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THE TRUTH ABOUT AB 2183 AND "THE PROMISE"

As if we needed more proof about how morally bankrupt Sacramento has become, Governor Newsom signed AB 2183, known as the Card Check bill, despite repeatedly telling everyone for weeks on end how significantly flawed it was and how he intended to veto it if it reached his desk without specific changes he had recommended. Instead of following through as he and Governor Brown had done in the past, by vetoing such legislation when it lacked protections for the farm workers it was intended to help, he went ahead and signed it. He made it law even though he believed it to be flawed like similar legislation he vetoed just last year. Supposedly, he is hoping that a deal he made with the UFW and Lorena Gonzalez of the California Labor Federation (as an Assemblyperson, she authored the bill which outlawed independent contractors) to push for new legislation next year to significantly revise some of this deal…let's call it "The Promise"…does include a draft of a proposed bill (as yet unauthored by anyone in the State Senate or Assembly) which would substantially rewrite the union election provisions of AB 2183. What we are left with are new laws which become effective January 1, 2023, some of which will remain in effect unless and until the UFW and Lorena Gonzalez follow through on the deal they cut with Governor Newsom to change them.

Got it? You may think you do. Folks have been rushing to issue press releases and articles about this but with a very light touch about the specifics. Hopefully, you will find the explanations below and in the enclosed chart helpful in understanding just how far-reaching the Governor's actions in conjunction with the UFW and the California Labor Federation are. Warning: You will not like it if you are a California agricultural employer.

Financial Penalties and Appellate Bonds

Everyone's talking about mail ballots and card check, but are barely talking about the changes that will take effect on January 1, 2023 which are **not** slated to be repealed or modified by The Promise or set to expire by their own terms in 2028, even though they are the ones that will affect agricultural employers more than any others…especially in the pocket book. For the first time ever, the ALRB will be empowered to levy penalties for each violation of the ALRA, which are known as unfair labor practices ("ULPs"). For each violation, over and above any backpay or other financial remedy, the ALRB can levy a penalty of up to $10,000. For any violation which involves discrimination or retaliation, the ALRB may double the basic penalty up to $25,000. Obviously, those numbers will be multiplied by the number of violations and/or charging parties or affected employees. Thus, even in a case involving a limited amount of backpay for a crew, an employer could be hit with substantial penalties. Many recent cases have not involved a union but, rather, are based on individual or group complaints about wages or working conditions, amounting to concerted activity protected under the ALRA, and alleged discharges or reductions of work by individual supervisors. Because farm labor contractors are

statutorily excluded as employers under the ALRA, agricultural employers are also directly responsible for any violations by farm labor contractors and their supervisors.

Making it even more financially burdensome for employers involved in ALRB litigation will be the new requirement that agricultural employers must file a bond equal to the full financial amount awarded in an ALRB decision in order to appeal that decision to the Court of Appeal. New provisions require the Board to calculate the amount of back and interest, as well as any of the new penalties which may be awarded, before the employer can file a writ of review with a Court of Appeal. In Mandatory Mediation and Conciliation ("MMC") cases, the Mediator must set forth what the full financial impact of the recommended collective bargaining agreement will be over its term (usually 1-3 years) and that amount will have to be posted by a bond if the employer wishes to challenge the MMC decision.

The intent of these two new laws is to make it financially burdensome, if not impossible, for agricultural employers to seek judicial review of the ALRB's administrative decisions. The National Labor Relations Act, which covers all other private industries in the entire nation, including California, does not provide for financial penalties or require appellate bonds. Again, these provisions will take effect at the beginning of the year and are <u>not</u> slated for repeal or modification by The Promise, nor are they due to expire on their own in 2028 like other provisions of AB 2183.

<u>Labor Peace Elections (Mail Balloting) and Non-Labor Peace Elections (Card Check).</u>

Regardless of whatever anyone tells you about the deal Governor Newsom made (The Promise), these provisions are now law and they will be in effect on January 1, 2023. Part of the election procedures package of AB 2183 included modifying one of the essential ingredients of the labor law Cesar Chavez demanded in 1974: That unions could only be certified by in-person secret ballot elections to ensure farm workers would be free from intimidation or coercion. This is one of the hallmarks of the ALRA and distinguished it from the NLRA. Effective January 1, 2023, and continuing until January 1, 2028, in-person secret ballot elections will be one of the alternative methods of voting, instead of being the only one.

The other thing AB 2183 does is establish job protection for the UFW and other less-involved established unions that might organize agricultural operations (Teamsters, UFCW, etc.). Over the past year, there have been organizing drives and some elections under the NLRA conducted by single facility employee-established labor organizations at large multi-facility employers such as Starbucks and Amazon. This growth in groups of employees working together at a single facility may be the result of renewed interest in unionization by younger generations, but it does not translate well to repairing the losses suffered over the past few decades by traditional unions. Unions are like any other business; they dislike competition, especially from upstarts. AB 2183, at the behest of the UFW and the California Labor Federation, reserves the use of mail balloting and card check alternatives for use only by traditional established unions by requiring any union wishing to use either method to have filed LM-2s (annual reports filed by unions) with the federal government for the two previous years. This is monopolistic obviously under any

examination and restricts the collective bargaining rights of farmworkers, not that anybody seems to have cared about that when pushing the legislation through and making it the law.

AB 2183 also establishes new rules to allow economic strikers to be eligible to vote in any of the alternative methods (in-person, mail or card check) if they have not been permanently replaced for more than 12 months. If they have not been permanently replaced, they may vote even if they have not worked for the employer for up to 36 months.

Labor Peace Elections (Mail Balloting)

The very first thing that is supposed to happen under the new law is for each agricultural employer to decide whether it wants to sign up for Labor Peace or be left to fend for itself with Non-Labor Peace. The terminology alone establishes an "Us vs. Them" mentality being fomented by the State on behalf of the UFW. You are supposed to sign up for Labor Peace during January 2023 and it will be automatically renewed each year for your convenience. When you sign up, you agree to a few things, such as Access onto your property by union organizers the way it used to be before the Supreme Court ended access last year. You also have to agree to stay neutral and not make statements about unions during hire or rehire and not disparage the union. You cannot have captive audience meetings with your employees. Individual employees or unions may request "Voting Kits" with ballots that, once filled out and signed, are good for 180 days. The union can handle the mailing or delivery for the employees. The mail ballots are then used to support a petition for a mail ballot election. The employer has to submit the names and street addresses for employees who worked during the payroll period before the filing of the petition and the Board compares the mail ballots with the employee list. If more than 50% of the listed employees signed mail ballots, then the board will conduct a mail ballot election and mail out Voting Kits to all of the employees on the list except for those employees who already submitted mail ballots. All mail ballots returned to the Board within 30 days are then tallied. If the union has more than 50% of the tallied votes, it becomes certified as the exclusive bargaining representative of the employees. If an agricultural employer violates the terms of the Labor Peace provisions, the union may be certified without conducting a new election. If you demote, discharge, suspend or otherwise discipline an employee during a mail balloting campaign, the action will be presumed to be retaliatory and a violation unless the employer can prove by "clear and convincing and overwhelming evidence" that the action would have been taken anyway. Remember those new financial penalties discussed above? Now combine them with the presumption of guilt if an employment action takes place at the wrong time. Once certified, even if election objections are filed and a hearing is to be held, the time begins to run for submission to Mandatory Mediation and Conciliation (90 days) for imposition of a collective bargaining agreement.

Non-Labor Peace Elections (Card Check)

For those employers who decide against signing up for Labor Peace with the State, and who instead wish to enjoy the renewed ability to enjoy their property rights after access was overturned by the Supreme Court after 45 years of State-sanctioned trespass

by union organizers, as well as their right to Free Speech, and being able to talk to their employees and manage their personnel like any other employer, unions (again, those that have filed LM-2s during the previous 2 years) may utilize Card Check in order to be certified as the bargaining representative of an employer's employees. The union will file a petition with the Board along with evidence establishing its majority support, which may include union authorization cards, signature petitions and the like. Once filed, and assuming all of the timing and other requirements are met, the employer must turn over the employee list (with street addresses) and payroll information for the payroll period immediately preceding the filing of a petition. The Board will then compare the evidence of majority support submitted by the union and the employee list within 5 days of the filing of the petition. If a majority of the employees on the list are shown to have submitted proof of their support of the union, then the union will be certified. If less than a majority support the union, the Board can provide the union with an additional 30 days and the employee list to gather additional proof of support. As with Labor Peace elections, if you demote, discharge, suspend or otherwise discipline an employee during a mail balloting campaign, the action will be presumed to be retaliatory and a violation unless the employer can prove by "clear and convincing and overwhelming evidence" that the action would have been taken anyway. Once certified, even if election objections are filed and a hearing is to be held, the time begins to run for submission to Mandatory Mediation and Conciliation (90 days) for iposition of a collective bargaining agreement.

The Promise: Governor Newsom's Deal With the UFW and the California Labor Federation (Card Check).

Enough has been said about the deal Governor Newsom made with the UFW and Lorena Gonzalez of the California Labor Federation…how it was intended to provide him cover from mounting pressures from opponents within his own party (President Biden and a host of others) by allowing him to sign AB 2183 based on a written promise by the UFW and Lorena Gonzalez to push for passage of drafted legislation that would repeal parts of AB 2183 and add some new provisions. The Promise letter and the draft legislation is included for your convenience.

A few things need to be noted. First, thus far, there is no indication of any sitting state senator or assemblyperson agreeing to carry it to become enacted legislation. Presumably, that will not be a problem for any of them wishing to curry favor with the state's unions. Secondly, nothing has been issued from the Governor's office, at least not publicly, ordering the ALRB to ignore AB 2183 provisions slated to be repealed by The Promise and essentially stand down. So what happens if some union other than the UFW wants to utilize the Non-Labor Peace Card Check provisions come January 1, 2023? The ALRB is almost entirely staffed by former attorneys from the California Rural Legal Assistance (CRLA), which is not always in lock step with the UFW. Then there is the question of having obtained mail balloting and then watching it being repealed…there could very well be some folks on the state and national levels (especially unions wanting to adopt the same type of procedure for the NLRB) who may say no. The Promise states that the UFW and the California Labor Federation will push for adoption of the drafted language "without amendment." There is not a lot of leeway in that. Finally, when would the drafted language be approved by both houses of the state legislature and be signed

by Governor Newsom? If it is not passed as an emergency measure by a super majority, it may not become effective until January 1, 2024. There is absolutely nothing in The Promise letter of September 28, 2022 which states that the UFW (and certainly not any other union) agrees not to use either mail balloting (if some employer actually signs up for it) or the card check provisions for any employer that does not sign up for Labor Peace, while waiting for the passage of The Promise's drafted legislation and then waiting for whenever it might become effective.

The Promise draft legislation does **not** repeal the $10,000/$25,000 penalties that the ALRB will be able to impose for unfair labor practices after January 1, 2023. It does **not** repeal the requirement for a bond to be posted for the full amount of any financial award ordered by the ALRB if an employer wishes to seek appellate court review of an ALRB's decision. In fact, it adds provisions to make the requirement for an appellate bond specifically applicable if an employer wishes to seek review of an ALRB decision to implement a collective bargaining agreement resulting from the Mandatory Mediation and Conciliation process. It does **not** do away with the presumption that any disciplinary or other employment action taken by an employer against an employee was illegal or retaliatory, that can only be overcome by "clear and convincing and overwhelming" evidence that it was not.

What The Promise draft legislation does do is repeal the Labor Peace (Mail Ballot) and Non-Labor Peace (Card Check) provisions and replaces them with a newly named Majority Support Petition which is basically the same card check procedures set forth for Non-Labor Peace situations under AB 2183. Mail balloting and any statutory ability to revive Access or restrict an employer's Free Speech would be removed. That is it.

What This Means for Employers:

The new procedures, whichever way you look at it, will make it virtually impossible effectively thwart a unionization campaign. Now, the UFW (and any other union who wishes to unionize agricultural workers) will be able to present a petition showing majority support without employers ever becoming aware of the union's effort to get support. This will require employers to rely upon ongoing efforts to create a workplace where employees do not feel the need to seek outside representation and where the employees will reject efforts to get them to sign authorization cares when union reps show up at their houses will outlandish allegations about what a horrible employer they work for. This will necessitate substantial training for supervisors who are the front line face of the company as employee dissatisfaction with their supervisor is the leading cause of unionization.