Legal Update Article

Biden Administration Indicates Support for Union Neutrality Agreements

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Employers can expect union and political pressure to push for neutrality agreements. President Joe Biden had signaled his approval of employers that enter into union neutrality agreements, including making a campaign promise that he would ensure federal contracts are awarded only to employers that sign union organizing neutrality agreements.

A neutrality agreement is an agreement between an employer and a union where the employer agrees to not oppose the union's efforts to organize the employer's workers. Often, these neutrality agreements seek employer promises to not disparage the union and to remain silent during union organizing efforts.

Construction employers and unions may lawfully enter prehire and project labor agreements for work the employer's construction workers will perform in the future on a construction project under Section 8(f) of National Labor Relations Act (NLRA). In other circumstances, it can be unlawful for an employer to negotiate with a union that does not yet have majority support of its workers. It also can be unlawful for an employer to provide impermissible support or a "thing of value" to a union seeking to organize the employer's unrepresented workers.

These legal issues may affect the lawfulness of neutrality agreements. In February 2021, the Biden administration's new National Labor Relations Board (NLRB) Acting General Counsel, Peter Sung Ohr, rescinded many Trump-era General Counsel Memoranda. This included rescission of the prior GC 20-13 memorandum (Guidance Memorandum on Employer Assistance in Union Organizing) on imposing tighter restrictions for neutrality agreements and employer assistance to union organizing. That memorandum had aimed to adopt a stricter "more than ministerial aid" standard for neutrality agreements, rather than the "totality of the circumstances" standard. The difference between the two standards is when an employer's support for a union becomes impermissible and unlawful support.

For example, impermissible employer support during a union organizing campaign can include a manager or supervisor engaging in pro-union conduct, like soliciting union authorization cards from employees. An employer agreeing in advance to the terms of a labor agreement when not covered by an exception, like the NLRA Section 8(f) construction industry exception, is another example.

The Obama-era NLRB held that a neutrality agreement is lawful when it only sets certain principles for future bargaining, not otherwise recognizing the union as the employee's bargaining representative prior to a showing of majority support by the employees. That Obama-era decision noted, however, that it was still unlawful for an employer to first recognize a union that does not yet have majority support as the employees' representative and to negotiate a collective bargaining agreement with the union to be

signed in the future if a majority of the workers chooses the union.

Thus, before acceding to a union demand to sign a neutrality agreement, employers should analyze the pertinent sections of the agreement fully while developing a strategy to ensure its managers and supervisors do not cross the line into impermissible support for the union's organizing campaign.

If you have questions or need assistance, please reach out to the Jackson Lewis attorney with whom you regularly work or any member of our Labor Relations Practice Group.