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Labor Peace Agreements streamlining the pathway for unionization in the cannabis industry

By Alicia Anderson and Kimberly Harding[1]

As the number of states legalizing recreational marijuana continues to grow, the cannabis industry has become fertile ground for union organizing efforts, with such efforts even being fostered at the state level. Of the sixteen states that have legalized recreational marijuana, six—California, Illinois, New Jersey, New York, Pennsylvania, and Virginia—have enacted measures that specifically support union organizing in the cannabis industry. Another five states have proposed such measures.

Some state measures, including most recently New York, specifically require that employers in the cannabis industry enter into Labor Peace Agreements (LPAs) with unions as a condition of licensure, thus limiting the ability of employers to resist, challenge, or contest union organization efforts. Indeed, where the state does not require an LPA, employers have more tools in their arsenal to fight unionization efforts, but they should still consult with counsel to make sure that they are following NLRB rules. Though LPAs alone do not result automatically in a unionized workforce, they do ease the way to unionization, which can have significantly adverse effects on an employer's operations and ability to run the business efficiently.

What are LPAs and what do they mean for employers?

An LPA is an agreement between an employer and a union that requires both parties to waive certain rights under federal law. Though the definition of LPA varies across states, it typically has a provision that requires the employer to remain neutral in any union organizing effort, meaning that the employer cannot oppose the union's efforts to convince employees to "vote yes" in a union election in any way, including by discussing, or providing employees with information about, the disadvantages of being represented by a union (as companies like Amazon and Boeing successfully did to resist large-scale union organizing efforts in recent years). On the union side, the LPA commensurately prohibits union members from engaging in activities that cause economic interference with the employer such as boycotts, picketing, and work stoppages.

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LPAs do not automatically render the union the collective bargaining agent of the employer's workforce, nor do they guarantee that the employees will elect to form a union. They are essentially a "pre-agreement" between the employer and the union. While the LPAs "grease the wheels" for a successful union organizing campaign, by providing access and eliminating employer opposition, it is ultimately up to the workers to decide if they want to unionize, including with that particular union. To this end, the state laws only appear to require an LPA with "a" union, not a specific union, meaning that an employer could face the (albeit highly unlikely scenario) where it executes an LPA with one union, only to have its employees seek to be represented by a different union (whose efforts it would be able to challenge). Regardless, LPAs sufficiently simplify and facilitate union organizing efforts.

Some states, such as California and New York, require LPAs as a condition of licensure for employers in the cannabis industry. Specifically, California requires LPAs for cannabis employers with twenty or more employees, while New York requires them for all cannabis employers. Unions accordingly can have significant leverage in LPA negotiations, as many employers otherwise cannot operate until an LPA is executed, and unions may seek to use this leverage to negotiate union-friendly terms and/or extract specific concessions in the LPA itself prior to organizing any employees. Nonetheless, employers should keep in mind that there are minimal legal requirements for the content of LPAs, and, as the union is not yet the authorized representative of any employees, it has no right to make demands regarding terms and conditions of employment, or any other terms unrelated to the union organizing effort. Employers accordingly should engage counsel to review and analyze LPA language closely to avoid signing an LPA that is overly union-friendly or that would otherwise unnecessarily disadvantage the employer's operations, particularly as it gets the business off the ground.

What is the impact of unionization on employers?

Although there appears to be somewhat of a growing trend, particularly for smaller employers, not to resist union organizing efforts, such employers may come to regret these decisions from their nascent days. Unionization results in substantial rights for employees (including often the right not to be terminated absent "just cause"), and many oftentimes burdensome responsibilities for employers. With respect to the latter, once a union is authorized as the bargaining representative for particular employees, employers have a duty to bargain in good faith with the union on virtually all matters relating to terms and conditions of employment, such as wages, benefits, and attendance policies. This bargaining duty often includes both the obligation to bargain the decision itself, as well as the obligation to bargain any effects of that decision. Unionized employers tend to be less nimble, as implementation of even the simplest decisions can at times be stalled or altered as a result of bargaining obligations and/or union resistance. They also typically are unable to reward high performers, and are vulnerable to increased labor costs. The decision whether to remain neutral, in the absence of any legal obligation to do so, accordingly should not be made lightly (or without the assistance of counsel).

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