TIPS FOR DEALING WITH UNION ORGANIZING ACTIVITY

By Michael Leb

No matter where you fall on the political spectrum, there is no denying that the Obama administration is decidedly pro-union. Most visibly, the administration forced Chrysler into a deal granting a UAW trust fund 55% control of the auto company.[1] As the Washington Times notes: "President Obama has moved quickly to demonstrate his solidarity with the labor movement, making a series of policy and personnel moves dramatically reshaping the landscape to give unions a better foothold."[2]

One of Labor's top priorities, the so-called Employee Free Choice Act (EFCA), would make it far easier for unions to organize workers based solely on signed "union authorization cards" rather than the results of a secret ballot election. Despite the fact that then-Senator Obama was one of the primary sponsors of this bill, it now appears to be stalled as the business lobby has, apparently, swayed some of the more conservative Democrats. Make no mistake, however, if EFCA does not pass in its current form, some compromise is likely. And, even if no new legislation is passed, union organizing campaigns will unquestionably become more frequent and more aggressive the favorable climate in Washington.

Because of the likelihood that companies, even those with traditionally "white collar," or "pink collar" workforces, will face an organizing campaign or at least confront an increase in pro-union talk around the water cooler, we at The General Counsel thought it would be useful to review the legal requirements imposed on employers in these circumstances.

In general , when confronted with a union organizing campaign – whether formal (an organizer hands out leaflets to employees) or informal (employees start whispering in the halls about bringing in the union), employers a prohibited from engaging in certain kinds of conduct – summarized by the acronym **TIPS**. Employers are prohibited from **T**hreats, **I**nterrogation, **P**romises, or **S**urveillance. Each of these prohibited categories of employer conduct is explained below.

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[1] Dolan, Matthew, "UAW Says Won't Control Chrysler," Wall Street Journal, May 1, 2009.

[2] Miller, S.A., "Unions Benefit from Obama Decisions," Washington Times, May 5, 2009.

-**T**hreats are statements by the employer to employees that convey some form of detriment to an employee, such as discharge, layoff, loss of pay, loss of benefits, or plant closure tied to an employee's exercising of a legal right like attending union organizational meetings, wearing union insignia, speaking in favor of unionization, or voting for a union. The most obvious example is a statement like, "if you bring the union into this company, it will kill our business and you'll have no job." More subtle, but still unlawful is a statement like, "I don't know what might happen to those jobs if we become a unionized company."

-Unlawful **I**nterrogation ranges from seemingly innocent questions like a supervisor casually asking an employee over a cup of coffee how many people attended a publicly announced union meeting the previous evening. Interrogation includes asking an employee who the "pro-union" employees are in the company, "who is likely to vote for the union?" and, potentially, even questions like, "why do you think you need a union now?"

-**P**romises are the opposite of threats. An employer is prohibited from offering beneficial treatment (such as promotions or higher wages) to an employee in exchange for the employee's vote against the union or other "anti-union" action.

-**S**urveillance includes supervisors stationing themselves near union meetings and observing and identifying employees attending the meeting, following union supporters to determine where they go after work, or requesting or directing employees to report on the union activities of co-workers.

In addition to prohibiting TIPS, the law also prohibits employers from taking actions such as discharging or demoting employees when such actions are based on the employees' union activities or sympathies rather than legitimate business considerations. Nor can an employer increase wages or benefits or promote employees during a union organizing campaign unless the employer can prove that the decisions involved were made prior to the unions' organizing efforts. Unless wage or benefit increases were implemented as part of a regular, periodic process, an employer will have a hard time meeting its burden.

The National Labor Relations Act, which governs labor/management relations is complicated and very susceptible to different interpretations depending on the sympathies of those in positions to make decisions about an employer's conduct (e.g. regional agents of the National Labor

Relations Board [NLRB], administrative law judges, and the members of the NLRB in Washington). The General Counsel has attorneys well-versed in all aspects of traditional labor law. We have performed hundreds of workplace audits which, among other things, assess the risk of a business being the subject of an organizing attempt.

Please contact us for more information concerning this topic or any aspect of your business on which you need legal advice.