

## WARNING: No Solicitation

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Few things are more painful for a company to go through than a union election. One of those things is when the National Labor Relations Board (NLRB) orders a “re-run” election due to alleged misconduct by the employer (*i.e.*, the company has to go through the entire contentious, cumbersome, and costly process again). Various types of misconduct by companies can give rise to a re-run election. One such category is “solicitation of grievances,” which occurs when, in the face of a union organizing drive, an employer asks employees about problems/concerns in the workplace and promises to (or implies that it will) fix them. The board generally finds such conduct to be unlawful when organizing activity is underway absent certain circumstances, such as a clear past practice. On July 25, the NLRB issued a decision in [Mek Arden, LLC](#), 365 NLRB No. 110 (2017), in which the agency found an employer unlawfully solicited grievances during an organizing drive. As a result of the unlawful conduct, the board ordered a re-run election. At issue in the case was a visit by the company’s Chief Operating Officer (COO) to the site where a union campaign was underway. Prior to his visit, the COO heard an employee at the site had raised concerns with a new manager. When the COO encountered employees during his visit – both those who were potentially eligible to vote in the impending union election and those who were not – he routinely asked them, “How are things going?” When he saw the employee who had raised a concern regarding the manager, he similarly asked her how things were and then followed up by asking her about the concerns she had raised. The COO also told the employee he would “look into” her concerns. After the union lost the subsequent union vote, it filed objections to the election and asked for a re-run vote. Among other things, the union alleged the COO’s conduct violated the law on grounds it constituted soliciting grievances. The NLRB agreed because, in the board’s view, the COO both solicited a grievance by seeking out the employee who had raised the concern and also impliedly promised to remedy it by stating he’d “look into it.” Based on that conclusion and other findings of misconduct, the NLRB ordered a re-run election. Notably, NLRB Chairman Philip Miscimarra issued a dissent in the case on the solicitation of grievances finding. He said he did not believe the COO violated the law because, among other things, the phrase “how are things going?” merely is “a familiar, commonplace greeting” and the employee at issue had volunteered a concern about a manager without being prompted. Unfortunately, his lone vote was not enough to carry the day for the company. This case illustrates the importance of ensuring employer campaign conduct does not run afoul of NLRB precedent, including with respect to solicitation of grievances. That’s one of the only surefire ways to avoid a dreaded re-run election. Thankfully, we’ll likely see a majority of NLRB members espousing views similar to those of Chairman Miscimarra in the near future, assuming President Trump’s

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