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EMPLOYMENT LAW BULLETIN

A Monthly Report On Labor Law Issues

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STRATEGIC RESPONSE PLAN TO AMBUSH UNION ELECTIONS

Since the effect of the new National Labor Relations Board (NLRB) "quickie" election rules is to deprive an employer of valuable time to address issues, it is critical for employers to do pre-planning steps to take in advance of union organizing, as well as steps to take at the onset of union organizing. Failure to take such steps could result in a situation where an employer faces a union election in less than three weeks after finding about the advent of union organizing activities. Statistics indicate that an employer has little chance of changing employees' minds in such a short period of time, particularly where unions normally do not request an election unless they have signed cards from a majority of voters. Further, pre-election NLRB procedures are done so quickly that an employer may be forced to spend much of the available time dealing with those issues rather than addressing issues of whether the workers are better off with or without a union. Since the new "ambush" election rules go into effect on April 14, 2015, this article briefly summarizes some of the most important suggested steps.

Steps Prior to Advent of Union Organizing: Certain steps are desirable if not necessary to take prior to the advent of any type of union organizing. Every employer desiring to maintain union-free status should have a policy statement as to why it feels that a union is not in the best interest of the employees or the company. Such a policy statement should be written into the employee handbook and published as part of regular company communications.

It is also important that some sort of policy explanation towards unions be given in the orientation procedure for new hires. It has been shown that new hires receiving this information are more supportive of the company's position on unions and more likely to tell the employer when union organizers come around. Many applicants will make a non-binding "commitment" after hearing such policy statements, and make the company's union campaigning in the event of union organizing more effective.

Third, company management and supervision needs to be trained on the company's union-free policy, and on the critical necessity of reporting any suggestions that union organizing may have commenced at the employer's establishment or in the employer's geographic area. Experience has shown that oftentimes supervisors do not report such matters, in part because they have never been trained on the importance of doing so. Such a failure to communicate creates a disastrous situation where the employer has little time to plan or respond.

Finally, there is a fourth critical component at this pre-union activity stage that every employer should have in place some type of internal complaint procedure to resolve employee complaints, that do not require employees to go outside the company, either to a union or to a government agency. One of the strongest appeals of a union is having a grievance procedure in which employees have the right to address their concerns. Any steps taken by an employer

to correct grievances after the advent of union organizing will be seen as lacking credibility, and possibly illegal by the NLRB.

While many other items might be mentioned as part of the pre-union activity planning stage, the above four points should be considered as minimums.

Steps to Take After Commencement of Union Organizing: When an employer becomes aware of union organizing activities at his facility or nearby, the first steps should be to contact a responsible labor attorney who specializes in this practice. A great deal of planning and strategy is necessary, and what seems logical may not be legally or strategically appropriate.

A labor attorney will likely want to visit the facility and meet with upper management, and possibly all levels of supervision. The initial purpose in the visit will likely be fact-gathering. It becomes important to immediately know which union is involved, the extent of the union organizing activities, the potential issues, and the history and capability of the company in dealing with human resource issues. Some of these facts can be gathered in group meetings of management and possibly supervision, but sometimes "one-on-ones" with individual supervisors are helpful if not necessary. At a minimum, upper management needs to be educated on the does and don'ts of union campaigns, such as the "TIPS" rule (no threats, interrogation, promises or spying). Initial evaluations will need to be made of whether there are any human resource issues that can or should be addressed, whether the company should come out in its own "anti-union card signing" campaign or the like, the determination of an appropriate company spokesperson(s), an initial evaluation of eligible voters and who is a "supervisor," and related matters.

Only after gaining this type information from an experienced expert can an employer properly plan what to do next. In some cases, the employer will use a "wait and see" approach, in which all management and supervisors are advised to be on alert and report any and all suspicious activities to a central source. Even in such situations, however, managers and supervisors need to be well versed in the "does and don'ts" of legal and illegal statements, and trained how to respond in casual discussions with employees when the subject of unions comes up.

In other cases, it may be decided that some type of union-free campaign response is necessary or desirable on the part of the employer. Such a response is particularly necessary if there is reason to believe that significant numbers of employees are signing union cards. Probably the simplest response is to post a notice reminding employees of the company's position on unions, and/or the dangers of signing a union card. Sometimes managers or supervisors are trained to go around and ask each employee whether they have seen the notice, and/or whether they have any questions about it, thus generating useful discussions.

More aggressive responses include "one-on-ones" by supervisors with individual employees, and group meetings conducted by higher management. Handouts can also be used and there are some excellent videos available on the dangers of signing a union card. Even more aggressive responses include a campaign to promote the revocation of union cards already signed, or to encourage employees to fight the union themselves.

Some of the basic information or plans an employer needs to have immediately available are the following:

A. Solicitation and Distribution Rule
B. What if Approached by Union Official
C. What if You Hear Rumor of Union Activity in Plant or Community
D. What if Subject of Union Comes Up in Your Presence

E. What if Union Handbills the Plant
F. Arguments Against Signing a Union Card
   1. Commit You to Union Membership Without Knowing Disadvantages
   2. May Require You to Pay Union Dues, Etc.
   3. May be Used as Basis for Calling Recognition Strike
   4. Is a Legal Document
   5. They Will Say Anything to Get You to Sign
   6. Cards Are Not Kept Confidential
   7. Like Signing a Blank Check

If you have questions on developing or implementing any of these plans, please feel free to contact your attorney at Wimberly & Lawson.

SENATE COMMITTEE AND CONGRESS TRYING TO BLOCK NEW NLRB QUICKIE ELECTION RULE

Employers may be lulled to a false sense of security by reading about legislative and judicial efforts to block the NLRB quickie election rule that goes into effect April 14, 2015. The effect of the new "quickie" or "ambush" election rules are to shorten the time frame from the union's request of an election to the election date itself, from approximately forty (40) days to possibly as little as fourteen (14) days. The concern expressed by Sen. Lamar Alexander is that: "I would hope that both Democrats and Republicans would oppose a rule that allows unions to organize before the employer has time to know what's going on." It is possible if not likely that a resolution will be passed in both the Senate and the U.S. House attempting to block the new NLRB rules, but such a resolution would face a certain veto from President Obama. Congress would lack the two-thirds vote necessary to override such a presidential veto.

NEW OSHA REPORTING RULE ENFORCEMENT PROCEDURES RAISE STRATEGY ISSUES FOR EMPLOYERS

Effective January 1, 2015, employers are required to report to OSHA within twenty-four (24) hours an amputation, the loss of an eye or any incident that results in at least one worker being admitted to a hospital for in-patient care, in addition to existing procedures requiring the reporting of fatalities within eight (8) hours. Little noticed in these changes is the fact that area OSHA offices are now sending out to employers questionnaires requesting details about the accidents causing the injuries. In addition to basic questions about the accident, some questions request that the employer "identify the root causes" of the incident, explain why safety procedures weren't followed, and give reasons for the failure of safety devices. The questionnaire closes with the employer being asked to explain what the company's recommended corrective actions were, and what actions were taken.

Based upon the initial reports returned by employers, OSHA will put the situations into one of three categories, with varying levels of follow up by OSHA. Category 1 reports will automatically trigger an inspection, while Category 2 reports will not always result in an inspection. An inspection does not result in reports that are considered Category 3.

Editor's Note: Although employers are not necessarily legally required to respond with detailed information or to use the form OSHA sends, advice of counsel is desirable because of the significant ramifications. That is, the failure

to cooperate in a reasonable way will likely result in an early inspection, but there are ways of providing the general information without using the particular OSHA form.

U.S. SUPREME COURT CONSIDERS A SECOND OPPORTUNITY TO OVERTURN OBAMACARE

On March 4, 2015, the U.S. Supreme Court heard arguments in the second major case before it which will determine the future of ObamaCare, *King v. Burwell*. Unlike the first case, this second case does not deal with the constitutionality of ObamaCare but instead deals with its terminology. ObamaCare basically grants health insurance subsidies to people who obtain coverage "through an Exchange established by the State." The plaintiffs argue that the statute means what it says, and thus the ObamaCare subsidies should not be available to residents in the States that have not established an Exchange, currently some 34 States. The residents of these States have to use the federal website exchange to obtain insurance rather than any exchange established by the State.

It appears that four liberal justices on the Court are ready to look to the overall purposes of ObamaCare rather than the literal reading of the key portion of the statute. Many believe that if the federal government's current interpretation of the statute is rejected, then ObamaCare would largely stop in those States without a state exchange. The final outcome may rest upon the vote of Justice Anthony Kennedy, who is considered a moderate on many issues, and Chief Justice John Roberts, who voted to uphold the constitutionality of ObamaCare.

If the government interpretation of the application of ObamaCare in all states is rejected, enormous legislative issues will immediately appear both on the state and federal levels. The States will determine whether or not to add State exchanges, and Congress will determine whether to amend ObamaCare.

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