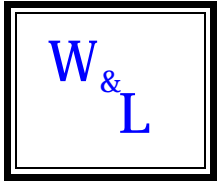


EMPLOYMENT LAW BULLETIN

A Monthly Report On Labor Law Issues



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IMPORTANCE AND EFFECT OF REJECTION OF UNION BY AMAZON WORKERS

In the most closely watched union representation election in at least a decade, Amazon workers at its warehouse in Bessemer, Alabama, defeated the Retail, Wholesale and Department Store Union, with 1,798 no votes to only 738 yes votes, along with approximately 500 challenged ballots that will not be counted because it would not affect the results. Statistically, counting all eligible voters, the results mean that fewer than 16% voted to join the union. This was a crushing defeat for the union, particularly since it was endorsed by President Biden and many other political officials, including a well-known Republican (Sen. Rubio). The largest two private employers in the country, Amazon and Walmart, have no union representation, and thus that situation will not change.

The union, following its crushing defeat, tried to make the most of a very bad situation. It claims that Amazon "interfered with the right of its . . . employees to vote in a free and fair election," and is using the defeat to encourage support for the PRO Act, a massive pro-union bill that passed the House of Representatives narrowly along party lines. Among other things, the union claimed that the installation of a mail box on the warehouse property would lead voters to believe that Amazon would play a role in collecting and counting votes, and that the holding of mandatory anti-union meetings by Amazon were coercive. The union also accuses Amazon of spreading false information about mandatory union dues, since employees can opt out of dues payment in a "right-to-work" state.

Such "captive audience meetings" are totally legal under current law, although would be prohibited by the PRO Act. Similarly, the PRO Act would void state "right-to-work" laws.

It was hard for the union to campaign on the idea of negotiating for more money or benefits for the workers, since Amazon starts its workers at \$15.00 per hour, twice the state minimum wage, and has good benefits. In contrast, Amazon was likely able to point to various union contracts in the state with much lower pay and benefit levels. On the other hand, Amazon runs a highly efficient and technology-enhanced warehouse, and undoubtedly some workers felt they had to work too hard or had too much mandatory overtime without significant notice or had long walks to the break room that cut into their breaks over 10-hour shifts. But, as one worker said, "A lot of us are in agreement that we don't need anybody there to speak for us and take our money." As stated by Amazon in a biog. post, "It's easy to predict the union will say that Amazon won this election because we intimidated employees, but that's not true. Our employees heard far more anti-Amazon messages from the union, policy-makers and media outlets than they heard from us."

Currently, unions represent just 6.3% of U.S. private-sector workers, down from 24.2% in 1973. On the other hand, about 40% of public-sector workers are represented. To show the different reaction by persons in Congress, Sen. Bernie Sanders said that the Amazon vote showed that legislation is needed "that finally gives workers a fair chance to win organizing elections." On the other hand, Sen. Tommy Tuberville (R. Ala.) said the vote showed workers "value their right-to-work protections."

Editor's Note: Employers should not be too giddy about the Amazon election results, in part because the current administration is living up to President Biden's promise to be the most "pro-union President" in history. The changes at the National Labor Relations Board (NLRB) have been rapid and remarkable, basically unprecedented. The PRO Act, were it to pass in the Senate, would make things much worse for employers. Moreover, public opinion polls such as Gallup show the public feels more favorably towards unions today than in many years. The pandemic has resulted in many non-union walkouts and the like, such as protesting working hours and pay, situations in which unions can find support. Union organizers have basically not been as active during the pandemic, because of fear of contagion, but that situation is rapidly coming to an end. One interesting observation of the Amazon election, however, is that the voting employees were overwhelmingly minorities, and unions sometimes assume that they can gain more support among minorities. This assumption proved wrong at Amazon.

PRO ACT SUPPRESSES EMPLOYEE RIGHT TO VOTE IN UNION ELECTIONS

This writer is from Georgia, where a recently passed state law has been accused by the media of discouraging voting by minorities. While this writer believes this claim is overstated at best, and false at worst, as evidenced by the fact that both Democrat activist Stacey Abrams and Republican former President Trump believe that recent elections in Georgia did not have sufficient safeguards. However, the subject of this article is not the Georgia state election laws, but the fact that massive media attention is being given to the claim that Georgia election laws discourage minority voting, while no one, and certainly not the press, seems to be interested in the massive discouragement of voting in union elections under the PRO Act.

Traditionally, secret ballot union elections conducted by the NLRB are held on company property, which thereby allows easy access by voters. As a matter of fact, NLRB statistics show that about 98% of eligible employees vote in secret ballot elections held on company property.

The PRO Act expressly prohibits employee voting on company property and instead says that voting must be conducted by mail, or in some cases at locations away from company property. It would be hard to imagine a greater restriction on voting. Let's take the example of the recent Amazon election. As stated by an Amazon spokeswoman, "We said from the beginning that we wanted all employees to vote and proposed many different options to try to make it easy" The [union] fought those at every turn and pushed for a mail-only election, which the NLRB's own data showed would reduce turnout. This mailbox - which only the USPS had access to - was a simple, secure, and completely optional way to make it easy for employees to vote, no more and no less." Even in the most publicized and important union election in a decade, only 55% of the eligible voters at Amazon voted. Had the election been held on company property, more than likely the normal 98% would have voted. And yet, the PRO Act prohibits voting on company property and basically advocates mail balloting, where only a little over half of the voters actually participate.

To make the point directly, why is it that the media accuses the State of Georgia of restrictive voting while making no mention of arguably the greatest suppression of voting in history in terms of the PRO Act?

POLITICS IS RISKY BUSINESS FOR CEOS

The above headline appeared in the Opinion section of the Wall Street Journal. The writer of the article, a former CEO of American Express, advises that executives should not take a company position on public-policy questions that do not directly affect their business. Among other things, the article points out that whatever political statements are made, it will alienate many employees and customers. In discussing executives expressing such opinions on political issues, the Economist magazine reports that: "They enjoy little upside and risk plenty of downside."

A current example of the danger of public statements on political issues involve the CEOs of Atlanta-based Coca-Cola and Delta Airlines. Those CEOs publicly announced their disapproval of the Georgia legislation, involving themselves in a process that led to announced boycotts by persons of all political persuasions. The left announced a boycott because the two companies were headquartered in Georgia, and the right, including former President Trump, announced a boycott because of the claim that the announcements were false and further resulted in great harm to the State of Georgia, including a movement of certain economic activities out of the state. Consider more neutral comments made by officials of the Augusta National, which held the Masters Golf Tournament in Georgia in April. Those statements generally said that Augusta National supports the right to vote but does not wish to have political issues involved in the sport of golf. Such more neutral statements are less likely to offend anyone.

Note that Congress long ago banned companies from making direct political contributions to federal candidates and political parties, but admittedly executives are allowed to take a stand on broad public policy issues that do not identify any particular candidate or advocate for or against any particular legislation or government rule.

PRESIDENT BIDEN'S INFRASTRUCTURE BILL MAY BE DESIGNED TO STRENGTHEN ORGANIZED LABOR

President Biden is in the process of proposing his second multi-trillion bill, on infrastructure, with a third multi-trillion bill to follow thereafter. Unlike President Obama's infrastructure bills, however the infrastructure bill produced in April, called the American Jobs Plan, would require employers benefitting from an infusion of infrastructure funds to pay prevailing wages and stay neutral in union organizing efforts. The proposal can be as far reaching as the PRO Act since as many as one in every four workers is associated with a federal contractor. The legality of a union-neutrality clause might be legally attacked in court on the grounds that it is pre-empted by the National Labor Relations Act, but the President's decision to fire a Trump-appointed NLRB General Counsel in the first 23 minutes of holding office, shows his intent to carry out his campaign promises of being the most pro-union American President in history, regardless of potential legal risks. In contrast, President Obama's infrastructure bills did not include the addition of policies aimed at increasing union membership. The President may have a greater opportunity of moving forward in his pro-union agenda in the infrastructure bill, because the Administration may need only a majority vote instead of the 60-vote margin required under the Senate's filibuster rules. The strongest opposition to the Biden infrastructure bill may come from the 33% increase in corporate income taxes (21% to 28%) he proposes to pay for it, while some progressive Democrats demand that it does not spend nearly enough. Senate GOP Leader Mitch McConnell calls Biden's plan a "Trojan horse" for tax hikes and liberal social policy changes having nothing to do with infrastructure. There are further complications because a number of progressive Democrats in the Northeast will not support the bill without ending the cap imposed on state and local tax deductions, a change which would only

benefit the very rich. Some also argue that these multi-trillion dollar federal programs will add more heat to a hot economy, resulting in inflation and other adverse consequences, a position held by President Obama's Economic Advisor, Lawrence Summers.

REPORTING DEADLINE FOR EEO-1 COMING UP FAST

After a brief hiatus due to the COVID-19 health emergency, the Equal Employment Opportunity Commission (EEOC) is reminding covered businesses that they must report EEO-1 Component 1 data for both 2019 and 2020 by July 19, 2021. The portal for data collection and submission will open April 26, 2021.

The duty to report applies to businesses with 100 or more employees in their workforce (and federal contractors with 50 or more employees) and requires a demographic breakdown of the workforce by race and gender. Because many employers had wide fluctuations in their workforce during the pandemic this may be a more-than-usually daunting task. It also remains to be seen how these setbacks and surges will affect the numbers. There is a longstanding presumption that certain statistical disparities suggest discrimination on the basis of race or sex. Some employers may be surprised by the results for these two very unusual years.

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