<u>WHEN/WHERE/WHY/HOW: QUESTIONING EMPLOYEES 101</u>

By: Jeffery L. Thompson

<u>Problem:</u> you are faced with litigation, an unfair labor practice charge, a union campaign, criminal allegations, a wage and hour issue, etc., and need to interview employees. What can the employer do? Not do? *Most importantly, what does an employer need do to protect itself from liability when they need to weigh their interests verses the employees interests and rights?*

During this process, an employer must ride a very fine line between fact finding and being coercive. When employer begins an internal investigation into the allegations — interviewing at the minimum for a harassment claim or an unfair labor practices claim, the complainant, the aggressor, co-workers, and the immediate managers/bosses/supervisors, and any other names that arise during the investigation, they must be careful not to intimidate, persuade, influence, or manipulate the witness(s).

<u>How can the employer get itself in trouble?</u> An employer should be careful not to be coercive. Various cases have come to the determination that a *statement of rights, known as "Johnnie's Poultry Warning," must be read to an employee when an employer plans to question an employer about union, or labor, or litigation matters.* The name of the warnings stem from a 1965 case that is still very relevant today.

<u>Solution:</u> in order to determine if the employer was coercive the court will look to see if employer's questions are coercive or the employee was actually being coerced by considering the following factors:

1. The employer's historical attitude toward employees;
2. What information is sought or related;
3. The questioner's position with the company;
4. The conversational manner and setting;
5. The veracity of the employee's answers;
6. Whether the employer had a valid reason for the employee communication;
7. Was the purpose of the communication conveyed to the employee; and
8. Did the employer assure involved employees that no retaliation would occur if they supported the union/litigation?

<u>Practical Pointers</u>

The main point is that no matter how even-handed the company representative is in the discussions, the employees are vulnerable because of the control the employer has over their livelihood. Be careful: even where the complainant employees initiates the conversation, do not talk about the lawsuit.

Employers who are interviewing employees about wage and hour issues, or conducting a National Labor Relations Board (NLRB) investigation, or any other investigation; such as, an unfair labor practice proceeding or objections to an election, need to be sure that the employees are aware of their rights. Employers should consult legal counsel to determine how to create a simple statement for their own legal situation.

A simple statement given to all interviewers ensures that all points are made and that all employees are handled consistently and lawfully. It is extremely important that the questioning of employees should take place in a non-coercive environment; such as a secretarial office or an employee break room. At the onset, the purpose of the interview should be clearly communicated. Any questions should be limited to the legitimate reason for the interview, and should focus on objective facts, and should not suggest that the employee not participate in the litigation, or if a participant, that the employee should drop out of the litigation.

If the employee is currently represented by an attorney, seek an opinion from your attorney before conducting any type of interview or investigation related to the litigation of the labor or employment matters. When in doubt, we encourage employers to consult with a competent labor and employment attorney before making these decisions.