Akerman Practice Update

LABOR & EMPLOYMENT

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The NLRB Proposes Additional Burdens on Employers

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Every employer needs to be aware of recent developments at the National Labor Relations Board that are sure to increase union activities. In two moves reported on December 21, 2010, the Board proposed a rule to require employers to post a notice of employee rights under the National Labor Relations Act and the acting General Counsel to the Board, Lafe Solomon, announced an initiative to systematically seek aggressive remedies in response to charges that an employer engaged in impermissible conduct during a union organizing campaign. In addition, the Obama Administration just announced on January 5, 2011 that it has nominated Mr. Solomon to be General Counsel at the Board. All of these moves show that the Board is posed to make union organizing easier. Indeed, almost every decision that has been made by the NLRB during the past several months has been in favor of labor.

On December 21, 2010, the Board issued a Notice of Proposed Rulemaking to require employers covered by the NLRA, and meeting the Board's discretionary jurisdiction standards, to post notices informing employees of their rights as employees under the Act. There is a 60-day period for public comments before a final rule is implemented. The proposed rule would require such notices to be placed in conspicuous places and by electronic means, if the employer customarily uses such methods to communicate with employees.

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The proposed notice tells employees that they have the right to organize and bargain collectively with their employers and to engage in other protected concerted activity. Specifically, the notice tells employees that they have the right to: 1. organize a union; 2. form, join or assist a union; 3. bargain collectively through a representative; 4. discuss terms and conditions of employment or union organizing with co-workers; 5. take action with one or more co-workers to improve working conditions; 6. strike and picket; and 7. to not do any of these things.

In addition, the notice states that it is illegal for an employer to: 1. prohibit employees from soliciting for a union during non-work time and from distributing union literature during non-work time in non–work areas; 2. question employees about union support; 3. take adverse action against employees based on union or concerted activity; 4. threaten to close the workplace if workers choose a union; 5. promise or grant benefits based on union support; 6. prohibit union hats, buttons, t-shirts, and pins except in special circumstances; and 7. spy on or videotape peaceful union activities and gatherings.

Finally, the notice tells employees that if they select a union, the employer must bargain in good faith to reach an agreement, that employees have 6 months to contact the NLRB after unlawful activity, and that employees may obtain lost wages and benefits for unfair labor practices.

The proposed rule states a failure to post is an unfair labor practice and that, upon a failure to post, the Board may order the employer to post a notice, post a remedial notice, toll the statue of limitations for unfair labor practice charges, and consider knowing failure as evidence of unlawful motive in unfair labor practice proceedings. Arguably, these penalties go beyond any harm that could possibly be caused by an employer's failure to post a notice.

On the same day as the notice of the proposed rule, Mr. Solomon announced that cases of discharges in response to union organizing may be accompanied by threats, solicitations of grievances, promises or grants of benefits and surveillance. In such situations, the acting General Counsel stated that remedies should be crafted to recreate an atmosphere in which employees may fully utilize their right to free choice. The acting General Counsel authorized complaints and injunction petitions to seek a reading of a remedial notice to employees, allowing union access to employee bulletin boards and providing names and addresses of employees to the union. These are all extreme measures that would greatly enhance a union's ability to organize.

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Finally, on January 5, 2011, the White House announced President Obama's intention to nominate Mr. Solomon to be General Counsel of the Board. As shown by his aggressive stance toward implementing reform, Mr. Solomon would be pro-labor in his agenda.

These developments point to a better environment for unions to gain access to employees and to organize workforces. The foregoing actions will give all employees a pro-union message and make it harder for employers to control the workforce. It is clear that the defeat of legislative initiatives such as the Employee Free Choice Act has caused the Obama Administration to seek a labor agenda through change at the Board. Employers need to keep up to date on the ever-changing landscape.

For more information, please contact a member of our Labor & Employment practice.

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