ACWI ADVANCE

Is the NLRB Helping or Hurting Unions?

It may seem counterintuitive, but veteran labor attorney Harold P. Coxson of the law firm of Ogletree Deakins believes the National Labor Relations Board is not really helping unions organize nonumion employers with its barrage of pro-union decisions and rulemakings.

Unions will need more than just some organizing campaign regulations written in their favor to reverse their decades-long decline in dues-paying members, he contends.

"In the end, perhaps the best way for a union to gain members is not by contested election at all -- but rather by the employer that voluntarily recognizes a union based solely on authorization cards and public pressure," Coxson said in a recent communication to his clients.

Increasing union membership in certified or recognized bargaining units will be harder to achieve than the NLRB seems to think, Coxson said, although he agrees the ambush election rules, micro-bargaining unit decision and impending persuader will help unions. It just won't be enough for them to dig out of the hole they're in, he says.

Coxson said: "The most effective organizing methods – 'corporate campaigns,' global pressures on employers to voluntarily recognize unions and other new media meta-tactics -- may well lie beyond the reach of today's proposed rules."

In spite of six years of a sympathetic, union-friendly administration in Washington, DC, and a pro-union majority on the NLRB doing its best to promote union organizing, total union membership remained static in 2013, which saw a slight decline in public sector members and a slight increase in private sector membership.

Last year, unions represented 35.3% (7,210,000) of public sector workers, while private sector union density increased ever so slightly to 6.7% (up from 6.6% in 2012) with 7,318,000 members.

Overall, unions represented 11.3% of U.S. workers – the same as in 2012. Compare those numbers to union density and membership in 1983, which was 16.5% in the private sector and 20.1% overall.

More recently, when the United Auto Workers tried to organize the workers at a Volkswagen plant in Tennessee, the headlines were about the union's embarrassing inability to win the vote. (On the other hand, Tennessee was the state with the fastest rate of union membership growth in 2013).

But make no doubt about it, Coxson warned, the NLRB changes are helping the unions. Currently, unions win an overwhelming majority of representation elections – 65.2% of the 643 private sector elections held in the first six months of 2013, compared with 62.6% of 709 elections in the same period in 2012.

The changes unions sought from the NLRB impose are helping them win more elections, Coxson admitted. But he believes their decline has been so serious that even the board's help can't significantly improve their shrunken role in overall economy.

Food Safety Whistleblower Rules Create Employer Issues

OSHA has issued interim final rules for handling employment retaliation complaints under the Food Safety Modernization Act that will make it more difficult for employers to defend themselves against food safety-related whistleblower claims.

The FSMA prohibits any "entity" engaged in the manufacture, processing, packing, transporting, distribution, reception, holding or importation of food from discharging or discriminating against an employee who provides information about an FSMA violation.

A big issue for employers is that the rules place a bigger burden of proof on them. The law requires an employee to show only that the whistleblower activity was a contributing factor in the adverse action taken by the employer.

The employer, in turn, must demonstrate by "clear and convincing evidence" that it would have taken the same adverse action in the absence of the protected activity. If the employer meets this burden, the OSHA investigation will end.

To meet the "clear and convincing" evidence standard, an employer must show it is "highly probable or reasonably certain" it would have taken the same adverse action absent the employee's protected activity.

In addition, the employee burden is met if the complaint on its face, supplemented through OSHA interviews with the employee, alleges that facts and direct or circumstantial evidence exist.

The rules explain that the complaining employee can meet this burden simply by alleging the adverse action took place shortly after his or her protected activity, or even years later, if the employer did not have an opportunity to retaliate until then.

A full copy of the interim rules can be found here: www.gpo.gov/fdsys/pkg/FR-2014-02-13/pdf/2014-03164.pdf. Public comments are due by April 14.

Walmart Extends Grocery Home Delivery Experiment

Walmart announced that it is growing its purchase program called Walmart to Go that gives shoppers the option of placing an order online and picking it up at a nearby store for free, or arranging for it to be delivered at home for a small fee.

The giant retailer began the experiment domestically in 2011 in San Francisco and San Jose, CA, and last October expanded it to Denver.

Walmart is competing with Amazon.com, which began the AmazonFresh grocery delivery program in 2008 in its hometown of Seattle, and expanded it last year to Los Angeles and San Francisco.

Companies that have made a success of grocery home deliveries include FreshDirect in New York City and Peapod, which is owned by Royal Ahold, the parent company of the Giant Food and Stop & Shop supermarket chains.

The concept of grocery home delivery exploded during the Internet boom of the late 1990s but later almost disappeared when the bubble burst, taking with it a plethora of startups, and the $1.1 billion invested in Louis Border's Webvan, which built enormous distribution centers around the country before it went bankrupt in 2001.

This is probably why Amazon and Walmart have embraced a go-slow approach. An advantage Walmart has is that it already has exploited its extensive network of bricks-and-mortar stores to become the biggest grocer in the U.S.

Walmart appears to be committed to the home delivery/store pickup program, particularly following last year's disappointing store sales in the U.S. Also spurring growth is burgeoning consumer confidence in using Smartphones for purchases.

Walmart also has plans to significantly expand its Superama grocery home delivery service in Mexico. In Britain the company already owns a subsidiary called Asda that now operates the second-largest grocery delivery business in that country.

However, Walmart's Global Ecommerce President Neil Ashe said recently the concept isn't ready for a big rollout here because the U.S. doesn't have doesn't have the same customer density as Britain.

EPA Seeks Stronger Retail Hazardous Waste Regulation

The Environmental Protection Agency announced that it is gathering information for improving hazardous waste regulation in the retail sector.

Retailer hazardous waste violations are already a hot enforcement issue in areas like California where settlements against big box retailers and chain stores are regularly in the millions of dollars, including recent settlements of $8 million by K Mart and $9.9 million by Home Depot.

EPA said it is seeking information on what materials may be affected, the scope of the issues and the options that may exist.

Specifically, the agency is exploring episodic waste generation, transportation and reverse logistics, industry programs for handling hazardous waste, as well as employee training.

EPA already has conducted meetings with the Council on Safe Transportation of Hazardous Articles, National Retail Federation, Retail Industry Leaders Association, and several large retailers and consumer goods manufacturers.

Many of the comments the agency received at these meetings dealt with specific issues like managing hazardous waste pharmaceuticals and reverse distribution.

Retail industry hazardous wastes are regulated under the Resource Conservation and Recovery Act, which is enforced primarily by the states.

Last year EPA and the U.S. Department of Justice reached agreement with one of the largest retailers to resolve RCRA violations that allegedly occurred across the country.

EPA said that unidentified retailer committed to a comprehensive, corporate-wide waste management program to identify and manage all hazardous wastes generated throughout its retail operations.

It now has a waste management system that requires suppliers to submit product information to a third party for evaluating products to determine their regulatory waste status and transportation classification, as well as a reverse logistics system to track the disposition of all items going through the retailer's reverse distribution system.

Court Reminder: Watch Out for Incomplete Bills of Lading

If you offer interstate trucking services and want to limit your cargo liability you should take note of a recent court finding in favor of a shipper due to an incomplete bill of lading.

Although the case involved a rail shipper and CSX Transportation, the statutory requirements are nearly identical to trucking. As a result, if you are an interstate truck operator and you're not careful, a $25,000 liability could turn into a $550,000 liability, which is exactly what happened in this case.

CSX had damaged an electrical transformer worth about $1.3 million for the shipper, ABB Inc., which said the damage amounted to more than $550,000. The railroad contended its liability was limited to a maximum of $25,000 under the bill of lading because it had incorporated a reference to a $25,000 liability limitation in a separate price list

However, the court decided that the bill of lading was silent regarding the extent of CSX's liability. The space on the BOL labeled "rate authority," where a notation regarding rate and liability normally would be listed, was left blank.

Moreover, the BOL did not contain any references to an identifiable classification, a rate authority code, a price list, or any other indication that the carrier assumed only limited liability.

According to the court, it is not enough to rely solely on the boilerplate language contained in the uniform straight bill of lading, which reads: "Shipper hereby certifies that he is familiar with all the terms and conditions of the said bill of lading, including those on the back thereof, set forth in the classification or tariff which governs the transportation of this shipment."

The court decision shows that it also doesn't matter if the shipper drafted the bill of lading. It's the carrier who must make sure the BOL expressly states the liability limitation.

Gartner Predicts Corporate Information Crisis by 2017

The global high tech research firm Gartner Inc. predicts that, by 2017, nearly one third of top corporations will experience an information crisis due to their inability to effectively value, govern and trust their enterprise information.

Gartner pointed to the rise of big data, social networking and mobile interactions, coupled with an accelerating increase in the amount of structured and unstructured information enabled by cloud-based technologies flooding onto firms.

These developments are forcing organizations to focus on the enterprise information that is most relevant, value-generating and risk-related.

"There is an overall lack of maturity when it comes to governing information as an enterprise asset," said Andrew White, Gartner research vice president.

"It is likely that a number of organizations, unable to organize themselves effectively for 2020, unwilling to focus on capabilities rather than tools, and not ready to revise their information strategy, will suffer the consequences," he added.

Managing Data for Business Advantage

Business leaders need to manage information, rather than just maintain it, White stressed. "When we say 'manage,' we mean 'manage information for business advantage,' as opposed to just maintaining data and its physical or virtual storage needs."

White added, "In a digital economy, information is becoming *the* competitive asset to drive business advantage, and it is the critical connection that links the value chain of organizations."

The discipline of exploiting the various types of information created and managed inside and outside organizations is called Enterprise Information Management (EIM).

EIM is designed to enable people across an organization to share, manage and reuse information created in different applications and stored in different databases and repositories.

But these abilities do not, by themselves, help an organization, Gartner said. "IT leaders must design EIM initiatives so that sharing and reusing information creates business value, and the value created must contribute to enterprise goals."

Ultimately, an EIM program must help an organization identify which information is important to its success — not all information is, Gartner said. It must evaluate a great deal of information and determine what qualifies as enterprise information.

At present more than three-quarters of individual information management initiatives are isolated from each other within the same organization, Gartner analysts said. This leads to EIM not being realized, sustained or fully exploited, they asserted.

Gartner recommends IT leaders identify the crucial business outcomes that need improvement or that are being held up by poor information management.

Secondly, they need to determine the business processes and leaders who are most impacted by those outcomes, and use their findings to start setting priorities for a new EIM program.

Finally, Gartner said that IT leaders need to adopt a program management approach for EIM, to identify work efforts, resource commitments, stakeholder expectations and metrics for success.

When EIM begins focusing on linking projects, using assets and aligning organizational efforts, there also will arise demand for information governance, the researchers contend.

"With effective information governance, business users will understand the impact of poor quality data on the outcome of desired business processes," White said.

"This understanding leads to a desire, on behalf of the end user, to assure or 'steward' the data so that it supports their day-to-day business activities."

Warehouse Market Takes Off Like a Skyrocket

Warehouse space demand exceeded expectations in the last quarter of 2013 and absorption reached the highest levels on record, CoStar Group reported.

The commercial real estate research firm said net absorption totaling 58 million square feet of warehouse/distribution space was recorded within the 210 largest U.S. markets.

Meanwhile, CoStar said the 45 million square feet absorbed in the top 54 markets ranks as the sixth-highest quarterly reading on record – and the strongest since the recovery began.

For the full year of 2013, total warehouse absorption reached 162.6 million square feet in the top 210 markets, surpassing 2012's totals.

Almost every major market has seen year-over-year occupancy gains, led by a pair of Keystone State markets: Harrisburg and Lehigh Valley, PA.

"Right now, we're seeing vacancies on a national level lower than the entire period of the last cycle," said Rene Circ, director of industrial research. "You have to go back to before the bursting of the Internet bubble in the early 2000s to see vacancies for U.S. industrial space below that 7.6% number."

A total of 162 out of 210 markets showed positive net absorption for a total of 162.6 million square feet, 39% increase over the 117 million square feet in 2012. Dallas, the Inland Empire, Chicago, Atlanta, Columbus, Cincinnati and Memphis led the gainers, while Northern New Jersey lagged with 150,000 square feet of negative absorption.

In the last year, most markets started moving into a late expansionary phase, where most major warehouse markets began to see new construction exert pressure on occupancies, CoStar said.

Developers delivered 80.6 million square feet in 2013. However, the 82 million under construction at end of December has jumped to 98 million in the first few weeks of 2014. Four of the 18 big boxes larger than 900,000 square feet currently under construction, and 36 of the 50 buildings larger than 500,000 square feet, are being built on speculation.

CoStar added that California's Inland Empire and Dallas/Fort Worth markets are the strongest in terms of both demand and new supply.

About 9.4 million square feet was completed in the Inland Empire last year, and the 11.6 million square feet under construction at the end of 2013 has jumped to nearly 14 million since then. Houston, Chicago and Phoenix also show strong levels of new supply.

Asking rent growth was also very strong across most markets, with the national average of $4.81 per square foot up 2.5% over 2012. Growth was even stronger in the top 54 markets at 3.8%, the research found.

In certain supply constrained markets, year-over-year rent growth was eye opening, CoStar noted, including Edison, NJ at 9.6%; Los Angeles, 8.9%; Orange County, 7.9% and Miami, 7.5%. There is room for growth, the researchers said, because rents are still well below their peaks in most markets.

Retailers and logistics companies remain very active and ecommerce continues to drive demand for both pure plays like Amazon and traditional retailers like Walmart, which took 1.2 million square feet in the Lehigh Valley, and another 788,000 in the Dallas market.

"Modern space with proximity to population centers and a robust logistics infrastructure will dominate the industrial real estate sector in 2014," said Meyer, who attributed 40% of current big-box requirements to ecommerce – a sector growing globally by 20% annually as retailers develop real estate models to support omnichannel logistics.

Notable deals included Restoration Hardware's lease for 850,000 square feet in Dallas's Great SW/Arlington submarket. Companies recently leasing spaces that exceed 500,000 square feet include Excel Logistics and Deckers Outdoor Corp. in the Inland Empire, Sephora Americas in Baltimore, Ceva Logistics in Nashville, Trader Joe's in Chicago GENCO in Memphis and Owens & Minor in Chicago.

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