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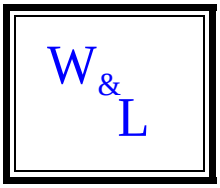
EMPLOYMENT LAW BULLETIN

A Monthly Report On Labor Law Issues



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VOLUME XXXX, Issue 5 MAY 2022

LABOR BOARD COUNSEL ATTEMPTING TO INSTITUTE MODIFIED CARD CHECK RULE AND DO AWAY WITH ANTI-UNION EMPLOYER MEETINGS

The current Administration, led by President Biden's promise to be the most pro-union Administration in history, continues in its efforts to change the rules so that unions become more widespread. The President's appointed National Labor Relations Board (NLRB) General Counsel, Jennifer Abruzzo, plans to change the rules of union organizing not by law or regulation, but by interpretation.

First, she is seeking to outlaw mandatory anti-union meetings conducted by employers. These meetings are sometimes called "captive audience" meetings because employers can require employees to attend such meetings. She is now claiming that employees have the right to listen to, or refrain from listening to, an employer's speech concerning their rights to act collectively to improve their workplace. She contends that forcing employees to attend captive audience meetings discourages employees from exercising their right to refrain from listening to the speech and is therefore in violation of the Labor Act. She takes this position in spite of the fact that the First Amendment gives employers free speech rights, and it is even written into the Labor Act which states that employer expression "of any views, argument or opinion, or the dissemination thereof . . . shall not constitute or be evidence of an unfair labor practice." Since 1948 in the *Babcock & Wilcox* case, the NLRB has consistently upheld a company's right to require employees on company time to attend such meetings.

In taking this position, Abruzzo is going where no NLRB General Counsel in modern times has gone before. Abruzzo explains that years ago the NLRB incorrectly concluded that an employer does not violate the Act by compelling its employees to attend meetings in which it makes speeches urging them to reject union representation. She states: "I believe that the NLRB case precedent, which has tolerated such meetings, is at odds with fundamental labor law principles. . . Because of this, I plan to urge the Board to reconsider such precedent and find mandatory meetings of this sort unlawful."

The second dramatic move made by Abruzzo in April, calls for a change in Board case law to allow unions the ability to win recognition from employers without an election. In a brief filed in a pending NLRB case, she calls for a decades-old legal standard allowing a union to be recognized if a majority of workers sign cards of support, established in the 1949 ruling in *Joy Silk Mills.* That decision was later overturned, but she wants to reinstate the concept. The concept would be under Abruzzo's approach that any employer that doesn't have clear evidence against the union's majority support in the workplace could be ordered to bargain with the union, even before any type of an election. Abruzzo argues that the law doesn't necessarily require the Board to hold an election, given the "substantial deference" the Board has in shaping national labor policy. The change would require employers to show "good faith doubt" when

challenging a union's majority status. Abruzzo claims the current Board election process deters private-sector unions, which now represent just 6% of the workforce.

These changes demonstrate the aggressive pro-union mandate being carried out by the federal government. The federal government itself as an employer issued guidance during April outlining what federal agencies could do as an employer to improve union organizing of federal employees. The guidelines instruct agencies on "how to encourage unions' access and ability to communicate with federal employees;" quickly process workers' requests to have union dues deducted from their paychecks; and train federal managers and supervisors about how to remain neutral when workers are organizing a union. The new guidance comes from a White House labor task force which was formed to explore ways to expand workers' collective bargaining rights in both the public and private sectors.

Editor's Note - These steps by the NLRB General Counsel are probably the strongest steps attempted yet by the Administration to promote unions. Note that the steps are not based on the passage of any law or regulation, or any vote by Congress, but instead are based on the power of the Board to change national labor policy by itself. Of course, the full Board will have to approve this change in policy, and the current developments are only the position being taken by the General Counsel to urge the Board to do so.

Traditionally, employer-conducted employee meetings have been probably the employers' most effective tool to explain the facts and issues to employees, the significance of union authorization cards, the employers' position on having a union, and the like. Such meetings are really the employers' main advantage in union organizing campaigns. The unions have numerous advantages in organizing campaigns, including the legal ability to promise employees virtually anything. Employers, on the other hand, cannot make any "promise of benefit" or even suggesting same to the employees who are voting, as such employer statements are deemed to be coercive and thus violative of the Labor Act. The Board allows unions to make such promises because unions have no ability to force the employer to change anything.

Regarding the secret ballot issue, unions have long fought to come up with ways to gain or force union recognition without giving the employees a right to vote by secret ballot. There was the Card-Check law many years ago, and a modified version of it now appears in the PRO Act, a proposal that has already passed the House of Representatives, and one co-sponsored by 47 Democrat Senators.

The current effort is to gain by statutory interpretation of the existing law, what could not be gained through Congress or through a formal Board regulation. It is not only anti-democratic in terms of employees' right to vote, but anti-democratic in the sense that it does not represent any vote by elected representatives. It is another way to do away with the right to vote, this time by regulatory fiat.

UNION SUCCESSES AT AMAZON AND STARBUCKS ENCOURAGE ORGANIZED LABOR

In early April, an employee-led labor organization was the first to unionize an Amazon warehouse. The employee-led group that won, however, was not a traditional labor union. It is called the Amazon Labor Union, a volunteer organizing operation among current or former Amazon warehouse employees with no formal ties to existing unions. The employee-led group won with 55% of the vote of workers at the New York warehouse in Staten Island.

Amazon filed objections to the election, contending that union organizers threatened employees into voting in favor of the union, and blamed the NLRB for suppressing voter turnout and issuing complaints against Amazon which the company contends had an improper influence on the votes of the workers.

Meanwhile, Amazon warehouse workers in Bessemer, Alabama, voted in a second union election after the union lost an earlier election by a large margin. On this occasion, although Amazon held a slight lead in the ballots that have been counted, there are approximately 400 challenged ballots that must be resolved before the final winner can be determined.

President Biden, reacting in glee over the Amazon situation, said in a Washington speech: "By the way, Amazon, here we come."

The election win by the union at the New York warehouse is precedent-setting for a second reason, the lack of ties to national unions. The local union group consisted only of current and former warehouse employees, without involving professional union organizers. A local campaign run by employees already on-site is usually a quite powerful tool for union organization. At a minimum, the Amazon development may cause national unions to rely more on local employee committees and the local community to run election campaigns.

Another well-known employer, Starbucks, has ongoing union campaigns at many stores seeking NLRB elections conducted in single-store units. In December 2021, the Service Employees International Union won an election at a Starbucks store in Buffalo, New York, and it was the first time in over 50 years' of history that a Starbucks corporate store had been unionized. The union won an election at a second store in New York the following month, and currently Starbucks is dealing with unionization efforts all over the U.S. The union campaigns are underway not only in New York, but in over 70 Starbucks locations across 21 states.

Starbucks as an employer is generally known to offer excellent benefits and has a reputation of being politically "liberal." With union issues, however, the company spokesperson has stated: "From the very beginning we've been clear that we're better together as partners without a union between us and Starbucks, and that conviction hasn't changed." Further, looking to defend against union-related attacks, Starbucks is hiring an in-house labor lawyer and a public relations manager. Howard Schultz, Starbucks' Chief Executive, in announcing to store leaders that Starbucks will be expanding benefits to reduce attrition, indicated that the new benefits legally cannot go to the growing number of stores that have voted to unionize, since federal law requires separately negotiated contracts for union-represented workers. Mr. Schultz has also released an employee message criticizing unions as an outside force trying to gain influence at the company, pointing out that due to low voter turnout under the mail ballot procedures, less than 40% of their employees have voted in union elections in stores that have voted to unionize. The company is apparently attempting to show that the union does not negotiate better benefits and pay than what Starbucks offers.

During the first six months of Fiscal Year 2022, union representation petitions filed at the NLRB have increased 57%. A Gallup survey last year found that 68% of Americans approved of labor unions, more than at any other time since 1965.

It should be noted that more than half of unionized workers live in just seven states - California, Illinois, Michigan, New Jersey, New York, Ohio and Pennsylvania.

IRS ISSUES PROPOSED RULES EXPANDING HEALTH INSURANCE SUBSIDY

The IRS has issued proposed regulations to require that "affordability" of health plans be based on the cost of coverage for not only the employee (as provided under current regulations) but also the employee's family members. The proposed regulations would allow family members who pay more than 10% of income for coverage to receive premium tax credits to purchase health coverage through the Obamacare Exchange.

Employers who do not offer affordable coverage to employees are subject to penalties, but such penalties do not apply to coverage for family members.

EMPLOYERS WILL NO LONGER BE ALLOWED TO ACCEPT EXPIRED DOCUMENTS FOR FORM I-9

As of May 1, 2022, employers should not accept expired List B documents (e.g., driver's license) as proof of identity for purposes of Form I-9.

If employers completed Form I-9 between May 1, 2020, and April 30, 2022, using an expired List B document, employers need to update Form I-9 with an unexpired document from List A or List B by July 31, 2022. If the employee is no longer employed, no action is needed.

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