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Employers Should Start Planning Now For Prospective Union Activity

By Matthew Baldassin

Current State of Union Activities

As many of our clients who own or operate businesses already know, union activity has increased dramatically during the last year. You may have observed such activity at local small businesses or followed the well-publicized unionization efforts at larger corporations like Apple, Starbucks, Amazon, and Google. Recent statistics from the National Labor Relations Board ("NLRB")—the federal agency charged with enforcing the National Labor Relations Act ("NLRA")—confirm this trend and indicate that petitions to unionize during the first three quarters of fiscal year 2022 exceeded the number of petitions filed for the entirety of fiscal year 2021.

Employees' increased interest in unionization is undeniable, and too many employers have found themselves blindly reacting to union activities without a coherent plan. This article contains practical strategies that may help you avoid that common pitfall by proactively evaluating your current labor climate.

What is the National Labor Relations Act?

The NLRA was enacted to promote employee advocacy for better working conditions without fear of retribution. The NLRA generally protects employees who engage in concerted activities, which may occur within or outside the workplace. A "concerted activity" involves employees banding together to seek changes to working conditions; it does not require union involvement. Additionally, if employees are successful in forming a union, the NLRA generally requires employers to bargain or negotiate with the union in good faith over their conditions of employment.

Employees making a concerted effort to impact their conditions of employment under the NLRA have two primary tools. First, the employer is required by law to engage with employees and a union in good faith; failure to do so may result in intervention by the NLRB. Second, employees can exercise economic leverage by striking or otherwise making an employer's operations less efficient and less profitable.

Why Do Employees Organize?

The first thing many employers think of when considering what motivates employees to organize is money. That is understandable; most labor negotiations do focus on that subject at some point. However, many union campaigns begin with much less tangible, but no-less compelling, motivations: respect and communication.

It is often employees' feelings that they are not being heard by management, or that the work they do is not respected or appreciated. Those perceived deficiencies may push employees toward forming a union. Employers should try to proactively identify these sentiments. Employers should begin by evaluating the amount of turnover they are experiencing, considering what exiting employees tell them about their reasons for leaving, holding meetings or conducting surveys requesting employee feedback, or by training managers or supervisors to engage with and listen to employees and report concerns. Perhaps counterintuitively, it is when employees get quiet that employers may have the most to worry about. If employees believe bringing concerns to management is ineffective, then they may look for outside support. Namely . . . a union.

Prepare in Advance

Before engaging with union activities, an employer should first consider the strength of—and reasons for—its opposition to a union. The instinctive, default reaction is often that unionization must be resisted at all costs. But the question of whether, and how, an employer should oppose union activities needs to be thoughtfully considered. And answering that question is complicated in today's unique workplace by employers' struggles to attract and maintain quality employees.

Employers should begin planning on how it would answer these questions now. Once an employer actually observes union activities, the organizing efforts are probably further along than the employer may think. Begin by identifying and addressing the gaps or weaknesses in the employer-employee relationship that may be exploited by a union. Some questions the employer might ask include:

- Is there a common complaint that employees express repeatedly, but that has not been effectively addressed? Or, similarly, are we starting to see more gripes or grievances overall?
- Are we giving employees an opportunity, from their perspective, to effectively communicate concerns, frustrations, and suggestions? In other words, are we making them feel "bought in"?
- How do our compensation and benefits compare to that of our competitors? If we are behind, can we adjust or bring other things to the table that employees will appreciate . . . whether they express it or not?
- Are there front-line or mid-level managers we can train so their interactions with employees are more productive and positive?

Evaluating whether an employer's interactions with employees in these contexts are permitted under the NLRA requires the application of federal and state law to the unique facts at issue. Though the NLRB's approach shifts periodically, certain guidance has been approved consistently enough to be considered reliable. Here are a few considerations for employers evaluating and responding to union activity.

You CAN

- Inform your employees that you do not favor unionization and that you think a union is unnecessary to address employee concerns.
- Share information about your pay and benefits and compare those to other union or non-union employers.
- Point out that a union can promise a lot but cannot guarantee any particular outcome from collective bargaining or contract negotiation.
- Remind employees that simply signing a union authorization card does not commit them to joining a union.
- Identify any inaccurate or misleading information in union materials.

You CANNOT

- Threaten employees with loss of jobs or benefits if a union is pursued or engaged.
- Question employees about their feelings toward unions if it might interfere, deter, or restrain their activities in pursuing union involvement.

- Promise to increase pay or benefits specifically to discourage union engagement.
- Penalize employees because they have associated with or spoken to labor representatives.
- Track employee activities or "surveil" them to assess their involvement with union activities.

You SHOULD

- Proactively evaluate and look for signs of union activity.
- Train managers and supervisors on how to engage with employees about union topics.
- Emphasize communication and genuine interest in, and respect for, your employees and the conditions of their employment.
- Consider how your responses to union activities will be portrayed by the local media, and potentially affect the public's perception of your business.
- Develop an articulable position regarding unionization at your business.

Statements made or positions taken in response to union activities can get an employer in trouble even when acting with the best intentions, and labor law can be confusing at best. This information is intended to inform firm clients about fundamentals, but nothing in this article should be construed as legal advice or a legal opinion. Please do not act upon the information without seeking the advice of legal counsel or human resources professionals.

For Employers with Additional Questions

For employers with additional questions, Crowley Fleck PLLP has an experienced team of attorneys who can assist with all manners of employment questions, including questions related to compliance with the NLRA. If you would like more information, please contact Crowley Fleck's Employment Practice Group.

Updates on Federal Employment Laws

By John M. Semmens

Employment law is constantly evolving, and employers should work closely with their attorneys to keep apprised of updates to state and federal employment laws.

This article provides an overview of some recent developments to federal employment laws, including: (i) the EEOC's new guidance on how the Americans With Disabilities Act ("ADA") applies to COVID-19 tests required by employers; (ii) OSHA's announcement that it will extend its COVID-19 National Emphasis Program indefinitely, which focuses on inspecting hospitals and skilled nursing facilities; (iii) OSHA's recent announcement that it will focus on weekend workplace inspections this fall in certain states, including Montana; (iv) the IRS's recent decision to increase mileage reimbursement for business travel from $0.58½ to $0.62½; and (v) recent guidance issued by the EEOC on how employers' use of algorithms and/or artificial intelligence to make hiring decisions may violate the ADA.

EEOC Announces New ADA Guidance for COVID-19 Testing

Employers who test workers for COVID-19 should review their testing policies to ensure they comply with new guidance issued by the EEOC. Previously, and based on the "current circumstances of the COVID-19 pandemic," the EEOC had suggested in its answer to FAQ No. A.6 that employers had broad authority to test employees for COVID-19 without violating the ADA, provided that the employer's testing was "consistent with current CDC guidance." That prior guidance no longer is operative.

Now, the EEOC has changed course and advised that employers may test employees for COVID-19 only if they can meet the general standard for conducting medical examinations, i.e., they affirmatively "show it is job-related and consistent with business necessity." The EEOC continues to advise that an employer's COVID-19 testing protocol is permissible if it is "consistent with guidance from Centers for Disease Control and Prevention," but the EEOC is clarifying that such guidance often is dependent on underlying facts. Accordingly, employers must account for a variety of factors when determining whether a COVID-19 testing program is justified:

"Possible considerations in making the 'business necessity' assessment may include the level of community transmission, the vaccination status of employees, the accuracy and speed of processing for different types of COVID-19 viral tests, the degree to which breakthrough infections are possible for employees who are 'up to date' on vaccinations, the ease of transmissibility of the current variant(s), the possible severity of illness from the current variant, what types of contacts employees may have with others in the workplace or elsewhere that they are required to work (e.g., working with medically vulnerable individuals), and the potential impact on operations if an employee enters the workplace with COVID-19. In making these assessments, employers should check the latest CDC guidance (and any other relevant sources) to determine whether screening testing is appropriate for these employees."

Notably, applicable state law (such as Montana's HB 702) may prohibit employers from considering some of those factors, including the vaccination status of employees.

In short, the EEOC's new standard "makes clear that going forward employers will need to assess whether current pandemic circumstances and individual workplace circumstances justify viral screening testing of employees to prevent workplace transmission of COVID-19." Stated differently, if employers want to test their employees for COVID-19, they must first engage in an "individualized assessment . . . to determine whether such testing is warranted consistent with the requirements of the ADA."

OSHA Extends National Emphasis Program

On June 30, 2022, OSHA announced it was "extending its Revised National Emphasis Program for COVID-19 until further notice." Originally launched in March 2021, the NEP focuses inspection targeting efforts on employers whose workers are at serious risk of contracting COVID-19, including "hospitals, assisted living facilities, nursing homes, and other healthcare and emergency response providers treating patients with coronavirus." In particular, and pursuant to the NEP, OSHA reaffirmed its intention for at least 10 percent of its total workplace inspections to target those employers. To date, OSHA estimates it has "issued 1,200 coronavirus-related citations to employers . . . [with] penalties totaling $7.2 million dollars."

OSHA's recent announcement confirms it continues to view COVID-19 as an enforcement priority requiring heightened scrutiny, especially with respect to healthcare providers. Although targeted healthcare providers do not need to change their policies or procedures in response to OSHA's recent announcement, such providers generally will need to continue to comply with existing compliance requirements for the foreseeable future. Additionally, OSHA signaled it was continuing its efforts to adopt a "permanent standard" to replace the NEP; healthcare providers should prepare to implement that permanent standard once it is issued.

OSHA's New Weekend Workplace Inspection Plans

OSHA also recently announced a new initiative, which it plans on implementing this fall in Western states, including Montana, Colorado and South Dakota. This new "Weekend Work" initiative will target workplaces operating on weekends—and primarily construction industry workplaces—to ensure safety protocols remain in place even outside of the tradition 9-to-5 weekday working hours. In particular, OSHA intends for its new initiative to target "construction-related fall injuries."

Employers should take note of OSHA's new initiative, and work to ensure that their workplace safety protocols remain in effect whenever employers are engaged in the workplace, including on weekends.

IRS Increases Mileage Reimbursement Rate for Remainder of 2022

On June 9, 2022, the IRS announced "an increase in the optional standard mileage rate for the final 6 months of 2022." The new standard mileage reimbursement rate is "62.5 cents per mile, up 4 cents" from the rate the IRS set on January 1, 2022. That new rate became effective on July 1, 2022.

Employers should take note of the new IRS mileage reimbursement rate. Although utilizing that reimbursement rate is optional (and often used "in lieu of tracking actual costs"), many employer policy manuals and/or procedures peg the reimbursement rate to which employees are entitled to the IRS' standard rate. And the IRS typically only changes its reimbursement rate at the beginning of a year. However, in recognition of the impact inflation has had on fuel prices, the IRS took the

unusual step of increasing its mileage reimbursement rate mid-year. Employers should note that change, and update their practices and procedures accordingly.

EEOC's Warning to Employers who use Algorithms or AI for Hiring Purposes

According to the EEOC, employers' use of "algorithms and artificial intelligence can lead to disability discrimination in hiring." As a general matter, the ADA prohibits employers from discriminating against people with disabilities, including when making hiring decisions. Although such discrimination typically is attributed to explicit, purposeful acts, the EEOC has announced that "employers' use of hiring technologies may [also] violate the ADA," even if an employer does not intend to discriminate.

In relevant part, the EEOC notes that many "hiring technologies are software programs that use algorithms or artificial intelligence" to "try to predict who will be a good employee by comparing applicants to current successful employees." However, because "people with disabilities have historically been excluded from many jobs," the use of such hiring technology could "unfairly screen out a qualified individual with a disability."

The EEOC advises that employers should "should examine hiring technologies before use, and regularly when in use, to assess whether they screen out individuals with disabilities who can perform the essential functions of the job with or without required reasonable accommodations." The EEOC also warns employers that using "another company's discriminatory hiring technologies" does not insulate the employer from potential liability.

For Employers with Additional Questions

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