Legal Update Article

Changing Landscape of Labor Relations in Retail Industry

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The retail industry has experienced an uptick in union organizing over the last few years, and decisions from the National Labor Relations Board are expected to ease unionization. Labor law is evolving, and employers must adapt to changing unionization tactics.

Increase in Union Activity

There has been a significant surge in union filings for elections under the Biden Administration. In 2022, a total of 223 union petitions were filed — a marked increase from the 135 petitions filed in 2021. Additionally, a decade-high 165 union elections took place in 2022, with unions winning 122 of them — a 74% union win rate.

In the past decade, California, Illinois, and New York witnessed the most strikes in the retail industry. In 2022, 13 strikes occurred across the country, involving a total of 10,447 workers. Strikes continue to gain steam in 2023, with 21 reported strikes in the retail industry, according to Cornell University's Labor Action Tracker. These strikes highlight increasing strike activity associated with the labor movement, particularly in the retail sector.

Board Decisions

Developments at the National Labor Relations Board, the government agency that oversees labor law, have changed how unions are recognized and how elections are conducted are expected to increase union activity in the retail industry. Employers in the retail sector must adapt to new standards and anticipate shifts in union organizing tactics.

Previously, if a union gathered enough employee support through signed authorization cards, it could request an employer voluntarily recognize the union as the employees' representative. The employer was free to ignore the request, wait for the union to file an election petition, and proceed with a secret ballot election.

In a recent decision, however, the Board has introduced a set of rules that directly affect the recognition and authorization processes for labor unions. If a union presents an employer with a demand for recognition backed by a majority of employee signatures, the employer has two choices: (1) it can recognize the union as the bargaining representative; or (2) if an election petition has not yet been filed, *the employer* must promptly file its own petition for an election within two weeks of the union's demand for recognition.
The decision introduces another potential game-changer. If an employer is deemed to have violated the National Labor Relations Act for any reason during the election's "critical period" between filing of the petition and the election,

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there will be no setting aside the results and conducting a rerun election. Instead, the Board will issue a bargaining order requiring the employer to recognize and commence negotiations with the union. In the past, such a serious remedy (known as a "Gissel" order) would be reserved only for the most serious unfair labor practice violations.

The Board will continue to employ the same criteria used to evaluate the validity of elections in light of an employer's unfair labor practices. These criteria include factors such as the severity and number of these unfair practices, their proximity to the election's timing, the size of the bargaining unit, the margin of the vote, and the number of employees affected by the misconduct. However, under new precedent, *any* employer misconduct that interferes with the results of an election will lead to a bargaining order rather than a rerun election. It is concerning that, under this framework, something as simple as a facially neutral handbook policy may be deemed a violation warranting a bargaining order. This underscores the need to make sure employee handbooks are reviewed to ensure legal compliance.

A takeaway from the decision is the Board's willingness to apply it retroactively. This move has generated some uncertainty, though, as it arguably conflicts with U.S. Supreme Court precedent. While the employer has appealed to the U.S. Court of Appeals for the D.C. Circuit for review, for now, the decision is legally binding on employers.

Practical Steps for Employers

Employers can mitigate potential legal issues by taking several practical steps. Employers should be prepared for union elections, particularly in light of the tight two-week deadline for filing an employer-sponsored election once a union seeks recognition.

Employers should consider offering training to supervisors and other leaders on appropriate actions during both potential and active union organizing efforts. Given the Board's scrutiny of post-election employer actions as potential unfair labor practices, employers must exercise caution throughout all phases of a union campaign, encompassing the periods before, during, and after elections.

Employers should review and update their handbooks and policies to ensure compliance and to change any rules that might invite accusations of unfair labor practices.

The Board's recent decision has made it more important than ever that retail employers assess their labor relations posture, emphasizing the importance of proactive, positive employee relations, and the potential consequences of unfair labor practices. Employers must stay vigilant, adapt to the evolving landscape, and navigate the legal intricacies of Board processes and procedures. The growing influence of unions, coupled with the surge in strikes, highlights the importance of managing labor relations effectively in the retail industry.

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