"Treat Employees Like Mushrooms?" – NLRB's Attack on Employer "Captive Audience Meetings" is Officially On!

Labor & Employment Law Update

By Jeffrey Risch on April 11, 2022

Treat 'em like mushrooms is an expression that is never actually uttered out loud by union organizers, but it's certainly implied when it comes to organizing a workforce. Keeping the worker *in the dark* concerning key facts and the *fine print* before casting an official vote for or against union representation 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 mislead workers and provide them with false information while making wild promises that they cannot possibly follow through on. In short, when attempting to organize workers to join a union, union organizers intentionally fail to disclose unflattering facts related to the union and union membership. It's a common and expected tactic.

Unsurprisingly, treating prospective members like mushrooms is quite effective — telling the prospect everything they want to hear and leaving out the ugly details is often a winning strategy. Educating the prospect fully, directly and honestly is not in a union's playbook.

Here's a short sampling of highly relevant issues that would help inform an individual before they vote for or against union representation:

* Reviewing the union's financials (and, specifically the % of funds used for actual representation);

* Examining the history of the union's failure to provide fair representation to certain members and related unfair labor practice charges against the union;

* Exposing particular union leaders' past legal troubles (including any harassment and discrimination lawsuits and/or criminal convictions related to the union); and

* Sharing and examining the union's bylaws, constitution and many "rules" that subject members to certain financial penalties, fees and compulsory dues and allows the union to bargain for what it wants vs the workers' needs (individually or as a group).

Having a well informed worker is not a winning strategy for the union. 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 *captive audience meetings* and such meetings have been deemed lawful in the private sector for generations.

While unions commonly perceive the captive audience meeting as being anti-union, in reality it's typically anything but. If an employer decides to simply trash the union, it often backfires. Rather, the better and more common approach is to heavily focus on educating workers on everything union representation means (the good, bad and ugly). Examining the labor organization at issue under a microscope and educating the worker on the *fine print* leads to a more informed voter. And, this scares union organizers like nothing other!!!

A more informed voter usually means the union loses at the ballot box. Indeed, labor unions continue to lose members. In 2021, the total U.S. workforce belonging to a labor union dropped to 10.3% — matching the all-time low in 2019. Among private-sector workers, the numbers were even worse — union members made up just 6.1% of the private sector workforce. There is certainly a connection between quality captive audience meetings and unions losing elections.

The unions can't take this much longer. In fact, they are in full panic mode. And so… on April 7, 2022, Jennifer Abruzzo (General Counsel for the National Labor Relations Board), 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.

In the April 7 GC Memo, Abruzzo identifies two circumstances that she believes are problematic and should be deemed unlawful coercion under the NLRA. These circumstances are: 1) when non-supervisory employees are forced to attend a meeting on paid time or 2) when such employees are approached by management one-on-one while performing their job duties. According to Abruzzo, "both situations deprive employees of their statutory right to refrain, and instead are compelled to listen by threat of discipline, discharge, or other reprisal—a threat that employees will reasonably perceive even if it is not stated explicitly."

Abruzzo and the pro-union NLRB must still contend with the 1st Amendment. 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.

"Treat Employees Like Mushroom-s?" – NLRB's Attack on Employer "Captive Audience Meetings" is Officially On!

However, with a new approach coming from the NLRB's top policy maker, employers conducting any sort of union related education training with employees should be very cautious when navigating these waters — especially when dealing with a union's petition to formally represent workers.

Of course, the NLRA already clearly prohibits employers threatening, interrogating, promising or spying on workers with respect to their union related activities or preferences. The NLRA protects concerted activity in many forms. Employers who engage in such actions or do anything to interfere with employees engaging in protected concerted activity have always faced stiff legal headaches under federal labor law. But, that doesn't seem to be enough for Abruzzo. Afterall, the unions are losing ground.

TAKE AWAY

Employers need a forum to share with employees of all levels objective facts about unions and union organizing. Careful and well planned management training and conducting a labor relations evaluation at regular intervals throughout the year are the first steps to remaining union-free. Determining what, how and when to present non-supervisory employees with key facts related to unions or a particular union is critical. Navigating these waters with experienced labor law counsel is necessary.

As always, we will continue to keep you abreast of changes as they occur. Please reach out to any of our L&E attorneys with any concerns regarding this highly sensitive and alarming development.