HUNTON ANDREWS KURTH

Lawyer Insights

NLRB and OSHA to Enhance Enforcement Cooperation

The NLRB and OSHA enhance enforcement cooperation with a new MOU, impacting employer risks and rights during inspections, and potentially affecting workplace safety and union activities.

By Susan Wiltsie, Reilly Moore, Steven DiBeneditto
Published in Occupational Health & Safety | January 26, 2024



On October 31, 2023, the National Labor Relations Board (NLRB) and OSHA announced the signing of a Memorandum of Understanding (MOU) to coordinate investigations and enforcement actions between the two agencies. This coordination between agencies is nothing new for the NLRB. The agency has also signed MOUs with the Wage and Hour Division and the Office of Labor-Management Statistics. These actions all are consistent with NLRB General Counsel Jennifer Abruzzo's stated goal of taking a "whole government approach" to enforcement of the National Labor Relations Act (NLRA).

The enhanced cooperation between the NLRB and OSHA called for under the MOU has consequences for employers regarding their enforcement risk and their ability to consent — or refuse to consent — to a compliance safety and health officer's (CSHO) inspection scope. OSHA has the authority to conduct workplace safety/health inspections in limited circumstances, which generally include imminent hazards, complaints, accidents that result in serious injury or death, referrals or inspections pursuant to an emphasis program. NLRA compliance is not listed.

The MOU specifically provides that "The NLRB and OSHA may share, either upon request or upon the respective agency's own initiative, any information or data that supports each agency's enforcement mandates, whether obtained during an investigation or through any other sources to the extent permitted by law." The only way OSHA gets labor law information is by looking for it during an inspection. Ordinarily, an employer who has consented to an inspection still may object to an expansion of that investigation beyond the purpose for which it was initiated.

But CSHOs question employees in private. As such, employers may not even know that OSHA is seeking NLRA-related information during the site visit. In this manner, OSHA will be able to obtain information that the NLRB would not be able to obtain directly and could do so in a manner that bypasses an employer's rights to object to an expanded investigation.

The MOU also provides that "in appropriate cases and to the extent allowable under law, the agencies will determine whether to conduct coordinated investigations and inspections, where doing so would facilitate and not delay enforcement action." This language could incentivize employees and/or unions to simultaneously file unfair labor practice charges along with OSHA complaints. Of course, such dual filings

may be legitimate, but sometimes, they are not. They are part of a strategy to put pressure on an employer for a different purpose completely unrelated to safety and health.

In addition, the MOU places government officials in the position of interpreting laws and regulations that are outside of their expertise. The MOU directs OSHA to counsel employees who have failed to meet OSHA deadlines for 11(c) retaliation claims to file unfair labor practice charges with the NLRB. The NLRB has a longer time period within which to file unfair labor practice charges than the time period within which OSHA retaliation claims must be filed.

And the NLRB will likewise "promptly share with OSHA information related to workers currently or likely exposed to safety hazards or suspected violations that OSHA enforces and/or encourage affected individual(s), representatives or labor organizations to promptly contact OSHA." The MOU directs the agencies to conduct reciprocal training for their employees on labor and workplace safety laws to help implement the MOU.

Finally, the MOU reinforces the growing movement by OSHA to expand union rights in the workplace, and the NLRB's efforts to curb employer abuses under the NLRA that are particular to workplaces in which safety issues are prominent. This movement began in August 2023 when OSHA announced a proposed rule that would allow an outside third party selected by employees to accompany an OSHA CSHO during a "walk around" of the worksite conducted as part of an OSHA inspection.

By way of background, current regulations specify that a CSHO can be accompanied during these inspections by an employee representative or a third-party representative with specialized safety knowledge. However, under the proposed rule, employees may select *any* third-party representative so long as their participation is reasonably necessary to the inspection. If this rule is implemented in its current form, employees may designate a third-party union official to serve as their walkaround representative even if the union does not represent the relevant employees in collective bargaining or has any safety experience.

Since the MOU, the NLRB and OSHA issued a joint handout to accompany the MOU which specifically notes the NLRB's emphasis on recognizing unlawful employer-dominated labor organizations under the NLRA. Section 8(a)(2) of the NLRA prohibits the formation of "company unions" or similar groups created or supported by an employer to allow employee participation in workplace decisions. This lesser-known section of the NLRA can have particular relevance concerning employee safety committees, which are one type of employer-supported employee group that could run afoul of labor law.

If an employer creates, funds and selects employees to participate in an employee safety committee, the NLRB could determine that the group qualifies as an employer-dominated labor organization. Safety committees are encouraged and, in some states, required by OSHA. Further, such committees can play an important role in continuous safety improvement at a worksite. The MOU increases the risk that issues related to safety committees could reach the NLRB and put employers in legal jeopardy for legitimate, good-faith efforts to enhance workplace safety.

Employers without any union activity at their sites may not see much impact from the MOU. But at sites with active or percolating union activity, this MOU could be impactful. Employers should be sure they know their rights under both the Occupational Safety and Health Act and the National Labor Relations Act so that they will be prepared.

NLRB and OSHA to Enhance Enforcement Cooperation
By Susan Wiltsie, Reilly Moore, Steven DiBeneditto
Published in Occupational Health & Safety | January 26, 2024

Susan Wiltsie *is a partner in the firm's labor & employment group in the firm's Washington office. Susan's practice focuses on labor, employment and OSHA compliance, pandemic preparedness and response, litigation and defense. She can be reached at +1 (202) 955-1546 or swiltsie@HuntonAK.com.*

Reilly Moore *is an associate in the firm's labor & employment group in the firm's Richmond office. Reilly counsels employers on labor-management relations, OSHA compliance and complex employment law issues. He can be reached at +1 (804) 788-8409 or skopstein@HuntonAK.com.*

Steven DiBeneditto *is an associate in the firm's Labor & Employment group in the firm's Washington D.C. office. Steven's practice focuses on advice and counseling matters, litigation, and workplace safety in the labor, employment, pandemic preparedness and compliance space. He can be reached at +1 (202) 955-1619 or sdibeneditto@HuntonAK.com.*

*This article was originally published in Occupational Health & Safety on January 26, 2024***,** *https://ohsonline.com/Articles/2024/01/26/NLRB-and-OSHA-to-Enhance-Enforcement-Cooperation.aspx?admgarea=news&Page=1. Reprinted with permission. All rights reserved.*