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***Maintaining A Union Free
Workplace***

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The Union Rat is Making a Comeback: Can you picture this in front of your organization?



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Overview: Union Organizing

- Current law and the proposed Employee Free Choice Act (“EFCA”).
- How to detect union organizing.
- What an employer may and may not do under the Labor Management Relations Act (“LMRA”) to counter union organizing.
- What the union may and may not do.

The Legal Right to Organize Under the LMRA

- Employees have the right to organize, join a union, and the equal right to refrain from organizing or joining a union.
- Employers cannot interfere, restrain, or coerce employees from organizing.
- Employers cannot discharge or discriminate against an employee based on union activity.

Current Law: Secret Ballot Elections

- Union may file petition with the National Labor Relations Board (“NLRB”) to conduct a secret ballot election after obtaining signed authorization cards from 30% of employees in a unit.
- In FY 2006, the NLRB conducted 2,147 elections where 8 out of 10 eligible employees voted.
- Unions only won 55.7% of elections.

How NLRB Elections Work

- **Determining the "Appropriate Unit"**
 - The NLRB will serve a Notice of Representation Hearing.

How NLRB Elections Work

- The union's petition must have a showing of interest involving 30 percent of the employees in the unit found appropriate.
 - Only employees having a substantial mutuality or "community of interest" in wages, hours and working conditions can be appropriately grouped in a single unit.
 - Appropriate unit does not mean the only unit.
 - The NLRB attempts to determine similarity of duties, skills, wages and working conditions.
 - The employees' own desires to form a unit should be considered but not controlling. *NLRB v Ideal Laundry*, 330 F2d 712 (CA 10 1964).

How NLRB Elections Work

- **Establishing a Date for the Election**
 - **Generally within 42 days, but Obama Board likely to shorten if Congress does not act.**

How NLRB Elections Work

- **Appointing Observers**
 - Each party may appoint an equal number of election observers.
 - If a party fails to use an observer, it will not be able to enter post-election challenges. *Cities Service Oil Co.*, 87 NLRB 324 (1949).
 - Observers must be non-supervisory employees.

How NLRB Elections Work

■ Challenging Voters

- Either an authorized election observer or the board agent has the right to challenge a voter. The agent must challenge a voter whose name is not on the eligibility list. *Knox Metal Products, Inc.* 75 NLRB 277 (1947).
- The challenge must be made before the voter is given a ballot. Failure to make a timely challenge may not be remedied by filing objections. *Oppenheim Collins & Co.*, 108 NLRB 1269 (1954).
- If the challenged ballots are sufficient to affect the results of the election, the eligibility of the challenged voters will be determined.

How NLRB Elections Work

■ Objections

- Any party may file post-election objections to the conduct of the other parties or of the NLRB agents that allegedly prejudiced the proceedings.

How NLRB Elections Work

■ Objections

- A "meritorious" objection is "anything that would justify setting aside the election," whether the misconduct was raised in the objections or discovered during an investigation.

How NLRB Elections Work

■ Objections

- **Typical union objections to a lost vote are that the employer:**
 - **Interrogated employees about their union sympathies.**
 - **Threatened to reduce wages, bonuses or other terms and conditions of employment.**

How NLRB Elections Work

■ Objections

- **Typical union objections to a lost vote are that the employer:**
 - **Interfered with employees engaged in protected activity (i.e., solicitation and distribution).**
 - **Arbitrarily changed working hours of members of the organizing committee.**

How NLRB Elections Work

■ Objections

- **Typical union objections to a lost vote are that the employer:**
 - **Threatened Company closure.**
 - **Threatened cancellation of existing benefits.**

How NLRB Elections Work

- **Union must receive a majority of votes**
 - Tie goes to the employer
 - A majority is only of the total votes cast.
 - *i.e.*, if three eligible workers in a unit of 50 vote and 2 vote yes, then all 50 are in the union.

How NLRB Elections Work

- **Certifying the Election**
 - Either majority for or against union.
- **Effect**
 - Certification bars another election for one year – either representation or a decertification.

Proposed Law: The Employee Free Choice Act



- While in the Senate, Barack Obama co-sponsored the EFCA.
- Already passed in the House: 241-185.
- Supporters of the EFCA came within 9 votes to limit debate and force a vote in the Senate.
- Would have been first major revision of the NLRA since its enactment in 1935.

Impetus behind the EFCA

Three justifications:

- Elections involve “employer intimidation and coercion.” In 2005, purportedly over 30,000 workers were discriminated against.
- 34% of union victories did not result in a labor contract.
- Employers fire pro-union workers in 25% of organizing campaigns.

What is the EFCA? An Oxymoron!

Attempts to streamline the union certification process by:




- Allowing employees to select union representation by obtaining 50% + 1 of signed authorization cards.
- NLRB confirms cards.
- Forces employer to bargain with union.
- Similar to process for public sector employers.

What is an authorization card?

YES, I WANT THE IAM

I, the undersigned, an employee of _____
(Company) _____
hereby authorize the International Association of Machinists and
Aerospace Workers (IAM) to act as my collective bargaining agent with
the company for wages, hours and working conditions.

NAME (print) _____ DATE _____
ADDRESS (print) _____
CITY _____ STATE _____ ZIP _____
DEPT. _____ SHIFT _____ PHONE _____
Classification _____
SIGN HERE **X** _____

 NOTE: This authorization to be SIGNED and DATED in EMPLOYEE'S OWN HAND-
WRITING. YOUR RIGHT TO SIGN THIS CARD IS PROTECTED BY FEDERAL LAW.
visit us at www.iam751.org/join Call 1 800 763-1301

(sample)

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**WHY DO
EMPLOYEES WHO
MAY NOT WANT A
UNION SIGN
CARDS?**

Why do employees who may not want a union sign cards?

PEER PRESSURE

Why do employees who may not want a union sign cards?

INTIMIDATION

Why do employees who may not want a union sign cards?

DECEPTION

Why do employees who may not want a union sign cards?

MISUNDERSTANDING

Why do employees who may not want a union sign cards?

**FEAR
OF
RETALIATION**

Why do employees who may not want a union sign cards?

**DESIRE
TO BE
LEFT ALONE**

Why do employees who may not want a union sign cards?

LACK OF THE FACTS

The EFCA: What would it do?

- **In forcing the employer to bargain over a first labor contract:**
 - If no contract is reached in 90 days, the Union can force mediation with the Federal Mediation and Conciliation Service (“FMCS”).
 - If, after 30 days, mediation fails, the Union can compel arbitration.
 - Employer is bound by arbitrator’s finding for 2 years.



Impact of Card Campaigns

- Removes employees' right to vote in a secret ballot election.
- Unions have an advantage if employees only hear one side – the union's side.
- Employees can't change their minds.
- What happens to the 49.99% of employees who do not sign cards?

Impact of Card Campaigns

- Curbs employer free speech.
- Employer campaigns educate employees on the facts of the union's claims.
- Union research shows that with little or no employer campaign, the union wins 80% of NLRB secret ballot elections.
- Win rate drops to 35% when employer wages campaign.

Impact of Card Campaigns

- Most card campaigns occur underground and in secret.
- Deprives employees of the opportunity to hear from the employer.
- Restricts the employer's opportunity to run a campaign.

Union Avoidance 101

Early Detection.

Know the S C R I P T.

Spot union misconduct.

Early Warning Signs of Union Organizing

- An employee writes down the names and contact information of employees in a facility or a department.
- Groups of employees in deep conversation suddenly stop talking when a supervisor approaches.
- Small groups of employees gathering together.

Early Warning Signs of Union Organizing

- Employees from separate locations, departments, or in different job levels begin meeting and talking together.
- New groups form with new leaders.
- During breaks or lunch periods, unusual, intense conversation or activity occurs.

Early Warning Signs of Union Organizing

- Employees start leaving the workplace for lunch or are absent from customary social get-togethers.
- Employees go to the restrooms much more frequently than before.
- Employees who are normally friendly and talkative become quiet and uncommunicative.

Early Warning Signs of Union Organizing

- Employees seek to avoid being seen with supervisors.
- Conversations with employees become unpleasant.
- Employee complaints change or increase.
- Questions about policies, particularly on pay, benefits, discipline, and staffing increase.

Early Warning Signs of Union Organizing

- Argumentative questions are asked in meetings.
- Exit interview information indicates that employees are attempting to escape an unpleasant environment.
- Cartoons or graffiti which direct humor/hostility toward the employer, management, or supervision.

Early Warning Signs of Union Organizing

- A noticeable change in the rate of turnover.
- People applying for jobs who do not have relevant experience or who claim to be willing to work in a job with lower status and pay than a job for which their record qualifies them.
- Complaints begin to be made by a delegation, not single employees.

Early Warning Signs of Union Organizing

- Strangers appear and linger at the facility or in the parking lot.
- Employees or strangers show unusual curiosity about the employer's affairs and policies.

Early Warning Signs of Union Organizing

- Employees adopt a new vocabulary which includes phrases like “protected activity,” “unfair labor practices,” and “demands for recognition.”
- Union authorization cards, handbills, or leaflets appear on the premises or in parking areas.

Early Warning Signs of Union Organizing

- Union representatives visit or write employees at their homes.
- The grapevine suddenly goes dead.
- A former employee periodically shows up after work and targets people in the parking lot or in local employee hangouts.

Early Warning Signs of Union Organizing

- A previously popular employee suddenly becomes unpopular.
- A new employee, usually someone in the probationary period, goes overboard in asserting his enthusiasm for the job and his loyalty to the employer.

Union Solicitation v. Distribution: The Rules

- ❖ Employer may ban outside union organizers from distributing or soliciting on company property, except where employees may not reasonably be reached otherwise or where the ban is applied discriminatorily.
- ❖ An employer may also prohibit employees from union distribution and solicitation during their working time, unless the rule is unfairly applied.

Union Solicitation v. Distribution: The Rules

- ❖ An employer normally may not prevent employees from distributing or soliciting on company property *during nonworking time*, unless there are special circumstances making such a rule necessary in order to maintain production or discipline.
- ❖ An employer may not bar employees from union soliciting during their own time, even in working areas.

Union Solicitation v. Distribution: The Rules

- ❖ A valid rule regarding distribution or solicitation may not allow the work place to be disrupted by non-union solicitations.
 - If it does, then it must allow union solicitation that is “substantially equivalent” to non-union solicitations.
 - “Substantially equivalent” is measured in terms of interference with production and discipline.
 - Unions and employees may not solicit via e-mail, even if the employer allows limited personal e-mail solicitations, such as fundraising for United Way.

Guard Publishing Co., 351 NLRB No. 70 (Dec. 16, 2007).
 - Employer must prohibit all e-mail solicitations for profit-making ventures, organizing meetings of clubs or private organizations, or to promote competitors.

Union Solicitation v. Distribution: The Rules

- ❖ A no-solicitation / no-distribution rule is not necessarily unlawful merely because the employer adopts it during an organizing campaign.
- ❖ Rules banning solicitation or distribution during “working time” are presumptively valid, but rules covering “working *hours*” are presumptively invalid.

Union Solicitation v. Distribution: The Rules

- ❖ Employees have a right to wear union buttons or other paraphernalia while at work, absent special circumstances based on considerations of production, safety, or discipline.
 - e.g., on May 20, 2008, how did the Ninth Circuit rule on a hospital's ban of the following button message?

“RN's Demand Safe Staffing”

Wash. State Nurses Ass'n v. NLRB, 06-74917 (9th Cir. May 20, 2008)

The Employer's Legal Right to Campaign

- Section 8(c) of the LMRA states:

The expressing of any views, argument, or opinion, the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under the provision of this Act, *if such expression contains no threat of reprisal.*

Supervisors Memorize the S C R I P T!!

S = Spy

- Don't spy on union meetings or ask employees to spy for you.
- Don't hire private investigators or conduct surveillance.

C = Coerce

- Don't pressure union supporters in any way to put them in fear of their jobs.

R = Restrain

- Don't restrain employees from exercising their right to organize.
- Don't blacklist union supporters in hiring.

Supervisors Memorize the S C R I P T!

I = Interrogate

- Don't ask employees if they signed a card.

P = Promise

- Don't promise any award for opposing the union.

T = Threaten

- Any threat to a pro-union employee or threats/opinions about what might happen if the union gets in is an unfair labor practice.
- Don't threaten to close a department or facility.

Speak from the S C R I P T!

YOU CAN:

- Listen
- Express your opinions
- Continue to manage
- Be a leader by example
- Tell employees their rights

Speak from the **S C R I P T!**

- **Explain the facts**
- **Describe the election and card campaign process**
- **Enforce rules**
- **Write to your employees**

What the Union Can't Do

- Generally, the NLRB and LMRA place more restrictions on what employers and supervisors can do versus what unions can do during campaigns.
- There are still important limitations on union organizing.

What the Union Can't Do

Union officials, organizers, and agents

CANNOT:

- ✓ Threaten employees who refuse to join or assist the union, or sign authorization cards.
- ✓ Waive initiation fees for card signers.
- ✓ Promise monetary rewards for obtaining signed cards.
- ✓ Make promises of gifts to induce vote in favor of the union.

What the Union Can't Do

- ✓ Threaten the loss of a job or other economic loss if the union wins.
- ✓ Use workplace bulletin boards to post campaign literature.
- ✓ Obtain “equal time” to speak to massed groups of workers at the facility.
- ✓ Interfere with an employee’s right to campaign against the union.
- ✓ Solicit employees via e-mail in violation of a no-solicitation/distribution rule.

What the Union Can't Do

Union officials, organizers, and agents

CANNOT:

- ✓ Distribute fake or forged campaign materials.
- ✓ Distribute sample NLRB ballots with the “Yes” box marked.
- ✓ Disregard an employer’s no-solicitation or no-distribution rule.
- ✓ Hold meetings at work and during working time without permission.
- ✓ Make racial appeals to employees to inflame prejudices.

What the Union May Do

- ✓ Promise anything.
- ✓ Criticize the employer's pay and benefits, practices, supervisors, or any programs or actions.
- ✓ Compare the employer to a unionized employer.
- ✓ Visit employee's homes.
- ✓ Furnish pro-union buttons or insignias to employees to wear.
- ✓ Provide free refreshments or food at organizing meetings.
- ✓ Offer to postpone or reduce dues if a union is selected.
- ✓ Offer not to charge dues until a contract is negotiated and ratified by the employees.

What Employees May Do

Employees who are not supervisors, regardless of whether they are voting, **may**:

- Campaign for or against the union at work during non-working time.
- Distribute literature in non-work areas during non-working time.
 - **But**, employees may not engage in union organizing via e-mail pursuant to a valid no-solicitation or no-distribution rule.
- Wear buttons or insignias so long as they do not interfere with production or pose a safety hazard.
- Make any claim or statement whether it is true or not.
- Make threats of economic loss or adverse consequences if the union wins or loses.

Campaign Literature

- **Examples of documents you can distribute to employees:**
 - **Illustration of Cost of Union Dues**
 - **Explanations of Union Dues**
 - **Qs & As**
 - **Explanations of Union power**
 - **Describe promotions, benefits, etc.**
- **Be creative, but be accurate and factual.**

BASIC MESSAGE TO EMPLOYEES.

Basic Message to Employees

**A union card
constitutes a
legal document.**

Basic Message to Employees

You wouldn't sign a mortgage or a car loan without knowing how much your monthly payments would be.

Basic Message to Employees

**Ask hard
questions of both
management and
the union.**

Basic Message to Employees

**DEMAND
ANSWERS IN
WRITING.**

Basic Message to Employees

**Don't sign a union
card until you get
ALL THE FACTS.**

WHAT AN EMPLOYER MAY NOT DO:

- **Promise an employee(s) a pay increase, promotion, better benefits, or any special favor for voting against the union or if the union is defeated.**
- **Threaten loss of job, reduction of income, discontinuance of privileges or benefits presently enjoyed, discharge, or layoff, to refuse to negotiate or to move or to close the facility if the union wins.**

WHAT AN EMPLOYER MAY NOT DO:

- **Discriminate against employees supporting the union by intentionally assigning undesirable work. Discipline or penalize employees supporting the union for an infraction which employees who are not supporting the union are permitted to commit without being similarly disciplined; make any work assignment for the purpose of causing a supporter to quit his job, or lay off employees with the intention of discouraging unionization.**

WHAT AN EMPLOYER MAY NOT DO:

- **Ask or poll employees about their or any other employee's attitude or activity regarding the union or how they or any other employee intends to vote.**
- **Call an employee or small group of employees into a supervisor's office or managerial area away from other employees for the purpose of generating opposition to the union.**
- **Talk to employees in a group on the facility's time within the twenty-four hour period immediately preceding the opening of polls for the election.**

WHAT AN EMPLOYER MAY NOT DO:

- **Spy on union meetings; watch employees to determine whether or not they are participating in union activities; or ask employees about the identity of the instigators or employee leaders favoring the union.**
- **Visit the homes of employees for the purpose of urging them to reject the union.**
- **Bar the wearing of pro or anti-union buttons so long as they do not physically interfere with work or constitute a safety hazard.**

WHAT AN EMPLOYER MAY NOT DO:

- Bar employees from orally campaigning for or against the union or soliciting signatures on union cards or petitions related to the campaign during non-working time in any area of the facility.
- Bar the distribution of pro or anti-union literature by employees during non-working time in non-working areas of the facility (e.g., cafeterias, lounges, etc.)
- Bar non-employee union organizers from distributing literature in public areas near the facility.

WHAT AN EMPLOYER MAY NOT DO:

- **Furnish any employee campaigning for or against the union with any type of assistance (e.g., clerical, printing, meeting rooms).**
- **Withhold any pay or benefit increase which would otherwise be given because of the forthcoming election or employees' union activity.**

WHAT AN EMPLOYER MAY DO

- Advise employees that the employer is legally barred from making or promising any improvements before the election other than previously scheduled benefit changes.
- Tell employees that the union is free to promise them anything but actually can only negotiate with an employer and can't get anything the employer does not agree to.
- Listen to and answer employees' questions provided no promise can be made with respect to future improvements.

WHAT AN EMPLOYER MAY DO

- Listen to employee complaints. If the complaint can be solved by correcting an error in the administration of an existing practice or policy, such correction can be made. If the solution of a valid complaint would require the promise of or conferring of a benefit, as distinguished from simply correcting a failure to comply with an already established policy or practice, the validity of the complaint can be acknowledged but the employee must be reminded of the legal restriction of conferring any benefit prior to the election. Advise employees that the facility wants to hear their complaints and do everything it reasonably can to make the facility a good place to work.

WHAT AN EMPLOYER MAY DO

- Listen to anything an employee has to say about the union, union meetings, or anyone's union activity.
- Tell employees that those who oppose the union have the right to campaign against it just as those who support it may campaign for it and urge all employees to campaign for the outcome they want.
- Tell employees about the benefits they presently enjoy.

WHAT AN EMPLOYER MAY DO

- Tell employees how their compensation, benefits, job security, promotional opportunities and working conditions compare with those of other facilities in the area, whether unionized or not.
- Tell employees about any existing practice of periodically updating compensation and benefits.
- Compare past increases in compensation and benefits to those of other employers or those provided under union contracts.

WHAT AN EMPLOYER MAY DO

- **Tell about any strikes in the area or industry or those in which the union has been involved.**
- **Tell about settlements which the union has negotiated and compare them to past increases made by the employer.**
- **Furnish employees with information on the pay they would lose in strikes of various duration.**

WHAT AN EMPLOYER MAY DO

- Advise employees of the level of any strike benefits the union has.
- Tell what union dues would cost each month or year.
- Review individual employee's past pay and promotional history.
- Tell employees about the union's power to fine its members for failure to attend meetings and for crossing picket lines in an attempt to return to work during a strike.

WHAT AN EMPLOYER MAY DO

- Explain how a strike vote is sometimes taken on the representation that it will be used only for bargaining purposes, but then a strike is later called on the basis of the vote.
- Tell employees that the law permits the facility to hire permanent replacements for anyone who engages in an economic strike.
- Tell employees that in negotiating with the union, the facility does not have to agree to the union's terms, so long as the facility negotiates in good faith.

WHAT AN EMPLOYER MAY DO

- Tell employees about any untrue or misleading statements made by an organizer personally, in a handbill, or through any other medium of union propaganda.
- Describe the existing promotion practice and the number of promotions that have resulted.
- Tell about “super seniority” provided by many union contracts for union stewards and officials.
- Describe the past record of job security and compare it to the layoff record at unionized companies. Describe the system used for the order of layoff when it becomes necessary.

WHAT AN EMPLOYER MAY DO

- Refute untrue statements or claims which the union makes.
- Use the facility's bulletin boards for posting the facility's campaign materials.
- Keep non-employee organizers off the premises.
- Restrict employees from distributing literature in working areas, or in any area during work time, provided the restriction is imposed uniformly on all employees.
- Deny employees the use of facility bulletin boards for posting campaign literature, so long as the literature of all organizations, other than the employer's, is not permitted on the boards.

WHAT AN EMPLOYER MAY DO

- Refuse to allow pro-union employees or union organizers to hold meetings on the facility's premises at any time so long as employees who oppose the union are not allowed to have their meetings on the premises. *(NOTE: If your facility has allowed other organizations such as Weight Watchers to hold meetings on your premises, you may be required to allow the union to hold its meetings on your premises, if requested.)*
- Enforce the regular rules and standards with normal measures of discipline so long as there is no discrimination on the basis of employee's union activity or attitude.

WHAT AN EMPLOYER MAY DO

- Administer existing pay and benefit programs including the granting of normal merit and progression increases periodically.
- Make increases in pay and benefits at regular times under any existing practice.
- Administer any existing grievance procedure.
- Hold employee social events such as open houses, picnics, parties, etc.
- Provide free food and refreshments at meetings of employees at which the facility campaigns against the union.

QUESTIONS?

ANSWERS!

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