

ESSENTIALS IN UNDERSTANDING UNION ORGANIZING



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The National Labor Relations Act (the "NLRA")¹ was enacted in 1935 to define and protect the rights of employees and employers, to encourage collective bargaining, and to eliminate certain practices on the part of both labor and management that may be harmful to the general welfare of the public.² The NLRA defines the rights of employees to organize and to bargain collectively with their employers through representatives of their own choosing or not to do so. More specifically, the NLRA ensures that employees can freely choose their own representatives for the purpose of collective bargaining, or choose not to be represented, and establishes a procedure by which employees can exercise their choice at a secret ballot election conducted by the National Labor Relations Board (the "NLRB"). Although the NLRA has been in place for many decades, in recent years an activist NLRB has expanded the definition of activities that are protected by the NLRA and implemented new election

rules that significantly impact the election process. However, the Trump era NLRB has already begun to reverse many of these union-friendly positions, a trend that is likely to continue. It is important for developers, contractors, construction companies and real estate operating companies to understand both the basics regarding union organizing and the impact of more recent developments which may affect their industries.

EMPLOYEE AND EMPLOYER RIGHTS UNDER THE NLRA

Section 7 of the NLRA sets forth the rights of employees under the NLRA, which include 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, as well as the right to refrain from any or all of such activities. Section 8 of the

NLRA restricts an employer's actions, prohibiting an employer from interfering with, restraining or coercing employees in the exercise of their rights, dominating or interfering with the formation or administration of a labor organization, discriminating in regard to hiring or tenure of employment or any term or condition of employment to discourage membership in a union, discharging or otherwise discriminating against an employee because of protected activity, and refusing to bargain collectively in good faith with the representatives of employees.

THE BASICS OF A UNION CAMPAIGN AND ELECTION

While union membership has decreased in the U.S. in recent decades, unions are still prevalent in many industries and there is an ongoing effort by unions to recruit more members, including in industries and fields that have not historically been unionized. Employees may seek to join a union for various reasons, such as feeling that they are not being paid fairly and equally for their jobs in wages, salary and/or benefits, feeling that there is no opportunity or mechanism for employees to voice opinions or concerns, or believing that the employer is unfair, inconsistent in its application of policies and rules, or favors certain employees. Unions will encourage workers to unionize, promising representation on behalf of all workers. Unfortunately for employers, it is relatively easy for a union or employees to begin the union organizing process in a workplace. Employees or a union may file a petition for a representation election just by collecting signatures from at least 30 percent of workers in the potential bargaining unit, thereby beginning a union organizing campaign.

The Campaign Period

Under relatively new "quickie" or "ambush" election rules that went into effect on April 14, 2015, the amount of time between the filing of a petition for a union and a union election may be significantly shorter than those that took place before the new rules took effect, going from a typical range of a 45-60 day campaign period to 14-24 days. Under these rules, employers have one week to identify issues, state their position and prepare for a hearing. Further, because the Regional Director can defer litigation of issues until after the election, it is more difficult to slow the election process down. For example, under these rules, disputes over eligibility to vote or inclusion in an appropriate unit often will not be litigated or resolved before

an election is conducted.³ Further, unions are now entitled to email addresses and telephone numbers of employees prior to elections, which allows unions easier access to employees during the organizing campaign. Notably, the NLRB has recently asked for public input as to whether it should retain, modify or rescind the ambush/quickie election rules. Therefore, employers should be alert to potential changes to these rules in the future.

During any campaign period, both the union and the employer present their positions to employees and there are special rules about what employers and supervisors can say and do. If either the union or employer violate these rules, they may commit an unfair labor practice and be subject to penalties from the NLRB. On the employer side, if an unfair labor practice is committed during an organizing campaign, it frequently results from statements or actions of a supervisor. Because supervisors are considered agents of the employer, supervisory statements and acts, whether authorized or unauthorized, will be attributed to the employer. That is why it is critical that supervisors and other management personnel understand what they can and cannot say or do during an organizing campaign. An easy way for employers to train supervisors and management in what they cannot say or do during an organizing campaign is to think of the mnemonic "TIPSS." Each letter in TIPSS stands for something that an employer (including a supervisor or manager) cannot do. They include:

- An employer cannot Threaten an employee about the union or union activity. An employer cannot threaten employees with harm or reprisals (economic or otherwise) if they decide to sign a union card, join, campaign, assist or vote for the union. As an example, an employer may not threaten to close its company if the union wins an election.
- An employer cannot Interrogate an employee about the union or union activity. An employer should not ask or interrogate any employee as to whether or not he or she favors the union, has signed a union card, has gone to a union meeting or has otherwise assisted the union in any way. The NLRB considers these to be improper questions. In fact, an employer should not question an employee at all about his or her own or other employees' attitudes or activities relating to the union.

- An employer cannot Promise an employee anything. An employer must not directly or indirectly promise any benefits or rewards to employees if they refuse to sign a union card or vote against the union. For example, an employer may not promise employees a wage increase or improved health benefits if they decline to sign up with the union or vote against the union. Such an inducement is unlawful. It is equally unlawful to offer any inducement to employees in order to encourage them to withdraw or repudiate union authorization cards.
- An employer cannot Spy on an employee's activity if union related. An employer may not engage in surveillance of the union activities of employees or deliberately create the impression that it is engaging in surveillance. For instance, an employer may not park outside a union meeting place and watch to see which employees come and go. On the other hand, if an employee voluntarily reports to an employer about union activities, the employer is free to listen.
- An employer may not Solicit grievances about working conditions while expressly or impliedly promising corrections. It is not unlawful to ask employees about their grievances or suggestions for improving conditions. It is unlawful to promise an improvement. Employers should stay within the bounds of their established grievance procedure and inform employees that they cannot make promises during the organizing campaign concerning any new grievances that are raised. An employer can, of course, continue to implement any changes that were decided upon before it had knowledge of the union's organizing.

While employers must be careful with communications during an organizing campaign, an employer may communicate to its employees its views concerning a union. An employer, including its supervisors and managers, may share facts about unions, the company, a particular union, the collective bargaining process, etc. For example, an employer can explain what employees should expect with respect to how the contract negotiation process takes place if the union wins the election and can explain that employees will pay dues to the union if it is elected.

Campaigns can be challenging for employers because they need to run their businesses while also participating in the campaign. Also, employers often are

not prepared and ready for a campaign, unlike the petitioning union. Particularly because of the current ambush/quickie election rules, and even if these rules are modified in the future, employers should implement proactive, preventative measures ahead of time, such as union awareness and performance management training for supervisors and managers, and working to positively engage employees.

The Election

To win a union election, the union must receive more than half of the vote of employees who actually cast votes. The employer wins if the vote is a tie. Either the union or the employer may challenge the outcome of an election, which can set in motion a potentially lengthy process of appeals and other legal claims. If a union fails to win an election and is not successful with any challenges or objections to the election, then the union must wait one year before conducting another election.

Neutrality Agreements

As an alternative to the campaign and election process, a union and an employer may enter into a neutrality agreement, which typically provides that the employer will remain neutral while the union attempts to organize its workforce and, instead of a secret ballot election, the employer agrees to recognize the union automatically if a certain number of employees sign union authorization cards. Such neutrality agreements often give the union access to the employer's premises and certain employee information. Generally, it is much easier for a union to gain the required number of employee votes through this process, often known as a "card check." Employers usually only agree to this process when faced with pressure from the union in the form of picketing or a public relations campaign or in the context of a public approval process where a union conditions its support (or lack of opposition) on the employer entering into such a neutrality agreement.

TIPS FOR EMPLOYERS WHO PREFER TO STAY UNION FREE

There are many proactive steps that employers can take in order to stay union-free. Employers should be aware of common signs of union organizing, such as groups often dispersing when supervisors or managers approach, employees hanging around break areas or parking lots before or after work or meeting with strangers, employees using union jargon such as

“grievances,” “bargaining,” and “arbitration,” a changed attitude toward management, new employee leaders emerging, and an increase in employee conversations.

Employers should also focus on the positive engagement of employees to help avoid becoming unionized. More specifically, an employer should establish channels of communication to provide for the flow of unfiltered information throughout the organization on an ongoing basis. Creating an atmosphere where employee concerns, complaints and problems are allowed to be aired and result in decisive and timely actions taken by management can also reduce the likelihood of the workforce unionizing. Employers should give employees as much notice as possible of any future changes related to their employment. When a sudden change is unavoidable, employers should provide whatever support is possible and be understanding and communicative with employees. Employers should regularly communicate the company’s philosophy and business plan to its employees and explain their role in making these ideas and plans become a reality. A workforce that is satisfied and feels heard by its employer is less likely to unionize.

Another way employers can prepare for a possible union campaign is by being mindful of what a union campaign would look like in their workplace. For example, employers should research unions that might possibly target their workforce. Employers should also consider their structure and identify potential appropriate bargaining units so that it understands what unit might be targeted and considered an appropriate unit for a union election. Further, employers should be aware of joint employer issues. While the NLRB had expanded the standard for joint employment in recent years,⁴ the NLRB recently replaced this standard, returning to its prior position that two employers may be found to be joint employers if there is proof that one entity has exercised control over the essential employment terms of another entity’s employees (rather than merely having reserved the right to exercise control) and has done so directly and immediately (rather than indirectly) in a manner that is not limited and routine.⁵ Despite this change in the joint employer standard, the joint employer concept can still have repercussions in the construction industry in particular, as a general contractor could be viewed as the joint employer of a subcontractor’s employees, possibly resulting in a joint obligation to bargain with a union. Employers can take steps to reduce the risk of being found to be joint employers with another entity

by reviewing relationships and agreements with third parties to eliminate any direct and immediate joint control over essential employment terms.

Employers can also take steps to discourage unionizing by implementing new or reviewing existing employment policies that can be useful in limiting a union’s ability to communicate within the workplace. For example, an employer’s policy on solicitation and distribution of literature can be useful in prohibiting union solicitation and distribution, but employers must also make sure that such policies do not run afoul of the NLRA. Any policies limiting solicitation and distribution of literature must be applied and enforced uniformly to union organizing activities and other employee activities. In particular, the activist NLRB of recent years looked harshly at any employer policies that could reasonably be construed as restricting activities protected by the NLRA, often finding that vague or overbroad policies were unlawful because they have a chilling effect on employees’ engagement in protected activities.⁶ However, the Trump era NLRB has already begun to undo these rulings. In Boeing Company, the NLRB set forth a new test for evaluating an employer’s rule or policy, noting that it will balance the nature and extent of the potential impact of the policy or rule on the exercise of protected rights and the employer’s legitimate justifications associated with the policy or the rule.⁷ Even prior to this decision, on December 1, 2017, the Office of the General Counsel of the NLRB issued a memorandum suggesting that it will consider an alternative analysis of various issues, including a prior decision finding that an employee has a presumptive right to use an employer’s email system to engage in protected activities and off-duty access to an employer’s property.

DEALING WITH A UNIONIZED WORKFORCE

If an employer’s workforce does unionize, the employer must engage in the collective bargaining process with the union. During collective bargaining, the employer and union are required to meet at reasonable times to bargain in good faith about wages, hours, vacation time, insurance, safety practices and other mandatory subjects. Some managerial decisions such as subcontracting, relocation, and other operational changes may not be mandatory subjects of bargaining, but the employer must bargain about the decision’s effects on bargaining unit employees. Neither party can refuse to bargain collectively with the other, but the parties

are not required to reach agreement. Instead, if after good faith efforts to bargain, an agreement cannot be reached, the employer can declare an impasse and implement the last offer presented to the union. Under these circumstances, however, the union may file a charge of an unfair labor practice with the NLRB for failure to bargain in good faith, and the NLRB will make a determination on the issue.

PROJECT LABOR AGREEMENTS

In circumstances limited to the construction industry, an employer may be subject to the terms of a special collective bargaining agreement called a project labor agreement. Certain construction projects, most often large public works projects, may require that employers agree to be bound by a project labor agreement in order to perform work on the project. If a project labor agreement applies to a particular project, it is important that the employer fully understand and comply with the terms of the applicable agreement throughout the duration of the project.

CONCLUSION

While an employer may not always have the ability to prevent union organizing activities, whether due to a pro-union workforce, an already-unionized workforce acquired in a corporate deal, or where a project labor agreement exists in the case of a construction project, the information provided above will enable those employers without a unionized workforce to better understand the process of union organizing and enable them to be prepared should they ever face a union organizing campaign. 🍀

Notes

- 1 29 U.S.C. §§ 151-169.
- 2 Office of the General Counsel, National Labor Relations Board, Basic Guide to the National Labor Relations Act (1997).
- 3 National Labor Relations Board, Frequently Asked Questions – 2015 Representation Case Procedures, <https://www.nlr.gov/resources/faq/2015-representation-case-procedures>.
- 4 See *Browning-Ferris Industries of California, Inc.*, 362 NLRB 186 (2015) (holding that an employer was a joint employer of workers provided by a staffing agency to a recycling plant).
- 5 See *Hy-Brand Industrial Contractors, Ltd.*, 365 NLRB No. 156 (Dec. 14, 2017).
- 6 See *NLRB v. Pier Sixty, LLC*, 855 F.3d 115 (2nd Cir. 2017) (holding that a catering worker engaged in protected speech and could not be fired for a vulgarity-laced Facebook post about a supervisor); *Banner Health System v. NLRB*, 851 F.3d 35 (D.C. Cir. 2017) (holding that employers may not prohibit employees from discussing information related to employees' salaries and discipline, finding impermissible a confidentiality agreement provision that defined "confidential information" to include "private employee information (such as salaries, disciplinary action, etc.) that is not shared by the employee"); *Three D, LLC v. NLRB*, 629 Fed. Appx. 33 (2nd Cir. 2015) (finding that an employee's commenting on and "liking" a critical Facebook post which included derogatory comments and profanities about the employer was protected activity).
- 7 265 NLRB No. 154 (Dec. 14, 2017) (upholding employer's policy prohibiting cameras in the workplace).