Responding To The (New) NLRB

Insights
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For the past 75 years, the National Labor Relations Board (NLRB) has been responsible for conducting union representation elections and investigating unfair labor practice charges. Because the agency is comprised of members who are appointed by the standing President, it has been vulnerable to the occasional pendulum shifts that flow from the political process. That being said, the agency has traditionally steered clear of major controversies by confining itself to the application of long-standing principles that have typically stood the test of time.

Barring an act of Congress, the agency has been reluctant to impose its own doctrine on the procedures governing union representation elections. Consequently, when Congress failed to pass the Employee Free Choice Act (which aimed at substituting "card check" procedures for secret ballot elections) back in 2009, the business community breathed a collective sigh of relief.

This did not sit well with labor unions, which have long believed that their declining numbers are due in part to regulations extending employees upwards of six weeks or more to contemplate their decisions before casting their votes. In response, they began to set their sights on "Plan B," in the form of administrative rulemaking designed to expedite the election process.

Late last year, unions got their wish, as a reconstituted NLRB passed first-ever rules reducing the time period between representation petition and election from an average of 38 days to 20 or less. This was a rare foray into rulemaking from an agency that had been reluctant to enact sweeping reforms in the absence of legislative action, but it was not the first.

Just months before, the same agency imposed a first-ever notice posting requirement, designed to educate employees on their right to engage in organizing activity. Coincidentally, both of these initiatives are presently scheduled for implementation on April 30th.

Some Background
Representation petitions must be supported by a "showing of interest" in the form of authorization cards signed by bargaining unit employees. Unions are required to submit a minimum of 30% of the employees they wish to represent, although more often than not they will hold off filing a petition until securing closer to twice that percentage.

The new rules do not purport to change this requirement, but they will go a long way toward ensuring that employees end up casting their ballots while wedded to the tide of negative emotions

ensuring that employees end up casting their ballots while wedded to the tide of negative emotions that fueled their signatures in the first place. Unions have long argued that "the current system is broken!" But studies show that they have enjoyed win rates hovering between 60% and 70% for well over a decade. It's fair to assume that these rates are only going to increase once the new rules take effect.

Business groups have responded with various efforts to enjoin these initiatives, and legislators have vowed to mount their own opposition. Others are exploring legal challenges to the status and authority of the NLRB itself. While their prospects for success remain to be seen, two things remain clear. First, the new rules are likely to increase employee discourse and embolden unions in areas that were not previously viewed as hotbeds for organizing activity.

Moreover, barring any last minute developments, employers are confronting a closing window of opportunity in which to get their employee relations programs up to speed, in preparation for the new framework and the onslaught to come.

Countering The Threat With Communications

Consequently, we encourage businesses to act legally but swiftly to optimize the effectiveness of their employee communications initiatives, so that they are standing on go once the new rules take effect. Here are a few proactive considerations along the way.

First, remember that employees often gravitate toward third-party representation based on lingering perceptions of alienation, favoritism and general insensitivity to their individual concerns. Others point to a lack of security in their jobs, increased benefits costs and rapid changes in employment conditions accompanied by a lack of advance notice. These factors have remained relatively constant over the past 75 years, and they are not likely to change any time soon. It therefore stands to reason that an effective employee relations program will be more critical than ever come April 30th.

To that end, take a fresh look at your current communications programs, so as to ensure the smooth flow of information in upward and downward directions. Along the way, take the time to evaluate all potential vehicles and participatory initiatives, ranging from large group meetings to one-on-one sessions with opinion leaders on the shop floor.

Conventional options such as newsletters, bulletin boards and home mailings should always be considered. Increasingly, however, it has become important to explore video communications, along with electronic and social media. Because employees often complain of a lack of senior management visibility (particularly on the off shifts), look for ways to put your top officials in front of employees on a regular basis, beginning with the orientation process. When conducted properly and lawfully, opinion surveys can also go a long way toward tapping into workforce expectations.

Communication skills are not always intuitive, and management training may be necessary. As employee expectations are rapidly changing, all vehicles must be readily adapted to respond to

generational changes and tailored to fit the unique aspects of your culture. Above all else, err on the side of keeping it simple and concise.

Tighten Up Your Procedures

Of course, an effective communications program is just the beginning. You should also revisit your selection practices to ensure that youare hiring the most qualified applicants for any openings on the front end, and tracking any trends in employee turnover on the back. Along the way, take steps to ensure that employees are regularly updated on the state of the business, any recent accomplishments, and the hidden value of company-provided benefits. You should always be looking for opportunities to foster organizational identification and loyalty.

Once the statutory supervisors within your organization are properly identified, they should be trained to conduct themselves lawfully and properly in response to union organizing activity, and to effectively utilize their own free speech rights in response to employee inquiries with an accurate statement concerning the organization's position on third-party representation.

Above all else, sensitize your management to quickly identify any nagging issues undermining employee morale, and do their best (within reason) to resolve them. Monitor progress in these areas on a periodic basis, and hold designated managers accountable for achieving measurable goals.

Review Your Policies

Lastly, you should constantly audit and update your internal policies to ensure that they are legally compliant while optimizing their effectiveness. Specific procedures must be crafted to deal with electronic communications, employee solicitation, premises access, bulletin board use and grievance resolution. Scrutinize any mandatory arbitration provisions for compliance with recent NLRB decisions, along with all confidentiality policies purporting to restrict employee dissemination of wage-and-benefits data.

Ready . . . Set . . .

As the NLRB's April 30th deadline approaches, one thing remains clear. Employers will soon be confronting a limited window of opportunity in which to respond to representation petitions. As the field tilts sharply in favor of organized labor, unions will soon enjoy a distinct advantage in the absence of proactive employer efforts.

Our advice: to ensure that your employees go into the process on an informed basis, begin taking a critical look at your employee relations programs now, and ensure that they are "standing on go" once the new rules take effect. With increased organizing activity all but assured under the new framework, the clock is ticking down on your ability to get your program up to speed. It's time to overhaul your program before the NLRB overhauls the law.

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