Responding to a Union-Organizing Campaign

Do you and your supervisors know the legal boundaries in a union campaign?

By Edward Young and William Levy

If your franchise is operating non-union, is it ready for a full-scale drive by a labor union to organize its employees?

Consider this before answering: Many campaigns come as a complete surprise to the employer. In such situations, the company learns that a number of employees who never expressed their sentiments in the past are suddenly indicating an interest in union representation. Once underway, a campaign such as this can move swiftly, especially if the union has done an effective job of recruiting and training a dedicated core group of employees working inside the organization.

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While not all campaigns come as a surprise, employers that want to remain non-union should be ready to react promptly to news that an organizing effort is underway. First, it will want to immediately put employees on notice that it is opposed to unionization and that it is prepared to use whatever lawful means that it has available to stay "union free." Second, it will want to act quickly to provide employees with facts supporting its position and, at the same time, urge them to consider the pluses and minuses of unionization before making a final decision concerning union representation.

Key to a company's success in getting its message across is the knowledge and savvy of front-line supervisors who have frequent contact and communication with those employees that the union is attempting to bring within its fold. To assess just how well prepared these supervisors are to deal with the tasks that may lie ahead, the company should ask itself the following questions:

- When was the last time these supervisors underwent "basic training" for dealing with employees in the heat of a union-organizing campaign?
- Would they know what to do if they suddenly learned that union cards were being circulated among employees under their supervision?
- Would they know what to tell employees about letters and flyers saying that the union stands for better health care at lower costs to the employee, a traditional pension plan, longer vacations, better hours and higher pay?
- Do they know that the company could be held responsible for what they say and do?
- Do they know that what they tell employees could be unlawful under federal labor laws and could lead to a union gaining the right to bargain with the company over rates of pay, hours of work and other terms and conditions of employment?
- Do they know that what they tell an employee could be used against the company in a claim that the company discharged or disciplined the employee because the employee joined or assisted the union?
- Do they know that an employee has the right under federal law to freely complain to other employees and to outsiders about his or her working conditions, never mentioning a union, and that it is unlawful to discipline them for making such complaints?

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- Do they know that during the early stages of a campaign, union organizers may try to keep a low profile and obtain as many card signatures as possible before the employer realizes that it has been targeted? Also, do they know that the longer a union campaign goes unnoticed by the company, and the longer the company takes to react, the greater the chances the union will prevail in an election?

- Do they know that the employer expects its supervisors to be loyal to the company and that they can be discharged for participating in or assisting union- organizing efforts?

Can a Company Afford to Bypass Supervisory Training?

The need to assure that supervisors receive training in union avoidance is underscored by the fact that employers pay out more each year to remedy violations of federal law. On Jan. 3, the National Labor Relations Board announced that during 2006, it recovered more than $110 million on behalf of employees and that most of that amount was for wages lost as a result of unlawful terminations. In addition, employers offered reinstatement to nearly 3,000 employees who had allegedly been discharged for unlawful reasons. These numbers could be dwarfed by future payouts if Congress passes pending legislation providing for liquidated damages and civil penalties for violations of the National Labor Relations Act. The AFL-CIO considered this legislation to be so important that it, by its own admission, spent more than $40 million to support congressional candidates who pledged to support it.

Because unions tend to "spring" their campaigns on companies at times when they least expect it, it is important that companies make sure that supervisors are prepped on an ongoing basis. This means familiarizing supervisors with recent case law and periodically giving supervisors refresher courses. Supervisors should also be kept up to date with typical campaign issues such as wages, benefits and working conditions and be ready to explain to employees why they should support the company's efforts to remain "union-free."

Card Check Legislation Gathers Steam on Capitol Hill

Business and organized labor have taken the gloves off in a major battle over the future of union organizing in the workplace. Just weeks after the start of the 110th Congress, House leaders unveiled the Employee Free Choice Act, H.R. 800, with more than 230 co-sponsors. The bill would replace the protection of a federally-supervised private ballot election with a simple authorization card that would disclose an individual's views of the union to their coworkers, union organizers and their employers. The bill also provides for binding interest arbitration on the initial contract, a radical change in the law that will deny employers their basic right to agree to the terms of any contract. While the timetable for consideration of the legislation remains uncertain, it is clear that the House leadership has put this key labor priority on the fast-track. The IFA and several other Washington trade groups are leading the efforts of the Coalition for a Democratic Workplace, which will work to defeat H.R. 800 and similar bills.

The IFA believes that an employee's right to a private ballot is fundamental, and Congress should not trade this right in order to benefit their labor allies. The so-called Employee Free Choice Act is incompatible with protecting the interests of individual liberty and the principles of a sound democracy. If Congress passes this proposal, they will be stripping away federally protected private ballots from the hands of American workers and replacing them with a scheme where their votes are made public, leaving them vulnerable to coercion and intimidation.

Look for frequent updates on this critical legislation at the government relations section of Franchise.org, as well as a link to the coalition's information.

What Do Front-Line Supervisors Need to Know?

To make supervisors "campaign ready," employers should provide them with guidance concerning what the law permits them to do and say and, at the same time, caution them against conduct regarded as off limits by the NLRB. Here are some suggestions concerning what each supervisor should be told.

Remember that as a supervisor, one is an "agent" of the company and that the company can be held responsible for what is said and done. For example, if someone unlawfully threatens to fire an employee because he or she actively supports a union, the employer can be found to have committed an unfair labor practice and be required to take action to remedy the unlawful act. In certain circumstances, this kind of conduct can result in an election being set aside and a new election ordered even if the company had received far more votes than the union.

Listening to what employees voluntarily and openly say about the union or the campaign is not only permitted, it is required by the company. In addition, one must report such comments to an official of the company designated by the company to receive it. However, interrogating employees about their union activities or sentiments is unlawful. Therefore, as a supervisor, one should not ask employees such questions as "Have you signed a union card?" or "Did you attend the union meeting?" or "Do you know who has signed a card?"

While supervisors may generally express their opinions concerning unionization, the NLRB draws a distinction between a lawful expression of opinion and an unlawful threat. Supervisors should avoid telling employees such things as: "In my opinion, the business

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will close if the union comes in" or "In my opinion, the company will never agree on a contract." A supervisor may, however, lawfully express the view that employees don't need a union in order to receive fair treatment. Assuming it is true, they can make the point that employees got their existing benefits without a union. Also, it is okay to say: "No union ever paid out a penny in wages to our employees—our company has paid it all."

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Supervisors should be aware that they may be accused of spying upon employees' union activities if they drive in the vicinity of a union hall where company employees are attending a meeting. They should also be aware that the NLRB recognizes another form of unlawful activity known as "creating an impression of surveillance." Therefore, supervisors should be cautioned against telling employees "We know who is for the union" or "We know who attended the meeting" or "We know who the ringleaders are." Also, supervisors should not accept invitations to attend union meetings.

The law also makes it unlawful for an employer to promise benefits to employees in exchange for the employees withholding their support of a union. The NLRB has held that the prohibition against "making promises" may extend to announcing and implementing pay increases or improved benefits during the course of an organizing campaign. If a company makes changes in existing pay or benefits during a campaign, it may be required to prove by objective facts that such changes were in no way related to the presence of a union. The law requires that the company act as though no union was on the scene.

The National Labor Relations Act, in general, permits supervisors to relate facts and experiences. For example, a supervisor can factually describe what occurred during the course of a strike. However, he or she should be careful not to suggest that a strike at the employer's facility is inevitable.

Supervisors are expected to report to upper management what information they have obtained during the course of a union campaign. Thus, they are expected to "look, listen and report."

A common mistake during a campaign is for a supervisor to ask employees to tell him what their complaints are. The law protects employees in the exercise of their right to complain about their working conditions. The NLRB may infer that the supervisor is soliciting grievances and, by implication, is promising to rectify those grievances in order to induce employees to withdraw their support of the union.

Supervisors should be made aware of the serious consequences of committing unlawful acts during a union-organizing campaign. Thus, they should be informed that, in exceptional circumstances under current law, the company could be ordered by the NLRB to recognize and bargain with a union without an election being held if more than 50 percent of the employees in an appropriate bargaining unit sign cards designating the union as their bargaining agent and the NLRB finds that the company has violated the act enough to conclude that a fair election cannot be held.

> Supervisors should be made aware of the significance of union authorization cards.

While there are many "don'ts" for a supervisor to remember, he or she should not shy away from carrying on a dialogue with employees about the advantages of working for his or her company or the disadvantages of unionization. If a supervisor has, in the past, worked in a unionized plant where the union did little or nothing to represent employees, the supervisor is free to point this out. Similarly, a supervisor can factually inform an employee that he or she has never belonged to a union because he feels he can get fair treatment by his employer without paying union dues.

Supervisors should be made aware of the significance of union authorization cards. Such cards are of primary importance to a union in its efforts to organize employees. A typical card simply states that the employee whose signature appears on the card authorizes the union to act as his or her representative for purposes of collective bargaining. In order to petition for an election conducted by the NLRB, the union must obtain the signatures of at least 30 percent of the employees in a proposed bargaining unit. Because a union must receive a majority of the votes cast in order to win an election, it may choose not to seek an election where it fails to obtain a majority of card signatures during its campaign. For this reason, it is important that the supervisor use his or her best (lawful) efforts to convince employees that they should not sign a card.

Time Is of the Essence

Once it learns that a union campaign is in progress, the employer should react promptly to accomplish two things. First, it should immediately inform employees that it is opposed to unionization and will use all lawful means at its disposal to remain non-union. Second, it should provide employees with facts supporting its position and urge employees to carefully consider those facts before making a final decision concerning union representation. From this point on, its job is to convince employees that, in the final analysis, their interests are better served by rejecting the union. At all stages, the role of the front-line supervisor is crucial. He or she must be constantly alert to changes in employee sentiment and must keep his employer informed of such changes and the reasons for them. As the one company representative who has regular contact with employees, the front line, his or her actions are of primary importance. ■

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