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BT Labor Relations' Top Ten Traditional Labor Stories Of 2011 (Part 1)

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'Tis the season for year-end recaps, and we here at BT Labor Relations couldn't resist taking our own look back at the year in traditional labor. As we move into 2012, here's our countdown of the top ten traditional labor issues that made the news this year. Numbers 10 through 6 are below; Check out our Top 5 Traditional Labor Stories of 2011.

10. The Board sues Arizona over secret ballot constitutional amendment

2011 started off with a bang in January when the Board's Acting General Counsel Lafe Solomon threatened to sue four states (Arizona, South Carolina, South Dakota, and Utah) over their secret ballot union election constitutional amendments. All four states added provisions to their state constitutions mandating that union elections be held by secret ballot only, after constitutional amendments passed by public referendum at the November 2010 election. These constitutional amendments were in response to the Employee Free Choice Act (EFCA) proposed in Congress in 2009, which would have required an employer to recognize a union if a majority of employees signed cards stating their desire for representation. This "card check" method of recognition is currently allowed by the NLRA, but employers have the option of demanding that election of the union be confirmed by a secret ballot. EFCA would have taken this option away from employers (as well as enacting other pro-union changes to the NLRA). EFCA never became law, but the constitutional amendments in these states passed anyway, purportedly preserving the right of a secret ballot election for employers in those states. The amendments as they currently stand do not conflict with the NLRA, but the NLRB nevertheless took exception to them, claiming that such state provisions are preempted by federal law.

After a back and forth discussion with the states' Attorneys General during the early part of 2011, the NLRB filed suit against Arizona in May, asking the court to declare that Arizona's constitutional amendment was preempted by federal law and therefore unenforceable. Although EFCA never became law, the NLRB has made attempts to individually implement many of the pro-union changes proposed in the bill, and Arizona has become the battleground for card checks. So far, the NLRB's lawsuit appears to have some traction. The Arizona federal court hearing the case has denied Arizona's motion to dismiss and litigation continues. Stay tuned in 2012 as this issue continues to develop.

9. The NLRB strikes a blow to mandatory arbitration policies in *Supply Technologies*

Companies love mandatory arbitration policies in contracts and in May, the U.S. Supreme Court issued a landmark decision in *AT&T v. Concepcion*

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upholding such policies in consumer contracts. Employers also see the appeal of mandatory arbitration clauses and many union contracts include such provisions. However, an NLRB Administrative Law Judge reminded employers of the limits of such policies in a decision in June, finding in *Supply Technologies LLC* that an employer's arbitration policy violated the NLRA by unlawfully restricting employees' rights by suggesting that an employee had to bring any unfair labor practice charge through the arbitration procedure, and thus could not make that charge with the Board. This decision served as a warning for employers hopeful after the *Concepcion* decision that arbitration provisions should be carefully reviewed before being included in collective bargaining agreements. Employers should know that just because SCOTUS approves, doesn't mean the Board will.

8. Congress sits up and takes notice (although no new legislation is actually passed)

With a new majority in the House of Representatives after the 2010 elections, certain Republican members of Congress have made the NLRB their new target this year. Several hearings were held by Congressional Committees to discuss what many characterize as the pro-union, "activist agenda of the National Labor Relations Board." The Board's complaint against Boeing was a frequent target, as well as its decisions regarding posting requirements, "quickie" elections, and "micro" bargaining units. Additionally, Republicans in both the House and the Senate have introduced bills to amend the NLRA to reverse these controversial actions taken by the NLRB in 2011. The Democrats weren't able to get EFCA passed when they had a majority of both houses, so it is unlikely that any of this legislation will actually be passed by a divided Congress, but the NLRB's continued perceived pro-union actions have made traditional labor a key issue as we move into the 2012 election season.

7. General Counsel memo regarding mandatory language in settlement agreements puts additional pressure on employers

This year, the Board has placed additional pressure on employers looking to settle NLRB proceedings with the issuance of a memo by General Counsel Solomon in January which requires mandatory language in settlement agreements whereby an employer in effect agrees in advance that if it is even accused of violating the agreement, all of the prior charges against it have merit. Although the Board characterized this language as necessary for effective enforcement of such agreements, this requirement likely has the effect of simply making employers less willing to settle a case. And it was another example of the Board's aggressive efforts to secure rights for unions in 2011.

6. *Specialty Healthcare* decision opens the door for "micro" bargaining units

One of the Board's more controversial decisions of 2011 was issued in August regarding appropriate bargaining units. In *Specialty Healthcare* (357 NLRB No. 83), the Board overturned 20 years of precedent regarding determination of an appropriate bargaining unit in non-acute health care

facilities. The Board increased the burden on employers who wish to challenge a bargaining unit petitioned for by a union to include more employees. Under the new standard, employers have the burden to prove that the employees the employer believes also should be part of the unit share an "overwhelming community interest" with the petitioned for employees. The previous rule (as articulated by the Board in *Park Manor Care Center*, 305 NLRB 872 (1991)), applied a lower standard: whether the community of interest of the employees the employer sought to include was "sufficiently distinct from those of other employees" in order to justify their exclusion from the bargaining unit.

The upshot is that this decision allows unions to pursue so-called "micro" bargaining units, and it will be easier for unions to certify bargaining unit(s) piecemeal, even when a majority of employees in a facility do not desire union representation. This decision helps unions trying to "get a foot in the door" by allowing them to target vulnerable employer sub-groups. This decision was targeted by legislation introduced in Congress to reverse it, but for now, it remains current Board law and sets up new challenges for employers seeking to avoid unionization.