Portfolio Media. Inc. | 860 Broadway, 6th Floor | New York, NY 10003 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Obama's NLRB Deals Big Labor A Winning Hand: Part 1

Law360, New York (January 21, 2014, 6:55 PM ET) -- Since 2009, employers that are union-free — and those who intend to stay that way — have had to deal with a blizzard of new decisions and rules by agencies of the Obama Administration to make union organizing easier for employees, and more difficult for employers resist. It appears that the final pieces of a grand payback to organized labor, in lieu of the Employee Free Choice Act, will fall into place in 2014. As a result, employers will have to reinvent their union-free strategies to meet game-changing challenges. Employers that do not change and retool their union-free strategies dramatically will find that organized labor has been dealt all of the winning cards. Once union organizing is underway, there will not be time to make amendments and the National Labor Relations Board's law will prevent most of the most essential and effective changes.

The Capstone Changes Expected in Early 2014

The NLRB will almost certainly republish its new election rules and, in doing so, all but erase the ability of employers to respond effectively to union organizing post-petition. This may come as early as April. By that time, in March, the Department of Labor will have issued its new interpretations of the Labor Management Reporting and Disclosure Act ("LMRDA") that will redefine the public reporting requirements for employers who use third-party consultants or attorneys to establish and implement union-free strategies or combat active organizing.

These are the remaining two pieces that will complete the Obama Administration's rescue plan for big labor. When combined with the reinterpretations of the law already made by the NLRB, union organizing will not only be easier but nearly irresistible, unless nonunion employers learn to operate in this entirely new environment. Yet, there are things that can be done to create a winning strategy to remain union-free.

NLRB Election Rules Changes

In April 2012, the NLRB published a series of rule changes to force speedy representation elections and to restrict — some would say eliminate — the ability of employers to affect issues such as the appropriateness of the requested unit and voter eligibility. These changes were enjoined by a court in

May 2012 because at the time the rules were issued, the court said the NLRB lacked the necessary quorum to engage in rule-making. As a result of the court's action, the NLRB withdrew the new rules.

The technicality relied on by the court has now been cured and now, with a full slate of members, its chairman, Mark Pearce, has signaled that that he wants to reissue the rules, including, perhaps, even those portions that were removed from the original version during negotiations to avoid the resignation of the opposing member. There is no doubt that when the rules are proposed to the other members by Pearce, the pro-union majority will act quickly and favorably.

One combination of these rule changes will shorten the time between the filing of a petition and an election. Under some circumstances, they would permit an election to be conducted as soon as fourteen days after the petition, only one week after the hearing where the regional director sets the date of the date of the election and the voting unit. These changes would make "organizing by ambush" more than just a catch-phrase.

Another group of changes, when combined with substantive law modifications, would nearly eliminate the ability of employers to litigate the appropriateness of the bargaining unit requested by the union and voter eligibility in the hearing on the union's petition. As a consequence, an employer may be unable to stop an election in a unit that is as small as a single classification or makes no operational sense merely because it was requested by the union, usually based on support for the union. The employer also would not be sure as to who would be considered by the NLRB to be supervisory and, therefore, would not know who could be required to participate on behalf of the employer in the campaign to combat the union's drive and provide information with regard to voter concerns and attitudes.

Board Decisions

The NLRB has already made it a protected right for employees to use social media to disparage their employer, prohibited instructions to keep the existence and content of an investigation of employee misconduct confidential, placed extreme limits on restrictions on off-duty access to the employer's property and, soon, is likely to open the email system of employers to use by union organizers. The NLRB has also been quick to use injunctions against alleged wrongful conduct during organizing and imposing enhanced remedial orders, such as the reinstatement of discharged employees pre-election before it is finally determined that the discharge was due to union activity, access to the employer's premises for union organizers, in-facility speeches by union organizers and attendance by union organizers at captive audience meetings.

Three decisions make resistance to the union organizing especially difficult. The first relates to proposed bargaining units, the second to the definition of supervisor and the third to the use of neutrality agreements.

Specialty Healthcare

In Specialty Healthcare (357 NLRB No. 83 (2011)) the NLRB held that a unit of certified nurse assistants ("CNAs") in a nursing home constituted an appropriate unit for an election and bargaining. The employer had argued that a unit limited to CNAs was inappropriate and should include all nonprofessional employees, a common unit in nursing homes.

In making its decision, the NLRB rejected its long-standing presumption in favor of wall-to-wall, or large

units, against the proliferation of units and against “extent of organizing units.” In the future, it said, units, perhaps even as small as a single job classification, would be found appropriate. Not less significant was the NLRB’s declaration on the burden of proof necessary for an employer to prove that the unit requested by the union was inappropriate. Going forward, the employer’s burden will not just be persuasion, but the employer would be required to establish by “overwhelming evidence” that the requested unit would be inappropriate unless it included — or excluded — certain other employees. This unprecedented and extraordinarily high burden is expected to be carried only rarely. The result is that the appropriate unit for the election will almost always be the unit desired by the union and the issue of appropriateness of the unit is effectively off the table prior to the election.

Specialty Healthcare cleared the way for multiple “microunits” within a single workplace and balkanized workforces where several different unions may each represent only small groups of employees. The dysfunction that would result from a state of nearly constant bargaining, constant risk of strikes and constant “one-upsmanship” would be dramatic, costly and debilitating.

At a minimum, a single union could obtain a foothold in the workplace by organizing a single, small group of employees. At its worse, movements between classifications, job flexibility, cross-training and a host of other operational imperatives would be either impossible or come at great and unnecessary cost to efficiency. This operational nightmare is a significant and real consequence of this NLRB's decision — this is not fear-mongering.

Since Specialty Healthcare, regional directors have directed elections in such units as the cosmetics and scents employees at Macy’s and the women’s shoes at Bergdorf-Goodman. Different unions and different contracts for each department in a department store is not far from different unions and different contracts for each classification in a manufacturing facility.

Oakwood Healthcare and Croft Metals

While these two cases (Oakwood Healthcare, 348 NLRB No. 37 (2006); Croft Metals, Inc. 348 NLRB No. 38 (2006)) predate the current NLRB, they are now being applied much more vigorously. In these two cases the NLRB narrowed the definition of “supervisor” significantly. Supervisors are not “employees” under the National Labor Relations Act and, therefore, are not entitled to its protections.

That means, supervisors have no protected right to engage in or to support a union and employers may count on supervisors to resist union organizing and can interrogate them with regard to what they know about such activity in the workplace. If the supervisors do not cooperate, they can be discharged from their employment without violating the NLRA. By narrowing the definition of a supervisor, employers are limited in who they can rely on during the course of a campaign.

Under these cases, for example, the NLRB will not consider the assignment of work to be an indicia of supervisory authority unless the exercise of this authority is not routine (not pursuant to detailed employer guidelines) and requires the exercise of independent judgment. Other critical points of examination are the amount of time spent supervising, as opposed to doing employee work, and whether the supervisors are held accountable for the performance of those who are supervised.

Equally problematic with regard to the supervisory issue is that the likely new rules will prohibit the litigation of whether an employee is or is not a supervisor pre-election, unless the number of the individuals involved is more than 10 percent of the proposed unit. As a consequence of the narrowing of the definition of supervisor and the likelihood that the supervisory issue will not be decided pre-

election, employers are left uncertain as to whether a particular individual is a supervisor until after the election, when the issue may be the subject of an unfair labor practice charge alleging that the employer interfered with the protected rights of "an employee" when it included the "supervisor" in strategy sessions regarding union activity. Including them as employer representatives during a campaign because the employer, in good faith, believes they are supervisors, therefore, places the employer at risk of having the election results overturned and other remedial NLRB orders.

Further, fearing that an employee may be improperly classified as a supervisor may push an employer to reduce the number of individuals it may use as advocates against unionization and as sources of information, only to find that the votes of those whom the employer was conceding to be employees are challenged by the union on the basis that they are, in fact, "supervisors." Unsure employers are placed in a classic "damned if you do and damned if you don't" dilemma with some individuals feeling demoted when the employer, out of an abundance of caution, tells them that they being excluded from the "inner process" because they are not supervisors.

Dana Corp, 356 NLRB No. 49 (2010)

In Dana Corp. (356 NLRB No. 49 (2010), the NLRB approved of a neutrality and cooperation agreement between Dana and the United Auto Workers. The UAW had induced Dana not only to be neutral (i.e., not oppose the union's organizing effort and agree to a card check) to union representation of the employees at a particular plant, but also to facilitate the organizing drive by providing the names and contact information of the employees to the union while issuing a statement that the company believes it can work cooperatively and positively with the union. In return, the UAW agreed that, when it obtained the collective bargaining rights, it would not oppose in principle the productivity and incentive plans the company felt were important.

In this case, the UAW induced Dana's neutrality and cooperation agreement with promises related to a subsequent collective bargaining agreement. Some unions have achieved neutrality agreements by agreeing to back legislation favorable to the employer. Other unions have coerced neutrality agreements through picketing, adverse publicity and regulatory complaints.

At first blush, combating the neutrality and card check strategy does not appear to be relevant to a discussion of election-based strategies. However, neutrality and card check agreements are not effective if the union is unable to obtain signatures on authorization cards from a majority of the employees. The subject also is relevant because the neutrality strategy has become the preferred method of organizing by some unions and employers must be prepared to combat it. Many of the elements of a union-free strategy to resist traditional union organizing discussed below are also effective to neutralize or eliminate the desire of employees for union representative.

—By James R. Redeker, Duane Morris LLP

James Redeker is a partner in Duane Morris' Philadelphia office where he represents both organized and unorganized companies in their personnel and labor relations. Redeker has been directly involved in equal employment, wage and hour, occupational safety and health, collective bargaining, contract administration and National Labor Relations Act problems.

Keys For Employers To Remain Union-Free In 2014: Part 2

Law360, New York (January 23, 2014, 1:01 PM ET) -- The next few months are critical for employers who wish to stay union-free in 2014 and beyond. The Obama administration's quest to make union organizing easier and more difficult for employers resist is on track to come to fruition in the first half of this year. As a result, employers will have to reinvent their union-free strategies to meet these game-changing challenges. Employers that do not change and retool their union-free strategies dramatically will find that organized labor has been dealt all of the winning cards.

Increasing the complexity of creating and implementing a union-free strategy beyond what Big Labor has and is doing, the U.S. Department of Labor is poise to deal another ace.

New Persuader Rules

The Labor Management Reporting Act of 1959 requires that any third-party hired by an employer to persuade employees with regard to union representation must report the nature of the activities and the amount paid to them by the employer. Employers have a similar reporting requirement.

The reports must be filed with the DOL and are available to the public on the department's website. The law contains an exception for "advice" and, historically, the DOL has defined advice as not including strategic, training and campaign-related services if those services were not rendered in direct contact with employees. Services that are only indirect in that they involve only working with managers and supervisors of the employer who would then have direct contact with the employees would not have to be reported. This is a bright-line rule that has prevailed for the last 40 years.

The DOL has announced that in March of this year it will issue a new interpretation of the law so that now only strictly legal advice will be considered to be within the advice exception and not reportable. That is, if an employer sends a document to a lawyer for advice concerning its compliance with the law (as distinguished from its effectiveness or advisability), the activity and fee paid would not have to be reported. However, if the employer asks the lawyer for advice concerning whether it would be a good thing to use the document in a campaign or for modifications that do not relate directly to the law, that advice would fall outside the advice exception and have to be reported. Services that consist of the creation of a union-free strategy, training supervisors with regard to union organizing or creating documents or speeches for use during a campaign and the fees charged for those services would have to be reported by both the employer and the service provider. As noted above, those reports would be published on the DOL website for viewing by an interested union or any other person.

Under the rule as it was proposed first in 2012 (and it is likely that the rule that will be published will be at least as far-reaching as the proposed rule, regardless of the numerous objections from employers and employer representatives), if a consultant or lawyer engages in any reportable activity, all labor services provided by that consultant or lawyer (and all others in the firm with which the consultant or lawyer is associated) to the employer, even if not directly related to a union-free strategic plan or a union campaign, would have to be reported along with the amounts paid. This would include the development of or advice concerning policies, reviews of handbooks and training. Only actual work in connection with litigation and other direct legal advice would be excluded from the mandate.

The bottom line is that, unless enjoined (there is likely to be a court challenge at least on the issue of whether the new rules violate attorney-client privilege), any employer using any third-party consultant or lawyer to assist it to remain or to become union-free will have to make public that it is doing so, what it is doing and how much it is paying for the service. Once reported, the information can be republished

by a union to employees in an effort to discredit the employer or impugn the employer's motives.

Since most employers do not have the resources to have strategic union-free specialists on staff, the new persuader rules may diminish the use of third-party specialists. Since studies historically confirm that employers who use third-party union free specialists are significantly more successful than those who don't, the persuader rules are viewed by some labor commentators as a way to clear the field for union organizers. This consequence would be exacerbated if unions turn the reports into the moral equivalent of Megan's Law — and they very well may. Thus, employers that may be reluctant to obtain the services they need to combat union organizers, would be left to deal with the guile of professional organizers alone.

Unstacking the Deck

In spite of the Obama administration's apparent determination to do everything possible — short of legislation — to assist unions to obtain new members, employers are still in control of their own destiny when it comes to remaining union-free, if they are willing to make the effort. In addition, if these employers act before the new persuader rules are promulgated in March, they may keep their strategic planning confidential.

While not an exhaustive list, here are some things that employers should be doing now to stay union-free:

- Neutralize the desire for third-party representation — it will be too late after organizing begins.
- Have wages and benefits that are competitive with unionized companies in the area. The value of being union-free lies elsewhere and if you are significantly under market you will likely fail.
- Enable employees to have a stake in the organization's success. When the company's success is everyone's success outsiders are not welcome.
- Have an effective communication program. Employee security often depends on their knowledge of how you and they are doing and why things are happening that change, or may change, their lives.
- Make safety and equal and fair treatment important. Besides keeping you on the right side of the law, it communicates that you care.
- Have a credible legal problem solving system. Employees with unresolved problems beg for help.
- Provide employees with due process. If you provide protections from unfair treatment, employees do not need to find it elsewhere.
- Train supervisors how to manage employees and employee performance. Supervisory failings in performance management frequently stimulates looking to the outside for help.
- Give supervisors time to supervise. If supervisors do not have time to see and solve employee problems, employees have nowhere to turn but out. Lean operations are sometimes anorexic .
- Have a strong and communicated union-free philosophy — you may not have time after a petition is filed.
- Communicate that you think it is important for the company to be union-free and why while avoiding reasons that can be twisted to appear exploitive. (E.g., "We don't need a union because we need flexibility" can be heard as "we don't want a union because we want to jerk you around.")
- Communicate what you are doing to make unions unnecessary. If someone does not make the connections for them, employees may not see or appreciate it.

Educate Supervisors, They Need to Know

- Reasons why employees seek union representation and how to avoid or eliminate them.
- How unions organize employees.
- What unions are and can and can't do.
- What supervisors can and can't do with regard to protected activity.
- What their responsibilities are to recognize, report and respond to suspected union organizing without violating the law.

Structure Operations to Have Desired Employee Units

- Know what you need to show to have the employee units you desire and then adjust your operation, if necessary, to create overwhelming evidence that make undesirable and micro-units inappropriate.
- Collect and have easily retrievable documentary evidence to assure that you will be able to present within seven calendar days all that is necessary to carry your burden of overwhelming evidence.

Make Sure Those You Want to be Supervisors Will Meet the NLRB's New Definition

- Prepare job descriptions that contain the indicia of supervisory status.
- Establish wage, evaluation and other policies and systems that establish that your supervisors are, under the law, supervisors.

Have a Rapid Response Plan

- Be prepared to respond effectively and quickly — within 24 hours — to credible union organizing.
- Be prepared to prove what is necessary to be proven at a post-petition hearing.

The reality is that the agencies of the Obama administration are stacking the deck in favor of unions and making it easier for unions to organize employees. They are doing this by:

- Depriving employers of the time to educate employees effectively once a petition is filed.
- Limiting the rights of employers to challenge and avoid election and bargaining units chosen by unions solely on the basis that they will be the easiest to organize.
- Restricting the definition of supervisor and denying employers the ability to have that issue resolved pre-election.
- Encouraging card-check strategies that include coerced or purchased neutrality and cooperation agreements.
- Expanding the public reporting of the nature and cost of union-free services provided to employers who use nonemployee experts, encouraging employers without on-staff union-free specialists to remain vulnerable.

As a result of these administrative actions, keeping your workplace union-free in 2014 and for the foreseeable future will require more urgency and very specialized efforts. Hopefully, this list of things you must do will be a guide.

Another word to the wise, if you do not feel you have the in-house capability of meeting the challenge and wish to create your strategies within the confidentialities of your own company, you should consider seriously doing, at the very least, the most important strategic work prior to the March publication of the new rules for nonemployee specialists who will then be required, as will you, to file public reports for inclusion on organized labor's version of its own Megan's Law type list of despicable offenders.

—By James R. Redeker, Duane Morris LLP

James Redeker is a partner in Duane Morris' Philadelphia office where he represents both organized and unorganized companies in their personnel and labor relations. Redeker has been directly involved in equal employment, wage and hour, occupational safety and health, collective bargaining, contract administration and National Labor Relations Act problems.