

NJ Businesses Are Vulnerable to Unionization

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New Jersey Law Journal, April 25, 2016

Although private-sector union membership in the United States is near its all-time low at just under 7 percent, recent actions by the National Labor Relations Board (NLRB or "the Board") and U.S. Department of Labor (USDOL) make New Jersey businesses vulnerable to unionization now more than ever. The NLRB's and USDOL's actions—the most notable of which is the Board's decision to expedite its union election procedures last April—have set the table for a wave of union organizing that this country has not seen since the 1950s, when over a third of the private sector workforce was unionized.

In addition to the new "quickie" election rules, which have quite literally left companies speechless, the NLRB has recently issued decisions that allow unions to cherry-pick the employees who will vote in union elections, and opened the floodgates to unionization for new groups of workers by expanding its interpretation of "employers" and "employees" under the National Labor Relations Act. Most recently, the USDOL issued a new "persuader" rule, which expands employers' obligations to publicly report engagements that they enter into with labor consultants (including attorneys), creating a disincentive for businesses to take steps to insulate themselves from unionization when they may need to most.

Why NJ Companies Are Vulnerable

If there were a resurgence in unionization, it likely would occur here in New Jersey and the surrounding states, because organized labor has a strong infrastructure in this area. New Jersey is one of the more heavily unionized states in the country and only a stone's throw from two others—New York and Pennsylvania. Approximately one quarter of all union members in the nation reside in these three states alone.

Recent data concerning the Board's new election rules highlights New Jersey companies' vulnerability. When comparing the first nine months under the new election rules with the same nine-month period the year prior, nationwide statistics show just a 1 percent increase in the filing of representation election petitions and a 2 percent decrease in the union win rate. (NLRB, Three Quarter Review of Revised R-Case Rules, available at www.nlrb.gov.)

However, in the NLRB's New Jersey regional office, there was about a 70 percent surge in the filing of such petitions during the same time frame. (Data obtained from Labor Research Partners, which are available for purchase at www.laborresearchpartners.org.) Board election reports further show that, although the union win rate in New Jersey dipped approximately 5 percent in elections held during this time frame, there was about a 35 percent increase in total union wins. (NLRB, Election Reports, available at www.nlr.gov.) Moreover, when data from the NLRB's New York and Pennsylvania regional offices are added to the mix, the statistics show an approximate 35 percent increase in the filing of these election petitions, 1 percent increase in the union win rate, and 50 percent increase in total union wins.

"Quickie" Elections Leaving Employers Speechless

Last April, the Board amended its election procedures to expedite the process. Under the old rules, a business generally had six-to-eight weeks after the filing of an election petition to educate employees about unions. Although waiting for the petition was never an ideal strategy, companies had about two months to share facts about unions with employees so the employees could actually cast informed ballots. Now, the time between the filing of a petition and the election has been cut by about 60 percent, leaving employers only two or three weeks to speak with employees about unions. (NLRB, Three Quarter Review of Revised R-Case Rules, available at www.nlr.gov.) This narrowed time frame strips an employer of the ability to effectively communicate with employees who have heard only the union's side of the story in the weeks and months leading up to the petition.

The new rules also require a company to raise virtually all legal arguments to defend against a petition within a week of receipt. Additionally, the new rules require employers to compile employee data in a very specific format, which can be an administrative nightmare. In *Danbury Hosp. of W. Conn. Health Network*, a regional director directed a second election because he believed the hospital did not adequately search its databases for personal phone numbers, even though the employer provided numbers for approximately 94 percent of the 866 eligible voters. No. 01-RC-153086, 2015 NLRB Reg. Dir. Dec. LEXIS 209 (Oct. 16, 2015). These added obstacles can present insurmountable hurdles to businesses that do not have labor strategies in place.

Unions Cherry-Picking Voting Units

The new election rules follow the Board's ground-breaking decision in *Specialty Healthcare & Rehab. Ctr. of Mobile*, 357 NLRB No. 83 (2011), enforced sub nom. *Kindred Nursing Ctrs. E. v. NLRB*, 727 F.3d 552 (6th Cir. 2013), which practically enables unions to hand pick the employees that will vote in union elections. In *Specialty Healthcare*, the NLRB altered decades-old law by requiring a company to prove that employees it wants to add to the petitioned-for unit share an "overwhelming" community of interest (e.g., similar employment conditions and terms) with the unit the union seeks, and not just a close community of interest. Recently, the Eighth Circuit upheld this new standard in *FedEx Freight v. NLRB*, No. 15-1848, 2016 U.S. App. LEXIS 4221 (8th Cir. Mar. 7, 2016), further paving the way for unions to organize businesses one "micro-unit" at a time. A separate challenge to the standard is currently pending before the Fifth Circuit. *Macy's Inc.*, 361 NLRB No. 4 (2014), appeal docketed, No. 15-60022 (5th Cir. Jan. 12, 2015).

Opening Doors to Unionization

Alongside the new election rules and *Specialty Healthcare* decision, the Board has expanded its interpretation of "employer" and "employee." And there are numerous pending matters that may continue this trend.

The most significant decision expanding the definition of an employer came in *BFI Newby Island Recovery*, 362 NLRB No. 186 (2015). In *BFI Newby*, the NLRB departed from precedent, which focused on the control an entity actually exercises over workers, and held that a company can be a statutory employer if it merely *possesses the ability* to exercise sufficient control over working conditions and terms. Applying that standard, the Board in *BFI Newby* determined that a waste management company and a staffing agency that provided that company with temporary workers were "joint employers." Currently pending is a massive unfair labor practice proceeding involving allegations that the McDonald's fast-food franchise is a joint employer of 30 separate franchisees, which threatens to further expand the definition of an employer. *McDonald's USA*, NLRB Case No. 02-CA-093893.

The Board has enlarged the definition of an employee as well. In *FedEx Home Delivery*, 361 NLRB No. 55 (2014), the NLRB "sharp[ly] depart[ed] from precedent by diminishing the significance of the entrepreneurial opportunity factor" in deciding whether a worker is an

employee as opposed to an independent contractor. Id. at slip op. at *25 (Member Johnson, dissenting). In *FedEx*, the Board held that a multi-factor common-law agency test under which no single factor is determinative should govern, and, accordingly, drivers who could operate multiple routes and sell them to other drivers were deemed to be employees instead of independent contractors—a decision that is directly at odds with the D.C. Circuit's decision in *FedEx Home Delivery v. NLRB*, 563 F.3d 492 (D.C. Cir. 2009). Using the new independent contractor standard, the NLRB recently went so far as to decide that door-to-door canvassers who collected donations for a nonprofit organization were statutory employees who could unionize. See, e.g., *Sisters Camelot*, 363 NLRB No. 13 (2015).

Also of significance are the education cases. In *Pacific Lutheran Univ.*, 361 NLRB No. 157 (2014), the Board decided that it could exercise jurisdiction over employees of religious-affiliated universities so long as those employees are not performing a "specific role in creating or maintaining the school's religious educational environment." In that same case, the NLRB facilitated the path for professors to unionize by placing a premium on their decision-making authority over academic programs, enrollment, management and school finances, thereby making it easier for them to qualify as employees instead of supervisors who cannot unionize. In *Columbia Univ.*, No. 02-RC-143012, the Board is revisiting whether students, including teaching assistants, are employees, which could reverse precedent precluding these individuals from unionizing. And, although the NLRB declined to exercise jurisdiction over scholarship football players in a highly-publicized matter, the Board did emphasize that its decision would "not preclude a reconsideration of this issue in the future." *Northwestern Univ.*, 362 NLRB No. 167 (2015).

New Persuader Rule May Dissuade Employers

The latest attack on the business community came in the form of the USDOL's new "persuader" rule, which expands the obligations of employers to publicly disclose engagements they enter into with outside labor consultants regarding unionization. The rule, coming on the heels of the various pro-union actions mentioned above, serves to discourage companies from entering into such arrangements at a time when employers could most use the assistance and insight.

Under the persuader rule's "advice" exemption, labor consultants historically did not have to publicly disclose engagements they entered with employers unless they *directly* communicated

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with employees to persuade them on the issue of unionization. The new rule narrows this exemption by requiring consultants to disclose activities that *indirectly* persuade employees. Examples of indirect persuasion include providing materials to employers to distribute to employees, conducting seminars for supervisors, and even developing personnel policies. Several lawsuits have been filed challenging the rule on various grounds, including that it violates the attorney-client privilege, due process, freedom of speech and the USDOL's powers. Barring judicial or legislative intervention, the rule will cover engagements businesses enter into with labor consultants beginning July 1.

Conclusion

Actions by the NLRB and USDOL have and likely will continue to lead to an insurgency in union organizing, at least in New Jersey and its surrounding states. It would be wise for New Jersey employers to put comprehensive labor-relations strategies in place now.