

LABOR LAW UPDATES FOR NON-UNION EMPLOYERS

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AGENDA

- Positive Employee Relations Strategy in Non-Union Workplaces & “CPR”
- Union Organizing in 2016 – Quickie Elections in Practice
- Key Obama Era NLRA Decisions and Their Uncertain Future Under Trump
- What would you do?

LAWFUL POSITIVE EMPLOYEE RELATIONS IN NON-UNION WORKPLACES & CPR

LAWFUL POSITIVE EMPLOYEE RELATIONS IN A NON-UNION SETTING

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

LAWFUL 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.

WHAT DO ALL EMPLOYEES THINK ARE 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 CAN YOU LAWFULLY DO?

Maintain Positive Employee Relations Strategy (“CPR”)

C – Communication

P – Participation

R – Recognition

WHAT CAN YOU LAWFULLY DO?

Communication

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

WHAT CAN YOU LAWFULLY DO?

Participation

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

WHAT CAN YOU LAWFULLY DO?

Recognition

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

THE LAW OF UNION ORGANIZING QUICKIE ELECTIONS IN PRACTICE

UNION ORGANIZING REALITIES – HISTORICAL LEGAL PERSPECTIVE

- 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 – HISTORICAL LEGAL PERSPECTIVE

- 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 During Obama Administration
 - Success: Activist NLRB decisions and rules

NLRB DECISION-MAKING AND RULE-MAKING 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 (*Numerous Decisions*)
 - Joint Employer Doctrine (*Browning Ferris*)
 - Temp Workers (*Miller & Anderson*)

THE LAW OF UNION ORGANIZING RULES

The Law

- All governed by the National Labor Relations Act, Section 9
- As implemented by 29 C.F.R. Part 102
 - Notice from NLRB re: targeted group
 - Petition supported by 30%
 - Secret ballot election
 - Results certified
 - One year election bar
 - Negotiations until agreement or impasse

THE LAW OF UNION ORGANIZING RULES

The Real World

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

PRE-“QUICKIE ELECTIONS” REGULATORY AMENDMENTS

- Under old 29 CFR Part 102, 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” REGULATIONS

- 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: **~21 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

“LABORATORY PERIOD” LAW: THE TRUTH IS YOUR WEAPON

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

“LABORATORY PERIOD” LAW: THERE ARE SIGNIFICANT LEGAL LANDMINES AND TRAPS

- T.I.P.S.
 - Threats
 - Interrogation
 - Promises
 - Spying

KEY OBAMA-ERA NLRA DECISIONS AND THE FUTURE UNDER TRUMP

WHAT RIGHTS DOES THE NLRA PROTECT?

- The FUNDAMENTAL Right under the NLRA is at Section 7:
 - “Employees shall have the right to . . . engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . .”
- What it means in plain English? Employees have the right to discuss all of the terms and conditions of their employment, including their wages, hours, jobs and managers with co-workers and non-employees.
- Applies to *both* union and non-union employees.
- What is “concerted?”
 - An activity is “concerted” when an employee acts “with or on the authority of other employees, and not solely by and on behalf of the employee himself.”
Meyers I.
 - Includes “circumstances where individual employees seek to initiate or to induce or to prepare for group action” and where individual employees bring “truly group complaints” to management’s attention. **Meyers II.**

WHAT EMPLOYER CONDUCT DOES THE NLRA PROHIBIT?

- Prohibits “Unfair Labor Practices” at NLRA, Section 8(a)
 - (1) Interference with Section 7 Rights
 - (2) Unlawful assistance or support of labor organization
 - (3) Discrimination (“belief based”)
 - (4) Discrimination (“process based”)
 - (5) Refusing to Bargain in Good Faith

KEY CASE-LAW AREAS DURING OBAMA ADMINISTRATION

- Union Organizing
 - New Election Rules
 - New Unit Targeting Rules
 - New Multi-Employer Rules
- Confidentiality
 - Investigations
 - Handbook Rules
- Technology Use
 - Employer Email
 - Social Media
- Arbitration
- Common Handbook Rules

UNION ORGANIZING - OBAMA

- “Triple Threat”
 - New Election Rules
 - Micro-Units
 - Joint-Employer Units

UNION ORGANIZING - OBAMA

- “Micro-Units”
 - Leading Case: *Specialty Healthcare*, 357 NLRB No. 83 (2011)
 - ◆ If defined unit is “appropriate,” employer must show “overwhelming community of interest” with other employees to add them to group
 - *Macy’s* (5th Cir. 2016)
 - *Bergdorf Goodman*, 361 NLRB No. 11 (2014)

UNION ORGANIZING - OBAMA

- “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)

UNION ORGANIZING - OBAMA

- “Temporary Employees + Regular Employees”
 - *Miller & Anderson*, 364 NLRB No. 39 (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.
 - *Retro Environmental*, 364 NLRB No. 70 (2016)
 - ◆ Construction companies reserved authority over terms and conditions of employment of temps was enough to create joint employer relationship.

UNION ORGANIZING - OBAMA

- *Specialty Healthcare + BF + M&A*
 - In combination:
 - ◆ Union gets to cherry-pick unit it prefers
 - ◆ 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.

UNION ORGANIZING - TRUMP

- Quickie Election Rules?
- Case Law
 - *Browning-Ferris* and *Miller & Anderson*?
 - *Specialty Healthcare*-based decisions?
- Legislation: National Right-to-Work Bill?

TECHNOLOGY-OBAMA

- 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."

TECHNOLOGY-OBAMA

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

TECHNOLOGY-OBAMA

- 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.

TECHNOLOGY-OBAMA

- Most Recent Major Social Media Cases
 - *NLRB v. Pier Sixty, LLC*, No. 15-1841 (2d Cir. April 21, 2017)
 - ◆ FB Post about manager during union campaign: “Nasty mother f**cker!” “F*** his mother and his entire f***ing family,” “Vote YES”
 - ◆ Holding: Termination unlawful + reinstatement
“Although vulgar and inappropriate, was not so egregious as to exceed the NLRA's protection nor was his facebook post equivalent to a 'public outburst' in the presence of customers and thus can reasonably be distinguished from other cases of 'opprobrious conduct.' ”

TECHNOLOGY-OBAMA

- Most Recent Major Social Media Cases
 - *Chipotle*, 364 NLRB No. 72 (2016)
 - ◆ Employer's Social Media Policy prohibited: "posting incomplete, confidential or inaccurate information and making disparaging, false or misleading statements."
 - ◆ Twitter/FB Posts: "Nothing is free, only cheap#labor;" "Guac is extra not like #qdoba;" crews only make \$8.50
 - ◆ Employee also circulated petition about break policy
 - ◆ Employer (1) asked employee to take posts down (which he did) and (2) fired him after circulating petition
 - ◆ Holding: Termination unlawful; policy unlawful

TECHNOLOGY-OBAMA

- Other Key Social Media Cases During Obama Era
 - *Hispanics United of Buffalo (3-CA-27972)*
 - ◆ Employees unlawfully terminated for “bullying” employees in Facebook post that also raised concerns about employer policies
 - *JT’s Porch Saloon and Eatery, Ltd(13-CA-46689)*
 - ◆ Bartender fired for Facebook conversation with his step-sister complaining about the employer’s tip-sharing policy, lack of a pay raise and “redneck customers.”
 - *Arizona Daily Star (28-CA-23267)*
 - ◆ Newspaper reporter lawfully terminated for posting offensive comments that had very little (or nothing) to do with work.

TECHNOLOGY-OBAMA

- Likely Social Media “Safe Harbors”
 - Product and service disparagement
 - Customer disparagement
 - Malicious defamation
 - Threats of violence
 - Harassment
 - Use of social media during work time

TECHNOLOGY - TRUMP

- Decisions already made = here to stay.
- Future Decisions?
 - *Lutheran Heritage*, 343 NLRB 646 (2004)
 - ◆ Would employee “reasonably” construe rule to prohibit Section 7 activity?
 - ◆ ... But *reasonable* minds can differ ...
 - ◆ Current Chair – Dislikes rule (*William Beaumont* dissent)

CONFIDENTIALITY-OBAMA

- Cases

- *Banner Estrella Medical Center*, 358 NLRB No. 93 (2015)
 - ◆ Blanket rule requiring confidentiality during internal investigations *per se* unlawful
 - ◆ Need “specific legitimate” reason to keep confidential.
- *Public Services Co. of NM*, 364 NLRB No. 86 (2016)
 - ◆ Employer, citing confidentiality interests, unlawfully refused to provide unredacted notes of memo recommending termination.

CONFIDENTIALITY-OBAMA

- Overbroad Rule
 - **MCPc, Inc.** (February 6, 2014) the Board held that employee handbook provision could reasonably be construed to prohibit discussion of wages or other terms and conditions of employment and was unlawfully applied in discharge of employee.
 - ◆ “dissemination of confidential information within [the company], such as **personal or financial information**, etc., will subject the responsible employee to disciplinary action or possible termination.”

CONFIDENTIALITY-TRUMP

- *Banner Estrella*
 - Recently (in March 2017) the D.C. Circuit Court of appeals sent the case back to the NLRB based on an evidentiary technicality
 - Current NLRB Chair has openly criticized the ruling – likely to be overruled
- *Confidentiality Rules Decisions*
 - Will go how *Lutheran Heritage* goes.

ARBITRATION – OBAMA/TRUMP

- *D.R. Horton and Murphy Oil*
 - NLRB has said, repeatedly, that “class action” arbitration waivers violate Section 7
 - Circuit courts are split
 - Supreme Court to decide case in fall of 2017/Spring of 2018
 - Legislation?

ASSAULT ON HANDBOOK RULES- OBAMA

- Common Handbook Rules Routinely Held to violate Section 7
 - Confidentiality (see above)
 - Social Media (see above)
 - Conduct (Toward managers, coworkers, customers)
 - Photography and Recording in the workplace
 - Leaving Work
 - Non-Solicitation

OTHER POTENTIAL TRUMP ADMINISTRATION CHANGES

- Composition of NLRB
- \$\$\$
- National Right-to-Work law

WHAT CAN YOU DO?

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

WHAT WOULD YOU DO?

YOUR OFFICE

You are the HR manager at a regional paper supply company. You recently hired Ryan as a temp from a staffing agency called WUPHF. He (and a regular employee named Kelly) works as sales support for two superstar salespeople (Jim and Pam). *They can really move paper.* The Salespeople and sales support have very different jobs (requiring different skills, training, and experience), but they work together as an integrated team. All of the sales employees work under the same draconian boss, Assistant (to the) Regional Manager, Dwight. Dwight – while he means well – doesn't have the best people skills and is constantly rubbing people the wrong way.

#1: THE TEMP

The temp, Ryan, is annoying – he constantly complains about his work and Dwight. You think he might be dating Kelly. You aren't sure, it might be an on-again-off-again thing. Yesterday, you noticed Pam, Jim, Ryan, and Kelly huddled around Ryan's computer laughing. They scattered when they saw you coming. Later, Dwight caught them preparing a PowerPoint making fun of him for his love of beets and his straight-laced application of company rules. Dwight (who has some history in law enforcement as a volunteer sheriff's deputy) demands that you investigate their "mutiny." IT gives you access to all of their email accounts. You discover that Ryan has sent Pam, Jim, and Kelly numerous emails critical of Dwight. He used foul language, calling Dwight a "hick farmer" and "a piece of s**t, with s**t on his stupid farmer boots." He said Dwight treats them so badly that they should do something about it together. It's all very offensive. Kelly's responses have supported Ryan. Jim and Pam haven't said much, but what they've said has generally (surprisingly) supported Dwight and the Company. As the next step of your investigation, you are asking each of them to come speak with you individually.

How should you handle that interview? What should you do about Ryan's offensive emails? What should you do about Kelly?

#2: THE PETITION

Two weeks later, you are hit with an NLRB Election Petition filed by the Paperworkers Union. They are targeting the following group of employees: “All Fulltime and Temporary Sales Support.” The Paperworkers Union also sends you a letter demanding that you recognize it as the exclusive bargaining representative of the Sales Support or face boycotts and demonstrations. If you don’t recognize them, they ask for at least a “standard neutrality agreement” leading up to the election.

Because Ryan and Kelly are the only two in Sales Support, and Ryan isn’t even your employee, you aren’t sure what to make of this. It also doesn’t make sense, operationally, for Sales Support to be treated differently than Salespeople because they work so closely together. What do you do?

#3: THE SONG

Now that the petition has been filed, you know that there is going to be an election in about 3 weeks. The office is divided, with some people supporting the unionization effort and others really opposed. One eclectic marketing employee, Andy, is a well-known supporter. Andy is quirky – he likes to sing acapella while he works. Sometimes he sings pro-union songs that have offensive lyrics. He sings off-key. Dwight hates all of this (well, really, his secret girlfriend and well-known goodie-two-shoes, Angela, hates it) and is determined to enforce the Company's rule against "language that is inappropriate." He comes down hard on Andy. He berates him in front of his peers (much to Angela's delight). He tells him if he wants to sing about a union at work he "better be very careful," and "might as well start looking" for a job somewhere else. Andy cries.

He then takes to twitter and engages in an explicit and vulgar tirade against Dwight, calling him a "bears, beets, Battlestar Galactica loving son of a b****." Kelly retweets it. Ryan retweets it. He also claims you are price-gouging and encourages customers to go to a competitor ("#officedepot #screwdundermifflin"). Numerous people from the community (but no employees) retweet it.

Dwight reports all of this to you. What do you do?

#4: THE ELECTION

Andy gets fired. You just can't put up with what he said about Office Depot. The election is only 5 days away. With help from your legal counsel, you develop a foolproof flip-chart (not a PowerPoint, of course – you are a regional paper company, after all) discussing the Company's view on the upcoming vote, and urging employees to "Vote NO". You know everything you put in that presentation is 100% lawful.

Dwight gives the presentation. During it, he pounds his fists violently while expressing his points of view. One part of the presentation discusses how the Company was currently looking into wage increases and that, after going through the same process at other branches, wage increases have been as high as 12%. Those wage increases – coincidentally – happened shortly after unions were rejected at those branches. The presentation describes that this process started long before the Union showed up (here and at other branches), and that it will continue with or without a union. Dwight says all of this. He also adds that while the process will continue with or without a union, it will take longer if a union comes in (because wages would have to be bargained). He says that, after the union lost at the other branches, the wage increases went into effect immediately (which was true), and a "reasonable person" could assume the same thing would happen at your branch if the union loses.

You win the election! Congratulations! Any problems?

#5: THE DEBATE

You won the appeal on the election. It is now months later. Your office is in the same building as a major customer, Vance Refrigeration. Your employees and Vance employees often eat lunch outside in a common patio area. You have some rules that apply to lunchtime: no smoking; no cursing; clean up after yourself; be respectful of the company, coworkers, managers, and customers. Last week, Angela came to you and was quite upset. Several employees were eating lunch on the patio together and got into a heated debate. Meredith and Phyllis started it. They had just learned that employees at Office Depot were making more than them and demanded that the group, including Angela, tell what they made.

When Pam refused, Phyllis raised her voice and said "that is bulls**t." Meredith then called Pam a "company girl" and a "company stooge." She went off the handle, yelling at Pam (and Angela) for not "liking" their "Paper Cuts" Facebook page (a page devoted to complaining about work) or following them on twitter.

Angela noticed that a few employees she recognized from Vance Refrigeration were watching the incident. The women didn't stop. It was all very upsetting to Angela. After Angela left your office, you checked out the Facebook and Twitter sites. Holy cow! Not only do they slam the Company and Dwight for "screwing the employees" and "caring more about the bottom line than the kids," they post some confidential information—namely the salaries of each of the women at the table that day. You're stunned. You meet with Meredith and Phyllis. They refuse to apologize to Angela or take down the sites. What can you do?

QUESTIONS?

THANK YOU.

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