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ALERTS

Labor & Employment Law Alert - Unions Score Two Important Victories In Consecutive Weeks

August 1, 2014 | Atlanta | Chicago | Columbus | Delaware | Elkhart | Fort Wayne | Grand Rapids | Indianapolis | Los Angeles | Minneapolis | South Bend

In the past two weeks, unions have secured dual notable victories that are likely to spark additional organizing efforts nationwide. On July 17, an Indiana judge struck down that State's "right-to-work" (RTW) law as unconstitutional. The following week, on July 22, the National Labor Relations Board (NLRB) issued a 3-1 decision permitting a so-called "micro-unit" of Macy's, Inc., employees to organize cosmetics employees within a single retail location in Massachusetts. These developments reflect a growing trend of unions to use courts and administrative bodies to establish pro-union policies in the absence of legislative support for the Employee Free Choice Act and to leverage those policies in their organizing activities.

In *United Steel v. Zoeller*, the United Steel Paper, and Forestry, Rubber Manufacturing, Allied Industrial and Service Workers International Union, AFL-CIO (United Steel) union challenged the constitutionality of Indiana's controversial RTW law, originally enacted in February 2012. The RTW law prohibits unions from requiring employees to become bargaining unit members or pay dues to the union as a condition of employment. Since its enactment, the RTW law has prohibited unions from negotiating collective bargaining agreements that require Indiana employees to pay union dues. Under Indiana law, unions that violate this statute risk the criminal penalty of being charged with a gross misdemeanor. Further, the RTW law provides individual employees with private claims eligible for monetary damages and attorney's fees.

In its declaratory judgment lawsuit against the Indiana State Attorney General, Greg Zoeller, United Steel alleged the RTW law violated the Indiana State Constitution's "Particular Services Clause," Article I, Section 21, which disallows the government from demanding services free of charge. The union claimed the RTW law allows non-bargaining unit employees to demand services from the union without compensation. In striking down the RTW law as unconstitutional, Lake County, Indiana, Judge George C. Paras wrote: "There are few more abhorrent notions than that of government seizing private property or compelling a private person into the service of the government itself or into the service of another private person without the government paying just compensation for the property taken of the service compelled."

In granting summary judgment to United Steel, the court rejected Indiana's argument that the RTW law itself is not a demand for purposes of the Particular Services Clause, holding that the "explicit threat of criminal prosecution," administrative proceedings by the Indiana Department of labor, and private rights of action all constitute "demands" upon labor unions by the State of Indiana for particular services without compensation. The court also dismissed Indiana's argument that the

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federal Labor Management Relations Act of 1947 provides a shield against the protections granted by Indiana's State Constitution. Although the State of Indiana has filed an appeal of this decision, the RTW law remains enjoined from enforcement under Judge Paras' Order.

This development now allows unions to freely bargain on contracts that require union dues payments for representation and other services. Until this development, many Indiana-based union employers continued to operate under pre-2012 contracts, refraining from re-negotiating such contracts until the legality of the law had been decided (or implementing opt-out procedures to comply with the RTW law). Now, empowered by Judge Paras' ruling, organized workplaces can expect unions to pursue new collective bargaining agreements with increased vigor to increase their funding.

The *United Steel v. Zoeller* case follows on the heels of an earlier Lake County, Indiana, lawsuit that similarly found the RTW law in violation of the Indiana State Constitution Article 1, Section 21. In September 2013, Indiana Judge John Sedia issued a declaratory judgment in Sweeney v. Zoeller, which held the RTW law unconstitutionally compelled labor unions to provide services to individual employees without compensation. *United Steel v. Zoeller* takes that ruling one step further by explicitly prohibiting the enforcement of the RTW law, declaring it null and void.

In a second notable union-side victory, decided less than a week after *United Steel v. Zoeller*, the NLRB issued a decision further bolstering a significant shift in organizing tactics. In *Macy's, Inc. v. Local 1445*, United Food and Commercial Workers Union, the NLRB permitted a small sub-group of employees to unionize within a single location of the nationwide retailer. Relying on the basic principles set forth in *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB No. 83, and other precedent, the NLRB permitted the United Food and Commercial Workers Union (UFCW) to organize a "micro-unit" of specialized employees, thereby creating unique challenges for uniformly managing the company's workforce as a whole.

There, the UFCW sought to represent a relatively small group of retail sales employees working in the company's cosmetic and fragrances department. Although such employees comprised less than one-third of the company's Saugas, Massachusetts-based total workforce, the NLRB cited numerous unique traits of those employees that were different from sales employees in other store departments. Specifically, employees in the cosmetic and fragrances department worked on an "on-call basis," did not commonly transfer to other store departments, rarely interacted with other departments, were compensated on a commission basis, and had a practice of limiting sales transactions to registers in their own department. These factors, the NLRB held, were sufficient to create a readily identifiable group and reflected a shared community of interest separate and apart from other sales employees.

In its opinion, the NLRB specifically rejected Macy's argument that applying the principles of *Specialty Healthcare* (upholding the formation of micro-units) would "allow a proliferation of micro-units based solely on the products sold by employees" whose organizing efforts would result in "chaos and disruption of business." The NLRB firmly disagreed, calling such concerns "pure speculation," and holding that Macy's cosmetic and fragrance employees were an appropriate unit for bargaining. Citing a

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number of other retail-based decisions permitting the organization of similar units, the NLRB stated: "…the petitioned-for unit is appropriate under retail department store precedent, even without reference to *Specialty Healthcare*." Noting that the employees of Macy's cosmetic and fragrance department work exclusively in their own department, have a unique departmental structure, and lack regular contact with employees in other departments, the NLRB declared such employees to be "sufficiently different from other employees so as to justify representation on a separate basis."

The *Macy's, Inc*. case reflects ongoing efforts by unions to continue pressing the advantage of a pro-labor Administration. Through such "divide-and-conquer" tactics, unions, through the NLRB, are expected to pursue increased micro-unit organizing efforts. By targeting occupation-specific groups of employees, union organizers have a distinct advantage to overcome traditional avoidance strategies. In light of this decision, companies that have employees in specialized fields should be diligent to eliminate the types of unique, department-specific management and sales practices that swayed the NLRB to permit a small group to organize within the larger workforce.

The effect of these decisions cannot be underestimated. In the wake of failed legislative efforts to pass the Employee Free Choice Act, the labor movement has found some receptivity to its efforts in the courts and through the NLRB's administrative process. Despite the recent U.S. Supreme Court's unanimous invalidation of NLRB decisions rendered by a recess-appointment Board (*NLRB v. Noel Canning*), union organizing remains a potent obstacle to companies that wish to manage employees without third-party interference.

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