Changing times

How employers can address new NLRB rules that increase the chance of unionization

Interviewed by Sue Ostrowski

Under new National Labor Relations Board rules, your employees are finding it much easier to unionize. And with micro-units now permitted, even companies with fewer than 50 employees may find themselves dealing with more than half a dozen unions, says John Entenman, a member at Dykema Gossett PLLC.

"This is a tsunami coming at employers, and many are not prepared for the implications of the new rules," says Entenman. "The next few months could see an explosion of union organizing."

Smart Business spoke with Entenman about changes to NLRB rules and how employers can react proactively.

John Entenman
Member
Dykema Gossett PLLC

What new rules has the NLRB enacted?

Historically, the NLRB has only rarely engaged in rule making. But last fall, it decided two major rules would go into effect on April 30.

The first would have required employers covered by the National Labor Relations Act to post a notice, ostensibly designed to inform employees of their rights. It further said that failure to post would result in a per se unfair labor practice being committed by the employer, and that the six month statute of limitations on the amount of time in which a charge can be brought could not be used as an affirmative defense, resulting in open-ended liability for acts an employer may or may not have committed.

In a South Carolina lawsuit, a federal court said the NLRB did not have the authority to require posting. However, in a separate lawsuit, the federal district court in Washington, D.C., said the Board had the authority to issue the rule but not to declare the failure to post a per se unfair labor practice, nor to toll the statute of limitations.

However, on appeal the Board was enjoined from making employers post the notice until a final ruling is issued.

What other rules did the Board issue?

The second rule did go into effect on April 30 and allows for expedited union elections. It greatly shortens the time from when a union files a petition to the holding of a secret ballot election.

Previously, it was 30 to 40 days before a vote, giving employers time to communicate to employees why it hoped they would not vote for union representation.

Under the new rule, the period between filing a petition and holding a vote has been shortened to 10 to 15 days, meaning that employees will not get a meaningful opportunity to hear from their employer. In addition, matters that were appealable prior to the election are no longer appealable until after the election, so a secret ballot election could occur within 10 days.

We expect to see a significant uptick in the number of union petitions filed. Employers will be receiving documents from the NLRB, and by the time they meet with a lawyer and assess the situation, there's an election in five days, and they've got problems.

How will the new rule impact employers?

This will greatly increase unions' chances of winning elections from the current 50 percent to a union success rate of 80 to 90 percent. An employer may not even be aware its employees are interested in a union until it gets a petition, and then there's an election 10 days later. Many employers are going to blindsided.

How will the ability to form micro-units impact unionization?

Micro-units are a new phenomenon. In 2010, a union petitioned to represent a collective bargaining unit of poker dealers. The employer (a casino) said that was not appropriate because the result would be separate unions for each card game it offered. The NLRB decided, only 2-1, that a unit solely consisting of poker dealers was not an appropriate bargaining unit.

A year later, a union petitioned to represent only CNAs at a nursing home and the NLRB approved the petition. The nursing home objected, saying it didn't have many employees and couldn't deal with a multiplicity of unions, but the ruling held.

Finally, in a recent case at the Denver International Airport, a union wanted to represent just rental car agents at a car rental company. The NLRB ruled that was fine, that each job category could form its own separate union.

As a result, unions are poised to represent these micro-units. And most employers are not going to fare well if their work forces are composed of multiple unions all whipsawing each other. If one union goes on strike, and the others observe the picket line, the employer could be in real trouble.

What can employers do?

It starts with sitting down with a labor lawyer, who can help assess your situation and define what, if anything, you should be doing. If you haven't yet prepared for this new legal environment, you need to do so immediately.

Employers should also be educating their employees, explaining what unions may mean to the workplace. Tell them there are reasons to believe they may be approached by a union organizer and that you want them to know the good, the bad and the ugly about what is involved with union representation.

Tell them you are educating them so that if a union asks them to sign an authorization card, they will know something about this and will have heard the employer's side of things.

Employers may not want to raise the subject with employees, and that may work for some, but you take the chance of employees only hearing one side of the argument, that of the union. It's better to be proactive, because union organizing is expected to increase significantly the next few months. <<

JOHN ENTENMAN is a member at Dykema Gossett PLLC. Reach him at (313) 568-6914 or JEntenman@dykema.com.

Insights Legal Affairs is brought to you by Dykema Gossett, PLLC