CLIENT ALERTS & INSIGHTS

NLRB and DOL Clamp Down on Anti-Union Activities, Expand Unfair Labor Practice Remedies, and Restrict Handbook Policies

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In recent weeks, both the National Labor Relations Board ("NLRB" or the "Board") and U.S. Department of Labor ("DOL") have signaled or put into effect several pro-union initiatives. Collectively, these moves will significantly restrict employers' ability to engage with their workforce regarding potential union representation, and will provide the NLRB an additional remedy to redress employers' violations of the National Labor Relations Act ("Act").

Restrictions on Captive Audience Meetings and "Persuader" Activities

In April 2022, the NLRB's General Counsel Jennifer Abruzzo announced the NLRB's intention to ban captive audience meetings, which have long served as a key tool in employers' arsenal to combat unionization efforts. Captive audience meetings, which are meetings held during working hours for which employees are paid, are an employer's only real opportunity to address its workforce regarding the impact that union organization would have and to express its views on the labor organization. The meetings already are not without restrictions: employers are prohibited from threatening, punishing, or promising benefits to employees at the meetings, and are likely to run afoul of the Act if they provide information at the meetings that is not based in truth.

Captive audience meetings have long been viewed as an essential tool to level the playing field between employers and unions in their ability to make their case to the workforce. The propriety of captive audience meetings has also been recognized since the passage of the Taft-Hartley Act in 1947, which contains a free speech proviso providing that an employer's expression of views, arguments, or opinions about a union does not constitute an unfair labor practice where such expression "contains no threat of reprisal or force or promise of benefit."

In spite of the plain language of the Act, the NLRB's campaign against captive audience meetings is unwavering, and several states have begun to follow the Board's cue by outlawing the meetings. To date, Connecticut, Maine, Minnesota, and Oregon have outlawed captive audience meetings. New York's legislature passed a similar law in June of this year, which awaits the Governor's signature.

In a similar vein, on July 27, the DOL released a final rule that modifies the LM-10 form that employers must submit when hiring consulting firms to discourage union organizing efforts. The revised LM-10 now requires employers to disclose whether they are a federal contractor or subcontractor. According to the DOL, the final rule is intended to promote transparency, as federal contractors are prohibited from using federal funds for "persuader" costs. The rule is also consistent with the current administration's stated objectives

of promoting union organization and increasing union membership nationwide. The practical impact of this modification is that, because consulting firms are not likely to know whether an employer is paying them with federal funds, it is likely to discourage contractors from exercising their free speech rights under their engagements with employers.

NLRB Expands Unfair Labor Practice Remedies

In another pro-union move, a unique remedy continues to gain traction in recent NLRB decisions: the institution of mandatory bargaining schedules. Until recently, this novel remedy was imposed by the Board only a handful of times since its introduction in a 2011 Board decision. The Board has recently signaled its preference for this new remedy, invoking it twice in 2021, twice in 2022, and twice in the last two months.

The Board's interest in developing new remedies to redress unfair labor practices is not limited to imposing mandatory bargaining schedules: in recent decisions, the Board has discussed and imposed a variety of other "extraordinary" remedies (see prior alert here) which arguably go beyond the Board's traditional authority to issue only "make-whole" relief.

NLRB Adopts New Standard Analyzing Legality of Employer Rules, Handbooks, and Policies

On August 2, 2023, the Board issued a decision in *Stericycle Inc.*, 372 NLRB No. 113 overruling the standard established in *Boeing Co.*, 365 NLRB No. 154 (2017) for analyzing the legality of employer rules, handbooks, and policies. The Board in *Boeing* (see prior alert here) adopted a balancing test that would consider two factors when evaluating a facially neutral policy, rule, or handbook: (1) the nature and extent of the potential impact on NLRA rights and (ii) the employer's legitimate justifications associated with the rule.

In Wednesday's split decision, the Board found that *Boeing* places too little weight on the burden a work rule may impose. "At the same time, *Boeing's* purported balancing test gives too much weight to employer interests. Crucially, *Boeing* also condones overbroad work rules by not requiring the party drafting the work rules-the employer-to narrowly tailor its rules to only promote its legitimate and substantial business interests while avoiding burdening employee rights."

The new *Stericycle* standard holds that the Board will assess whether General Counsel has established that a challenged work rule has a reasonable tendency to chill employees from exercising their Section 7 rights. The Board will interpret the work rule from the perspective of a "reasonable employee who is economically dependent on her employer and thus inclined to interpret an ambiguous rule to prohibit protected activity." In determining whether the rule is presumptively unlawful, the employer's intent in maintaining the rule is immaterial. If the employee could reasonably interpret the rule to restrict or prohibit Section 7 activity, General Counsel has satisfied the burden of demonstrating that it is presumptively unlawful.

However, once General Counsel has met this burden, an employer "may rebut the presumption by proving that the rule advances a legitimate and substantial business interest and that the employer is unable to advance that interest with a more narrowly tailored rule." If the employer proves its defense, then the work rule will be found lawful to maintain.

Key Takeaways for Employers

Each of these recent moves demonstrates the current administration's continued pro-union commitment, and employers should anticipate additional, similar moves under the current administration.

As a result of the growing restrictions on captive audience meetings, employers (and particularly multistate employers) should stay abreast of those developments in each of their states of operation to ensure that their anti-organizational activities do not run afoul of applicable state law. As the campaign against captive audience meetings continues to gain traction, employers should also be aware that a Board decision may ultimately reject captive audience meetings as unlawful, which would render the meetings unlawful nationwide unless and until such decision is overturned.

In the meantime, and even in states where captive audience meetings are no longer permitted, employers may lawfully be able to hold *voluntary* meetings with the workforce. This alternative reduces, but does not entirely eliminate, the risk that the meeting will be deemed coercive and in violation of applicable state law. Employers may also still hold one-on-one or small group meetings with factions of the workforce to assert their position on labor organization.

In light of the new modifications to the LM-10 form, employers who are federal contractors or subcontractors should deliberately earmark funds that they intend to use to engage consulting firms to confront union organizing activities. This prophylactic step will allow employers to affirm to their engaged consultants that the funds paid under the engagement are not derived from a federal source, mitigating any hesitation that a consultant may have towards speaking freely to the workforce under its agreement with the employer.

Employers faced with negotiating a new or successor collective bargaining agreement should be aware that simply coming to the bargaining table will likely not be enough to stave off the Board's arsenal of new remedies. A finding by the Board that the employer came to the table but refused to bargain in good faith is equally likely to result in the Board's imposition of new "extraordinary" remedies.

Finally, all employers should review their workplace rules and handbook policies to identify any provisions that could reasonably be read to infringe on employees' rights under the Act, including the right to organize. Employers should promptly retool any such policy to reduce or eliminate the risk that the policy runs afoul of the Act under the Board's new, more restrictive standard.

To learn how these developments can affect your business, contact a member of Benesch's Labor & Employment Practice Group.

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