Decision Reminds Employers to Think Before Speaking to Employees About Union Issues

Labor & Employment Law Update

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On September 4, a Federal Appeals Court upheld a National Labor Relations Board (NLRB) decision finding management comments to employees during the early stages of a union organizing campaign unlawful. Section 8(a)(1) of the National Labor Relations Act makes it unlawful "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." Section 7 rights include "the right to self-organization, to form, join, or assist labor organizations." The NLRB and the Courts interpret this language broadly.

Back in 2011 rumors about a possible unionizing campaign prompted an in house attorney and regional HR director to meet with employees, one of whom secretly taped the meeting. Comments made during that meeting were found to unlawfully: (1) threaten by suggesting unionizing was futile; (2) imply a promise of pay increases if the employees did not vote for a union; (3) threaten that unionization would result in demotion for some employees; and (4) threaten blacklisting of union supporters.

The following comments by management officials during the meeting were found to unlawfully imply that unionizing was futile and would not produce the benefits sought:

- Be "very careful" when listening to the union's "sales pitch."
- "In many cases, when you enter these negotiations, if you ever get there, employees tend to lose things."
- Negotiations are "a wide open game of uncertainty" in which "nothing is guaranteed" even if the union wins the election.
- Answering "it's possible" when asked if unionizing would cause wages to decrease adding, "we start from scratch…we don't start with what you guys are making today. Everything goes to zero."
- Employees at a unionized location have gone nearly three years without a bargaining session or contract. The bargaining process is "never automatic" and employees might never see the benefits they seek.

The finding of an unlawful implied promise to raise wages arose when, in response to an employee's specific request, management agreed to review the current pay structure to ensure it was fair and competitive adding, "we want a chance to address … [your concerns] before you pay somebody else to address them."

Management's answer to questions about the apprentice and journeyman system was found to be an unlawful threat to demote certain employees if the workforce unionized. Finally, reference to union membership as a "scarlet letter," and suggestions that other employers might be less inclined to hire job applicants who had worked in a union shop, were deemed unlawful threats to blacklist employees for union activity.

As the Court stated, "the underlying message…is that an employer…needs to take care in the rhetoric it uses when discussing union issues with its workers." Employers must be very careful when discussing union related matters with their employees. Special and careful considerations must be paid to developing labor law. Detailed scripts, approved through seasoned labor counsel, should be in place to ensure appropriate language is being communicated.

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