Happy New Year 2011:
The NLRB Takes a Pro-Union Organization Role

As we have been anticipating, the National Labor Relations Board ("NLRB") has decidedly tilted its role in favor of promoting union organization. Although the NLRB customarily relies on litigated cases to make federal labor policy, the current Board is using its regulatory power in a newly expansive fashion. Employers thus will need to pay attention to the aggressive enforcement and rule-making activities of the NLRB in 2011.

Some recent initiatives which are illustrative of the new role the NLRB is taking:

Proposed Mandatory Posting Requirements

In a traditionally uncharacteristic fashion, the NLRB has resorted to its rule-making authority to propose regulations mandating employer notice posting requirements. If adopted, the new rule would require employers to add another poster to their walls of government mandated notices to employees. In addition to state and federal notice posting requirements governing wage and hours, non-discrimination, federal contractor and family medical leave requirements, the NLRB would require employers covered by the National Labor Relations Act ("NLRA"), (most private sector employers) to post a government prescribed poster on their physical and electronic employee bulletin boards. NLRB Proposed Rulemaking, December 22, 2010.

The proposed mandatory poster would inform employees of their rights to organize, or refrain from organizing, and how to file unfair labor practices with the NLRB for perceived violations of these rights. The NLRB reasons that the forefather of all employee protection statutes (the NLRA) is the only federal statutory scheme that does not require a workplace poster informing employees of their rights. Out of a concern that employee ignorance of these rights leads them to forego recovery and protection from unfair labor practices, the posting requirement is believed by the NLRB to encourage employees in the enforcement of their rights to organize and engage in "mutual aid and protection."

Comments in favor of or in opposition to the proposed rule can be made in writing or electronically as indicated in the attached notice of proposed rule-making for 60 days. We will, of course, keep you updated as to if and when this proposed measure is approved through the rule making process.

Unprecedented Remedies for Unfair Labor Practice Violations

In a similar fashion, the NLRB Office of the General Counsel (responsible for NLRA enforcement) has indicated that it will be seeking new remedies in support of its duty to rectify "serious" violations of the Act. In addition to traditional remedies of back pay and reinstatement ("make whole" remedies) established through a long litigation process, the Board's General Counsel will seek immediately through federal court injunctions to impose novel remedial requirements on employers alleged to be guilty of interfering with employees' rights to engage in concerted protected activities including union organizational efforts. General Counsel Memo 11-01, December 20, 2010

Among the new injunctive remedies will include a requirement that offending employers

and guilty managers read a notice to employees of violations committed and corrective actions to be taken to an assembly of employees on company time and company property. Apparently believing a little *mea culpa* never hurt anyone, the NLRB wants to see employers publically acknowledge their errors and openly commit to "do right." No other federal statute imposes such a sanction. The "pillory approach" to labor law enforcement is intended to incentivize employers to take NLRA responsibilities seriously or suffer public humiliation when they don't.

Additionally, the General Counsel will seek expansive notification remedies to "nip in the bud" what it believes are employer actions which unfairly stymie union organization. No longer content to simply require the posting of a notice on the company bulletin board, the GC will now seek to compel the employer to provide employee contact information to unions in advance of the filing of a petition, make access of company property available to union organizers and provide unions with "equal time" to rebut employer speeches to employees warning them of the dangers of unionization.

Furthermore, these remedies will be sought through injunction actions filed in federal court at the outset of unfair labor practice proceedings. Rather than await the often delayed litigation process before the NLRB and federal appeals courts, the General Counsel is committed to advance union organization efforts before the unfair labor practice allegations are fully litigated.

The New Era Has Arrived

These are but two indications of the resolve of the newly constituted NLRB to reverse the losses of union advantages in organizing the unorganized. Unions once represented as much as 35% of private sector workforce at their peak in the 1950's. That number has declined to under 7% in 2010. The NLRB apparently wants to see that trend reversed in 2011. **Employers will need to become much more vigilant if they wish to remain union free in the new era of union resurgence openly supported by the NLRB in its enforcement and policy making role**.

For additional information about these or other NLRB initiatives in this new era, contact Larry Bridgesmith or your Miller & Martin Labor and Employment law attorney.

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