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News & Types: Client Advisories

Unionized Employees Vote Union Out!

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Practices: Employment, Labor & Benefits

EXECUTIVE SUMMARY

Unionized employees have the right to and do vote to end their representation by a union. By executing a proven and workable formula, unionized companies may file a special petition with the National Labor Relations Board to decide whether or not the employees want the union to continue to represent them. Knowing and implementing that formula is a game-changer for many companies.

On July 28, 2020, the National Labor Relations Board ("Labor Board") issued a Certificate of Results, stating that the unionized employees at one of our client's companies voted that they no longer wanted the union to represent them. The union contract has now ended, and the company does not need to follow the terms and conditions in the contract. More importantly, the company does not have to recognize and bargain with the union as the exclusive collective bargaining representative of the employees previously covered by the union contract.

The employees' vote was the result of the company filing an RM Petition. Like a decertification (RD) petition the RM Petition asked the Labor Board to hold an election so that the employees may determine if they wanted the union to continue to represent them. Unlike an RD Petition, which must be supported by at least 30% of the unionized employees, the RM Petition must be supported by evidence that at least 50% of the unionized employees no longer want the union to represent them. The supporting evidence could be a petition signed by at least 50% of the employees or, instead, one or more affidavits signed by the company's managers. In these affidavits, the managers attest that a majority of the employees expressed their belief that they no longer want to have the union represent them.

To obtain the goal of filing an RM Petition with the required evidence, the company employed a special formula and implemented proven techniques so that the employees could decide whether they wanted to decertify the union as their representative. The formula and the techniques used by the company complied with Section 7 of the National Labor Relations Act ("Act"), which states that employees "shall have the right to… form, join or assist labor organizations… and shall also have the right to refrain from any or all of such activities." The company did not commit an unfair labor practice under Section 8(a)(1) of the Act, by not "interfer[ing] with, restrain[ing] or coerc[ing] employees in the exercise of the rights guaranteed in Section 7." The company balanced this obligation against its right in Section 8(c) to communicate with its employees," as long as the communications do not contain threats of reprisals, threats of force, or promises of benefits." The company also complied and worked with the Labor Board to convince the local regional director to order an election

rather than dismiss the petition and to implement a mail-in voting process ordered by the regional director because of the COVID-19 pandemic.

Because Section 8(c) allows a company to communicate with its employees, the company initiated conversations with its employees about the union. These communications were held with the assistance of an experienced labor relations consultant and the company's attorney. When the employees expressed their interest, the company filed the RM Petition and the supporting evidence. The Labor Board did not dismiss the RM Petition but, instead, determined that the showing of interest was sufficient to order an election. After an election campaign, a majority of the voting employees voted not to be represented by the union. Because the union did not file objections to the conduct of the election, the Labor Board issued the Certificate of Results.

The ordering of the election was, itself, a victory. Because of the difficulty in obtaining evidence that at least 50% of the employees supported the RM Petition, the RM Petition is rarely used. For example, during Fiscal Year 2019, companies throughout the United States filed only 37 RM Petitions, but they withdrew 13 of them. The Labor Board dismissed 8 of the remaining RM Petitions. Contrasting these statistics with the statistics for RD Petitions, 283 RD Petitions were filed, 116 withdrawn and 13 dismissed. For petitions filed by unions seeking to represent employees, called RC Petitions, unions filed 1,673 petitions, withdrew 476 petitions and the Labor Board dismissed 23 RC Petitions.

Even if the Labor Board had dismissed the company's RM Petition, the use of the formula opened the door to communications with the employees about unions, the services the union was or was not providing to the employees and, in response to questions, the laws and regulations about decertifying a union. Therefore, if a company files an RM Petition and the Labor Board dismisses it, communications between the company and its employees could continue. These continued conversations may cause the employees, themselves, to file an RD Petition, requiring a showing of interest of only 30% of the unionized employees. Moreover, the communications may help the company during its collective bargaining negotiations with the union for a new contract.

Therefore, every company whose contract is about to expire should measure the union's vulnerability to a vote by its employees to end the union's representation. Usually, this process works best if the process is initiated a few months before the end of the contract's term so that a trusting relationship may be built between management and the unionized members. Then, depending upon the vulnerability analysis, the company, with the assistance of an experienced labor consultant, could implement the special formula and techniques.