

KEEP THE TRAINS RUNNING ON TIME: BEST PRACTICES FOR IDENTIFYING AND RESPONDING TO UNION ORGANIZING

With the recent rise in labor organizing and general interest in unions in the private sector, employers should know and understand the signs of union organizing and how to lawfully respond. Under the National Labor Relations Act (NLRA) and corresponding federal regulations, employers are required to adhere to numerous procedural requirements within a very short timeline after receiving a representation petition (known as an “RC Petition”). An employer should immediately seek counsel from a labor attorney if they are served with an RC Petition to avoid inadvertently running afoul of a requirement or timeline.



The following general advice is applicable both before and after an RC Petition is filed.

Signs of Union Organizing in the Public Sector¹

Direct supervisors typically have the best sense of the general mood of an employer’s workforce, and often are the first to observe the signs of union organizing or general interest in a union. An employer and its supervisor should watch for the following signals:

- Increased amounts of time spent in conversation.
- Group conversations quieting down when a supervisor approaches.
- New social connections/friendships/fraternization among individuals or groups not previously seen.
- Employees going off premises together (if this was not common before).
- Sudden increases in suggestions, grievances, and complaints.
- Change in tone: employees no longer interested in talking to a supervisor, unwillingness to participate in company projects.
- New interest in company policies and procedures or benefits.
- Requesting a list of employee names and addresses.
- Union t-shirts, buttons, handbills or signature cards at workstations or break areas.

¹ This material addresses union organizing in private sector workplaces under the NLRA. It does not address union organizing in the public sector, which is governed by state law that may differ significantly from the NLRA. Public sector employers with questions about union organizing or activity should reach out to a member of Miller Nash’s labor team for additional guidance.

Employer Response to Union Organizing

Once management becomes aware that there may be union activity in the workplace, the company should respond assertively and thoughtfully. While the National Labor Relations Board (NLRB) puts some limits on what a company can do or say, an effective response early in the process of organizing can persuade employees.

What Employers *Should Do*:

1. State the company's position that it prefers to remain non-union.
2. Tell employees that if a union is selected that the company must deal through the union.
3. Tell employees that the company prefers to deal with employees directly rather than through a third party or another employee.
4. Tell employees that the company and its supervisors and managers are always willing to discuss any subject of interest.
5. Make sure that employees know and understand the benefits that they presently enjoy—without making promises or threats.
6. Make sure employees understand that their wages, benefits, and working conditions are competitive with others in the area (whether unionized or not).
7. Let employees know that unions are free to make all the promises they want but any change requires the company's agreement.
8. Tell employees some of the disadvantages of belonging to a union:
 - Expensive initiation fees
 - Monthly dues
 - Union membership rules and the threat of fines for disobeying
 - Loss of right to directly negotiate with management
9. Identify and explain any false or misleading statements made in any handbills or union presentations.
10. Tell employees they are free to join or not join any union without prejudice to their status with the company.
11. Tell the employees that merely signing the authorization card or application for membership does not mean they have to vote for the union in the election.
12. Enforce non-solicitation rules.
13. Enforce access rules.
14. Be consistent with discipline and discharge for cause, and follow customary practice without regard to union activity or support.
15. Make assignments of work per customary practice without regard to union activity or support.
16. Continue to enforce work rules impartially and in accordance with customary practice without regard to union activity or support.
17. Listen when employees tell you about internal union activity and how they are proceeding. Just don't ask questions about these topics.

What Employers Cannot Do:

Remember **TIPS**:

T = Threats. Do not threaten employees.

Do not tell employees that they will lose their job or benefits if the union is chosen as the representative.

I = Interrogate. Do not interrogate.

You cannot ask employees about their union activities or other employees' union activities. Do not ask employees what they think about the union, how they intend to vote, if they signed a card, or attended a union meeting.

P = Promise. Promises are impermissible.

Do not promise employees what will happen if the union organizing drive is defeated. You cannot tell employees that better wages, promotions, or greater benefits will result if the union does not get in.

S = Spy. Do not spy.

You cannot send individuals to spy and inform on employees' union activities or ask employees to do so.

Examples of impermissible supervisor conduct:

- Threaten loss of job, reduction of wages or income, or discontinuance of privileges or benefits.
- Threaten or actually discharge, discipline, or layoff an employee because of activities on behalf of the union.
- Threaten to drastically reduce or close operations if the union is selected.
- Discriminate against employees actively supporting the union by assigning undesirable work.
- Discipline employees actively supporting the union for infractions which other employees are permitted to commit without discipline.
- Select some employees for layoff with intention of curbing union strength or discouraging affiliation.
- Conduct yourself in a way that would imply any of the foregoing acts of threats or interference.
- Ask employees how they intend to vote.
- Ask employees for their thoughts on the union or its officers.
- Ask employees at the time of hiring whether they belong to or signed up for union, signed a union application form, or signed a union authorization card.
- Ask employees about internal affairs at union meetings.
- Urge employees to try to persuade others to oppose the union or stay out of it.
- Give financial support or assistance to one union as opposed to another.

- Visit the employee's home to encourage them to reject the union (note that the union can visit employees at their homes to encourage support).
- Assist employees in withdrawing their union membership or application card.
- Ask employees about the identity of the instigator or leader of the union organizing effort.

What Happens if a Company or Its Supervisors Engage in TIPS?

1. Acts of threats, promises, interrogations, and/or spying may be grounds for voiding a union election. In such a case, the election is overturned and the union has a second chance to prevail in the voting.
2. Such actions may constitute an unfair labor practice (ULP), which could result in having to reinstate terminated employees, back pay, an order by the NLRB to bargain with the union, and other potential monetary and non-monetary penalties.