What's Next In Labor Law

Top Line Labor Issues

The National Labor Relations Board (NLRB) and Department of Labor (DOL) have been pursuing a union-friendly, anti-employer agenda through regulations, case decisions, and enforcement. With continued high unemployment, these agencies are making it harder to start or expand a business, and create jobs.

Ambush Elections and Reduction of Employee Privacy

On February 6, 2014, the NLRB proposed an expedited election rule that would drastically shorten the election period, from about 38 days to as little as 10 days, limit an employer's ability to talk to workers about unions, and mandate that disclosure of workers' personal phone numbers and e-mail addresses to unions.

Expand Non-Majority Unions

In *Specialty Healthcare,* the NLRB redefined how bargaining units are determined, allowing unions to gerrymander the workers they wish to organize and create very small "micro" unions. This is facilitating a proliferation of small unions and making it far easier for organizers to penetrate non-union workplaces.

The Rise of Worker Centers

Worker Centers are non-profit groups, linked to organized labor, that launch protests, pickets and strikes, but don't call themselves unions so they can avoid complying with federal labor law. This movement is gaining momentum and sophistication and may help organized labor find entry into facilities where workers have previously declined to embrace unions.

Employers Beware of Social Media Pitfalls

Employee use of social media, like Facebook or Twitter, is a hot topic for the NLRB, which has struck down many sensible employer policies limiting the use of social media with regard to the workplace. Even policies simply encouraging workers to be respectful have been ruled overbroad and unlawful.

Cyber Card Check

The NLRB is considering making off-site, electronic voting standard for union elections, with the same potential for coercion and undue influence as the original card check bill. By depriving workers of the privacy of the voting booth and removing elections from the workplace, "Cyber" Card Check will likely skew voter participation so that staunch union supporters make up a larger share of voters.

Enhanced Joint Employer Liability and Permissive Intermittent Strikes

The NLRB intends to adopt a new, liberal standard to find joint employer status, attacking third party contractor and franchisor/franchisee relationships, as well as expand the definition of protected strike activity to include disruptive, intermittent, "hit and run" strikes, which will only benefit worker centers and unions.

Increased Union Access

The NLRB is preparing to set a new precedent that would allow unions access to employer e-mail systems, restricting employers' ability to regulate and set policy in their own workplace.

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Ambush Elections

When a union wishes to organize a workplace, it will usually ask the National Labor Relations Board (NLRB) to hold an election. The median time to hold such an election is currently 38 days. This campaign period gives both sides a chance to communicate with workers. The NLRB's expedited election rule was struck down by D.C. Circuit Court of Appeals on technical grounds, **but with its quorum reestablished, the Board will likely republish the rule which will again limit employers' free speech rights and the ability of workers to get complete information about this critical decision.**

This shortened election window gives unions a tremendous advantage over employers.

- Cutting short the election period favors unions by limiting employers' free speech rights and preventing workers from hearing both sides of the story.
- The NLRB's rule dictates that fundamental issues such as the size and scope of the bargaining unit and who is eligible to vote will be resolved only *after* an election has taken place.
- Unions have months to give workers their side of the issue without employers being given formal notice that an organizing drive is underway — and can spring an ambush election when they feel the time is ripe.
- Under the rule, employers will then have a very limited window to discuss unionizing. It would eliminate the current minimum 25 day period required before holding an election.
- Employers would be required to file a formal Statement of Position within seven days raising issues and stating their basis, or forfeit the legal right to pursue them later.
- Unfair labor practice charges dealing with union misconduct will only be dealt with *after* the election has taken place.
- Employers also lose their automatic right to a post-election Board review of contested issues.

Ambush elections are a solution in search of a problem.

- The NLRB already handles election requests quickly. The median time for an election to be held is just 38 days. More than 95% of elections occur within two months.
- In 2010, 2011 and 2012, the NLRB met or surpassed its own internal time goals for elections and case handling, feats the acting General Counsel continues to describe as "outstanding."
- Unions already win 65% of all union certification elections.

Ambush elections are just one of many ways the NLRB is attempting to upend the playing field in favor of unions through more regulations.

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Forcing Employers to Allow Union Access to E-Mail Systems

The National Labor Relations Board (NLRB) appears ready to grant organized labor's long-held wish for greater access to non-unionized employees by opening workplace e-mail systems to union solicitations. The agency's General Counsel made this abundantly clear when his office began actively seeking cases involving employee use of work e-mail systems to bring before the full Board, and *Purple Communications* (NLRB Case No. 21-CA-95151) may be just the case that the NLRB has been looking for.

Under current law, employers may prohibit off-duty employees from engaging in union organizing on the employer's property and bar union literature distribution as long as the restrictions are (a) limited to work areas, (b) clearly explained to all employees and (c) applied to all off-duty employees equally, not just those engaged in union activity [*Tri-County Med. Ctr., Inc.*, 222 N.L.R.B. 1089 (1976)]. Without question, work e-mail systems are the property of the employers who have invested time and capital in establishing and maintaining them. Seven years ago, the NLRB upheld an employer's right to ban "non-job-related solicitations," from company e-mail systems, including those related to union matters [*Register Guard*, 351 NLRB. No. 70 (2007)]. But now, that may change.

After a vote to unionize two Purple Communications call centers failed, the company's policy restricting the use of company equipment (laptops, Internet access, voicemail, etc.) to "business purposes only" came under fire. An Administrative Law Judge dismissed the General Counsel's allegation that the employer had illegally prohibited its employees' personal, non-business use of its e-mail system. In the pending appeal, the Board invited the public to file amicus briefs on whether the current law should be changed to mandate greater non-business use of e-mail systems by employees. The briefs, which were due on June 16, 2014, were asked to address the following:

1. Should the Board reconsider its conclusion in Register Guard that employees do not have a statutory right to use their employer's email system (or other electronic communications systems) for Section 7 purposes?

2. If the Board overrules Register Guard, what standard(s) of employee access to the employer's electronic communications systems should be established? What restrictions, if any, may an employer place on such access, and what factors are relevant to such restrictions?

3. In deciding the above questions, to what extent and how should the impact on the employer of employees' use of an employer's electronic communications technology affect the issue?

4. Do employee personal electronic devices (e.g., phones, tablets), social media accounts, and/or personal email accounts affect the proper balance to be struck between employers' rights and employees' Section 7 rights to communicate about work-related matters? If so, how?

5. Identify any other technological issues concerning email or other electronic communications systems that the Board should consider in answering the foregoing questions, including any relevant changes that may have occurred in electronic communications technology since Register Guard was decided. How should these affect the Board's decision?

It is anticipated that the NLRB will use the *Purple Communications* case, instead of a formal rulemaking with notice and comment period, **to grant workers new rights where none before existed**. The new precedent would mandate that an employer must permit employees to use workplace e-mail systems for union organizing and other Section 7 activity, if it allows any incidental, personal e-mail use. An employer would only be able to limit use for Section 7 activities if it can show that the limitations are necessary to maintain production and discipline.

Such a change would present employers with a choice between two impractical policies: completely bar workers' use of workplace e-mail for any non-business purpose or allow unfettered access for all uses, including union organizing.

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"Micro" Bargaining Units

In *Specialty Healthcare*, the National Labor Relations Board (NLRB) threw out decades of precedent regarding what is an "appropriate" bargaining unit. Abandoning the long-established preference for units representing all workers in a class or craft, the NLRB will now rubber stamp virtually any bargaining unit suggested by a union, even "micro" unions made up of just a few workers.

By isolating a small number of workers, it is far easier for unions to win majority support. This cherry-picking of smaller groups of employees will lead to increased numbers of fractured bargaining units, disrupting business operations and undermining stable labor relations as multiple units making competing demands for wages, benefits and work rules.

In his dissent to *Specialty Healthcare*, former NLRB Member Hayes declared this to be **"perhaps the most glaring example in cases decided recently by my colleagues . . . for the purely ideological purpose of reversing the decades-old decline in union density in the private American workforce."**

The *Specialty Healthcare* decision has allowed unions to cherry-pick bargaining units whose construction borders on the ludicrous, including:

- Retail employees of just the women's shoe department at a Bergdorf-Goodman store in Manhattan.
- Bakers working at only 6 Panera Bread cafés that sit adjacent to a Michigan interstate highway, even though bakers at 11 other nearby cafés are owned by same franchisee,
- The radiological technicians of only one department of a shipbuilding defense contractor, excluding approximately 90% of the employer's rad-tech workers from the unit,
- Only 31 of the 78 hourly employees of two rental car agencies at Denver International Airport, despite the strong overlap of duties for all of the employees,
- The fragrance and cosmetics staff of a single Macy's department store.

This is another example of the NLRB taking advantage of every opportunity to tilt the playing field in favor of organized labor, one that is having far-reaching and harmful consequences for workers, employers, and the economy. The bottom line is that it is now much easier for unions to organize, even in places where they have previously been rejected by a majority of workers, and much more difficult for employers with micro unions to manage their workplaces.

The *Specialty Healthcare* decision virtually eliminated an employer's right to participate in determining who is in a bargaining unit. It is up to Congress to pass legislation that will restore the balancing test that had stood for more than fifty years and ensure that employers have a voice in determining this important issue. Tell your elected officials to support the *Representation Fairness Restoration Act* (H.R.2347).

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Expanded Joint Employer Liability

Potentially reversing a thirty year precedent, the National Labor Relations Board (NLRB) has engaged in a two-pronged scheme to expand "joint-employer" liability to include franchisors and employers that use contractors.

The NLRB's General Counsel announced on July 29, 2014, that his office will pursue McDonald's as a "joint employer" with its franchisees in cases involving alleged unfair labor practices. Two months earlier, the Board itself signaled its intent to upend the joint-employer standard when it requested amicus briefs in *Browning-Ferris Industries*, a representation case. This one-two punch is part of a larger NLRB agenda to encourage union organizing at the expense of employers' rights and existing law.

Normally determined on a case-by-case basis, two companies can constitute a "joint-employer" under the National Labor Relations Act (NLRA) if they both exert significant control over employees or share the ability to meaningfully affect employment conditions such as hiring, firing, discipline, compensation, benefits, scheduling, and providing day-to-day direction and supervision. This clearly defined standard has been in place for more than three decades.

This clarity has allowed employers to develop business models that have led to increased flexibility, competitiveness, and growth. For example, through contracting, employers have been able to focus on the core functions that are at the heart of their businesses while allowing outside firms to handle other activities such as payroll, cleaning, and other back-office support services. This has freed up funds that can be used to invest in new products and expand operations. Through franchise arrangements, employers have been able to expand the national and international presence of their brands while giving entrepreneurs the ability to buy into a successful business they couldn't afford to establish on their own.

The NLRB's goal appears to be scrapping the current joint-employer standard and replacing it with a test based on "industrial realities," a vague concept under which a wide range of businesses could be held liable for issues involving workers they don't actually employ. Creating the legal fiction that a host facility or a company that uses subcontracted workers is the "employer" of another wholly independent company's employees will have significant impacts, such as disrupting operations, increasing costs and limiting the ability to respond to changing market conditions. The practical effects of altering the joint employer standard could also include:

- Companies inadvertently finding themselves vicariously liable for the actions of third parties they do not control.
- Forcing companies to negotiate with unions over workplaces they don't actually control.
- Allowing unions to use contract negotiations at a single franchise to force corporate-wide agreements on issues like card check and neutrality.

The bottom line is that any employer that utilizes franchising, is involved in a joint venture, engages staffing agencies, hires subcontractors, could unexpectedly be dragged to the bargaining table with a union, and face liability for unfair labor practice charges for which they had no responsibility.

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The Rise of Worker Centers: Union Corporate Campaigns Under a Different Name

As their ranks decline, unions have turned to alternative approaches to organizing. **One of their new tactics is the Worker Center.** This movement is gaining both momentum and sophistication and may help organized labor find entry into facilities where workers have previously declined to embrace unions.

Worker centers are usually organized as nonprofit, "charitable" organizations, claiming to provide education and training services. **While they act like unions in many respects,** their §501(c)(3) status allows them to harass employers **while avoiding the restrictions on picketing and boycotts** established by the National Labor Relations Act (NLRA) and the disclosure and democracy requirements of the Labor Management Reporting and Disclosure Act (LMRDA). Their "charitable" status also brings an element of creditability — in the eyes of both employees and the public — to a corporate campaign that a union would typically not have.

To exist, worker centers do not need substantial support within a workplace — they only need to enlist a few disgruntled workers to launch a campaign against an employer. Their activities include negotiating directly for higher wages and benefits, raising grievances on behalf of particular employees, conducting publicity-driven smear campaigns, engaging in secondary boycotts, filing lawsuits against employers and encouraging government agencies to investigate baseless charges of discrimination and workplace safety violations.

Some of the most active worker centers are the Restaurant Opportunities Center, the Coalition of Immokalee Workers, Our Wal-Mart, Warehouse Workers for Justice, and the Fast Food Forward. These groups are active in multiple states.

Traditional labor unions have been sponsoring and collaborating with these alternative groups, and Richard Trumka, head of the AFL-CIO, recently declared that worker centers would be a new partner in expanding union membership. In fact, unions are already leveraging worker centers for direct economic campaigns against employers and for opportunities to enact public policy changes. For example, the Black Friday campaign against Wal-Mart, strikes at fast food restaurants in New York and other cities and demands that supermarkets and restaurants in Florida and other states observe "codes of conduct" are all led by union-backed worker centers.

Worker centers are striving for mainstream acceptance and increased influence. **Some receive taxpayer and philanthropic funding. The U.S. Department of Labor, for example, has entered into a formal partnership with the Restaurant Opportunities Center, essentially deputizing the activist organization to act as the eyes and ears of enforcement agents.**

Both employers and workers need to monitor the worker center movement. In particular, if these groups are going to claim to represent workers and make demands of employers, **they need to be governed by laws that regulate union behavior and provide democratic protections for employees**.

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Employers Beware of Social Media Pitfalls

Employee use of social media, like Facebook or Twitter, is a hot topic for the National Labor Relations Board (NLRB). The NLRB has found numerous employers' restrictions on employee's use of social media to discuss their workplace to be overly broad and has determined that employee use of social media can be protected activity.

In the NLRB's determination, employers are not free to adopt blanket policies that restrict workers' use of social media. The NLRB continues to declare policies regarding blogs, tweets and posts to be unlawful if they potentially interfere with employees' right to engage in concerted activity or to discuss terms and conditions of their employment.

Many facially neutral, broadly worded communications policies have been held to unlawfully restrain employee activity. For example, the NLRB has struck down social media policies that:

- Prohibit "disrespectful conduct," "inappropriate conversations," "unprofessional communications," or "defamatory comments."
- Prohibit the disclosure of confidential, sensitive or non-public information about the company to anyone outside company without prior approval.
- Prohibit employees from engaging in unprofessional communication that could negatively impact the employer's reputation or interfere with its mission.
- Prohibit posts that are discriminatory, defamatory or harassing about specific employees.
- Require employee comments to be "honest, professional and appropriate."
- Require postings to include a disclaimer that the opinions expressed are the employee's alone and not that of the employer's.
- Require approval before an employees are allowed to identify their employer or use their trademarks or service marks.

The NLRB has placed a heavy focus on whether employees are social media "friends" with co-workers, and whether co-workers respond to an employee's posts about the company. Merely using Facebook's "like" feature may be enough for the Board to determine that concerted activity is taking place. Even if no other workers respond, the NLRB has indicated that it may protect an employee's posting as an *attempt* to initiate group action.

Employers should be aware of and concerned about how the NLRB is expanding its definition of "concerted activity" and its heightened scrutiny of seemingly standard, unobjectionable language that employers have used in their personnel policies for years. While this is an emerging area of law and there is no bright line test, one thing is for certain: the NLRB will be making life more difficult for employers with regard to social media.

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Cyber Card Check

The National Labor Relations Board (NLRB) is considering a rule establishing off-site, electronic voting for union certification elections. **This proposal would take workers out of the privacy of the voting booth**, creating the same potential for coercion as the original Card Check bill. By moving elections away from the workplace, "Cyber" Card Check is also likely to depress turnout so that staunch union supporters make up a larger share of voters. Finally, Cyber Card Check may limit workers' ability to become fully informed about the decision to join a union.

Cyber Card Check Under Consideration

- The NLRB has issued a Request for Information (RFI), which is often the first step in developing a new regulation. The RFI asks vendors to submit ideas and technical information on how the NLRB could develop an off-site, electronic voting mechanism for union certification elections.
- Workers would likely be able to vote by e-mail, internet, phone, i-pad, or other device.

Cyber Card Check Erodes Worker Privacy

- By instituting off-site, electronic voting, the NLRB would take voters out of the privacy of the voting booth. Unlike a voting booth, there is no technology to insure workers have complete privacy while voting electronically and remotely.
- Voting electronically may seem like an appropriate means to protect privacy, but union organizers often visit workers' houses to discuss union issues. With Cyber Card Check, this visit would be accompanied by pressure to vote. Union organizers could either "assist" workers with logging in to a voting web site, or hand them an i-pad on which to vote. In addition, union organizers could bring their i-pads or laptops to parking lots or other public locations where employees gather to pressure workers to vote.
- Compromising the secret ballot and the potential for intimidation were major reasons Card Check legislation failed. Now the NLRB seems intent on reviving these threats.

Less Participation, Less Information

- The NLRB has traditionally held elections at the workplace since that is where workers are centralized and most likely to vote. By decentralizing voting, Cyber Card Check may well lower voting participation, with staunch union advocates most likely to take the time to cast their (electronic) ballot.
- NLRB rules also prevent employers from holding staff meetings to share information on union issues 24 hours before the day of an election. Since off-site, electronic voting is likely to take place over more than one day, the window of time when employers are prohibited from talking to workers is extended, thus making it more difficult to share information and ensure that workers make an informed decision.

In the fiscal year 2012 & 2013 Labor/HHS appropriations bills, Congress included a rider to prevent the NLRB from "issuing" a final rule on Cyber Card Check. Unless renewed for fiscal year 2014, that rider will expire leaving the Board free to publish a new cyber card check rule.