Proskauer

NLRA for Non-Union Employers

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The NLRA And The Non-Union Employer: It's Time To Get In Gear

It is a common misconception held by many employers that the National Labor Relations Act — which, among other things, prohibits discrimination against employees based on union membership and governs the collective bargaining process between labor and management — does not apply in any way to nonunion employers and their employees. Make no mistake about it, the rights guaranteed in the NLRA apply to all private sector employers/employees, union and nonunion.

Although passage of the Employee Free Choice Act appears unlikely at this point, the expectation has been that a National Labor Relations Board filled-out with Obama Administration appointees will be decidedly pro-union/employee as the pendulum swings back after eight years of Republican rule, during which the Board issued numerous pro-employer decisions. As we recently reported to you, on March 22, 2010, President Obama made two recess appointments to the NLRB: Craig Becker and Mark Pearce. Both have represented unions throughout their long careers as labor lawyers, and Member Becker in particular had been subject to vigorous opposition by many industry groups for his record of having taken some rather extreme positions on labor-management relations in papers that he has authored.

These two appointments, which were made during the Easter recess without Senate approval and will continue until at least the end of 2011, result in three Democrats and one Republican on the Board, positioning the agency not only to reverse many of the decisions that were considered great victories to management, but also to adopt procedures, through a combination of rulemaking and adjudication, that could make it considerably easier for unions to organize and expand their ranks, even without the radical changes to the certification process that EFCA would make if enacted in the form that it was last introduced in Congress.

Now more than ever it is important for non-union companies to turn their attention to their rights and obligations under the NLRA to withstand the challenge of union organizing. Here are some of the more important issues to consider:

Has the Company Published a Statement on Unions?

If the Obama Board does move in the direction of making union organizing easier and employer opposition more difficult, all in an effort to reverse a decades-long decline in union membership, non-union companies would be well-advised to publish a position on unionization. A typical statement on unions shines a light on the employer's competitive wages/benefits and progressive approach to employee relations, while explaining to employees that a union is unnecessary and that direct communication between labor and management is better for all concerned than communication through a third-party intermediary, with interests all its own. Section 8(c) of the NLRA recognizes the employer's right to communicate its views on unionization in a non-coercive, non-threatening manner. A succinct statement of the employer's position on the subject is an essential first step in that direction. (Click here to see a sample statement on unions.)

Does the Company Have a Valid No-Solicitation Rule?

The NLRB has some hard and fast rules on employee solicitation and distribution in the workplace. In general, it is lawful for an employer to prohibit solicitation about unions when employees are on their working time, but unlawful to do so when employees are on non-working time, even in working areas. Rules regulating distribution of union literature are treated differently. Because of concerns about safety and littering, distribution may be prohibited at all times (*i.e.*, during both working and non-working time) in all working areas, but must be permitted in non-working areas during the employees' non-working time. However, all these rules must be applied in a non-discriminatory manner; the employer may not prohibit union-related solicitation and distribution while allowing employees to engage in that activity for other non-business purposes.

In addition, absent unusual circumstances, *i.e.*, where there is no reasonable alternative means of access to employees, employers may prohibit solicitation on company property by nonemployee union organizers at all times. Once again, however, the right to bar union representatives from company property may be compromised if other third parties are permitted to solicit.

The NLRB also has rules regarding use of company bulletin boards for organizational purposes. In short, the NLRB consistently has held that employees have no right to post union literature on bulletin boards, unless the employer has allowed its employees to post other non-work related items. Whether the new Board will continue to follow that rule is an open question.

If your company does not have a rule regarding solicitation and distribution in the workplace, the time to implement one is before a union appears on the scene. Once organizing begins, it is much more difficult to promulgate new rules and to make other changes without risking an unfair labor practice charge. (Click here to see a sample no-solicitation rule.)

What Is the Company's Policy on Employee Use of the Company's E-Mail System?

Now is also the time to review the company's policies on employee use of computer equipment to access the internet and to send and receive messages on the company's email system. Employer e-mail has become the media of choice for union-related solicitation and distribution.

As of now, employees have no statutory right to use the employer's computer equipment, e-mail system or other company property to engage in union activities. This is so even if the employer permits employees to make certain other non-business use of its e-mail system.

That was the NLRB's well-publicized holding a little more than two years ago in the *Register-Guard* case, but that ruling may be short-lived. Many predict that the issue of employee access to the employer's email system will be revisited and that *Register-Guard* will be reversed by the Obama Board at its first opportunity.

What is the Company's Dress Code?

It is well-established that employees, including non-union employees, have the right to wear union pins, buttons and other union insignia under Section 7 of the NLRA, which guarantees employees the right to form, join or assist labor organizations of their choosing and to engage in other activities for "mutual aid or protection."

Absent “special circumstances,” *e.g.*, where employees are subject to strict uniform requirements in jobs where they regularly interface with the company’s customers and other members of the public, it is an unfair labor practice for employers to prohibit employees from wearing union buttons, *etc*.

This is another area where consistent application of the rules is critical. An employer cannot prohibit employees from wearing union buttons — even when “special circumstances” exist — if it permits employees to wear political or other buttons.

Do the Company’s Rules Prohibit Disclosure of Confidential Information and How Is “Confidential Information” Defined?

Policies on solicitation/distribution and dress code are not the only ones that should be examined in advance of union organizing. Attention also should be given to confidentiality policies that may limit employee discussion of wages and other terms and conditions of employment.

We have encountered many that prohibit employees from discussing their employment terms with co-workers and other persons outside the employment relationship, including unions. Most non-union employers are unaware that employees have the right to engage in such discussions under the NLRA, and that it is an unfair labor practice for an employer to discipline employees for doing so.

The NLRB has considered the issue on several occasions over the last few years, each time finding that the confidentiality policy placed unlawful limitations on what employees were permitted to discuss among themselves. The Obama Board can be expected to do the same.

Does Company Policy Prohibit Negative Comments Concerning the Organization and/or its Management, or Require Employees to Follow the “Chain-of-Command” for All Employment-Related Complaints?

There’s more . . . Rules that prohibit employees from making negative comments about the company and its management also have been subject to challenge as a form of interference with protected employee speech concerning the employer.

The NLRB also has based unfair labor practice complaints on rules that require employees to follow the chain-of-command when pursuing employment-related complaints. It is a little known fact that the NLRB has held that employees — whether or not they are represented by a union — have the right to bring issues affecting their employment to the attention of the employer's customers.

Few employers are aware that these restrictions exist under the NLRA. Given the likelihood of heightened organizational activity in coming years, personnel policies that on their face can reasonably be read to interfere with employee rights should be identified and corrected.

Employers run the risk of giving the union a head start in organizing employees if their policies can easily be made the subject of an unfair labor practice charge. It hands the union a ready-made opportunity to show employees that it can bring about change in employer policy.

The Right to an Employee Representative at an Investigatory Interview

Finally, we should mention that on and off over the years the Board has interpreted the NLRA to require all employers — union and non-union alike — to permit representation, upon employee request, at an "investigatory interview" when the employee has a reasonable apprehension that the interview could result in the imposition of discipline. Unionized employees are permitted a shop steward or other union representative; non-union employees have been allowed to bring a co-worker into the interview.

The NLRB has gone back and forth on this issue several times. Today, the law is that the right to a representative at an investigatory interview is limited to unionized employees, but not long ago the Board held that non-union employees also have the right. It was the second time that the NLRB ruled that so-called *Weingarten* rights apply to non-union employees.

It would come as no surprise if the Obama Board revisited the issue once again and, upon doing so, extended *Weingarten* rights to non-union employees for the third time since the U.S. Supreme Court established the right in the mid-70s.

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