

Action Alert: Advice to Employers Who Want to Remain Union-Free

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Human resource professionals and corporate executives should be well aware of the provisions of the so-called “Employee Free Choice Act,” and the dramatic adverse impact it would have on American businesses. At the present time, it is unclear whether the EFCA will become law in its current form. The political maneuvering and lobbying will be intense over the next several weeks and months. At a minimum, it appears likely that some legislation will pass that will make it easier for unions to organize. We urge you to be vigilant and proactive.

This article has a more specific focus--I will provide recommendations employers should implement now to help their company remain union-free.

A. It All Starts With a Little Card

As you probably know, a formal union organizing campaign begins when union supporters get employees to sign union authorization cards. Union organizers and supporters are trained to “persuade” an employee to sign a card. Peer pressure, coercion and/or confusion are often at play. Union supporters visit employees at their homes, in parking lots, at the local restaurant or bar, or anywhere else where the employee can be found. The bottom line is this: *the average employee has no idea as to the legal significance or implications of signing a union authorization card*. Moreover, the employee is rarely able to make a “free” or informed choice as to whether he would be better off having a union as his exclusive bargaining representative.

Once a union obtains signed cards from at least 50% of the employees in an “appropriate bargaining unit,” it can petition for an election. (Technically, the union only needs 30% to sign cards to file a petition. The reality, however, is that unions want well over 50% to sign cards because it knows that it will lose some support once the company begins its counter campaign.) The NLRB typically schedules an election within about 40 days of the filing of the petition.

If the EFCA passes in its current form, however, the union will be certified based on the purported “card check majority” and there will be NO secret ballot election.

The employer’s primary goal is to create an environment in which employees will not sign union authorization cards. The prudent employer must act now to minimize the chance that an employee would advocate for the union and/or sign a union authorization card. This white paper is designed to help you achieve this goal.

B. Reasons Employers Prefer to Remain Union-Free

If an employee asked you (or one of your supervisors) today the reason the company did not want to have a union, what would you say? Do your supervisors or employees know and understand the reason for the Company’s position? Here are the primary factors often cited by employers:

- Overwhelming majority of employees are non-union (over 92% of employees in private sector do not belong to union; union rate in Virginia is a mere 4%)
- Unions need adversarial system to justify their existence (us v. them mentality)
- Unions are expensive (higher labor costs, inefficiencies, grievances, collective bargaining costs)
- Employees would lose personal freedoms as Company would not be able to recognize individual achievement or address individual requests
- Union = another monthly bill for employees (monthly dues, fees and/or assessments)
- Strikes may occur
- Unions can interfere with customer relations

C. So Why Would Your Employees Consider a Union?

Sometimes employers do things or allow an atmosphere to exist that may lead employees to think that a union can “fix” their problem(s). Unions can and will exploit perceived problems in the workplace. The following are examples of circumstances that can result in union organizing:

- Change that is unexplained or not communicated well (anxiety, fear)
- Lack of respect for employees
- No voice or say as to what happens at work
- Poor communication by company and management
- Unfair or inconsistent treatment, especially by the front line supervisors
- Perceived low pay, inadequate benefits and/or poor working conditions
- Little or no job security

Take a serious look at the above points. Is your company vulnerable?

D. Initiatives We Recommend That You Consider or Implement

With the above landscape in mind, we recommend that the prudent employer immediately consider or implement the following action items:

1. Publish a union-free policy. Do you have a written policy that sets forth the Company’s policy on labor unions? If not, you should. Your supervisors and employees should know the Company’s position. (Let us know if you would like to see a sample policy.)
2. View your employee handbook in a different light. For years, HR professionals have been trained to ensure that the handbook is not a contract and to preserve the at-will nature of the employment relationship. While these concepts remain valid, handbooks

- should also be a positive employee relations tool. Your handbook should emphasize the benefits of working for your company.
3. Take a renewed look at policies that could play a special role in union context. As examples, do you have a no solicitation, no distribution rule that you enforce in an even-handed manner? Similarly, do you have a policy that would prevent an employee from using the company's email system to solicit employees concerning a union? Further, do you have a policy that encourages employees to come forward when they have questions, problems or concerns?
 4. Ensure your top executives understand the risks and fully support the initiatives to remain union free. (This point should not be assumed.)
 5. Make an informed assessment of the effectiveness of your supervisors, especially first-line supervisors.
 - Front-line supervisors typically win or lose union campaigns. These supervisors are often the "face" of your company.
 - How did your supervisors attain their positions: if they were promoted from within based on their technical job performance, ask yourself whether they have received proper training on their new roles as supervisors. Supervisors must be well equipped and well trained to serve as the leaders of your company.
 - Invest the time to train and educate your supervisors on how they can be effective leaders (people skills in addition to technical skills).
 - An effective supervisor must be, among other things, a good listener, a good communicator, and a person who is viewed as trustworthy and fair.
 - You must ensure that your supervisors understand the company's union-free position and are able to communicate it effectively to employees.
 - Supervisors who are unable or unwilling to be effective leaders must be reassigned or terminated.
 6. Assess the current level of satisfaction of your employees
 - Are your employees truly satisfied with the work environment?
 - What problems or concerns do your employees have?
 - Consider small group meetings with employees or an employee survey that is realistic (and for which you follow up and address concerns!!!)
 7. Are there "changes" in the workplace (or do you foresee changes)?
 - If so, you must communicate these changes in a timely manner, and the reasons for them.
 - It is better if you are able to involve employees on the front end and obtain their input and buy-in before implementing major changes.
 - Employees are much more likely to accept change if they understand that the company is doing the best it can and has considered their interests

8. Highlight and emphasize HR's role.

- HR professionals have a significant role as to this initiative. They must be empowered to take the lead and to communicate with supervisors and employees alike.
- Likewise, a company is more likely to remain union-free if it has a strong HR team that ensures that policies and practices are followed in a fair and even-handed manner.

9. Build company unity and loyalty with meaningful actions

- You must take steps to publicly recognize and appreciate loyalty, seniority and/or good performance.
- Do not underestimate the value of telling employees that they are doing a good job and are appreciated.
- Take steps to create good will and sense of team (e.g., T-shirts, hats, coffee mugs, sponsor sports team)

10. Make sure your employees understand the benefits they enjoy.

- Benefits are a tremendous expense to employers. Do your employees have any idea how much time, effort and money employers spend on them in addition to the wages they receive?
- On a periodic basis, inform and educate your employees as to all of the benefits that the Company provides to them.

E. Judgment Call: Should You Directly Discuss Union Organizing With Employees?

Let us assume for a moment that you have undertaken some or most of the initiatives described above. These would be big steps in the right direction. There is another decision, however, you need to make. *Should you address the topic of union organizing directly with your employees?* (Remember that your goal is to create an environment in which employees would not feel the need to sign a union authorization card.)

The more I analyze this question, the more I am persuaded that the answer to this question in most cases is "Yes." If the card check provision of the Employee Free Choice Act passes, this is a no-brainer. If you do not educate your employees, they may not get the facts until it is too late.

Alternatively, there is the real possibility that the Employee Free Choice Act may be amended to preserve the secret ballot election, but greatly condense the time between the petition and the actual election. (The average length is currently about 40 days. There are proposals floating that would reduce the time period to 10 days or less.) If such an amendment became law, the employer would still have very little time to educate employees as to whether they would truly be better off with the union.

Thus, under either scenario, I believe that on balance it is better for employers to be proactive as to their communications with their employees.

Each company must consider its circumstances and vulnerability. Please contact us if we can help you with this decision or if we can help craft your message to employees.

F. Communicating the Company's Union-Free Position to Employees

The key question is not whether the company is a perfect place to work. Every company has its problems and issues. For purposes of union organizing, I recommend that you frame the question to your employees as follows:

Would you [as an employee] be better off if a union represented your interests?

So what information should you convey to your employees?

- I recommend that you start with the Company's union-free policy and the reasons that the Company strongly prefers to remain union-free.
- The Company should also articulate the facts concerning unions and the reasons set forth in section B above.
- The Company can talk candidly about union authorization cards, the legal significance of them, and the fact that the Company would strongly prefer that employees not sign cards. (As aside, if an employee has signed a card and wants to revoke his authorization, the Company can inform employees that they have the right to revoke their authorizations.)
- The Company can talk about the false promises that unions typically make (e.g., job security, better benefits) and the reality of collective bargaining.
- The Company should also talk about the cost of union membership to employees including monthly dues, fees and/or assessments, as well as the possibility of strikes.

G. Supervisors Must Be Trained As To Early Warning Signs of Union Organizing

- You must train your supervisors to be alert for potential signs of union organizing.
- Ideally, your supervisors will cultivate good relationships with their employees, and a loyal employee will come forward and inform the supervisor of any activity.
- Alternatively, if a supervisor hears or sees any atypical or unusual activity, he or she must be trained to immediately inform his or her supervisor and/or Human Resources. (What may appear to one supervisor to be an isolated occurrence could be evidence of a much bigger pattern if other supervisors observe or hear similar atypical or unusual activity.)
- The sooner the Company becomes aware of any potential union organizing, the sooner the Company can be proactive and can educate employees as to the facts.

H. Things Management or Supervisors Cannot Do Or Say

The National Labor Relations Act protects an employee's right to support or advocate for a union (or to oppose a union). Similarly, there are certain well-settled rules that govern an employer's conduct as it relates to unions. Such rules are especially true in the context of union organizing and/or during a union organizing campaign. This section provides a very general overview of things a company cannot do or say.

The easiest way to remember this concept is the acronym "TIPS."

- "T" stands for Threaten. A company cannot threaten a union supporter or make statements that contain an actual or veiled threat (e.g., if the union gets in, we may close our facility.)
- "I" stands for Interrogation. A company cannot ask an employee questions as to whether he supports the union or ask him to identify persons who support the union.
- "P" stands for Promise. A company cannot promise that it will provide certain benefits to an employee if he supports the company instead of the union (this is viewed as tantamount to buying a vote.)
- "S" stands for Spy. Company management cannot attend union meetings or engage in surveillance to attempt to determine who is supporting the union.

Outside of "TIPS," company management is generally free to state the facts and its opinions concerning unions. If you are in doubt as to the potential legality of an action or comment you would like to make, we highly recommend that you consult with experienced labor counsel.

Conclusion

Employers who ignore the current landscape do so at their peril. Given the dynamics in Congress and with the support of a labor-friendly President and Administration, I believe that there will be new legislation passed that will make it easier for employees to unionize and will result in an increase in union organizing. Employers cannot afford to sit on the sidelines. We are prepared to help you remain union free. Please contact Todd Leeson at 540-983-9437 or any of the labor lawyers at Gentry Locke and let us know how we can assist you.

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