



SHOOK
HARDY & BACON

MAY 2021

Labor and Employment Law in the Cannabis Industry – How to Navigate Unionization Part II

Stephanie McGraw
Ashley Harrison
Charlie Rosebrough

Shook, Hardy & Bacon L.L.P.

Article first published in FlowerHire

Labor and Employment Law in the Cannabis Industry – How to Navigate Unionization Part II

Stephanie McGraw
Ashley Harrison
Charlie Rosebrough

Shook, Hardy & Bacon L.L.P.

One of the trickiest areas of law for management to navigate is the union campaign. When a union reaches out to a labor force (or vice versa) and begins the process of unionizing, it is critical that management understands the dos and don'ts. Only with skilled management can an employer be sure to avoid “unfair labor practices” and unnecessary liability. This primer goes through the legal framework controlling union campaigns and concludes by discussing a recent update: Neutrality Agreements.

How Do Unions Form?

Under the National Labor Relations Act, employees have a right to choose a union as their exclusive bargaining representative. As part of that right, employees are allowed to participate in an organizing campaign.

Traditional organizing campaigns have the following structure. First, disgruntled workers and/or eager union representatives will make contact with each other. The union and workers will sit down and discuss working conditions and the reasons to pursue collective bargaining. Then, when a union has a strong concept of the workplace, it will determine a “bargaining unit.” A “bargaining unit” is a term of art, used to describe the precise group of employees to be represented by the union. *See* 12 C.F.R. § 269.4. Once the bargaining unit is set, the union will begin a “card drive,” in which the union seeks to have employees sign authorization cards requesting a union election. If the union is able to collect authorization cards from 30% of the bargaining unit, it can petition the National Labor Relations Board (the group that oversees union activity under the NLRA) for an election. The NLRB will check the cards and, if certified, will conduct a secret election.

While all of this occurs, both the union and the employer have the opportunity to conduct a campaign. Campaigning usually takes the form of flyers, speeches, dinners, and videos. But where these can occur and the content they may contain is—you guessed it—heavily regulated.

What Duties Do Employers Have During a Union Campaign?

Employers facing a union campaign must walk a tightrope. On the one hand, the NLRA makes it an “unfair labor practice” to “interfere with, restrain, or coerce employees in the exercise of the rights guaranteed” by the NLRA. 29 U.S.C. § 158(a)(1). In other words, employers may not go too far in threatening reprisal or promising benefits to dissuade participation with a union. But on the other hand, employers may not be overly supportive of unions either. In fact, it is also an “unfair labor practice” for an employer to “dominate ... the formation or administration

Reprinted from



of any labor organization” or to “encourage or discourage membership in any labor organization by discrimination.” 12 C.F.R. § 269.6.

Between these two extremes, employers must find the middle. That middle road generally takes the form of voicing one’s opinion. Under a First Amendment carve-out, courts have held that employers have the right to express their views, arguments, and opinions on union formation, as long as those opinions are not threatening.

In practice, employers usually take the following approved actions:

- Write letters to employees communicating why the union is unnecessary
- Give after-hours speeches at work on the practical functions of collective bargaining (i.e., no individual bargaining)

Some standard pitfalls to avoid are:

- Firing employees who engage in union activities
- Telling employees they would have received a higher wage if it were not for the union campaign
- Telling employees that the store will have to close if the union wins an election
- Interrogating employees about how they intend to vote

What Are Neutrality Agreements and How Do They Affect Employer Rights?

As a way to simplify the complicated and risky union campaign process, some employers enter a

“Neutrality Agreement” with the union before the start of the campaign. In some jurisdictions, such as California, Labor Peace Agreements (LPAs) or “Neutrality Agreements” are actually required for companies of a certain size.

These “Neutrality Agreements” typically do a few things:

- Force the employer to recognize the union after a majority of the bargaining unit signs authorization cards, even without an election
- Force an employer to remain neutral on the issue of unionizing in letters and speeches
- Allow union organizers access to employer facilities
- Allow union solicitation during working hours

Given the significant benefits to unions, many employers prefer not to enter into “Neutrality Agreements.” But for those who do, they receive the benefit of no secret election, which can be time-consuming. And such employers can avoid a protracted and messy campaign.

Conclusion

In the end, precisely how to handle a union campaign is a matter of choice. But no matter the employer’s strategy, it is important that management understand the boundaries. Knowing how far one may go in supporting or opposing a union is the key to interacting both legally and effectively with a union campaign. ●

AUTHORS

Shook, Hardy & Bacon L.L.P.



Stephanie McGraw

Partner
Houston
smcgraw@shb.com



Shook, Hardy & Bacon LLP



Ashley Harrison

Partner
Kansas City
aharrison@shb.com



Charlie Rosebrough

Associate
Kansas City
crosebrough@shb.com

Shook, Hardy & Bacon Partner Stephanie McGraw represents clients in product liability and business litigation matters in the cannabis, and food, beverage and agribusiness industries, among other areas. Partner Ashley Harrison and Associate Charlie Rosebrough advocate for national companies facing employment and commercial litigation matters in the cannabis space, and food, beverage and agribusiness. For more information, go to www.shb.com.