All Rise!

A Legal Update on Employment Issues Affecting the Newspaper Industry
February 19, 2020
Agenda

01 Labor Developments
Spotlight on Union Organizing in the Nation’s Newsrooms

02 Litigation Pain Points and Defenses
Ways to Optimize Risks

03 New and Pending Legislation to Watch
Labor Developments: Spotlight on Union Organizing in the Nation’s Newsrooms

Michael J. Rybicki, Partner, Seyfarth Shaw LLP
Update on Organizing

• An Unprecedented Level of Organizing Activity

• New Trends
  – Impacting Newspapers Historically Not Receptive to Organizing
  – Internally Generated Activity
Update on Organizing: Union Organizing Successes

The following is a partial list of recent successful newspaper organizing efforts by the NewsGuild:

- Los Angeles Times
- Morning Call (Allenton)
- Missoula Independent
- Lakeland Ledger (FLA)
- Sarasota Herald-Tribune
- The Florida Times-Union
- Chicago Tribune
- Hartford Courant
- The Virginia Piolet and Daily Press

- Omaha World Herald
- Southern Illinoisan
- Daily Hampshire Gazette
- Arizona Republic
- Columbian (WA)
- Daily Progress (VA)
- Miami Herald
- Caspar Star-Tribune (W)
- Newport News Daily Press

- The NewsGuild has also successfully organized magazines (e.g., Fortune Magazine, New York Magazine) and a number of digital producers (e.g., Law 360, BuzzFeed).

- Additionally, the Writers Guild of America (East) has been even more successful than the NewsGuild organizing digital producers (e.g., Huffington Post, Salon, The Intercept, Gawker, Thrillist, Gizmodo Media Group, ThinkProgress, Al Jazeera, etc.).
Update on Organizing: Millennials and Unionization

• Tech savvy millennial content producers are not impervious to unionization

• Millennials are at the forefront of organizing efforts

• Organizing includes digital operations
Update on Organizing:
Changes at the NewsGuild – Millennial Ascendant?

Prior Guild President
Bernie Lunzer

New Guild President
Jon Schluess
While union organizing efforts frequently are precipitated by property-specific issues, a number of common threads have emerged (although not in every instance):

- Employee frustration over extended periods with few, if any, pay increases coupled with an escalating cost for benefits;
- Employee anger over “lavish” executive pay and/or “excessive” returns for investors;
- A belief that employers are no longer committed to “quality” journalism, frequently coupled with the belief that the only thing that matters to owners/investors is short-term profits, regardless of whether this is “gutting” the news organization;
- Employee anxiety over constant reductions in staff; and
- Employee concerns with respect to a change in ownership.
Update on Organizing:
Some “Millennial” or “Trending” Issues…

• Diversity in staffing and news coverage

• Assertions of pay disparity
  – “Transparent and equitable compensation”

• Reporter “integrity” / “editorial freedom”

• Allegations of harassment / #MeToo
Update on Organizing:
All of the Old Issues & One “New” BIG ONE
Update on Organizing: Warning Signs

• **WARNING:** Management may not see any warning signs unless it looks really hard for them.

• **Stealth Campaigns:** Campaigns are being conducted in a manner designed to minimize the detection of organizing activity before the Guild is prepared to disclose it.

• Coupled with the “ambush election” rules put in place by the Obama National Labor Relations Board, a successful stealth campaign may leave an employer with as little as three weeks to respond to union organizing.
• Interaction with Guild-represented employees from other papers (e.g., on news assignments, at conventions, interactions with former co-workers etc.).

• The role of the internet.

• The grapevine goes dead.

• Group meetings away from the workplace.

• The emergence of new leaders.

• Pro-company employees suddenly ostracized.
Update on Organizing
Employer Election Scorecard: Not So Good

• “Traditional” Employer Campaigns have NOT been working.

• Once a petition is filed or a demand for recognition is made, winning is extremely difficult.

• The importance of earlier detection.
Update on Organizing: Frontline Supervision

• *Trusted* supervisors and managers must be made aware of the early warning signs.

• They must be cautioned not to try to handle things on their own or “keep things quiet.”

• Don’t hope the problem will just go away – it won’t.

• They need to understand they are immediately to report signs of possible union activity up the chain of command.
Update on Organizing: What Should Your Organization Be Doing Now?

- Cornerstones of effective union avoidance programs:
  - To be open and truthful to employees
  - To communicate as often as appropriate
  - To encourage and be responsive to employee feedback
  - Employee perceptions of fairness

- Recognizing the challenges facing the industry – where the second largest newspaper chain has filed for bankruptcy and the family that has owned it for more than 150 years will be losing control – management must nonetheless be sensitive to the issues that result in organizing elsewhere.

- Management needs make hardheaded assessments with respect to its vulnerabilities to organizing and have a game plan for dealing with it.

- Management needs to be vigilant to signs of union organizing and move immediately when those signs are detected: Don’t hope the problem will just go away – it won’t.
Update on Organizing – If An Employer Loses: Collective Bargaining

• Whether newly organized or in a longstanding relationship, Employers need to take a fresh look at what must change in labor agreements.

• The industry has fundamentally changed and Employer proposals and agreements must change as well to address new industry realities.
Conclusion: Unprecedented Challenges

- The adaption of 20th century organizing to the 21st century workplace has seen successful organizing drives at an unprecedented number of newspapers and prominent digital media outlets.

- As observed elsewhere, “it calls into question all those confident predictions about the inevitable decline of unionism in the information-age economy.”

- In addition to all of the other challenges media companies face in today’s difficult business environment, the risks of union organizing of news operations has never been greater.

- Avoiding unionization – or dealing with it where it occurs – will require creative approaches recognizing the new industry realities.
Litigation Pain Points and Defenses: Ways to Optimize Risks

Richard B. Lapp, Partner, Seyfarth Shaw LLP
Independent Contractor Issues

• Inconsistent Patchwork of Legal Requirements
  – Common Law of Agency
  – Economic Realities
  – ABC Test

• Risk Minimizers
  – Re-evaluating Existing Relationships
  – Strong Independent Contractor Practices
  – Secondary Defenses
  – Mandatory Arbitration Agreements (With Class Waivers)
  – Waiver and Release Language
State Wage and Hour Litigation

• Hot Topics
  – Exempt Status
  – Off-The-Clock Work
  – Accurate Time Records

• Proactive Approaches to Minimizing Risks
  – Arbitration Agreements
  – Audits
  – Training
  – Documentation
Equal Pay Litigation

• What is Equal Work?
  – Reporters
  – Photographers
  – Editors

• Proving Legitimate Reasons for Differences in Pay

• Prior Salary – The Risks

• Documentation

• Audits
New and Pending Legislation to Watch

Camille A. Olson, Partner, Seyfarth Shaw LLP
Federal

Employment Discrimination

• Pregnant Workers Fairness Act (PWFA, H.R. 2694)
  – Expands accommodation obligations to pregnant workers

• Protecting Older Workers Against Discrimination Act (POWADA, H.R. 1230 & S. 485)
  – Lessens burdens of proof of plaintiffs

• Paycheck Fairness Act (H.R. 7 & S. 270)
  – Bars salary history inquiries
  – Eliminates, in effect, differences in pay except in extraordinarily narrow circumstances amongst workers performing equal work
Federal

Union Organizing

• Protecting the Right to Organize Act (PRO Act, H.R. 2474 & S. 664)
  – Expands reach of the NLRA
  – Narrows Employee and Employer Rights in Favor of Expanded Union Rights
  – Expands Litigation and Remedies
State Developments

• Equal Pay Obligations and Prohibitions
  – Disclosure of Information
  – Relevant Factors Other than Sex
  – Prohibited Inquiries

• Non-Harassment
  – Training
  – Postings
  – Policy Revisions

• Independent Contractor – State Laws
  – AB 5 in California
    ▪ Distributors and Freelancers
thank you

Questions or Comments?