

Responding to a Union Drive

By Tom Gorsky

Union certification can happen extremely quickly, have an extraordinary impact on a business and, if not addressed lawfully, create significant financial liability for a company.

Being unionized means a union has the right to represent employees regarding conditions of employment such as scheduling, wages, hours of work, termination and overtime. To better understand the implications of a union drive, I'll use Ontario as an example of the rights and obligations of the employer.

In Ontario, a union files an application with the Ontario Labour Relations Board (OLRB) asking to be certified to represent an identified group who are working for a particular employer. The union needs the support of only 40 per cent of employees to file the application.

The company has two business days to file its response to the application, including providing a list of employees in the relevant employee group and deciding what legal positions the company wishes to take on the issues raised in the application.

The OLRB conducts a vote of the employee group five days after the application has been filed, and the outcome is decided by 51 per cent of the employees who vote. That means that if only 10 employees vote and six vote in favour of the union, the entire employee group is unionized.

Many employers, and even legal counsel, misunderstand what an employer is and is not permitted to say and do during a union campaign. A common misunderstanding is that an employer must remain neutral. In most Canadian jurisdictions, employers have a legislated right of free speech that entitles them to express a preference that there not be a union. Employers can also point out benefits in the workplace that employees receive without the union, and they can educate employees about unionized companies that pay less than the union is promising them.

It can be a mistake for an employer to refrain from exercising its rights of free speech because, while there may be some employees committed to a union, there are usually a number who are undecided. It is critical that employees hear management's side of the story, and members of management should be trained to proactively and persuasively discuss the issue of unionization with employees.

That said, employers must remember that whether to join a union is a decision to be made by employees, not their employer. The Labour Relations Act prohibits an employer from penalizing an employee because he or she supports being a member of a union. Where an employer has disciplined, terminated or laid off an employee related to his or her support for a union, the OLRB can reverse the employer's decision. The OLRB can reinstate a terminated or laid-off employee and order payment of back wages. Further, if the OLRB finds the employer's actions amounted to threats or intimidation, the Board can automatically unionize that employer, *even where employees voted against the union*.

Bottom line: Stakes are high. Establishing and maintaining positive employee relations is fundamentally important. So too is knowing your rights and obligations as an employer and working with labour counsel knowledgeable of and experienced with union organizing drives. ■



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