Labor Board's General Counsel Imposes Additional Burdens on Employers Responding to Union Recognition Demands: 6 Takeaways for Your Business

Insights
11.10.23

In the aftermath of a game-changing NLRB decision that drastically changed how employers can respond to union recognition demands, the Board's General Counsel recently issued a guidance memorandum offering important insight into the Board's priorities and future legal arguments. The November 2 memo from GC Jennifer Abruzzo imposes heavy burdens on employers faced with bargaining orders in response to unfair labor practice charges. Here are the six key takeaways for your organization.

6 Key Takeaways

By way of quick reminder, the NLRB issued a decision on August 25 that created a new framework for determining when employers are required to bargain with unions without a representation election. The decision was yet another step taken by the Board to reverse the decline in union membership and make it easier for unions to add new members. In a follow-up move, GC Abruzzo issued a guidance memo on November 2 that provides some further structure to this new framework.

1. Employers have three options when confronted with a union demand for recognition.

The memo explains that an employer faced with a verbal or written demand for recognition has only three options:

- voluntarily recognize and bargain with the union;
- file an election (RM) petition (within no more than 14 days of receiving the demand) for a secret ballot election and/or determine the appropriateness of the bargaining unit; or
- if the union files a petition for a representation election (an RC petition) in the interim, await the NLRB's processing of that petition.

If the employer takes no action, however, the union may file an unfair labor practice charge based on an alleged refusal to bargain. In rare instances, an employer may claim that "unforeseen circumstances" prevented it from filing an RM petition within two weeks of the demand. In such

cases, however, the GC instructs Regions to consider the impact of an untimely RM petition on a case-by-case basis.

2. Potentially any charge alleging a violation of Section 8(a)(1) or 8(a)(3) during the "critical period" between the demand and an ensuing election may trigger a bargaining order based on any prior designation of representative status (such as signed authorization cards) by a majority of unit employees.

The memorandum clarifies that *any* Section 8(a)(3) unfair labor practice committed by an employer – e.g., the termination of a union supporter – during this period will result in the Board setting aside an election and issuing a remedial bargaining order.

Section 8(a)(1) unfair labor practices – I.e., any actions which interfere with employees' right to engage in (or refrain from) protected concerned activity during the critical period may also lead to bargaining orders, unless they are "so minimal or isolated that it *is virtually impossible* to conclude that the misconduct could have affected the election results." The GC takes pains to emphasize that "even one" violation after a union's demand for recognition will likely sustain a charge alleging a refusal to recognize and bargain unless this exceedingly narrow standard is met.

Coupled with the GC's efforts to reduce the burden of proof in certain unfair labor practice proceedings, this is a troubling development. For example, the GC recently argued employers should be found liable for potential union animus even when the employer's decision does not adversely impact the alleged discriminatee. Instead, the GC argues, any employer action may be an unfair labor practice if the action tends to interfere with workers' rights to organize. This could include positive actions such as a raise or promotion, as well as trivial changes such as moving the office stapler.

3. Union demands for recognition may take many forms and may even be verbal.

The GC memo reminds employers that demands for recognition may take any number of forms, including the filing of an RC petition, so long as the union checks the 'request for recognition' box on the NLRB's petition form and notes that the petition serves as its demand. Importantly, demands may also be made verbally. We anticipate this position will lead to arguments, and unfair labor practice charges, over whether and at what point demands for recognition were actually made and by and to whom.

4. Demands for recognition may be made to any agent or representative.

The GC takes the position a demand for recognition (whether oral or verbal) may be made upon any agent of the employer—including *any* legal supervisor. Once that demand is made, the 14-day period for an employer to either voluntarily recognize the union or file an RM petition begins. Accordingly, employers should train all supervisors and managers regarding how to detect and immediately report to their management team any time they receive even a potential demand for recognition.

5. The Board decision applies retroactively.

The memorandum makes clear that the Board's August 25 decision applies retroactively and regardless of the stage of any pending case (and indeed, the agency has already taken steps in that direction). The Board will no longer accept any claim to a legitimate reliance interest by an employer "based on an expectation of being able to engage in some degree of unlawful conduct without triggering a bargaining order." We expect this position to result in significant litigation given the fundamental unfairness associated with imposing a bargaining order on an employer for even a technical violation that occurred long before the new standard was announced.

6. Employers may also be ordered to bargain where they have "independent knowledge" of union support.

Finally, the GC advises that, although the Board's August 25 decision "does not address other situations where an employer may have forfeited or waived its avenue to seek a Board-conducted election," a bargaining unit may nonetheless issue where an employer has independent knowledge of the union's majority support and, yet, disputes the union's majority and refuses to recognize and bargain with the union.

What's Next?

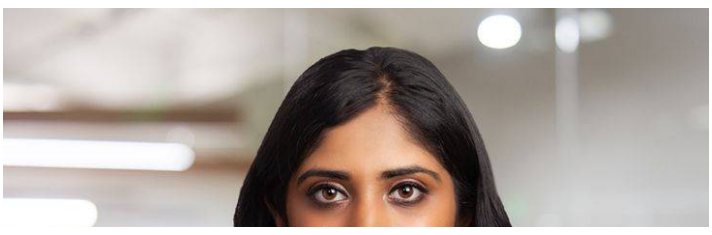
In light of the GC's memo and the Board's game-changing August 25 decision, we expect significant litigation over the sufficiency of demands for recognition. We also expect to see an increase in the number of unfair labor practice charges and refusal-to-bargain charges during election periods.

Presumably, this will lead to a stark increase in election results being set aside and replaced with bargaining orders. Under this new regime, employers may soon be under constant scrutiny from unions and the NLRB alike, as both go searching for any reason to avoid a free and fair election.

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.

Related People



Deepa K. Desai
Associate
617.532.8211
Email

Joshua D. Nadreau
Regional Managing Partner and Vice Chair, Labor Relations Group
617.722.0044
Email

Service Focus

Labor Relations