“Click Here To Organize”— NLRB now Accepts E-Signatures on Authorization Cards

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The National Labor Relations Board (NLRB) has made union organizing by email and social media a reality. The NLRB’s General Counsel issued Memorandum 15-08 on September 1, 2015, stating that, “[e]ffective immediately, parties may submit electronic signatures in support of a showing of interest.” On October 26, 2015, the General Counsel issued Revised Memorandum 15-08 providing more detail and examples of how the new process will work. Employers should expect unions to take advantage of this groundbreaking development by using email and social media to expedite and expand the organizing process.

The History of Actual Signatures on Authorization Cards

The NLRB has long required that a union election petition be supported by a “showing of interest” demonstrating that at least 30 percent of the employees involved support the union. For decades, the showing of interest has taken the form of employee-signed “authorization cards,” pocket-sized cards stating that employees wish to be represented by a union for purposes of collective bargaining. Under the General Counsel’s new rule, there is now no need for union organizers to solicit actual signatures from employees.

Part of the Larger Picture

This move to electronic signatures is an outgrowth of the NLRB’s new “ambush” election rules, which took effect in April 2015. Under those rules, the speed of the organizing process has increased significantly and, for the first time, electronic filing and service of petitions is permitted by the NLRB. As part of that rulemaking process, the Board directed the General Counsel to issue guidance on whether electronic signatures should be accepted to support a showing of interest, and Memorandum 15-08 was issued in response to that directive.

What Types of Electronic Signatures Are Acceptable?

Multiple forms of “electronic signature” will be accepted by the NLRB, including “email exchanges or internet/intranet sign-up methods.” Options include a website that employees could access to complete an online “authorization form” or a form email message. An authorization supported by electronic signature must include the signer’s name, email address or social media account, telephone number, the actual “authorization” language to which the employee assents, the date of the submission, and the name of the employer. The submitting union also must provide a declaration identifying the technology used and explaining the identification controls within the system. Rather than signing an authorization card with a pen, employees will be offered the opportunity to affirm their desire for union representation by clicking a box.
Concerns About Authenticity

In accepting "electronic signatures," it is not clear whether, how, or what actions the NLRB will take to verify authenticity. The NLRB has long presumed conventional signatures to be valid absent significant evidence to the contrary, and the acceptance of cards has been at the NLRB's discretion with extremely limited opportunity for legal challenge. Under the procedures detailed in the Revised Memorandum, electronic signatures verified by an independent third party through public key infrastructure (PKI) technology will be accepted without further action. If the union gathering the electronic signatures does not use a PKI-based system, it will be required to send a "confirmation transmission" to each electronic signer confirming the information to which the signer assented, and inviting the signer to respond if anything is incorrect. The submitting union will be obligated to provide any responses to the confirmation transmission" to the NLRB along with the electronically signed authorizations. Sample forms for these submissions are provided as attachments to the Revised Memorandum.

In the General Counsel's view, "the contact information (email address, phone number or other social media account) is easy to obtain electronically from the signer and will enable the NLRB to promptly investigate forgery or fraud, where appropriate." While the process of verifying the authenticity of the showing of interest always has been murky from the viewpoint of employers, the potential for fraud and abuse of electronic processes is significant.

"Electronic Signatures" Reduce the Employer's Ability to Respond

It remains to be seen how unions will capitalize on this development, but the opportunity is tremendous. Many unions have existing websites, social media pages, Twitter accounts, etc., that provide a ready-made platform for soliciting employees by offering a hyperlink to the "electronic authorization form" for employees to complete. Likewise, a hyperlink easily could be included in a mass email to employees—a prospect that was enhanced greatly by the NLRB's recent decision in Purple Communications. In that case, the NLRB held that employees who have been granted access to company email systems must be permitted to use those systems for union organizing activity when on non-working time. If a union provides the hyperlink to one sympathetic employee, that employee could extend the invitation to all employees in a matter of seconds. In addition to electronic solicitations, more traditional means still may be used to direct employees to a union's "e-authorization" website, such as handbills and mailers. One union has already placed an advertisement in a local newspaper, inviting employees of a particular employer to visit a union website for the purpose of signing an electronic authorization card.

The General Counsel's decision to allow unions to organize electronically creates an alternative to traditional authorization card signing drives that is exponentially faster, very low in cost, and more "under the radar" than ever before. A union can now effectively solicit all of an employer's employees before the employer has any opportunity to respond, or perhaps even without the employer becoming aware that it has happened. A proactive approach to positive employee relations, including advising employees in advance of the ramifications of signing an authorization card and properly training supervisors, is now more important than ever.