

# RESPONDING TO UNION ORGANIZING GUIDELINES FOR EMPLOYERS

## INTRODUCTION

Union organizing can take many forms, including Union representatives visiting employees at their homes or at work, soliciting employees to sign “authorization cards” which state the employee’s individual support for the Union, hosting after-hours meetings for employees, and many others. The goal of union organizing is generally to obtain sufficient support among the employer’s employees to obtain an election run by the National Labor Relations Board (“NLRB”).

To seek an election, the Union files a “petition” with the NLRB identifying the group or “unit” of employees that the union wants to represent [Example: “All carpenters, helpers, and apprentices employed by XYZ Corporation in Colorado, excluding supervisors.”]. To get to an election, the union must be able to present evidence of support from at least 30% of the employees in that unit. That evidence is most often the “authorization cards” that the union has gathered from the employees over time, often without telling the employees what the card their signing means or how the Union intends to use it. The Union may even use deception; for example, the Union might offer a very nice prize to entice employees to enter the raffle by filling out a card which happens to be an authorization card.

If the Union gets and wins the election, the Union becomes the “collective bargaining representative” for all the employees in that “unit.” The employer must bargain toward a contract with the Union and cannot make any changes in terms or conditions of the employment of the unit employees.

In order to avoid a successful union organizing campaign, it is critical that the employer respond immediately, effectively, and lawfully to the union’s actions. It is important to have good legal advice to walk you through the process and help you steer clear of serious unlawful actions that could lead you to an NLRB order that sets aside an election the employer won and orders a new election or, worse yet, skips the election and declares the Union the representative of your employees. It is also important that all members of your management and supervisory teams be trained and understand what they lawfully can and cannot do when faced with union activity, particularly by employees.

These guidelines are not intended as legal advice, nor are they a substitute for good legal advice tailored to what is actually happening in your company. They are intended to provide some initial guidance on issues that may come up before you have obtained counsel, so that you are able to recognize problems and to help you steer clear of mistakes until you do.

### 1. EMPLOYEE RIGHTS

Under the National Labor Relations Act, your non-supervisory employees have the rights to form , join, assist, and/or support a Union; to choose to be represented by a Union; and to engage in “concerted activity” (2 or more employees acting together or one employee acting for others) regarding their terms and conditions of employment. They also have the right not to engage in those activities. The employer, including all managers and supervisors, are prohibited by the Act from interfering with , restraining or coercing employees who are engaged in those activities. Doing so is an Unfair Labor Practice and will be prosecuted by the NLRB, if a charge is filed by the employee, the Union or any other person.

### 2. AVOIDING UNFAIR LABOR PRACTICES – SUPERVISORS/MANAGERS

It is important that all of your managers and supervisors are aware of the employee rights described above and that the managers and supervisors understand what they can and cannot do when faced with union-related or

concerted activity. Training on this subject is particularly important when union activity is going on and better yet, before it begins.

What an employer, its managers, supervisors and agents, may not do, when their words or actions are directed at, motivated by, or affect employees' union sentiments, membership, and related activities, is generally summed up in the acronym "**TIPS.**" TIPS includes the following conduct:

**T**hreats and adverse actions, whether directed at individual employees or groups of employees. Examples include a supervisor telling an employee that he will be discharged for joining or supporting a union; a vice president telling a large group of employees that the company will subcontract all field work if the union is voted in; a supervisor demoting an employee who has been a vocal union supporter for that reason.

**I**nterrogation of employees related to union sentiments or activities. The most common prohibited interrogation involves managers or supervisors asking one or more employees whether (a) there is union activity going on; (b) whether they or others support or have joined the union; (c) what employees are saying about the union; and (d) what the union is doing or telling them. The prohibition is on the employer asking these questions. If employees volunteer information, the manager or supervisor can listen and participate in the discussion. Managers can initiate discussions of union-related topics and can talk about their opinions and the facts, so long as they don't threaten, interrogate or promise in the process.

**P**romises of benefits of any sort connected with employees' actions related to a union. Promising employees that they'll all get raises if the union is voted out or that an individual will be promoted if he opposes the union (or supports the union) is a violation. As with threats, unlawful promises can be to an individual or to a large group of employees.

**S**urveillance of employees engaged in protected activity. Examples include: manager or supervisor going to the bar where a union meeting is being held; manager or supervisor obviously listening in on employees discussing union during lunch break; employer photographing employees engaged in picketing outside the employer's facility; employer gaining access to a confidential union blog site or chat room, particularly if employees learn that employer is doing so.

A common mistake by employers after they learn that employees are being organized is to ask why the employees are unhappy and want a union and then promise to "fix" things. It is a combination of unlawful interrogation and unlawful promises.

On the other hand, outside of these limitations, managers and supervisors have a lot of freedom. As noted above, management always has the right to state its opinions and to state facts, so long as the conversation doesn't cross over into threats, promises, or interrogation.

### **3. AVOIDING UNFAIR LABOR PRACTICES – COMPANY POLICIES**

Unlawful employer policies can be the subject of unfair labor practice charges, even when the policies have not previously enforced. The NLRB has taken a very aggressive approach to finding some common types of policies that affect employees unlawful. Unions will often look for opportunities to file charges against an employer with the NLRB, alleging that certain policies are unlawful. Defending the charge can be expensive, even if there is no monetary penalty. Worse yet is when the charge is that an employee was discharged for violating an unlawful policy and the remedy is to get rid of the unlawful policy and reinstate the employee with back pay. Because a charge can be filed any time within six months after the violation, the union or an employee has plenty of time to learn about the action and file a charge.

Examples of policies that have been the subject of charges include solicitation policies, social media policies, policies against employees gathering or loitering during non-work time; confidentiality policies which appear

to limit employees talking with each other and sharing information (for example, prohibiting employees from talking among themselves about their compensation); recruiting and hiring policies; and even some at-will employment policies. If you have policies on these subjects, they may or may not be lawful, but you” want to consult with counsel to know for sure.

In any case, it is a good idea to have your policies reviewed by your labor counsel before you see signs of union activity. It need not be a particularly costly process, and it is likely to pay for itself in saved future defense costs and remedies.

#### **4. AUTHORIZATION CARDS**

As described above, a major goal for the Union will be to gather signed Authorization Cards from your employees. These cards are usually no bigger than a 3” x 5” index card and often a little smaller. They will have the Union’s name on them and language that indicates that the person who signs the card supports the Union, chooses to have the Union represent him/her, and/or supports the Union’s effort to obtain an NLRB election. Once the employee signs the Authorization Card, the card can be used by the Union at the NLRB at any time for a year. The employee can ask the union to return the card, but there is nothing that obligates the Union to return the card, unless it is written on the card itself.

If you believe the Union is or might begin contacting employees to get them to sign Authorization Cards, it is important to educate your employees about what the cards mean, how they can be used, and for those and other reasons, why an employee would be foolish to sign an Authorization Card unless and until he or she fully understands what signing the card means and is sure that is what he or she wants. You, the employer, cannot forbid employees from signing Authorization Cards, but you can tell them that while they have the right to choose whether to sign or not, they should know what they’re signing before they decide whether to sign or not.

#### **5. UNION SOLICITATION – BY EMPLOYEES**

Employers have the right to prohibit employees from soliciting for any cause (including a Union, during “working time,” which is the time supposed to be working. It does not include time before and after work or designated break like lunch, mid-morning or afternoon breaks, etc. During non-work time, employees have the right to solicit. It is important to establish and enforce such a policy before you have any knowledge of Union activity. It is also important to enforce the policy against any solicitation. You cannot enforce the policy against union-related solicitation if you have not enforced the policy against other types of solicitation.

You also have the right to prohibit the distribution of non-business-related documents, handbills and other papers at any time in work areas. This generally does not apply to handing out Authorization Cards, which the NLRB treats as a form of solicitation. As with solicitation, you should establish a no-distribution policy well before union activity has started and enforce it consistently against distribution for any cause.

#### **6. UNION SOLICITATION – BY NON-EMPLOYEES**

Generally, non-employee Union representatives have no more right to be on private property than any other member of the general public. Unless other non-business-related organizations or people have been allowed into a private area, the owner, or anyone to whom the owner has delegated authority, may prevent Union representatives, who are not employed by a company on the property or otherwise authorized to be there, from being on the property.

In construction, if you are a contractor or subcontractor on a project and a non-employee Union representative appears on the project or in the area where your employees are working, the Union representative most often won’t be authorized to be on the project or in your area. You can ask the Union

Representative to leave your area or the project. If the Union Representative refuses, your next step depends upon your legal authority over that property. If you don't have authority from the owner to control access to that property, taking steps to have the Union Representative removed, such as calling the Police or filing a trespass complaint is probably an unfair labor practice. You need to approach the owner, your general contractor or whoever has legal authority to control the property. That is the party that should call the police or file a complaint.

## **CONCLUSION**

Union organizing activity often is kept hidden initially, so that the Union can make progress without the employer communicating its view and the truth about union-representation. Once the Employer learns of union organizing activity, the employer has a relatively brief amount of time to lawfully educate employees with the truth about union representation and make its arguments as to why the employees are not better off with union representation. That is why it is critical that an employer who learns his employees are being organized act quickly to involve competent labor counsel and to begin to get the employer's messages to the employees.

## **QUESTIONS**

If you have questions about these Guidelines or anything related, you may contact the author:

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