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employer makes a union's racial prejudice the dominant theme of a campaign, it is grounds for setting aside an election.

Employers should keep in mind that the NLRB has approved strong appeals by unions to the class consciousness of minority employees. In one case, a union organizer remarked to employees that if African-American employees did not stick together and the union lost the election, all African-American employees would be fired. The NLRB found the union comment lawful, reasoning that the statements were germane to the larger issue of advantages and disadvantages of the union.

In short, most employers in the United States now have an acute awareness of the impact racial issues can have on their business and workplace. Few, however, fully appreciate that unions can use the current state of the nation as a significant campaign platform among employees who perceive racial bias at work. Union-free strategies for 2020 are incomplete without taking a deep look at possible racial issues at your worksites and remedying them before an onset of organizing activity. ■

COVID-19's Effect on Labor Relations

Employers in the United States are nearly six months into the pandemic. To say that companies have faced unprecedented challenges is something of an understatement. As states continue to emerge from various levels of shutdowns and businesses move forward, unions see the pandemic as an opportunity to bring in tens of thousands of workers who have never previously engaged in protected concerted activity. Unions report they have had a surge in calls from workers who want information about organizing. They are even holding meetings on Zoom to reach the many people working from home.

A call center operator in Lawrence, Kansas, who supported a union before the pandemic said interest in organizing was increasing, as workers believed the employer had been much too slow to protect the center's more than 400 workers from COVID-19. This included not ensuring that workers were six feet apart, provided with personal protective equipment, and assured of emergency sick leave. As a result, in April alone, membership nearly tripled in an already established call center committee that includes many union supporters and had been calling for increased pay and benefits.

The virus has stirred new organizing all over the country. In Chicago, for example, it spurred new organizing among Instacart workers. Several were upset that the company had failed to provide PPE or hazard pay and that it was too difficult to get paid sick leave. Interest in organizing and participating in a strike spread to stores across the country.

In March, there was a nationwide strike that included both in-store shoppers (whom Instacart considers employees) and Instacart food deliverers (Instacart says they are independent contractors). The United Food and Commercial Workers International Union asserts that the food deliverers should also be considered employees.

“The pandemic led to the strike, and the strike led to this opportunity to organize workers all over this country,” an Instacart worker told *The Guardian*. “No question the pandemic has opened up a whole new dynamic in the labor movement.”

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Because the rule did not expressly make this intent clear, however, the NLRB also examined the company's business justification for the policy. It held that the company had a compelling interest in protecting information regarding hotel guests and that those interests outweighed the impact of the rule on Section 7 rights.

The Board concluded by advising that it was not issuing a "broad conclusion" about the lawfulness of such rules and that Category 2 analyses would continue to be applied in similar future fact patterns. The decision is not a green light to prohibit participation in government proceedings. It is, however, an important reminder not to make summary conclusions about what may be lawful. Even a rule that would seem on the surface to be unlawful can pass muster before the NLRB, particularly in light of its current Republican-leaning membership. Employers can, and should, take deep dives on rules that can help protect legitimate business interests... even if such rules might also have some relatively lesser impact on employees' Section 7 rights. ■

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A UFCW organizer said at Whole Foods, Trader Joe's, and other supermarkets, the union is "working with activists to engage in rebellion and protest that may lead to a permanent organization and collective bargaining."

The labor movement's hopes are running sky high with leaders of organizations that fight for low-wage workers predicting that the COVID-19 crisis will change how the public views corporate America and that working people will not continue to accept the way they are treated.

In the meantime, however, according to *The New York Times'* reporting, some employees contend they have been fired for complaining about their pandemic working conditions. At an Amazon warehouse in Staten Island, N.Y., employees claim they were fired after complaining about working in close proximity to each other during the pandemic. New York Attorney General Letitia James is looking into whether Amazon violated federal worker safety laws and the state's whistleblower protections when it fired one worker. Amazon said it respects employees' right to protest but that those rights "do not provide blanket immunity against bad actions."

In Louisville, an employee at a Trader Joe's supermarket said he was fired after he created a Facebook page to discuss working conditions. Trader Joe's chief executive officer sent all employees a letter opposing labor unions and calling union organizing "a distraction." A spokeswoman for Trader Joe's denied the worker had been fired because of his Facebook post.

Sharon Block, a former National Labor Relations Board member appointed by President Barack Obama, called employers' response "a continuation of behavior that has become all too common, of employers being willing to use increasingly aggressive tactics to stop unionizing."

There were similar conflicts during the 1918 influenza pandemic. Organizers were attracting employees at steel plants and big industrial companies like General Electric. Local officials, at the behest of big companies, started banning meetings because of the risk of workers infecting one another at such gatherings. GE managed to stall union organizing drives.

The very essence of the National Labor Relations Act—protecting the concerted activity of employees—gives rise to another area of concern for employers. Unfair labor practice charges before the NLRB are often filed by unions but can also be filed by individual employees regardless of their status with respect to union representation. The NLRB has started to receive such charges specifically related to COVID-19 issues. In one instance, a tea shop is alleged to have unlawfully replaced several employees who organized themselves to negotiate COVID-19 safety precautions. In another case, a poultry processing plant is alleged to have unlawfully required employees to attend a captive audience meeting that failed to provide for adequate social distancing.

Other NLRB charges have been made where employers are alleged to have used the need to lay off employees because of COVID-19-related business shutdowns as a pretext to unlawfully terminate known union supporters. In other cases, employees charge they were terminated because they went on strike about inadequate workplace protection from COVID-19.

COVID-19 has also spurred employees who were considering unionization to file petitions for elections with the NLRB. This includes employees of two Missouri health care providers. The Service Employees International Union had been working for more than a year to organize these employees. The submission of a petition for a vote came shortly after the workers had delivered a petition to hospital administrators for hazard pay due to their high exposure risks during the pandemic.

Whether the surge in employee activism will have long-lasting effects depends in part on how employers respond. Amazon fired four outspoken union supporters and, as mentioned earlier, the CEO of Trader Joe's sent employees a letter opposing a union. Some

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companies have brought in consultants to explain the downside of unionization to employees. Reportedly, one of their strongest arguments is that with the coming recession and so many people out of work, there will be hundreds of candidates to replace the current employees should they decide to vote for a union.

As businesses reopen with the virus remaining omnipresent, employee concerns about it are likely to grow. While health and safety requirements are often at the top of the minds of HR executives in this situation, union-free employers should be mindful of the NLRA's protection of concerted activities. Most protests of the way the employer responds to the virus are protected because they concern the safety of working conditions. Employers are generally in a better position if they consider the threat of unfair labor practice charges before taking any action against employees' COVID-19-related complaints. Such charges can not only cause legal headaches, but they can also provide material to a union looking for a compelling anti-employer message for anxious employees. ■

More than 50 Union Corruption Cases in First Half of 2020

Stories about corrupt, criminal union officials who are caught embezzling dues payers' money can be very helpful in convincing employees that their own money could be at risk of theft should they choose to become union members.

Discovering this type of information is abetted by a U.S. Department of Labor website that tracks all of the union-related investigations that have resulted in "criminal enforcement actions." The most recent report is from January 1–June 30, 2020. According to the website, as of June 30, 2020, there were 54 "criminal enforcement actions" involving union officials since January 1. Most cases charge embezzlement and/or wire fraud and/or conspiracy to defraud the United States.

The biggest union fish who was investigated by the DOL's Office of Labor-Management Standards and has now admitted to his crimes in the first half of 2020 is former United Auto Workers President Gary Jones.

Here is how the DOL report describes that case:

On June 3, 2020, in the United States District Court for the Eastern District of Michigan, Gary Jones, former President of the United Auto Workers (UAW), located in Detroit, Mich., pleaded guilty to one count of conspiracy to embezzle union funds and use a facility of interstate commerce to aid

racketeering activity, in violation of 18 U.S.C. 371, 1952(a)(3), and 29 U.S.C. 501(c), and one count of conspiracy to defraud the United States, in violation of 18 U.S.C. 371. During the course of the conspiracy, from at least 2010 and continuing through in or about September 2019, Jones embezzled and conspired to embezzle approximately \$1,000,000 in union funds by submitting fraudulent vouchers to the UAW that misrepresented the destination and purpose of the expenses and by using unauthorized checks to divert funds from the UAW Midwest CAP. The guilty plea follows an investigation by the OLMS Detroit-Milwaukee District Office, the Department of Labor's Office of Inspector General, the Federal Bureau of Investigation, and the Internal Revenue Service – Criminal Investigations.

In addition to the above, it's known that Jones is part of a wide-ranging federal investigation that has involved at least 15 others. He has agreed to cooperate with the investigation. Jones admitted that he took more than \$1 million in union funds. He used the money to live beyond his means, purchasing vacations, golf outings, clothes, liquor and high end meals. Prosecutors said Jones spent \$60,000 just on cigars and smoking paraphernalia.

He is scheduled to be sentenced Oct. 3. Federal guidelines call for a prison sentence of 47 to 56 months.

Many Unions Involved

In addition to the UAW, other unions involved in these case reports include the Teamsters; Service Employees International Union; Machinists; Operating Engineers; Laborers; Steelworkers; Electrical Workers; United Food and Commercial Workers; Sheet Metal, Air, Rail and Transportation Workers; Communications Workers of America; Roofers and International Longshore and Warehouse.

Here are a few more case reports from June alone:

On June 23, 2020, in the United States District Court for the District of New Jersey, Angel Luis Garcia, former Financial Secretary of Amalgamated Transit Union (ATU) Local 1614 (located in Dover, N.J.), pleaded guilty to one count of embezzling union funds in the amount of \$117,000, in violation of 29 U.S.C. 501(c).

On June 12, 2020, in the United States District Court for the District of North Dakota, Chad Michael Waldoch, former Secretary-Treasurer of Sheet Metal, Air, Rail and Transportation Workers (SMART) Local 980 (located in Fargo, N.D.), pleaded guilty to one count of embezzling union funds in the amount of \$107,706, in violation of 29 U.S.C. 501(c). ■