We Know What the NLRB Did Last Summer: 7 Recent Labor Board Moves That Could Haunt You This Fall and Beyond

Insights
9.29.23

As fall creeps up on us — and you trade your beach days and barbeques for hayrides and horror flicks — don't forget about all the activity from the National Labor Relations Board (NLRB) this past summer that could cause compliance nightmares for employers. The flurry of activity is part of an ongoing effort by the current Labor Board to make it easier on unions and their ability to organize employees. But before you scream, you should note that many of these concerns can be mitigated through a proactive and positive employee relations program that underscores the importance of policy audits and supervisory training. You can avoid potentially grave consequences by reviewing these seven major moves the Labor Board made last summer and the actions you should consider taking now.

1. **Axed Broader Workplace Conduct Policies**
   The Board changed the law again on employee handbooks by modifying the legal standards that for the past six years have provided a commonsense solution for evaluating workplace misconduct rules. The NLRB's August 2 decision in *Stericycle, Inc.* dramatically impacts employers across the country and will lead many to once again modify their handbooks to ensure compliance with the latest NLRB mandates. While some employers already review their handbooks on a yearly basis, it may be important to do so more frequently in light of this ruling, as well as additional decisions and guidance memos. Here's what you need to know about the *Stericycle* decision and how your policies may need to be updated.
2. **Resurrected a Stricter Independent Contractor Standard**
   A highly anticipated decision issued this summer makes it significantly harder for companies to classify their workers as independent contractors. The Board's June 13 decision in the *Atlanta Opera* case reverts to a broader independent contractor standard that was established during the Obama administration in 2014 — which means more workers will again be considered "employees" under federal labor law. Click here for the top four things employers need to know about this development.
3. **Tipped the Scales to Ensure More Employee Conduct is Considered Protected Concerted Activity**
   The Board overturned additional employer-friendly precedent by making it more likely that individual employee gripes – whether in a unionized or non-union workplace – will be deemed protected concerted activity under Section 7 of the National Labor Relations Act (NLRA). In the August 25 *Miller Plastics* decision, the Board overruled a 2019 decision that established a

August 25 *Miller Plastics* decision, the Board overruled a 2017 decision that established a checklist of easy-to-follow factors to determine whether complaints raised by an individual are tantamount to group activity protected under the NLRA. The Board found the checklist unduly narrowed the scope of legally protected conduct, returning to a broad and ambiguous standard where the question of whether an employee has engaged in concerted activity is a factual one based on the "totality of the record evidence." Click here to learn more about this latest decision tilting the playing field further against management and what you should do about it.

4. **Raised Quickie Union Elections from the Dead**
   Employers were dealt yet another blow on August 24 when the Board re-introduced "quickie" elections and accelerated the time period between union petitions and elections. This is just one of the changes found in the NLRB's new representation rule that will revamp the union election process and make life that much harder for employers responding to a union organizing campaign. The new rule, which will take effect on December 26 without any additional comment period, is yet another recent example of steps the current Board is taking to tilt the playing field firmly in the direction of unions. Click here for the top 10 things you need to know in light of this impending change.

5. **Transformed the Representation Process to Boost Union Organizing**
   The NLRB drastically changed how employers should respond to union recognition demands while creating a new framework requiring employers to bargain with unions without a representation election. The NLRB's August 25 decision imposes bargaining orders upon the commission of unfair labor practices that would otherwise warrant setting aside an election, it potentially does so at the expense of the secret ballot vote. Here's what employers need to know about this significant change and their options for responding to this new process.

6. **Revived Limits on Employer Actions During First Contract Negotiations and After a Contract Expires**
   Employers should note of two new decisions from August 30 that limit their power to implement changes during first contract negotiations and after a collective bargaining agreement (CBA) has expired. These decisions — *Wendt* and *Tecnocap* — overrule a 2017 case that gave employers broad latitude to implement operational changes during first contract negotiations and following the expiration of a CBA. What do employers need to know about these rulings? Click here for the answers to your top six questions.

7. **Killing Non-Competes?**
   Employers should also review their non-compete agreements now that the NLRB General Counsel announced that many of them violate federal labor law – regardless of whether you have a unionized workforce. General Counsel Jennifer Abruzzo's May 30 memo was yet another broadside against employers, urging NLRB regional directors to find that many employer-mandated non-compete agreements infringe on employees' rights under Section 7 of the NLRA. While General Counsel memos don't represent the official legal position of the entire agency, they do represent the policy and guidance for all Regional Offices investigating and prosecuting charges against employers. So, you should immediately examine your non-compete agreements for potential compliance concerns, understand the risks that are now presented by using such

agreements, and decide whether to update your practices accordingly. Click here for the answers to your top seven questions about this development.

Conclusion

We will continue to monitor NLRB and other agency decisions that impact your day-to-day operations and provide updates as necessary, so you should sign up for Fisher Phillips' Insight System to ensure you receive updates directly to your inbox. If you have questions, contact your Fisher Phillips attorney, the authors of this Insight, or any attorney in our Labor Relations Practice Group.

Related People

Steven M. Bernstein
Regional Managing Partner and Labor Relations Group Co-Chair
813.769.7513
Email

Todd A. Lyon
Partner and Labor Relations Group Co-Chair
503.205.8095
Email

Service Focus

Counseling and Advice

Labor Relations

Government Relations