Labor Letter

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Responding To The (New) NLRB

By Steve Bernstein (Tampa)

For the past 75 years, the National Labor Relations Board (NLRB) has been responsible for conducting union representation elections and investigating unfair labor practice charges. Because the agency is comprised of members who are appointed by the standing President, it has been vulnerable to the occasional pendulum shifts that flow from the political process. That being said, the agency has traditionally steered clear of major controversies by confining itself to the application of long-standing principles that have typically stood the test of time.

Barring an act of Congress, the agency has been reluctant to impose its own doctrine on the procedures governing union representation elections. Consequently, when Congress failed to pass the Employee Free Choice Act (which aimed at substituting "card check" procedures for secret ballot elections) back in 2009, the business community breathed a collective sigh of relief.

This did not sit well with labor unions, which have long believed that their declining numbers are due in part to regulations extending employees upwards of six weeks or more to contemplate their decisions before casting their votes. In response, they began to set their sights on "Plan B," in the form of administrative rulemaking designed to expedite the election process.

Late last year, unions got their wish, as a reconstituted NLRB passed first-ever rules reducing the time period between representation petition and election from an average of 38 days to 20 or less. This was a rare foray into rulemaking from an agency that had been reluctant to enact sweeping reforms in the absence of legislative action, but it was not the first.

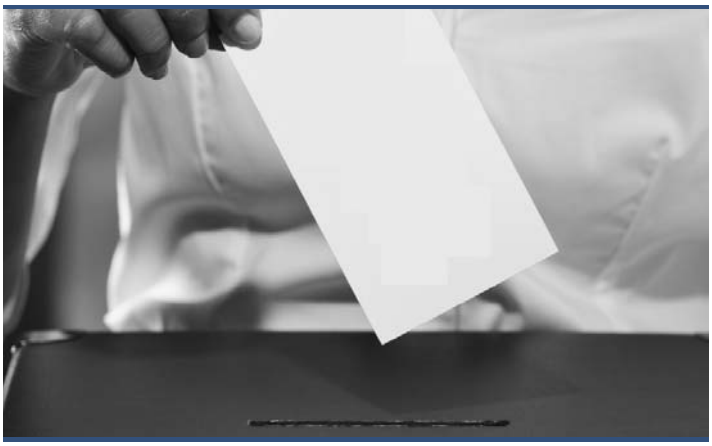
Just months before, the same agency imposed a first-ever notice posting requirement, designed to educate employees on their right to engage in organizing activity. Coincidentally, both of these initiatives are presently scheduled for implementation on April 30th.

Some Background

Representation petitions must be supported by a "showing of interest" in the form of authorization cards signed by bargaining unit employees. Unions are required to submit a minimum of 30% of the employees they wish to represent, although more often than not they will hold off filing a petition until securing closer to twice that percentage.

The new rules do not purport to change this requirement, but they will go a long way toward ensuring that employees end up casting their ballots while wedded to the tide of negative emotions that fueled their signatures in the first place. Unions have long argued that "the current system is broken!" But studies show that they have enjoyed win rates hovering between 60% and 70% for well over a decade. It's fair to assume that these rates are only going to increase once the new rules take effect.

Business groups have responded with various efforts to enjoin these initiatives, and legislators have vowed to mount their own opposition. Others are exploring legal challenges to the status and authority of the NLRB itself. While their prospects for success remain to be seen, two things remain clear. First, the new rules are likely to increase employee discourse and embolden unions in areas that were not previously viewed as hotbeds for organizing activity.



Moreover, barring any last minute developments, employers are confronting a closing window of opportunity in which to get their employee relations programs up to speed, in preparation for the new framework and the onslaught to come.

Countering The Threat With Communications

Consequently, we encourage businesses to act legally but swiftly to optimize the effectiveness of their employee communications initiatives, so that they are standing on go once the new rules take effect. Here are a few proactive considerations along the way.

First, remember that employees often gravitate toward third-party representation based on lingering perceptions of alienation, favoritism and general insensitivity to their individual concerns. Others point to a lack of security in their jobs, increased benefits costs and rapid changes in employment conditions accompanied by a lack of advance notice. These factors have remained relatively constant over the past 75 years, and they are not likely to change any time soon. It therefore stands to reason that an effective employee relations program will be more critical than ever come April 30th.

To that end, take a fresh look at your current communications programs, so as to ensure the smooth flow of information in upward and downward directions. Along the way, take the time to evaluate all potential vehicles and participatory initiatives, ranging from large group meetings to one-on-one sessions with opinion leaders on the shop floor.

Conventional options such as newsletters, bulletin boards and home mailings should always be considered. Increasingly, however, it has become important to explore video communications, along with electronic and social media. Because employees often complain of a lack of senior management visibility (particularly on the off shifts), look for ways to put your top officials in front of employees on a regular basis, beginning with the orientation process. When conducted properly and lawfully, opinion surveys can also go a long way toward tapping into workforce expectations.

Communication skills are not always intuitive, and management training may be necessary. As employee expectations are rapidly changing,

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OSHA Forecast For 2012: Cloudy With Possible Storms

By Tiffani Hiudt Casey (Atlanta)

Strategic changes at the Occupational Safety and Health Review Agency in the last several years have resulted in stricter enforcement, larger penalties, greater compliance requirements and new regulations. This year we expect to see many of the proposed rules and initiatives that OSHA has been pushing make significant progress within the regulatory process, and maybe even come to life.

Things to be on the lookout for in 2012 include:

The Globally Harmonized System

In 2003, the United Nations adopted the Globally Harmonized System of Classification and Labeling of Chemicals (GHS). Since that time, many countries have adopted its use. These systems may be similar in content and approach to OSHA Hazard Communication Standards, but their differences are significant enough to require multiple classifications, labels, and safety data sheets for the same product when marketed in different countries, or even in the same country when parts of the life cycle are covered by different regulatory authorities. In an attempt to align OSHA's Hazard Communication standard with the GHS, OSHA published a proposed rulemaking on September 30, 2009 to adopt the GHS system.

The GHS itself is not a regulation nor a standard. GHS establishes standard hazard classification and communication provisions with explanatory information on how to apply the system. The elements in the GHS supply a mechanism to meet the basic requirement of any hazard communication system, which is to decide if the chemical product manufactured or supplied is hazardous, and to prepare a label or Safety Data Sheet as appropriate. In adopting the GHS, OSHA would thus take the agreed criteria and provisions, and implement them through their own regulatory process and procedures rather than simply incorporating the text of the GHS into their requirements.

Revision of the Hazard Communication standards based on GHS will bring some important changes such as a new form of safety data sheets, changes in labeling requirements and changes in hazard identification keys. Implementation will require training to ensure employees understand the new system.

You can find more information about GHS at http://www.osha.gov/dsg/hazcom/ghs.html.

The Injury And Illness Prevention Program (I2P2)

An injury and illness prevention program is a proactive process to help employers find and fix workplace hazards before workers are hurt. This "find-and-fix" requirement applies regardless of whether the hazard relates to an existing OSHA standard. The goal of the program is to reduce injuries, illnesses, and fatalities by preventing them in the first place through a systematic approach. Of course, it also provides another means for the Agency to impose fines against already overwhelmed employers.

The I2P2 Rule is currently going before a Small Business Regulatory Enforcement Fairness Act Panel review. This is a crucial step in the regulatory process where small business representatives will review and comment on an actual draft of the I2P2 regulatory text that OSHA would intend to publish as a proposed rule. OSHA has reviewed state plans with I2P2's already in place and believes that states with I2P2's have shown reduction in their illness and injury numbers.

Currently 34 states and many nations around the world require or encourage employers to implement such programs. It is likely that the regulatory language will reflect some of the guidance previously established for voluntary programs and that of successful state programs.

OSHA published an Injury and Illness Prevention Programs White Paper on its website (http://www.osha.gov/dsg/InjuryIllnessPrevention ProgramsWhitePaper.html) describing how injury and illness prevention programs work, presenting studies on their success, reviewing existing I2P2 requirements under various OSHA-approved state programs, and describing issues related to their implementation for small businesses, as well as costs associated with implementing I2P2 programs.

Increased Follow-up Inspections And More Repeat Violations

While repeat violations were historically rarely issued, the current administration's agenda has specifically focused on selecting inspection targets with past violations (at the same facility or another facility of that employer). Keep in mind, OSHA can look back five years at the citation history of any facility to issue a repeat citation. If your company has a history of OSHA citations in the past five years, be extra diligent about ensuring you are in compliance and the hazards previously cited have been and remain corrected.

Also, a Repeat does not have to be for the same exact situation, and can be cited in any other facility. Therefore, if you received a citation for failure to have a guard on a machine press in your Chicago plant four years ago, you could (and likely would) be cited for a Repeat at your Atlanta plant this year for a guard missing on your rollers. Think globally when auditing for potential repeat violations. Repeat violations can get very expensive at up to $70,000 per violation.

Many Repeat citations will come from an increase in follow-up inspections. Historically, OSHA performed very few follow-up inspections unless there was a complaint or reason to think the employer was not in compliance. The new agenda calls for a significant increase in follow ups. Again, if you have received prior citations be sure to carefully maintain your abatement and be prepared for a knock at your door at any time.

Possible Changes In Recordkeeping And Reporting

OSHA is looking to change who must keep illness and injury 300 logs based on a review of more recent injury and illness rates under current SIC and NAICS codes. If their proposed changes are implemented, some industries which are currently required to keep injury and illness records (electronics and appliance stores, recording studios, death care services, and others) will no longer need to comply.

Others, who historically have not had to keep 300 logs (automobile dealers, specialty food stores, museums, consumer goods rental stores and others), will have to comply with the recordkeeping requirements. The Agency is also looking to modernize recordkeeping through the use of an electronic system. The on-again/off-again proposal for a separate column on the 300 log for musculoskeletal injuries is once again, off the agenda.

Under the current rules, employers are required to contact OSHA within eight hours of any incident that results in a fatality or the in-patient hospitalization of three or more employees. The proposed rule would require employers to report any incident that results in a fatality, the in-patient hospitalization of even a single employee, or any incident that results in any form of amputation. Of course, more reporting means more inspections as well.

Revisions To PELs

Permissible Exposure Limits, PELs, are the limits for how long an employee can be exposed to a hazardous substance without experiencing

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all vehicles must be readily adapted to respond to generational changes and tailored to fit the unique aspects of your culture. Above all else, err on the side of keeping it simple and concise.

Tighten Up Your Procedures

Of course, an effective communications program is just the beginning. You should also revisit your selection practices to ensure that you are hiring the most qualified applicants for any openings on the front end, and tracking any trends in employee turnover on the back. Along the way, take steps to ensure that employees are regularly updated on the state of the business, any recent accomplishments, and the hidden value of company-provided benefits. You should always be looking for opportunities to foster organizational identification and loyalty.

Once the statutory supervisors within your organization are properly identified, they should be trained to conduct themselves lawfully and properly in response to union organizing activity, and to effectively utilize their own free speech rights in response to employee inquiries with an accurate statement concerning the organization's position on third-party representation.

Above all else, sensitize your management to quickly identify any nagging issues undermining employee morale, and do their best (within reason) to resolve them. Monitor progress in these areas on a periodic basis, and hold designated managers accountable for achieving measurable goals.

Review Your Policies

Lastly, you should constantly audit and update your internal policies to ensure that they are legally compliant while optimizing their effectiveness. Specific procedures must be crafted to deal with electronic communications, employee solicitation, premises access, bulletin board use and grievance resolution. Scrutinize any mandatory arbitration provisions for compliance with recent NLRB decisions, along with all confidentiality policies purporting to restrict employee dissemination of wage-and-benefits data.

Ready . . . Set . . .

As the NLRB's April 30th deadline approaches, one thing remains clear. Employers will soon be confronting a limited window of opportunity in which to respond to representation petitions. As the field tilts sharply in favor of organized labor, unions will soon enjoy a distinct advantage in the absence of proactive employer efforts.

Our advice: to ensure that your employees go into the process on an informed basis, begin taking a critical look at your employee relations programs now, and ensure that they are "standing on go" once the new rules take effect. With increased organizing activity all but assured under the new framework, the clock is ticking down on your ability to get your program up to speed. It's time to overhaul your program before the NLRB overhauls the law.

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OSHA Forecast For 2012: Cloudy With Possible Storms

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harmful effects. Many have not been updated since the early 1970's. Scientific progress, medical breakthroughs and evidence that suggests the current PELs are insufficient to truly protect workers has fostered OSHA's continued efforts to re-evaluate permissible exposure limits (PELs) based on new information gathered over the last forty years. OSHA is preparing a Request for Information, due out in August 2012, to seek "input from the public to help the Agency identify effective ways to address occupational exposure to chemicals."

Increased Whistleblower Complaints

OSHA administers the employee protection or "whistleblower" provisions of 17 statutes. Under the Act, employees may file complaints with OSHA if they believe that they have experienced discrimination or retaliation for exercising any right afforded by the OSHA act, such as complaining to the employer, union, OSHA, or any other government agency about workplace safety or health hazards; or for participating in OSHA inspection conferences, hearings, or other OSHA-related activities.

OSHA has dedicated additional funds to training its investigators to more accurately and thoroughly investigate whistleblower claims which will likely lead to more follow-up on complaints and increased litigation. It has also reassigned responsibility for the Whistleblower Program directly to the Office of the Assistant Secretary of Labor for greater oversight of the program.

Always consider employee relations when making employment and safety decisions to avoid complaints to the extent possible. Be extremely careful when considering any adverse action against an employee who has made a complaint about safety or has engaged in other protected activity, and consult your attorney if action appears necessary.

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"I'M AN ATTORNEY WITH THE SMALL BUSINESS ADMINISTRATION."

10th Circuit Slaps Down EEOC Subpoena

By Gregory D. Ballew (Kansas City)

In 2007, two persons in Colorado applied for employment with Burlington Northern Santa Fe R.R. Co. (BNSF). The company extended each applicant a conditional offer of employment, but rescinded each applicant's conditional offer following a medical screening. Each applicant then filed a separate charge of discrimination with the EEOC alleging that he was perceived as disabled in violation of the Americans With Disabilities Act.

In the course of investigating the charges, the EEOC requested that the employer provide: "any computerized or machine-readable files … created or maintained by you … during the period December 1, 2006 through the present that contain electronic data about or effecting [sic] current and/or former employees … *throughout the United States*." (emphasis supplied)

The employer challenged the scope of the EEOC's request and sought information from the EEOC to justify such an expanded investigation. In response, the EEOC then sought the information by subpoena and sent a letter which, without explanation, stated that the EEOC had broadened its investigation to include "pattern and practice discrimination."

BNSF refused to comply with the subpoena and the EEOC sought court enforcement. The District Court of Colorado refused to enforce the subpoena, finding it overly broad and stating, "The demand for data on a nation-wide basis with two individual claims involving only applicants in Colorado is excessive."

The Commission appealed, but the U.S. Court of Appeals for the 10th Circuit upheld the lower court's decision and refused to enforce the subpoena. *EEOC v. Burlington Northern Santa Fe R.R. Co.*

"Turn Over Everything You've Got" Is Too Broad

The statute granting the EEOC authority to investigate charges of discrimination provides that the EEOC may access evidence that is "related to unlawful employment practices … and is relevant to the charge under investigation."

The EEOC argued that its nationwide discovery request was justified because, in addition to the two Colorado disability charges, it had received four similar charges against the same employer in Kansas, Minnesota, Texas and Wyoming. But the 10th Circuit stated, "The EEOC should not wait until it applies to the district court to supply justification or evidence that should have been provided during the administrative enforcement phase."

As to the EEOC's claim that the broad subpoena was necessary to determine whether there was a possible pattern or practice of discrimination, the 10th Circuit reasoned that the relevance of any information sought by the EEOC must be measured against the two individual charges of disability discrimination, stating, "Any act of discrimination *could* be part of a pattern or practice of discrimination, but not every charge of discrimination warrants a pattern or practice investigation." (emphasis in original). The court stated that relevance should not be construed so broadly as to render its requirement a nullity.

Additionally, the court agreed that the EEOC's subpoena was plenary in nature and was unconvinced that a single allegation of discrimination may warrant a pattern or practice investigation. The decision stated, "Perhaps the EEOC would have been entitled to information relating to other positions and offices *in Colorado*; but that is not the case before us." (emphasis in original).

Thus, the 10th Circuit concluded that "nationwide recordkeeping data is not 'relevant to' charges of individual disability discrimination filed by two men who applied for the same type of job in the same state, and the district court did not abuse its discretion in reaching that conclusion."

What It Means

During the last several years, the EEOC has become increasingly aggressive in attempting to expand the scope of its investigations. While the BNSF decision is only binding precedent in the jurisdiction of the 10th Circuit (Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming), it nonetheless provides a basis for employers in other jurisdictions to resist overly broad discovery requests that appear to be nothing more than a fishing expedition.

While the court did not rule out the possibility that broader discovery may be warranted in some types of cases and noted that there are other avenues at the EEOC's disposal (for example, a Commissioner's Charge), it placed the burden on the EEOC to demonstrate the need for discovery early in the administrative process and suggested that while individual charges might warrant discovery in the same state, they are not a launching point for nationwide discovery.

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