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NLRB Issues Memo That May Void Some Neutrality Agreements

On September 4, 2020, the Counsel for the National Labor Relations Board (the “Board”) issued a guidance memorandum on employer assistance in union organizing. According to the memo, the lawfulness of neutrality agreement provisions should be examined through a stricter and less ambiguous standard. The General Counsel proposed that the same standard that is used in determining whether an employer has unlawfully assisted employees in ousting an existing union also be used when determining whether an employer has unlawfully assisted a new union in obtaining recognition as the certified bargaining representative of a new unit of employees. Although this new standard sounds simple and is equitable in that the same standard will be applied whether a union is on the verge of obtaining or losing majority status, the new standard may upset some existing neutrality agreements and make it more difficult for employers faced with union demands for neutrality.

The new standard would mean that an employer violates the National Labor Relations Act (“the Act”) when it provides “more than ministerial aid” to a union seeking recognition. Further, with respect to pre-recognition agreements, the memo states that the Board should adopt a simple bright-line test that would find a violation of the Act whenever an employer and union enter into a pre-recognition agreement where the parties: (1) negotiate terms and conditions of employment prior to the union attaining majority status; (2) agree to restrain employee access to Board processes and procedures; or (3) agree to any provision that is inconsistent with the purposes and policies of the Act, such as by impacting Section 7 rights by providing support of the union’s organizing activities, rather than neutrality.

Background

The Board has historically applied two different legal standards in determining whether an employer provides impermissible support to a union in organizing the employer's unrepresented workforce in violation of Sections 8(a)(2) and 8(b)(1)(A) of the Act compared to determining whether an employer provides impermissible support to employees who wish to decertify or withdraw from a union in violation of Section 8(a)(1) of the Act. In the former situation (*i.e.*, employer support for a union's organizing efforts) the Board uses a "totality of the circumstances" standard, whereas in the latter situation (*i.e.*, employer support of a decertification petition) the Board uses a "more than ministerial aid" standard. To create greater certainty in its guidance to the public concerning what activity is considered impermissible support and to treat consistently similar types of conduct that impact Section 7 rights in similar ways, the Board will apply the same "more than ministerial aid" standard to both types of violations under the Act.

Application of New Standard to Pre-Recognition Union Organizing

According to the memo, the Board should apply the "more than ministerial aid" standard when analyzing employer assistance furnished to unions engaged in efforts to organize their employees and when analyzing certain provisions of neutrality agreements. Neutrality agreements that are truly "neutral" and do not interfere with employee rights—for instance, where an employer agrees to remain neutral during an organizing campaign in exchange for the union refraining from a corporate campaign—will remain lawful under the "more than ministerial aid" standard. However, some neutrality agreements may contain provisions that permit or require conduct that under the "more than ministerial aid" analysis is prohibited under the Act, such as:

- Allowing non-employee union organizers access to employer facilities or informing employees of the presence of union organizers;
- Allowing union solicitation during working time;
- Providing a union with employee contact information; and
- Certain statements of preference for a specific union.

Negotiation of Terms and Conditions of Employment Before Union Attains Majority Status

Neutrality agreements in which substantive terms and conditions of employment have been negotiated are unlawful. According to the memo, it follows that an employer violates Section 8(a)(2) of the Act by dealing with or bargaining with a minority union regarding working conditions, and a minority union's agreement to such terms constitutes a violation of Section 8(b)(1)(A). Thus, where a minority union and an employer enter into a neutrality agreement that sets or otherwise deals with terms and conditions of employment, it establishes that the union clearly dealt with the employer at a time when it did not represent an uncoerced majority, thereby establishing violations of the Act. Accordingly, pre-recognition agreements are unlawful to the extent they deal with:

- Wage provisions;
- Interest arbitration provisions;
- No-strike/no-lockout provisions;
- Access to company facilities provisions; and
- Determination of appropriate unit provisions.

Additionally, the memo states that pre-recognition or neutrality agreements between a union and employer that restrain employee access to the Board and its procedures are inconsistent with the policies and purposes of the Act. This suggests, without clearly stating, that agreements in which employers waive their and their employees' right to a secret ballot Board election (e.g., card check agreements) may violate the Act and be vulnerable to legal challenge.

Employer Takeaway

Employers should review any neutrality agreement a union seeks that calls for more than ministerial aid from an employer as they are unlawful. Employers should also review any labor peace agreements they are subject to as many go beyond the ministerial aid allowed by the Act. Additionally, if the memo is correct, an employer who has entered into an unlawful neutrality agreement or is contractually obligated to engage in conduct prohibited by the Act, may seek to be relieved from its contractual obligations by filing an unfair labor practice charge against the union and/or using its unlawfulness as a defense to a union suit seeking enforcement of the unlawful neutrality agreement.

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If you have any questions regarding this alert, please do not hesitate to contact us.

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