The Attack on Employer Free Speech Continues to Grow –- More States Enact Laws to Muzzle Employers on Educating their Employees on the Good, Bad and Ugly of Unionization

Labor & Employment Law Update

By Jeffrey Risch on September 7, 2023

Entering 2023, the union membership rate dropped to a new historic low of 10.1%. Among private sector workers, the numbers were even more bleak for unions: just 6% of the overall private sector workforce is now unionized (compared to 33% in the public sector). The membership rate actually dipped in 2022 in both the private and public sectors. Organized labor has been in full panic mode and seeking assistance from its allies in D.C. while trying to organize as many young adults as possible working in coffee shops and cannabis stores.

We all are aware that the National Labor Relations Board (NLRB) has been actively working on giving unions assist after assist to help organize workers. The *Cemex* decision is just the latest development out of D.C. However, organized labor has been very active in some key states and recently helped lobby the legislature in Minnesota, Maine and New York to pass a law that attempts to muzzle employers from educating their employees on the "things" that the labor unions don't want the employees to know before they cast their vote or sign a union authorization card. However, having a well-informed worker is not a winning strategy for unions. This is why it's always left to the employer to actually educate the workforce on the good, bad and ugly of becoming part of a particular labor union. This practice is often referred to as the *Captive Audience Meeting.*

Keeping the worker *in the dark* concerning key facts and the *fine print* before casting an official vote or signing a union authorization card (which can now on its own make a worker a union member compelled to pay union dues) is something organized labor tries to ensure. In fact, under the National Labor Relations Act (NLRA), unions not only don't have an obligation to share key information to prospects, they can also lawfully lie to workers and provide them

with false information while making wild promises that they cannot possibly keep. Treating prospective members like mushrooms is quite effective — telling the prospect everything they want to hear and leaving out the ugly details is a no-brainer for union organizers. Educating the prospect fully, directly and honestly is not part of the union's playbook.

Of course, the NLRA already clearly prohibits employers threatening, interrogating, promising or spying on workers with respect to their union related activities or preferences. In fact, under the *Cemex* decision, an employer that says or does the wrong thing in the eyes of a decidedly aggressive pro-union NLRB risks being ordered to recognize a labor union without an election altogether. But, that doesn't seem to be enough for big labor and their allies. Recall that on April 7, 2022, Jennifer Abruzzo (General Counsel for the NLRB), issued Memorandum 22-04. Abruzzo is now calling for the NLRB to reign in on employers holding meetings to educate the workforce on union organizing or a particular union — including while on company time and being paid. While the NLRB has not yet published a decision that cements Abruzzo's desire to end all captive audience meetings, more and more states are doing so through state legislation. Indeed, Minnesota, Maine and New York just passed legislation that aims to curb, if not eliminate, captive audience meetings --- with MN and NY legislation actually now in effect! These states join Connecticut and Oregon in passing similar laws.

How Is This Legal? Obviously, these laws must still contend with the 1st Amendment. And, it's well established in Section 8(c) of the NLRA that employers can lawfully communicate to their employees on union related matters. Indeed, the U.S. Supreme Court has long recognized the employer's right to certain free speech in the private sector aimed at unions and union organizing. In fact, the Connecticut law (effective July 1, 2022) is being actively challenged by the U.S. Chamber of Commerce. Also, while Oregon's law has been on the books for several years now, there's been no serious lawsuit involving employees and labor unions to date and the State of Oregon doesn't even enforce the law --- as captive audience meetings continue to occur there.

What Should I Do? Doing nothing and feeling paralyzed is NOT a plan --- and plays right into big labor's hand. However, with a plethora of laws and mandates coming from multiple angles now (and more states like CA and IL soon to follow suit), employers conducting any sort of union related education training with employees should be cautious when navigating these waters — especially when dealing with a union's petition to formally represent workers or when union card signing is afoot. Management training and conducting a labor relations evaluation at regular intervals throughout the year are the first steps to remaining union-free. Determining how, when and what to present to non-supervisory employees is critical. Deciding if the meeting should be mandatory or not is an important decision for employers to carefully explore. Supplying workers with key facts related to unions or a particular union is going to be their only source of accurate information (remember, unions can lawfully lie and

mislead workers). Educating them on the union's *fine print* and what a union authorization card actually is (especially in the wake of the *Cemex* decision) is vital.