UNION CERTIFICATION PROCESS – TIPS FOR EMPLOYERS DEALING WITH AN ORGANIZING DRIVE IN THEIR WORKPLACE

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Today we will cover:

1	Legislative Update
2	Recent Noteworthy Cases
3	Overview of Union Certification Process (BC, Federal) – Application; Vote or Automatic; Statutory Freeze
4	Scope/Restrictions on Employer Communication during Union Organizing
5	Unfair Labour Practices – Overview and Relation to Union Organizing
6	Overview of Union Decertification Process – Full & Partial
7	Questions

LEGISLATIVE UPDATE

BC – Bill 11 – *Employment Standards Act* amendment

- See our April 17, 2025 E-Bulletin: https://www.ahbl.ca/no-more-sick-notes-what-b-c-employers-need-to-know-about-bill-11-employment-standards-amendment-act-2025/
- No medical note required in specified circumstances
- Circumstances TBD (but will include s.49.1 - 5 paid and 3 unpaid sick days)
- Already exists: Ontario (for 3 unpaid sick days)

  Federally (for medical leave of at least 5 consecutive days; for personal leave up to 5 days (3 paid), no later than 15 days after return 'if reasonably practicable')

ONTARIO – *Working for Workers Acts*

June 1, 2025 Long-term Illness Leave

- Unpaid, after 13 weeks up to 27 weeks of 52 weeks
- Serious medical condition
- Medical certificate required

ONTARIO – *Working for Workers Acts* (cont'd)

July 1, 2025 – Employment Information (if 25 or more employees)

- Legal name of employer / contact information
- Location of work
- Wage rate / pay period
- Anticipated hours of work

ONTARIO – *Working for Workers Acts* (cont'd)

January 1, 2026 – Job Postings (if 25 or more employees)

- range of expected compensation (up to $200k)
- if AI use in selection
- if indeed existing vacancy
- requirement for Cdn experience banned
- exclude jobs outside Ontario
- inform of hiring decision within 45 days of last interview
- retain records for 3 yrs

RECENT NOTEWORTHY CASES

Mercer Celgar LP v. Ferweda, 2025 BCCA 120 (CanLII) - Inducement

- Engineer contacted by recruiter on LinkedIn
- Paid visit to prospective employer; told ‘hired for long term’; asked how long they would commit to the company
- Accepted increased offer
- 27 years with prior employer, and 53 years of age considered
- Terminated after 2 years – awarded 12 months’ notice

Saskatchewan Indian Gaming Authority v. Pasap, 2025 SKCA 15 – Disability during Notice Period

- 47 year old EE was on leave for 1 year following 5 years of employment as Facilities Manager
- Concerns with performance following RTW
- EE called into meeting and told had the choice to resign or would be fired
- EE found to have been terminated without cause

Saskatchewan Indian Gaming Authority v. Pasap, 2025 SKCA 15 – Disability during Notice Period (cont'd)

- 4 months following termination, the former EE collapsed due to heart failure requiring immediate surgery
- Remained totally disabled up until trial
- 8 month notice period, and disability arose during notice period when would have been covered under LTD plan
- Entitlement to severance as well as damages for lost disability benefits, and punitive damages – total award over $1.2M

Kirke v. Spartan Controls Ltd., 2025 ABCA 40 – Limit to Wrongful Dismissal Damages

- Managerial employee fired after 24.5 years of employment
- Entitlement to 20 month notice period
- Damages based on base pay, benefits and quarterly bonus payments
- Optional Profit-Sharing Program provided for profit-sharing payments based on share ownership
- However, under terms of Shareholder Agreement, the ER could buy back shares upon 90 days' notice
- Right to profit-sharing was determined by SHA and not EA, and claim limited to 90 days' profit-sharing

OVERVIEW OF UNION CERTIFICATION PROCESS (BC, FEDERAL) – APPLICATION; VOTE OR AUTOMATIC; STATUTORY FREEZE

Application for Certification

British Columbia – *Labour Relations Code*

- 45% or more apply for representation by Union
- Signed cards (within last 6 months)
- Board notifies Employer (by email/courier) same day
- Any vote required to be held within 5 business days (s.24(2))

- Requirement for ER to provide EE information
- Proposed bargaining unit excluding non-employees (managers/ confidential)
- IRO report prior to hearing – tentative voter list, extent of support

Application for Certification (cont'd)

British Columbia – *Labour Relations Code*

- Hearing prior to vote
- Issues at hearing – union? Appropriate bargaining unit? 45% or more signed cards?
- Automatic certification if 55% or more (s.23)
- For vote, Union only needs majority of those who vote (50% + 1)
- Challenge to employees without sufficient continuing interest (ie. resigned or terminated)

Federal

35% or more apply

Vote may be ordered if 35% to 50%

Statutory Freeze

British Columbia

- Once application filed, ER cannot “increase or decrease rates of pay, or alter a term or condition of employment” (s.32)
- Proper cause exception for discipline, layoff or termination
- If certification, then freeze for 12 months (s.45(1)), with proper cause exception
- Overall ‘business as usual’ permitted

Federal

- Once application filed, no change until application dismissed or 30 days after certification (s.24(4)
- If certification, then no change once notice to bargain delivered until end of bargaining (ss. 50 and 89 (1))

Vancouver Fire & Alarm Services v International Brotherhood of Electrical Workers, Local 213, 2023 BCLRB 70 — Violation of statutory freeze vs "Business as usual"

- In June 2022, Union applied to represent "fire service technicians" of Employer
- Shortly afterward, Employer gave raises to all fire service technicians
- Raises were larger than norm and some employees received higher raises than others
- Union alleged Employer gave higher raises to anti-Union employees in an attempt to shore up support against union
- Employer replied that, by the time the Union certification application had been filed, it had already planned to implement the wage increases. Further, it did not know which employees were anti-union
- **Application dismissed. The wage increases were planned prior to the certification application and therefore constituted "business as usual"**

Vancouver Fire & Alarm Services v International Brotherhood of Electrical Workers, Local 213, 2023 BCLRB 70 — Violation of statutory freeze vs "Business as usual"

32 ***Looking to the circumstances as a whole, I am satisfied the Employer has demonstrated it planned to implement the wage increases prior to the certification process and the decision to move forward with the wage increases was the culmination of its wage review process and constitutes "business as usual".*** *I note the Union asserts the wage increases cannot be business as usual as the wage increase process implemented by the Employer was different from prior years and the increases were much larger. However, the business as usual test does not require that any changes that are implemented by an employer are similar to changes previously made; what it requires is that any change was planned prior to the application for certification and the conditions upon which the change was to be triggered occurred during the statutory freeze period. I am satisfied that is what occurred in the present case.*

SCOPE/RESTRICTIONS ON EMPLOYER COMMUNICATION DURING UNION ORGANIZING

British Columbia

Labour Relations Code

- Significant legislative change in 2019
- Employers <u>can</u> communicate with an employee a “statement of fact or opinion”, so long as the statement is:
  - **“reasonably held”; AND**
  - made **“with respect to the employer’s business”** (s.8)
- Employers <u>cannot</u> interfere with the formation of a trade union (s.6(1)), must be “circumspect” when it comes to issues of union membership
- Highest scrutiny at time of organizing drive
- Employer cannot coerce, intimidate, or use threats or undue influence on employees

Employer’s written statement to Employees:

“Who are these union people who say they want to represent me? How well do I really know them? Why are they doing this? What's in it for the union and the union organizers personally? […] The more members, the more money the Union receives. And are you confident as to where all of this money goes? Ask yourself if the union organizers' own interests are your own interests?”

British Columbia (cont'd)

Prohibited speech: *Sysco Fine Meats v Teamsters*, 2020 BCLRB 78

- In context of union certification application, Employer made statements, including in the context of meetings called by the Employer at their premises, that communicated the following information:
  - The implication that the Union had nefarious motives, including by asserting Employees should "get all the facts", research the history of the Teamsters, consider if they want to be represented by "this sort of group"
  - Because of the union certification application filed by the Union, the Labour Relations Code prohibited the Employer from going ahead with its pre-planned increase to wages and pension plan improvements (which was legally incorrect; the Employer actually had an obligation to proceed with these wage increases under the Code)

Communications were illegal: when viewed in context, they were misleading, suggested nefarious motivations on the part of the Union, amounted to undue pressure, and did not relate to the Employer's business.

British Columbia (cont'd)

Protected speech: *Homewood Health Inc. v. BC Nurses'* Union 2024 BCLRB 87

- In context of union certification application, Employer communicated the following information through various memos:
  - Employer preferred to remain a non-union facility and believed this was best for its operations, wanting to avoid an "us vs. them" culture
  - Employer was disappointed if some Employees felt they needed a union to represent them, but Employer noted it "respects the process"
  - Beyond paying union dues, "Everything [i.e. benefits that Employees currently enjoy as employees] will be up for negotiation" (technically untrue, but later corrected in the same document to "most [benefits]")
  - Employer's "total compensation package" is "very competitive" and Employer was "at the top end of our industry - union or non-union"
  - Employer does not believe any union "has much or anything" to offer Employees in exchange for mandatory union dues

Communications were legal: when viewed in context, they were not coercive and pertained to the Employer's business. In a different context, same communications would likely have been illegal.

Federal

Canada Labour Code

- Similar standard as in British Columbia
- Employers can express a “personal point of view”
- Employers cannot use coercion, intimidation, threats, promises or undue influence
- Dividing line (*FedEx Ground Package System Ltd*, 2011 CIRB 614)
  - CIRB looks to whether opinion contains an element of coercion, intimidation, threats, promises, or undue influence
  - Board considers context in which statement made + “probable effect” on a “reasonable employee”
  - Employers are evaluated on whether their conduct has deprived employees “the ability to express their true wishes” about unionization

Examples

Allowed Communications

- **True statements about:**
  - The legal regime under which employees work
  - *Labour Relations Code*
  - Business climate in employer's sector or industry
  - Employer's competitors
- **Responses to:**
  - Inaccurate propaganda
  - Inaccurate or incomplete statements about specific aspects of employer's business, such as the terms and conditions of employment

Examples (cont'd)

Prohibited Communications

- Asking employees (individually or collectively):
  - Whether they have signed membership cards or support the union
  - For information that would have a bearing on the bargaining relationship
- Suggesting that a Union or its organizers have nefarious motives
- Threats about the consequences of unionization, including:
  - Closure of the workplace
  - Lower or higher wages
  - Termination of staff
- Promising employees any benefits if they do not unionize or suggesting specific outcomes if they do or do not unionize

Suggested Best Practices

- Ensure all communications are in writing
- Express views - do not urge specific actions
- Avoid “Captive Audience” meetings
- Lookout for (unintended) implied threats or promises & prepare for intense scrutiny:

> *“… we must always be conscious of the fact of employee dependence on the employer, especially for job security, and the opportunity this gives the employer for undue influence on that choice.* ***Comments and predictions which might seem innocuous in a political campaign take on a very different hue when voiced by management.***”

UNFAIR LABOUR PRACTICES – OVERVIEW AND RELATION TO UNION ORGANIZING

ULPs

British Columbia: ss. 5, 6 and 9 LRC

- ss. 5, 6 and 9 LRC
- Prohibition on retaliation for filing application (s.5)
- s.5 complaint must be heard within 3 days of filing unless agreement otherwise
- No interference in formation or administration of Union (6(1))
- No intimidation or coercion to induce to join or not join a Union (s.9)

ULPs (cont'd)

British Columbia: ss. 5, 6 and 9 LRC

Prohibited Employer Conduct:

- Discharge or discriminate in regard to condition of employment (6(3)(a))
- Discharge during organizing except for proper cause (b)
- Seek by intimidation or promise of wage increase, or to alter term of employment to compel to not join union (d)
- Use of replacement workers during a strike or lockout
- exception for proper cause or 'necessary for proper conduct of business' (6(4))

Federal: ss.94, 96

CIVEO Premium Services Employees LP v British Columbia Regional Council of Carpenters 2021 BCLRB 164

Scope of interference with administration of Union (s.6(1))

- In June 2021, the Union, Unite Here Local 40 (Local 40), requested access to Employees of Employer for purposes of organizing employees
- Soon after, the Employer signed an agreement to voluntarily recognize another union, BC Regional Council of Carpenters (BCRCC) if its Employees voted in favour of being represented by BCRCC
- The Employer's Director of HR admitted this agreement was motivated by the Employer's preference for working with BCRCC over Local 40
- Local 40 alleged Employer's agreement with BCRCC interfered with its operations contrary to s.6(1)

Application granted. By signing the agreement with BCRCC, the Employer unduly influenced Employee choice in a way that interfered with the selection of a trade union

Radisson Blu Vancouver Airport Hotel and Marina (Re) 2024 BCLRB 73

Discussion of intimidation / inducement in violation of s.6(3)

- Union certified to represent Employees working at one of the Employer's hotels
- The Union began a lawful strike on May 3, 2021
- While Employees were picketing, Raj, the owner of the hotel and a representative of the Employer, communicated the following information
  - The Employer could fire an employee the day after the strike
  - There was no longer any jobs for Employees in the hotel's kitchen, which was inaccurate
  - An "offer" for one of the Employees to play a plastic vuvuzela horn at a wedding for Raj's daughter; and
  - An offer to pay certain Employees to retire

- Many of the Employees did not feel intimidated by Raj's comments
- However, Union alleged that Raj's comments were illegal attempts to intimidate or induce the Employees and applied for determination that the Employer breached the Code

Application granted. Whether employees were subjectively intimidated is not relevant; the Board looks to the "objective" impact of statements in light of the context

Altrad Services Ltd. v International Union of Painters and Allied Trades, Local No. 138 2023 BCLRB 65

Discussion of "Proper Cause" (s.6(3)(b))

- Union filed a certification application
- One of the Employees, Alex, was a Union supporter and attempted to persuade Employees to vote in favour of unionizing
- Alex was a probationary employee and the Employer terminated his employment after he began advocating for unionization
- Union alleged the Employer fired Alex in retaliation for his pro-Union advocacy and applied for determination that Employer breached the Code
- Employer replied that it did not know Alex was pro-Union and it had proper cause to terminate him, since he was difficult to manage, displayed poor judgment, and had a negative effect on Employee morale including by disparaging work and management

Application dismissed. The Employer showed it dismissed Alex for proper cause and had more latitude in assessing him since he was a probationary employee

OVERVIEW OF UNION DECERTIFICATION PROCESS – FULL & PARTIAL

British Columbia

- 45% or more sign application for cancellation
- Application only after 12 months from certification
- Vote within 5 business days
- Majority of those who vote
- Board may refuse application or vote results where ULP or due to improper interference

Federal

- Majority apply for decertification (50%+1)
- Application within allowed time periods (after 12 months, or during last 3 months of 3rd or subsequent year of CBA)

Certain Employees of GRC, 2023 BCLRB 117

Partial Decertification

- Certification in January 2023 to represent employees of 2 coffee shops
- May 2023 partial decertification application for 1 shop pursuant to s.142 of LRC
- Vote held and sealed pending outcome
- Application dismissed as too early
- Board adopted 12 month statutory freeze as minimum period for discretionary partial decertification application
- Union given “breathing space” following certification in which to “engage in responsible collective bargaining”

ANY QUESTIONS?

THANK YOU

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