NLRB Makes It Easier To Oust a Union

Labor & Employment Law Update

By Beverly Alfon on July 9, 2019

Did you know that when a private sector employer has evidence that a union has lost support from a majority of its bargaining unit members, the employer can refuse to recognize the union as their bargaining representative? In 2001, the National Labor Relations Board (NLRB) ruled that employers can unilaterally withdraw recognition from an incumbent union based upon "objective evidence" (typically, a petition signed by at least half of the bargaining unit members indicating that they no longer wished to be represented by a union) that the union has lost majority support (*Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2001)). This would allow the employer to withdraw recognition effective upon expiration of the collective bargaining agreement and allow the employer to end bargaining over a successor collective bargaining agreement (CBA). This is referred to as "anticipatory" withdrawal of recognition. This remains law – but in a 3-1 decision issued on July 3 (*Johnson Controls*, N.L.R.B., 10-CA-151843 (7/3/2019)) – the NLRB significantly changed the legal framework around withdrawal of recognition in favor of employers.

Until now, a significant hurdle for most employers who attempted to withdraw recognition from a union is that they would be at great risk for being subjected to an unfair labor practice charge from the union for failure to bargain in good faith. The crux of the problem was that the Board would look at whether or not the union lacked majority status at the time of actual withdrawal. This allowed the union to covertly gather evidence of "reacquired" majority status (often consisting of signatures from the same members who signed the anti-union petition) between the time of the anticipatory withdrawal and the date of actual withdrawal on the date of contract expiration. The union was not required to show the employer its evidence prior to the effective date of withdrawal – often leaving the employer on the losing end of the charge, facing an order directing it to bargain with the union, and the union insulated from challenges to majority status from six months to a year (and an additional 3 years if an agreement is reached).

The Key Change for Employers

Now, if an employer receives objective evidence of an incumbent union's loss of majority support (at least 50 percent of the bargaining unit no longer supports the union) no more than 90 calendar days prior to the expiration date of the relevant collective bargaining agreement (CBA), the employer is free to declare an

anticipatory withdrawal of recognition from the union, without fear of being charged with an unfair labor practice. The Board "...will no longer consider, in an unfair labor practice case, whether a union has reacquired majority status as of the time recognition was actually withdrawn." Instead, if the union wishes to re-establish its majority status, the burden falls on the union to file a petition for election within 45 days from the date that an employer gives notice of an anticipatory repudiation — regardless of whether the employer gives notice more than or fewer than 45 days before the contract expires. The Board will process the petition without regard to whether the parties' contract is still in force at the time the petition is filed.

Some Things Stay the Same

It remains that a "good faith reasonable doubt" of majority status will not cut it as "objective evidence" to support an anticipatory withdrawal of recognition. The objective evidence that an employer relies upon to declare an anticipatory withdrawal of recognition must be free of improper influence or assistance from management. A majority of the bargaining unit (50% +1) would still have to vote "no union" during the election in order to oust the union. Also, incumbent unions still enjoy insulated periods from challenge during which the union enjoys a presumption of majority status: (1) certification bar – up to one year after the NLRB certifies a union as the exclusive bargaining representative of a unit; and (2) contract bar – the first three years of a collective bargaining agreement.

Bottom Line

In explaining the appropriateness of this new standard, the NLRB stated as follows: "It ends the unsatisfactory process of attempting to resolve conflicting evidence of employees' sentiments concerning representation in unfair labor practice cases. Instead, such issues will be resolved as they should be: through an election, the preferred method for determining employees' representational preferences." The NLRB further reasoned that the election process generally moves at a faster pace than the ULP process. Whether or not this shift has a significant impact on the employer's rate of success in ousting a union remains to be seen. While a significant legal hurdle has been removed, others remain, and navigating this process requires careful planning.