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The COVID-19 pandemic may spur union organizing and complicate union relations: Part One

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The coronavirus pandemic is creating a set of circumstances that present a big opportunity for organized labor and a serious challenge for non-union employers. Job security and safety are traditional issues that unions use to appeal to unorganized employees, and these issues are looming large right now. Many employees are being asked to continue working under conditions that they may perceive as unsafe. Others are being laid off or furloughed without pay in numbers not seen since the Great Depression of the 1930s and must rely on unemployment benefits which may be less than what they normally earn and could run out if this situation continues into the summer and fall. All of this is potential fodder for union organizing, and many observers are predicting a wave of strikes (which already may have begun) and a large spike in union organizing, both during and particularly after the crisis, especially among employees working in essential businesses. One historian has noted the parallel to the strike wave that accompanied the “Spanish Flu” in 1919 when one-fifth of American workers walked off the job.

Despite the weakness of organized labor in the past several decades, unions do not appear to be letting this opportunity pass, and there are many new groups, like Fight for 15, that are trying to capitalize on the current situation. The news has been filled with reports of an increase in labor actions. Instacart shoppers, for example, went on strike demanding hazard pay and protective equipment. Sanitation workers in Pittsburgh and construction workers in Massachusetts staged strikes over safety issues. There have been protests and work stoppages at food-processing and meatpacking plants, distribution centers, and supermarket chains around the country. And this may be only the beginning.

The potential for labor disputes will grow as businesses that have closed begin to reopen and contend with the type of issues that already have plagued essential businesses that are continuing to operate -- demands for protective equipment like masks and gloves, hazard pay, additional paid sick time and leave beyond what is provided by law, wage demands, disability accommodations, and, of course, a variety of real and perceived safety



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concerns. Some laid off or furloughed workers have lost their employer-sponsored and partially-subsidized health insurance. These are all issues around which unions historically have organized, and thus every decision made by an employer in response to this pandemic could be used by a union either now or in the future as part of an organizing campaign. Moreover, some unions have been decimated financially by the pandemic, so they may have an added incentive to increase their organizing efforts in hopes of replenishing their coffers.

The National Labor Relations Board temporarily suspended board-conducted elections on March 19, due to the “extraordinary circumstances related to the COVID-19 pandemic,” but **the Board has since resumed business**, although each Regional Director has been given discretion about how to handle petitions for representation elections. Some regions continue to postpone elections, others are conducting elections by mail ballot, and a few regions appear to still be holding hearings and on-site elections. So unions are not precluded from filing petitions for elections or trying to organize. Where the NLRB is conducting mail ballot elections, employers may find themselves at a serious disadvantage. Mail ballot elections are more vulnerable to the destruction of the required “laboratory conditions” than manual elections because, as a practical matter, the normal constraints on union campaigning when employees are casting their ballots are absent, which increases the potential for a union to directly influence the vote.

Moreover, in recent years, unions have become experienced in organizing using websites specially created for this purpose and communicating with employees by email. This electronic organizing has been facilitated by the new NLRB rules enacted in recent years that permit unions to collect and submit authorization cards electronically and require employers to provide unions with employee contact information (including email addresses) early in the election process. Shelter-in-place orders, travel bans, and closed facilities thus won’t necessarily insulate employers from union organizing, and those companies that continue to operate brick-and-mortar facilities remain targets for traditional union organizing tactics.

The NLRB’s election rules provide a very short window, sometimes as short as 18 to 24 days, between the filing by a union of the petition for an election and the actual election, during which an employer can organize and deliver a response. Even in industries that in the past have seen little union organizing, current circumstances may make such history an unreliable predictor of future vulnerability. Employers need to take steps now in order to be able to respond effectively and legally. What should you be doing?

1. **Statutory Supervisors.** You should identify your “statutory supervisors,” as defined by the National Labor Relations Act. The NLRA defines the term “supervisor” to include the following:

[A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Statutory supervisors are considered agents of the employer. If they violate the law, then the employer will be held responsible. So, it is critical to train them to avoid this. It also is important to train statutory supervisors to avoid unintentionally granting a union voluntary recognition without a secret ballot vote by the employees. Statutory supervisors may not be included in a bargaining unit or represented by a union. They are considered part of management. You therefore do not want to treat an employee as a statutory supervisor who isn’t, or vice versa. Identifying statutory

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supervisors can sometimes take time – time that you won't necessarily have once an election petition is filed. Identifying and training statutory supervisors should be done now as part of a proactive union avoidance plan.

- 2. Personnel Policies.** Once a union has begun an organizing campaign, you may not be able to put in place new policies or fix existing ones. Some of those policies can be critical to your ability to effectively operate your business while it is the target of a union organizing campaign, like those that address solicitation and distribution on your property, use of your email system, and bar non-employee visitors from your property. Policies that violate the NLRA are likely to be unenforceable, and attempting to enforce them will be an unfair labor practice. Nor may you be able to fix the policy once organizing has begun. Equally problematical is an attempt to implement a new restrictive policy or tighten an existing one. Thus, all your policies need to be reviewed for legal compliance before union organizing begins.
- 3. Communications Plan.** Every employer has the right to respond to a union's campaign claims and allegations. Some of these claims are standard in every organizing campaign, and a response can be prepared before it may be needed. Other claims can't be anticipated – for example, you may need to defend how you responded to this pandemic. Since there usually isn't much time between the filing of an election petition with the NLRB and the actual election, you should prepare as much of your communications plan as possible now.

One note of caution for businesses with between 500 and 10,000 employees who receive loans under the Coronavirus Aid, Relief, and Economic Security (CARES) Act: Section 4003 of the Act includes some serious restrictions concerning labor relations that a business taking a loan needs to consider. In particular, it provides that the business will need to “remain neutral in any union organizing effort for the term of the loan.” It is unclear exactly what “remain neutral” means. However, common provisions in neutrality agreements with unions prohibit the employer from expressing its opposition to being organized and sharing with its employees the downside of working for a union company. Thus, employees make a decision after hearing only the union's side of the story and not a balanced perspective, which may make them more likely to vote for union representation. “Remain neutral” also might mean that the employer must grant the union access to its property and employees, another common term of neutrality agreements. It could even mean that an employer must agree to a card check that would supplant a formal secret ballot election conducted by the NLRB. Such a process could give a union a great advantage by allowing it to win recognition based upon authorization cards or a petition. Although the legality of the CARES Act language may be subject to challenge, employers nevertheless should carefully evaluate the risks and benefits of taking such a loan and consider including terms to allow prepayment of the loan so as to end its “term” early and thus not be bound by the “remain neutral” provisions in the event of union organizing.

- 4. Proposed Bargaining Units.** Another significant factor in winning or losing a union election often is who gets included in the proposed bargaining unit and thus gets to vote. When a union files its petition with the NLRB for an election, it will ask to represent a particular group of employees – the “bargaining unit.” The NLRB's rules allow an employer to propose a different bargaining unit from the one the union requested, but you won't have much time to figure out what is the most advantageous bargaining unit for the company. This analysis is something that should be done

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beforehand based upon your understanding of your workforce and feedback from your supervisors and employee surveys. Don't wait until you have to state your position to the NLRB to begin figuring out what it should be, because you may be forced to rely on just your gut instinct. Instead, develop your position now as to the most advantageous bargaining unit for your company.

5. **Consultants.** Some employers use their own supervisors to communicate with employees about whether to vote for a union. However, it can be difficult to operate your company with many supervisors engaged in a union campaign. The alternative is to retain a consultant to help you conduct the communications program. A decision about whether to use a consultant should be made well before you face a union organizing campaign, since a consultant will be more effective if you already have been working together, as opposed to your waiting to hire someone when the election petition appears in the mail.
6. **Public Relations Plan.** If you don't have a relationship with a public relations firm, you may want to engage one now. Unions will often target their campaign as much toward the public and your clients, customers, vendors, and suppliers as toward the employees whose vote the union wants. Managing the impact of union organizing on these relationships may be critical to a company's ability to prevail.

Now is not the time to be complacent and assume that unions don't pose a potential threat to your company. Instead, this is the time to plan proactively so that you can respond effectively within the limits allowed by federal and state law. Attorneys in the **Labor Relations Practice Group** at Constangy are available to assist you with such planning.

For more information, check out our **Resource Center** for
FAQs and updates about the coronavirus.

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