7 Things Employers Couldn't Say About Unions if NLRB's General Counsel Has Her Way

Insights
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When the National Labor Relations Board's General Counsel stealthily released a series of older Advice Memoranda at the end of January, she sent a not-so-subtle hint to employers: the Board will soon be taking a tougher stance against employers who misrepresent how things could change if employees voted to unionize. GC Jennifer Abruzzo's selective release of these Memos is a message to the Board to find cases that would overrule the NLRB's 1985 decision in *Tri Cast Inc*. that permits employers to tell workers that voting to unionize would make their working relationship more "onerous and acrimonious." What do you need to know about this impending shift – and what are seven things you won't be able to say about unionization efforts if the Board follows the GC's message?

What Case Will Soon Be Overturned?

If the GC has her way, the Reagan-era decision *Tri Cast* will be overturned and employers will have a tougher time talking plainly to their workers about unionization. In that case, the employer told its employees that it would no longer be able to "work on an informal and person-to-person basis" with them if they unionized. The company's management also said, "we will have to run things by the book, with a stranger, and will not be able to handle personal requests as we have been doing."

The Board held that these statements accurately reflected the "possible effects of unionization." They were thus deemed not to be unlawful threats but mere permissible comments on a union campaign.

The current General Counsel believes that Section 9(a) of the National Labor Relations Act (NLRA) gives unionized employees the right to take their grievances to their employers individually and without their union's involvement – so long as grievances are adjusted and resolved under the terms of the collective bargaining agreement and a union representative is permitted to attend. Thus, contrary to *Tri Cast*, the General Counsel considers representations that unionized employees can only access their employer through the union unlawful as untrue, deceptive, and unduly coercive.

What 7 Things Might Employers Soon Not Be Able to Say?

By releasing the Memos, the General Counsel has telegraphed her search for cases that would reverse *Tri Cast* and restrict employers' right to explain how unionization could impact the day-to-

reverse *TTI Cast* and restrict employers' right to explain how unionization could impact the day-to-day working relationship between them and their employees. According to the Memos, the following seven employer statements would be unlawful:

1. "There would be no direct contact allowed between supervisors, managers and employees."
2. Employees "could no longer come to HR or the plant manager and talk to them about your problems, you would only be allowed to do that through a union representative."
3. "You can't just come to me as your manager anymore. You have to go to your union rep."
4. If you sign a union card, "you'll be giving up your right to speak for and represent yourself."
5. If you sign a union card, "you no longer have a voice, you've signed that away to some third party."
6. "Everything would be filtered through the union."
7. "The number one difference with a unionized environment is that you will not have the pleasure of working with me or management directly. You will have to go through the union to have a relationship with us."

So What *Could* You Say?

Compare these employer statements with one that the General Counsel would permit:

Why might a union not be in your best interests? It means giving up your legal right to deal directly with me and our management team when it comes to your working conditions. Instead, it means giving the union the right to decide for you what's most important to raise with us.

The distinction is subtle yet significant: in the purportedly unlawful statements, the employers said that unionized employees lose their right in Section 9(a) of the Act to continue to deal directly them about their grievances. But the General Counsel would permit the employer to ***characterize*** the role of the union as the employees' elected sole and exclusive representative.

By comparing these statements, it is clear that the General Counsel wants to limit employers' ability to speculate in good faith on the ***effects*** of unionization. The GC would rather hold employers to plain statements about a union's role in representing employees under the law.

What Should Employers Do Following the Release of these Memos?

Employers should be aware that the current General Counsel has an aggressive agenda to tilt interpretation of the NLRA in favor of unions. She is actively searching for test cases to that will allow the Board, as it is now constituted, to radically change national labor policy – not just in this area but in others as well. What should you do to adjust to the new normal?

- If you are faced with union organizing activity, you should immediately consult with experienced labor counsel for guidance on what you may and may not lawfully say to employees seeking to organize.

- While the National Labor Relations Act still guarantees employers a right of free speech, the General Counsel and Board are seeking to limit employer communications that they believe are coercive and/or misrepresent the effects of employees seeking union representation. The scope of permissible speech is evolving by the day, and the penalties for violating the National Labor Relations Act can be severe. You should work with counsel to stay abreast of what is and is not permissible speech towards employees.
- Recognizing the General Counsel's intent in releasing these specific Memos, you should be exacting in what you say about the impact that union organizing could have on your otherwise amicable relationship with your employees – and train your managers on the subtle but important differences.
- You should review the specific ways you communicate with employees in the event of organizing activity. Because specific words can make the difference between lawful speech and a violation of the NLRA, written communications may be more effective and defensible than verbal speech.
- Lastly, remember that the General Counsel believes that mandatory meetings to educate employees about unionization could be coercive and unlawful. For this reason, prepare to work within this position during any attempt to communicate with employees regarding union activity.

Conclusion

We'll 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 the Fisher Phillips Insight Service 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 member of our Labor Relations Practice Group for further information.

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