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NLRB Memo May Void Some Union-Employer Neutrality Pacts

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Unions have long sought to avoid the National Labor Relations Board's election process, relying instead upon so-called neutrality agreements to obtain initial recognition by employers and legally enforceable rights to represent and bargain on behalf of previously unrepresented employees.

Although truly neutral prerecognition neutrality agreements — i.e., those calling for an employer to be neutral on the subject of unionization and little more — are lawful, many such agreements go beyond mere neutrality and venture into actual employer support of organizing. This may render such agreements unlawful under the National Labor Relations Act because they interfere with employees' rights.

Indeed, Section 8(a)(2) of the act declares it impermissible for an employer to support a union's organizing efforts. Likewise, Section 8(b)(1)(A) of the act makes it unlawful for a union to receive such support.

Until now, there has not been a bright line separating lawful neutrality agreements/provisions from those that interfere with employee rights and are, therefore, prohibited by federal labor law.

However, that is likely to change, for on Sept. 4, NLRB General Counsel Peter Robb issued a guidance memorandum on employer assistance in union organizing,[i] setting forth parameters for lawful and unlawful neutrality. This is an important development portending a new direction the NLRB will take when presented with such questions.

According to the neutrality memo, the lawfulness of neutrality agreement provisions should be examined through the lens of whether they provide "more than ministerial support" to a union's efforts to organize based on a simple bright-line test that would find a violation of the act whenever an employer and a union enter into a prerecognition agreement where:

- The parties prenegotiate the terms and conditions of employment prior to the union attaining majority status;
- The parties agree to restrain employee access to board processes and procedures; or
- The parties agree to any provision that is inconsistent with the purposes and policies of the act, such as impacting Section 7 rights by providing support of the union's organizing activities, rather than mere neutrality.

Under this standard, an employer and a union violate the act if they bargain over wages and working conditions before the union achieves majority status. Likewise, a provision requiring an employer to seek the dismissal of any third party's petition for an election restrains employee free choice and, thus, violates the act.

Indeed, without saying it in so many words, the neutrality memo's reasoning suggests that a neutrality agreement in which an employer waives its and, more importantly, its employees' right to a secret ballot NLRB election to decide questions concerning union representation — opting instead for such questions to be decided by a card check to be conducted by a third party — may be vulnerable to legal challenge.

Further, noting that the very wording of some neutrality agreements may be unlawfully coercive, the neutrality memo applies the same "more than ministerial support" bright-line standard when analyzing the lawfulness of certain neutrality agreement provisions. Thus, neutrality agreement provisions that permit or require an employer to render more than ministerial aid to a union are unlawful. They include but are not limited to the following:

- Provisions allowing nonemployee union organizers to take access to an employer's facilities or informing employees of the presence of union organizers;
- Provisions allowing union solicitation during working time;
- Provisions providing a union with employee contact information;
- Provisions requiring an employer to post a notice or letter announcing the neutrality agreement itself and indicating a preference for the union;
- Prerecognition provisions calling for interest arbitration to resolve disputes over the terms and conditions of the parties' labor agreement;
- Prerecognition no-strike clauses; and
- Prerecognition clauses determining the scope of a bargaining unit.

Important Takeaways From the General Counsel's Neutrality Memo

A Possible Basis for Attacking Union Corporate Campaigns

Unions and their surrogates often wage corporate campaigns against targeted businesses for the purpose of extorting an employer's entry into a neutrality agreement. Insofar as the neutrality agreement the union seeks calls for more than ministerial aid from an employer, the campaign the union wages in support of that agreement may violate Section 8(b)(1)(A) of the NLRA.

Therefore, the employer who is the object of that campaign may be able to defend itself against that campaign by filing an unfair labor practice charge with the NLRB based on that corporate campaign.

A Basis for Rejecting State LPA Requirements

In many progressive jurisdictions, state and local licensing and procurement laws and procurement contracts often require licensees or successful bidders to enter into what are euphemistically called labor peace agreements, or LPAs, as a condition of operating under their state licenses or performing under their state contracts. Though called another name, LPA's are essentially neutrality agreements that employers are compelled to enter into with unions, requiring them to be neutral should a union attempt to organize their workers.

Many of these LPA's contain the very provisions declared legally off-limits by the neutrality memo because they go far beyond the ministerial aid allowed by the NLRA and coerce nonunion employees in the exercise of their rights under the NLRA.

Thus, insofar as state and local laws and/or contracts make an employer's entry into such agreements a condition of doing business, those requirements may be preempted by federal labor law, giving an otherwise successful licensee/bidder a legal basis for rejecting their preempted state LPA requirements and the ability to refuse to honor their state license's/contract's LPA requirements.

A Possible Basis for Voiding/Not Complying With a Neutrality Agreement

If the neutrality memo is correct, then a neutrality agreement that calls for more than ministerial aid on the part of a nonunion employer is an illegal promise prohibited by NLRA Sections 8(a)(2) and 8(b)(1)(A). In Kaiser Steel Corp. v. Mullins in 1982, he U.S. Supreme Court ruled that such illegal promises requiring prohibited conduct controlled by federal law are contrary to public policy and will not be enforced.[ii]

Accordingly, even though lawful neutrality agreements are legally enforceable contracts, an employer who has entered into an unlawful neutrality agreement or is contractually obligated to engage in conduct prohibited by the NLRA may seek to be relieved from its contractual obligations by filing a unfair labor practice charge against the union who is party to that unlawful agreement or interposing neutrality agreement's and/or its provision's unlawfulness as a defense to a union suit to enforce the neutrality agreement.

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[i] https://apps.nlrb.gov/link/document.aspx/09031d4583220da3.
[ii] Kaiser Steel Corp v. Mullins, 466 U.S.72, (1982).