

Labor Law Update: Union Certification Without Winning the Employee Vote

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As reported throughout the trade press, alcohol beverage companies are facing escalating pressure from unions and the National Labor Relations Board (or NLRB, the federal agency that enforces labor laws against both unionized and non-unionized companies). As recently as last month, an NLRB administrative law judge ordered Woodford Reserve Distillery to recognize and bargain with a union even though that union lost the election (45 employees voted against the union and only 14 in favor). This case reflects an aggressive tack at the NLRB that, across numerous fronts, poses increasing risk to operations, maneuverability and brand. But these risks are navigable.

BACKGROUND

For context, across all industries, union election petitions are up 35% over last year, and unfair labor practice investigations are up 7%. This follows consecutive years of spikes including a 53% jump in union election petitions in 2022 and a 19% increase in unfair labor practice investigations.

Behind this data are historic changes in law on how unions form. In an August 2023 decision, the NLRB now offers a path to union certification without unions having to win secret ballot elections. A union with signed majority support from their target “bargaining unit” can demand recognition, and have that imposed if the employer does not file a petition for election in two weeks or if it commits unfair labor practices. Where a union files for an election, or the employer does and it is granted, even then the union can be certified without the union actually winning majority employee support.

RECENT DEVELOPMENTS

In a notable example of this development, in an April 2024 NLRB administrative law judge decision against Woodford Reserve, the company was ordered to recognize a union and bargain with it even after employees voted against unionizing. Prior to a November 2022 election, the company announced market-based raises, changed a few work policies for consistency, and provided bottles of whiskey after production targets were reached as it had done in the past on various occasions.

The union filed objections to the election result and alleged unfair labor practices. Despite evidence that the company's actions were for legitimate business purposes and practices and unrelated to the election, the NLRB administrative law judge found that the "timing and circumstances surrounding these actions" were "more than sufficient to infer unlawful motivation." The employees' votes and the entire election has been set aside pending potential appeal.

In another case, over 60% of employees at Creature Comforts Brewing Company voted against joining a union in October 2023. But the union filed objections and alleged unfair labor practices by the employer during the nine-month union organizing campaign. The NLRB is investigating, and if the agency finds violations, it may issue a union recognition and bargaining order.

DEVELOPING A RESPONSE PLAN

Despite the NLRB's trajectory in these cases and in many others, courts that can overrule the NLRB have long recognized the rights of employers to run their businesses, express their views on unionization, and expect due process in investigations and hearing processes. There is increasing regulatory pressure on these rights, but this is navigable with careful attention to technical labor laws and processes, timing and strategy.

Proactive development of legal response plans can provide sufficient runway to decrease risk on all fronts and help ensure (1) that the company speaks with a consistent, compelling, and legally effective voice and (2) that employees' rights to decide to join or not join a union are protected.

KEY ELEMENTS FOR PLANNING

- Understand current employee pressure points and expedite solutions
- Stay up to date on local union activity, developments and key players
- Evaluate policies and protocols for National Labor Relations Act compliance
- Ensure appropriate access and communications rules
- Provide manager and executive training and support
- Communicate management's perspective on unionization
- Develop a rapid response game plan, including delegation of responsibilities for responding to union election petitions or demands for recognition

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