Is Staying Neutral During A Union Campaign Unlawful?

October 6, 2020 | Labor And Employment,Union Organizing,National Labor Relations Board

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When employers are faced with union organizing, many develop and implement robust communication plans and other strategies to stave off unionization. Other companies enter into “neutrality agreements” with unions instead. However, the National Labor Relations Board (NLRB) may be taking a new look at these agreements to evaluate whether certain terms in them are lawful.

A neutrality agreement is an agreement – in reality, a contract – between a union and a company that an employer will remain “neutral” in any organizing efforts by the union of the company’s workforce. In other words, the company will not oppose unionization of its workers by that union. For example, a company would be prohibited from issuing communications to its workforce expressing its opinion that the employees are better off without the union or otherwise speaking negatively about the union and unionization.

Neutrality agreements vary widely in scope and terms. Some are limited to a single site of a company and others cover regions or even the country. Some also require other actions by employers, such as providing the union with contact information of employees and agreeing to recognize the union if it procures enough authorization cards from workers instead of going through a secret ballot union election conducted by the NLRB. Some employers don’t realize that if they enter into such an agreement with a union, they can get certain concessions from the union as well. For instance, an employer could

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agree to remain neutral in any union campaign at a plant in Michigan but, in exchange, have the union agree it will not seek to unionize employees at any company location in other states.

According to a recent memo issued by NLRB General Counsel Peter Robb, some provisions contained in neutrality agreements may be unlawful. For example, scope of unit provisions in such agreements identify the segment of employees to be represented by a union. A union, for example, may be seeking to only represent maintenance employees at a manufacturing site. A scope of unit provision in that context could state that the union will only represent maintenance workers and no one else. Unions and companies entering into such an arrangement may like this because it gives clarity to who will be represented if a union achieves recognition. However, the NLRB has defined legal standards for evaluating the proper scope of a unit and, as stated by General Counsel Robb in his recent memo, if employers and unions agree to a defined unit prior to a union actually representing employees, that could detract from employee choice on the issue. Accordingly, these provisions likely will face more scrutiny from the NLRB.

Robb further cautioned that employers who render more than "ministerial aid" to unions in an organizing effort may violate labor law, and noted that the same standards applied to companies in the decertification and other contexts should be applied here. This makes sense both conceptually and practically. The National Labor Relations Act was enacted to give employees – not companies or unions – the right to join or not join a union. The NLRB has sought to protect this right by minimizing an employer's role in the decertification process and other contexts, so it makes sense that the same standards should apply on the other end when a union is trying to come in and organize a workforce.

Many companies desire to remain union-free for a host of reasons, so entering into a neutrality agreement may seem counterintuitive to many people. Companies have various reasons for doing so. Neutrality agreements often are entered into by companies that have large segments of their workforce already represented by unions, so employers may enter into such an agreement to secure favorable labor agreement terms at their existing unionized sites. Other times, a company may be pressured by a unionized customer to enter into a neutrality agreement. Sometimes unions wage corporate campaigns and engage in picketing and similar tactics to leverage a company to agree to enter into one. Neutrality agreements are far from the norm, but they are out there.

Bottom line: a company should carefully evaluate the pros and cons of entering into such an agreement, because it is surrendering important rights to voice its opinion on unionization to its workforce. Employers should also take note of this recent NLRB memo before agreeing to specific terms.