

STRATEGIES FOR KEEPING YOUR WORKPLACE UNION FREE



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DECLINE IN UNION MEMBERSHIP



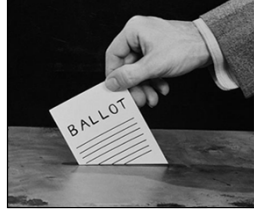
THE OBAMA NLRB: WHY SHOULD NON-UNION EMPLOYERS BE CONCERNED?

- Current Board favors Unions 3-2
- Sole goal is to increase unionization of the American workforce
- Want to remove Employers from the process
- Discarding long-standing Board precedents and rules
- Pursuing activist enforcement initiatives

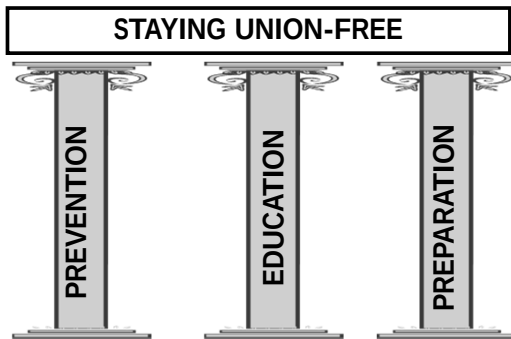


NLRB “QUICKIE” ELECTIONS

- Compressed time frame between petition and election
- Mandatory pre-election posting within 2 days
- Employer SOP within 7 days after receiving Notice of Hearing
- Pre-election hearing within 8 days after receiving Notice of Hearing
- Unit Composition issues decided after election
- Expanded Excelsior List must be submitted within 2 days of Notice of Election
- No judicial review of order directing election until after election
- Post hearing election within 21 days of election



THREE PILLARS OF UNION AVOIDANCE



STRATEGIES FOR STAYING UNION FREE

- **Prevention**
 - Understand “Protected Concerted Activity”
 - Develop Lawful Workplace Policies and Procedures
- **Education**
 - Train Employees on Company’s Position on Unions
 - Educate Management Team About Why and How Unions Organize
 - Train Supervisors on How to Recognize and Respond to Union Organizing Activity
- **Preparation**
 - Conduct a Risk Assessment
 - Create a Rapid Response Program

PREVENTION

UNDERSTAND PROTECTED CONCERTED ACTIVITY

- National Labor Relations Act applies to all employers regardless of whether employees are unionized.
- Section 7 states: "Employees shall have 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..."



PREVENTION

UNDERSTAND PROTECTED CONCERTED ACTIVITY



Elements of Concerted Activity:

- Any group action by employees: Group action is two or more employees representing a group.
- Acting together in a protected manner: The conduct must be for the legitimate furtherance of their common interests.
- For a common, legal, work-related objective: To be a work-related objective, it must concern wages, hours or other terms and conditions of employment.

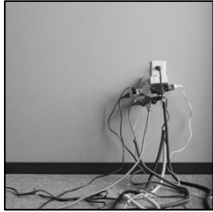
"Concerted activity" is not necessarily union activity.

PREVENTION

UNDERSTAND PROTECTED CONCERTED ACTIVITY

Examples of Protected Concerted Activity:

- Dangerous working conditions
- Lawsuits related to working conditions
- Speaking with the news media about employer/working conditions
- Political advocacy with a nexus to the job
- Jointly complaining with other employees about working conditions.



PREVENTION

UNDERSTAND PROTECTED CONCERTED ACTIVITY

Examples of Unprotected Conduct:

- Intermittent strikes or work slowdowns
- Comments to third parties critical of employer that have no relationship to a labor controversy
- Concerns about the "happiness" of customers or quality of work product
- Social issues that have no relationship to work
- Profane outbursts

PREVENTION

UNDERSTAND PROTECTED CONCERTED ACTIVITY

- Conduct which appears inappropriate and would seem a proper basis for discipline may, in fact, be protected.
- Employees are permitted some leeway for impulsive behavior when engaging in protected activity.
- Protections can extend to individual employees, e.g., when an employee speaks individually to his or her employer on his or her own behalf and on behalf of one or more co-workers about improving working conditions as a prelude to bringing some kind of group action in opposition to working conditions or directed at working conditions.

PREVENTION

UNDERSTAND PROTECTED CONCERTED ACTIVITY

Violations of the NLRA include:

- Promulgating a work rule that reasonably tends to chill employees from exercising their right to engage in protected concerted activity even if not enforced.
- Application of rule to restrict the exercise of Section 7 rights.
- Retaliation for discussing or complaining about terms and conditions of employment.

PREVENTION

DEVELOP LAWFUL WORKPLACE POLICIES AND PROCEDURES

- No Solicitation / No Distribution Policy
- Social Media
- Electronic Communications Policy
- Open Door Policy



I DON'T HAVE TO LET UNIONS ON TO BUSINESS PROPERTY, RIGHT?

- No Solicitation / No Distribution Rule
- Solicitation & Distribution By Non-employees Prohibited On Facility Property
- Solicitation By Employees Prohibited During "Working Time"
- Distribution Of Literature By Employees Prohibited During Working Time And In Working Areas
- Uniform Application Of Rule

WHY DOES THE NLRB CARE ABOUT SOCIAL MEDIA?



NLRA protects employees, even non-union employees, who engage in "concerted activity": two or more employees taking action "for their mutual aid or protection" regarding terms and conditions of employment

THE BEGINNING OF THE END FOR EMPLOYERS?

NLRB v. American Medical Response

- Employee posted negative comments about her supervisor on Facebook
- Co-workers commented and supported her negative comments
- Employee was fired



WHAT HAPPENED AFTER AMERICAN MEDICAL RESPONSE?

- General counsel memos (August 2011, January 2012, May 2012)
- Several NLRB decisions
- General confusion



MY SOCIAL MEDIA POLICY CAN PROHIBIT DISCLOSURE OF CONFIDENTIAL INFORMATION, RIGHT?

No, per the NLRB:

"As to 'non-public information,' in the absence of clarification, the term is so vague that employees would reasonably construe it to include subjects that involve their working conditions. Similarly, the Board has long recognized that the term 'confidential information' without limiting language would reasonably be interpreted to include information concerning terms and conditions of employment."



MY SOCIAL MEDIA POLICY CAN PROHIBIT USE OF MY FACILITY'S/COMPANY'S LOGO, RIGHT?



No, per the NLRB:

"the portion of the policy prohibiting employees from using the Employer's logo, trademarks or graphics is unlawful. Employees would reasonably understand the rule to prohibit the use of the Employer's logo or trademark in their online [discussions of the terms and conditions of employment], which could include electronic leaflets, cartoons, or even photos of picket signs containing the Employer's logo."

BUT WHAT IF I TRY TO CLARIFY THE LIMITING LANGUAGE?



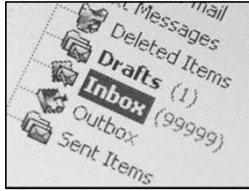
Policy: "Please note that the Company will not construe or apply these guidelines in a manner that improperly interferes with or limits employees' rights under any state or federal laws, including the National Labor Relations Act."

NLRB: *"the Employer's 'savings clause' does not cure the otherwise unlawful policy provisions."*

TO HAVE A SOCIAL MEDIA POLICY OR NOT TO HAVE A SOCIAL MEDIA POLICY: THAT IS THE QUESTION

- If yes:
 - Please get help from a lawyer!
 - Do not prohibit any form of discussion of terms and conditions of employment
 - Be very careful with enforcement
- If no:
 - Use other policies to address inappropriate behavior

EMAILS



- I can dictate how my employees use the company email system, right?
- Recent decision by National Labor Relations Board

EMAILS

Key Points from NLRB's December 2014 Decision:



- Employees may use email for union purposes, but only during *nonworking* time
- Employer cannot ban all non-work-related email

PURPLE COMMUNICATIONS CASE: EMAIL

- Excessive emails that burden your system may justify a blanket rule (but probably not)
- Employer can still monitor employees' email to "maintain production and discipline"
- Employer need not provide email addresses to employees whose job does not require the use of email



OPEN DOOR COMMUNICATION IS ESSENTIAL

Establish Open Doors to Management at All Levels for Suggestions and for Rapid Resolution of Complaints

- Open the doors at all levels
- Publish your open door policy
- Ensure it works
- Suggest discussions with immediate supervisor first, but do not mandate
- OK to skip levels or bring to top
- Ensure a response within a pre established number of days
- Make sure the process works as advertised

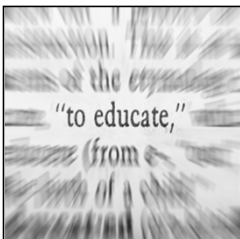


OTHER POLICIES & THE NLRB

- Confidentiality
- Respect for Others
- Discussion of politics
- Comments to the media
- Photographs and videotaping



EDUCATION EDUCATE EMPLOYEES ABOUT UNIONS



- Company's Position
- Facts About Unions
 - Dues
 - Initiation Fees
 - Penalties and Fines
- Advantages of a Merit-Based System Over a Seniority Based System

EDUCATION DEVELOP AND COMMUNICATE COMPANY'S POSITION ON UNIONS

- The Facility operates and thrives as a non-union organization by being pro-employee.
- The Facility intends to maintain the type of atmosphere, working conditions, and communications that will promote the continuation of this union free environment.
- This operating philosophy carries with it the obligation to provide employees with fair and equitable management practices.
- Procedures are in place to provide an effective means for all employees to offer ideas and suggestions, or pursue questions or concerns they may have.
- We are committed to making the Facility a good place to work - the kind of workplace that does not need a union to treat employees well.

IS THE FACILITY ANTI-UNION?

- The Facility is in a highly competitive business of providing service to residents and their families.
- Union contracts are inflexible and impair the ability of the Facility to make necessary changes in the business to remain competitive.
- The Facility does not believe that a union would help employees or the Facility in this business environment.



“WHY DON'T WE JUST GIVE THE UNION A TRY?”

- The Company does not believe that employees need a third party representative
- We have “pro-employee” policies in place to enable employees to speak for themselves
- Nothing is free – Employees must pay for Union representation
- Hidden costs of Union membership
 - Initiation Fees
 - Fines
- “The Hotel California”
- What happens if the Union goes on strike?
- No guarantee of better pay or benefits

EDUCATION

EDUCATE MANAGEMENT TEAM ABOUT WHY AND HOW UNIONS ORGANIZE



- Motivating Factors
- Organizing Methods
- Warning Signs
- Union Card Signing
- Secret Ballot Elections

WHY DO EMPLOYEES ORGANIZE TODAY?

- Perceived unfair, inconsistent, or arbitrary treatment by managers.
- Lack of effective communication.
- Unions promise job security.
- Perceived favoritism.
- Unfair wage practices – noncompetitive wages and internal wage inequities.
- Overly harsh or impersonal disciplinary rules or policies.
- Ambiguous policies or arbitrary changes in work rules.
- Broken promises and lack of follow through by management in addressing employee complaints.
- Lack of respect and elitist attitude of management.
- Employee believes the union can get them a “better deal.”

UNION ORGANIZING TECHNIQUES

- Demands for recognition and claims of majority support
- Employee visits and cell formation
- Union “salts”
- Offsite employee social events (i.e., union-sponsored happy hour)
- Invitations to employer to debate or attend union meetings
- Hand billing and informational picketing (area standards)
- Rallying behind employees during major adverse event (mass layoff or a significant safety or environmental disaster)



SUPERVISOR-CONTROLLED CONDITIONS AFFECTING UNIONIZATION

- Failure to listen and understand before making decisions or responses
- Failure to respond promptly – or at all – to questions, problems or complaints
- Failure to communicate what employees need to know about the company, its policies, and/or their jobs
- Unawareness of employees' concerns before they become issues
- Lack of courtesy and respect
- Inability to treat employees equally
- Inability to motivate employees to work toward common goal
- Failure to convey a sense of job security
- Failure to convince employees that wages and benefits are fair and competitive

TYPES OF SUPERVISORS WHO TURN EMPLOYEES TO UNIONS

- Bossy, pushy or on ego trip
- Demands instead of requests
- "You Do" attitude vs. "Let's Do"
- Weak or insecure; DOES NOT TAKE A STAND
- Critical of management or company in presence of employees (openly jaded or disloyal)
- Self-serving or dishonest
- Plays favorites or exhibits inconsistent application of company policies
- Not open to ideas, suggestions, or change – closed-minded about improvement
- Habitually profane and disrespectful
- Negative or unappreciative attitude (lack of personal interest in subordinates)
- Failure to acknowledge achievements, or to give recognition when due (blames downward)

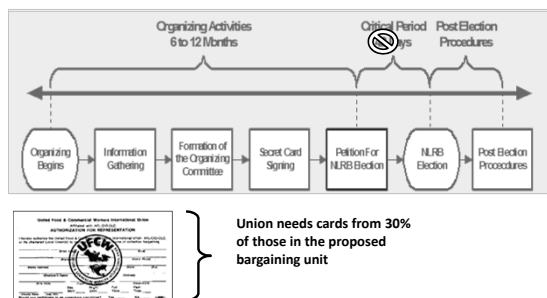
EARLY WARNING SIGNS OF UNION ORGANIZING EFFORTS

- Noticeable increase in casual employee gatherings (tendency to stop talking when supervisors approach)
- Employees seem uncommonly busy during breaks, before or after work, and during lunch hour
- Discussions of informal employee "get togethers" after hours
- Nature of employee complaints changes, and becomes noticeably more or less frequent
- Complaints/concerns presented by a delegation instead of individual employees
- Formation of new cliques with new leaders
- Employees begin using terms like "job security," "concerted activity," "economic pressure," "duty to bargain" and "right to representation"
- Sudden changes in employee attitudes, coupled with reluctance to talk to/deal openly with management
- Former employees – especially discharged ones – loitering on company premises

EARLY WARNING SIGNS OF UNION ORGANIZING EFFORTS

- Any person (employee or outsider) asking for names and/or addresses of employees
- Unknown individuals appearing at facility and conferring with groups of employees (such as in the parking lot)
- Personal "visit," telephone call, or registered letter from a Union representative
- Union authorization cards, handbills, or leaflets left on the premises or in parking areas
- Anti-company graffiti
- Once popular and/or friendly employees become withdrawn, seem outcast and avoid
- contact with supervisors or co-workers (maybe opposed to unionization effort)
- Sudden and unexplained change in work habits and productivity - watch for a drop in
- quantity and/or quality of production (i.e., work-to-rule attitude)
- Increase in questionable usage of sick time coupled with noticeable attempts to take advantage of HR policy "loopholes"

TRADITIONAL ORGANIZING TIMELINE



UNION AUTHORIZATION CARDS

- Union cards are legal documents that can establish legal rights and obligations
- Takes away employees' rights to speak for themselves on issues of wages, hours and conditions of employment
- Often contains a "request" for membership
- Sometimes includes a dues check-off authorization!

FOR THE INFORMATION OF THE NATIONAL LABOR RELATIONS BOARD

NAME _____ PHONE NO. _____

ADDRESS _____ Street _____ City _____ State _____ Zip Code _____

I, the undersigned, authorize the _____

SIGNATURE _____

DATE _____

(MAIL TODAY)

ALL APPLICATIONS STRICTLY CONFIDENTIAL

UNION STRATEGIES TO OBTAIN SIGNED AUTHORIZATION CARDS

*Go ahead and sign,
It's no big deal!*



Union organizers will say anything to get employees to sign a union card . . .

- It's just to get more information
- It's only an election card
- Just give us a try
- Everyone else has signed, you're the last one
- You can always vote the union out
- If you sign, you can come to a free party

HOW CAN EMPLOYERS PREVENT UNION CARD SIGNING?

- Maintain open and effective communication with your employees.
- Be familiar with your workforce and the issues that are important to them.
- Make sure employees understand that you are committed to maintaining a positive work environment.
- Remind employees of the benefits they already have.
- Have the ability to inform employees of the pitfalls of a unionized workplace.
- Foster a positive workplace culture

EDUCATION TRAIN SUPERVISORS TO RECOGNIZE AND RESPOND TO UNION ORGANIZING ACTIVITY

- Supervisors have an important role in the Company's union avoidance strategy
- Supervisors should follow these "TIPS"



THE ROLE OF SUPERVISORS

- Agency status
- Responsibilities:
 - Learn to recognize early warning signs, and address potential work issues that may lead to union organizing.
 - Foster an atmosphere of fair and equitable treatment for all employees.
 - Learn effective communication skills to react quickly, positively and aggressively to employee problems.

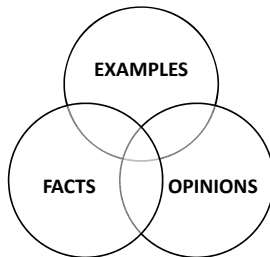


SUPERVISORY RULES WHAT SUPERVISORS CANNOT SAY



- **T**HREATEN
- **I**NTERROGATE
- **P**ROMISE
- **S**PY

SUPERVISORY RULES WHAT SUPERVISORS CAN SAY



SUPERVISORS CAN:

- State Facility's position on unions.
- Review the disadvantages of unions.
- Emphasize the Facility's willingness to maintain two-way communications.
- Mention personal opinions about unions.
- Relate personal experiences with unions.
- Review the benefits of being employed here.
- Point out misleading statements often made by unions.
- Emphasize that unions represent a great unknown for employees.

ADVANCE PREPARATION CONDUCT RISK ASSESSMENT



- Conduct "Vulnerability" Audit
- Research and Monitor Local Union Activity
- Evaluate Potential Bargaining Unit Issues
 - Change Size of Unit
 - Evaluate Status of Supervisors
- Annual Benchmarking of Wages and Benefits

ADVANCE PREPARATION VULNERABILITY AUDIT

- Interview managers and supervisors to identify issues and assess effectiveness of managers and supervisors in resolving those issues
- Communication methods, training, management styles, employee recognition programs, disciplinary systems, work rules, working conditions, employment terms and conditions, opportunities for advancement, employee morale, safety rules, job security, employee empowerment and incentives, and employee interest and involvement in union activity
- Evaluate morale
- Identify and resolve any outstanding employee issues/grievances
- Conduct under protection of attorney-client privilege

ADVANCE PREPARATION

MONITOR LOCAL UNION ACTIVITY

- Identify union organizing activity in geographic area and industry
- Ignore traditional targets of certain "industry-specific" unions
- Network with local human resources organizations



ADVANCE PREPARATION

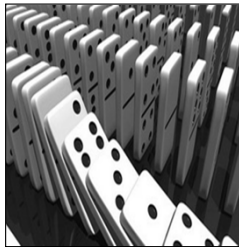
ANALYZE POTENTIAL BARGAINING UNIT ISSUES

- Identify potential bargaining units within facility
- Evaluate status of supervisors



SPECIALTY HEALTHCARE - NEW STANDARD FOR "UNIT APPROPRIATENESS"

- NLRB decision finding stand-alone unit of CNAs appropriate
- Presumption of appropriateness for unit of clearly identifiable group of employees
- Burden on Employer to demonstrate proposed unit not appropriate
- Employers face risk of a proliferation of multiple, small bargaining units within a single facility
- Unions hope for a "domino effect"



ADVANCE PREPARATION

SUPERVISORS - IN OR OUT?

- Under the NLRA, “employees” are guaranteed the right to unionize, while “supervisors” are not.
- A “supervisor” is “any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.”



ADVANCE PREPARATION

SUPERVISORS - IN OR OUT?

- Are LPNs “supervisors”?
- *Lakeland Health Care Associates, LLC v. NLRB*
 - Authority to hire, fire and discipline
 - Authority to “responsibly direct” work
 - Disciplined for failing to ensure subordinates meet company standards
- Why should you care?



ADVANCE PREPARATION

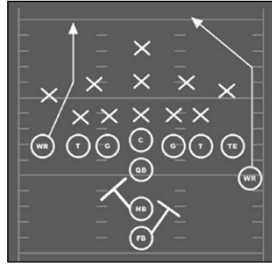
ANNUAL BENCHMARKING OF WAGES AND BENEFITS

- Accurate information essential
- Don’t violate the antitrust laws
- Find legal ways through appropriate surveys and human resource organizations



CREATE A RAPID RESPONSE PROGRAM

- **Identify Your Team**
 - Management
 - Human Resources
 - Legal
 - Consultants
- **Collect Data**
- **Develop Written Plan of Action**
 - Identify Witnesses
 - Outline SOP
 - Outline Campaign Strategy

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? QUESTIONS ?

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