# Legal INSIGHTS

## with Jeffrey W. Larroca

## *The Unions Strike Back*

At its zenith, the union movement claimed over 35% of the American workforce as members. Even in the 1970s, when Americans were implored to "look for the union label" while shopping, union membership fluctuated between 20% and 25%. Currently, however, only 7.5% of American employees belong to a union.

Despite decreasing numbers, labor remains aggressive in pursuit of their aims, and with the ascent of the Obama administration (and 60 Democratic senators) in 2008, unions came very close to having The Employee Free Choice Act passed. Otherwise known as the card check bill, The Employee Free Choice Act would certainly have dramatically increased the union presence in the American workforce through institution of a few simple changes to the law. As opposed to current law, where employees sign up for a union and, thereafter, an election process is initiated, card check merely required a union to hand out cards to employees. If a majority of the employees indicated their desire to be represented by the union, the National Labor Relations Board (NLRB) would have required the employer to recognize the union. Of even greater impact, The Employee Free Choice Act stated that once a union was certified by the NLRB, the employer and the newly-minted union would only have 120 days to reach agreement, before facing the prospect of being forced into binding arbitration, the result of which would have enforced a two-year labor contract.

While the mid-term elections and the attendant loss of Democratic seats in the Senate (Democrats now hold a thin majority of 53-47 in the upper chamber) have effectively shelved The Employee Free Choice Act, that one setback, however, has not dampened labor's drive to expand its reach and strengthen its position of strength in the American workforce.

Just recently, the NLRB took two actions that require employers to take notice. First, an NLRB administrative judge required the reinstatement of five employees fired under an anti-bullying policy. The employees had posted comments on Facebook criticizing the job performance of a co-worker. The judge determined that the employer violated federal labor law, which protects "concerted activity" even in the absence of a unionized workplace. Specifically, the judge determined that the five employees were engaged in protected activity, which include discussions related to the "terms and conditions of employment" or joint employee activity for "mutual aid or protection" of employees. On review of the posts, it is clear that the tenor of the comments would have been of concern to most employees:

> *Lydia Cruz, a coworker feels that we don't help our clients enough at HUB I about had it! My fellow coworkers how do u feel?*
>
> *What the [expletive] Try doing my job I have 5 programs*
>
> *What the Hell, we don't have a life as is, What else can we do???*
>
> *Tell her to come do mt [my] [expletive] job n c if I don't do enough, this is just dumb*
>
> *I think we should give our paychecks to our clients so they can "pay" the rent, also we can take them to their Dr's appts, and served as translators (oh! We do that). Also we can clean their houses, we can go to DSS for them and we can run all their errands and they can spend their day in their house watching tv, and also we can go to do their grocery shop and organized the food in their house pantries ... (insert sarcasm here now)*
>
> *Lol. I know! I think it is difficult for someone that its not at HUB 24-7 to really grasp and understand what we do ..I will give her that. Clients will complain especially when 30 they ask for services we don't provide, like washer, dryers stove and refrigerators, I'm proud to work at HUB and you are all my family and I see what you do and yes, some things may fall thru the cracks, but we are all human :) love ya guys*

The employer fired the employees for bullying and harassment. As explained by the NLRB in a report assessing recent social media cases, the employees were engaged in protected activity and should not have been fired:

> *Here, the coworker sought input from a fellow employee about her dispute with the advocate after the advocate indicated that they should have the Executive Director settle their differences. The coworker had reason to believe that the advocate's action would result in a discussion with management about employees' responsibilities and performance and could result in discipline. The comments of the other employees in response to the coworker's initial Facebook posting were directly related to criticisms of job performance and staffing/workload issues. Thus, because the Facebook postings directly implicated terms and conditions of employment and were initiated in preparation for a meeting with the Employer to discuss matters related to these issues, we concluded that the Facebook conversation was concerted activity for "mutual aid or protection" under Section 7.*

Upshot: Before firing an employee for public criticism that even includes the profane, employers will now have to engage in an exacting and rigorous inquiry to ensure they do not run afoul of the National Labor Relations Act (NLRA).

Second, the NLRB issued a ruling requiring private-sector employers to notify employees of their collective bargaining rights under the NLRA via the posting of a new notice. The goal of the rule is set forth in the notification issued by the NLRB:

> *The Board believes that many employees protected by the NLRA are unaware of their rights under the statute and that the rule will increase knowledge of the NLRA among employees, in order to better enable the exercise of rights under the statute. A beneficial side effect may well be the promotion of statutory compliance by employers and unions.*
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> *The notice of rights will be provided at no charge by regional office of the NLRB or can be printed out from the Board website. The notice must also be posted on an Intranet or an Internet site if an employer's personnel rules and policies are customarily posted there. Failure to post the notice may be treated as an unfair labor practice under the National Labor Relations Act.*

Upshot: Starting January 31, 2012, employers are going to be required to educate all employees, union members or not, on their rights under federal labor laws, via posting.

In some quarters, unions are beleaguered. The Wisconsin law restricting the collective bargaining right of public employees that engendered a bitter fight stands as a prime example. On other fronts, as noted above, labor is expanding its reach and the rights of American workers.

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