Labor Board Overhauls Representation Process to Boost Union Organizing: Your 8-Step Plan to Respond

Insights
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The NLRB just drastically changed how employers can respond to union recognition demands by creating a new framework that will determine when employers are required to bargain with unions without a representation election. The NLRB's August 25 decision is yet another step taken by the Board to reverse the decline in union membership and make it easier for unions to add new members. By imposing 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. What do employers need to know about this significant change and their options for responding to this new process?

Prior Framework Included Fair Process

For over a half-century, employers could legally decline union demands for recognition based on a claim of majority status (typically in the form of signed authorization cards) pending the outcome of a secret-ballot election monitored by the NLRB.

Stakeholders to the representation process (particularly the employees themselves) have reaped many benefits from this process. As union organizers often solicit card signatures covertly, employees initially confront the question of third-party representation without the time or information they may need to make an informed decision. In some cases, they are pressured to sign even though federal law protects their right "to refrain" from doing so. More importantly, the secret ballot process allows employees to decide on union representation within a protective environment that safeguards the confidentiality of their vote.

New Framework Complicates Process and Tilts Favor Toward Unions

All that has changed thanks to Friday's controversial decision. Now, in the absence of a representation petition filed directly by the union with the NLRB, employers confronting union recognition demands will have to navigate a more complicated path. Most significantly, they no longer have the option of rejecting them outright in favor of secret ballot elections. Instead, employer options are now confined to:

- Recognizing the union as exclusive bargaining representative based on a claim of majority status (usually signed authorization cards which employers do not have an opportunity to independently

review);

- Promptly (i.e., within two weeks of the recognition demand) filing an "RM" petition for a secret-ballot vote to resolve the union's claim of majority status, and/or to challenge the appropriateness of the applicable bargaining unit. Of course, this option could still result in a secret-ballot vote if the employer's evidence and/or position on the unit are rejected; or,
- Defending a refusal to bargain unfair labor practice charge by presenting objective evidence establishing that the union never had a valid majority status to begin with, and potentially testing its certification through a protracted appeals process.

Consequently, the days of simply denying a demand for recognition and waiting to see if the union files a petition for an election are now over. Evaluating the best approach you should take in each situation will involve an in-depth analysis of numerous legal and practical considerations.

New Standard for Issuing Bargaining Orders

The new apparatus for challenging recognition demands is not even the biggest upheaval from this decision. Rather, the most significant change relates to expansion of the NLRB's ability to require employers to recognize a union *prior to any representation election, or after employees have voted to reject union representation.*

In fact, the NLRB expressly states that "the standard we announce today" will make "remedial bargaining orders more readily available…." Up until now, such orders were traditionally reserved for rare situations in which an employer's conduct made it unlikely that a fair election could be held in the future – leaving "re-run elections" as the more common remedy. This analysis sought to ensure the use of secret-ballot elections to confirm a union's majority status, which the Board and courts have recognized as the preferred method.

That well-reasoned approach has been replaced on a retroactive basis by a simplistic test in which one or more ULPs could now be enough to invalidate the employer's RM petition – replacing it with a standing bargaining order that was previously deemed extraordinary.

Employers Feel One-Two Punch

The NLRB goes to great lengths to justify its reversal of a tried-and-true method for establishing legal representative status by maintaining that it does not unreasonably infringe on employee rights to oppose union representation, or to make fully informed decisions. However, this decision needs to be viewed against the backdrop of other NLRB actions to understand its full impact.

Just one day before the NLRB released this decision, it resurrected the expedited "quickie" election rule first implemented by the Obama-era NLRB. Effective December 26, this rule will substantially reduce the time period between employer (or union) petitions and the ensuing representation election – thereby limiting the time employees have to gather facts on union representation. The

"quickie election" rule will also preclude employers from effectively litigating the appropriateness of the appropriate bargaining unit until after the election. Combined with Friday's decision, this will deliver a powerful one-two punch for organized labor. Even if that fails to deliver a union victory outright, any ensuing unfair labor practices are now more likely to do so through the issuance of a bargaining order.

Meanwhile, the NLRB is also expanding the types of employer conduct that constitute unfair labor practices. This is significant because the NLRB's expanded ability to impose union representation through a bargaining order is triggered by unfair labor practices. For example, the NLRB has already increased the risk of inadvertent unfair labor practices through its recent decision in *Stericycle, Inc.*, which creates unfair labor practice liability for handbook policies that were never intended to infringe on employee rights and in some cases, were never applied at all.

Moreover, while the NLRB declined to use Friday's decision to create new unfair labor practices based on the use of mandatory meetings to address the issue of third-party representation, it suggested that such changes may be forthcoming. The likelihood of new and expanded unfair labor practices suggests that the risk of bargaining orders has never been greater.

What Should You Do Now? Here's Your 8-Step Action Plan

Given Friday's ruling, it is more important than ever for employers to be proactive. Therefore, you should consider taking the following steps to strengthen your employee relations program:

1. **Create positive relationships with employees.** Human Resources and frontline managers should commit to developing a positive culture. Seek input from and listen to employees about their needs in the workplace and promptly respond to their concerns. Implement a regular process to confirm your wages and benefits are competitive. Use a robust communication process to remind employees of the "hidden value" of their benefits package.
2. **Share your philosophy with employees.** Lawfully educate employees on your employee relations philosophy. In doing this, understand that the legality of mandatory meetings to discuss unionization is now in jeopardy and that a decision rendering such meetings unlawful could be applied retroactively.
3. **Ensure that employees understand the significance of authorization cards.** Consider providing a lawful overview of their legal rights regarding union authorization cards (and the enhanced impact they may now have in light of these latest developments) before the onset of organizing activity.
4. **Train supervisors and managers**. While the NLRB is rapidly shrinking the rights available to employers for lawfully responding to union activity, they technically retain statutory "free speech rights" to help employees make informed decisions. It is therefore more important now than ever for your statutory supervisors to understand what can be said lawfully, the importance of avoiding ULPs, and the role they play in maintaining your employee relations infrastructure.

5. **Develop a consistent process for responding to and handling union recognition demands.** There are now a multitude of legal and factual matters to consider when responding to a demand for recognition. A direct and consistent process for handling such demands can ensure your responses are lawful and sufficiently protect the rights of employees to decide the issue of union representation free from undue influence and based on relevant facts.
6. **Identify your statutory supervisors and strategically evaluate other bargaining unit issues.** Front-line supervisors are critical to the employee relations success of any organization. Act now to properly identify them as needed and consider modifying the scope of their authority to support your position. Analyze other potential bargaining issues that may arise, given the unique aspects of your workplace. For example, are your operations vulnerable to "micro-unit" organizing under recent shifts in NLRB doctrine? Do you have viable multi-location, functional integration, joint employer, or independent contractor issues under current legal standards? Act now to develop arguments bolstering your position.
7. **Recognize that a "one size fits all" approach may not be best.** Rather, employers are encouraged to collaborate with their internal stakeholders and labor counsel to tailor an appropriate compliance strategy around the unique aspects of their workplace cultures.
8. **Collaborate with your labor counsel.** The time is right for you to call on your trusted labor counsel and evaluate whether your organization needs to adapt policies and practices to match the new reality that is about to unfold.

Conclusion

We will continue to monitor this situation as it unfolds. Make sure you are subscribed to Fisher Phillips' Insight System to get the most up-to-date information direct to your inbox. For further information, contact your Fisher Phillips attorney, the authors of this Insight, or any member of our Labor Relations group.

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