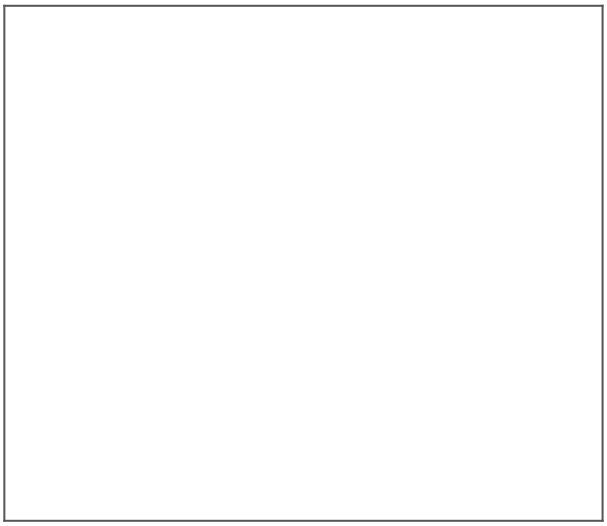
THOMPSON DORFMAN SWEATMAN

Employees Are Thinking About Unionizing?

published 11/01/2010

Employers Use Caution When Communicating With Employee

For the most part, The Labour Relations Act protects the freedom of speech of individuals - which includes that of employers, too. Under The Labour Relations Act, an employer is not denied the freedom to generally express its views to its employees, so long as it does not use intimidation, coercion, threats or undue influence or interfere with the formation of a union.



In circumstances where employees are considering unionizing, therefore, employers must be careful that any communications made to their employees during this time are not only free of intimidation, coercion, threats and undue influence, but do not “interfere with the formation of a union”.
To interfere with the formation of a union could have negative consequences for an employer, as this may constitute an unfair labour practice. The consequences for an unfair labour practice could include, but are not limited to, being ordered by the Manitoba Labour Board to cease and desist any activity constituting the unfair labour practice or to pay to the union or any affected persons up to $2,000 each.

More importantly, an unfair labour practice in these circumstances could also result in the Labour Board granting an “automatic certification” to the union. In other words, if the Labour Board concludes that the employer acted inappropriately, it can certify a union even if the union does not have sufficient support from the employees.

So what is an inappropriate communication?

While an employer is free not to want a union, an employer is not free to express its negative views of unionization to its employees.
The Labour Board has rendered several decisions that deal with the issue of employer

communication during a certification campaign. In Re Marusa Marketing Inc.,the Labour Board set out the following guidelines:

- When an employer communication issue arises, the first question a hearing panel must ask itself is whether the communication can be considered employer interference. In other words, could it affect an employee's decision to join or support the union, or one union as opposed to another?
- Statements do not necessarily need to be overtly negative or threatening to be considered interference. Statements about the union which may not on their face be negative - for example, statements describing the dues structure of a union - can be considered interference if the panel considers, on the facts of the particular case, that they convey a negative message.
- In addition to the content of the communications, the panel considers how the statements were delivered to the employees. Examples include, but are not limited to, whether the communications were made to the employees in a threatening manner or in a setting that conveyed compulsion, or, whether the communications, whether written or oral, were made in a disparaging tone which conveyed a negative view of the union.
- The panel must also examine the communication in the context of the particular case. The panel must weigh all the evidence and determine whether the negative communication, in the context of all the circumstances of the particular case, could likely influence an employee to reject the union.

The Labour Board also pointed out that it does not matter what the actual effect of the communication was - rather, the test is whether the average employee would likely be negatively influenced against the union.

So does that mean an employer cannot communicate with employees about its business?

Not necessarily. The Labour Board has also gone on to note that, if an employer's communications do amount to interference, the next question to ask is whether the communications are statements of fact or opinion reasonably held with respect to the employer's business. These types of communication are permitted under The Labour Relations Act.

For example, statements about the employer's wage rates and benefits, or the economics of its business, might have a negative effect on the certification application, but they may not be considered interference if the Labour Board determines that they are statements of fact or opinion reasonably held with respect to the employer's business.

On the other hand, statements about the union's internal disciplinary process, or the manner in which the union deals with workplace issues, would not likely be considered to be facts or opinions reasonably held with respect to the employer's business.

Of course, any communications where intimidation, coercion, threats or undue influence are

involved, even subtly, would not be protected in any event.

So what can an employer say?

Although the rule is not meant to silence employers, employers must still be very cautious in communicating with employees during a certification campaign. At the end of the day it falls to an employer to determine whether there is any benefit in communicating information to employees. In other words, an employer will have to ask itself whether it should run the risk of having the communication successfully challenged, with the possibility of the Labour Board issuing a discretionary certification or granting some other remedy against the employer.

As can be seen, it is far from clear what types of employer communications "cross the line" between acceptable communications and interference with the formation of a union. *Please contact **businessdevdept@tdslaw.com** to connect with a lawyer on this topic.*
