

UNIONS ARE POISED TO MAKE GAINS IN SOUTH'S AUTO INDUSTRY

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Employers working for foreign-based automotive manufacturers in the 13 right-to-work states throughout the South should consider preparing for what may become a protracted battle over industry unionization. Volkswagen AG may have unwittingly shifted the paradigm last November when it became the first foreign-based automotive manufacturer to open its doors (in a manner of speaking) to organized labor at a domestic plant that is not jointly owned by an American-based manufacturer. A new policy at Volkswagen's Chattanooga, Tennessee, plant — entitled the Community Organization Engagement policy — allows labor organizations to be involved in employee-related discussions if it can be established by an outside auditor that the labor organization has enrolled at least 15 percent of the plant's workers in a relevant employee group.

This development may signal a pathway to future, formal collective bargaining between Volkswagen and labor organizations, such as the United Auto Workers. This pact, coupled with significant recent cases and other initiatives by the National Labor Relations Board, give unions a potent new arsenal of weapons in the ongoing battle to organize the auto industry. Knowing how to navigate this new landscape will undoubtedly be significant to the future of the auto industry in the U.S.

Volkswagen Opens the Door to Organized Labor — But Not All the Way

Volkswagen's new Community Organization Engagement policy does not specifically recognize the UAW (or any other labor organization) as an official bargaining representative for its employees under federal law. According to a November 2014 press release, Volkswagen's policy describes three levels at which a labor organization can obtain "engagement access" to the employer and its facilities. The level and nature of the engagement access is determined by the percentage of worker membership in the labor organization for each relevant employee group whose members support the organization's interaction with Volkswagen.

The first tier provides specified engagement opportunities to labor organizations who obtain no less than a 15 percent enrolled union membership of workers in the relevant employee population (likely intended to correlate with the concept of the bargaining unit in NLRB parlance). The level of access to company management and resources increases as the percentage of union-enrolled members increases. Tiers two and three are for operational units that have worker-enrolled union memberships of 30 percent and 45 percent respectively.

Accompanying the policy were examples of benefits including the ability to use company space for group meetings, the ability to post union information and announcements on the employer's premises and the ability to have union officials meet regularly with Volkswagen management representatives. The membership support requirements are audited and confirmed by an external auditor and not by Volkswagen when necessary to determine whether and when membership percentage milestones have been reached so as to trigger increased union access/engagement rights.

The new policy came shortly after Volkswagen employees rejected the UAW's bid to become the certified collective bargaining representative of employees at the Chattanooga plant in a February NLRB-conducted election. The union lost that election by a vote of 712 to 626. Nonetheless, the UAW formed a local chapter (Local 42) in July for the benefit of workers at the Chattanooga plant. Though optional, many Volkswagen employees have joined that chapter, and it is likely the UAW will in the future seek official recognition by the NLRB for collective bargaining representative status if it is successful in obtaining greater employee interest than was present during the first election.

Though Volkswagen management publicly expressed support for organized labor, many foreign-based employers within the industry do not share such views. Costs attendant to union-represented units of employees in the auto industry can be significantly higher than their union-free counterparts.

Auto Industry Employees Can Now Use Employer Email for Union Organizing

In a significant departure from prior precedent, the NLRB ruled in December that employers cannot prohibit employees from using their employer's email systems during nonworking time to communicate about topics such as wages, hours and working conditions (Purple Communications, 361 NLRB No. 126). In particular, this means that employees cannot generally be prohibited from using employer email for union organizing. Communications about such matters are part of protection associated with "protected concerted activities" by employees, which are guaranteed by the National Labor Relations Act. The NLRB's 3-2 decision in Purple Communications overturned its very different 2007 decision in Register Guard (357

NLRB No. 27), which held that employees have no right to use their employers' email systems other than as allowed by the employer.

To get a sense about how this can become an issue for auto industry employers, consider the facts that produced this recent decision. Like most employers, Purple Communications Inc. had a policy prohibiting personal use of the company's computers and email systems. But in 2012, a labor union sought to represent Purple Communications employees at several locations. The NLRB conducted an election among affected employees, but the union lost. The union then appealed that decision — first to an administrative law judge, and then to the full five-member NLRB in Washington, D.C., arguing that employee use of company email for union organizing was within the rights protected by the NLRA. Ultimately, the NLRB rejected the reasoning of *Register Guard* and its progeny, and decided that employees do in fact have the right to use employer email for union organizing.

The email focus of Purple Communications is not the first time the NLRB has made incursions into employer rights associated with the advance of computer technology. For example, it has previously placed significant restrictions on employer use of social media. And in Purple Communications, the NLRB also signaled willingness to displace historical employer rights to control its own property, by overruling its own 2005 decision in *Johnson Technology*, a case in which the employer had been allowed to prohibit employees from using previously used copy paper to make flyers notifying workers about union organizing meetings.

NLRB's "Quickie Election Rule" May Catch Auto Industry Employers Unprepared

On the heels of deciding the Purple Communications case, the NLRB announced its "Quickie Election Rule" — scheduled to go into effect on April 14. Historically, a union is not certified as the collective bargaining representative for an appropriate bargaining unit of employees unless it wins a secret ballot election. These elections typically take place up to 42 days after the union first files official paperwork with the NLRB asking to represent a unit of employees. During the intervening time, employers usually communicate with their employees about the benefits of remaining nonunion.

But under the Quickie Election Rule, the NLRB has significantly shortened the pre-election time to as little as 10 days. Many employers — certainly including those in the auto industry — are understandably concerned that this shortened pre-election time will present significant challenges in their ability to communicate with their employees when unions seek to organize them after April 14, 2015. Industry observers predict that there will be a surge in union organization activity after that date in order, among other things, to catch unwary employers by surprise.

Where Is Unionization of the U.S. Auto Industry Headed?

Since the early 1980s when Japan's American Honda Motor Co. decided to build cars in the U.S., foreign-based manufacturers have opened more than 15 major manufacturing plants, with more than 10 of them located in the South. That region has become a magnet for "transplant companies" in part because of favorable economic conditions, and relatively union-free operating conditions. It is not coincidental that a significant number of our country's 24 right-to-work states — those where compulsory union membership is prohibited by statute or the state's constitution — are concentrated in Southern states. Many fear that if unions move into the automotive manufacturing plants of the South, those companies may begin looking at doing business in lower-cost regions such as Mexico.

If organized labor gains strength in the South's auto industry, these employers will necessarily find themselves having to consider new strategies for maintaining union-free work environments. At the end of the day, it is critical that employers openly and genuinely communicate with their employees on a regular basis about the value of their wages, hours and working conditions in a union-free environment, rather than sitting back and waiting to do so 10 days before a union vote is scheduled to take place.

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