NLRB Looks To Make It Harder For Employees To Decertify Unions

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**National Labor Relations Board (NLRB)** General Counsel Richard F. Griffin, Jr. has announced in a newly issued Memorandum Regional Directors in the agency’s offices across the country that he is seeking a change in law that would make it much more difficult for employees who no longer wish to be represented by a union to do so. Under long standing case law, an employer has had the right to unilaterally withdraw recognition from a union when there is objective evidence that a majority of the employees in a bargaining unit no longer want the union to represent them.

**The General Counsel Wants the Board to Change the Law**

If the General Counsel’s position is agreed to by a majority of the members of the Board, it would be an unfair labor practice for an employer to withdraw recognition from a union, no matter how strong the evidence is that employees do not want to be represented unless and until the employees or the employer petition for a decertification election, a majority of the employees vote against continued representation and the results of the vote are certified. This would mean that the employer would be required to continue to recognize the union and bargain with it for a new contract even where it knows that a majority of the employees do not want the union to continue to represent them.

**Levitz Furniture Allows Employers to Withdraw Recognition Based on Objective Evidence That a Majority Of Employees No Longer Want the Union to Represent Them**

Fifteen years ago, in *Levitz Furniture Co. of the Pacific,* the Board’s then General Counsel made a similar argument to the Board, which it rejected. While the Board in *Levitz* held that an employer needed more than an objective good faith belief that a union was no longer supported by the majority, and in essence set a rule that an employer would act at its peril when withdrawing recognition, it rejected the notion that employees who no longer wanted to be represented by a union could only make such a decision in an NLRB election.

**The General Counsel Directs Regions to Ignore Existing Law Under Levitz Furniture**

In GC Memo 16-03, the General Counsel has directed the Regional Offices to issue an unfair labor practice (ULP) complaint any time a union files a charge in response to an employer’s decision to act in accordance with existing law and withdraw recognition of a union that is no longer supported by the majority of the employees in a unit. As the Memo states, the Regional Directors are instructed to unilaterally withdraw recognition “under extant law.” In other words, complaints will be issued in those cases where employers are taking action that the existing law allows, in the hope that the Board will change the law and find the employer guilty of a ULP for taking action that the law allows it to, and respecting the wishes of its employees.

**What Happens Next?**
An employer faced with evidence that a majority of its employees no longer want to be represented at the end of a contract, has until now had several options. It could file an RM petition, asking the Board to hold a secret ballot vote to allow the employees to vote on continued representation or it could, if it concluded the evidence that the union had lost majority support was clear, it could inform the union of that fact and therefore that it was withdrawing recognition and would not bargain for a new contract. Often, such employer action was met with ULP charges by the union and a union effort to convince the employees to stick with it. If the employer, or for that matter an employee, filed a petition for a decertification election, a common union response has been to fight on and do whatever it could to delay the election and if possible deny the employees of their right to make the decision. Unions can easily accomplish this desired delay by filing any garden variety unfair labor practice charge which, under NLRB procedures, act to “block” the election until they are fully investigate, litigated and resolved. Unions often file multiple and successive blocking charges” to continually delay employees’ ability to exercise their right to become union free.

If the General Counsel is able to convince the Board to overturn Levitz Furniture the result will likely be a serious impairment of the right of employees to decide whether or not they want to continue to be represented. The General Counsel’s decision to seek to overturn Levitz Furniture should not come as a surprise to those who have read his last GC Memo, 16-01, in which he notified the agency’s Regional Offices of the issues that they must submit to the Division of Advice in the General Counsel’s Office for guidance. In that memo, issued last month, the General Counsel laid out the road map of his “initiatives and/or priority areas of the law and/or labor policy” and where in his view “there is no governing precedent or the law is in flux.”

Reading the model language included in GC Memo 16-03, it is clear that the General Counsel sees the question of what must happen before an employer may lawfully withdraw recognition to be such an area in “flux” as he references statements in the Levitz Furniture decision in 2001 that if “experience proved” to a future Board that employers were unilaterally withdrawing recognition in the absence of “evidence” clearly indicating that a union had lost majority support, the Board would revisit this question. While the General Counsel implies that this is why he now wants the Board to revisit the question, GC Memo 16-03 and the model brief language does not point to such evidence.

What Does This Mean for Employers and Employees?

An employer faced with evidence that a majority of its employees no longer wish to be represented by their union has always faced a difficult choice – whether to petition for an election or to respect its employees’ request and take the risk of charges and litigation by immediately withdrawing recognition. Clear understanding of the law and facts, as well as the potential consequences of each course of action has always been critical. By issuing this Memo and announcing his goal, the stakes have clearly been raised and the right of employees to decide, one of if not the ultimate purpose of the National Labor Relations Act has been placed at serious risk.

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