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THE NLRB IS ALIVE AND WELL AND ENGAGED IN CHANGING THE LAW

What Non-Union Employers Need to Know

The changing environment in employment and construction is likely to affect your business in many ways. Among the issues that you may face in the coming months or next few years are those concerning the aging of the construction workforce, the availability of a trained work force, increases in costs of labor and benefits, the National Labor Relations Board's ("NLRB") revisions to its regulations and reversal of prior decisions in order to enable unions to represent more of the US workforce and the resulting potential of a union organizational campaign at your company.

While we cannot delve with great detail into all of these topics, you should be aware that:

1. The US labor force is aging. The average age of the US workforce is now 41.8 years old. Between 1985 and 2010, the average age of construction workforce went from 36 to 41.5 years old. Age distribution within the construction workforce has also changed. In the same 15 year period, the proportion of workers aged 45 to 64 years old increased to almost 40% of the construction workforce. The proportion of younger works in the industry decreased significantly. This is not sustainable.
2. A national study of over 500 construction employers conducted by the AGC determined that, despite the addition of 211,000 jobs in the construction industry in the recent past, 66% of respondents faced a labor shortage, particularly a shortage of skilled labor. Further, we are aware that, in Massachusetts, there has been a downtown in applications to local trade schools. As of October of 2014, the Northern New England and Massachusetts Laborers District Council had received 600,000 more contribution hours than in all of 2013. They expect to have1 million more work hours in 2014 than in 2013 in this union alone. Over the summer of 2014 the Laborers added 400 new members.

The pipefitters, the electrical workers and carpenters all say they are increasing their membership.

3. There is no question but that health insurance costs are climbing precipitately. Looking forward, there is no change in that trajectory.
4. Recent decisions by the Obama controlled NLRB, OSHA and DOL such as the approval of micro-units, union access to open shop construction sites, and upcoming changes in laws relating to the "ambush" or "quickie" election rules, "Persuader" rules and an enhanced definition of protected concerted activities will give trade unions greater access to open shop employees and provide less opportunity for employers to educate employees about or to oppose unionization.

A good place to start thinking about how to protect your business and your employees is with understanding the role of the National Labor Relations Board and the law over which it has jurisdiction, the National Labor Relations Act ("the Act").

The Act was passed by the Congress in 1935 to remedy, "(T)he denial by some employers of the rights of employees to organize and the refusal by some employers to accept the procedure of collective bargaining . . ." The words of the Act's introduction are indicative of the obligations as well as the sympathies of National Labor Relations Board investigators, attorneys and Board members.

The Board is composed of five members appointed by the President of the US, a majority of w hom are always from the President's political party. The Act is administered by 30 regional offices one of which is located in Boston. President Obama has appointed three Board members who are ex-union attorneys. Under their aegis, the rules and decisions of the Board have changed significantly.

The Board has jurisdiction over construction industry employers that purchase $50,000 of goods and services originating outside the employer's state. Its jurisdiction covers issues relating to union organizational campaigns, union elections and contract negotiations. It also has authority to determine whether picket lines and strikes are illegal and to resolve jurisdictional disputes between the trades.

Additionally, the Board issues unfair labor practice complaints and redresses violations of the Act such as employer discipline of employees who engage in "concerted activity". The Act defines, "concerted activity" an employee's or group of employees' attempt to organize employees or better the terms and conditions of their employment. This could involve employees meeting to demand a better health plan or one employee's complaints about a supervisor's actions on twitter.
Examples of concerted activity include:

- Work stoppages
- Refusing voluntary on call work
- Honoring picket lines
- Protests of discrimination
- Attempts to involve other employees in work related disputes

Generally, disparaging the employer's product and disloyalty, release of confidential information and partial or intermittent strikes are not considered concerted activities.[1/]

UNION TACTICS

As a result of the upsurge in construction activity in New England and a dwindling number of trained tradesmen, a number of unions including the Carpenters, Electricians and Plumbers and Pipefitters have recently become involved in "salting," "stripping" and organizing at companies not signatory to union agreements.

Salting

"Salting" is the union ploy of brazenly or surreptitiously attempting to plant union organizers into the open shop workforce. "Salts" try to organize, strip the company of workers or file charges against the company with state or federal agencies. For example, salts may alert a union or the union financed Foundation for Fair Contracting of unlawful acts such as an employer's misclassification of employees as independent contractors, failure to comply with the federal Affordable Care Act, failure to pay overtime, etc… In egregious situations, salts have sabotaged work, created safety hazards and secretly taped discussions with managers.

Employer Action Steps

It is a violation of the Act to discriminate against an employee or applicant for employment because of his/her union membership or union inclinations. Therefore, employers who wish to avoid unfair labor practice charges and potential back pay to union applicants should adopt legitimate hiring policies and insure that their application process is uniformly administered, for example:

- Set out the work related attributes sought in applicants for the vacant position
  - Licenses
  - Significant experience in the work to be performed
  - Long tenure with prior employers;
- Train specific individuals to handle all hiring and make them aware that discrimination on the basis of union interest, activity, or membership cannot be considered in hiring decisions;[2/]
- Require all applicants to complete a written Application for Employment at the company's offices;
- Have a procedure for handling applications which is consistently adhered to including a deadline for consideration of applications that have been submitted;
- Create a script to be followed by those who interview applicants.

[1/] The names, addresses, wages and benefits of employees are not considered "confidential" information under the Act.

[2/] Under federal anti-discrimination laws employers may also not discriminate on the bases of race, age (40+), color, ethnicity, national origin, sex, religion or disability. The federal anti – discrimination agency, EEOC, has published guidelines stating that employers may not discriminate on the basis of prior criminal history unrelated to the job for which an applicant is applying.

Stripping

"Stripping" is the word used to define the union practice of enticing trades people to leave their non union employers to become union members and work for union signatory employers. In the recent past, the IBEW, Sheet Metal, Carpenters, Pipefitters and other unions have engaged in this tactic.

The union involved in "stripping" will offer an employee increased wages and benefits and ask the employee to leave the open shop employer in a manner that will cause delays, hardships or violations of law for that employer saying, for example:

- Do not inform the employer in advance that you are resigning,
- Leave in groups so that the employer cannot provide sufficient workers for the worksite or so that the journeyman to apprentice ratio no longer complies with the law, and
- Take "as built" drawings or other information important to the employer.

In a number of cases, employees who have been stripped and have joined unions have tried to return to their prior employer because:

- The union jobs require travel of an hour or two from their homes,
- They are shuffled from one employer and job to another with stops in between on the bench where they must wait to be called for the next job,
- If they refuse a job because it is too far away from their homes, or any other reason, they go to the bottom of the wait list,
- They claim union trades people do not take pride in their work but simply try to prolong each job.

Union Organizing

The increase in the number of construction projects and the significant backlog amassed by many contractors has been accompanied by an upsurge in union organizing attempts across many sectors of the economy including retail (the fast food industry), manufacturing (auto industry), health (hospitals) and education (universities). Construction has also been subject to organizing. The Union of Painters and Allied Trades announced in August that they intend to increase their membership by 30,000 in the next 5 years using a combination of corporate relationships and traditional organizing. Other unions are making similar claims.

Top Down Organizing

In the construction industry, employers may sign union collective bargaining agreements (contracts) without their employees voting to be represented. Employers may do this because they believe they will have greater opportunities and profits if they are union, to avoid picketing at their jobsites or to stop the union from placing pressure on the developers and building owners with whom they do business in "corporate campaigns". "Corporate campaigns" include union attempts to intimidate developers or building owners for whom a targeted contractor is working. Evidence of these campaigns are the banners seen at construction sites stating, for example, "Slave Wages Being Paid on XYZ Company's Construction."

Bottom Up Organizing

Generally, construction unions organize utilizing a few individuals who recruit others to come to meetings where union agents laud union wages and benefits and denigrate the policies and behavior of company owners. They then ask employees to sign "Union Authorization Cards." The employer may not learn that an organizing campaign is underway until he receives a request to review those cards signed by his employees and to bargain for a contract or until a Petition for an Election is filed with the Board. Once a majority of employees have signed, the cards may be presented to the employer. If management reviews those cards, it may have an obligation to negotiate with the union without benefit of secret ballot election.

A Petition for an Election may be filed with the Board once the union has collected the signatures of at least 30% of the employees in an appropriate unit. Most unions do not file petitions until at least 60% of employees have signed cards. An appropriate unit is comprised of employees in a particular craft or a grouping of employees who share a community of interest by virtue of their having, at the very least, the same terms and conditions of employment and supervision.

Following the filing of a Petition for an Election, the Board may hold to determine issues as to the appropriateness of the unit. Currently, a secret ballot election is conducted by the Board within 35 to 42 days of the filing of the Petition. In order to represent the employees, the union must win a majority of the votes cast. This provides the employer with about a month to communicate with employees his/her opinion on unionization. During this period, the employer is prohibited from:

- Surveillance. Engaging in surveillance of employees while they are involved in organizing or union activities.
- Promises. Promising employees benefits if they refrain from pro-union activities.
- Interrogation. Interrogating employees about their or others' union activities.
- Threats. Threatening employees with negative consequences if they engage in pro-union activities.

The employer is also prohibited from changing any terms or conditions of employment.

Once a union is certified by the Board as the exclusive representative of employees for the purpose of collective bargaining, the employer and the union must bargain in good faith over wages, benefits and terms and conditions of employment. Neither party can demand that a particular contract be signed. Both must actually negotiate by explaining why they require or will not agree to certain terms and change their position on terms as the negotiations progress.

AVOIDING SALTING, STRIPPING AND ORGANIZING

Employer Action Steps

Experienced construction workers have their choice of employers. To retain workers and minimize union disruption employers should:

1. Pay wages comparable to what union contractors pay their employees.
2. Provide good benefits including family health insurance and a retirement plan to all employees.
3. Develop positive and respectful relationships and company loyalty by paying attention to employees, their problems at work and at home and their aspirations.
4. Engage in off work social activities with employees and their families.
5. Develop a program of promoting capable people from within the organization, giving employees an opportunity to advance.
6. Train managers to deal appropriately with your employees.

In addition, employers should post "No Trespassing" signs at job sites and call police to remove uninvited intruders who enter the site to solicit Company employees or videotape employees at work.

Many employers also promulgate a No Solicitation Rule meant to prohibit employee involvement in union activity and other solicitation during work time.
Such a policy is only valid if it is enforced uniformly. It will be deemed invalid if it is enforced against union organizational attempts but not against employees requesting signatures for a political campaign or selling shares in a condo. A typical No Solicitation Policy states:

No Solicitation Policy

Solicitation for any purpose may only take place on the non-working time of the employees involved. Selling of items or the distribution of materials and literature must occur in non-work areas on the non-working time of the employees involved. The term "working time" does not include meal or break periods. "Working areas" include all areas where employees perform duties for the company.

> Solicitation or distribution of literature on company premises by non-employees is strictly prohibited.

THE OBAMA BOARD CHANGES THE LAW

Micro-Bargaining Units

In Specialty Healthcare, 357 NLRB No. 174 (2011), the issue before the Board was the extent to which a unit of nurses was appropriate to vote in a union election. Traditionally, the Board had approved elections in the largest unit in which the employees share a "community of interest." "Community of interest" is defined as sharing the same facility, working conditions, benefits and

managers. In addition, rather than look to the extent of the union's organizational activities, the Board, in the past, has deemed "wall to wall" units to be more appropriate than fractured units. For example, in the retail industry, the Board has favored units including all sales people. In 2014, however, the Board approved a unit in a department store of only women's shoe salespeople in one shoe department finding that these sales associates have the unique goal of selling particular shoes which sales associates in other departments do not have.

The U.S. Court of Appeals for the 6th Circuit, has approved the Board's new rule that, unless there is an "overwhelming community of interest," the Board will approve and allow elections in smaller discrete units of employees. This decision favors units defined by the extent of a union's organizational campaign.

In a recent case involving a mechanical contractor's two interrelated companies owned by the same individual in which employees had the same benefits and wages, worked for the same executive, performed the same tasks on different kinds of projects and, on occasion transferred from one company to the other, the Board determined that the unit requested by the union composed of the employees in only one of those companies was appropriate for a vote. Since unions may represent units as small as 2 employees, such elections give unions the opportunity to not only get their foot into an employer's door but to bedevil an employer with elections and negotiation in small units of employees.

Employer Action Step

Employers should think now about what units would be appropriate for a union election and take steps to create the kind of unit that would not involve negotiations with one or more unions about discrete micro groups of employees.

Ambush or Quickie Elections

The Board currently schedules elections 35 to 42 days after the filing of a Petition for an Election. But, it has proposed rules expediting the secret ballot elections to a period 10 days to 2 weeks following the filing of a Petition. It is expected that these new rules will be in effect by the end of 2014.

Most unions organize employees in secret, asking employees to sign union authorization cards at their homes, restaurants or local institutions where employees gather. They ask employees not to inform management of the fact of the campaign. The proposed foreshortened time table will reduce the period available to employers to communicate their message to employees.

Changes in the rules will require:

- Elections being held within 10 days to 2 weeks following the filing of a Petition,
- Issues involving which classifications should be included in the unit of employees eligible to vote or unfair labor practice charges will be investigated and adjudicated after the election is held,
- Names, addresses, phone numbers and emails on file for all eligible employees to be turned over to the union by the employer within 2 days of the filing of the Petition.

Employer Action Steps

Because the time for communicating with employees will be significantly reduced if the new rules go into effect, employers should now consider what, when and how they are going to communicate with their employees.

Employers should consider:

- Learning the NLRB's rules and training managers now
- Insuring that wages and benefits are as comparable as possible to those of the relevant union,
- Telegraphing upcoming positive changes in wages and benefits,
- Providing letters or pay stubs to employees enumerating the hidden cost of all the benefits the employer provides,
- Establishing effective means of two way communications with employees,
- Soliciting grievances from employees and dealing appropriately and expeditiously with employee work related concerns, and
- Researching the issues that would most concern employees regarding union organizational attempts and communicating these issues to employees.

Employers should provide their employees with the information employees need to make an informed and intelligent decision if they are asked to sign a union authorization card or to vote in a union election.

Persuader Rules

In 2011 the Department of Labor issued new rules extending the obligations of employers under §203 of the Labor-Management Reporting and Disclosure Act that would require employers to disclose in writing to the federal government the names of individuals and firms hired to provide advice to the employer on issues that could influence employee decisions regarding union organizational activities, thereby eradicating the attorney/client privilege. "Advice", under the Rule, is "an oral or written recommendation regarding a decision or course of conduct." The employer would also have to describe the nature of the advice given and the amount paid for such advice.

While this Rule has not yet been enforced and will, if it is enforced, engender numerous lawsuits which will rely on the US Supreme Court's endorsement of the attorney/client privilege since 1888 as well as the fact that it is the oldest evidentiary privilege known to the common law.

Under the Rule, reporting to the DOL would be required if any of the following conduct by an attorney or consultant could aid the employer in dealing with unions:

- Development of Human Resources policies and procedures.
- Advice to employers on the wording of letters or information distributed to employees on the employer's website.
- Training supervisors to conduct meetings with individuals or groups of employees.

- Conducting a seminar for supervisors on appropriate handling of employee discipline, grievances, performance evaluations or wage reviews

The rule is written so broadly that it appears an employer will have to report its hiring of lawyers or consultants to advise them on issues such as conducting employee satisfaction surveys, planning employee compensation guidelines and advising on selection of benefit plans or drafting of an employee handbook.

Under the current wording of the Persuader Rule, failure to adhere to its provisions could result in criminal as well as civil penalties of up to $10,000 for each violation and a one year prison sentence for flagrant violations.

Employer Action Steps:
Because so much of the law relating to an employer's relationship with his/her employees is currently in flux and changes in the law are expected to be announced in the next few months, employers should be aware of the current law as well as alert to notifications concerning changes. Ignorance is no defense to a violation of law.

Employer Policies

Recent directives and decisions of the Board have significantly changed employment policies and practices in the union and non-union shop by highlighting policies that could infringe on employees' rights to engage in concerted activity. Because the use of prohibited policies may result in unfair labor practice charges being brought against an employer, the potential for back pay, or the overturning of a company won union election, great care should be taken in combing through employee manuals. All language not in compliance with the Act should be stricken.

These changes arise from the National Labor Relations Board's relatively new interest in finding that company policies that it believes chill the rights employees have under Section 7 of the National Labor Relations Act ("the Act") to be violations of the Act. Section 7 gives employees the right to, among other things, organize and engage in "concerted activity." Section 7 provides that employees are free to act together, or to engage in concerted activity, not only for purposes of collective bargaining or organization, but also for "other mutual aid or protection."

Employees, therefore, have the right to join together to try to improve their pay and working conditions or to deal with other job related problems regardless of whether they are unionized. Also, although concerted activity normally requires two or more employees acting together, the Board has held that the action of a single employee may be considered concerted activity if he or she either involves co-workers before acting or acts on behalf of co-workers. Hispanics United of Buffalo, Inc., 359 NLRB No. 37, slip op. at 2 (Dec. 14, 2012) (citing Myers Industries (Myers 1), 268 NLRB 493 (1984) and the same case on remand in Myers Industries (Myers II), 281 NLRB 882 (1986)). Atlantic Steel Co., 245 NLRB 814, 816 (1976).

For example, individual gripes and disruptive outbursts or statements made only to third-parties disparaging an employer, its products, or its services are typically not protected. However,

statements that the Board deems to be the first step toward a group action may be protected. Hispanics United of Buffalo, Inc., 359 NLRB No. 37, slip op. at 3 (Dec. 14, 2012).

In Knauz BMW, 458 NLRB No. 164 (Sept. 28, 2012) the Board found that an employer's rule requiring employees to be "courteous, polite and friendly to customers, vendors and suppliers [and] fellow employees" and disallowing "disrespectful ... or any other language which injures the image or reputation of the [employer]" – violated the Act because this could chill Section 7 activities!

In its decision in *Costco Wholesale Corp.*, 358 N.L.R.B. No. 106 (Sept. 7, 2012), the Board held that a provision in Costco's employee handbook prohibiting employees from electronically posting statements that "damage the company, defame any individual or damage any person's reputation or violate the policies outlined in the Costco Employee Agreement" violated the Act by stifling employee rights to free speech. The Board specifically pointed out that the provision did not include "accompanying language that would tend to restrict its application," therefore allowing employees to "reasonably assume" it applied to protected concerted activity. In a later decision the Board held that a social media policy prohibiting "disparaging or defamatory comments" about the company also violated the Act.

In May of 2012 the Board's General Counsel stated that employer policies prohibiting harassment, bullying, discrimination, or retaliation and discriminatory remarks and threats of violence or similar inappropriate or unlawful conduct were lawful because such policies could not be reasonably understood to restrict Section 7 activity.

The Board has ruled that a simple disclaimer stating that, "Nothing in this policy manual is meant to violate the National Labor Relations Act" will not suffice to correct overbroad policy statements. An employer could, however, manage to limit its prohibitions by stating, "Nothing in the company's policy manual is designed to interfere with, restrain, or prevent employee communications concerning wages, hours, or other terms and conditions of employment, and company employees have the right to engage in or refrain from such communications."

Employer Action Steps

The Act applies to your business regardless of whether any portion of your workforce is unionized. It is therefore best to avoid overbroad statements and ambiguous words that could be interpreted to "chill" Section 7 rights. The Board has disfavored terms and phrases such as "confidential information" and "disparaging comments" – without further explanation or context – as being too vague and likely to violate the Act. Prohibiting distribution of confidential information, if such prohibition includes co-worker names, addresses, wages or benefits, would violate the Act. Therefore, in writing policies:

- Provide examples whenever possible. The Board has repeatedly indicated that a particular policy might have been lawful if it had included specific examples of prohibited conduct. Thus, instead of stating that the policy prohibits "inappropriate behavior," consider providing examples such as harassment, bullying, etc.

- Include a savings clause. These clauses exclude protected Section 7 activity from the scope of a social media policy. Although (per the Board) a savings clause will not cure an otherwise unlawful and overbroad policy, it might cure a slightly flawed policy, and there is no downside to including it.

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