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COLUMNS

How the NLRB's case docket could impact retailers

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By John F. Ring

Unionization and employee activism. Changes in labor law. Greater financial liability for violations. These are some of the major developments that retailers are watching from the United States' National Labor Relations Board (NLRB) in the coming months.

I recently wrapped up a five-year term on the NLRB, serving as chairman and, later, as a board member. I had a front-row seat to the establishment of some of the priorities that the board is taking into 2023 and beyond.

For retailers, these priorities will mean factoring a lot of key issues into their business planning.

Unionization and employee activism
We should expect to see more high-profile unionization efforts and continued employee activism.

Last year, the NLRB saw 54 percent more organizing petitions over 2021 and, according to recent reports, unions won more NLRB elections in 2022 than in any year since 2005.

For many reasons from the pandemic to social justice movements employees are more active in asserting their rights and making their voices heard, not just on workplace concerns, but also on social issues. And they are not limiting themselves to the traditional playbook.

Although some are seeking out established unions for representation, others are forming home-grown unions where employees form a location-specific union on their own.

Many are taking to social media or engaging in other types of non-traditional campaigns to advocate for themselves.

Regardless of how employees express themselves, there seems to be more employee activism and, if not handled correctly, it represents an additional area of potential reputational risk for employers.

With all this going on, the legal landscape around organizing is changing.

Last December, the board issued a decision that opened the door to union organizing for smaller groups, a return to the so-called "micro-units" standard.

The NLRB is considering other major changes in union election procedures that could eliminate secret ballot elections and outlaw employer so-called captive-audience speeches, among other things.

How these changes play out in the coming year could have a significant impact on employers.

Changes in labor law
What we are seeing from the current NLRB is a focus on issues that could lead to precedential and pendulum-swinging decisions.

The changes will move labor law further in the direction of facilitating union organizing and making employer conduct that was once lawful subject to monetary penalties.

At the end of last year, the NLRB issued several decisions that put new limitations on employers' private property and management rights.

The board also has proposed changes in a number of other issues important to marketers, manufacturers and retail businesses, including the joint-employer standard, the definition of "independent contractor" and the board's approach to employer handbook rules and investigation confidentiality.

For many retailers who rely on independent contractors for everything from deliveries to sales positions, changes to independent contractor rules could affect the very way they structure their business arrangements.

Similarly, the joint-employer standard is critically important for many retail operators.

While I was NLRB chairman, we restored the NLRB's decades-old joint-employer standard that required direct and immediate control over terms and conditions of employment.

The current board has proposed replacing that standard with a vastly broader one that would sweep many more business relationships under its coverage.

Greater monetary liability for employers
The board recently added new and expanded financial liability for employer labor law violations.

In addition to the traditional back pay and benefits remedies, the board will now assess employers for all "direct or foreseeable" losses caused by a violation.

Although it is unclear how the board will interpret this new standard, it could include things such as out-of-pocket medical expenses, restitution for lost credit ratings, and missed mortgage and rental payments. This change could significantly increase monetary risk for employers.

BECAUSE THE RETAIL industry is one of the largest employers in the United States, steps taken by the current NLRB could represent a significant change for many companies.

If not already doing so, retailers unionized and non-union need to pay close attention to what the NLRB is doing and, in some areas, start preparing for the changing landscape.

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