Unions Want Fast Food – Now!

Insights
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With union membership rates at their lowest level since the National Labor Relations Act (NLRA) was enacted in 1935, organized labor is desperately seeking to attract new members, even if that means targeting new industries that have traditionally been ignored. Over the past few months, unions have been busy sparking drives to organize retail and fast food service workers across the country.

In November, organized labor coordinated a series of protests and strikes in over 100 cities in response to the Black Friday plans of various retailers. A few weeks later, unions coordinated their largest fast food demonstration to date when 200 nonunion workers protested outside dozens of New York restaurants.

These protests highlight the need for employers across all industries, including those that have historically been disregarded by organized labor, to understand that the NLRA protects employees – regardless of whether they are union members.

Why The Fast Food Industry Is Tough
The fast food industry has been historically perceived as paying low wages and offering limited or irregular work schedules for their employees, making it a prime target for organized labor. But unions have faced an uphill battle organizing fast food workers for years. According to organized labor leaders, high turnover has complicated efforts to muster the support sufficient to file a representation petition with the National Labor Relations Board (NLRB).

The franchise-operated structure in the fast food industry is also said to create a further hurdle for union organizing. With these difficulties in mind, many employers were caught off guard when Big Labor hit retail and fast food establishments this past December.

According to the United Food and Commercial Workers International Union (UFCW), a well-known retailer faced protests at over 1,000 of its stores in conjunction with its Black Friday operations. According to this retailer's management, the UFCW's figures were exaggerated and had no impact on their Black Friday sales. Although the UFCW's figures are in question, the protests signified the first coordinated work stoppage of this retailer's nonunion employees in its history.

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A few weeks later, organized labor groups coordinated similar protests at various well-known fast food establishments in New York City. This represented the most extensive effort to unionize fast food workers to date and likely signals an intent to continue targeting this rapidly growing industry.

The NLRA

It is important to remember that the NLRA protects union and nonunion employees alike. Section 7 of the NLRA grants employees the right to "engage in ... concerted activities for the purpose of collective bargaining or other mutual aid or protection."

Protected concerted activity generally takes place when an employee acts on behalf of others aside from himself or herself to complain about workplace terms and conditions. The broad statutory language leaves room for subjective interpretation, and, over the years, the courts and the NLRB have broadly defined the standard for "concerted conduct."

The recent retail and fast food strikes offer just one example of concerted protected activity. That means that participating nonunion employees are typically protected (absent violent or otherwise unlawful misconduct) from termination for their involvement. With these labor activities garnering much media attention, they will likely spawn copycat protests at other worksites throughout the country.

Adding fuel to the fire is the NLRB's increased focus on the Section 7 rights of nonunion employees. In June 2012, the NLRB dedicated a webpage specifically advising nonunion employees of their rights to engage in concerted activity. The website also provided selected descriptions of recent cases involving protected concerted activity at nonunionized worksites.

According to NLRB Chairman Mark Gaston Pearce, "the right to engage in protected concerted activity is one of the best kept secrets of the National Labor Relations Act, and [it is] more important than ever in these difficult economic times. Our hope is that other workers will see themselves in the cases we've selected and understand that they do have strength in numbers."

A proposed rule requiring employers to post a conspicuous notice advising employees of their workplace rights under the NLRA will likely further serve to drive up employee awareness of this doctrine.

In light of the recent media coverage of this strike activity, as well as the NLRB's increased focus on the rights of nonunion employees, employers who historically have not spent much time worrying about the NLRA may have more to worry about in 2013.

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