

# TAFT-HARTLEY ACT

Distributed by the Labor Education & Research Center University of Oregon

## Employer Unfair Labor Practices

The keystone of the Act is the statement of rights granted employees in Section 7, which reads as follows:

### RIGHTS OF EMPLOYEES

“Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3).”

These rights are protected by declaring certain types of conduct by both employers and unions to be unfair labor practices, and prohibiting them.

We shall consider first employer unfair labor practices. There are six types of such practices listed in the Act, all in Section 8:

1. Section 8 (a)(1) - to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in Section 7:
  2. Section 8(a)(2) - to dominate or interfere with the formation or administration of a union, or contribute financial or other support to it;
  3. Section 8(a)(3) — by discrimination in regard to hire or tenure of employment, to encourage or discourage membership in any union;
  4. Section 8(a)(4) - to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under the Act;
  5. Section 8(a)(5) - to refuse to bargain collectively with a union selected by a majority of the employees in an appropriate bargaining unit;
  6. Section 8(e) - to enter into a “hot-cargo” agreement with a union.
1. Any conduct on the part of an employer which interferes with, restrains or coerces employees in the exercise of their rights to organize and to bargain collectively is a violation of Section 8(a)(1). Conduct thus prohibited includes espionage, surveillance, blacklisting, anti-union propaganda, denial of solicitation privileges and economic coercion.
    - A. Espionage, or spying, is one of the oldest weapons used by employers against unions. It includes spying through (a) company officials and supervisors, (b) use of detective agencies, and (c) informers among employees. The first is by far the most common. Even if an employer merely gives the impression he is engaging in espionage, he violates the Act.

If an employer questions his employees concerning their union membership or activity, this would probably constitute a violation, unless the circumstances are such that no tendency to interfere with organizational rights appears. Polling of employees about their views on whether to strike, or to accept a wage offer about which their union is bargaining, would be a violation.

B. Blacklisting.

This consists of circulating the names of militant union among employers for the purpose of preventing their employment. clearly a violation, but appears not to be in general use now.

C. Forbidding solicitation of members.

An employer may prohibit union activity on company time, but may not prohibit solicitation during non-working time on company property.

But if the employer applies a valid rule discriminatorily, he would be guilty, as where he lets one union do what he forbids to another — such as soliciting on company time.

The rule on distribution of literature is different. An employer may prohibit distribution of literature in working areas even during non-working hours. An employer may prohibit non-employee organizers from access to compnay property at any time for any purpose, but he may not prohibit employee organizers from distributing literature on company property in non-working areas.

D. Favoring the Union.

Where two unions are competing, it is not unlawful for an employer to express a preference for one union over a rival, but he may not take any action to support his preference, or deny competing unions equal organizational opportunities. So, if an employer recognized one union without an election while another is demanding recognition, or allows one union organizational privileges which he denies to another, he violates the Act.

E. Anti-union propaganda.

Statements in opposition to unions, containing promises of benefits or threats of reprisal are violations. So if an employer threatens to discharge, layoff, demote, or otherwise punish an employee for union activity, that is a violation; so also a threat to move a plant if the union wins an election,

But statements by an employer of hostility toward unions, and urging employees to vote against a union, are lawful so long as there are no promises of benefits or threats of reprisal.

F. Coercion.

Some examples of unlawful coercive conduct are: granting wage increases and promotions during organizing campaigns, bribery or attempted bribery of union officers or members, increasing overtime pay and vacation benefits to discourage union membership, and reducing the work week.

## 2. Domination of Unions

The company-dominated union is illegal. Such unions may be organized as the result of (1) formation by the employer or his representatives; (2) formation by employees on demand or suggestion of the employer; (3) formation by employees encouraged by supervisors. If a union is formed in any of these ways it is not qualified to act as bargaining agent.

Furthermore, financial independence is essential to the integrity of a bargaining agent. Payment by an employer of a union's organizational or administration expenses is a violation of the Act.

A union which is legally formed may be illegally supported. If an employer gives a union preferential treatment, or allows it privileges it denies to a rival, these acts may be evidence of illegal support.

If a union fails to hold meetings, elect officers, and collect dues, this may be evidence of illegal domination.

If a union is found to be company-dominated, the NLRB may order it to be disestablished, that is, in effect, to disband. Or it may only order termination of any illegal support and assistance given by the employer.

## 3. Discrimination

Discrimination means, generally, unequal treatment. Section 8(a)(3) is intended to insure that union and non-union workers shall be accorded equal treatment by employers. It does not interfere with the employers' normal right to hire and fire, except to the extent that the exercise of that right interferes with the employees' right of self-organization. So far as this law is concerned, an employer may lawfully discharge an employee for any reason except that of encouraging or discouraging membership in a union.

Likewise, refusal to hire a person because he is, or is not, a member of a union is a violation of this section. However, hiring through a union hiring hall, on an exclusive basis, is not unlawful where the collective bargaining agreement provides that referrals will be made without regard to membership or non-membership and there is no evidence of discrimination.

In determining whether a refusal to hire, discharge, demotion, layoff or other action adversely affecting an employee's tenure, status or earnings is discriminatory, the NLRB must interpret the conduct of the employer, who usually assigns a lawful reason for his action. The Board must decide if the reason given was the real motive for the action taken, or only a pretext.

The Board may consider many factors in determining the real cause of the action taken. Some factors are as follows:

1. If a group of employees is discharged the proportion of union members in that group is much greater than the proportion of union member in the plant, this may be evidence of discrimination.
2. If an employee is discharged soon after the employer learns that he joined the union, it is likely discrimination will be found.

3. A penalty against a union member much more severe than usually given to non-union members may be held to be discriminatory.
4. The fact that legitimate grounds for discharge exist may be no excuse for an employer who took no action against an employee until he learned the employee joined a union. The Board then has to decide which is the real reason, and frequently holds that the discharge is discriminatory.

An employer may not lawfully lockout his employees to prevent unionization of his plant. But he may legally lockout his employees after a deadlock in bargaining negotiations to protect his bargaining position.

Strikers. The right of an employer to discharge strikers depends, to a large extent, on the kind of strike involved. If the strike is caused by the employer's unfair labor practices, the employer must reinstate the strikers. If the strike is economic--for a change in working conditions--the employer may replace the strikers, and is not obliged to reinstate those whose jobs have been permanently filled. If their jobs have not been permanently filled, economic strikers must be reinstated on application, unless they have lost their reinstatement rights for other reasons.

Strikers--regardless of the cause of the strike--may lose their right to reinstatement if they engage in certain kinds of illegal conduct during a strike. Thus employees who strike illegally, such as a wildcat strike, or engage in a sit-down strike, or commit acts of violence, may be legally discharged by their employers.

Union Security. Under Section 8(a)(3), an employer may agree with a union to establish a union shop, or agency shop, or maintenance of membership.

A closed shop is illegal. Under this arrangement an employer may hire and retain only union members.

Under a union shop, an employee need not be a union member at the time of hire, but is required to become one on or after the 31st day after hire, and to remain such throughout the term of the agreement. Under maintenance of membership, employees are not required to join the union, but must remain members if they do join.

Under agency shop, employees are not required to hoin a union, but are required to contribute to the support of the union, usually in an amount equivalent to union dues.

The law imposes a number of limitations on such agreements:

- (1) the union must be properly qualified as the exclusive bargaining agent,
- (2) membership must be available to all employees on uniform terms and conditions,
- (3) membership may not be denied or terminated for reasons other than the non-payment of dues and initiation fees,
- (4) the State in which the employees work does not prohibit such agreements. An employee may not be discharged for non-payment of back dues, fines, or assessments.

A union security agreement may be rescinded by an NLRB election for this purpose.

The law creates a special exception for the building and construction industry. As stated above, unions generally must show they represent a majority of employees in an appropriate unit before they can legally enter into a union security agreement. But in the construction industry, a valid agreement may be made before any employee is hired provided

- (1) the employer is engaged primarily in this industry,
- (2) the union is a building and construction union,
- (3) the union is otherwise qualified to enter into a union security agreement.

In such case, the employee may be required to join the union on or after the 8th day after hire, and the employer may be required to hire employees through a non-discriminatory hiring hall operated by the union.

Reinstatement and back pay. When the Board finds that an employee has been discharged on violation of the Act, it will usually direct the employer to reinstate him to his former job, or, if that is not available, to one substantially equivalent. The employees\* net earnings during the period of discharge are deducted from the amount due. Unemployment insurance payments are not deductible. The earnings are computed on a quarterly basis. The amount of back pay must include any promotions and bonuses the employee would have received if he had been working.

#### 4. Discrimination for filing charges.

Any kind of discrimination against an employee because he has filed an unfair labor practice charge with the NLRB against his employer, or has testified at a Board hearing against his, is an unfair labor practice.

This provision is necessary to protect employees who seek assistance of the Board in the exercise of the rights which the Act guarantees.

#### 5. Employer\*s Refusal to Bargain

Section 8(d) of the Act states that to bargain collectively, the union and employer representatives must meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment, or the negotiation of an agreement, or any question concerning the agreement, and they must reduce such agreement to writing and sign it if either party to make a concession.

Good faith means that the parties must have an honest desire to reach an agreement. This is usually difficult to determine, because the employer would rarely say he does not to do so. The Board considers the circumstances in order to his state of mind. For example, if the employer:

- (1) Delayed unreasonably long in arranging conferences, or refused to do so;
- (2) Refused to send representatives who had power to negotiate;
- (3) Constantly changed his positions;

- (4) Granted employees improvements in working conditions while negotiations with the union were pending;
- (5) Tried to undermine the union during negotiations;
- (6) Made no counter proposals,

the Board would probably conclude that the employer was not negotiating in good faith.

Subjects of bargaining. The parties must bargain with respect to wages, hour of employment and other conditions of employment. The subjects usually discussed include:

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|------------------------|--------------------------------|
| 1. wages               | 10. transfers                  |
| 2. hours               | 11. safety                     |
| 3. overtime            | 12. vacations                  |
| 4. working rules       | 13. holidays                   |
| 5. seniority           | 14. leaves of absence          |
| 6. layoff and recall   | 15. sick leave                 |
| 7. discipline          | 16. union security             |
| 8. grievance procedure | 17. health and insurance plans |
| 9. promotions          | 18. pensions                   |

The employer must bargain about a subject which relates to wages, hours and other working conditions; these are called mandatory subjects of bargaining. If the union wishes to discuss other subjects, these are called permissive subjects, and the employer may, but he is under no obligation to, bargain about those subjects. Examples of such subjects are the structure of the employer\*s business, the way he conducts his business, indemnity bonds for performance of the contract, contributions to an industry promotion fund.

Subcontracting of work which results in the replacement of employees in a bargaining unit by those of another employer, or in the loss of jobs, is a mandatory subject of bargaining.

An employer is not required to bargain for the duration of the contract on any subject contained in the contract, unless he has agreed to do so.

Part of the employer\*s duty to bargain is his obligation to provide the union the wage information it requests for bargaining purposes.

If an employer bargains in good faith, he may continue to insist on his demands with respect to mandatory subjects of bargaining until negotiations break down. This breakdown is called an impasse. The employer is then relieved of the duty to bargain, but he is not permitted to engage in any unfair labor practices. A strike breaks an impasse, and the employer is required to resume bargaining, after the strike begins, on request of the union.

Grievances. An employer\*s obligation to bargain collectively does not end when he signs an agreement. The handling of grievances under an agreement also constitutes bargaining, and an employer\*s refusal to process a grievance may be a refusal to bargain in violation of Section 8(a)(5).

6. “Hot-Cargo” contracts.

It is an unfair labor practice for an employer and a union to enter into any agreement, express or implied, under which an employer ceases, or refrains from, doing business wiht any other person or handling the products of any other employer, or agrees to do so (Section 8e).

This type of contract is discussed later in connection with union unfair labor practices.