



The 2022 Construction Labour “Open Period” - What Employers Need to Know

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Agenda



- What is “Open Period” and “Raiding”?
- What kind of union activity may we see on site?
- What can employer say, or not say?
- What does an employer have to file with the Labour Board if an application is filed?
- What are the timelines to respond to applications at the Labour Board?

| “Open Period” & “Raiding”

- On April 30, 2022, the majority of collective agreements in the construction sectors will expire
- The last two (2) months of those expiring collective agreements are known as the “open period”
- This will be **March 1 – April 30, 2022**
- This window opens only once every 3 years

| “Open Period” & “Raiding”

- Construction employees may apply to the Labour Board to terminate their union’s bargaining rights
 - Also known as “decertification”
- Construction trade unions may apply to the Labour Board to displace an incumbent trade union
 - Also known as a “raid”

| “Open Period” & “Raiding”

- Under the *Labour Relations Act, 1995* employers cannot commence a decertification or raid
- The decision to “decertify” must be made by employees, and the employees must file the application **without any assistance from an employer**
- The decision of whether to conduct a “raid” and file a displacement application lies solely with a construction trade union

What kind of union activity may we see on site?

- For a decertification, the employees organizing the effort will seek other employees' signatures for the Application
 - May also discuss what needs to be filed with the Labour Board and how to do so
- For a raid, union representatives will seek union membership cards signed by employees
- Incumbent union may have more representatives on site to "service" its members and prevent either a decertification or a raid

What kind of union activity may we see on site?

- Increased discussion and anxiety about unions
- Increased presence of union representatives at the gate
- Union representatives on site – may have right of access, or may not
- Impromptu employee meetings / gatherings
- Distribution of pamphlets, flyers, and other promotional material

What can an employer say and do?

"An employer is free to express opposition to a trade union, to express opinions on the merits of unionization, to describe the law, and to generally engage in electioneering and propaganda or salesmanship...it is therefore acceptable for an employer to say it does not want a union, or for an employer to express a desire that employees vote "no" to a trade union, so long as an employer's expression...is not accompanied by coercion, intimidation, threats, promises or undue influence."

- *Capelas Homes Ltd.*, [1998] O.L.R.D. No. 3121

| What Can You Say

FACTS

OPINION

EXAMPLES

| What can an employer say and do?

- An employer does not have to “remain silent”
- An employer can answer employee questions about existing terms and conditions of employment, the applicable collective agreement, and its current relationship with the incumbent union
- **STICK TO THE FACTS**

What can an employer say and do?

- Enforce site access protocols – signing in, use of proper PPE, etc.
 - Especially COVID-19 protocols
- Employers DO NOT have to grant site access to union representatives who do not have a right of access under a collective agreement
- Employers CAN tell employees and union representatives to not discuss decertification or raid issues during paid work time on the site

| What can an employer say and do?

- Remind employees that they are free to choose whether to decertify or join a different union
 - It is not a choice for the employer to make for them
- Can correct any misleading or false propaganda

| What you cannot say - T.I.P.S.

- No **T**hreats
- No **I**ntimidation
- No **P**romises
- No **S**urveillance

What should and employer not say or do?

- Threaten loss of jobs, loss of overtime hours, or loss of business/customers if the raiding union displaces the existing union
- Promise an increase in business, better wages, more overtime, higher wages, etc. if a union is decertified
- Tell employees to sign a membership card or to sign a decertification petition
- Tell employees to get their signed membership card back from a union

What should and employer not say or do?

- Permit employees or union reps to wander the site to promote a decertification or raid
- Ask employees to wear clothing and/or insignia that supports a decertification or raid
- Assist employees in preparing and/or filing a decertification application – **i.e. no use of office equipment**

Consequences - Unfair Labour Practice Complaint

- “Taint Theory”
 - If union activity is one of the reasons – even a minor one – for the employer's actions, this fact will taint the outcome of a decertification, and possibly the outcome of a raid
- Decertification applications dismissed
- Displacement vote held again

Responding to a Decertification or Raid Application

- Employer response deadline: **2 business days** from delivery to the employer
- Very limited amount of time to consider both strategy and gather information necessary to file a complete response
- Extensions to this deadline are rare – failing to respond can result in dismissal of decertification or no participation in raid litigation

Responding to a Decertification or Raid Application

- What is the geographic area and which sites are affected?
- Which employees are affected?
- What work were the employees doing on the “application filing date”? For how long?
- What documents are available for evidence?
- Need to gather witness statements before memories fade
- If there is a decertification or raid vote, where and when? Will it be electronic?
- Who will represent employer at the vote?

Responding to a Decertification or Raid Application

- Decertification or raid vote normally held 5 business days after Application delivered to the employer
- All potentially affected employees may vote
- If the employer or a union does not believe a person has the right to vote it may “challenge” the voter
 - i.e. was not working in the trade on the application filing date, is “managerial” and not in bargaining unit, etc.
- “Challenges” are resolved via “status dispute” litigation at the Labour Board

What can an employer do to prepare?

- A list of all active jobs in Ontario (including precise location) and the employees who work at each site
- Employee hire dates, job classification, whether hired directly or referred by a union, pay structure
- Payroll records and/or time sheets for at least one month (i.e. from February 1, 2022) prior to application filing date and the weeks thereafter
- Details of the work each employee was performing each day between March 1 and April 30, 2022
- **Detailed daily site reports** with photos and supporting documents
- Names and numbers of site supers and other managers who have knowledge

Thank You

Q&A



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