

WERC Changes Legal Standard for Raffles and Prizes Related to General Employee Bargaining Unit Elections

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In an April 14, 2021 decision, the Wisconsin Employment Relations Commission (the "WERC") departed from a nearly 30-year-old legal standard governing raffles conducted during general employee bargaining unit elections and adopted the current standard used by the National Labor Relations Board (the "NLRB"). In the *Matter of the Petition of: United Lakewood Educators-Kettle Moraine Chapter, WEAC Region 7*, Dec. No. 38585-A (WERC, 4/21).

Specifically, the WERC adopted the standard created by the NLRB in 2001 via *Atlantic Limousine*, which bars employers and unions from conducting a raffle during an election if: (1) eligibility to participate in the raffle or win prizes is in any way tied to voting in the election or being at the election site on election day; or (2) the raffle is conducted at any time during a period beginning 24-hours before the scheduled opening of the polls and ending with the closing of the polls. This bright-line standard is a significant departure from the WERC's prior standard under *Dairyland Greyhound Park, Inc.*, Dec. No. 26851-H (WERC, 2/93).

Under *Dairyland Greyhound Park, Inc.*, when determining whether an election must be set aside due to improper outside influence by a union or employer, the WERC assessed whether the conduct in question rendered it improbable that the voters were able to freely cast their ballot. The WERC historically applied this standard from the perspective of an objective outsider when determining whether an election must be set aside. The WERC looked toward a variety of factors, such as whether the voting process was truly secret, the value of any gifts or prizes involved, and the salaries of the employees involved. By contrast, the NLRB's standard, as enunciated in *Atlantic Limousine*, provides for an outright prohibition on raffles (and other instances of outside influence) during an election period.

In its April 14, 2021 decision, the WERC indicated it adopted the *Atlantic Limousine* standard because the WERC, although not bound to follow the NLRB, has historically looked to the NLRB's legal standards, and because the *Dairyland* standard was unworkable when compared to the bright-line standard set forth under *Atlantic Limousine*.

What Should Employers Do Moving Forward?

1. If an employer chooses to conduct a raffle or award prizes near the time of a general employee bargaining unit election, the employer should be clear the raffle or prizes are entirely unrelated to participation in or a presence at the election. The employer should also take care to avoid underlying conduct that causes the raffle or prizes to appear connected to an election.
2. An employer should likewise monitor union raffles or prizes, including correspondence related to those raffles or prizes, to ensure a union is not tying the prizes or raffles to an upcoming election for a general employee bargaining unit. If evidence of improper conduct is discovered, preserve the evidence so an objection to the election can be filed, if appropriate.
3. Understand that all raffles conducted within 24-hours before the scheduled opening of the polls and ending with the closing of the polls are now strictly prohibited, regardless of whether conducted by an employer or union, and regardless of any other factors.
4. Employers should provide high-level employees, such as department heads, with training regarding conduct to both avoid and look for with regard to workplace raffles and prizes. Employers should also train high-level employees to preserve any relevant evidence related to perceived election misconduct and to promptly report any such misconduct up the chain-of-command. An employer only has eight days following an election to object to the election results, so any preparation that can be done ahead of time will benefit the employer.
5. Be mindful that a union member who is engaging in improper election conduct may be engaged in protected, concerted activity, especially if the election conduct is not eventually deemed improper by the WERC. Employers should contact legal counsel before implementing any disciplinary action in response to perceived improper election conduct.

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