive representative.

Conflicting standards replaced by uniform rule

Employee free choice—the right to engage in as well as refrain from concerted activity—constitutes the NLRA's bedrock principle. Employers violate the Act if they go over the line in supporting unions that are seeking to organize workers, and unions that receive such support similarly violate the NLRA.

The line to be drawn in instances of union organizing efforts should logically be the same as the line that applies when employees or another union seeks to *decertify* the incumbent union. As pointed out by the General Counsel, however, the NLRB's lines in these parallel situations have historically been dissimilar. When employers have supported unions in their unionization efforts, the NLRB has applied an amorphous "totality of circumstances" standard that has given employers and unions broad leeway. But the Board has held employers to a much higher standard—"more than ministerial support"—if they engaged in any significant effort during a decertification process to tilt the balance against the incumbent union. That suggests an imbalance that favors unions over employee free choice.

In the General Counsel's view, the "totality of circumstances test" for assessing how much support an employer can lend a union's organizing campaign is not only tilted but also amorphous and imprecise, leading to "different conclusions despite indistinguishable facts." These contrasting rules, for example, can allow

an employer to give unions access to company property to *organize* workers. In the decertification context, however, the ministerial aid limitation forbids employers from letting antiunion employees solicit signatures on work time—a completely opposite result. In the General Counsel's view, applying the "ministerial aid" test to both situations provides uniformity and balance consistent with protecting employee free choice.

Prerecognition organizing

Until now, employers and unions usually have been free to enter into "neutrality agreements," the content of which highly varies depending on union strength, employer willingness, and even the actions of local governments, which may require or give preference to neutrality agreements in their contracting practices with employers.

Neutrality agreements can require employers to:

- Remain mute about whether they support the union;
- Give employees' contact information to the union;
- Allow union solicitation during working time;
- Post a notice advising employees of the neutrality agreement, which could include a now-unlawful statement (or implication) of support; and
- Include a "card check," whereby the employer agrees to grant recognition to the union if it proves majority status through presentation of proof that it represents a majority of employees.

Last year, in a case filed by the National Right to Work Committee against United Here! Local 8, the NLRB General Counsel signaled an effort to reset the law on this point. The guidance memorandum solidifies that resolve. Indeed, under the guidance memorandum, any of the above accommodations of union organizing efforts may be scrutinized even if no formal neutrality agreement exists.

Prerecognition agreements

Under the guidance memorandum, employers and union can't negotiate agreements on wages, hours, or working conditions before a union is recognized. That's true even if the agreement hasn't been signed. Establishing a premature collective bargaining relationship is based on "self-interested union-employer agreements," which can "preempt employee choice and input as to their representation and desired terms and conditions of employment." Indeed, even agreeing before lawful recognition on subjects that are outside the scope of bargaining may give the union "a deceptive cloak of authority with which to persuasively elicit additional employee support."

For example, prerecognition negotiations over wages—and even an agreement to "consider" wage rates of unionized competitors—are unlawfully coercive. Even an employer's agreement on the scope of the bargaining unit—a common occurrence—is impermissible because such an action would oust the NLRB's authority to determine appropriate bargaining units and give the union a cloak of authority that interferes with employee free choice. And any agreement that would require either party to ask the NLRB to discuss any competing union's petition for representation is completely out of bounds.

Bottom line

The General Counsel's test is hostile to the basic interests of unions. It supports the concept of employee free choice in deciding whether to unionize. Yet—coincidentally or not—it also increases the prospect that employers can remain union-free, presumably a goal of the Trump administration.

This isn't NLRB law yet—it's General Counsel policy. But it has immediate national impact. It means the Board's regions will scrutinize allegations that a union either sought or received from the employer more than ministerial assistance to its organizing efforts.

We can predict that unions more than management will be on the receiving end of employees' unfair labor practice charges (ULPs). This also opens the door to employers filing ULPs against unions that threaten them with adverse consequences unless they accede to union demands.

A public-/private-sector contrast: Legislative efforts to amend the NLRA to replace secret-ballot elections with "card checks" in the private sector have been beaten back over time. Under the guidance memorandum, card checks appear to be illegal. But under all Public Employment Relations Board (PERB) statutes, card checks are legally *required*. Much of the memo would be anathema to PERB—a further showing of the power of public-sector unions in California and the pervasive impact campaign contributions have on labor policy.

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