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Briefly

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Howard B. Jackson

"A great deal of planning and strategy is necessary, and what seems logical may not be legally or strategically appropriate."

STRATEGIC RESPONSE PLAN TO NEW NLRB "QUICKIE ELECTION" RULES

The new National Labor Relations Board (NLRB) "quickie" election rules obviously deprive employers of valuable time to address issues after an election petition is filed. This increases the importance of both efforts to prevent organizing activity from beginning in the first place, and of being prepared to address such activity quickly should it occur.

Failure to take such steps could result in a situation where an employer faces a union election in less than three weeks after finding out about the advent of union organizing activities. In that shorter span of time, an employer has far less chance of appropriately educating and communicating with its employees so that they can make an informed choice on election day. This time factor will often be exacerbated because many unions do not request an election unless they have obtained signed authorization cards from a majority of voters. Further, pre-election NLRB procedures must now be accomplished so quickly that an employer may be forced to spend much of the available time dealing with those issues rather than on campaign efforts. Since the new "ambush" election rules go into effect on April 14, 2015, this article provides some thoughts about preventive efforts.

Steps Prior to Advent of Union Organizing: Employers should make their stance on union organizing clear. One place for this message is in the Employee Handbook. The message should be phrased in a positive manner, but should also be clear in communicating the employer's position.

New employee orientation is also an appropriate opportunity to communicate the employer's position. Again, the message should be positive and clear. Obviously, there should be no threats, direct or implied.

Employees who are informed regarding their employer's position are more likely to say "no" in the event that someone attempts to push union activity upon them. In contrast, if an employee has not been given information about the employer's view, he or she may be more open to organizing efforts.

In addition, training management and supervisors is critical. These persons need to know the legal basics. They also need to understand how to look and listen for signs of organizing activity, and how and to whom to report any such signs. Early detection has always been crucial, and that is even more true under the new "quickie election" rules. Yet, supervisors sometimes do not observe or report such matters, not because they do not care but because they have not been properly trained. These days, such a failure to communicate creates a potentially disastrous situation because the employer has little time to respond after an election petition has been filed.

Last but far from least, an effective deterrent to organizing activity includes having appropriate complaint resolution and harassment policies in place, providing appropriate training and instruction to employees and supervisors, and enforcing those and other policies in a fair, calm and even handed manner. Just as mistreatment, or at least perceived mistreatment, by supervisors frequently causes employees to seek help from some third party, be it the EEOC or a union, the opposite is also true. Implementing an effective employee relations practice with a well-trained and effective management team encourages employees to resolve matters internally, versus seeking outside assistance.

Steps to Take After Commencement of Union Organizing: When an employer becomes aware of union organizing activities at the facility or nearby, the first steps should include contacting a responsible labor attorney who specializes

Continued on page 2

in this practice. A great deal of planning and strategy is necessary, and what seems logical may not be legally or strategically appropriate.

A labor attorney will likely want to visit the facility and meet with upper management, and possibly all levels of supervision. Initial steps during or before that visit include fact-gathering. The attorney and employer need to know, for example, which union is involved, the extent of the union organizing activities, the potential issues in the workforce, and the history and capability of the company in dealing with Human Resource issues.

A round of initial training for both upper management and all levels of supervision is important. At a minimum, management needs to be educated on the do's and don'ts of union campaigns, such as the "TIPS" rule (no threats, interrogation, promises or spying). Initial evaluations will need to be made of whether there are any Human Resource issues that can or should be addressed, whether the company should come out with its own "anti-union card signing" campaign or the like. Other early decisions and assessments may be required, such as, for example, identifying an appropriate company spokesperson, evaluating who is a "supervisor" under NLRB rules (note, such supervisors are excluded from the bargaining unit and are counted on to support management's position in a campaign), and determining the likely composition of the bargaining unit the union is seeking to represent.

After going thru such an initial fact gathering and evaluation process with labor counsel, the employer will evaluate the next steps. The proper step depends on what is learned during the initial process. In some cases, a "wait and see" approach may be appropriate and management and supervisors will be advised to be on alert and report any and all suspicious activities to a central source.

In other cases, the employer may conclude that some level of counter-organizing campaign should be undertaken. Such a response is particularly necessary if there is reason to believe that significant numbers of employees are signing union authorization cards.

The type of campaign communication and overall strategy for response may differ significantly from case to case. For example, if the employer learns that someone is passing out union authorization cards and urging employees to sign them, the employer may want to hold meetings to: (1) education its workforce about the significance of signing such a card; (2) confirm and clearly communicate the employer's position with regard to union organizing; and (3) encourage employees to refuse to sign such cards.

On the other hand, if the employer receives an election petition, the time for discussing card signing has pretty well passed. It is time to gear up, and gear up quickly, to engage in a full-fledged counter-organizing campaign. Conducting an effective campaign requires quick and accurate assessment, good planning, and solid execution. And these days, all of this must be accomplished quickly.

If you have questions about developing or implementing preventive measures or other counter-organizing steps, please feel free to contact your attorney at *Wimberly Lawson.*

SENATE COMMITTEE AND CONGRESS TRYING TO BLOCK NEW NLRB "QUICKIE ELECTION" RULES

Howard B. Jackson

Employers should not be lulled to a false sense of security by reading about legislative and judicial efforts to block the NLRB quickie election rule that goes into effect April 14, 2015. The effect of the new "quickie" or "ambush" election rules are to shorten the time frame from the union's request of an election to the election date itself, from approximately forty (40) days to possibly as little as fourteen (14) days. The concern expressed by Sen. Lamar Alexander is that: "I would hope that both Democrats and Republicans would oppose a rule that allows unions to organize before the employer has time to know what's going on." The House and Senate passed a resolution attempting to block the new NLRB rules. But on March 31, 2015, President Obama vetoed that resolution. Is it very unlikely that Congress will muster the two-thirds vote necessary to override the presidential veto.

HEALTH REFORM UPDATE: U.S. SUPREME COURT CONSIDERS A SECOND OPPORTUNITY TO LIMIT THE AFFORDABLE CARE ACT

Catherine E. Shuck

"If the plaintiffs prevail, it will derail two key pieces of the [Affordable Care Act]."

On March 4, 2015, the U.S. Supreme Court heard arguments in *King v. Burwell*, the second major case testing the future of the Affordable Care Act ("ACA"). Unlike the first case, this second case does not deal with the constitutionality of the ACA. Instead, King deals with the law's terminology.

A key feature of the ACA is to provide health insurance subsidies to people who obtain insurance coverage "through an Exchange established by *the State*." The issue in *King* is whether subsidies should also be available through exchanges (also called "marketplaces") established by the federal Government. Currently 34 states have federally-run exchanges and only 16 states plus Washington, D.C. have state-run exchanges. The plaintiffs argue that the statute means what it says, so the subsidies should not be available to residents in states that have not established their own exchange. The federal government argues that the statute must be read as a whole, and that the subsidies should be available in all exchanges.

If the plaintiffs prevail, it will derail two key pieces of the ACA. First, without subsidies to buffer the cost of health insurance, many if not most of the 11 million people who have purchased insurance through the exchanges will no longer be able to afford their premiums. Second, in states with a federal exchange, the employer mandate will no longer be enforceable. Recall that the employer mandate to offer health insurance to full-time employees applies to employers of 100+ full-time equivalent employees (FTEs) in 2015 and 50+ FTEs in 2016. Critically, the employer penalty for failing to offer coverage is only triggered when one or more employees receive a subsidy *through an exchange*. If the exchange can no longer offer a subsidy, there is no longer a trigger for the employer penalty, making the mandate unenforceable.

The final outcome will likely rest upon the vote of Justice Anthony Kennedy, who is considered a moderate on many issues, and/or Chief Justice John Roberts, who voted to uphold the constitutionality of the ACA in 2012. A decision in the case is expected in June.

KNOW YOUR ATTORNEY
MARGARET L. NOLAND

MARGARET L. NOLAND is a Senior Associate in the Cookeville, Tennessee office of Wimberly Lawson Wright Daves & Jones, PLLC, joining in September 2008. She is a practicing attorney since 1988, with experience in the areas of workers' compensation, personal injury and general practice. She currently focuses her practice on workers' compensation, general practice and litigation, estate planning and probate, as well as commercial law. She obtained a Bachelor of Arts degree in chemistry with honors from the University of Tennessee at Knoxville in March 1983. In 1988, she received a Doctor of Jurisprudence degree from the University of Tennessee College of Law in Knoxville. Margaret has a BV Distinguished® Rating - a widely respected mark of achievement given by Martindale-Hubbell, the leading independent attorney rating entity. She is a member of Tolletts Chapel United Methodist Church in Crossville, Tennessee, where she is treasurer and worship leader. She is also Chairman of the Trustees of the Cookeville District of the United Methodist Church. She is active in community affairs, including the Bread of Life Rescue Mission in Crossville, Tennessee, where she has volunteered since its inception in 2001.

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NEW OSHA REPORTING RULE ENFORCEMENT PROCEDURES
RAISE STRATEGY ISSUES FOR EMPLOYERS

Mary Moffatt Helms

"… OSHA offices are now sending out questionnaires to employers requesting details about the accidents causing the injuries."

Effective January 1, 2015, employers are required to report to OSHA within twenty-four (24) hours in the event of an amputation, the loss of an eye, or any incident that results in at least one worker being admitted to a hospital for in-patient care. This is in addition to existing procedures requiring the reporting of fatalities within eight (8) hours.

Little noticed in these changes is the fact that area OSHA offices are now sending out questionnaires to employers requesting details about the accidents causing the injuries. In addition to basic questions about the accident, some questions request that the employer "identify the root causes" of the incident, explain why safety procedures weren't followed, and give reasons for the failure of safety devices. The questionnaire closes with the employer being asked to explain what the company's recommended corrective actions were, and what actions were taken.

Based upon the initial reports returned by employers, OSHA will put the situations into one of three categories, with varying levels of follow-up by OSHA. Category 1 reports will automatically trigger an inspection, while Category 2 reports will not always result in an inspection. An inspection does not result for reports that are considered Category 3.

Editor's Note: Although employers are not necessarily legally required to respond with detailed information or to use the form OSHA sends, advice of counsel is desirable because of the significant ramifications. That is, the failure to cooperate in a reasonable way will likely result in an early inspection, but there are ways of providing the general information without using the particular OSHA form.