National Labor Relations Board Turns Up The Heat On Negligent Unions

Insights
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Summer might be coming to a close, but labor unions continue to feel a rise in temperature. Unions can expect to face a change in how the National Labor Relations Board's Regional Offices will handle duty of fair representation (DFR) charges brought by individual employees, and it doesn't appear as if unions will be happy with the change.

Specifically, the Board's General Counsel's Office just provided Regional Offices with new instructions on how to handle charges against unions in DFR cases in the wake of a steep increase in "mere negligence" defenses raised by unions. Where unions have previously been able to argue such a defense to evade these types of claims with ease, the Regional Offices will now look more closely at these cases to determine if there was in fact gross negligence or arbitrary behavior exhibited by the union, and will likely prosecute them if such findings present themselves. What do employers need to know about this development?

How Does This Directive Change Current Treatment Of DFR Cases?
DFR cases arise when an individual employee accuses their union of acting arbitrarily, discriminatorily, or in bad faith. In other words, union members can file a DFR charge pursuant to Section 8(b)(1)(A) of the National Labor Relations Act when they believe the union did not treat them fairly or process their grievance correctly.

Formerly, Regional Offices analyzed DFR charges against unions on a case-by-case basis, and a union's defense of "mere negligence" was typically enough to warrant a dismissal of the charge. The September 14 memo from the General Counsel's office admits the new approach to handling DFR cases "may be inconsistent with the way the Board and Regional Directors have historically interpreted the law." The new directive from the General Counsel's office aims bring more predictability to the outcome of DFR cases. The changes are intended to be "an effort to enable employees to better understand the duty owed by a union representative and to help unions discern their duty owed to employees."

In particular, the Board will focus its new procedures on two types of cases: (1) when a union loses track, misplaces, or otherwise forgets about a grievance; and (2) when a union fails to communicate its decisions on a grievance, or does not respond to inquiries for information or documents by the aggrieved member.

Forgotten Grievances

The Regional Offices of the Board will now be more meticulous in determining if a union showed "mere negligence" or if the union's action in misplacing a grievance amounted to something more. Unions will have to show "the existence of established, reasonable procedures or systems in place to track grievances." The "mere negligence" defense unions have relied on in the past will "ordinarily fail" if a union fails to establish such a system.

Unless there are unique circumstances, the lack of an established procedure in place will lead Regional Offices to issue a complaint, and argue a union engages in "gross negligence." A union may avoid facing liability if it has a reasonable system in place, but "was not effective in a particular case for an identifiable and clearly-enunciated reason."

Failure To Communicate

Regional offices will now be more likely to find a union acted arbitrarily when it fails to "communicate decisions related to a grievance" or when it does not "respond to inquiries for information or documents by the charging party." A union can still avoid prosecution in these types of cases if it shows "a reasonable excuse or meaningful explanation."

Additionally, in situations where a union has in fact responded to a grievant's request, but the grievant is unhappy with the union's opinion, the union does not have to share any additional explanation with the grievant to avoid acting arbitrarily.

Why Should Employers Care?

Employers might be wondering why they should care about the internal workings of unions. One unintended consequence that could soon be felt by employers is an uptick in the number of grievances filed by unions.

Unions concerned about the specter of stricter treatment of DFR cases by the Board could become more vigilant in pursuing grievances on behalf of their members. Grievances that may have once fallen through the cracks might no longer be ignored by unions as they try to avoid upsetting members. Such an increase in grievances will inevitably lead to more arbitrations and more time and money spent on resolving disputes.

Unions fighting DFR charges may also find themselves with higher litigation costs to defend themselves, which could lead to fewer resources to spend on representing their members, or, more likely, to spend on political contributions that lead to union-sponsored legislation.

Conclusion

Because this memo is a change to the way Regional Offices have handled DFR cases, there is always a chance the Board may disagree with the General Counsel. The General Counsel for the NLRB is the lead prosecutor for all cases filed with the NLRB, while the Board is a mainly adjudicative body. Comprised of a five-member panel located in Washington D.C., the Board decides NLRB cases brought before it. The Board in D.C. could choose to weigh in on the prosecution of these cases and

find they do not rise above "mere negligence." We will be in a better position to judge the impact of this development once the Board begins weighing in on these cases.

For more information, contact any member of the Fisher Phillips Labor Relations Practice Group or your Fisher Phillips attorney.

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