FOUR TAKEAWAYS FOR BUSINESSES FROM RECENT CHANGES IN FEDERAL LABOR LAW

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Since late last year, the National Labor Relations Board (the "Board") has drastically changed federal labor law in ways that will impact both union and non-union businesses. Beginning in late 2012, the Board issued a flood of decisions that changed businesses' obligations concerning employment policies, disciplinary procedures, union avoidance strategies, and several other practices. A federal court then added to the confusion by voiding President Obama's recent "recess" appointments to the Board, thus casting doubt on whether its decisions are valid. As businesses attempt to navigate these changes to this already arcane body of law, there are four key steps they should take.

1. UNDERSTAND WHAT CONSTITUTES "PROTECTED CONCERTED ACTIVITY"

The change that may impact non-union businesses the most is the expansion of the rights federal labor law provides. The National Labor Relations Act (Act) protects employees' right to engage in "protected concerted activity," *i.e.*, to act to improve working conditions for themselves and co-workers. Both union and non-union employees possess this right. Before 2012, however, the Board primarily applied this doctrine to protect traditional labor activities, such as picketing or advocating for a union. Also, because most non-union employees did not know about these rights, they rarely filed actions. But the Board has worked hard recently to inform non-union employees of these rights and expand the rights to encompass new types of activities, including social media conduct.

To ensure they do not unlawfully retaliate against employees, businesses must understand what activities are protected. The key question is whether the employee is doing something lawful that reasonably could improve working conditions for both her and her co-workers. The Board applies this standard liberally in favor of employees. For example, in one recent case, the Board reinstated five employees who had complained about a co-worker on Facebook after the co-worker criticized their performance. The Board reached this conclusion because it believed they were attempting to defend themselves against the co-worker's criticisms. Conversely, when an employee posted comments about her co-workers on Facebook only to vent and advance her own interests, she was not protected.

It also is critical for individuals who prepare or enforce employment policies to understand this concept, because the Act largely prohibits businesses from *discouraging* employees from engaging in protected concerted activities. Thus, if a policy prohibits an employee from doing something lawful that could improve working conditions for

her and her co-workers, the policy will violate the Act. Under recent Board guidance, the policies most likely to offend this requirement are social media policies and confidentiality policies because they often bar employees from discussing working conditions. Due to this new law, businesses may find it prudent to reassess old policies with an eye toward eliminating language that reasonably could coerce employees against engaging in protected concerted activity.

2. REASSESS YOUR INVESTIGATORY AND DISCIPLINARY PROCEDURES

The Board also has changed the rules for investigating employee misconduct and issuing discipline. In one notable decision, the Board rescinded its decades-old rule protecting employee witness statements. Previously, if an employee witnessed misconduct and then described it to her employer in a confidential witness statement, a union could not compel the employer to disclose the statement. The Board now requires union employers to disclose such statements unless they prove, under a high evidentiary standard, that disclosing them will cause harm. To mitigate the problems that can arise from disclosing witness statements, union businesses should obtain as many forms of evidence to support employee discipline as possible, because individual witness statements will now be more vulnerable to challenge. Businesses also should consider other options for potentially shielding confidential investigatory information, such as taking steps to utilize the attorney-client privilege.

In another surprising decision, the Board generally prohibited union and non-union businesses from instructing employees not to discuss ongoing investigations. This ruling should make it more difficult for companies to protect the integrity of their investigations and minimize resulting distractions. As a result, businesses should revamp their investigatory procedures to ensure they are conducted and concluded as quickly as possible, without impairing their efficacy. It also will be prudent, in many cases, to more significantly limit the number of employees who are apprised of, or questioned about, sensitive misconduct.

Finally, when investigating employee misconduct, businesses should understand that the Board has subtly expanded the scope of "Weingarten rights." This doctrine gives union-represented employees the right to have union representatives attend any meetings with employers that the employees reasonably believe to be "investigatory." The Board recently made it far easier for union-represented employees to invoke these rights, such as by permitting one employee to invoke his rights with a vague statement about union representation, and by deferring even more to employees' opinions about whether or not such meetings may be investigatory. Accordingly, in many cases, union businesses may want to simply err on the side of providing union representation if they are uncertain whether it is required. Companies can significantly minimize the disruptions union representatives can create at these meetings if they know what the representatives can and cannot do.

3. PREPARE FOR MORE UNION ACTIVITY

After the November elections ended, unions largely shifted their focus to lobbying and organizing new businesses. One recent decision will significantly expand the resources they have available for this, by increasing the dues they can recover from non-members. In most states (i.e., those without "right to work" laws), if an employee declines to join an elected union, she still must pay the union for expenses it incurs on her behalf. Under prior law, unions generally could charge these non-member objectors only for actions that directly benefitted them, such as negotiating contracts and processing grievances, but not for actions with more attenuated benefits, such as lobbying. The Board recently overturned this rule. Although many believe the decision violates established Supreme Court precedent, it will effectively permit unions to charge non-member objectors for virtually everything, at least for the time being.

As a result, unions should have significantly more revenue available for lobbying and organizing. This means that controversial state laws on unionization, such as the measures that recently passed in Indiana, Michigan, and Wisconsin, will be more vulnerable to challenge. It also means that businesses can expect more and better funded union organizing campaigns. The problems this creates for companies are compounded by the fact that the Board's "quickie election rules" may become effective in the near future, which would significantly decrease the time a union needs to organize a workplace. Accordingly, it will be particularly important for non-union businesses to prepare anti-union campaigns in advance. Once an organizing campaign begins, it may be too late to prepare an effective response.

4. CONSIDER APPEALING ANY RECENT ADVERSE BOARD RULINGS

When businesses consider how to respond to these decisions, they should also note that the decisions, and others, may be invalid. In late January, a federal court of appeals voided President Obama's recent "recess" appointments to the Board, holding that they were not appointed during a true recess. Because the Board needs at least three members to Act, this could void every decision the Board has issued since these members were appointed in January 2012.

This court is not likely to have the last word on the matter; the Obama administration almost certainly will ask the Supreme Court for review. If the decision stands, however, it will have major consequences. First, the decisions above, and many others, will be void. Second, it will become far more difficult for President Obama and future presidents to utilize recess appointments to circumvent a filibuster for controversial appointees. As a result, this decision could lead to a more moderate Board.

Despite this uncertainty, businesses should not sit on their hands. Any business that has received an adverse ruling from the Board since January 2012 should strongly consider appealing soon. Due to the Board's unique procedural rules, businesses can appeal most Board decisions to the court that issued this decision, which should reverse the Board's rulings. If the Board first moves for enforcement, however, it could bring the matter before a less favorable court, and potentially deprive the business of the benefit of this decision.

CONCLUSION

Many businesses find federal labor law easy to overlook, given its complexity and the tendency to believe it covers only union companies. Doing so becomes increasingly perilous, however, as the Board continues to expand the law, including in ways that more significantly implicate non-union businesses. By taking the time to understand federal labor law, and by keeping in mind the concepts above, businesses can significantly reduce the obstacles that this expanding body of law creates.

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