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Time to LAWYER UP?

When to Consult with Labor/ Employment Counsel

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Many in-house counsel have a working knowledge of the concept of at-will employment and the general protections from discrimination available to employees under Title VII of the Civil Rights Act of 1964. However, except for the largest in-house legal departments where one or more individuals specialize in labor and employment law, it is impossible to be familiar with every nuance of the ever-expanding amount of state and federal laws that govern the workplace.

To address this reality, this article discusses several potential traps that can be avoided by employers reaching out for assistance from outside labor counsel.

Policy on Workplace Solicitation and Distribution

Two areas in employee handbooks can present serious problems if the language is not carefully drafted. First, practically every employee handbook should contain a solicitation and distribution policy. The purpose of this policy is to regulate employee conduct as well as the conduct of non-employees. The solicitation portion of the policy regulates under what circumstances an employee can solicit or try to sell something to another employee. The distribution portion of the policy describes when and where it is permissible for an employee to distribute literature on company premises.

It is imperative that an organization's solicitation and distribution policy be implemented prior to the commencement of a union campaign. If the policy is instituted *after* a union campaign is underway, it is likely that the National Labor Relations Board (NLRB) would find it discriminatory and would invalidate it. *See Elmendorf & Fort Richardson,* 247 NLRB 6687 (1980).

Even if the solicitation and distribution policy has been adopted by the company before the union campaign, it must be facially valid for the NLRB to uphold it. A well-crafted solicitation and distribution policy will also prohibit solicitation and distribution for any purpose by non-employees on company premises. On the other hand, an overbroad policy may subject employers to an unfair labor practice charge. For instance, the NLRB recently reaffirmed an

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employer's ability to regulate on-premises solicitation and distribution in *UPMC*, 368 NLRB No. 2, (June 14, 2019). However, in doing so, the board provided reminders of key restrictions on this ability, such as the notion that an employer may restrict employees only from distributing materials during the employee's working time (which does not include breaks) and in working areas. Given the many potential pitfalls in crafting a solicitation and distribution policy, outside labor counsel should be consulted so that the language in the employee handbook is the broadest language legally permitted for the industry while containing language that the NLRB is likely to find valid.

Absenteeism, Time-Off Policies

The second troublesome area in many employee handbooks concerns absenteeism and time-off policies. Both federal and state law provides guidelines for enforcing attendance policies in the workplace. The Family and Medical Leave Act (FMLA) requires covered employers to provide leaves of absence to eligible employees who need time off from work because they are seriously ill. Even occasional incapacity caused by a treatable medical condition may be a serious health condition under the FMLA. Therefore, attendance and tardiness policies in an employee handbook must be consistent with the FMLA. Further, employers may run afoul of federal law even when an employee has exhausted or is ineligible for FMLA leave. If an employer's medical condition qualifies as a disability, the Americans with Disabilities Act (ADA) may require accommodations to cope with the condition, including time away from work. Thus, prior to making employment decisions based on the attendance of an employee with medical conditions, evaluation by outside counsel is always prudent.

Union Matters

A union that possesses authorization cards from a majority of employees in an appropriate bargaining unit may lawfully demand recognition from the employer. If the employer admits to the union that the union represents a majority of the employees and takes actions consistent with that (i.e. committing to enter negotiations with the union), the NLRB may find that the employer has voluntarily recognized the union. The employer could then be required to bargain with the union even without an NLRB election. *Jerr-Dan Corp*. 237 NLRB 302 enforced, 601 F.2d 575 (3rd Cir. 1979).

Even when an employer actively disputes the union's majority status and campaigns against the union, once the election petition is filed with the NLRB, an employer may commit acts that would invalidate an election in which the employer has prevailed. The NLRB requires "laboratory conditions" during the period between filing the election petition and the election. If the company commits unfair labor practices that result in a significant impairment of the election process, the election can be invalidated and ordered to be re-run. *See NLRB v. Heath TEC Div./San Francisco*, 566 F.2d 1367, 1372 (9th Cir. 1978). Where the employer has committed egregious unfair-labor practices, the employer can be ordered to bargain with the union even if the employer has won the election. *NLRB v. Gissell Packing Co*., 395 U.S. 575 (1969).

Regardless of the sophistication of an employer, legal counsel should be used to advise management during the entire union-organizing campaign, as well as even in the pre-petition stage. A fast-moving election period can lure unsuspecting employers to engage in potential unfair labor practices. Even seemingly innocuous questions from a supervisor to a bargaining-unit member could be considered a violation of the National Labor Relations Act (NLRA) and result in an unfair labor practice charge *See Struksner Construction Company*, 165 NLRB 1062 (1967).

Thus, supervisor training prior to a union campaign is prudent, and the assistance of labor counsel during any union campaign is critical.

Audit by the U.S. Department of Labor (DOL) or Nevada Labor Commissioner (NLC)

Generally, the cause of a DOL or NLC investigation and inspection stems from some complaint being filed that an employee has not been paid minimum wage or overtime wages as required by state or federal law, or that an employee has been deprived of meal and/or rest breaks as required pursuant to state law. Complaints alleging minor violations affecting only one employee may be assigned as "conciliations."

Conciliation is more informal and often conducted by telephone or letter to provide fast service by limiting the scope of the investigation to one employee or to one minor violation.

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Conciliations may be converted into investigations if additional facts regarding violations surface or the facts of the case are unclear.

Outside labor attorneys with a good working relationship with the investigators can frequently prevent a conciliation converting into a full-blown audit. Even in the cases wherein an audit is unavoidable, competent counsel may assist in limiting the scope of an audit and can help employers avoid damaging admissions.

INS Audit

In 1986, Congress enacted the Immigration Reform and Control Act (IRCA), 8 U.S.C. § 1324a *et seq*. The act imposes penalties on employers for knowingly hiring or continuing to employ aliens who are not authorized to work in the U.S. To ensure employers hire only individuals authorized to work, the law requires employers to verify the employment eligibility of all new employees at the time they are hired. Accordingly, all employers must complete and retain Form I-9, Employment Eligibility Verification, for each employee hired after November 6, 1986. Form I-9 allows government investigators to determine whether the employer has knowingly employed unauthorized aliens. Also, the verification procedure may provide the employer with a good-faith defense against charges that it engaged in knowing employment of unauthorized alien workers.

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Penalties may be levied against employers with "paperwork" violations, because they have not properly maintained I-9 records for some or all of their employees, or because they have made mistakes in completing the forms. These civil penalties may vary depending upon the severity of the violation or whether there were good faith efforts to comply or correct the error. Substantial penalties can also be applied to employers who "knowingly hire or continue to employ" workers who do not have proper work authorization. This action would include falsely making a document for immigration purposes or for knowingly accepting a forged or counterfeit document for I-9 verification purposes.

If Immigration and Customs Enforcement (ICE) conducts an I-9 inspection or investigation based on a suspicion of violations, the agent will provide written notification to the employer of the inspection's time and place. While three days' notice is customary, ICE can bypass the three-day-notice requirement if it has probable-cause evidence of a violation and obtains a civil or criminal search warrant. Absent the search warrant, a company should not consent to an immediate review of I-9 or any other records; invoke the three-day rule for production of the I-9 records. While it is important to be cooperative, proper planning may give an employer additional time to meet with its ICE counsel to review the I-9 records and correct mistakes. More importantly, an ongoing relationship with outside counsel will provide the best opportunity to proactively achieve, maintain and defend an organization's compliance with the IRCA.

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