akerman

Blog Post

Navigating the NLRA in the Pandemic and Post-Pandemic Workplace: What Both Union and Nonunion Employers Need to Know

June 29, 2020

By Amy Moor Gaylord and Thomas Y. Mandler

As shelter in place restrictions ease and U.S. workplaces begin to reopen, both union and nonunion employers may find themselves facing a host of new challenges. Employers may wonder what they should be doing to keep their employees safe at work. They may wonder what kinds of medical tests they can perform on employees before allowing them into their facilities. They may wonder whether they need to disclose to their employees when one of their coworkers tests positive for the virus. But, what they might not be thinking about is whether their employees' voiced questions and concerns on these types of issues are protected by the National Labor Relations Act (NLRA), or whether their employees may seek out unions to protect them in the workplace. Employers should be pondering that with respect to both essential workers who have been working through the pandemic and nonessential workers who may be stepping foot back into their workplaces for the first time in months.

Amidst their other concerns, the NLRA and unions may not be at the forefront of employers' minds, especially those with entirely nonunion workforces. Employers with unionized workforces know that

Related People

Amy Moor Gaylord
Thomas Y. Mandler

Related Work

Employment Training and Compliance
Labor and Employment
Traditional Labor Law

Related Offices

Chicago

HR Defense Blog

Akerman Perspectives on the Latest Developments in Labor and Employment Law

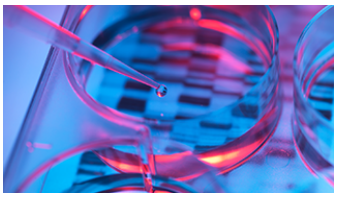
Visit this Akerman blog

when employees discuss their terms and conditions of employment, which include safety, pay, and job security, with their coworkers, those conversations are protected by the NLRA. But many nonunion employers do not realize those same protections apply to their employees as well.

The news has been rampant with stories about employees protesting what they believe to be unsafe working conditions and hardships caused by the pandemic. From mass sickouts, to demands for premium or hazard pay, to walking off the job, employee activism appears to be reaching a new height. Nonunion employers may assume that only unionized employees are free to take such actions and that they may discipline, or even terminate, nonunion employees who engage in such activity. But this type of employee conduct and speech is called protected, concerted activity (PCA) and it is protected under the NLRA, regardless of whether the employees are in a union or not.

PCA is when employees act together in an attempt to improve the terms and conditions of their employment. The actions of an individual employee can still be considered concerted if it appears they are seeking to initiate or to prepare for group action or bring group complaints to the attention of management. PCA can take many forms, as we have seen recently in the media. On May Day (May 1), traditionally a day of celebration by workers and organized labor, employees at numerous online retailers, grocery store chains, and package-delivery services – most of whom are nonunion – staged mass sickouts or walked off the job. Nurses across the country stood in the streets to protest a lack of personal protective equipment (PPE). Meanwhile, counter rallies were staged by workers who have lost their jobs because of the virus, demanding that businesses be allowed to reopen so they can return to work.

Employees often take to social media to voice their complaints about their employers or workplaces.



Facebook groups dedicated to employees of an employer are especially common as are tweets aimed at the employer. Employers can find themselves in hot water if they respond negatively to these posts. For example, the president of an online media company was recently ordered by the National Labor Relations Board (NLRB) to delete tweets he had directed towards his employees in response to their unionization efforts, and to provide a notice to his employees describing their right to unionize and engage in other PCA.

As might be expected, unionized employees have not been silent during these past few months either. Recently, a large SEIU Local organized an essential worker caravan of janitors, security officers, fast food workers, and others. Hundreds of cars and trucks flooded the streets of downtown St. Louis demanding PPE, testing for all, and hazard pay for the thousands of essential workers who have continued to work throughout the pandemic. Airlines that took federal aid under the CARES Act have come under fire from their unions for reducing salaries, cutting jobs, or forcing employees to take furlough days.

Special Considerations for Nonunion Employers and those with Partially Organized Workforces

Employers should expect that employees – union and nonunion – will continue to raise concerns about workplace safety, pay, and job security in the upcoming weeks and months. And nonunion employers should be especially wary about their employees being vulnerable to union organizers. Unions use these types of employee concerns to appeal to employees when they are trying to organize. If employees feel as though their employer is not listening to their concerns or adequately communicating with them, labor unions are lining up to offer their support.

For example, the Teamsters recently launched a website aimed at helping nonunion workers secure workplace protections. This online resource center tells employees how to stage workplace actions that comply with the NLRA, outlines workers' rights to organize and report unsafe conditions to federal and state authorities, and tracks worker actions related to COVID-19. It also invites workers who feel unsafe or want to join with co-workers to improve job conditions to provide their contact information to arrange a call with the union. The Communications Workers of America is providing similar resources for nonunion workers, including a template for demanding protections and an in-depth guide to their NLRA right to take concerted action. Both unions have reportedly been inundated with requests for information and assistance from nonunion employees.

Unions have also been assisting nonunion employees with filing unfair labor practice charges with the NLRB. One union filed a charge on behalf of workers at a poultry processing plant in Delaware, alleging that the employees were forced to attend crowded meetings where social distancing requirements were not being observed, placing the employees in danger. The charge further alleged that the employer deducted the cost of PPE from the employees' paychecks. Another charge was filed by workers in Colorado claiming they were fired after trying to organize to negotiate safety precautions with their employer. The employer claims the employees were replaced after refusing to report to work when the employer reopened for business, a situation being faced by employers all over the country.

Union organizers are viewing this point in time as an opportunity to revive the American labor movement, using technology, social media, and virtual hangouts on various media platforms to reach out to and connect with employees and connect employees with each other at a time when many are feeling isolated and unheard. It is anticipated that there will

be a sharp uptick in union organizing drives for the foreseeable future, particularly among lower paid essential workers who feel they have risked their lives in order to feed their families. To these workers, the promise of a wage increase, job security, and enhanced workplace safety measures can be awfully appealing.

And make no mistake, when unions are trying to organize employees, they make all kinds of promises – automatic wage increases, enhanced paid sick leave, restrictions on an employer's right to lay off workers, and protections from being forced to work in a perceived unsafe workplace. The NLRA places virtually no restrictions on what a union can promise employees in order to get them to sign up. Employers, however, are bound by a complex web of NLRA rules dictating what they can and cannot say to their employees during a union organizing drive. Which is why being proactively ready, before a union starts talking to employees, is essential.

It is imperative that employers, even though they may have a vast array of other pandemic-related concerns on their minds, view this time as an opportunity to connect with employees and help their employees understand the steps the employer is taking to keep employees safe. Employers should proactively anticipate employee concerns, address those concerns, and let employees know what they are doing to alleviate the concerns. Communication and transparency are essential elements to maintaining a union free workplace, as are instilling a sense of fairness and value. Akerman labor attorneys are well-versed in positive employee relations and union avoidance strategies and are ready to assist employers.

Employers with partially organized workforces should likewise be prepared. Their nonunion employees may have witnessed whether union employees fared better during the pandemic, perhaps having greater job security or having a union that negotiated hazard pay for essential

workers or severance pay for those who lost their jobs. Consider maintaining some level of consistency and equity for both union and nonunion employees as employees return to the workplace, and communicate that fairness and equality in treatment to employees to ward off union organizing among nonunion employees.

Special Considerations for Unionized Employers

For unionized employers, it is important to be mindful when bringing employees back so as not to run afoul of a collective bargaining agreement (CBA) or bargaining obligations under the NLRA. When determining which laid off or furloughed employees should be recalled, unionized employers are confronted with different issues and challenges than nonunion employers. The CBA must be carefully reviewed to determine the order of recall. Some CBAs require the most senior employees to be recalled without regard to whether they can perform the work. If the most senior employee cannot immediately perform the work, some CBAs may require training, or a period of familiarization for an employee who may not have performed the work in a long time.

Other CBAs allow employers to determine which employees will be recalled by matching employee skill and ability to the work to be performed, while some CBAs focus the selection process on the job, department, shift, or even work to be performed. Most CBAs specify the type or method of notice that must be given to the employee, and the amount of time that the employee has to report to work. Under certain circumstances, a CBA may allow an employee to refuse the recall and remain on layoff with eligibility for recall at a later date. If a particular recall situation is not addressed in the CBA, an employer may be obligated to bargain with the union regarding how the recall will be implemented.

Upon being recalled, employees may be subject to different terms and conditions of employment than were in existence at the time of lay off. For example, recalled employees may be subject to COVID-19 rules such as temperature checks, social distancing, and other precautions like wearing PPE. Employers in most circumstances will have an obligation to bargain with their unions over the impact of these new rules.

All Employers

Whether an employer is largely unionized, partially unionized, or entirely nonunion, the NLRA can present a host of challenges that can be tricky to navigate. An experienced labor attorney can be instrumental in assisting employers in avoiding landmines, and helping nonunion employers remain that way. Additional guidance is available through Akerman's Return to Work Resource Guide, a useful guide to employers as they bring their employees back to the workplace or for employers with essential employees looking to navigate the "new normal." For assistance with these and other return to work issues, contact your Akerman attorney.
