Bits & Briefs

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In our **"Bits & Briefs" Special Series** dedicated to **Israeli Labor and Employment Law**, we provide periodic bite-sized updates introducing key provisions of Israeli labor law and their practical implications, particularly from the perspective of businesses looking to operate in, or expand to, Israel.

In this update we bring to your review our article regarding " Legal aspects of organized labor".

Legal aspects of organized labor

Contributed by Fischer Behar Chen Well Orion & Co

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Introduction

Collective labor law in Israel is a dynamic and constantly evolving field. In the past decade, many important changes have taken place with respect to collective labor law which have greatly influenced the scope of organized labor.

This article reviews the following guiding tenets and underlying principles of Israeli collective labor law:

- the legal aspects of organized labor, including the right to organize as a basic right, as set out in legislation and by Supreme Court and National Labor Court decisions;
- the protection of the right to organize and the support granted by the labor courts to organizers; and
- the definition of collective bargaining units and workers' organizations.

Right to organize

The right to organize is one of the most important rights available to employees to improve their employment terms and job security. It gives employees the ability to work together to reduce the balance of power between themselves and their employers and to conduct negotiations that are as balanced as possible.

The right to organize includes the right of an individual to join, or not to join, a workers' organization and the right of employees and employers to establish workers' and employers' organizations, respectively.

The right to organize is established by:

- international conventions, a significant number of which have been adopted in Israel;
- Supreme Court and National Labor Court decisions that recognized the right to organize as a basic right under Israeli labor law; and
- the Collective Agreements Law (1957/5717) through declarative provisions and its practical

implementation which establish rules and penalties for breaching them.

Protection of right to organize

Collective Agreements Law

The Collective Agreements Law:

- allows employees to receive assistance from representatives of workers' organizations (who are not necessarily employees of the same employer) with respect to union activities;
- forbids employers from breaching the employment terms of employees due to their involvement in a workers' organization or committee. Denying promotion or refusing to allow participation in training or professional development activities, as well as refusing any other benefits due to such collective activities, is also prohibited;
- provides that employers must comply with requests to negotiate made by newly inaugurated workers' organizations; and
- provides that disrupting a workers' organization carries a penalty (without the need to prove damages) of up to NIS200,000 for each breach in addition to criminal penalties that may be imposed on persons that breach the law.

Protection of right to organize in case law

The labor courts prohibit harm to employees resulting from their involvement in union activity and have ruled that employers are precluded from taking any action that could affect an employee's membership of or activity in a workers' committee or organization.

The labor courts have held that the burden of proof to determine whether an employee has not been harmed due to their organized labor activity rests with employers. The mere suspicion that harm caused to an employee was due to membership of a workers' organization or activities regarding the right to organize is sufficient to shift the burden onto the employer to prove that such harm was the result of a legitimate business reason.

In a precedent-setting ruling, the National Labor Court held that an employer has no right to intervene in matters relating to the initial organization of employees. The court held that the right to organize as a workers' organization concerns only employees. Employers cannot participate in employee discussions regarding whether to organize themselves or discussions between employees and workers' organizations regarding membership. Further, employers must distance themselves from involvement in the organization of their employees at each initial stage and are not interested parties, even if they believe that they will suffer economic damage as a result of such organization.
The boundaries of an employer's freedom of expression regarding organized labor and its implications must be examined on a case-by-case basis.

The court also established the following guidelines for examining the right to organize or breaches thereof:

- employers cannot pressure or coerce workers, including during individual or group meetings;
- employers cannot pressure employees to cancel their membership of a workers' organization or declare that they are reluctant for employees to join a workers' organization;
- employers cannot monitor employees regarding their involvement in labor organizations;
- duress, coercion or threats of dismissal are prohibited;
- during an initial organization period, employers cannot dismiss members of a workers' committee, employees active in the organization activities or organized employees;
- during an initial organization period, employers cannot:
    - lower the standard of working conditions of committee members or members of a newly inaugurated workers' organization;
    - discriminate against them on the basis of their activities relating to organized labor;
    - remove them from their positions; or

    - take disciplinary action;
- employers cannot directly or indirectly express opinions regarding such organizations;
- employers cannot establish an "organization on behalf of" or "committee on behalf of" employers (ie, an organization or committee over which an employer has significant influence and which will seek to promote employer interests rather than act to advance the goals and interests of employees). The labor courts have held that this is an unacceptable way for employers to influence their employees and impede the right to organize. Case law imposes an increased burden of proof on employers to prove that such organizations are authentic and free from employer duress or intervention;
- employers cannot prevent the entry of a workers' organization representative into their business premises;
- employers cannot conduct personal correspondence with employees by electronic means or otherwise regarding organizational matters; and
- employers cannot modify (for better or worse) working conditions that were in place prior to the organization process.

Defining collective bargaining units

The main purpose of a workers' organization is to create collective labor relations based on a collective agreement that regulates the relationship between an employer and a group of employees whether they are all employees of the enterprise or a portion thereof.

It is important to define a collective bargaining unit, as it is the basis for defining the group of employees that will be subject to the collective agreement and with whom negotiations will be held.

Collective bargaining units are defined in agreements between employer and workers' organizations.

In cases where no such agreement is in place, the default is that a collective bargaining unit will relate to the entire business enterprise or company. When a group of employees requests to be defined as a separate collective bargaining unit, the courts will examine whether they have characteristics that distinguish them from the rest of the enterprise's employees.

From an employee perspective, the following are likely to be relevant considerations in defining a collective bargaining unit:

- common interests and similarity of working environment and conditions;
- the type of occupation;
- the similarity of vocational training backgrounds;
- geographical proximity;
- working location; and
- whether they are a part of a 'chain of representation' with a background of collective negotiations.

From an employer perspective, organizational management parameters should be considered. Within this framework, the aim should be, insofar as possible, to match collective bargaining units to the organizational and managerial structure of employees. The criteria to be examined include:

- budget management;
- human resource management;
- logistics management;
- information systems;
- IT; and
- marketing and sales.

Where collective bargaining units have been analyzed in the context of newly inaugurated workers' organizations, courts have ruled that these criteria should be:

- implemented in view of the specific characteristics of the newly inaugurated organization; and
- refined in scope and adjusted throughout the inauguration process.

Representative workers' organizations

Section 3 of the Collective Agreements Law provides that a representative workers' organization must be one where no less than one-third of employees in a workplace are members.

Where disputes arise between workers' organizations as to which one represents employees, the organization with the greatest number of members in the relevant workplace prevails.

The 'prevention principle', developed by the labor courts, is an important principle which aims to maintain stability in the workplace. The prevention principle aims to provide representative workers' organizations with an immunity period during which a competing workers' organization cannot claim to represent employees in a specific workplace. The labor courts have held that a workers' organization is entitled to an immunity period at all stages of collective negotiations, provided that:

- negotiations continue for a reasonable period of time and are reasonably managed; and
- from the time a collective agreement is concluded, a one-year prevention period commences.

The National Labor Court has established the following guidelines regarding competition between workers' organizations:

- In order to be considered a representative workers' organization, such organizations must recruit at least one-third of employees in a workplace and more employees than any competing workers' organization.
- Employers must not adopt a position in any competition between workers' organizations.
- The relevant time for determining which competing workers' organization will be the representative organization in a specific workplace is when a workers' organization or competing workers' organization has served notice, in writing, including the relevant registration forms, of its representation to the employer and the competing workers' organization.
- During a 10-day period (known as a moratorium), each workers' organization may examine the authenticity of membership in a competing workers' organization. The race between competing workers' organizations must cease during this time.
- At the end of the moratorium, the representative workers' organization must respond, in writing, to the competing organization and present its declaration of representation.
- If an existing workers' organization has served notice of its opposition to a declaration of representation, the competing organization must file, within 10 days of the existing workers' organization serving notice, a motion to the National Labor Court to hear the dispute between the parties.
- The existing representative workers' organization may raise a 'prevention period' claim in such a situation (ie, during collective negotiations or the one-year period subsequent to the signing of a collective agreement).
- After the decision has been made with respect to representation in the workplace, a six-month moratorium applies to changing representation. Once the moratorium has expired and, subject to there being no prevention period in place, a competing workers' organization may make a competing claim to represent workers.

The National Labor Court has established the following guidelines with respect to the rights of employers to re-examine workers' organization representation on their premises:

- Where a workplace has an established workers' organization and a new workers' organization is established and claims to represent workers, the latter will not be afforded a prevention period.
- The principles of good faith in labor relations and the prohibition on employers from interfering in freedom of association mean that in the ordinary course of business, an employer cannot question the representation of a newly inaugurated representative workers' organization for a reasonable period of time and during collective negotiations.
- When it becomes apparent to an employer acting in good faith and not as a direct or indirect result of its actions against a workers' organization that there are genuine grounds to suspect that the organization does not represent its employees, the employer may question the organization's representative status. Examples of significant events that allow an employer to question representation include:
    - a significant change in the workforce that occurred in good faith and as part of a business process not stemming from the employer's attempts to influence the collective bargaining unit; and
    - severance of the relationship between an employer and a workers' organization.
- A workers' organization that ceases to be representative of workers has a duty of good faith to serve notice to such effect.
- With regard to annulment forms delivered after serving notice to an employer with respect to representation, when an employer claims that a workers' organization has lost its right of representation and has not yet signed its first collective agreement, it must prove that:
    - it acted in good faith;
    - it upheld its obligation not to interfere with unionization;
    - the event that caused it to question the organization's right of representation did not directly or indirectly result from action against said organization; and
    - the cancellation of membership did not stem from employer pressure or influence.

Endnotes

(1) Based on the legal chapter in *The Struggle for Unionization* by Shuki Stauber.

(2) 25476-09-12 The New Histadrut Workers Union – The Division of Workers' Unions – Pelephone Communications Ltd, 2 January 2013.

We are happy to assist you in providing legal advice in relation to each of these issues, their ramifications for the workplace and the practical steps that may be taken as a result.

Sincerely,
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