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Union Organizing Efforts in the Southeast Appear to be on the Rise – and in an Increasingly Union-Friendly Environment

by Aron Karabel

In the labor world, 2014 has started out with a bang. We have seen a hotly contested union election at Volkswagen in Chattanooga make national news culminating in an employer victory. Commentators have openly questioned whether this portends an era of reinvigorated union efforts to gain a toehold in the historically company-friendly Southeast. We have also seen a decidedly union-friendly and reinvigorated National Labor Relations Board (NLRB) roll-out a new set of initiatives that champions and critics alike agree will make it easier to organize employees. While it may still be premature to draw any sweeping conclusions, these intensified union and regulatory efforts highlight the importance of early preparation, should the union come knocking at the door.

On February 4, 2014, the NLRB proposed a set of "Quickie Election" rules, designed to speed up the process of conducting a union election. Under the current rules, elections take approximately two months, meaning that employers have two months to develop and execute an anti-union campaign. Statistically, when management has more time to oppose union organizing efforts, union success rates drop exponentially. The NLRB's proposed "Quickie Election" rules purport to "simplify" election procedures, increase transparency and uniformity, and provide clarification to elections. Some of the key provisions of these rules include:

- Shortening the timeframe between the filing of an election petition and an election from two months to three weeks or less;
- Revising the process for addressing representational issues and the desired unit composition by creating new pre-hearing requirements and shortening the timeframe from weeks to days to conduct a pre-hearing election; and
- Requiring employers to disclose employee telephone numbers and email addresses in voter eligibility lists.

Explanations of "simplicity" notwithstanding everyone knows that these new rules giving unions greater access to employees create roadblocks for employers to assess, canvass, organize, develop an anti-union strategy, and effectively execute that strategy during the campaign.Unfortunately, many believe that these rules are a foregone conclusion because the 2011 rules were stymied for lack of a quorum.

As we begin a new calendar year, increased unionizing efforts in the Southeast coupled with the likelihood of new rules that will limit an employer's ability to challenge unionization effectively, increase the importance of management preparation. What should proactive companies do to be ready in this environment?

Assess the Workplace Culture

Do employees have, and are they aware of, resources that identify and address issues or concerns regarding working conditions or other terms of employment? Determine whether there are any barriers - or perceived barriers - to reporting issues to management. Additionally, determine the strengths and weaknesses of management and whether there is any inconsistency in responsiveness, availability and discipline. Well-drafted policies that reflect the employer's values have marginal utility when front-line supervisors who have the most contact with employees do not reflect those values in their everyday activities and interactions with staff. Ensuring that managers constantly communicate, promote workplace empowerment and avoid favoritism is one of the best defenses to unionization.

Assess Management Preparedness

If an election petition were filed today, would you be ready to oppose it effectively in less than three weeks? Have managers been sufficiently trained to answer or respond to employee inquiries about unionization? What would your

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Editor: K. Coe Heard

Mind the Cap: Preparing for the Fiscal Year 2015 H-1B Cap

by Vinh Duong and Nora Katz

On April 1, 2014, employers will be permitted to submit new H-1B petitions to U.S. Citizenship and Immigration Services ("USCIS") for Fiscal Year 2015. For U.S. employers needing to compensate for domestic labor shortages, the H-1B visa can be a valuable tool for hiring skilled professional workers, such as engineers, physicians, researchers, or IT professionals. H-1B classification is reserved for skilled foreign professionals who will be employed in a professional occupation, requiring at least a Bachelor's degree or its equivalent in a specific field relevant to the occupation. The foreign professional filling the position must be qualified to perform services in the specialty occupation because he or she has attained at least a Bachelor's degree or its equivalent in the field.

Acquiring H-1B status for a foreign professional takes careful planning. The H-1B cap is the annual numerical limit/quota set by Congress limiting the number of H-1B visas that USCIS can grant each year. Currently, the H-1B cap is set at 65,000 visas for employees with at least a Bachelor's degree or equivalent, of which up to 6,800 are reserved for foreign nationals of Chile and Singapore, and 20,000 visas for employees with a U.S. Master's degree or higher. Once these 85,000 visas have been allocated, USCIS will not grant additional H-1B visas until the following fiscal year. Additionally, initial H-1B visas petitions submitted and accepted under the cap in April 2014 will not become effective until October 1, 2014. This means that employers may need to consider staffing needs for the upcoming year earlier than they might otherwise.

Not all foreign professionals who qualify for H-1B status are subject to the cap. Foreign nationals who are already employed in H-1B status and have previously been counted against the cap are not counted again. Thus, foreign professionals who are seeking to extend their stay, change employers, or requesting concurrent employment can do so without waiting until April 1 or worrying about numerical visa limits. Employees at institutions of higher education or at related or affiliated non-profit entities, nonprofit research organizations, and governmental research organizations are also cap exempt. Finally, physicians who have been approved for a Conrad 30 J-1 waiver of the two-year foreign residence requirement based on employment in a medically underserved area are not counted against the cap.

Last year, the H-1B cap limit was exhausted by April 5, just five days after USCIS began accepting petitions. As the economy continues to pick up and employers hire more new workers, we anticipate that the demand for H-1B visas will increase. Employers should identify current and prospective employees who qualify for and need an H-1B visa as early as possible and begin taking steps to prepare H-1B petitions accordingly. We recommend that employers file all cap-subject H-1B petitions no later than April 1, 2014.

Criminal Background Checks: "Ban the Box" Movement Gains Nationwide Momentum

by Marti Downey

Historically, almost all applications for employment included some variation of the following inquiry: "Have you ever been convicted of a felony? Yes ☐ or No ☐." Many still do, which may prove problematic as an increasing number of states and municipalities across the nation enact statutes and ordinances designed to remove these types of questions, and their associated check boxes, from job applications.

This effort is commonly known as the "ban the box" movement. The goal of the movement is essentially to defer any criminal history inquiry until later in the hiring process and prohibit employers from using an applicant's criminal record as an automatic bar to employment.

It started as a grassroots movement with the goal of providing "second chance" employment opportunities to individuals with criminal records - a surprisingly large group of people. According to the National Employment Law Project, 1 in 4 Americans have either an arrest or a conviction on their record, in most cases for nonviolent offenses. The "ban the box" movement seeks to ensure that these individuals have a fair shot at entering (or re-entering) the workforce.

Although the precise restrictions vary a bit from city to city and state to state, "ban the box" laws generally prohibit an employer from asking about arrests or convictions on the initial application for employment. If an applicant makes it through the initial screening process, criminal history questions can usually be asked later in the hiring process, such as during the job interview, at which point the applicant will have an opportunity to explain him/herself. Some states - such as Minnesota - are more restrictive than most and prohibit making any criminal history inquiries until after interviews or conditional job offers. Proponents of "ban the box" (including the EEOC) want employers to make individualized inquiries to determine whether the criminal record involved is actually related to the job in question. Of course, there are often industry-specific or job-specific exceptions to "ban the box" laws, such as those jobs in which employers are required by law to run criminal background checks (*e.g.*, jobs working with children and/or vulnerable adults), so those obligations will not be affected.

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core message and theme be during the election? When it comes to union elections, practice does make perfect. For most employers, an election is their first go-around. That is why it is so important to assess your preparedness. Prudent employers should undergo training on how to conduct a self-assessment, an election canvass, and a mock campaign. This process will help identify team roles during an election, bring to light real issues that may not have been previously addressed, and establish protocols to react effectively to the first signs of a union on premises.

The events in Chattanooga notwithstanding, it is likely that unions - both large and small - will continue to to make inroads into an untapped and growing Southeastern labor market, leveraging every advantage the currently union-friendly NLRB will provide. 2013 has proven that election petitions in the Southeast are on the rise, and Tennessee remains fertile ground for unionization efforts. Employers that wish to remain union free should be proactive and prepared for the challenge.

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EEOC Gives Momentum to the Movement

The increased focus on "ban the box is due in large part to the EEOC's concerted effort to bring this issue to the forefront of public debate. In 2012, the EEOC released its Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions (available at http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm#I), in which the agency endorsed "ban the box" as a best practice under Title VII. The EEOC has taken the position that criminal background checks have the potential to violate Title VII because racial minorities are arrested and convicted of crimes at higher rates than non-minorities. Per the EEOC guidelines, an employer's criminal history questions should be tailored to the specific job in question and employers should not deny employment based on an applicant's criminal history without due consideration of the severity of the crime, the crime's relation to the job, and the time passed since conviction. Although not binding, the guidance caught the attention of lawmakers and employers alike.

As a practical matter, employers and human resources professionals should take note that this is a timely and constantly evolving area of the law. Now is a great time to double check the statutes/ordinances in the jurisdictions in which you solicit employment applications to see if there have been any changes and ensure compliance going forward.

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