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Labor Union Activity On The Upswing: How Should Employers Respond?

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The year 2003 has seen unprecedented levels of union activity directed at non-union employers in all industries and all locations. Traditional union organizing drives have been supplemented by “salting” of non-union workplaces by union *agents provocateur*, “targeting” (pricing below cost) by union-subsidized competitors, charges and “whistleblowing” claims by union agents alleging violations of wage and hour or licensing laws, the National Labor Relations Act, the Occupational Safety and Health Act, the Environmental Protection Act or other legislation. Unions have also supported lawsuits against employers based on similar claims. Employers’ legal defense costs and liabilities in such cases can be in the four to six figure range. Union organizers have been encouraged by the fact that union membership as a percentage of the workforce has not declined as much in the last two years as it has for the previous several decades. This comparatively “good news” for the unions, the economic downturn, the “availability” of union activists who have been laid-off, and the upcoming presidential election, a focus of the AFL-CIO, all suggest that union activity will be even greater in 2004.

If you have had to pass on medical insurance premium cost increases to employees, limit increases in wages and other benefits and “perks” or reduce or cutback on employees or hours, your business is vulnerable to organizing and harassment activity. We have participated in the defense of union organizing and “salting” campaigns for more than twenty clients within the last two years, all but two of which have been defeated (we have lost only three contested union elections since 1983), but employers who prepare for union activity before it happens have the best chance of prevailing. In addition, the same preventive steps that employers should take to avoid union organizing and harassment will also assist in recruiting and retaining good employees and in mobilizing them productively, with a minimum of “employee relations” problems, whether or not you experience union harassment or lawsuits. Be sure you are doing the following:

1. **Supervisory Training:** Train your supervisors on effective communications and on critical labor and employment law issues. All of the “tips” stated below will be unavailing if you do not train your supervisors effectively in dealing with employees. Supervisors’ willingness to hear employees out and to communicate effectively and respectfully with them is the crux of your “defense line” against union organization. In addition, supervisors need to be trained on the “do’s and don’ts” of labor and employment law so that they can be effective on your behalf, without running unnecessary liability risks.

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2. Employment Policies: Adopt an up-to-date, lawyer-reviewed, customized employment policies handbook and procedures. A critical first step for defending yourself is the adoption and regular updating of an employee handbook which complies with current legal requirements, but even more importantly, provides for strategic defense and leverage for you, as the employer, in dealing with any and all employment-related issues in your industry and market. Generic “software” handbooks and the like are not adequate for these purposes since they typically do not comply with relevant state law and often incorporate a “wishy-washy” non-aggressive approach to critical legal and employee relations issues.

3. Merit-Based Compensation: Retain or adopt “merit” components to your compensation program. No matter what your industry or compensation system, some portion of an employee’s earnings should be based on merit, productivity, revenue-generated or other measurable contributions to the “bottom line.” Such features give your employees “a piece of the action,” incentivize productivity and go a very long way toward wedding your employees to the success of the business, as opposed to the time clock-watching approach of union employees.

4. Rules of Conduct and Performance Standards: Implement clear, comprehensive and enforceable rules of conduct and performance standards. Uncertainty as to the employer’s expectations and performance standards can breed receptivity to union organizing appeals. It is very important for employers to adopt comprehensive work rules covering most of the circumstances in which you need to provide direction to your employees, as well as production standards. Clear notice of these rules in employee handbooks and elsewhere sets the stage for effective discipline and can be especially important when you are dealing with employees with “hidden agendas.”

5. Benefits: Keep your compensation and benefit program “in the ballpark” with your competition. Planning the best “bang for the buck” with your compensation and benefit program is critical to defending yourself against

union activity and to attracting and retaining good employees. Depending on the age, marital status and other factors relating to your employees, different benefit packages can have dramatically different results. It pays to keep an eye on these factors and manage your benefits program accordingly. Remember that small changes in benefit programs can have dramatic employee relations impact.

6. Discipline and Discharge: Discipline and discharge fairly, but firmly and promptly, when employees do not “get with the program.” Though some employers are surprised at this advice, it is actually effective preventive against union activity to promptly and fairly discipline and discharge employees who do not conform to your rules of conduct, performance standards or absence requirements. Failing to discipline demoralizes your good employees and encourages the worst employees, who typically are the employees who become most interested in union organization.

7. Responsiveness to Employees: Be responsive to employees’ concerns and suggestions. Your good employees can be a source of tremendously valuable suggestions for improvements in your productivity and customer service, and it is vital that you be responsive to employee complaints as well. Complaints do not have to be acted on favorably, but it is necessary that they be responded to promptly and with an explanation of the employer’s reasoning for its decision. Good employees do not want to be running the business for you, but they do want to know that their concerns and suggestions are considered.

8. Employee Communications: Communicate about your business’s plans, new developments, and good, as well as bad, news. Perhaps the single most difficult rule to follow, and also one of the most important means of avoiding employee anxiety, is to communicate to your employees, particularly when there is difficult news or uncertainty to convey. It is critical, when your business is involved in succession planning, a possible sale, major new developments or reorganization in the business, or the loss of key personnel or customers, that you communicate with your employees about these events. If you fail to do so, the

grapevine will do it for you and the results will always be far worse. Your employees will credit you for honesty in communications and you will gain rather than lose in employee morale through such communications, even when the news you have to communicate is bad.

9. Confidentiality, Conflicts and Moonlighting Policies: Adopt and enforce appropriate confidentiality, conflict and moonlighting policies. Depending on your industry and circumstances, careful policies need to be implemented in these areas to address trade-secrets and proprietary information, conflicts, unfair competition and work “on the side.” These issues can also be extremely important in relation to union harassment. More restrictive non-competition or non-solicitation agreements can also be implemented, but only with competent legal advice (see our October, 2003 LawFax for more information).

10. Non-Solicitation Policy: Adopt lawful non-solicitation and non-distribution policies. These critical policies, as well as many other changes in your policies, compensation and benefits, cannot be adopted legally after union organizing activity begins, and thus the time to do so is now. These policies are critical tools to keeping your employees’ attention on their work and avoiding any distractions, including that of union organizers.

Union officers of the month:

Greg Shafranski and Jerry Westerholm

Shafranski and Westerholm, International IBEW Representatives (Westerholm is also an ex-Local 292 Business Manager), have been charged by the U.S. Department of Labor with accepting improper payments from vendors of risky investment products to union pension funds which they served as trustees. These investments lost the Local 292 and other union pension funds \$327 million dollars.

11. Hiring Procedures: Carefully design a hiring policy and procedure and a customized employment application and hiring confirmation documents. The recruitment side of your operation is critical both to your operational success and to your defense against union salting and harassment. Your ability to defend yourself against charges that you have unfairly discriminated against applicants or employees is dependent upon the effectiveness and the lawfulness of your recruitment-related policies and documents. Do not rely on legally-deficient “stationery store” or “off the internet” applications and related materials. Hiring documents are now legally significant and should be developed and reviewed with competent counsel.

***Ten Commandments
of Effective Employee Relations***

We are excited to present the first in a series of 2004 “Executive Breakfast Briefings”, *Ten Commandments of Effective Employee Relations*. The series will be conducted by Seaton, Beck, Peters, Bowen & Feuss attorneys John Bowen and Tom Revnew.

This Briefing is a fast paced and dynamic session focusing on the fundamental elements and leadership skills necessary to develop proactive employee relations – and became an “employer of choice.” We will focus on preventive procedures and practical solutions to workplace challenges – designed to help employers develop and maintain a more effective and productive workforce.

We are now accepting reservations for our Breakfast Briefing, which will be held at the Wyndham Garden Hotel – Bloomington on February 12, 2004 from 7:30 a.m. – 10:00 a.m. at a cost of \$15.00 per person, payable at the door.

To register for the February 12 Briefing or for more information on this and the rest of the 2004 “*Executive Breakfast Briefing*” series, call us NOW at 952-896-1700 or email us at gsmith@seatonlaw.com.

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