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The COVID-19 crisis is likely to increase worker activism and union organizing: What employers need to know

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After decades of steady decline in union activity, the number and magnitude of strikes in the United States increased sharply in both 2018 and 2019, rising to their highest levels since the early 1980s.

Relatively successful job actions by teachers across the country and by workers at General Motors, Stop & Shop, National Grid and several hospitals had leaders of organized labor excited about the first real resurgence in worker activism in a generation.

Then COVID-19 hit, placing much of the economy into a medically induced coma. All indications are, however, that this has increased the amount of union-related activity in American workplaces and that such activity may well increase further as the restrictions on the economy are lifted.

Unionized employees at Stop & Shop were granted a 10% pay increase early on in the shutdown, while workers at other large essential retailers have demanded, and often received, pay increases and related benefits.

Construction, power plant, service industry and other workers have all engaged in formal strikes during the pandemic. Low-wage workers have found themselves designated "essential" even as many higher-wage workers are filing for unemployment benefits for the first time in their lives.

In this context, employers need to be aware of both the likelihood of an upsurge in formal and informal union activity as the economy reopens and their legal responsibilities in such circumstances.

Because unions have been a less significant part of the private sector workplace in recent decades, many employers are likely to have little or no experience in legally addressing such activity and may make unnecessary blunders in their responses to such an upsurge.

THE BASICS

The bedrock law that governs private sector labor relations is the National Labor Relations Act (NLRA).

Passed in 1935, the NLRA has three main components:

(1) It encourages and protects collective action among employees over matters such as wages, hours, workplace safety, and other terms and conditions of employment.

(2) It provides an orderly process by which employees can designate a union as their exclusive bargaining representative.

(3) It offers a framework under which such a union and the employer are required to bargain in good faith to reach an agreement and to abide by such an agreement once it is reached.

Each of these components has greater significance during this pandemic, and will continue to be important in the aftermath of the pandemic.

THE NLRA AND THE NON-UNION WORKPLACE

One of the core provisions of the NLRA allows employees to engage in "concerted activities for ... mutual aid and protection." This protection is NOT dependent on the presence of a union; non-union employers are every bit as subject to this provision of the NLRA as are union workplaces.

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Thus, for example, if employees act "in concert" — meaning that two or more employees take action together — for reasons related to their compensation or working conditions, then the employer may not fire or discipline the employees for engaging in such activity.

The paradigmatic example of such "protected concerted activity" is when several employees walk away from work to protest low wages. Such a job action, even when there is no formal union or bargaining relationship involved, may not be a basis for the employer to discipline or discharge those employees.

Over the 85-year life span of the NLRA, courts and the National Labor Relations Board (NLRB) have defined the contours of this protection, with several of the activities being relevant to workplace issues during the COVID-19 pandemic.

Examples of protected concerted activity include complaints by employees, or the concerted refusal of a group of employees to report to work, because of

- a reasonable fear that working conditions are unsafe or unhealthy;
- better health insurance;
- increased paid sick leave; and
- discipline or discharge of other employees.

Employers that are attempting to operate or reopen in these inherently stressful times may understandably be upset with employees who decide not to cooperate, or cooperate fully, with the employer's plans, and might be tempted to discipline or dismiss such employees.

Such action, however, can lead to unfair labor practice charges before the NLRB and, at least as problematic, provide a strong sympathetic opening for an outside labor organization to demonstrate its value to employees.

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Employers can best avoid such issues by being transparent with workers about issues of concern, particularly worker safety and economics.

That is especially important now and in the coming months as formal restrictions lessen and employers develop and implement plans to reopen.

If despite such actions some employees refuse to work with the employer, then the employer should consult its attorney and develop a response that is lawful and addresses the operational issues fairly.

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FORMAL UNION ORGANIZING EFFORTS

While informal concerted activity is protected by the NLRA, the goal of organized labor is generally to establish exclusive representational status for a group of employees, which obligates an employer to recognize and bargain with the union with respect to those employees.

The NLRA provides a relatively orderly process by which employees can, by secret ballot vote, make such designations.

Most employers, however, have little experience recognizing and responding to union organizing campaigns and can easily be caught unaware and unable to effectively respond to a petition for an election among employees.

Since 2015, the NLRB election process has been swift and streamlined. The procedures were recently amended by the NLRB,[1] but they will remain somewhat arcane and will require expertise to navigate.

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If the employees select the union as their bargaining representative, the employer will have a long-term partner in its operations that it did not plan on.

With a successful recent unionization vote at Kickstarter and increased high-profile activism at tech companies such as Google and Amazon, unionization in both the old and new economies is poised to increase, and companies need to understand what that means and be prepared.

As businesses emerge from the COVID-19 pandemic, they should take responsible steps to prepare for potential union organizing campaigns.

Such steps would include:

- Re-evaluating employee compensation and benefits in light of changed and changing circumstances, and making appropriate adjustments.
- Communicating with employees about workplace issues and taking seriously concerns expressed by employees.
- Proactively addressing employee safety and health concerns.
- Reviewing and revising policies to make sure they reflect new circumstances, and training supervisors and managers to follow such policies.
- Training managers and supervisors about the union organizing campaigns and their rights and responsibilities under the NLRA.
- Developing a plan to respond to a petition for a representation election, so that there is not panic if and when one is filed.

Among the myriad other pressing concerns facing businesses as and when they reopen, rationally addressing the possibility of union organizing activity is one that should be near the top of the list for many organizations.

MANAGING A UNIONIZED WORKFORCE IN THE TIME OF COVID-19

Many employers currently have unions representing some of their workers. Often such relationships are long term and relatively productive; occasionally they are difficult. As the COVID-19 crisis continues, and hopefully abates, such employers need to keep in mind a number of basic principles.

First, the NLRA's duty to bargain in good faith means that, without authorization in a collective bargaining agreement, the employer may not unilaterally change wages, hours or other terms and conditions of employment without first bargaining with the union and reaching either agreement or impasse.

Therefore, as unionized employers develop responses to COVID-19 and come up with plans to reopen operations that may have been closed, they need to consider involving the unions that represent employees.

The good news on that front is that the management rights clause contained in most collective bargaining agreements provides employers with substantial leeway to make operational changes without first bargaining with the union.

The NLRB has recently revised its rules concerning these provisions and made clear that if a matter is even arguably encompassed by a collective bargaining provision, then the duty to bargain over that issue ceases during the life of the agreement.

Employers should check these management rights clauses to determine whether they are broad enough to encompass the actions they wish to take.

In addition, most collective bargaining agreements contain no-strike clauses by which the union, on behalf of the employees it represents, gives up the employees' right to strike.

Therefore, employees covered by a collective bargaining agreement actually have a diminished right to strike as compared with unrepresented employees.

Employers should be aware, however, that a walkout by employees caused by "abnormally dangerous conditions for work at the place of employment" will not be grounds for discipline or discharge even in the face of a contractual no-strike provision.

In this time of pandemic, any such claims will need to be taken seriously.

Employers must also keep in mind that once a collective bargaining agreement expires, both the management rights provision and the no-strike provision also expire.

Employers should be aware, however, that a walkout by employees caused by "abnormally dangerous conditions for work at the place of employment" will not be grounds for discipline or discharge.

As such, if an employer has a bargaining unit that is represented by a union but for which there is not a current collective bargaining agreement, the employer must bargain with the union before making any changes to working conditions, including the implementation of new safety protocols.

As with a non-union workforce, employers with unions should keep in mind that the tone and tenor they set during this time of crisis will impact labor-management relations for years to come.

Employers should, at the very least, avoid unintentional missteps that could poison those relations more than in ordinary times.

In the aftermath of the COVID-19 pandemic, 2021 could quite possibly be a year that for many employers is defined by employee activism and increased union organizing. Businesses should consider now how they will respond to such circumstances.

NOTES

[1] *see* https://bit.ly/3dX9feD, now delayed until July 31, 2020

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