Keep It Neutral: Proposed Guidance Calls For Stricter Test When Evaluating Employer Support Of Union Activity

Insights
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The NLRB's General Counsel recently released a guidance memorandum advising the Board to apply a stricter standard when evaluating if an employer's support for union organizing activities violates the National Labor Relations Act. This change would implement a single "more than ministerial aid" standard for the Board's evaluation of employer support for both pre-certification union activities and employee de-certification activities. The September 4 guidance provides examples of employer conduct that would be unlawful under the stricter standard, and takes specific aim at pre-certification neutrality agreements, identifying provisions that would constitute impermissible support. If adopted by the full Board, the new standard would clarify the amount of support employers can give to a union before it is the exclusive bargaining representative – and would especially create confusion for cannabis employers across the country.

Federal Labor Law Limits Employer Support For Union Organizing And Decertification Efforts
Workers have a right under Section 7 of the NLRA to choose to "form, join, or assist a labor organization . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," as well as the right "to refrain from such activities." As a result, the NLRA limits the support an employer can give both to a union in organizing the employer's unrepresented workforce and to employees who wish to decertify or withdraw from a union.

Although an employer's impermissible support before a union becomes the representative of the employees and when employees seek to decertify the union as their exclusive bargaining representative impacts the same employee rights, current Board precedent applies different standards to evaluate the employer's conduct. The Board applies a "more than ministerial aid" standard to review support for employee de-certification activities, while it applies a "totality of the circumstances" standard to review support for pre-certification union activities. The guidance urges the Board to apply the stricter "more than ministerial aid" test in both circumstances, since applying different tests has yielded different results for equivalent conduct. Per Peter Robb, the NLRB's General Counsel, "the 'ministerial aid' standard is both more protective of statutory rights than the 'totality of the circumstances' standard and … provides better clarity." Under this test, the Board would consider the following employer conduct to be impermissible support for pre-certification union activities:

1. Allowing non-employee union organizers access to employer facilities or inform employees of presence of union organizers;

presence of union organizers;

2. Allowing union solicitation during working time;
3. Providing union with employee contact information; and
4. Making statements of preference for a specific union.

The NLRB Takes Aim At Pre-Certification Neutrality Agreements

The guidance singles out pre-certification neutrality agreements between employers and unions as violating the "more than ministerial aid" standard unless the agreement is truly neutral.

A neutrality agreement is a contract between a union and an employer that sets forth the terms that each will follow during the period that the union makes efforts to organize the employer's workforce. Both sides will typically agree to give up something in exchange for "peace." Unions give up their right to picket, strike, or otherwise engage in conduct that interferes with business operations; employers give up their right to conduct informational campaigns in response to union organizing activities and to make negative statements to employees about the union.

Neutrality agreements that are truly "neutral" and do not interfere with employee rights — for instance, where an employer agrees to remain neutral during an organizing campaign in exchange for the union refraining from a corporate campaign — would remain lawful under the new test. However, some neutrality agreements may contain provisions that permit or require conduct that under the "more than ministerial aid" analysis would be prohibited under the NLRA. The guidance advises that neutrality agreements, which include any of the following, would violate the law:

1. Provisions regarding wages;
2. Interest arbitration provisions;
3. No-Strike/No-Lockout provisions;
4. Access to Company Facilities provisions;
5. Determination of Appropriate Unit provisions; or
6. Provisions that restrain employee access to the Board.

This bright-line test would be applied to all neutrality agreements that set or deal with terms and conditions of employment. Further, Robb instructs Regions to submit cases involving neutrality agreements that do not set or deal with employee terms and conditions of employment to the Division of Advice, indicating the Board's increased emphasis on this issue.

What Does This Mean For Employers?

This guidance changes how the General Counsel will evaluate neutrality agreements. More importantly, this sets up a clear collision with state statutes dictating that businesses in the cannabis industry execute neutrality agreements with unions as a condition of obtaining a license. For instance, the Medicinal and Adult Use Cannabis Regulation and Safety Act (MAUCRSA) requires covered businesses to allow union solicitation at employer facilities, and to enter neutrality

agreements (included within Labor Peace Agreements (LPA) mandated by the MAUCRSA) that include No-Strike/No-Lockout provisions. Furthermore, many unions currently insist on including provisions in LPAs that conflict with this guidance. You should keep in mind that the NLRA likely pre-empts MAUCRSA and other similar state laws, and that maintaining an LPA that the Board determines as providing impermissible support for union organizing could lead to an unfair labor practices charge.

Although this guidance is not yet precedent, it is likely to be the standard applied in cases before the Board and may soon become the law of the land. That said, the direction of the Board could shift again in a matter of months if a new president is elected and Robb is replaced.

In the near term, you should review any current LPAs and neutrality agreements in light of the NLRB's new priorities included in the guidance and determine how best to proceed in the event that any provisions violate the new test. You may consider refusing to enforce any conflicting provisions, and if challenged by the union, take steps to ensure that the dispute will be decided by the NLRB where this guidance is likely to be followed. Of course, each circumstance is different and we suggest seeking the advice from experienced legal counsel to determine your best strategy.

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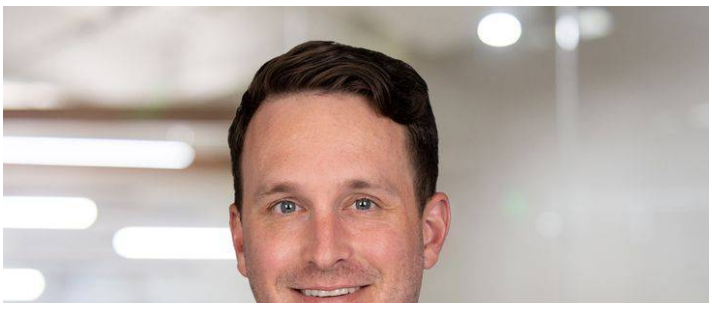

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