

Conducting a Successful Union-Free Campaign: A Primer (Part II)

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There has been an increase in the number of representative elections held to determine whether employees wish to be represented by Unions, as well as an increase in the number of union election victories. Additionally, the trend has been for more union voters in smaller, rather than larger, units of employees accordingly. practical and legal information on how to stay union-free has become increasingly relevant. This primer is presented in two parts because of the scope of the material covered. In the last issue of Employee Relations Law Journal, Part I discussed practical suggestions and legal guidelines for remaining union-free, as well as an overview of the organizing process and election mechanics through the start of the formal campaign period. In this issue, Part II discusses permissible and impermissible employer conduct during a campaign, practical suggestions for running a successful campaign, and an overview of post-election objection procedures.

The AFL-CIO is aggressively searching for opportunities to organize new union members. Part of this strategy includes focusing on lower-wage workers, including those with higher educational levels, who may be receptive to the union's messages. The strategy also includes targeting the employees of smaller employers where sophisticated human resource programs may be lacking. Because of this aggressive organizing posture, and despite the employer's best efforts to establish a proper union-free foundation, an organizing drive may rear its head.

This second part of this article will examine the effective ways to remain union-free in the face of a union organizing drive. It will discuss the organizational aspects of an effective union-free campaign including establishing a union-free committee, gathering information, and educating managers and supervisors about the campaign process. It will then examine the Legal guidelines for permissible and impermissible employer conduct and communications during a campaign. Finally, the article will highlight effective and lawful campaign themes and strategies, and provide an overview of election day activities, and the post-election objections process.

DESIGNATING A UNION-FREE COMMITTEE

Once inchoate organizing activity is discovered, or knowledge is received that a representation petition has been filed, the employer must immediately designate the individual or individuals who will be in charge of the union-free campaign. In larger organizations, the union-free committee is typically composed of high-level operations and human resources representatives, while in smaller organizations it may fall on the shoulders of a few credible managers or supervisors. This committee will be responsible for developing the union-free strategy, lawfully monitoring the organizing activity, keeping management informed as to developments during the campaign, and ensuring that managers and supervisors fulfill their union-free obligations during the campaign.

Gathering Information Needed for the Union-Free Campaign

At the same time the employer is assembling its union-free committee, it must begin gathering information that will be used during its campaign. Because of the generally short period of time between the filing of a petition and the date for the election (typically 30 days), it is critically important that an employer immediately begin this information gathering process. The information sought includes copies of the relevant international and local union constitutions and bylaws, financial reports,³³ and copies of collective bargaining agreements that have been negotiated by the union.³⁴ The union-free committee must also obtain information and press clippings about the union's strike record and membership figures; fines or other detrimental actions taken by the union against union members; copies of unfair labor practice charges or other lawsuits brought against the union; and indictments of union officials for corruption or other unlawful activity.³⁵ Other potentially useful information about the union may be obtained from area newspapers and magazines, and the Internet or commercial labor relations information providers.

Introductory Meetings with Management and Supervisors

The designated union-free committee must immediately meet with its managers and supervisors, preferably on a one-on-one basis, to obtain as much information as possible concerning the extent of employee support for the union, the issues driving the union campaign, and insights as how best to respond to the issues. Management and supervisors should be carefully interviewed to determine if there is any evidence of renegade supervisors who are engaging in pro-union activities.

The period of time between the date of the filing of the petition for an election and the date of the election is known as the "critical period." If an employer engages in unfair labor practices or other objectionable conduct during the critical period of the campaign, an election victory in favor of union-free status may be set aside if timely objections are filed by the union. Under the *National Labor Relations Act (NLRA)*, management and supervisors are deemed to be agents of the employer, and their unlawful or objectionable conduct will be binding on the employer. Therefore, in either a group or individual setting, management and supervisors must immediately be educated about permissible and impermissible employer conduct during the campaign. They should also be reminded about the importance of uniform and nondiscriminatory enforcement of company work rules, proper written documentation of disciplinary actions in order to defend against unfair labor practice charges, and obtaining signed statements from witnesses when any adverse personnel action is taken.

EFFECTIVE AND LAWFUL MANAGEMENT COMMUNICATIONS

Employer communications to employees during a campaign will normally consist of letters and leaflets to employees, bulletin board postings, paycheck enclosures, large and small group captive audience speeches, one-on-one meetings with employees, and perhaps commercially available or custom-made videos. The employer should not conduct its union-free meetings with employees in management offices as this may be viewed as having the tendency to interfere or coerce employees who are engaging in union activities, resulting in the setting aside of the election. Rather, meetings with employees should be conducted in neutral settings, such

as break or conference rooms. Likewise, the employer should not visit employees at their homes because of the coercive effect it may have on employees. While an employer is generally free to make any communication to employees that does not contain an unlawful threat of reprisal or promise of benefit, a few practical truisms must be mentioned.

Establishing the Agenda for Discussion

During the campaign, an employer must be diligent in establishing the topics for discussion, and should not be trapped into only responding to the issues or grievances harped on by the union. Instead, the employer must focus on the negatives to unionization in general and, where possible, tie it to specific examples involving the specific union organizing its employees. To do otherwise allows the union to establish the topics of discussion and puts the employer at a disadvantage of always responding to its inadequacies as defined and articulated by the union. While there may be certain circumstances where it is necessary for an employer to respond, such as when the union grossly misrepresents material facts or uses forged documents, the employer must strive to establish the agenda in the campaign and to stick to it. It is advisable for the union-free committee to establish a schedule of events and topics covered during the campaign, subject to change as appropriate.

Remember that while the initial impulse may be to immediately respond to a union attack or misrepresentation, a response should only be made where it will, in fact, help the employer. The employer should ask itself whether it will obtain union-free votes by responding, and should only respond when it can answer this question affirmatively.

Identifying and Designating Credible Messengers

At the very beginning of the campaign, it is essential that the employer identify and designate those individuals who have credibility among employees to effectively deliver the employer's messages and communications. Referred to as "credible messengers," these managers and supervisors will be used extensively during the campaign, typically in captive audience and small group meetings, and also in one-on-one discussions to persuade undecided voters and/or obtain critical swing votes.

While ideally all of the employer's managers and supervisors should be credible, in reality the management ranks of any organization are composed of individuals with varying degrees of leadership skills and talents. Those managers and supervisors who are lacking in such skills will be of limited effectiveness in communicating the employer's union-free messages on their own, and will need assistance from others who have credibility. While an effective campaign will involve as many credible upper-level managers and front-line supervisors as possible, some may have divided loyalties, or resist or even attempt to sabotage the employer's union-free campaign. Those supervisors who are ineffective or unintentionally damaging to the employer's campaign must be isolated from events and neutralized to prevent them from doing damage.

Because an employer has a legal right to the undivided loyalty of its management in labor relations, those supervisors who seek to obstruct or hinder the employer's campaign may have to be disciplined or discharged. The *National Labor Relations Board (NLRB)* has ruled that this

is lawful so long as it is reasonably necessary to ensure the loyalty of its management organization, even if an incidental effect is to cause employees to fear that they may suffer the same fate.³⁶ Note, however, that it is a violation of Section 8(a)(1) of the *NLRA* for an employer to terminate a supervisor for failing or refusing to commit an unfair labor practice.³⁷

LEGAL GUIDELINES FOR EMPLOYER COMMUNICATIONS AND ACTIONS DURING A CAMPAIGN

As is noted above, all supervisors and managers must be immediately educated about unlawful or objectionable statements and actions that could subject the employer to unfair labor practice liability or result in setting aside an election victory. These immediate prohibitions can be remembered by the mnemonic device "SPIT," which spelt backwards is "TIPS." This mnemonic device stands for:

Spying or Surveillance—it is unlawful for the employer or its agents to spy or surveil employees' union activities, as well as create the impression of spying or surveillance.

Promises—it is unlawful for an employer or its agents to expressly or impliedly promise to employees an increase in wages, benefits, or other terms and conditions of employment in order to influence their vote in an election. It is also unlawful to grant an increase in wages or benefits to reject the union.

Interrogation—it is unlawful for the employer to interrogate or question employees about their union activity or sentiments, why employees support the union, how they are going to vote, and so on.

Threats—it is unlawful for the employer to threaten employees with adverse action, reprisals, or retaliation, or to take the same, because of their union activities, sentiments, or support.

Spying and Surveillance

It is unlawful for an employer or its agents to spy or surveil, or create the impression of spying or surveilling, on employees' union activities.³⁸ This prohibition includes the obvious examples of eavesdropping on employees, following and monitoring employees' attendance at union meetings, and taking photographs and video of employees' union activities. It is also equally clear that an employer violates the Act by creating an impression of surveillance, such as by focusing cameras on employees even though no pictures are taken.³⁹ However, the prohibitions against spying and surveillance do not prohibit an employer and its agents from observing what employees do in plain view, or listening to employee comments that are directed to the employer or to others in the employer's presence.

Promises or Grants of Benefits

It is unlawful and objectionable for an employer to expressly or impliedly promise an increase in wages, benefits, or other terms of employment, in order to encourage employees to reject unionization or to influence a favorable vote in the election. Likewise, granting a wage or

benefit increase, or implementing other changes that have a favorable effect on employees' working conditions, is unlawful and objectionable if done to influence the employees' vote or dissuade them from supporting the union. Examples of prohibited conduct include promising or granting a wage increase, better insurance benefits, and so on. As the Supreme Court explained in *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964), the problem with increases granted during an organizing drive is suggestion of a "fist inside a velvet glove," noting that employees are not likely to miss the inference that the source of benefits conferred is the same source from which benefits will dry up.

The general rule is that an employer has a duty to conduct its business as if the union activity was not present.⁴⁰ While a grant of benefits is not per se unlawful, the employer must show that the timing of the grant of benefits was motivated by considerations other than the union activity. Such a showing can be made with proof that the grant of benefits is consistent with the employer's past practice, such as established, periodic increases. (Conversely, it is unlawful for an employer to fail or refuse to follow its past practice of granting an increase in benefits at a particular time, and an employer's failure to follow its past practice may be viewed as motivated by a desire to discourage unionization.⁴¹)

An employer may also defend wage increase or grant of benefits during the campaign by proving that the increase was decided upon before the employer knew of the existence of union activity, or that it was part of a planned corporate-wide increase that was implemented at all of the employer's locations, and was not implemented to influence the choice of the petitioned-for unit of employees.⁴² Besides documentary evidence showing that the decision to grant the increase was made before the employer had knowledge of union activity, the Board also considers evidence that the employer did not mention or otherwise link the pending election or union activity to the announcement of the increase.⁴³

While the employer is prohibited from promising or granting increases during an organizing drive in order to discourage employees from supporting the union, it is lawful for the employer to educate employees about existing wages and benefits, to discuss the employer's history of the favorable treatment of employees without union representation, and, if appropriate, to compare the wages and benefits received by the employer's non-union employees with the employer's or another employer's unionized employees.⁴⁴ When doing so, however, it is essential that the employer include a disclaimer in its discussion, informing employees that the comparison is made solely to show employees the employer's historical practice of treating employees favorably without a union, and the comparison is not a promise, and should not be construed as a promise, of an increase in wages and benefits in the event employees vote against union representation.⁴⁵

It is also lawful for an employer to request that employees give it a chance to show that it can treat them fairly without a union, and to tell employees that if in 12 months they do not feel they are being treated fairly, then they should petition for a union representation election.⁴⁶ The Board has found that such expressions amount to no more than a lawful request that the employees trust the employer, and were too vague to rise to the level of a promise of an increase. During a decertification election, it is lawful for an employer to guarantee employees

that in the event that the employees vote against union representation, there will be no cuts to existing wages and benefits. The Board has ruled that such "no-cut guarantee" is not a promise of an increase, and instead amounts to no more than a promise to maintain the status quo.⁴⁷

It is quite common during meetings and discussions for employees to directly ask the employer whether it intends to improve some term or condition of employment, for example, will the employer give employees better benefits if they vote against the union. The employer must ensure that its managers or supervisors do not fall into the trap of expressly or impliedly making a promise of betterment in response. Instead, the employer should inform employees that it is prohibited by federal law from making promises during the campaign, and will not do so. The employer must also immediately inform employees of facts which show that the employer has a history of treating employees fairly and improving working conditions without a union, thereby showing that a union is unnecessary at the company in order to be treated fairly.

Interrogations

An employer's agents are often inclined to question employees about their knowledge of union activity once it is discovered by the employer. While interrogation of employees is not unlawful, per se, it will be found to be unlawful if it has a reasonable tendency to restrain, coerce, or interfere with employees in the exercise of their Section 7 rights to engage in, or refrain from engaging in, union activities.⁴⁸ Questioning of employees will generally be found to be unlawful where it takes place in an anti-union atmosphere, or is accompanied by express or implied threats, or other unlawful actions. On the other hand, the questioning of open and outspoken union supporters will not be found unlawful where it takes place in a neutral and non-threatening setting and is not accompanied by any other unlawful conduct, such as threats or promises.⁴⁹

Common examples of unlawful interrogations include questioning employees about whether they signed a union authorization card, what they think or feel about the union, what other employees think about the union, how an employee or other employees intend to vote, and what issues are motivating employees to seek unionization. While management must be educated to avoid the pitfalls of unlawful interrogation, it is lawful for management to listen to what employees volunteer to them. For example employees often volunteer to the employer knowledge that they possess concerning who initiated the organizing drive, the grievances or other issues motivating employees to organize, and the extent of employee support for the union. Management must be trained to carefully listen to employees volunteering information, and to encourage the disclosure of information without interrogating the employee. Management must also be educated and reminded to report this information to the employer's union-free committee as soon as possible.

Threats and Retaliation and Reprisal

It is unlawful for an employer to threaten employees with an adverse change in their terms or conditions of employment, or with retaliation or reprisals, because they support the union. Examples of unlawful threats include threats of discharge, layoff, or plant closure, or the loss of

wages or benefits because of unionization. Likewise, it is unlawful for an employer to discipline or discharge employees, or take other adverse action, or to cut or withhold wages or benefits or other terms of employment, in order to discourage employee support for the union or to get employees to vote against representation.

An employer may lawfully inform employees about the negative consequences of unionization, or provide employees with its prediction about how unionization would negatively affect the employer's operations, including plant closure, as long as the message is based on objective facts which show that the negative consequences of unionization are beyond the employer's control, or based upon a previously reached management decision to close the plant in the event of unionization.⁵⁰ The Supreme Court, however, has cautioned that the employer's statement must be capable of objective proof, in order not to be found to be an unlawful threat of reprisal.⁵¹

It is permissible for an employer to educate employees as to the negative effects that unionization has had on competitors or other industries. This includes pointing out layoffs and plant closures and the fact that the union could not prevent those layoffs or plant closures. In order to prevent this otherwise lawful statement of fact from being twisted into a threat, it is recommended that the employer always use an appropriate disclaimer. This disclaimer should inform employees that the employer is not stating that unionization inevitably leads to the negative consequence in question (for example, plant closure), but only that the negative consequence sometimes happens when a union makes an employer uncompetitive.

UNLAWFUL DISCRIMINATION AND DISCHARGE

Section 8(a)(3) of the *National Labor Relations Act* makes it unlawful for an employer to discriminate in regard to the hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.⁵² This section makes it an unfair labor practice to discipline or discharge an employee for engaging in union activities, and such unlawful conduct will not only result in setting aside the election in the event of a union-free victory, but also may impose reinstatement and back pay obligations, and other make-whole relief on the employer. The prima facie elements of a Section 8(a)(3) violation are employer knowledge of the union activity, union animus, an adverse action against the employee, and timing.

In order to protect itself from such charges, the employer should ensure that all contemplated adverse actions are thoroughly investigated and properly documented, that management witnesses are used whenever possible, and that management witness statements be obtained. The employer must also ensure that any penalty imposed is consistent with the employer's past practice of discipline for the same offense. Obviously, the employer should obtain legal review of all adverse actions during a campaign to ensure that it is not acting unlawfully.

LAWFUL EMPLOYER CAMPAIGN TACTICS AND MESSAGES

As is mentioned above, the employer's campaign will center around captive audience speeches and small group meetings, one-on-one discussions with employees, and written campaign

materials. In its speeches, discussions, and written materials, the employer is permitted to inform employees, without threats or promises, about objective facts and opinions concerning the union, the employer, and the collective bargaining process. During any meeting with employees, management must be careful to ensure that the discussion does not degenerate into a solicitation of the employees' grievances. If the employer is found to have solicited grievances during the campaign, it may result in setting aside the election upon timely filed objections.

The Peerless Plywood 24-hour Rule

In *Peerless Plywood*, 107 NLRB 427 (1953), the Board established that an employer is prohibited from holding captive audience speeches with massed employees during the 24-hour period prior to the start of the election. This means that an employer must time its last speech to finish prior to the running of the 24-hour period. An employer's violation of the 24-hour rule will be grounds for setting aside the election. However, the 24-hour rule does 'not prohibit meetings, dinners, or parties, held for campaign purposes on the employee's own time where the employee's attendance is voluntary. To prevent employees who are scheduled to work from attending on scheduled work time, it is recommended that these post-24-hour meetings be held off of the employer's premises.⁵³ Moreover, the 24-hour rule does not prohibit one-on-one communications within the 24-hour period or the distribution of written materials,

Other Legitimate Campaign Tactics

Other legitimate campaign tactics should be considered depending upon how they will be received by the potential voters. Before blindly employing these tactics, the employer should determine whether they will help the employer's campaign. Common legitimate union-free tactics include:

1. "Fact Sheets," "Q & A" Leaflets, and "Did You Know.

Leaflets. Written materials may include "Fact Sheets," "Q&A" Leaflets, and "Did You Know Leaflets, or any other catchy title that the employer believes is appropriate. These written materials should be used regularly throughout the campaign in order to kick off the employer's themes for that period of the campaign, and to stimulate discussion among employees and management between speeches and meetings. All leaflets should be concise and in plain English to ensure that they will be read, and should address topics likely to capture the employees' interest and generate questions from employees. They should also be used to highlight important points raised in the employer's meetings, or to follow up and answer questions arising during the campaign. All written materials must be reviewed for legality prior to distribution to ensure that they do not contain threats or promises, and carry any necessary legal disclaimers. To be effective, all management and supervisors must read and understand the written communication and its subject matter, before it is released, so that they can be conversant and answer questions about it.

The leaflets may be posted in areas normally reserved for posting, placed in common non-work areas where other literature might be found, mailed to employees' homes, and placed in employee paychecks. Note, however, that an employer is prohibited from placing leaflets or

other materials in the employees' paychecks, or otherwise changing the paycheck process, during the final 24-hour period prior to the election. In *Kahn Construction Co.*, 321 NLRB 649 (1996), the Board held that an employer may not make changes in the paycheck process, for the purpose of influencing employees' votes in the election, during the period beginning 24 hours before the scheduled opening of the polls and ending with the closing of the polls. The Board defined the term "paycheck process" to include (1) the paycheck itself; (2) the time of paycheck distribution; (3) the location of paycheck distribution; and (4) the method of paycheck distribution.

2. Food and Drink. The Board has long recognized that providing employees with food and drink during meetings and discussions is a legitimate campaign tactic, and will generally not be grounds for setting aside the election. Thus, providing employees with coffee and donuts, or pizza and beer, or having a campaign-related open house, with refreshments, is generally lawful.⁵⁴

3. Commercial or Custom Videos. There are several commercial providers of canned and customized videos for use during campaign meetings, or for viewing while employees

are on their breaks. All videos must be screened for legality by competent legal counsel prior to use.

4. Sample Ballots. The employer may prepare sample ballots with the "Vote NO" box marked with an "X" in order to clearly demonstrate to employees how to vote against union representation. If the employer reproduces the Board's official sample ballot in order to demonstrate how to vote against representation, the employer should clearly mark the leaflet or reproduction on its face to indicate that the employer, rather than the government, was responsible for preparing it. This precaution is necessary to ensure that the election will not be set aside based upon allegations that the employer created and used a forged government document which misled voters into believing that the Board favored the employer in the election.⁵⁵

5. Raffles and Contests. Raffles in which all employees are eligible to win so long as they vote, and which do not condition winning on how employees vote, or the outcome of the election, are legitimate campaign techniques. It is recommended that the employer include a disclaimer in its announcement of the raffle, stating that participation is voluntary, and not dependent on the outcome of the election or how the employee voted. Typical campaign prizes may include the amount of union dues or the cost of groceries for one year. Note, however, that the value of the prize to be awarded may be deemed excessive and grounds for setting aside the election.⁵⁶ The Board has also held that it is objectionable for an employer to hold contests in which employees attempt to correctly answer campaign-related questions, where employees are required to identify themselves.⁵⁷

6. Pro-Company Buttons and T-shirts. Pro-company buttons, T-shirts, and caps are legitimate campaign tools to be used during a campaign.⁵⁸ Note, however, that while they should be made available to all employees, management should not physically distribute buttons and T-

shirts to employees. To do so risks allegations of unlawful interrogation, because it forces an employee to reveal his or her union sentiments by accepting or rejecting the offer of a button or T-shirt. Rather, it is recommended that the employer make the buttons or T-shirts available by placing them on a table in common areas, so that employees are able to take them if they want them.⁵⁹ It is recommended, however, that the employer not provide clothing items that are of more than a nominal value, such as jackets, since the value of the item may be deemed to be excessive and grounds for setting aside the election.⁶⁰

Misrepresentations and Forgeries

It is well established that the Board will not scrutinize the truth or falsity of an employer's or union's campaign statements, and therefore misrepresentations are not grounds for setting aside the election.⁶¹ This principle has been extended to the parties misrepresentations of Board actions.⁶² This rule effectively prevents exaggerations, factual inaccuracies, and intentional misstatements from being used to set aside an election based upon the truth or falsity of the statement. The Board, however, will set aside an election based upon a party's deceptive campaign tactics that involve the Board and its processes, or where a party has used forged documents that render voters unable to recognize the propaganda for what it is.⁶³

While an employer's misrepresentations will not result in setting aside the election based on the truth or falsity of the statement, such misrepresentations may cause employees to question the credibility of the employer, thereby resulting in increased support for the union. Additionally, an employer's misrepresentations may also be interpreted in a different light, such as a threat of economic harm to employees, thereby resulting in setting aside the election. Accordingly, for practical and legal reasons, it is recommended that an employer be sensitive to the representations it makes to employees.

PROVEN AND LEGITIMATE CAMPAIGN MESSAGES

The employer should diligently attempt to determine what messages will have the most positive effect on garnering votes against union representation, and should time the delivery of its messages carefully in order to not peak too soon. All campaign messages and communications must be reviewed for legality prior to publication to employees. The following topics are commonly delivered to employees depending on what stage the union-free campaign is at.

Introductory Campaign Messages

The employer should inform employees about all pre-election developments, such as whether a pre-election hearing will be held or whether the election is by stipulated agreement, the status of the pre-election hearing and issues resolved at hearing, any determinations and orders issued after hearing, the employee groups that are included in the bargaining unit, and those employees who are eligible to vote in the election. This information should be delivered to employees as soon as the development occurs, to ensure that employees receive the information from the employer, rather than through shop gossip or the union.

Early in the campaign, the employer should inform employees about the ramifications of signing authorization cards (see Part I). As soon as possible thereafter, the employer should inform employees about the date, time, and place of the election; explain how the election will work and that the election will be conducted by the *NLRB*; and explain that the vote is by secret ballot and that employees must mark an "X" in the "NO" box of the ballot if they do not want to be represented by the union. The employer should take time to clearly explain to employees that a simple majority of those voting will decide whether a union will represent all employees, and that therefore it is critically important that all employees vote and that the employees not let the issue be decided by the votes of only a few employees.

Messages About How Unions Operate

Employees often have very little understanding about what unions do or how they operate. It is important to explain to employees about what unions do, how they make their money, what their primary objectives and concerns are as a business organization, and the financial costs and legal obligations of becoming a union member.

Union Dues, Fees, and Fines

Employees need to be clearly informed about the financial costs of becoming a union member. This information can be obtained from the union's constitution and bylaws, and LM-1 and LM-2 financial statements. It must be explained to employees that the union gathers its operating revenue from union dues that it collects from the employees, and that this money is paid by the employees out of their own wages and not paid by the employer.

Employees also generally do not realize that by becoming a union member, they are subject to initiation fees, and special fees and assessments that can be imposed by the union as it needs more money. Moreover, employees are often shocked to learn that they can be fined by the union for violation of the rules contained in its constitution and bylaws; that the courts have held that this is lawful and that the fines may be collected in court if they are not voluntarily paid. When possible, actual examples of fines being imposed by the union should be provided to employees.

Union Constitution and Bylaws

A clear discussion of the union's constitution and bylaws enlightens employees to the loss of freedom that they may suffer by becoming a union member. In addition to imposing an obligation to pay dues, the union's constitution and bylaws contain rules and regulations that union members must follow, and the failure to do so subjects the member to penalties. For example, union members who fail to strike, and cross the picket line, are subject to trial by the union, and fines and other penalties can be imposed. Another important message is that when a union represents a group of employees, the employer is bound to bargain and deal with that union, and that this can have the effect of constraining an employer's ability to deal with employees individually concerning their own particular, personal problems. The employer should also educate employees to the representative status of the union, that is, that the union has broad authority to determine what it believes is in the best interests of the union and

employees, and that employees will be bound by these decisions, even if the employee disagrees with the decision or does not believe it is in the employee's best interest.

Union Financial Statements

Union financial statements are always fruitful areas for effective messages. In addition to revealing the financial cost that the union imposes upon members, it reveals the way the union spends its money. For example, the financial statements reveal the salaries that it has paid to its leadership; expenditures that it has made for questionable items such as entertainment, golf outings, and conventions and the amount of legal fees that it has paid to defend itself from discrimination and other charges filed against it by union members. The financial statements are also helpful in explaining to employees how their dues money is not kept by the local union for local member use, but is remitted to the international union body for expenditures of questionable value to local members.

The Truth About Collective Bargaining

Unions routinely promise employees that if they vote for it, the union will get them better wages, benefits, working conditions, and so on. It is critically important that the employer dispel this myth and educate employees to the real risks of collective bargaining.

Employees must be educated that nothing happens automatically in negotiations, and that the employer only has an obligation to meet and bargain with the union in good faith over wages, hours, and other terms and conditions of employment. Employees must also learn that federal law does not require that the employer agree to any particular demand, or agree to anything that it does not believe is in its best interest. It is lawful for an employer to inform employees that in negotiations, they could get the same, more, or even less than they have now.

One particularly effective tactic is to educate employees about the negative economic terms contained in contract settlements that the union has obtained or attempted to obtain from other employers. It is also helpful to show that the employees' current working conditions compare favorably or are superior to unionized employees elsewhere. The employer may lawfully point out to employees that in negotiations, the union may attempt to advance its own interests at the expense of the employees' interests, by agreeing to economic concessions in exchange for a union security clause and automatic dues deductions.

The employer should never state, however, that collective bargaining starts from 'scratch" or from 'zero," since such statements have routinely, but not always, been found to constitute unlawful threats.⁶⁴ Moreover, whenever making statements about the risks of collective bargaining, or criticizing the union's past bargaining efforts, the employer should include a disclaimer that it is not contending that the negative consequences will inevitably happen, and that the employer recognizes its obligation to, and will, bargain in good faith.

The Risks of Strikes

An employer may lawfully educate employees about the practical risks of strikes. This includes educating employees about the strike record of the union, including the negative post-strike contract settlements, job losses, and strike violence. The employer may also educate employees about the employer's right to continue to operate during a strike, including the right to hire permanent strike replacements, with the consequence that striking employees may never return to their jobs. To avoid unfair labor practices or a finding of objectionable conduct, however, this explanation should always be coupled with an explanation of the rights of an employee to return to work once the strike ends. Moreover, it is unlawful for the employer to refer to replaced striking employees as having been "discharged," "fired," or "terminated." Whenever discussing strikes, the employer should always include a disclaimer that it is not stating that strikes are inevitable, but only that they sometimes happen if the parties cannot reach agreement.

An employer may inform employees that they will not be paid, nor receive benefits, if they strike. The employer should also lead employees through written exercises to educate them about the amount of money that they may lose in a strike of any given length, as well as the number of hours or weeks that the employee would have to work in order to recoup the amount of money lost during the strike.

It is also essential that the employer dispel any myths that employees have of obtaining financial assistance during the strike. Depending on the state, employees are ineligible for unemployment benefits. While employees may have been promised strike benefits from the union, often those benefits are paltry and only paid to employees after they have walked on the picket line for more than a week.

The Myth of Union Job Security

Union organizers often try to gather employee support by making inflated claims about the job security that a union contract provides. Employees need to be informed that real job security only comes from a strong, profitable company that needs employees, and that union security generally means only a temporary delay of a temporary or permanent layoff through the exercise of seniority. The employer should research the job losses suffered by the union's members through layoffs and plant shutdowns, in order to provide employees with factual examples of how the union was unable to save the jobs of its members where the company fell on hard times or became unprofitable and uncompetitive. The employer must carefully word these statements, so that it cannot be accused of stating that unionization inevitably leads to job loss, and should consider using a disclaimer where necessary.

The Myth of Decertification

Employees may mistakenly believe that if they do not like the union after it is elected, they will be able to vote it out through the NLRB's decertification procedure. The employer must dispel this myth by explaining to employees how decertification works and the legal bars to decertification. Once a union is certified as the bargaining representative, it is guaranteed at least one year without challenge in order to give it a chance to negotiate a contract. If a contract

is negotiated, a decertification petition can only be entertained if it is filed during the 'window period' between the 90th and 60th day prior to the expiration of the contract, or after the contract expires. This has the practical effect of possibly preventing a decertification vote for several years.

Employees should also be reminded that the union and its attorneys may well fight a decertification effort, that employees may have to hire their own attorney to get the decertification petition on file, and that the union can be expected to wage a vigorous campaign to preserve its representative status. Additionally, decertification efforts are generally prohibited by the union's constitution, and employees who attempt to sponsor a decertification are subject to fines and other union penalties.

Embezzlement; Fraud and Other Criminal Activities

Research may uncover unsavory or unlawful activities committed by the union's officials and agents that may help diminish support for the union. Copies of indictments and other public records alleging criminal activities, such as violence, racketeering, or civil actions for embezzlement or fraud, often cause employees to question what they are getting into. Since some employees could conceivably admire thuggery and the like, an evaluation should always be made as to whether the material actually helps the employer's position.

ELECTION DAY

The election will be conducted by the board agent on the date, time, and place specified in the election agreement or order directing election. The board agent generally arrives a half hour before the polls open to inspect the polling area, set up the voting booth, train the parties' observers, and hold a pre-election conference with the parties. Prior to beginning the pre-election conference, the board agent will inspect the employer's premises to ensure that the employer has properly posted the official Board Notices of Election.

During the pre—election conference, the board agent will solicit whether there are any last-minute changes to the voting list, due to employee quits or terminations, and will seek to have the parties delete those names from the list. Any campaign literature from inside, and in the vicinity of, the polling area will be taken down and removed. The board agent will also instruct each party's observer in their responsibilities as an observer.

The board agent will have the parties synchronize their watches as to the opening and closing of the polls, and prior to the opening of the polls, will direct that the employer and the union leave the polling area and not return until the polls are closed. It may be objectionable conduct for the board agent to open the polls late where this may have an effect on the voters' ability to vote. It is against Board policy for the board agent to close the polls early, and this conduct may also be grounds for setting aside the election.⁶⁵

After the polls are closed, and in the presence of the parties, the board agent will begin the process of counting the ballots. The board agent will then attempt to get the parties' agreement as to the counting of any challenged ballots. If the party responsible agrees to withdraw the

challenge, the ballot will be commingled with the other uncounted ballots. The board agent will divide the ballots into two piles; one containing "YES" votes and one containing "NO" votes. The board agent will then count the ballots in front of the parties, usually in batches of 25. After the ballots are counted, the board agent will prepare a tally of ballots of the election.

FILING OBJECTIONS

The party losing the election has seven days from the date of the election to file its objections seeking to set aside the election. Objections may be based on objectionable conduct engaged in by the other party during the critical period of the election, or upon the board agent's conduct in improperly running the polls. Upon the filing of objections, the objecting party must file evidence of a prima facie case in a timely manner, as well as the objecting party's position on the objections. Where the party's objections have merit, the election will be set aside and a new election will be directed.

OBJECTIONABLE UNION CAMPAIGN TACTICS

It is important that the employer lawfully monitor the union's campaign activities for objectionable conduct that may be used to set aside the election in the event of a union victory. Supervisors and managers must be instructed to use prepared forms for keeping track of incidents of election misconduct, such as threats or violence directed at employees. Written statements should be taken of supervisors. However, written statements generally may not be taken of employees without risking allegations of unlawful interrogation. Accordingly, it is recommended that written statements not be taken of employees during the critical period without prior approval of competent legal counsel.

Objectionable union conduct usually takes the form of threats or coercion of employees in order to influence their vote in the election; attempts to bribe employees into voting for the union or influence employees' votes with excessive gifts; appeals to racial prejudice; using forged documents or misusing Board documents in order to mislead employees into voting for the union; offering to waive initiation fees for employees who sign authorization cards; or electioneering in the polling area on election day.

After an election, the employer may interview employees, and its observers, for the limited purpose of preparing its objections, provided that "Johnny's Poultry" warnings are given to employees.⁶⁶ This warning requires that the questioning be on a voluntary basis in an atmosphere free of union animus; that the employee be informed of the purpose of the questioning and that no reprisals or retaliation will be taken; that the questioning not be coercive in nature; that the questioning be relevant to the Board proceeding being investigated; and that the questioning not probe the subjective state of mind of the employee or otherwise interfere with the employee's Section 7 rights to engage in union activity. It is recommended that the employer, prior to interviewing any employee, have the employee sign, date, and return a consent form acknowledging that he has been given and understands his Johnny's Poultry rights, and that he voluntarily consents to the questioning.

CONCLUSION

A successful union-free environment requires credible managers, fair employment practices, and sound preventive labor relations programs and strategies. If an employer experiences an effort to organize its employees, the employer will then be in a position to communicate the disadvantages and risks of unionization and collective bargaining, and emphasize the benefits and advantages of the employer's union-free environment. A successful union-free campaign requires a coordinated effort by both high-level management and front-line supervisors to communicate these advantages and disadvantages to employees, through a mixture of meetings, one-on-one discussions, and written materials. The employer must also ensure that this information is communicated to employees in a lawful and timely fashion. By carefully training and monitoring the activities of its management, the employer should be able to lawfully convince employees of the benefits of remaining union-free in an election that cannot be challenged.

NOTES [continued from Part I]

33. Copies of constitutions, bylaws, and LM-1 and LM-2 financial reports may be obtained by contacting the U.S. Department of Labor, Office of Labor-Management Standards, Washington, D.C., or the appropriate regional office, or by contacting The Bureau of National Affairs, Inc., Washington, D.C.

34. Copies of collective bargaining agreements may be obtained through the *Bureau of National Affairs, Inc.*, other private information services, state departments of labor, and the private companies that are party to the agreement.

35. Some of this information can be obtained by using commercial computerized research tools such as *LEXIS*, or from other commercial labor relations information providers, and sometimes from the Internet. Copies of unfair labor practice charges and other public records may be obtained by submitting a *Freedom of Information Act* request to the relevant *National Labor Relations Board* regional office. Copies of lawsuits and other court documents may be obtained from the clerk of the appropriate court.

36. *Stop & Go Foods*, 246 NLRB 1076 (1979). See also *NLRB v Bell Aerospace, Div of Textron*, 416 U.S. 267 (1974) (employer has the right to the undivided loyalty of its management).

37. *Parker-Robb Chevrolet, Inc.*, 262 NLRB 402 (1982), review den. sub. nom. *Auto Salesmen's Local 1095v. NLRB*, 711 F.2d 383 (D.C. Cir. 1983).

38. *Consolidated Edison Co. v. NLRB*, 305 U.S. 197 (1938).

39. *CBS Records Div.*, 223 NLRB 709 (1976).

40. *Martin Indust.*, 290 NLRB 857 (1990); *Sourdough Sales, Inc.*, 246 NLRB 106 (1979).

41. *Id.*

42. *Northern Telecom*, 233 NI-RB 1104 (1977).

43. *Id.*

44. *Viacom cablevision*, 267 NI-RB 1141(1983); *Duo-Fast Corp*, 278 NI-RB 52 (1986).

45. *Id.* Note, however, that the Board has found a comparison of wages and benefits to be unlawful where the employer took "extraordinary effort to prepare individualized and tailored comparisons for each employee in the bargaining unit." *Etna Equip. & Supply Co.*, 243 NI-RB 956 (1979).

46. *Middletown Hospital Ass'n*, 282 NLRB 541 (1986); *National Micronetics Inc.*, 277 NI-RB 993 (1985).

47. *WeatherShield Mfg., mc*, 292 NLRB I (1988); *El Cid, Inc.*, 222 NLRB 1315 (1976).

48. *Rossmore House Hotel*, 269 NI-RB 1176, *aff'd sub nom, Hotel Employees Local 11 v. ~. NLRB*, 760 F.2d 1006 (9th Cir. 1985).

49. *Id.*

50. *MRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969).

51. *Id.*

52. 29 USC ~ 158(aX3).

53. *Lach Simkins Dental laboratories, Inc.*, 186 NI-RB 671 (1970); see also *Peachtree City Warehouse*, 158 NI-RB 1031 (1966).

54. *Northern States Beef Inc.*, 226 NI-RB 365 (1976), *enf. granted in part*, 575 F.2d 658 (8th Cir. 1978); *L.M. Berry & Co.*, 266 NI-RB 47 (1983).

55. *SDC Inv., Inc.*, 274 NI-RB 556 (1985).

56. *Compare Sony Corp. of m.*, 313 NI-RB 420(1993) (prize of television and *Discman* not so substantial as to be objectionable) with *Smith Int'l*, 242 NLRB 20 (1979) (grand prize of all-expense paid trip for two to Hawaii or family trip to *Disneyland* is objectionable).

57. *Melampy Mfg Co.*, 303 NI-RB 845(1991).

58. *Nu Skin Int'l*, 307 NI-RB 223(1992); *RL White Co.*, 262 NI-RB 575 (1982).

59. *Tappan Co.*, 254 NI-RB 1535 (1980); *Maremont Corp.*, 251 NI-RB 1617 (1980).

60. *Owens-Illinois, Inc.*, 271 NI-RB 1235 (1984)

61. *MidlandNat'lLife Ins. Co*, 263 NI-RB 127 (1982).

62. *Riveredge Hosp.*, 264 NI-RB 1094 (1982).

63. *Midland Nat'l* (cited in note 61) at 133.

64. *Taylor Dunn Mfg.*, 252 NI-RB 799 (1980); *Plastics, Inc.*, 233 NI-RB 155 (1977).

65. *Kerona Plastics Extrusion Co.*, 196 NLRB 1120 (1972).

66. *Johnny's Poultry Co.*, 146 NI-RB 770 (1964).
