

Personal View: Union rules force changes

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The National Labor Relations Board is set to make the final moves in a strategy seemingly designed to expand union representation in the private sector.

Under the Obama administration, the NLRB has systematically reinterpreted and expanded labor laws through a series of decisions and new rules.

This, in itself, is not necessarily surprising. Unlike courts, which tend to hew to the precedents of earlier cases in deciding outcomes, it's not uncommon for the NLRB to modify how labor rules should be applied after a new party takes office.

The news here is that, in this case, the five-member NLRB is putting its efforts to strengthen unions ahead of its mission to protect employee rights.

Section 7 of the National Labor Relations Act, which is the very heart of labor law in the United States, says that employees "shall have the right to self-organize, to form, join or assist labor organizations ... (and) the right to refrain from any or all of such activities." Section 7's entire focus is on employees, not unions or employers.

Yet, the NLRB is expected to implement new union elections rules within a few weeks that will dramatically limit an employee's ability to receive information before having to cast a vote for or against union representation.

Once in place, these new "quickie" election rules will, in most cases, require ballots to be cast within 14 to 21 days of a union filing a representation petition. The average time now is 38 days, a historic low. This shortened timeframe will make it virtually impossible for employers to effectively publicize information about the benefits of remaining union-free once an election petition is filed. Two to three weeks just isn't enough time for employers to communicate their message in a way that allows employees to thoroughly consider the issues involved.

More importantly, it will force employees to make decisions without being able to vet both sides of the argument.

In essence, the NLRB is saying the union is here to help - trust them.

The board also is considering whether to broaden the 30-year-old definition of "joint employer," which could fundamentally alter the way businesses utilize temporary employees through staffing agencies and expand through franchise agreements.

Traditionally, businesses have been considered joint employers when they actively share control over the terms and conditions of an employee's employment.

If that's the case, those businesses are on the hook for any unfair labor practices involving their shared employees.

Now, however, NLRB General Counsel Richard F. Griffin is urging the board to broaden the definition to cover businesses that indirectly or potentially control the terms and conditions of a staffing agency's or a franchisee's employees.

While it might appear slight, this change would mean that businesses could be held liable even though they had no involvement in the staffing agency's or franchise owner's employment decisions.

Griffin previewed his version of the joint employer definition last month in a case involving McDonald's USA LLC.

He claimed McDonald's USA and its franchisees were jointly liable for the firing or discipline of franchisee employees who participated in protests calling for higher wages, even though McDonald's USA said it has no control over how its 3,000 independent franchisees hire, fire, schedule or pay their employees.

The consequences of this new definition will be dramatic for the franchise industry and for businesses utilizing temporary employees. It also will have significant consequences for those who work in those industries.

The National Association of Manufacturers, National Restaurant Association and National Waste & Recycling Association have all warned that any joint employer definition that includes the indirect or potential control of a worker would compromise their members' ability to operate and "provide employment opportunities in a stable, predictable environment."

In other words, those businesses may be forced to find a model that doesn't subject them to liability.

That's not good news for the millions of people currently working for staffing agencies and franchisees.

Employers will need to assess how to deal with these new rules. With the new election rules, employers will need an ongoing union-free program and a rapid-response team that can be launched as soon as union organizational activity occurs.

Employers also will need to analyze how and when they engage leased employees to make sure they aren't unwittingly exposing the business to liability.

It is not an impossible task.

But at the very least, it will mean that employers will have to shift time and resources toward risk management and away from growing their business, which is not good for anyone, particularly the employees.

Rick Hepp is an associate in the Employment & Labor Group at Benesch Friedlander Coplan and Aronoff. Benesch is representing the National Association of Manufacturers, National Restaurant Association and National Waste & Recycling Association as amici curiae in a case titled Browning Ferris Inc. (Case No. 32 RC 109684), in which the NLRB is considering the parameters of the joint employer doctrine.