

ARE YOU PREPARED TO RESPOND TO A UNION ORGANIZING CAMPAIGN OR AN APPLICATION FOR CERTIFICATION?

AN EMPLOYER'S ADVANTAGE

Any employer that has experienced the threat of a union organizing campaign or application for certification knows the anxiety and instability that this kind of activity brings to the workplace. The members of our firm have spent the last decade assisting employers to prepare for and respond to these threats effectively and professionally.

During an organizing campaign or application for certification, one of the greatest hurdles an employer must overcome is the uncertainty that pervades the workplace. Unions anticipate that during their organizing efforts and the days leading up to a secret ballot vote, employers will be caught off guard and therefore not act with focus and coordination.

To maximize the employer's ability to prepare for and withstand the threat of unionization, Sherrard Kuzz has developed a two-staged plan which may be adapted to any employer regardless of industry or size of business.

The first stage of the plan helps employers to create or maintain a workplace environment that is not conducive to union activity - in other words, a motivated workforce. Invariably, motivated employees find no reason to unionize.

The second stage is a detailed action plan which is triggered once an organizing campaign or application for certification has been commenced. This stage assists workplace leaders to respond effectively by ensuring that they understand the process and what they can and cannot do to defend the workplace against union activity.

THE MOTIVATED WORKFORCE

Experience tells us that the success or failure of an employer faced with the threat of unionization rests squarely at the feet of the workplace leaders. A workforce that is content and motivated is less likely to actively seek out the assistance of a union, and more likely to reject a union's efforts to target it. A positive working environment in which employees and man-

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agement trust each other and communicate openly and constructively is fundamental to creating and maintaining a motivated workforce.

This may sound simple, but as many of you know, it is anything but simple. Positive employee relations include both the subtle and overt and almost always require the training of management at every level. Ultimately, what every employer wants to create are open lines of communication, trusting and reliable relationships and practices and policies that are developed and applied with fairness and consistency. The members of our firm have considerable experience working with employers to achieve

these ends in a wide variety of industries and workplace environments.

ACTION PLAN

If the risk of unionization is as important to your workplace as it is to the majority of our clients, we strongly recommend that you have in place an action plan in the event that a union drive is attempted.

Responsible employers develop and support *proactive* workplace practices and policies - they do not wait for problems to arise. They anticipate issues and seek to address them early in the process. Preparing for a union drive should be no different. Indeed, it may prove to be the most important workplace plan an employer has.

By developing an action plan, an employer can ensure that the actions of its workplace leaders are coordinated and focused - essential, because during a union drive or application for certification, unions anticipate that employers will be caught off guard.

Fortunately, this does not have to be the case. By already having in place a motivated workforce, an employer has at its disposal the most important tool in carrying out the action plan - lines of trust and communication. From this point forward, the employer's greatest advantage is an informed employee.

WHAT AN EMPLOYER CAN SAY AND DO

With the assistance of counsel, an employer ought to be able to prepare workplace leaders to address the uncertainty that exists when union activity is afoot. This is essential to an employer's success.

UNION ORGANIZING

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If your leaders are prepared they will be able to utilize their existing lines of communication and good workplace relationships to calm the fears of their employees and answer the many important questions that employees often ask concerning the process and the impact unionization may have on the workplace.

It is always important to spend time with employees providing information and answers to their questions. However, this is particularly so during union activity, when uncertainty is heightened. For example, one of the most important pieces of information employees should understand is that they *do have a choice whether or not to join a union.* In addition, it is essential that employees understand the process, what they should consider when making this important decision and the relevant timelines.

The Ontario *Labour Relations Act* (the iActi) governs the conduct of employers, employees and unions during an organizing campaign and the period leading up to a certification vote. Our experience tells us that first and foremost, every workplace leader needs to be aware that the Act protects the right of an employer and its leaders to express their views on the subject of unionization. The Ontario Labour Relations Board (the iBoar di), the administrative tribunal empowered to interpret and apply the Act, has said on numerous occasions that employer free speech is protected by the Act and that it should not be surprising that the employer is opposed to unionization.

The employer's freedom of speech is only restricted by actions that would be found to be threatening, coercive and/or interrogating to the employees.

Accordingly, where an employer retains counsel and in a consultative process develops its initiatives in response to a union organizing campaign or application for certification, the employer and its workplace leaders may do anything to thwart the union's efforts, provided they do not:

- Threaten
- Interrogate
- Promise
- Spy

The reason these four types of activities have been specifically identified is because their very nature undercuts one of the Act's important principles - to ensure that every employee is free to exercise his or her choice whether to join the union. Where the Board determines that an employer's actions have contravened the Act, it has a broad range of remedies available. These remedies may include ordering an employer to take whatever actions are necessary to rectify the results of its illegal behaviour.

Yet we all know that the vast majority of employers do not - and would never - threaten, interrogate, promise or spy in terms of their employees. To do so is entirely antithetical to positive employee relations. What every employer wants and should work towards is a motivated workforce. The commitment to positive employee relations remains at the heart of any employer's ability to withstand the threat of unionization.

An employer's iaction plani might therefore include the following steps:

- i develop an educational checklist with respect to employee rights;
- i develop a list of the factors an employee should consider when deciding whether or not to join a union;

- i identify the timelines involved in the process;
- i inform employees of their rights during the process;
- i develop a list of the benefits the employer provides TODAY without the union;
- i develop a list of the types of workplace improvements that have occurred recently, without the union;
- i if favourable comparisons can be made between the workplace and other unionized workplaces, compare the benefits that employees currently enjoy with those in similar establishments in the industry;
- i without exaggerating, inform employees of the pros and cons of belonging to a union, including the potential costs of unionization such as union dues;
- i correct false promises and/or misleading statements made by union officials to the employees; and
- i most importantly, respond to each and every question of your employees. No question goes unanswered. It is important that each employee experience and believe that workplace leaders will always provide credible answers in a timely manner.

At Sherrard Kuzz, we have developed many action plans that afford our clients the ability to react immediately to the threat of unionization. Regardless of industry or size of business, every employer should be prepared to respond to and successfully defend a union drive or application for certification.

Prepare in advance. Develop a plan and educate your workplace leaders.

**DID YOU
KNOW...?**

In the context of a union organizing drive, Employers are allowed to tell their employees that they are opposed to being unionized!

WORKPLACE SEARCH POLICIES: HOW TO ACHIEVE A BALANCE BETWEEN EMPLOYER INTERESTS AND EMPLOYEE RIGHTS

Theft in the workplace is a significant and ongoing issue facing business today. In an attempt to deter this behaviour and apprehend those who steal, many employers have implemented among a variety of initiatives search procedures to inspect employee-owned items including: lunch bags, backpacks and jackets. In some cases it is the employee himself who is the subject of the search.

In every case, the balance that must be struck lies somewhere between an employer's inherent right to protect its business interests (*e.g.* products, assets, information, *etc.*) and an employee's right to personal privacy. In all circumstances, regardless of whether the workplace is unionized or non-unionized, an employer should only conduct a search where the level of invasiveness is proportional to the risk of theft and the severity of the loss to the employer. The search policy may also be scrutinized to ensure that either the employee or union has provided prior authorization and that less intrusive measures have been unsuccessful in eliminating theft.

The following are questions commonly asked by employers regarding the appropriate level of search invasiveness in other words, when does an employer cross the line between protecting its business interests and violating the privacy rights of its employees?

DOES THE CHARTER OF RIGHTS AND FREEDOMS PROVIDE EMPLOYEES WITH PROTECTIONS FROM SEARCH?

Section 8 of the *Canadian Charter of Rights and Freedoms* (the "Charter") states that, "Everyone has the right to be secure against unreasonable search or seizure." However, the Charter generally does not apply to private employer search policies and/or practices. The Charter will apply to private sector search policies only when law enforcement officials carry out the

search, or legislation is relied upon to justify the procedure. As well, a number of adjudicators have relied on Charter principles to infer limited privacy rights within the private sector.

UNIONIZED WORKPLACES - WHAT DO ARBITRATORS SAY?

Arbitrators have consistently stated that search policies or procedures should either be agreed to at the time



the collective agreement is negotiated, or identified by the parties as a long-standing past practice.

If an employer in a unionized workplace wishes to unilaterally implement a search policy, it must be able to prove to an arbitrator that:

- i employee theft presents an immediate threat to business interests;
- ii less intrusive measures have been unsuccessful in eliminating theft;
- iii the employer's intention to institute a policy has been brought to the attention of the bargaining agent;
- iv the policy is reasonable and not inconsistent with any other term in the collective agreement;
- v the policy includes a search selection process that is non-discriminatory and chooses search participants from a broad group of individuals (*e.g.* employees, managers, clients, *etc.*); and
- vi the level of search is appropriate and reasonable in the circum-

stances (*e.g.* an employer dealing with small, valuable products will usually be able to conduct more extensive searches than an employer concerned with the theft of difficult to hide or less valuable items).

NON-UNIONIZED WORKPLACES - WHAT DO COURTS SAY?

A non-union, non-government employer has greater flexibility when implementing a search policy because its actions are not automatically proscribed by the terms of a collective agreement or the Charter. Nevertheless, this flexibility is constrained by an employee's inherent right to personal privacy. For example, an employer may be able to unilaterally implement a procedure to search lockers or gym bags. However, Canadian Courts may strike down a policy and assess liability against an employer where the search is of the employee's body. Consider that a police officer cannot conduct a legal body search unless and until the officer has arrested an individual or has irreasonable grounds to believe that a weapon or prohibited substance will be found during the search. Similarly, while customs officers have the authority to search an individual pursuant to the provisions of the *Customs Act*, no such statute supports an employer's authority to implement a body search procedure.

Accordingly, in circumstances where a private employer is of the view that a body search is required, that employer is advised to seek the assistance of the police. An employer who forces an employee to undergo a strip search or other invasive search may find itself on the receiving end of a complaint that the employee has been assaulted or that his/her privacy has been invaded.

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SEARCH POLICIES

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ADVICE FOR EMPLOYERS

When contemplating whether to implement a search policy, employers should consider the following:

- i in a unionized facility, attempt to negotiate a search procedure into the collective agreement;
- i communicate the reason for, and extent of the searches to both the bargaining agent and the employees. Emphasize that the policy is routine, will be applied to all people associated with the company (not just the hourly rated employees), and is not in place because of a lack of trust, but rather, to promote the long-term health of the company;
- i include a "Consent to Search" section in every employment agreement, and if applicable, in any visitation document that a non-employee visitor is required to sign as a condition of access;
- i carefully evaluate the necessary extent of the search by considering the risk of theft and the cost of potential losses. Then decide if a lunchbox search will suffice to protect business interests and deter theft, or if a search of lockers, jackets and other personal property will be necessary. Consider alternative means to a search. For example, provide all employees with a clear lunch bag that negates the necessity of a physical search;
- i whether unionized or not, ensure that the search selection process is non-discriminatory and identifies search participants from a broad group of individuals (e.g. employees, managers, clients, etc.); and
- i respect an individual's right to privacy and bodily integrity by only conducting searches that are included in the employment agreement or that minimally impair the employee's privacy. If a strip search or invasive body search is required, contact the police and request that they complete this process.

Breakfast Seminar

Sherrard Kuzz LLP invites you to join us for our ongoing series of employment and labour law update seminars.

TOPIC: Ontario's Proposed Privacy Legislation: How Will It Affect Your Workplace?
DATE: Wed., Sep. 18, 2002, 7:30 a.m. to 9:00 a.m. (program to start at 8:00 a.m.; breakfast provided)
VENUE: Wyndham Bristol Place Hotel (Toronto Airport); Carlyle Room
950 Dixon Road, Toronto

Watch for your faxed invitation the week of August 26, 2002 or contact Jennifer Ainsworth at 416.603.0700 to request an invitation.

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