



# ADVISORY

## EMPLOYEE FREE CHOICE MAY BE IN JEOPARDY

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Labor unions are feeling the same economic trials as other businesses riding out the economic downturn in America. In recent years, the number of union members has dramatically decreased. When unions feel the economic pinch, they scramble for members in the same way businesses scramble for customers. Unions are a business. They sell a service. They convince employees they can provide a voice to speak for employee rights. They sell the illusion of job security, but you only need to look at the auto industry to learn that union membership is not a guaranteed job. However, unions also use the power of the U.S. Congress to help them increase the numbers. A current bill before Congress, the **Employee Free Choice Act (EFCA)**, demands that every non-union company in America pay close attention and take preventive measures to protect themselves.

The **Employee Free Choice Act (EFCA)** would amend the National Labor Relations Act to require the National Labor Relations Board (NLRB) to certify a union **WITHOUT** an election. It is impossible to overemphasize how serious this change could be. Currently, employees who want to create a union must have 30% of the eligible employees sign a membership authorization card. These cards are then submitted to the NLRB. They verify the authenticity of the cards and then order a secret ballot election which it supervises. To win the election, the union must have a majority of the votes. That means 50% of those voting, plus one vote, must be "Yes." Passage of the EFCA could end this process.

Keep in mind that unions lose more elections than they win so they are pushing for the passage of this bill to help them avoid elections. It is relatively easy to get employees to sign a

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card because many employees feel intimidated and sign to avoid perceived repercussions of refusing. But, in the anonymity of the secret ballot, they vote "No" to union membership.

This new law will also allow a union to demand that the employer begin bargaining with it 10 days after it is certified as the exclusive bargaining representative for an appropriate unit of employees. In addition, if the union and employer cannot agree upon the terms of a first collective bargaining contract within 90 days, either party can request federal mediation, which could lead to binding arbitration if an agreement still cannot be reached after 30 days of mediation. When government arbitration determines terms of the agreement, employees lose their current right to ratify the terms of the agreement. Finally, the Act would provide for liquidated damages of three times back pay if employers were found to have unlawfully terminated pro-union employees. The EFCA also would impose a \$20,000 penalty upon employers for each employer violation of the proposed legislation if the NLRB and/or a court deem the violation willful or repetitive.

As a result of the outcome of the most recent national election, the EFCA is expected to pass the next Congress. For this reason, employers must act now to make absolutely certain they insulate themselves as much as possible from the impact of the passage of the EFCA.

Step one is to establish a strongly worded No Solicitation Policy. A sample policy and procedure is included at the end of this *Advisory*. However, this policy absolutely must be enforced. If you have a policy and then you allow employees to solicit from each other, your policy will be considered invalid. *What does this mean?* It means you could be required to allow your employees to solicit each other for union membership. You cannot allow employees to solicit for causes you like and then deny solicitation for those you don't.

Most businesses don't want organized labor involved in their operations because it impedes their ability to manage. Managing labor contracts is time consuming and expensive. Avoiding organized labor in your business requires excellent management and the understanding of how unions are able to persuade employees to join their ranks. The remainder of this *Advisory* is devoted to the exploration of unions, unionism, and how unions organize your business.

It has been many years since unions reached the height of their popularity. Their membership has been slowly dwindling ever since. Part of the decline is attributed to disillusionment when labor unions fail to follow through on promises and the rest is probably attributed to the reality that factors other than union membership determine whether job security exists. As large businesses lay off workers, they reduce the number of people who are members of organized labor. Unions are dependent on membership dues, fines, and assessments for their livelihood so they have turned to small employee groups as a source of revenue.

Unions gained their real strength from railroad workers and coal miners. Great union leaders, such as John L. Lewis, are credited as the driving force behind unionism in America. In the late 1930s, the United States government became heavily involved in the conflict between management and labor. Congress passed legislation that has far-reaching effects for American business. The National Labor Relations Act (The Wagner Act) is the framework under which employees have the freedom to organize unions. The NLRA is protective legislation that allows employees to ban together and demand recognition and collective bargaining.

The NLRB is the watchdog agency that oversees union-management relationships. When employees ban together to seek collective bargaining rights for wages, benefits, and working conditions, they seek the help of the National Labor Relations Board and request an election to be held in their workplace. Generally a union organizer is involved and guides employees.

Once the proper documentation is filed with the NLRB, the Board will intercede and conduct a secret ballot election in the employees' workplace. Should a majority of employees casting ballots wish to be represented by the union, the NLRB will certify the union as the official bargaining representative for the employees. Management will be directed to bargain in good faith for wages, benefits, and working conditions. These are the only three things that are mandated as subjects for bargaining. Should the union fail to get 50% plus one vote of those casting a ballot, or if there is a tie, the union loses. If the union loses, that specific union cannot

return for another vote for one year.

There are two major reasons why a union may attempt to organize your business. First, your business may be a target of union activity. Unions plan just as companies do and target entire industries, such as the distribution industry. If your business is within a targeted industry, you can expect the union to attempt to organize your employees. If this happens to you, it is a dubious honor. However, you have an advantage. Generally, you have done nothing terribly wrong and your employees must be lured away from you by the union.

If management practices in your business are poor or employees feel insecure and need protection, they may simply look up the name and number of the local union in the phone book and ask for their help. When this happens you are at a decided disadvantage. Your employees have abandoned you and you must win them back. This is no easy task. The union is always willing, ready, and able to organize any employee group who desires union membership. After all, every person who joins up represents a revenue stream. The union will charge each person dues.

The techniques unions use to organize employees vary from union to union. Many unions organize along industry lines and union organizers "*Speak the language of their people.*" Generally those who are part of the steel industry are members of the United Steelworkers of America. Employees in the automobile industry are members of the United Auto Workers. Some unions, such as the Teamsters, will organize just about anybody from truck drivers to nurses. They are best known for representing truck drivers and warehouse employees. The distribution industry knows them well. The techniques for organizing depend on the type of labor union, but unions have certain organizing techniques in common and some will be addressed here.

### **Stranger in the House**

A frequent sign of a union organizing attempt is the presence of a stranger on the property. A person hanging around your parking lot talking to your employees as they come and go from work or sitting around on your dock engaged in private conversations with employees who are off duty should cause suspicion. The union organizer will not look like a thug, but may be a well-dressed business person. The organizer will be reflective of the workers they want to help organize.

### **Increased Phone Calls**

Another sign of union organizing is the increased use of the telephone by employees who generally are not observed spending a lot of time on the phone at work. These calls occur during the work day and end immediately if you approach.

### **Small Group Chatter**

A third sign of union activity is small groups of employees gathered together talking quietly. Their conversations stop abruptly when a member of management approaches them.

### **Authorization Cards**

One sure sign of union activity is the presence of union authorization cards. Before a union can seek an election before the NLRB, it must present the NLRB signed authorization cards from at least 30% of the employees they wish to represent. Signed authorization cards become very important to a union organizing campaign. The authorization card may look like an index card and contain information that authorizes a specific union to act as the official bargaining agent and representative of a group of employees. These cards may be found in the stock room, on a warehouse shelf, in an office desk, restroom, on coat racks, in locker rooms, or in some other inconspicuous place.

The conduct of every management member during the union organization campaign can never be over-emphasized. The National Labor Relations Act limits the conduct of a supervisor or any other member of management during the union organization attempt. Members of management must never Threaten, Interrogate, Promise, or Spy on employees who are involved in forming a union. We call these four behaviors — TIPS. Any of these actions can result in an Unfair Labor Practice charge and negate any future victory the company might have over the union. Yes, that's right. If management violates the accepted conduct, the union can automatically win.

Unfair Labor Practice charges and more information about these TIPS start on the next page. However, there are two actions you want to take now. First, make certain your No Solicitation policy is up-to-date, posted, and enforced. (A sample policy is listed below if you need it.) Next, become aggressive with your Congressional representatives. Explain your opposition to the passage of the **Employee Free Choice Act** and its potential impact on your business.

## **NO SOLICITATION POLICY & PROCEDURE**

### **POLICY:**

We do not allow solicitation of employees on the premises, for any reason whatsoever, during work time. This prohibition also includes solicitation by non-employees. This specifically means our employees may not be solicited to join social, religion, political, or fraternal groups. This includes membership in a labor union. Employees will not be permitted to distribute circulars, handbills, or literature of any type during work time, or any other time, on the premises.

No employee may engage in any activity on company property that will result in personal gain for that employee. Specifically, this includes selling products or services that may be part of an outside business activity in which the employee may be involved. The only approved solicitation on our property will be for charitable purposes. All charitable solicitation must be approved in advance and represent a nonprofit charity. Charitable solicitation must be approved by the Chief Executive on this property.

Many employees feel solicitation, by co-workers and/or Managers, is intimidating and job-threatening. Solicitation often causes ill will among employees. It is for these reasons that we take a strong position regarding solicitation.

### **PROCEDURE:**

Solicitation on our property is a potentially serious problem that demands we vigorously enforce this policy. Do not allow any exceptions to this policy.

Management must immediately confront any solicitor and announce firmly that we do not allow solicitation. This includes solicitation for contributions, sale of goods, or membership in a group, such as a religious group, political party, or a labor union.

The sale of goods or services by employees or outside solicitors is disruptive to the business and offensive to some employees.

The Chief Executive must approve any solicitation on our property and will only consider solicitation for charitable purposes. That means the charity must be incorporated as a 501 C(3) non-profit organization.

Do not allow any employee to engage in solicitation for personal gain. This includes employees who sell cosmetics, spa memberships, jewelry, vitamins, household products, and merchandise that may be bought from catalogs.

If one solicitor is allowed to solicit employees, then the company may be required to allow all solicitors. It is extremely important to enforce the "No Solicitation" policies because failure to do so may mean that we must allow union organizers to solicit our employees.

For clarification or assistance, please seek assistance from Human Resources.

# TIPS

## KEEPING A UNION OUT OF YOUR BUSINESS

It is the goal of most non-union companies to stay that way. Remaining non-union requires vigilant, proactive, and knowledgeable management. The presence of union activity on your property can bring panic and the reaction could be costly. The appropriate response to the presence of union organizers is critical to the eventual outcome.

### First Things First

The first thing to do if you believe there is union activity in your business is to get help. There are many legal ramifications of union activity. You need the help of the best legal counsel you can find that specializes in labor relations. It is important during a union campaign to have no conversation with any union official. Refer everyone who wants to discuss union business to your legal counsel. You may also recommend that they contact the National Labor Relations Board, the government agency with oversight over labor-management relations. The Board exists to solve labor-management problems. Accept no certified mail, except mail postmarked from the National Labor Relations Board. Under no circumstance should you accept union authorization cards from any person who represents himself or herself as a member of an organized labor group. Be sure every member of your management knows this information. Your conduct during the union organizing campaign is critical.

Next, you must be certain every member of your management understands how they must behave during a union organizing campaign. Their conduct could make or break the outcome. If members of management engage in conduct that can be described as an unfair labor practice, the National Labor Relations Board can automatically certify the union and order the company to begin bargaining with the union immediately.

During an organizing campaign, an Unfair Labor Practice can be loosely described as an action by management that interferes in employees' freedom to freely choose union membership. To assure that no member of management makes a mistake that negates a positive outcome

for the company, you should gather your management team into a mandatory training session and provide them with the rules to guide their conduct regarding union activity. Specifically, they should be trained in what they cannot do. They cannot Threaten, Interrogate, Promise, or Spy on employees. We call the training — TIPS and it should contain the following information.

### Threats

During a union organization campaign members of management may do nothing to threaten an employee in his or her right to choose to join a union. No comments may be made by management that cause an employee to feel that his/her job, wages, or benefits may be in jeopardy if the union is successful. You can't say, *"I will close this business if the union gets in."* Owners may close after a union is successful. You have a right to sell or close the business, but you cannot tell your employees that you will. It will be viewed as a threat. Never say to any employee, *"Those who support this union will regret it"* or *"You will be sorry if this union gets in."*

### Interrogate

Members of management may not interrogate employees about his/her union activity or preferences. No member of management may ask who is active in the campaign, who attends the meetings, where the meetings are held, or what was discussed. Any of these actions may be viewed as intimidating and threatening to the employees' freedom to join a union. Sometimes an employee may come to you and volunteer information. You can certainly listen to what is said but you can't encourage the employee to divulge information.

### Promise

You may never make promises to employees in return for defeat of the union. You can't say, *"If you get rid of this union attempt I will arrange a raise or increase the company contribution to your health insurance."* That will obviously look like a bribe. Sometimes a renegade supervisor is the culprit that caused the employees to seek union help. You

should never promise to get rid of that person in return to an end of the union campaign. You should address that problem, but you can't comment on it as it relates to the union.

### Surveillance

During a union-organizing campaign, members of management may not engage in any act of surveillance. Members of management may not attend a union meeting nor may they send a person to find out who was at the union meeting or what was discussed.

It is important for management to remember these TIPS — Threats, Interrogation, Promises, and Surveillance. Violation of any of these actions during the union campaign may bring about a charge of Unfair Labor Practice (ULP). Keep in mind that a successful ruling of an Unfair Labor Practice charge can mean an automatic certification of the union by the NLRB or the results of an election may be set aside if the company wins. Since unions lose more elections than they win, there is every reason for the company to want the campaign to end in an election. The company has a good chance to win.

It is also important for members of management to know that unions are also covered by many of the same requirements as management. They, too, can be charged with an Unfair Labor Practice. Unions may not threaten or intimidate employees into signing cards or otherwise aligning themselves with the union. Unfair Labor Practice charges apply to both union and management.

### The Right to Resist

There are many things you cannot do during a union organizing campaign but you are not helpless. There are actions you can take and should be certain your employees know what they are getting into. You can speak out against unions and unionism. You can remind your employees that belonging to a labor union does not prevent layoff, as seen in every industry where unions are found. You can remind employees that union membership brings with it certain obligations by the employee. Labor unions

charge membership dues. They may also charge assessments and fines to members who do not attend union meetings or fail to participate in union sanctioned strikes. Management should remind employees during union organizing campaigns that should the union be elected as the official bargaining representative the employees will lose their unlimited freedom to speak directly to members of management about things that concern them. You should emphasize that unions cannot guarantee job security, more benefits, a raise, or any other improvement. In fact, a union cannot do any more than an employee can do himself/herself.

Unions make wild promises during campaigns, which members of management cannot make. Employees should be told this explicitly. It is a sobering thought to some employees when you remind them that the union does not run the business; the business is run by management and the decisions are management decisions. The union can only ask for consideration in the same way a non-union employee can ask, except the union charges the member to ask for them. Union membership is nothing more than paying another person to speak for you. It is a "membership" organization that charges dues for service that is not guaranteed in any way.

Unions may remind employees of their power because they can strike. Management employees should remind employees that if they strike for economic reasons they can be replaced with other employees who are permanent, and the company is under no obligation to give the employees their jobs back at the end of a strike.

As a member of management, you should never allow employees to discuss unionism during work time, unless, of course, you have not written, posted or enforced a No Solicitation policy (see page 4). If you have a No Solicitation Policy, you have no obligation to allow employees to solicit other employees into union membership during work time. The union activities may not interfere with the ongoing business. Those businesses who deal with the public have an obligation to prevent their customers from being involved in union hassles. All members of management should take a firm stand against union activity during work time.

Management should try to speak from personal experiences about unions. Sometimes members of management were forced to become members of a union in an earlier job and gained no advantages from it. These examples will be important in explaining to young employees how unions are persuasive but do not deliver.

Any other person that management knows who has had difficulty as a result of membership in labor unions can be invited to talk about their personal experience. Examples are always an excellent way of convincing employees that unionism is nothing more than the willingness to contribute part of their paycheck to unknown people for some unknown use.

Unions have been very successful in convincing disillusioned people of grand things. Their recent track record in America has been poor and members of management should never fail to point that out. Employees, in their home environments, often relate to members of labor unions and it is important to make them aware that unionism has not been the hero of America's workers in the long run. **Do not condemn union members.** Many union workers are very fine people. Union leadership makes the decisions, however, and they are often very well paid and do not relate to the needs of the workers.

### **Union Prevention**

The most important thing you can do to protect yourself from a union attempt by an organized labor group is to have good management practices. The number one reason employees seek protection from a labor union is job security. Employees resent unfair supervision and the lack of a feeling of security at work. Unions have existed for years on the job fears of employees. If you threaten your employees or cause them to feel their jobs are always in jeopardy, you are inviting a labor union into your business.

**NEVER** threaten to fire employees.

**NEVER** allow any member of management to be disrespectful to employees.

**NEVER** make sudden changes in work rules or policies without explaining to employees why change is necessary.

Every business should have posted and

uniformly enforced work rules. Employees want to know exactly what is expected of them. Management must treat all employees fairly and justly. Favoritism is a sore spot with most employees and will surely cause them to seek out the protection of a labor union. Whatever performance appraisal system you have in place should be used uniformly and fairly for all employees. Inequities in your pay practices and benefit programs will cause employees to feel that you are not fair. But wages are not the top priority or the number one reason for employees to seek the help of a labor union. Employees need to feel secure and unions prey on that need. Never make offhand comments that cause employees to feel insecure. Always feel that you can comfortably defend any action of discharge you may have to take.

A disciplinary procedure that gives employees adequate warning about unacceptable work behavior is a good defense in your business. Certain offenses by employees may warrant discharge and you should feel free to do that. Employees expect discharge for serious offenses and they will resent you if you are not a good disciplinarian. It is when you discharge employees on a whim or over an incident that appears to be minor that your employees become upset and worried about their own job security. Never accept, for a moment, that you are in complete domination of your business. You may set your destiny to have an outside partner in your business by treating your employees unfairly or unjustly.

It is widely known that unions have been the demise of many companies. Business after business have shut their doors, sold out, or merged because they simply cannot afford the expense of dealing with a labor union. Oddly enough, evaluating American business will show unions offer no job security AT ALL. They have been able, however, to thrive on the illusion that job security is the one thing a union member can count on.

If your employees are approached by a labor union in an atmosphere of good management they will say, "No, thanks." In an atmosphere of poor management, you can be sure you will have an unwanted partner in your business.