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With the election around the corner, the nation's attention turns to politics. However, regardless of who emerges victorious on November 6, one result can be predicted now: 2013 will see an uptick in union activity and union organizing drives. Although labor's participation and spending in this year's elections will reach record highs, employers should expect that after the election, unions will refocus their energy on non-union employers.

With private-sector union membership at record low levels and public-sector unions losing influence and members, the labor movement will be forced to recommit to organizing new private-sector members in 2013. While the tactics and tools available to unions may differ under a second Obama term than under a first Romney term, either way, unions will be targeting non-union employers rich with potential members to refill their ranks and coffers.

Here are five actions that non-union employers should take to retain their union-free status in 2013.

1. Assess Your Company's Vulnerability.

Too often, employers are caught off guard by organizing efforts that get traction and sometimes are successful because the unions are able to attack some preexisting latent vulnerability. Whether it is an overbroad handbook policy or an Occupational Safety and Health Administration ("OSHA") safety issue, identifying the company's risks

and developing corrective measures prior to union organizing can be vital to defending against a union's efforts.

For years, aggressive unions have utilized a tactic known as the Corporate Campaign to find and exploit employer vulnerabilities to pressure an employer into unionization. As President of the AFL-CIO Richard Trumka has stated:

It's the death of a thousand cuts, rather than a single blow.

and

If the union attacks the company's weak points and threatens its strengths, the employer will not be able to conduct business as usual because it's consumed with defending itself against the union.

With an ultimate eye on unionizing an employer, labor will bring wage and hour suits under the Fair Labor Standards Act and/or state laws; safety complaints under OSHA; corporate compliance and whistleblower actions under the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, or similar regulations; environmental challenges; and, of course, challenges to an employer's handbook and policies under the National Labor Relations Act. Unions bring these actions hoping to weaken employers in terms of defense costs, settlement costs, resources, public opinion, and employee trust and support. These campaigns can be devastating on an employer's operations, resources, and morale and often result in an employer being unable or unwilling to continue to oppose unionization.

In order to prevent the impact of these tactics, employers should make a concerted effort to assess their vulnerability by having an experienced labor professional who is familiar with these union tactics conduct a comprehensive audit of the company's policies and procedures.

2. Ensure That Company Policies Are Compliant and Pro-Company.

There has been a lot of attention paid this year to the efforts by the National Labor Relations Board ("NLRB" or "Board") to find employer policies overbroad and unlawful, including social media policies, at-will agreements, off-duty property access, and others. These new union policy targets are in addition to the traditional handbook policies that unions have attacked, including policies concerning solicitation/distribution, bulletin boards, confidentiality, press communications, disparaging comments, and similar employer rules. Clearly, if a non-union employer believes that it may be targeted, it should ensure that these policies are up to date and in compliance with the more restrictive view that the Board has been taking lately. Equally important, employers should consider promulgating proactive policies, such as those on labor relations, third-party interference, open door communications, and similar policies that positively present the company's non-union status.

3. Analyze and Arrange Your Company's Workforce to Avoid Micro-Units.

One of the key factors in recognizing a company's vulnerabilities is understanding its workforce composition and how a union may attempt to organize the workforce. This

can be exponentially more difficult since the NLRB's 2011 decision in Specialty Healthcare, which fundamentally altered the manner in which the NLRB evaluates a bargaining unit. Although the decision was in the health care context and disavowed a prior special health care industry rule, the Board's ruling is applicable to all employers and industries.

Under the Board's new rule, unions can target small employee groups (or "micro units"), such as a department or a classification, provided that the union can assert that it is "readily identifiable as a group." If it is, the employer must prove that other employees outside this small insular group share "an overwhelming community of interest with the petitioned-for employees," such that there "is no legitimate basis upon which to exclude" the other employees. This permits unions to cherry pick small groups to gain a foothold in a company upon which they can launch subsequent efforts to expand their representation to other employees.

Employers should adjust their labor relations strategies to this new paradigm by looking for ways to cross-train, utilize, and integrate otherwise insular groups. Additionally, employers should develop a leadership structure and strategy for each group that provides for the ability to assess and respond to any exposure.

4. Be Prepared to Respond at the Earliest Signs of Union Organizing.

Although currently enjoined by the courts, the NLRB's Ambush or Quickie Election Rules put many employers into a temporary panic as they realized how unprepared they were for a union drive and how quickly such a campaign could come and go, leaving them on the wrong side of a quick ballot tally. Though the rules are not currently effective, they could easily be restored in 2013 (either by the courts or by new NLRB action). Even under the current rules, the NLRB's Regional Directors have been forcing petitions to election swiftly. Regardless the posture, employers enjoy exponentially greater success when they are prepared and can respond to union organizing rapidly; however, advance preparation is necessary to achieve this readiness.

Employers should identify and train supervisors and management in advance of any signs of union organizing. As the company's frontline defense against the union and, generally, its most effective communicator with the employees, well-trained and incentivized supervisors are often crucial to successful union avoidance. Training should be conducted that empowers all levels of supervision to act cohesively and legally in defense of the company's union-free status. The goal should be not merely to teach the supervisors what they *cannot* do, but, more importantly, to educate them on the issues and train them on what they *can, should, and are expected to* do to assist in keeping the company union-free.

Employers should also develop a system that will permit the company to identify, communicate, and respond to a union's organizing attempts in a real-time fashion. The ability to rapidly respond at the first sign of organizing activity is often the difference between quickly resolving the issue and ending up in a costly and protracted organizing campaign, or worse—losing an election. The system should include an up-and-down communications and reporting network as well as a plan on how the company would communicate with targeted employees.

Finally, companies should consider the potential public and government relations

impacts of a union organizing drive. They should identify key interest holders and develop a communications plan for dealing with any issues that may accompany union organizing.

5. Watch for NLRB Developments Directed at Non-Union Employers.

In 2012, the NLRB planted new roots for targeting non-union employers, which unions presumably will continue to use in 2013. However, 2013 looks to be a banner year for NLRB developments. Again, regardless of the outcome of November's national election, major developments will occur. Not only are we likely to see court resolution of the procedural validity of the Ambush Election Rules, the Board's ability to require the NLRB Rights Poster, and the legitimacy of President Obama's recess appointments, but also several significant cases are likely to be decided by the Board.

In 2013, if President Obama is reelected, look for the Board to aggressively pursue reissuing the Ambush Election Rules and potentially other rules restricting the employers' ability to present a defense to a union's organizing campaign. Additionally, the Board likely would issue a number of decisions on important issues—from social media and employees' rights to use company email for union organizing to non-union employees' *Weingarten* rights to have a witness present during employer questioning.

If Romney is elected, depending on the composition of the Senate, we could see long delays in his ability to appoint a full and consistent Board. While some of the initiatives of the current Acting General Counsel (i.e., social media and at-will agreements) may see some temperance, the current backlog of cases already in progress and the delay in the appointment of new Board members could result in several decisions that track or resemble those issued under the current Board.

One thing for certain is that unions will be motivated in 2013 to increase their efforts to organize non-union employers. Employers dedicated to remaining union-free must be prepared and aware of developments as they occur.

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