Employee Grievance Committees are Problematic Under NLRA

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Practice Area: Labor and Employment

In the wake of a dramatic rise in employee litigation, non-unionized employers are experimenting with alternative methods of dispute resolution, including the employee grievance committee. Although progressive and efficient, employers may have difficulty legally implementing such committees under the National Labor Relations Act ("NLRA").

An employee grievance committee, composed entirely or in part of employees, hears an individual employee grievance and then issues either a binding or an advisory decision. This process can be useful to an employer in several ways.

First, employee participation in the decision-making process encourages employees to turn to this comparatively inexpensive forum before going to court. Second, an employee committee's decision may carry more weight with the aggrieved employee or bolster the employer's case if the employee later brings suit. Finally, employees may view traditional union representation as less necessary if employees already participate in the settling of grievances.

An employer's creation of an employee grievance committee can easily violate the NLRA, however. If a committee of employees meets the definition of "labor organization" under the NLRA, the employer is prohibited by law from "dominating" it. Domination likely occurs if the employer organizes the group, provides facilities for its meetings, and pays members for attendance time.

The NLRA defines a "labor organization" as any organization in which employees participate and which exists, at least in part, for the purpose of "dealing with" the employer concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work. Thus, the key question is whether an employee committee "deals with" the employer.

Appellate case law has explained that "dealing with" is broader than the act of collective bargaining, but narrower than mere communication between the employer and employees. "Dealing with" involves proposals from the employee committee coupled with real or apparent consideration of those proposals by management – not just on one occasion, but as a pattern or practice over time.

Illustrative Case Law

In a recent decision, *Keeler Brass Co. v. Puckett*, the National Labor Relations Board ("NLRB") struck down an employee grievance committee established by the employer, who had organized an employee grievance committee to hear grievances, discuss tentative decisions with the employer, and issue final decisions. The board held that the committee was a labor organization unlawfully dominated by the employer.

A useful aspect of the *Keeler Brass Co.* decision is its discussion of two previous cases in which employee grievance committees were not found to constitute labor organizations because they had full grievance-handling authority and thus did not have to "deal with" management.

In the first case, *Mercy-Memorial Hospital and Local 79*, the employee committee, heard grievances and then submitted its findings to the personnel committee for a final decision. The employee committee did not negotiate or discuss its decision with the personnel committee; instead, the personnel committee presented its final decision directly to the employee. This avoided the bilateral mechanism that constitutes "dealing with" the employer.

In the second case, *Sparks Nugget, Inc., and Hotel and Restaurant Employees*, the employee council existed on an ad hoc basis, consisting of one employee member and two management members. This council held the power to issue a final and binding decision.

Although the council's own deliberations might appear to be negotiations between the employer and employees over grievances, the board found that the composition of the committee and the form of its deliberations did not constitute "dealing with" the employer.

Recommendations

Employers wishing to establish lawful employee grievance procedures should fashion their programs after either of the two lawful models discussed above. Both *Legal Update Supplements* allow management to utilize employee input while retaining control over resolution of the grievance. Since both models involve overt management participation, however, they may be less effective at reducing employee desire for unionization.

Regardless of the grievance-committee model an employer adopts, the employer should remember a few basic principles. First, if the committee is established immediately prior to a union election, it is more likely that it will appear to function as a substitute for a union and will be found by the NLRB to constitute a labor organization.

Second, the committee should not be used as a vehicle for employees to propose changes in terms and conditions of employment to which management responds. Informal rap sessions in which the employer and employees gather to discuss policies would not fit this pattern.

Above all, an employer should keep in mind that the line between lawful and unlawful employee committees has not caught up with modern participative management techniques. Whether or not the NLRB will yield its aging union-protection principles to considerations of efficiency and progress is an issue for the future.
