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HUMAN RESOURCES & PAYROLL

Unions at The Crossroads

Employers who lack the necessary knowledge and experience regarding permissible conduct during a union organizing campaign frequently engage in activities found to be unlawful after the fact. Such conduct often constitutes unfair labor practices (ULPs).

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It's well known the majority of U.S. workplaces today operate union free. The unionization rate of American workers currently stands at 10.3%. In non-government workplaces, the percentage is only 6.4%. This is the lowest percentage of

unionized workers since the passage of the National Labor Relations Act (NLRA) in 1935. The lack of a union in the overwhelming majority of workplaces has understandably led to a major decline in knowledge about unions by both employers and employees. Yet surveys show that younger workers, especially millennials, lacking first-hand knowledge of unions, have a positive image of unions. It has not, however translated into increased numbers in the union ranks. At least not yet.

Unions' continued relevance in today's workplace is clearly at a crisis point. Their very existence is at stake. Their only option for survival is to increase their numbers through successful organizing. It has been anticipated that a Biden administration would give union organizing a major boost by passage of the Protecting the Right to Organize Act (PRO Act). The proposed law would dramatically tilt the playing field in favor of union organizing but hinges on Democrats taking control of the Senate.

A Democratic administration will however ensure the appointment of pro-labor members to the 5-member National Labor Relations Board (NLRB). That federal agency regulates essentially all relations between unions and employers. A pro-labor majority on the NLRB will help facilitate organizing activity in a variety of ways, not the least of which are a return of the "quickie" union election and much stricter limitations on employers' responses to unionization efforts.

Employers who lack the necessary knowledge and experience regarding permissible conduct during a union organizing campaign frequently engage in activities found to be unlawful after the fact. Such conduct often constitutes unfair labor practices (ULPs). ULPs can result in an nullification of an employer's election victory and the ordering of a new election. In circumstances where employer conduct is particularly egregious, the employer could be ordered to bargain with the union regardless of the election outcome.

In most cases, well-intentioned supervisors or managers who are simply unaware of the strictures that apply to employer conduct, engage in the conduct ultimately deemed unlawful. The lack of proper training on how to lawfully respond to union organizing activity too often results from lack of training due to employers' aversion to preparing for something viewed as unlikely because union organizing has never occurred before. Most believe an organizing attempt is such an improbable event that it does not warrant the time and effort it takes to invest in such preparations.

The proper training of first line supervisors is a critical step in being prepared. Through their daily interaction with the employees, they are likely to be among the first to become aware of unionizing efforts. Their training should focus on what a

union can mean to the workplace, as well as the types of conduct prohibited by the NLRA. The acronym “TIPS” describes generally the unlawful conduct supervisors should be trained to avoid. TIPS stands for “threaten,” “interrogate,” “promise,” and “spy/surveil.” These are the primary “don’ts” for employers and their representatives in a union organizing campaign. Without a proper understanding of what conduct violates the rules, violations are certain to occur.

The conduct that TIPS addresses is fairly straightforward. *Threatening* employees that something negative or adverse will occur for supporting or voting for the union is clearly unlawful. Similarly, asking an employee what they or others think of the union, or how they intend to vote is unlawful *interrogation*. Offering something of value such as a promotion, pay raise, or increased benefits to employees to refrain from supporting the union would constitute an unlawful *promise*. Finally, attempting to monitor union meetings or gatherings constitutes unlawful *surveillance* or *spying*.

In addition to educating supervisors and managers in how to respond to union organizing, Section 8(c) of the NLRA permits employers to lawfully inform employees of a wide variety of union-related facts, provided it is not conveyed in a coercive or threatening manner. This includes such critical information as the fact that if successful, the union becomes the exclusive representative of all the employees, whether they like it or not. They have only one voice, that of the union. What is ultimately agreed upon in the union contract will be the terms and conditions of employment for everyone.

This is the case even if some of the terms are less than what they enjoyed before unionization. Employers are permitted to tell employees that if negotiations are unsuccessful, the union may call a strike. As union members, they would be required to follow the union’s directions to strike or could be subject to fines from the union. Employers also can and should inform employees that in an economic strike, employees are subject to being “permanently replaced.” The employees are not fired or discharged, but simply replaced by someone who wants the job. They can only return if the replacement employee leaves.

Avoiding a union organizing drive is never totally within the employer’s control. Often, a particular industry or employer is targeted by a union. The best defense is to have a workplace where the union message cannot take root. While there are a variety of reasons why any particular workforce responds positively to a union appeal, among the most common reasons are: 1) lack of appreciation – feeling that

the employer does not really care about them; 2) lack of feeling “in” on things related to them and their workplace; and 3) lacking a supervisor or manager who is willing to listen and be understanding. There are no doubt innumerable factors that contribute to employee dissatisfaction, including failure to pay competitive wages and/or benefits, insufficient time off, unfair/inconsistent discipline, etc. However, in general, the three items cited above represent the primary drivers of worker dissatisfaction, which can open the door to union organizing.

Fortunately, there is a relatively simple answer to addressing those three most important factors for maintaining employee goodwill. Each can and should be addressed every day that supervisors and managers are in the workplace. Making employees feel appreciated does not require a significant effort. A sincere daily greeting, a “thank you” for a job well done, and similar expressions of goodwill can make a world of difference. Similarly, sharing information on matters that affect them and being receptive to their issues and concerns take only the will to do so. Each day that managers and supervisors take the time to genuinely interact with their employees, they help your workplace remain union-free.

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