

Guide to
**Managing
Unionization
Efforts**

Your Rights During a Union
Organizing Campaign



WHAT TO DO WHEN FACING AN ORGANIZING CAMPAIGN

AS A SMALL-BUSINESS OWNER, facing a union organizing campaign can create enormous anxiety and can even bring your business to a standstill. Considering the costs, the risk of strikes, and the excessive demands that unions may make, many business owners worry that a union presence could place their small business in financial jeopardy. But, there are ways to avoid facing a union across a bargaining table.

You might be compelled to do or say whatever it takes to keep the union out of your business; but in doing so, you could violate many of the nation's labor laws, resulting in unpredictable and expensive consequences. As an employer, what you do and say during a union organizing drive is critical. Restrictions on what you can do or say applies to owners, supervisors, and agents. So, as used in this Guide, "you" include individuals in these three

categories. An agent may include anyone speaking "on behalf" of the employer with sufficient authority.

The National Labor Relations Act (NLRA) is the primary federal law regulating union activity. It applies to all private employers with two or more employees and prohibits them from interfering with employees who wish to exercise the right to form and join unions, or to engage in collective activities intended to improve their wages and conditions of employment. This means that even non-union workers have rights that you cannot violate. They include "the right to self-organization, to form, join or assist labor organization, 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."

The National Labor Relations Board (NLRB) is the federal agency charged with determining what actions by employees, employers and union representatives represent unfair labor practices. For more than 75 years, the NLRB has been interpreting the law's general provisions against employers engaging in intimidating activities that are intended to discourage union support among their workers. The NLRB also conducts the secret ballot elections in which workers decide whether they wish to become unionized.

Becoming familiar with the union organizing process and knowing your rights during a union organizing campaign is an important part of running a successful business. Knowing what you can and cannot say during a union organizing campaign puts you and your business in a far better position to face down a union.

It is important to remember that you have rights when a union or your employees begin an organizing effort.

ALLOWING UNIONS ACCESS TO YOUR EMPLOYEES SOLICITATION AND DISTRIBUTION



Union representatives are allowed by law to visit your workplace and solicit employees to support the union by signing petitions or union cards. They may also distribute pro-union materials. Employers should be careful when restricting this activity as some restrictions are considered unfair labor practices. The following guidelines will help you properly handle this situation.

In General

Workplace Disruption — When non-employee union supporters appear at the workplace and disrupt the work environment, employers have a right to maintain order. They do not have to allow outsiders onto their private property, or give the union “equal time” to address their employees.

Policies — Policies that prohibit soliciting or distributing materials in specific areas and at specific times should apply to ALL organizations, not just unions. For instance, if you have a policy restricting the posting of non-work related material on bulletin boards, that should apply to all non-company-sponsored postings, such as yard sales, Tupperware parties,

etc. Otherwise the NLRB may accuse you of selectively preventing the union’s message from reaching your workers.

Solicitation of Employees

Access to Employees — The NLRB has the authority to require employers whose employees are about to vote in a secret ballot election regarding unionization to supply a list of names and last known addresses of employees to union officials. This means that employees could face phone calls and home visits from union officials prior to a vote. Employers are allowed to inform their employees that they do not have to allow union representatives into their homes.

Employees on Company Property —

Employees on Duty — Employers can prohibit solicitation while an em-

If a union representative tries to interfere with employees performing work, the employer has the right to order them to leave and even to call the police and report the activity as trespassing.

Common, non-work areas such as cafeterias, parking lots, and lobbies may be permissible areas for solicitation and distribution of materials.

employee is expected to be working. However, an employer may not prohibit union solicitation during “business hours” or “working hours” in general terms. This is because employees have the right to solicit other employees while they are on breaks or off duty in non-working areas, even if the business is operating. **Employees Off Duty** — In some cases, employers may prohibit off duty employees from soliciting other employees or distributing literature in working areas. In order to legally do this, the employer must explain the policy to all employees and prohibit solicitation for any reason, not just unionization. Employers may not deny off-duty employees access to exterior non-working areas such as entrances, perimeters or parking lots without a valid business purpose.

Non-Employees on Company Property —

Employers can prevent non-employees from soliciting on company property provided that the union can reasonably contact employees through other means (for example, via phone, mail or at offsite locations).

Retailers / Restaurants — Employers may prohibit solicitation by any person in public sales or dining areas during business hours. If a union representative tries to interfere with employees performing work, the employer has the right to order them to leave and even to call the police and report the activity as trespassing.

Health-Care Industry — Companies in the health-care industry can prohibit solicitation at all times in patient caretaking areas, such as patient and treatment rooms.

Solicitation vs. Talking About the Union —

Employers may prohibit employees from talking about the union during working time only if they are also prohibited from talking about other subjects. This rule is virtually impossible to enforce fairly, and is widely discouraged.

Union Propaganda and Insignia — Employers cannot prevent the wearing of union buttons or shirts unless there is a valid business purpose for the restriction. If, for instance, your business has special business circumstances (e.g., retail setting and employee interacts with customers, safety or product contamination concern) that necessitate a strict uniform code, you may lawfully prevent displays of union messages on clothing or on buttons and jewelry.

Distribution of Pro-Union Materials

Employees on Company Property —

Like solicitation, the employer can prohibit distribution during working time. Employers may also prevent distribution in working areas, even during non-working time. This applies to both on and off duty employees. A rule which prohibits distribution on “any company property” is not allowed because employees have the right to distribute materials on company property as long as they are doing so in non-working areas and during non-working time. Common, non-work areas such as cafeterias, parking lots, and lobbies may be permissible areas for solicitation and distribution of materials.

Non-Employees on Company Property —

Employers may prevent non-employees from distributing literature on company property if the union can reasonably contact the employees through other means (for example, via phone, mail or at offsite locations). If the public is allowed onto the property, however, it may be difficult to prevent union representatives from having the same level of access to the property without being accused of discriminating in order to discourage the right of the union to communicate with employees.

Health-Care Industry — Companies in the health-care industry can prohibit distribution of literature at all times in areas where patient caretaking occurs.

At A Glance

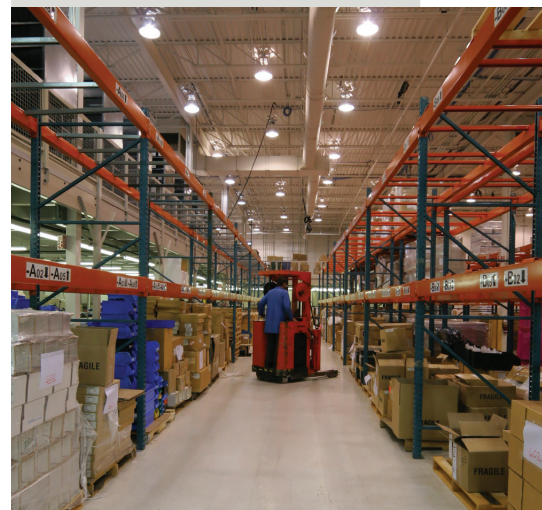
During a union drive, representatives may be subject to the requirements below, to visit the workplace to solicit signatures and distribute pro-union material, but they may not disrupt the work environment.

During a union organizing campaign, an employer may:

- bar non-employee union representatives from the property if the general public is also excluded,
- prohibit solicitation during worktime as long as this policy is explained to employees, and
- prohibit solicitation in retail areas and dining areas during business hours, and patient caretaking areas at all times.

An employer may not:

- forbid employees to solicit other employees during breaks, off-duty time, in non-working areas, or
- ban the wearing of union buttons or shirts without a valid business reason.
- call the police unless there is a sound basis for believing that the union is breaking the law, e.g., trespassing, blocking traffic, lettering or vandalizing.





WHAT YOU CAN SAY TO YOUR EMPLOYEES

ONCE A UNION ORGANIZING DRIVE has begun, employers are not expected to sit idle as union representatives try to convince employees to support the union and eventually vote for representation in a secret election. Employers are given broad “free speech” rights under the law to express their views or opinions regarding the union and unionization in general. Thus, the law does not prevent employers from informing their employees of the reasons why a union is not necessary. Employers or their representatives may actively campaign against the union organization by providing factual statements or opinions to employees, including reasonable forecasts of the possible outcomes of collective bargaining. When an employer mentions the possibility of a shutdown or layoff during organizational activity, the union is almost sure to file an unfair labor practice charge. For this reason, you should obtain qualified legal advice prior to making such a statement. Examples of permissible statements include:

>> **Correcting Inaccurate Statements Made by Union Organizers**

An employer can tell employees that they are not required to support the union effort, sign a union authorization card, vote in favor of a union, or even speak to union representatives.

The employer can warn employees about “trick authorization cards.” While most cards simply say the employee supports a vote for unionization, some cards are contractual agreements to become members of the union and pay union dues should it be voted in. In fact, in some instances the NLRB can order an employer to recognize and bargain with a union based solely on signed authorization cards, without an election. Signing a union card is a very important decision that employees should not make lightly.

>> **Communicating Personal Opinions**

Employers can say that the company is opposed to the union and that a union is not needed or wanted at the company.

The employer can offer factual information regarding the union and union officials, such as the high price of union salaries, union dues, fees, fines, and assessments.

Employers can provide personal opinions about the union policies, processes, officials or individual unions, provided that the statement cannot be construed as threatening or coercive.

Employers can point out that unions work under bylaws that allow members to be fined if they violate one of dozens of union rules, including trivial things such as “slandering a union official or another union member.”

Employers can remind workers that where there are unions, there can be strikes. In all but a handful of states, strikers are not entitled to unemployment compensation benefits while on strike. And in all 50 states, a striker’s application for food stamps will be rejected.

>> **Informing Employees of the Effects of Unionization on the Company**

Employers can forecast what effect unionization would have on the company’s stability if the forecast is based on factually probable conditions that would be beyond the employer’s control, like a union demand which forces the company to become non-competitive.

Employers can make factual comparisons between the company and other companies that have been unionized, including pointing to strikes in other businesses.

Employers or their representatives may actively campaign against the union organization by providing factual statements or opinions to employees.

Employers may explain to employees that, if a union is voted in, there is no guarantee an agreement will be reached. The employer is only under an obligation to negotiate in good faith with the union, but the law does not require an employer to agree to a single demand or to make a single concession.

Whatever agreement is made with the union will affect both union and non-union employees, so long as they are covered by the union contract. In right-to-work states, a small number of union members can end up with a great deal of power in the workplace, and they have the discretion to decide which grievances have merit. In short, unions and their supporters may play favorites, helping their friends and hurting those who don't choose to support them 100 percent.

>> The Disadvantages of Union Membership

Employers can explain the disadvantages of union membership, including those which are financial (dues, fees and assessments) and job-related (loss of work from strikes or picket lines).

Employers may describe common tactics used by unions (once voted in) which could be detrimental to employees, including:

Strikes— Employees collectively refuse to attend work.

Picket Lines— Employees protest in front of the workplace. Employees who cross picket lines and attend work are often harshly criticized or harassed by picketing employees and union supporters. And if they try to work during a strike, union members can be fined by their union for doing so. Often the fines equal the money they made during the strike, so they are, in fact, forced to either stay home or work for free.

Union Shops— Employees must either join the union or pay equivalent union dues in order to remain employed at that location (unless the state has enacted right-to-work statutes).

Check Offs— Where union dues are taken out of a paycheck before the employee ever receives it.

The employer can remind employees that unions are usually large, bureaucratic organizations that can only survive on employee money collected through dues, initiation fees and fines/assessments. The employer can state its opinion that the union is only after the employees' money and that unions sue employees to collect the money owed to them, or even get them fired if they refuse to pay dues in states without right-to-work laws.

An employer can say that once a union is voted in that they are under a legal obligation to negotiate with – and only with – the union, and cannot make decisions regarding compensation or working conditions with the represented employees on an individual basis. This is true even if the employees feel that the union is not adequately representing their needs.

>> The Risk of Strikes

The employer can say that in the event of a strike, it can lawfully and permanently replace the strikers, so long as the strike is over wages, hours, or other working conditions (this is known as an “economic strike”). When a strike ends, strikers who have been replaced are only entitled to be placed on a preferential hiring list in the event that their job becomes vacant. In most states, strikers are ineligible for unemployment benefits and food stamps. Unions may or may not pay strikers a small strike benefit, but it is usually

much less than their salary, and it may or may not include maintaining their health insurance or other fringe benefits.

>> Reviewing Working Conditions, Salaries or Benefits

Employers can explain that the bargaining process could result in no changes, increases, or even decreases of current salaries and benefits. In short, collective bargaining is a two-way street; it can go up, stay the same, and it can go down.

Employers can discuss the company's prior history of paying good wages, offering generous benefits, and providing excellent and safe working conditions to employees without needing a union to tell it to do so.

Employers can explain to employees that the union cannot guarantee that they will have higher salaries, more benefits, or other improvements in working conditions. Unions might make this and other promises, but they can't keep them.

Employers can tell employees that during a union drive the company is not permitted to alter any wages or benefits for any represented employee. All wage or benefit increases are frozen unless they were arranged prior to the union's appearance.



WHAT YOU CANNOT SAY TO YOUR EMPLOYEES

WHILE EMPLOYERS HAVE THE right to advocate against the union, they cannot make threats, promise benefits or improved working conditions, or make coercive statements in an effort to discourage workers from supporting or voting for a union. Whether the employer's statement is illegal depends on the employee's perspective – how the statement is perceived. Perceptions could vary greatly between the employer and employees due to tension in the workplace. For this reason, be very careful not to make what might appear to be either a threat or a promise that is contingent upon the workers' rejection of the union.

Threats

Employers cannot discipline (or threaten to discipline) an employee based on his or her union sentiments. This does not mean that an employee cannot be terminated during an organization drive, but the basis for the termination cannot be because of the employer's anti-union sentiment. During a union organizing drive you should scrutinize every disciplinary action carefully before implementing it. Ask yourself, in each instance, "Would this employee have been disciplined without his or her union activity or union support?" If the answer is "no," then don't take disciplinary action.



Employers cannot threaten to, or imply that it will, reduce wages or benefits if a union comes in. This includes statements that the bargaining process begins from scratch, starts at zero, etc. Likewise, an employer cannot take away any current benefits based on an employee's position on unionization.

Promises of Benefit

An employer cannot promise an employee any benefit (such as an increase in pay or a promotion, more holidays, or better working conditions) in hopes of influencing the employee's decision on the union or otherwise rejecting the union in an election.

An employer cannot solicit employee grievances and promise to remedy them if the union is not voted in. Unless an employer already has an active grievance resolution system in place, it is illegal to implement one simply because of a union drive.

Coercive Statements

Employers cannot ask an employee to act on behalf of the employer to dissuade other workers against the union, such as pressuring employees to wear "Vote No" buttons or to spy on their fellow workers.

Employers cannot spy on employee union activity, imply that the employer has spied on them, or ask an employee to spy on other workers.

Employers and/or supervisors should never bring an employee into their private offices to discuss the union, even if the discussion is entirely non-threatening. The NLRB considers a supervisor's office to be a "coercive environment" in which any discussions about the union will be construed as inherently intimidating and unlawful.

Statements Regarding Unions

Employers cannot say that it would be futile to elect a union because the employer's position on working conditions, benefits or wages will not change.

Employers or their representatives may actively campaign against the union organization by providing factual statements or opinions to employees.

Employers cannot say or suggest that if a union is voted in that strikes will absolutely occur.

Statements About Employees

The employer cannot disparage employees or make negative remarks about employees because of their pro-union sentiments.

Guidelines to Remember

Some statements by employers are governed by the way in which they are made. A statement that might otherwise be permissible or seem harmless can be considered threatening or coercive because of the environment in which it was made. In order to avoid a negative perception, employers should follow these six guidelines featured below.

6 GUIDELINES TO REMEMBER



1. Employers should not ask employees about their position on the union.
2. Employers cannot ask employees about another worker's views concerning the union.
3. Employers cannot ask employees about the status of the union effort.
4. Employers should not pull employees aside or call employees into their office to discuss the union.
5. Employers cannot visit an employee's home to discuss the union.
6. Employers cannot make "captive audience" speeches to employees during the 24 hours preceding a union election. A "captive audience" speech is one held by the employer during work hours that requires mandatory attendance of all (or some) employees, if the purpose is to discourage union support.

Employers should not interrogate their employees. While the NLRA does not outright ban employee interrogations, there are very few permissible situations in which an employer or his representatives may interrogate an employee. According to the NLRB, any interrogation which is considered coercive (and most are), threatening, or an interference with the employee's right to unionize is illegal.

An employer is otherwise free to speak with an employee who is open and active about their pro-union stance, or any other employee who approaches them, provided that the conversation remains free from threats, coercion, or promises of benefits. In short, employers are allowed to listen to (and report to upper management) information from workers that is freely volunteered.

At A Glance

A business owner may attempt to persuade employees against unionizing, but you must be extremely careful not to threaten or coerce.

The employer may:

- explain why unionization is unnecessary,
- offer personal opinions about union policies, as long as they are not threatening or coercive, and
- predict the negative effects that unionizing could have on the firm, as long as it is based on facts outside of the employer's control.

An employer may not:

- enlist an employee to help the employer lobby other employees against unionization,
- ask an employee his opinion of unionization, or ask an employee about another employees' opinions, or
- spy on employees, suggest that the employer has already spied on employees, or enlist employees as spies.



WHAT TO DO WHEN THE UNION ARRIVES

WHEN A UNION ARRIVES at a business that is concerned about remaining non-union, employees will no doubt hear both the pros and cons of unionization. An employer that strongly opposes unionization has the right to express that opposition to its employees. In doing so, the employer should avoid making statements or taking any actions that might be construed as unfair labor practices. This applies to owners, as well as managers and supervisors.

It is assumed that managers and supervisors are acting in the interest of the employer and therefore the employer is responsible for their actions. Regular employees, however, may unilaterally oppose the union efforts, and under the NLRA have an equal right not to organize. The employer is not responsible for these actions, and the employees are not considered agents of the employer unless the employer requested or approved their conduct. Effectively campaigning against a union in a legal manner can be tricky, and the consequences of any misstatements or missteps can be a costly NLRB trial and even a backpay award if workers are illegally terminated for their union support and activities. When in doubt, or if a union comes knocking on your door, it is best to consult a good labor relations attorney with experience in union avoidance activities and NLRB election proceedings.

At A Glance

An employer is also free to convey facts about unions and unionizing.

The employer may:

- advise employees that they are not required to sign union cards and petitions, vote for unionization, or speak to union representatives,
- warn employees about common tricky tactics that include distributing union cards that, when signed, actually serve as binding contracts, and
- convey factual information about a union or its officials, including the union's high salaries, dues, and fees.

An employer may not:

- issue threats or promises that appear contingent upon a worker's vote against unionization,
- punish an employee or threaten punishment based upon the employee's stance on unionization, or
- during a campaign, anti-union employees may form a committee in opposition to the union. The employer may not aid or support this committee, and must subject them to the same rules (e.g. solicitation, distribution, and access) as applied to the union supporters.

If a union comes knocking on your door, it is best to consult a good labor relations attorney with experience in union avoidance activities and NLRB election proceedings.

Disclaimer:

This NFIB Small Business Legal Center Guide outlines some basic rules for employers to follow. It does not cover employers' obligations once a union has been voted in nor does it review individual industry or state laws on unionization.

This Guide is not legal advice. It is not intended to be a final authority on employer-employee labor relations. The information contained in this Guide has been compiled as a helpful guide for independent businesses and should not be considered a legal resource. While we have attempted to provide accurate and complete information, the authors and publishers of this Guide cannot be responsible for any errors or omissions in its contents. **This Guide is provided with the understanding that the NFIB Small Business Legal Center and Ogletree Deakins are not engaged in rendering legal or professional advice in this document.** The advice of a good management-side labor relations attorney is invaluable during a union organizing drive.

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