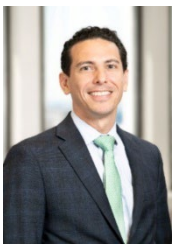
Lawyer Insights

5 NLRA Changes To Make Nonunion Employers Wary In 2024

By James La Rocca, Amber Rogers, Bob Dumbacher and Kurt Larkin
Published in Law360 | January 10, 2024




2023 was a busy year at the National Labor Relations Board, which saw an uptick in unfair labor practice filings and a continued increase in the filing of union election petitions.

For many employers, the National Labor Relations Act is more relevant today than it ever has been. This includes nonunion employers, thanks in no small measure to the pursuit of an aggressive pro-union agenda by NLRB general counsel Jennifer Abruzzo and several pro-union actions by a majority of NLRB members.

Below are five developments from 2023 that emphasize why nonunion employers should have the National Labor Relations Act at the top of their minds in 2024.

1. The NLRB may find employers and workers who historically were not covered by the NLRA to be covered.

Recent NLRB administrative developments relaxed the definition of an "employee" and "employer" under the NLRA in an attempt to extend the NLRA's coverage without any statutory amendment. Any employer that utilizes independent contractors and/or is in a business relationship with another entity should review those relationships to ensure that they do not run afoul of the new rules.

In June, the NLRB issued a decision in The Atlanta Opera Inc. that expanded the definition of "employee" to workers who historically would be considered independent contractors outside the NLRA's coverage.[1] The board did so by downplaying the importance of entrepreneurial opportunity for gain or loss — such as an individual's ability to work for other businesses and be subject to profits and losses as a result of their work — which is a factor the NLRB has historically and logically considered to be important in the analysis.

In October, the board issued a joint employer rule that significantly loosens the standard for deciding when two or more entities are jointly liable under the NLRA.

Under the new rule, liability can extend to an entity that merely reserves the right to indirectly control essential employment terms and conditions of another entity's employees. Previously, liability only applied if an entity actually exercised substantial direct and immediate control over such terms. Truly independent entities in franchise, outsourcing and staffing arrangements are now more vulnerable to joint liability under the NLRA than ever in the eyes of the NLRB.[2]

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In light of these developments, there is an increased risk of NLRA liability for nonunion employers that utilize independent contractors, as well as for employers in business relationships with entities that have employees or independent contractors of their own.

2. The NLRB may find common language in severance agreements unlawful.

Employers who have severance agreements that contain confidentiality or nondisparagement provisions should assess whether such provisions are lawful under the NLRA in light of the board's February decision in McLaren Macomb[3] and subsequent guidance issued by the NLRB's general counsel.

In the McLaren Macomb decision, the board found confidentiality and nondisparagement language in an employer's severance agreements violated the NLRA. The NLRB said the language was unlawful because it had a reasonable tendency to interfere with, coerce or restrain employees engaged in exercising their NLRA rights — such as the right to discuss terms and conditions of employment with colleagues and the right to publicly challenge an employer's treatment of employees — and was not "narrowly tailored."

Shortly thereafter, Abruzzo, who has the authority to prosecute unfair labor practice charges, issued a memorandum that broadly interpreted the decision. Abruzzo opined, in part, that the decision was not limited to confidentiality and nondisparagement provisions in severance agreements, but extended to any provisions in such agreements that "affect the rights of employees to engage with one another to improve their lots as employees."[4]

Although the employer in McLaren Macomb was unionized, neither the NLRB's decision nor the guidance issued by the board's general counsel is limited to union employees. The decision and the guidance apply equally to union and nonunion employers covered by the NLRA.

3. The NLRB's general counsel may challenge noncompete agreements.

Employers who use noncompete agreements should now be mindful of not only state law but also the NLRA. In May, Abruzzo issued a memo opining that noncompete agreements could violate the NLRA.

Abruzzo claimed noncompetes are unlawful if they reasonably tend to chill employees' rights under the NLRA unless the agreements are "narrowly tailored to special circumstances" so as to justify them. For instance, Abruzzo thought noncompetes could chill employee rights under the NLRA if they deny employees "the ability to quit or change jobs by cutting off their access to other employment opportunities."

The memo is no longer just academic. In September, the NLRB's regional Cincinnati office filed a complaint challenging an employee noncompete and confidentiality agreement from Harper Holdings LLC.[5] The complaint, which consolidates several unfair labor practice charges, alleges that Harper Holdings sought monetary relief from employees who violated the agreement "to discourage employees from engaging in these or other concerted activities."[6]

The board's attack on noncompetes should be of interest to nonunion employers, who may be as likely — if not more — to have noncompete agreements than union employers.

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4. The NLRB may find innocuous language in employee handbooks unlawful.

The board has set the stage for challenges to employment policies. In its August decision in Stericycle Inc., the NLRB created a draconian standard for assessing the lawfulness of most work rules.[7]

Under the new Stericycle standard, the board will find a work rule presumptively unlawful if an employee could reasonably interpret the rule to restrict or prohibit an employee's rights to engage in protected concerted activity, even if a contrary interpretation of the rule also is reasonable.

In assessing reasonableness, the NLRB will further assume that an employee reading the work rule is contemplating engaging in protected concerted activity.

The new standard does allow an employer to rebut the presumption that a work rule is unlawful, but it is no small task. To do so, the employer must prove not only that the work rule advances a legitimate and substantial business interest but also that the employer cannot advance that interest with a more narrowly tailored rule.

All employers covered by the NLRA who maintain work rules, whether union or not, should review those rules for NLRA compliance purposes in light of the Stericycle decision.

5. The NLRB has made it easier for unions to organize.

Employers who are currently nonunion should consider, now more than ever, implementing proactive measures to remain union free.

In Cemex Construction Materials Pacific LLC in late August, the board established a lenient framework by which unions that have obtained a showing of support from a majority of employees in an appropriate unit, such as by obtaining signed union authorization cards, can become the exclusive collective bargaining representative of employees.[8] The NLRB also changed the election rules in a way that benefits labor unions.

Under the Cemex framework, a union that has a showing of majority support now can become the exclusive collective bargaining representative simply by demanding that the employer recognize the union, unless the employer promptly files a petition for an election with the board.

In addition, if an employer or union files a petition for an election so employees can vote on unionization through a secret ballot election process, as opposed to a card check or the functional equivalent, and the union loses that election, the union can still become the exclusive collective bargaining representative if the employer commits an unfair labor practice that requires the election results to be set aside.

Historically, the NLRB would order a rerun election to safeguard employees' rights to vote on unionization in a democratic secret ballot election process, unless the employer committed misconduct that was so egregious that it would be impossible for a new election to reflect the true desires of employees.

As to the election rules themselves, the board, most significantly, shortened the time frame between the filing of an election petition and the election itself. In turn, the rules now make it more difficult, if not effectively impossible, for employees to obtain information about unionization from any source other than

the union. The changes also deprive employees of the ability to cast fair, free and informed ballots on election day.[9]

Nonunion employers should have a plan in place now in the event their employees seek to unionize. Such a plan could include explaining the significance of union authorization cards to employees upfront. An employer could also decide how they would respond to a demand for recognition, which could include knowing what documents to file with the NLRB, training managers on the NLRA to avoid unfair labor practice findings and communicating with employees about unionization.

Employers' failure to establish such a plan could greatly increase the odds that employees will wind up unionized — whether or not that is their true desire.

Conclusion

There were significant labor law changes in 2023 that will affect nonunion employers in 2024. And there will be more to come this year. Employers should resolve to focus on NLRA compliance to best protect themselves and their employees.

Notes

1. The Atlanta Opera Inc., 372 NLRB No. 95 (2023).

2. You can read more about the independent contractor standard at https://www.huntonak.com/en/insights/if-at-first-you-dont-succeed-nlrb-readopts-highly-controversial-independent-contractor-standard.html and the joint employer standard at https://www.huntonak.com/en/insights/nlrbs-expanded-joint-employer-rule-could-impact-third-party-staffing-and-outsourcing.html.

3. McLaren Macomb, 372 NLRB No. 58 (2023).

4. More details on the McLaren Macomb decision and the general counsel memo about that decision are available here: https://www.huntonak.com/en/insights/nlrb-rules-severance-agreements-with-confidentiality-provisions-violate-employee-nlra-rights.html; And here: https://www.huntonlaborblog.com/2023/03/articles/traditional-labor/nlrb-general-counsel-issues-guidance-memorandum-regarding-severance-agreements/.

5. More on the general counsel memo about noncompetes is available here: https://www.huntonlaborblog.com/2023/07/articles/agency-developments/nlrb-general-counsel-targets-non-compete-agreements/.

6. The named respondent in the complaint is Harper Holdings LLC d/b/a Juvly Aesthetics. The lead case number is 09-CA-300239.

7. Stericycle Inc., 372 NLRB No. 113 (2023).

8. Cemex Constr. Materials Pacific LLC, 372 NLRB No. 130 (2023).

9. You can read more about the "quickie" election rule here: https://www.huntonlaborblog.com/2023/10/articles/nlrb/nlrb-returns-to-ambush-representation-election-rules/.

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