

LABOR LAW UPDATES FOR NON-UNION EMPLOYERS

*ND GOVERNOR'S WORKFORCE & HR CONFERENCE
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AGENDA

- Overview of Positive Employee Relations Strategy
- C.P.R.
- Joint Employer & Temp Worker Rulings
- Union Organizing in 2016 – Quickie Elections in Practice
- NLRB Updates and Enforcement Strategies

WHAT DO EMPLOYEES THINK IS IMPORTANT IN THEIR JOBS?

- Job security
- Tactful discipline
- Help with resolving problems
- Good wages/benefits
- Opportunities for advancement
- Feeling “in” on things
- Interesting work
- Appreciation for doing job
- Loyalty to workers
- Good working conditions

WHAT DO EMPLOYEES THINK IS IMPORTANT IN THEIR JOBS?

Supervisor Ranking

1. Good wages/benefits
2. Job security
3. Opportunities for advancement
4. Good working conditions
5. Interesting work
6. Loyalty to workers
7. Tactful discipline
8. Appreciation for doing job
9. Help with resolving problems
10. Feeling “in” on things

Employee Ranking

1. Appreciation for doing job
2. Feeling “in” on things
3. Help with resolving problems
4. Job Security
5. Good wages/benefits
6. Interesting work
7. Opportunities for advancement
8. Loyalty to workers
9. Good working conditions
10. Tactful discipline

POSITIVE EMPLOYEE RELATIONS IN A NON-UNION SETTING

- Pro-Employee NOT Anti-Union
- Unions are NOT evil, but they are unnecessary

POSITIVE EMPLOYEE RELATIONS IN A NON-UNION SETTING

Run your business in a way that shows employees there is nothing a union can do that they, working together with the Leadership Team, cannot do better themselves.

Proactively educate the wage employees on the rules and realities of what it means to vote in a union.

UNION ORGANIZING RULES

The Law

- Notice from NLRB re: targeted group
- Petition supported by 30%
- Secret ballot election
- Results certified
- One year election bar
- Negotiations until agreement or impasse

UNION ORGANIZING REALITIES

The Real World

- Quiet, covert, focused
- Early warning signs
- Manager training
- Authorization card education
- Petition supported by at least 60%

UNION ORGANIZING REALITIES

- In last several decades it has not worked well for unions
- Steady decline in membership despite focused efforts and a lot of money
 - “My goal is to restore labor unions to their times of greatness . . . To bring unions back to the Center of American life.” John Sweeney, President AFL-CIO

UNION ORGANIZING REALITIES

- Efforts to Reverse Declines
 - Failure: EFCOA Legislation
 - Failure: “Right to Work” laws in historically union-friendly states (IN, MI, WI)
 - Success: Composition of the NLRB
 - Success: Activist NLRB decisions and rules

WHAT CAN YOU DO?

Maintain Positive Employee Relations Strategy ("CPR")

C – Communication

P – Participation

R – Recognition

WHAT CAN YOU DO?

Communication

- Perception is reality
- Ongoing, proactive
- Formal and informal
- Advance notice of change
- Respond to rumors

WHAT CAN YOU DO?

Participation

- Perception is reality
- Suggestion box
- Employee meetings
- Performance evaluations
- Exit interviews
- Be accessible

WHAT CAN YOU DO?

Recognition

- Perception is reality
- Formal and informal
- Performance evaluations
- Ongoing Feedback
- Sincere and credible

NLRB ACTIVISM OVER THE PAST 8 YEARS

- NLRB Rule Making
 - Quickie Elections
 - Disclosure of Employee Contact Information
 - Potential Electronic Voting
- NLRB Decisions
 - Use of Employer Email (*Purple Communications*)
 - Invalidating Common Handbook Rules (*2015 General Counsel Memo*)
 - Joint Employer Doctrine (*Browning Ferris/McDonalds*)
 - Temp Workers (*Miller & Anderson*)

JOINT EMPLOYERS

- *Browning-Ferris* (2015)
 - Creates *new* joint employer test, will apply generally but in this case directly applied to subcontractor/staffing agency relationships
 - No longer required to exercise direct and immediate control
 - Decision cannot be directly appealed (i.e. will be the NLRB law of the land for, likely, years)
 - Impact on *McDonald's* franchisor/franchisee fight?

JOINT EMPLOYERS

- *Browning-Ferris* Factors
 - The Board considered whether the employer reserved control over:
 - ◆ Scheduling and hours;
 - ◆ Work processes;
 - ◆ Training and safety;
 - ◆ How many workers;
 - ◆ What rules workers follow.

TEMP WORKERS

- *Miller & Anderson (2016)*
 - **Old Rule:** Both primary/ “user” employer & staffing supplier required to consent before an election covering bargaining units of both temp & regular employees can be held.
 - **New Rule:** Employers approval no longer required.

TEMP WORKERS

- These two decisions combined result in increased employer vulnerability:
 - Employer is potentially on the hook for staffing agency's unfair labor practices;
 - It is easier for unions to organize temp workers, creating increased possibility of joint-employer relationships with staffing agencies.
 - Unions can use CBAs including temps as proof of joint employer status.

TEMP WORKERS

- Potential Employer Advantage
 - Employers can add jointly employed workers to bargaining unit in an election if the employer thinks the votes will be against union representation.

PRE-“QUICKIE ELECTIONS”

- Under old rules, elections typically occurred 45-60 days after filing of petition;
- Allowed employers almost two months to educate employees on unionization facts
- Limited disclosures of employee information
- Robust hearing and appeal rights

UNDER "QUICKIE ELECTIONS" RULES

- Elections occur between 14-25 days after filing of petition
- Employers must provide voter's *personal* email addresses and telephone numbers (along with names and addresses)
- Limited ability to challenge issues at hearing

UNDER “QUICKIE ELECTIONS” RULES

- The hearing now must occur within 8 days of the filing of the petition
- Employer must file “statement of petition” (legal brief) 7 days after filing of petition or issues are forever waived
- No right to file post-hearing briefs
- Very limited appellate rights after hearing

“QUICKIE ELECTIONS” IN PRACTICE

- Extremely short-time frame
 - Average time from petition election under new rule: **24 days.**
 - Average under the old rule was 38 days.
- Detailed and cumbersome procedural requirements
- Difficult to pull together evidence for a hearing/brief in less than one week
- MOST IMPORTANTLY: Almost no time to inform employees as to the facts about unionization

“QUICKIE ELECTIONS” IN PRACTICE

- Need proactive approach
- Truth and knowledge are an employer’s best weapons
- Empower managers to know the truth about unions and share the truth about unions

THE TRUTH IS OUR WEAPON

- F.O.R.E.
 - Facts
 - Opinion
 - Rights
 - Experience

FACTS

- Brief history of organized labor
- Unions are a business (dues, fines, rules)
- Third parties. Can create “us” v. “them”
- How negotiations work
- Strikes

FACTS

- Impact on flexibility of managers
- Rules of organization drives
- Decertification

NLRB UPDATES AND ENFORCEMENT STRATEGIES

- NLRB Decisions/Strategies
 - Use of Employer Email (*Purple Communications*)
 - Joint Employer Doctrine (*Browning Ferris/McDonalds*)
 - Invalidating Common Handbook Rules (*numerous/2015 General Counsel Memo*)

ACCESS TO EMPLOYER EMAIL

- *Purple Communications* (late 2014)
 - "Employee use of email for [union] communications on nonworking time must presumptively be permitted by employers who have chosen to give employees access to their email systems."

ACCESS TO EMPLOYER EMAIL

- *Purple Communications, continued*
 - Are your policies lawful?
 - What are the exceptions?
 - What are legitimate rules?
 - Unlawful surveillance or lawful monitoring?

NLRB ASSAULT ON EMPLOYEE HANDBOOKS

- Confidentiality

- Employees have the right to discuss wages, hours, and other terms and conditions of employment with coworkers
- Employers have right to prohibit release of truly confidential information
- Avoid rules restricting release of “employee” or “personnel information”

NLRB ASSAULT ON EMPLOYEE HANDBOOKS

- Confidentiality
 - “Do not discuss customer or employee information outside of work, including phone numbers and addresses.”
 - “Never publish or disclose employer’s or another’s confidential or other proprietary information. Never publish or report on the conversations that are meant to be private or internal”
 - “Discuss work matters only with other employees who have a specific business reason to know or have access to such information... Do not discuss work matters in public places.”
 - “If something is not public information, you must not share it.”

NLRB ASSAULT ON EMPLOYEE HANDBOOKS

- Conduct Rules
 - Different standard applies with respect to conduct towards *managers, coworkers, and customers/third parties*
 - Generally, can be more restrictive of what employees say to each other and third parties.

NLRB ASSAULT ON EMPLOYEE HANDBOOKS

- Conduct Rules

- “Do not make fun of, denigrate, or defame your co-workers, customers, franchisees, suppliers, the Company, or our competitors.”
- “Be respectful of others and the Company”
- “Disrespectful conduct or insubordination, including but not limited to refusing to follow orders from a supervisor or a designated representative is prohibited”

- Conduct Rules

- “No rudeness or unprofessional behavior toward a customer or anyone in contact with the company”
- “Being insubordinate, threatening, intimidating, disrespectful or assaulting a manager/supervisor, coworker, customer, or vender will” result in discipline.

- Leaving Work

- “Failure to report to your scheduled shift for more than three consecutive days without prior authorization or walking off the job during a scheduled shift” is prohibited.

RECORDING IN THE WORKPLACE

- Policies banning recording must be linked to a legitimate employer justification:
 - Fulfilling HIPPA obligations;
 - Complying with state recording laws.
- Policies must also be narrowly tailored to address the employer's justification.

RECORDING IN THE WORKPLACE

- “Taking unauthorized pictures or video on company property” is prohibited.
- “The company completely bans the use or possession of personal electronic equipment on Employer property.”

EMPLOYEES' USE OF SOCIAL MEDIA

- Employers must use caution when disciplining employees arising out of their use of social media:
 - Electronic postings can be considered to be co-worker discussions.
 - Electronic postings can be deemed to be outgrowths of concerted activity.
 - Electronic postings can be deemed to be calls to action.

SOCIAL MEDIA CASES: NLRB FINDS VIOLATIONS

- *Hispanics United of Buffalo v. Ortiz*
 - Employee posted messages on her Facebook page, from her home, stating that another co-worker had been critical of her (and other employees') performance.
 - Other employees responded, defending themselves and criticizing working conditions.
 - Company terminated employees on grounds that postings constituted "bullying" and "harassment."
 - UNLAWFUL TERMINATIONS

SOCIAL MEDIA CASES: NLRB FINDS VIOLATION

- *NLRB v. American Medical Response*
 - Employee referred to her supervisor as a “dick” and “scum bag” on her Facebook page, her comments draw supportive responses from her coworkers.
 - Employer fires employee due to post.

SOCIAL MEDIA CASES: NLRB FINDS NO VIOLATION

- *JT's Porch Saloon and Eatery, Ltd.*
 - Employer discharges bartender after he engaged in a Facebook conversation with his step-sister complaining about the employer's tip-sharing policy, lack of a pay raise and "redneck customers."

SOCIAL MEDIA CASES: NLRB FINDS NO VIOLATION

- *Tasker Healthcare Group*
 - Employer terminated employee after private Facebook rant with a group of other employees (“They are full of s***, you know I don’t bite my tongue anymore, F*** . . . FIRE ME . . . Make my day”)
 - Held: message was not protected – it did not involve shared employee concerns over terms and conditions of employment.

PROHIBITION SAFE HARBORS ON SOCIAL MEDIA AND OTHER POLICIES

- Product and service disparagement
- Customer disparagement
- Malicious defamation
- Threats of violence
- Harassment
- Use of social media during work time

WHAT CAN YOU DO?

- Maintain positive employee relations strategy (CPR)
- Educate managers and Supervisors
- Conduct Workplace Audit
- Consider whether any subcontracting/staffing agency/franchise relationships could lead to “joint employer” finding
- Have a plan in place *before* election petition is filed
- Review handbook policies

QUESTIONS?

THANK YOU.

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