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THE ASSAULT ON EMPLOYERS' RIGHT TO REMAIN UNION-FREE

This article can more properly be described as an editorial, but the writer honestly believes the accuracy of the above statement. The extent of unionization in the private sector has declined from approximately 35% at the end of World War II, to the 6% range that exists today. Unions contend that it is impossible for them to gain representation under the current labor laws but consider the following.

Although recent Gallup polls indicate that 70% of the public have a favorable opinion of labor unions, only 11% of those polled would have any personal interest in joining one. Second, many of the old goals of organized labor have been met through legislation and otherwise, such as the wage laws, benefit laws, safety laws, and civil rights laws. Today, employers are fighting among each other as to who can attract and retain available workers, and while union wage rates are often higher than non-union rates, non-union rates are rising at a greater rate than union rates. Many of the predominately union industries are declining, and non-union industries are more often more likely to expand. All one has to do is compare the growth of jobs in right-to-work states as compared to non-right-to-work states.

Unions long complained that the long wait time after asking for an election to the date of the election allows employers to campaign against the union and defeat the union vote. The Obama Administration implemented the "quickie election" rule, and other measures, allowing the average campaign period to drop from 50+ days to around 22 days, and allowing union votes to be held in smaller voting units designed to give the union a better chance to win. Ironically, although the percentage of union election wins rose under these procedures, the number of persons joining unions actually declined. Further, while unions continue to complain that the labor laws are "rigged" against them, unions were winning 75% of the elections under these "rigged" laws.

The Biden Administration, the self-proclaimed most "pro-union" President in history, has appointed union lawyers to official positions to change the results. The most common campaign tactics for employers to use when facing a union campaign involve having a manager or supervisor talk to each worker at the facility, and/or conducting small or large group meetings in which workers are educated - the unions would say the workers are indoctrinated - about the disadvantages of union representation. Therefore, the National Labor Relations Board (NLRB) General Counsel has declared that such "captive-audience" meetings or even conversations are inherently coercive and therefore unlawful, and an employer can be prosecuted and/or an election voided because of these actions. Even though the Labor Board itself has not yet adopted this unprecedented rule, the regional offices are already implementing the concept so that any employer that dares conduct such activities, risks being charged with violating the law and/or with having an election won by an employer being voided. The next steps have been for NLRB officials to implement measures of what some would call punitive measures against employers. One such step includes seeking immediate court injunctions against employers firing union advocates under debatable circumstances, so that these discharged employees can return to the plant and advocate for union representation. This could be done prior to any findings that the employer is guilty of anything, and without the benefit of a hearing through

traditional Labor Board procedures. Other NLRB remedies being used is requiring an employer official to "apologize" for an unfair labor practice at a "captive-audience" type meeting, and refusing to allow an employer to enter into a settlement agreement with a non-admission clause. In other words, to settle the case the employer must admit guilt.

In 1947, when the Taft-Hartley amendments to the National Labor Relations Act were passed, the laws were generally construed to require the government, including the Labor Board, to be "neutral" in union campaigns by neither favoring or opposing union organization. Further, a "free speech" provision was added to the Labor Act in Section 8(c) enforcing the employer's Constitutional right to engage in free speech. Today, these Constitutional and statutory employer rights are in serious danger.

In general, absent a serious physical threat, union organizers can say or promise almost anything to employees to get their vote. Employers, however, have severe restrictions under the Labor Board's contention that, because the employer can control employment actions, its statements are often inherently coercive. This means that the employer cannot indirectly suggest improvements in working conditions should the employer win a union campaign, and likewise the employer cannot even indirectly suggest deteriorating conditions will occur should the union lose. Further, an employer is prohibited from seeking employees' opinions on such matters, or how they might vote or react to issues. Employers are often cited for "surveillance" of union activities as it might be "chilling" to employees engaging in such activities. The concept is that any NLRB election must be conducted under a "laboratory condition" in which there can be no perception of coercion by the employer whatsoever. If these conditions are not met, the union can get the election postponed to a time of its own choosing and/or get a second election to try again to gain a majority.

The latest assault on employer free speech rights is through a Reporting Act, in which a new proposed regulation requires an employer as well as any consultant to file public reports on the amount being paid to assist the employer in remaining union-free. The rationale for this rule is that it will allow employees to assess how much the employer is paying for these union-free activities, as well as to encourage government contracting agencies to look at these activities when awarding government contracts. These regulations, which would deter employers from getting legal advice, have not yet gone into effect, but they are a goal of the current Administration. It is noteworthy that similar proposals have been opposed by the American Bar Association.

There are other ways in which union rights have been expanded as compared to employer rights. Unions have actually been allowed to use racial epithets as part of their picket line activities against those who choose to work. In a recent case, a nurse walked out in the middle of a major surgery operation to attend a union matter and she was found to have been improperly terminated because of union activities. Workers who attempt to gain the support of other workers in almost any manner remotely connected to work have been deemed to engage in "concerted activities" in response to which the employer cannot retaliate or negatively respond in any manner. Common sense employer work rules can be challenged because someone might interpret them as "chilling" union activities – for example, rules against "walking off the job" can be found to be illegal because someone might feel they have a chilling effect on potential union strikes. The list goes on and on.

Finally, the so-called, "Pro Act" has been co-sponsored by all but three Democrat Senators. It would prohibit state right-to-work laws and allow for rules such as the "card check" allowing for union representation without a secret ballot election. The Pro Act also provides for a "Christmas tree list" of other union rights as opposed to those of employers.

This is not to say that union rights should not be protected, as it is a strength of our country and its laws to have the right of union representation. The key is to have a proper balance and recognition of Constitutional rights of free speech and other rights as well. Too much union power, it is submitted, is bad for our country. Look at the power exhibited by the railroad unions recently, where a small number of workers in four of 12 unions almost caused a major part of our economy to be shut down, causing President Biden, to his credit, to mandate implementation of the negotiated collective bargaining agreement.

This "saving" of our economy would probably not have occurred outside the railway industry with its particular and unusual resolution of labor-management disputes.

A fair balance and recognition of rights is necessary in union-management relationships. While there may have been years that the pendulum arguably swung too far to management, the pendulum today is swinging in the other direction, too far in this writer's opinion.

ANTI-TRUST ENFORCEMENT OF LABOR MARKET COLLUSION & PAY EQUITY ARE BECOMING MORE IMPORTANT

In 2016, the Department of Justice (DOJ) shifted its policy to criminally prosecute employers and executives that enter into wage-fixing or no-poach agreements with other employers. President Biden issued an Executive Order in 2021 that encouraged the DOJ and the Federal Trade Commission (FTC) to broaden enforcement against "wage collusion" and other unlawful labor market agreements. Since then, the DOJ has brought criminal indictments in a number of market collusion cases. However, although a number of these cases went to trial, all of them have resulted in acquittals until recently. A recent victory of DOJ occurred on September 1, 2022, when a healthcare staffing company indicated it intended to plead guilty to anti-trust violations, based on accusations it conspired with a competitor to not raise wages of certain nurses or recruit or hire nurses from their competitors.

The DOJ and FTC have issued Anti-Trust Red Flags for Employment Practices guidance. While HR personnel may attend conferences to learn industry best practices and share information about compensation and hiring with others within their industry, they must take precautions when doing so. For example, the DOJ in its recent cases seems to indicate that no-poach and wage-fixing agreements may be inferred from information exchanges between companies. And an agreement need not be formal or written to violate the anti-trust laws. Nevertheless, criminal prosecution of an anti-trust labor market violation requires an agreement between two or more individuals or companies not to compete in their recruitment or retention of employees.

It is interesting that the anti-trust developments seem to be occurring around the same time that many states are moving towards wage transparency laws. States like California, Colorado, Connecticut, Maryland, Nevada, Rhode Island and Washington have such laws, and a number of other states are moving towards the enactment of such laws. In addition, various cities have wage transparency laws, including New York City and several cities and counties in New York state, Cincinnati, and Toledo. These laws generally require employers to disclose the wage rate for each job they are filling. The idea is to make pay more equitable, and to give employees more bargaining power as they are negotiating starting pay. These laws can potentially have both negative and positive impacts. For example, the patchwork nature of the laws makes it difficult for employers to know what laws they have to apply in the case of remote workers. Further, in states or cities and counties subject to these transparency laws, employees may complain or file charges over why they are paid in the middle or bottom of the range, and such transparency may also increase the potential for pay equity lawsuits. On the other side of the coin, some argue that these laws have a positive impact on employees' feelings of fairness and job satisfaction and make it easier to attract talented workers.

Also, the federal government is moving towards more emphasis on pay equity employment discrimination. The most active agency is the Department of Labor's (DOL) Office of Federal Contract Compliance Programs (OFCCP), which enforces the discrimination statutes against federal contractors. This agency requires contractors to run pay equity analyses in order to insure there is no discrimination on the basis of protected categories such as race or sex. The broader the inequities appear, the more likely OFCCP is to find violations. Isolated disparities are less likely to draw attention. The Equal Employment

Opportunity Commission (EEOC) may in the future require employers to report pay ranges as part of their annual EEO-1 filing requirements.

It is not unusual for a company to find itself in a position of having to hire someone for a critical position at a higher rate of pay than what is advertised to attract that person away from a competitor or for remaining with the employer. In light of new wage transparency laws and pay equity issues, when doing so it would be helpful to document the reason why a higher wage was offered and to "red circle" that employee and show it represents a special situation.

CONTROVERSY IS BREWING OVER THE LEGALITY OF ABORTION TRAVEL BENEFITS

An extremely interesting issue has arisen over whether employers can be charged with discrimination by providing abortion travel benefits. One of the EEOC commissioners has instituted a rarely used Agency procedure to initiate discrimination investigations involving at least three companies over their providing abortion travel benefits to employees. The "Commissioner charges" allege that the employers are favoring workers seeking abortions while discriminating against pregnant workers and disabled workers because they are not offering equivalent benefits for their medical needs. The EEOC's former General counsel in a letter sent to employers pointed out such possibilities, but so far the EEOC has declined comment on these theories.

Editor's Note: It is unlikely that the current EEOC majority will support these charges, but of course private lawsuits can always be filed. Further, it may be unusual for an employer to cover travel for abortion but not offer benefits for other pregnancy related matters and medical necessities.

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