

Employer Update

Unionizing 101

By Mindy M. Willman¹ and Tamsen L. Leachman

The National Labor Relations Act (NLRA) was enacted in 1935 to promote equal bargaining power between employers and employees. This Act creates rights for employees and employers, and prohibits certain types of conduct by allowing the pursuit of an unfair labor practice (ULP) claim. ULPs can be alleged in the context of union formation, union recognition, and employer/employee interaction. Though ULPs are generally brought before the National Labor Relations Board (NLRB) by employees and employers, the General Counsel, an arm of the NLRB, is responsible for investigating and prosecuting the ULPs. A finding that a claim has merit can result in significant fines and other consequences. Thus, employers should have a basic understanding of the rights of employees and unions as well as what conduct must be avoided in the event that efforts to unionize are undertaken.

Who Can Form/Join a Union?

The right to unionize is broad, and extends to most private sector employees who are not supervisors.² Under the Act, a supervisor is one who: (1) has the authority to: hire, transfer,



suspend, lay off, recall, promote, discharge, assign, reward, discipline, responsibly direct, or adjust grievances; (2) exercises that authority in the interest of the employer; and (3) uses independent judgment in exercising his/her authority (the job is not routine or clerical).

Though this definition of supervisor seems straightforward, three recent rulings have narrowed the group of employees excluded from union representation. First, the term “assign” was found not to include “ad hoc instruction” (*e.g.*, telling someone to immediately perform a task) but instead to include the responsibility of appointing employees to work certain times or certain shifts or allocating significant duties to an employee. Second, the au-

Next month's topic:

Electronic evidence and litigation holds to preserve evidence.



thority to responsibly direct was found to mean that the individual directs people to perform tasks, and that s/he maintains responsibility for those tasks if they are not completed. Finally, independent judgment was found to mean that the individual making a decision is not controlled by specific direction from others, either verbally or through written policy, such that the individual uses no discretion.

What these rulings make clear is that more employees are eligible to join or form a union than ever before. Although Idaho is a right-to-work state, unions are pushing hard to organize workers in certain industries, such as construction, high-tech manufacturing, and health care. Given this, a basic understanding of what happens during an organizing drive and during an election is important, as is the awareness of an employer's rights and limitations during these two critical periods of time. Without such an understanding, a well-meaning employer may find itself defending a charge of unfair labor practices before the NLRB.

How Is a Union Formed?

For employees to require their employer to recognize a union as their collective-bargaining representative, the union must be certified under the NLRA. This can happen in one of two ways—either the employer may *voluntarily* agree to *recognize* the union, or a substantial number of employees petition the NLRB to force a *secret-ballot election*. If employees petition for an election, both the employer and the union will generally conduct a campaign to educate employees about the benefits or drawbacks of union representation. At the end of the campaign, an election process is conducted and certified by the NLRB. If a majority of employees vote for union representation, the union will be certified and collective bargaining will commence soon thereafter.

The Rules for Employers Before, During, and After Unionization

To protect its own interests and the rights of employees, there are things that employers should and should not do before, during, and after unionization. What follows is a discussion of these options as well as an overview of actions employers should avoid taking in the different stages of unionization.

Prior to a Showing of Interest by Employees

There are several steps employers can take well before any unionizing activity begins that may help minimize employee interest in unionizing or at least create the greatest possible rights for employers should later unionizing activity begin.

First, employers should consider taking steps to remind employees that unions are not necessary in the work relationship and that employees can bring their concerns directly to management. This is typically done through creation of an employee concern, open-door, or grievance policy. This message can be more strongly communicated, however, through a policy directly addressing the company's position on unions—that they are unnecessary and not in the best interest of employees and the company because they impair communication.

Second, employers should consider other, more pro-active ways to communicate their commitment to employees. One common way to do this is through an employee satisfaction survey. This can be done formally, through written questionnaires, or informally, through meetings or even one-on-one dialogue. Although this may require an investment of time and money, employers who avoid an organizing campaign will find it well worth the investment.

Finally, employers should evaluate whether they have helpful tools to control union access to employees and organizing activity by employees on company premises

and during work time. Typically, this is achieved through neutral, non-solicitation policies.³ It is important that these policies are carefully worded to prevent infringing upon protected rights and that they are implemented *before* any talk of unionization. This will prevent any argument that such policies are implemented purely as a form of retaliation.

During an Election Campaign

Despite employers' best efforts, employees still sometimes see unions as beneficial and take steps to pursue unionization. If this happens to you, don't despair, as there are still several options available to persuade the majority of employees that unionization is not ultimately in their best interest.

During the campaign process, the rules about communicating anti-union animus soften significantly, and employers can be more direct about the very real disadvantages of union involvement in the workplace. This more open dialogue is not without limits, however, so employers must understand just how far they can go and must be mindful of how far a union can go during this critical stage of the organizing process.

Employers can clearly advise employees of the negative consequences of unionizing, but must be careful to ensure that the message is based on facts, not opinions, and is non-threatening. The information can be communicated in print or verbally. If the message is communicated through an employee meeting, for example, employees must be paid for their time. Ultimately, what is important to remember is that messages should not be viewed as threatening or coercive, such as through surveillance or questioning employees about company loyalty, and that employees should not be subject to action that could reasonably be viewed as punishment or retaliation for exercising their right to engage in concerted activity.

If employers engage in anti-union campaigning, they must also give the union access to employees. Unions, like employers,

may distribute information at the workplace, but unlike employers, unions may only contact employees who are not on the clock. Employers must also provide a list of personal contact information for employees, *i.e.*, name, home phone number, and address, if the union requests it.

After Unionization

Should the employer's campaign fail, and the majority of employees vote for union representation, the rules for employers change once again. Once a union is certified, caution must be exercised in expressing any negative beliefs or feelings about it. In addition, the union's status as the exclusive bargaining representative cannot be challenged, *i.e.*, by another election, by the minority of employees against it, or by the employer, during the first year after it is certified.

This initial period of protection ensures that unions will be given the opportunity to bargain with the employer in an effort to secure a collective bargaining agreement (CBA). During this process, both the employer and the union must bargain in good faith. Not surprisingly, there is often disagreement about whether the negotiation positions of each party reflect a good faith approach to bargaining. In extreme cases, a union will formally challenge an employer's bargaining position through a ULP claim.

In most cases, a union will take a different approach, and encourage its members to go on strike and/or picket the employer. If this happens, employers may be forced to deal with a variety of negative forces, such as public support for workers, but they are still permitted to continue the operation of the business despite the protests of workers. If the strike creates an unreasonable hardship on the employer, the company may, for example, hire permanent replacement workers or lock out union employees. In these situations, the employer must have a legitimate business



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purpose for taking the action, and the employer's intent must not be retaliatory. Even if there is no evidence of animus, taking such action may still be the focus of a ULP if it is deemed to unreasonably invade the rights of the union members. Consequently, employers may want to consider various options in how to respond to unions, and must recognize that no single option is guaranteed to be the right one in all cases.

Conclusion

Idaho employers are feeling the effect of increased union activity and interest. For those employers whose employees take initial steps to form a union, it is especially important that the rules of organizing and bargaining are understood and respected so that the focus can remain on the best interest of the company and not be diverted to defending a ULP claim or dealing with union picketing. This is a complex area

of the law, but hopefully this article has provided a valuable overview of the most important concepts and principles. Please contact our office if you have further questions or require more detailed information.

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² The NLRA also excludes a few other types of workers from its definition of employee: agricultural workers, domestic service workers employed by and in the home of a family or a person, individuals employed by their parents, independent contractors, or individuals in the service of a carrier under the Railway Labor Act.

³ Though an employer may have a policy against solicitation, an employer must give employees the right to be solicited before and after work as well as during breaks at the workplace.

SHAME, SHAME, SHAME ON YOU!

You didn't consider the union factor when you hired your contractor!

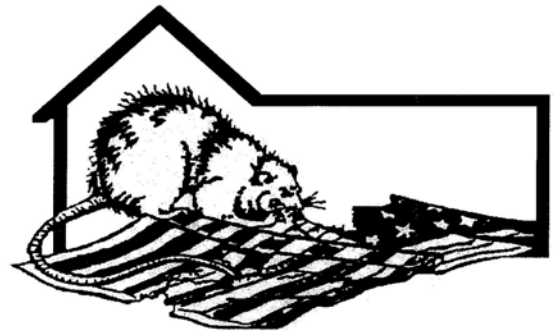
Employers who hire non-union contractors are not necessarily immune from negative publicity campaigns by unions. Although these employers do not make union hiring decisions and are thus not directly involved in labor disputes with unions, the unions are targeting them as a way to put indirect pressure on non-union contractors by damaging relationships with clients. Thankfully, the National Labor Relations Act (NLRA) gives employers a right to be free from certain union conduct, but this act has not stopped unions from testing the limits and trying to see just how far they can go and how much they can get away with.

The NLRA, which regulates the actions of unions and employers, prohibits any union activity that coerces, threatens, or restrains any person engaged in commerce, including actions designed to influence employers not to do business with non-union contractors. However, the NLRA does not list specific activities that fall within this prohibition, and judges have reached different decisions as to what exactly is prohibited.



Recently, unions have begun protesting the hiring of non-union contractors by displaying bright yellow, twenty-foot banners shouting "shame" in front of businesses that have hired non-union contractors and by handing out florescent colored flyers (a.k.a. handbills) that "enlighten" the public about the crime that is afoot because the ("rat") business is not getting involved in labor disputes that do not even involve it. Sometimes, unions will display a large inflatable rat, and occasionally, union workers will march up to a business in a funeral procession with a fake casket, a grim reaper, and funeral music. Of these activities, the most common in the Treasure Valley are bannering and handbilling.

What is most disturbing about bannering and handbilling is the negative focus on the employer as opposed to the non-union contractor and the degree of confusion that these tactics generate. For example, the handbill that is given to passers-by generally contains a picture of a rat chewing on an American flag, implying that the employer is a rat for not hiring a union contractor. In addition, these flyers also suggest that the employer is contributing to crime in the community and committing a social evil just because it hired a non-union contractor.



The goal of the unions who engage in this activity is clear - forcing employers to hire only union contractors. The use of public pressure and distribution of misinformation is believed by unions to be the best way of achieving this goal. When this activity has been legally challenged, judges have historically shied away from prohibiting it outright because of concerns about infringing upon the First Amendment right to free speech. While this freedom does give unions the right to educate and inform (even using inflammatory rhetoric), such as through handbills, newspapers, and billboards, it does not give unions the right to maliciously defame or to distribute fraudulent materials. Unions seem intent on continuing to test the limits of this right, and have recently begun sending letters to businesses suggesting that their non-union contractors have engaged in criminal activity. This kind of behavior, if legally challenged, will likely be viewed by a court as crossing the line, and not justified by the First Amendment.

Employers that find themselves in the middle of a “shame” campaign may want to carefully evaluate the options available to either stop the activity, or to correct the misinformation presented to the public. They are not required to sit and watch, and could instead:

- Seek legal relief through the courts or the National Labor Relations Board (NLRB) to stop the banner and handbilling;
- Set up a counter-campaign with banners and/or handbills, and remind customers of all the good things the employer does for the community, as well as respond to the factual inaccuracies; and/or
- Communicate directly with customers to explain what is actually going on and address any concerns or correct any misperceptions.

Each of these options has the potential for stopping the union conduct, but each also has potential drawbacks. For example, a counter-campaign may only draw more unwanted public attention, or could be perceived negatively as an attempt to draw the public into the dispute. Moreover, many of these options may lead to unplanned and possibly significant cost or time commitments. Also, inappropriate communications or contact with the union members could lead to unwanted legal consequences, as well as potential escalation of the union’s protest behavior. As a result, employers should carefully consider which course of action to take and should remember these words of advice when first targeted:

Don’t call the police. Do contact legal counsel!

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