NLRB's New Standard Bans Employers from Warning That Unionization Hurts Managerial Relations: 5 Essential Steps for Compliance

Insights
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In a groundbreaking decision, the National Labor Relations Board (NLRB) just tightened restrictions on what employers can say to workers about the impact of unionization, overturning a 40-year-old standard and raising the bar for what is considered a lawful communication. In a case involving a national hospitality chain, the Board ruled on Friday that employers can no longer broadly warn employees that unionizing could harm their direct relationship with management. Instead, such statements must be strictly **fact-based**, reflect **outcomes beyond the employer's control**, and avoid any hint of **coercion or threats**. Does this decision signal a new era in union-related discourse? Or will it quickly be scrapped by the new administration as soon as January? This Insight will tell employers what you need to know about this new case, what it means for your operations, and the five things you should do to ensure you are in compliance.

Story of the Case and Key Findings

This pivotal decision arose from a case involving a national hospitality chain where managers allegedly made statements suggesting that unionizing could strain employees' direct relationships with management and potentially lead to benefit changes. Managers reportedly implied that unionizing would complicate communication with upper management and could lead to reduced or terminated benefits. One manager urged employees who wanted a "direct relationship with leadership" to reject the union vote.

- An NLRB decision from 1985 – *Tri-Cast* – allowed similar statements so long as they didn't explicitly or implicitly threaten employees.
- But the NLRB's current Democratic majority just found these statements problematic and overturned that 40-year-old precedent, determining that statements about unionization impacts must now be held to a higher standard.
- According to the NLRB, the 1985 *Tri-Cast* decision "erred in deeming categorically lawful nearly any employer statement to employees touching on the impact that unionization would have on the relationship between individual employees and their employer." By taking this new stance, the Board emphasized that employer statements suggesting negative consequences from unionization can be perceived as implicit threats, even if not explicitly stated.

- The Board further highlighted that such warnings can subtly pressure employees to avoid unionizing out of fear of retaliation or loss of direct managerial access. As NLRB Chairman Lauren McFerran explained, the goal of the revised standard is to "protect workers' rights to make free choices about union representation, while ensuring employers can still express their views non-coercively."

New Standard

The NLRB's decision represents a dramatic shift in how the Board will view employer communications about unionization. By overturning *Tri-Cast*, the Board has set a stricter standard that requires employer statements about union impacts to be rooted in **objective facts** and likely **outcomes beyond the employer's control**. According to the NLRB, this new standard aligns with the Supreme Court's 1969 decision in *NLRB v. Gissel Packing Co.*, which allows employer predictions about union impacts only if they are fact-based and **free of coercion**.

Silver Lining: Only Forward-Looking Standard

If there's a silver lining for employers it's that the Board emphasized that this standard will apply only to future cases, allowing past communications under the *Tri-Cast* standard to stand without retroactive penalties – which is less common for NLRB decisions which are presumptively retroactive.

New Standard Here to Stay? Or About to Be Quickly Washed Away by a New NLRB?

Employers can't ignore the fact that this decision was issued the same week Donald Trump was re-elected as President. He'll assumedly steer the Board toward a more business-centric philosophy by appointing a majority of conservative Board members. Given that reality, should you go all-in to rework your policies to comply with this new standard, ignore it altogether given how confident you might feel it will soon be overturned, or somewhere in between?

Make sure you understand the lay of the land before you make your decision.

- What employers need to realize is that the Biden-appointed NLRB Board members may remain in the majority through 2026, which means it's quite possible that we will continue to see labor-friendly positions remain intact for the next several years. Even if Trump takes the expected step to terminate the current NLRB General Counsel just as Biden did on his first day in office, a new GC wouldn't be able to stop the Board from continuing to issue decisions such as these well into his second term of office.
- But what if Trump breaks precedent by terminating Democrat-party Board members without apparent cause just so that he could quickly stack the Board with his preferred appointees? We'd be in unchartered waters at that point. Opponents would argue that violates the National Labor Relations Act (NLRA), but this argument is already gaining traction in lower federal courts. It

might take some time for the courts to weigh in on such a maneuver. Any Board decisions made during that period – such as wiping away decisions like this one – could be susceptible to a rapid reversal if courts eventually disagree with such a move.

Bottom line: you should take your risk tolerance into account before establishing your new position in close consultation with your FP labor counsel.

Best Practices for Employers to Comply with the New Standard

If you choose to immediately comply with this stricter standard to minimize NLRB scrutiny, here are five best practices you should consider:

1. **Base Statements on Objective Facts**: You should ensure that all union-related statements are grounded in verifiable facts, avoiding any language that implies employer-driven consequences or control over outcomes.
2. **Avoid Generalizations or Speculative Language**: Make sure you frame any predictions carefully, steering clear of vague or broad statements that could be perceived as coercive or threatening.
3. **Train Managers and Supervisors**: Provide managers with clear guidelines and training on lawful communication practices, ensuring they understand the limitations set by this new standard.
4. **Regularly Update Communication Policies**: Regularly review and update employee communication policies, particularly on union discussions, to keep up with evolving NLRB standards and rulings.
5. **Consult Legal Counsel for Unionization Messaging**: Work with your FP labor counsel to create compliant messaging strategies, minimizing risks under the new, more stringent NLRB standards.

Conclusion

We will continue to monitor these developments and provide updates as necessary. Make sure you are subscribed to Fisher Phillips' Insight System to receive the most up-to-date information. If you have questions on how these developments may impact your organization and workforce, please contact your Fisher Phillips attorney, the authors of this Insight, or any member of our Labor Relations Practice Group.

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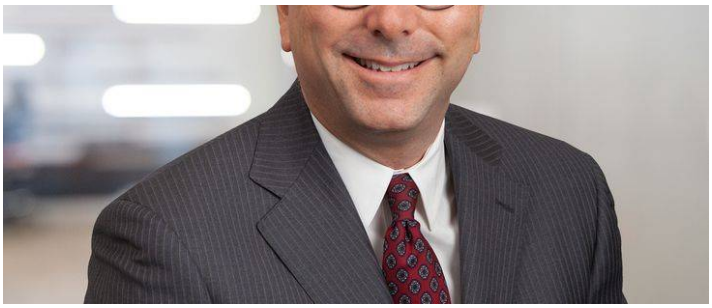

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