



Interacting with Unions

Here's a glimpse at the proposed Employee Free Choice Act, as well as other business and labor union issues.

By George N. Saliba, Managing Editor

While private-sector union membership in America has fallen below 8 percent in recent years, unions have maintained both political and legal power, which means certain businesses continue to interact with unions when generating an array of products and services. On the following pages, *New Jersey Business* magazine explores precisely how businesses might interact with unions, from a legal perspective.

Responding to the Marketplace

In these challenging economic times, many domestic companies are attempting to compete in a ruthless global marketplace plagued with cheap foreign labor, tight credit markets and reduced demand for their products. For firms that are not involved with unionized labor, employee wages and other terms can be adjusted to meet the demands of the marketplace. On the other hand, companies with unionized labor may need to engage in collective bargaining before they can legally change workers' terms and conditions of employment. Regardless of unions' many attributes, the collective bargaining process may be cumbersome and time-consuming.

Collective Bargaining: Communication

Jeffrey J. Corradino, partner in the Morristown office of the law firm of Jackson Lewis, LLP (offices in Morristown and 41 other major United States locations), asserts, "The last thing a company wants to be faced with is an inordinate amount of time to make changes when reacting to the marketplace."

Corradino recommends that businesses communicate any needs as quickly and truthfully as possible to the collective bargaining agent. Moreover, businesses should demonstrate the necessity for what they propose. Corradino says, "If you are looking for [a union] concession, the standard the union is going to use is: 'Is this necessary?'"

If businesses plead poverty, they must



Ken Gilberg of Flaster/Greenberg says there are many things employers can legally do during a union organizational campaign.



John Schmidt of Lindabury, McCormick, Estabrook & Cooper recommends creating a positive atmosphere for all employees.

be prepared to open their books, or they may find themselves legally required to do so by the National Labor Relations Board. Why would a union necessarily trust that a business is in fiscal straits without examining documentation demonstrating that to be true?

Also, businesses should be prepared to respond to alternatives that unions may offer. Finally, businesses should be ready to explain that economic difficulties are being shared throughout the company - and that budgets are not being balanced on the backs of union employees. That should indeed be the case, because unions would not likely agree to take six percent wage cuts if the CEOs receive \$2 million bonuses. Of the above strategies, Corradino remarks, "These things seem obvious, but sometimes [businesses] forget about them."

Common Issues

Recurring concerns with unions often involve cost containment and work flexibility. Skyrocketing health insurance costs, for example, have prompted many businesses to push for unions to shoulder more costs, with unions sometimes resisting. Regarding work flexibility, businesses often want union employees who can accomplish a myriad of tasks.

John K. Bennett is chair of the labor and employment practice at Connell Foley LLP (offices in Roseland, Jersey City, Manhattan and Philadelphia). Overall, he claims a common business/union difficulty is what he terms the "old school" approach of unions challenging management initiatives through grievances, rather than trying to work cooperatively with management.

He asserts, "The union needs to understand that what's good for the business is good for the employees whom they represent. Therefore, you have to break down the wall of the 'us-against-them mentality' and the 'you-can't-change-that-because-it's-the-way-we-have-always-done-it' mentality."

Looking at it from the union side, businesses may make the common misstep of not discussing management initiatives with union leaders in advance. Bennett says, "If you are going to ask the union to not challenge management initiatives with grievances or resistance at the bargaining table, you need to take the time to sit down with the union officials and explain the management initiatives and the business reasons for them. You don't have to come to an agreement on them, under the labor laws, but it is a good idea to meet so that the union leaders can understand them, hopefully buy into to them, and then they can explain them to - and get the buy-in from - the employees."

Employee Free Choice Act

To unionize workers, union organizers under current law need 30 percent of employees to sign a union authorization card (although unions often aim for support from, say, 65 percent of a company's employees). Then, the National Labor Relations Board can conduct a secret ballot election with employees, to determine whether those employees become part of a union.

The proposed Employee Free Choice Act (EFCA) legislation would change this process and other aspects of labor law. To be clear, EFCA is not law at this time, and it could assume many changes even if it ultimately does become law. Some attorneys prognosticate that EFCA will be more widely discussed in the coming months.

If EFCA becomes law as it is currently proposed, instead of holding the aforementioned secret ballot election, union organizers would need to get 51 percent of employees to sign a union authorization card. With the signatures validated, a union would then be formed.

Unions may feel that the EFCA would level the playing field, while many businesses feel EFCA is unfair. Kenneth R. Gilberg, shareholder at Flaster/Green-



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berg (offices in Cherry Hill, Linwood, Philadelphia, Trenton, Vineland and Wilmington, Delaware) asserts, "[With EFCA], there would be no [secret ballot vote], no opportunity for employees to hear the pros or cons of joining a union, its impact on them, the obligation to pay dues and union rules that they may be obligated to follow. Employees would not have the privacy of a voting booth, without pressure from either the union or the employer, to make a decision that they think is best for themselves."

Separately, the United States Supreme Court has said that no one can force an employer to agree to contract terms that the employer does not like. However, the employer is obligated to bargain in good faith, which means, for example, that it must hold meetings at reasonable times and places in a sincere effort to form a contract. For its part, a union can engage in economic pressure, slowdowns, work stoppages and asking people to boycott, among other tactics.

Yet, under the proposed EFCA, if the labor union and the employer don't reach a first contract agreement after 120 days, an arbitrator would impose a two-year agreement, setting the terms for wages and benefits, for instance. Many businesses find this unsettling.

On the other hand, one union rallying cry for EFCA is a claim that the collective bargaining process doesn't work well in the face of so-called greedy corporations.

What Employers Can't Do

The ultimate outlook for EFCA is unclear. However, when it comes to union organizing drives, there are long-standing legal restrictions on what employers can say or do during this time, including the fact that employers are not permitted to spy on union activities. In the same vein, employers cannot interrogate employees by asking what was said at meetings or, who attended. Moreover, businesses cannot make threats that if a union is formed, the company would in effect

make life difficult for employees, or that people would be fired or the company closed. A business also cannot make promises, perhaps saying, "If you employees drop the idea of a union, we'll do XYZ for you."

Gilberg says, "Attorneys get involved with helping employers determine what they can say and do, and there are many, many things employers can do during a union organizational campaign. I often help employers regarding legal parameters."

Keeping Employees Happy

What employers can do is create a positive environment in which employees would not see the need for a union. Jackson Lewis' Corradino says, "Put aside whether unions are good or bad, or whether you like a union or not and one's political side ... The fact of the matter is [with unions] you are getting involved in a process. And to remain union-free and stay away from this process gives you a lot of flexibility and ability to react to an ever-changing marketplace. And the way you stay union free is not by bashing unions or scaring employees. It is by making sure that the service a union provides, which is essentially bargaining power, is irrelevant in your workplace."

Flaster/Greenberg's Gilberg says creating a positive environment means contributing to a "human resource bank account" by paying competitive wages and benefits, and if a company cannot, then explaining to its employees why it cannot and what everybody needs to do for the company to be in a more competitive position. Moreover, employees should be treated with respect and dignity, and this entails having fair and consistent personnel policies, for instance.

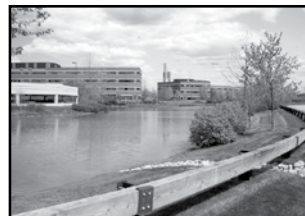
John H. Schmidt, a shareholder at the law firm of Lindabury, McCormick, Estabrook & Cooper, P.C. (offices in Westfield, Summit, Rumson, Manhattan and Philadelphia), has similar sentiments. "You have to be proactive in discussing with your employees the advantages and disadvantages of working in your particular place of business. You may want to talk to them and explain to them why you are, say, increasing the deductible on insurance premiums or changing carriers. Explain to them why you are not giving them the salary increase, or why you are only giving them a one percent or 2 percent salary increase. Do other things: try to be open and candid with discipline. Make certain you

have a progressive discipline system."

Among other points, Schmidt says, "[Also,] create a good atmosphere with open-door policies, eliminating any hostility in the office."

Conclusion

Regardless of one's opinion of businesses or unions, they must work together in today's economy. From the perspective of companies, New Jersey attorneys stand ready to help businesses navigate labor laws and strive for a symbiotic interaction between the two groups. **NJB**



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