A Timely Analysis of Legal Developments

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New Employee Privacy and Union Voting Rights Laws in Virginia Go Into Effect July 2013

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Virginia has enacted two new laws that are intended to enhance employee protections, particularly during union organizing drives in the Commonwealth. One law guarantees the right to vote in a secret ballot election. The other law limits those situations in which an employer may be required to disclose certain information to third parties about current and former employees. Both laws, which are effective July 1, 2013, were spearheaded by Delegate Barbara Comstock, who characterized them as "...a victory for the rights of workers and for protecting employees in the workplace."

The "Secret Ballot Protection Act" guarantees voter privacy in union elections. It states that "in any procedure providing for the designation, selection, or authorization of a labor organization to represent employees, the right of an individual employee to vote by secret ballot is a fundamental right that shall be guaranteed from infringement." This law is viewed as a response to federal legislation, proposed in the past, to allow unions to organize a workforce by simply obtaining signatures from a majority of employees on authorization cards—a procedure known as "card check"—instead of holding secret ballot elections. Proponents of the law have generally claimed that the secret ballot is crucial to insulating employees from intimidation and coercion in union elections, whereas supporters of card check argue that it is a fair procedure that shelters employees from employer persuasion and blocking tactics and provides a quicker avenue for organizing.

The second bill, entitled "Keeping Employees' Emails and Phones (KEEP) Secure Act," carries the title and tracks the language of a bill introduced in the U.S. Congress in February 2012 by Rep. Sandy Adams (R-FL), which would have prevented the National Labor Relations Board (the NLRB or Board) from implementing a rule requiring employers to provide to a union or the Board employee telephone numbers or email addresses. The federal bill did not pass. The Virginia law provides that employers cannot be "required to release, communicate, or distribute" to third parties personal identifying information (defined as home and mobile telephone numbers, email addresses, shift times and work schedules) about current or former employees, unless required by federal or state law, ordered by a court of competent jurisdiction, required pursuant to a warrant, or required by a subpoena or discovery in a civil case. These exceptions may largely swallow the rule, particularly if the NLRB changes the election procedures under the National Labor Relations Act (the NLRA) to include, among other things, a requirement that employers disclose employees' phone numbers and email addresses to labor organizations once an election has been ordered.

Virginia is a right-to-work state, which means a Virginia employer cannot require employees to become or remain members of a labor organization as a condition of employment or continuation of employment. Therefore, Virginia employers may not enter into a "union shop" agreement with a union. Virginia law also forbids employers from mandating that employees abstain from membership in a labor organization. These two new laws further establish an environment that can be viewed as protective of employees' freedom to choose union or nonunion status.

Anticipated Legal Challenges

Labor unions and the NLRB are likely to challenge these laws, particularly the Secret Ballot Protection Act, on preemption and other grounds, which may have the unintended consequence of turning Virginia into a target for union organizing activity in the near term. The Commonwealth is not the first state to adopt laws that provide such rights, and this would not be the first time the NLRB has challenged the validity of such legislation.

In *NLRB v. Arizona*, the agency sought a declaration that a constitutional amendment in Arizona guaranteeing workers the right to vote by secret ballot on whether to join a union was preempted by the NLRA and the Supremacy Clause of the United States Constitution. The District Court granted summary judgment to the state of Arizona, ruling that the court was unable to conduct the balancing test for preemption because there was "a basic uncertainty about . . . how [the law] will be enforced" and thus it would be "inappropriate" to assume the law would be interpreted and enforced in a manner that would conflict with the NLRA. This case has not been appealed. The NLRB previously stated its intent to bring similar legal action in South Dakota, Utah, and South Carolina, which have approved similar amendments, but it has not yet done so. Therefore, it remains to be seen how the courts in these jurisdictions will approach legal challenges when they arise.

KEEP is an apparent response to an NLRB representation election rule that was proposed in June 2011, initially requiring employers to provide a final *Excelsior* list that includes employees' names, addresses, telephone numbers, and email addresses to the union within two days after the representative election is scheduled. Although the NLRB historically has held that unions engaged in organizing campaigns are entitled to employee lists, they have only required that employers provide names and addresses of all eligible bargaining unit employees after an election is scheduled. The proposed rule would have significantly expanded the amount of personal information that employers are required to provide. The final rule, which was issued in December 2011 and was subsequently enjoined, does not contain these enhanced provisions regarding *Excelsior* lists; however, NLRB Chairman Mark Pearce has stated his intention to continue seeking these additional rule changes. An update on this issue, which was recently addressed at a Senate HELP Committee Hearing, can be found here.

While KEEP's strict definition of "personal identifying information" does not conflict with the existing *Excelsior* rule, if the NLRB changes this rule as proposed, KEEP could become the subject of a preemption battle, focusing on whether such disclosures are "required" by federal law and therefore within the exemption.

Recommendations for Virginia Employers

Pending the outcome of any court challenges, employers in Virginia should consult with counsel to ensure that their practices and policies comply with these new laws, particularly before recognizing a union based upon a card check. Employers also should monitor developments at the NLRB and in the courts, and revise their policies concerning the confidentiality of personal data and work schedules, and access to personnel files, and similar policies commonly contained in employee handbooks and manuals to ensure information is not released in violation of KEEP. Employers also should provide training to human resources professionals who are charged with overseeing employee files to ensure that they understand these new obligations.

Additionally, employers should be mindful that KEEP does not prohibit the disclosure of private employee data if an exception does not apply; it merely states employers cannot be "required" to release such information. Therefore, employers have the discretion to decide their internal policies regarding voluntary disclosure of employee data in circumstances not covered by the Act. That said, KEEP articulates a public policy of the Commonwealth of Virginia, which means it may be cited by plaintiffs' attorneys in negligence cases and public policy wrongful discharge cases, among others. It will be important to ensure that human resources managers are aware of the terms of the statute.

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