NLRB Action Against Starbucks Signals Increased Union Risk for All Employers

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The National Labor Relations Board (NLRB) is seeking injunctions against Starbucks Coffee Company. If granted, these injunctions will transform Starbucks employees ***who support a union*** into "sacred cows." The injunctions will require Starbucks to immediately reverse discipline for misconduct ***without*** Starbucks having any opportunity to prove that discipline was justified and unrelated to the employees' union support.

This type of NLRB litigation is not unique to Starbucks. Rather, it is part of a nationwide NLRB initiative to support union organizing efforts. It follows NLRB's General Counsel Jennifer Abruzzo's earlier announcement that she plans to restrict "captive audience" meetings where employers can educate their workforce about unions, and act to deny employers and workers alike a guaranteed secret ballot election before employees lose their voice to a union.

Impact on you?

Does this aggressive NLRB support for union organizing put your workforce at risk? The answer requires "getting into the weeds" of how union organizing usually begins and how the NLRB is supporting these organizing efforts. This update is the second in our series explaining the impact of these developments. Click here to read the first piece in this series, "Union Organizing Petitions Up 57%: What Does This Mean for Employers?" Watch for other updates to arrive soon.

NLRB injunctions need to be understood in their union organizing context. Most union organizing begins with a small number of disgruntled workers– sometimes only one. Secretly they seek out a union.

Think of your workforce. How often does a poor attitude lead to poor performance, and then discipline? Not every union supporter

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is a poor worker, but many poor workers find unions attractive. When union supporters face discipline, unions are quick to file NLRB charges alleging that their employer "must have known" of their union support, and this was the "real reason" for their discipline.

Guilty before trial.

Under normal NLRB procedures, an accused employer has the opportunity to prove lack of prior knowledge of a disciplined employee's support for a union or that the employee's misconduct warranted the discipline, regardless of their support for a union. Yet, an unusual provision of the National Labor Relations Act, known as Section 10(j), empowers the NLRB to circumvent an employer's opportunity to prove its innocence.

Under Section 10(j), the NLRB can obtain an injunction in federal court requiring an employer to immediately reverse discipline ***before*** any judge **rules that** the discipline violated the law. This is the legal proceeding that the NLRB filed against Starbucks.

The NLRB rarely used Section 10(j) injunctions for most of its history. Now, however, the NLRB is increasing filing 10(j) proceedings against employers targeted with union organizing. A 10(j) injunction creates the false impression that a union can protect its members who break their employers' legitimate rules. Employees witness the union using the NLRB to reverse discipline of its supporters ***before*** any legal finding that the discipline was improper.

Misleading display of union power.

Unlawful retaliation always hurts an employer's efforts to remain union-free. Any unfair treatment of a co-worker leads employees to conclude they ***need*** a union! A 10(j) injunction, however, does not require a legal finding of unlawful retaliation.

The NLRB relies upon ***mere allegations*** of unlawful conduct to obtain a court-ordered reversal of the discipline ***before*** an NLRB trial. By the time the employer gets an NLRB hearing to prove an absence of retaliation, the union election is over. Employees vote under the false impression that the union, not the employer, will

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have the final say on discipline if a majority votes for the union.

What to do?

Employers who want to protect their direct relationship with their employees must adapt to the new labor law environment. Prudent employers will invest in steps to avoid becoming a union target. Once an employer becomes a target, unions have an array of new legal and organizing weapons designed to convert worker discontent into new union members. The recent increase in union organizing campaigns highlights this risk.

Frost Brown Todd's union-avoidance lawyers stand ready to help you retool to meet this new challenge.

For more information, contact John Lovett, Mekesha Montgomery, Catherine Burgett, Brice Smallwood, Jeff Shoskin, or any other attorney with Frost Brown Todd's Labor and Employment practice group.

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