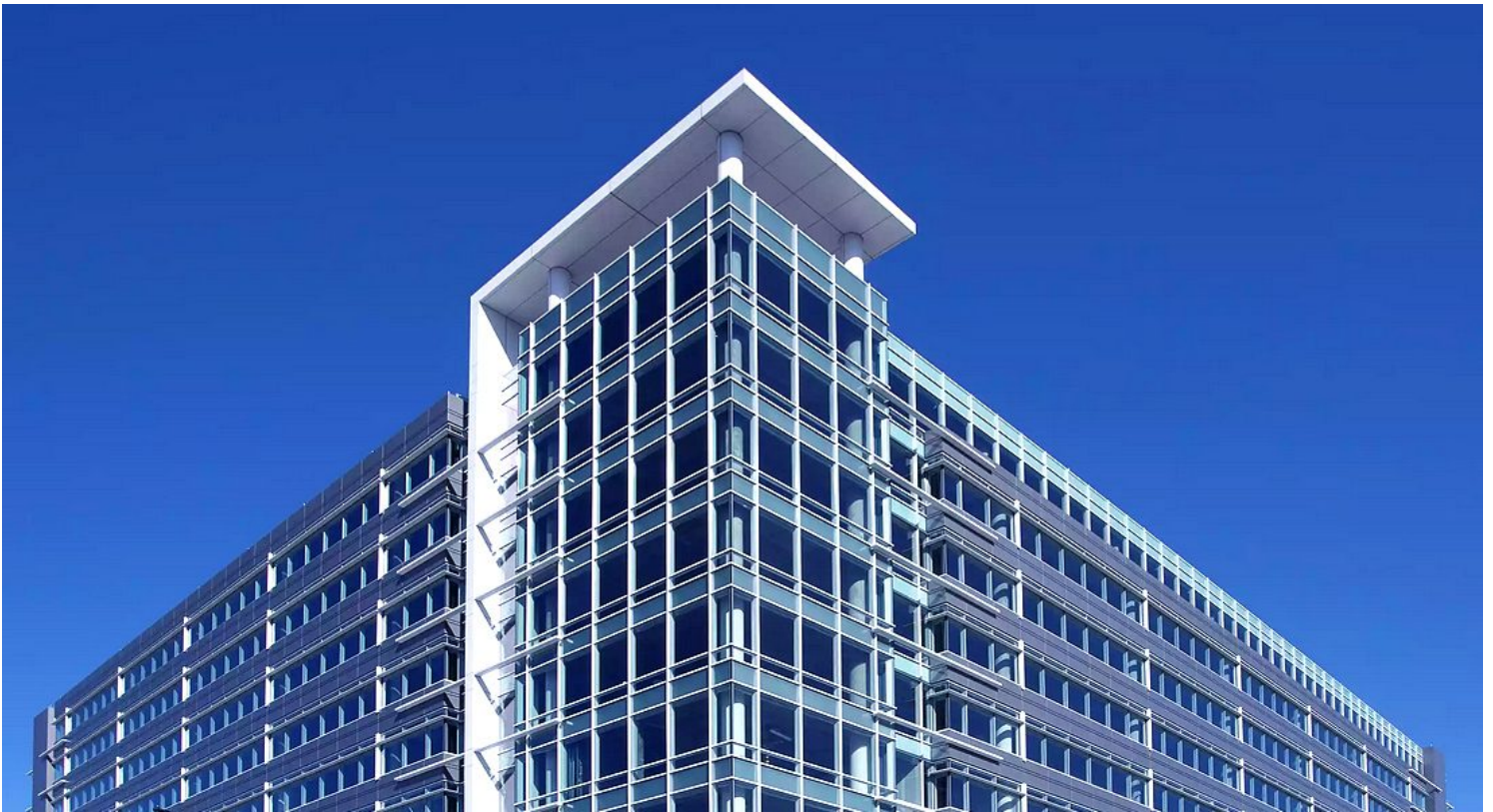


NEWS & INSIGHTS

Important end-of-year NLRB rulings came in bunches

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The National Labor Relations Board (NLRB) closed out 2022 with some important rulings of which companies with unions, or the specter of potential union organizing, need to be aware.

Union Organizing

After a recent NLRB ruling, employers will find it more difficult to challenge union organization with respect to a specific “subset” of their workforce.

In a 3-2 decision, the board reversed a Trump-era ruling and returned to the Obama-era standard related to the size of bargaining units within a workforce. This ruling shifts the burden to employers to show the similarities in employees not included in union organizing.

In 2017, the NLRB ruled that unions must show that workers in their proposed bargaining unit have “sufficiently distinct” interests from excluded workers of the bargaining unit. The recent ruling found that standard inhibited a worker’s right to organize along lines they choose.

Employers used the Trump-era ruling to challenge bargaining units within a company when an employee base was looking to organize a union limiting the size of the bargaining unit. The prevailing theory being the larger the unit, the less support a union may have within the overall workforce, and, as such, the greater the chance of thwarting a union organizing campaign. Union strategy has typically been to organize smaller units within the workforce to establish a presence at a business and later expand to the remaining workforce.

Cases that are pending currently before the NLRB will be subject to the new standard. Overall, employers are going to find it increasingly difficult to challenge a proposed smaller bargaining unit, resulting in greater union success. Employers challenging a union organization should reevaluate that challenge with their legal counsel, applying the current standard.

Compensation for Unfair Labor Practices

Another recent ruling in December 2022 from the NLRB affords workers greater protection in the event of an employer’s unfair labor practice. This ruling provides that, in the event a violation is found, an employer must now compensate workers for all “direct or foreseeable” harms that stem from the violation.

Typically, an employee’s remedies with respect to an unfair labor practice were limited to backpay and reinstatement where appropriate. With this new ruling, an aggrieved employee would now be entitled to “make-whole” relief, which could include, “at a minimum, these direct or foreseeable pecuniary harms that are a consequence of a respondent’s unfair labor practices.” While this “make whole” relief would not encompass “pain or suffering,” or “emotional distress,” it could include “front pay, compensation for legal fees, or heightened bargaining remedies.”

This ruling will result in a more punitive financial penalty on an employer deemed to have committed an unfair labor practice. Unionized companies must now tread carefully, and weigh explicitly, the potential significant financial implications associated with a course of action that ultimately could be deemed to violate the National Labor Relations Act.

If your company has any questions on any of these new rulings or how they could affect your company handles union-related issues, please [contact me](#) or [Steve Fleury](#) in the [Saxton & Stump Labor and Employment Group](#).

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