

IS THE UNION LURKING OUTSIDE YOUR DOOR? – UNION AVOIDANCE PRACTICES

by

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I. WHY STRIVE TO BE UNION-FREE?

A. Economic Costs Of Unions.

1. Administrative costs increase at least 10%.
2. Management time wasted on union issues:
 - a. Contract negotiations.
 - b. Grievance processing.
 - c. Other contract administration (union enforcing compliance with contract requirements).
 - i. Meetings over discipline.
 - ii. Meetings over other alleged contract violations.
3. Strikes.
 - a. Strikes hurt everyone, especially the people who go on strike.
 - b. Economic losses for company and strikers.
 - c. Causes further division between management and production workers and between production people who don't support strike and those who do. Adversely affects morale and breaks up the "team".

B. Other Disadvantages Of Unions.

1. Unions protect poor performers — easier to reward excellence without unions.
2. Restrict flexibility in meeting global challenges
 - a. Assigning work.
 - b. Transfers.
 - c. Modifying jobs.
 - d. Contracting out work.
 - e. Discipline.
3. Unions, by their nature, reinforce division between management and labor.

II. HOW TO STAY UNION-FREE.

A. Unions Are In The Business Of Getting Members.

GENERAL CONSIDERATIONS:

Union organizers will target a company for two main reasons:

1. To increase dues even if employees don't seek out the union.
2. To try to even the playing field for unionized companies within the industry.

Consequently, it is incumbent to create a work environment where unions will be unable to garner significant support.

B. Reasons People Join Unions.

OVERVIEW:

We cannot over emphasize this fact: unions don't win elections, companies lose them! Said another way, employees don't vote *for* a union; they vote *against* the company. It is important therefore for an employer that wishes to stay non-union to develop programs and policies that are designed to reduce employee dissatisfaction so that a union that

mounts a campaign will not be able to gain sufficient support so as to defeat the company. In developing and implementing employee relations programs and policies designed to achieve that goal, it is important to understand first the factors that can cause employees to be dissatisfied with their working environment so as to vote a union in.

1. Two basic reasons — either non-competitive wages and benefits or bad management.
2. Wages/benefits. Employees need to be able to provide for the physical needs of themselves and their families; (i.e., food, housing, insurance).
 - a. This once was the major reason for the creation of unions.
 - b. Not a significant issue anymore in U.S. except in the service sector
3. Management issues: Studies show that employees look for validation/satisfaction from a job. Management practices can help achieve this goal or hinder employees' fulfillment.
 - a. Mental Stimulation.
 - b. Fair Treatment
 - c. Potential for Growth.
 - d. Recognition.
 - e. Responsibility.
 - f. Achievement.
 - g. Social Needs..

B. Establishing A Work Environment That Eliminates The Reasons For Joining A Union.

OVERVIEW:

Before a union knocks, a company must take steps to make its employees feel that union representation is unnecessary. If the majority of employees are satisfied with their work environment, this lessens the chance that a union will even target the employer (no matter how tempting a target it may be because of the number of potential dues-paying members it employs). In addition, by implementing preventive labor relations policies,

employers will be in a better position to counter a union campaign since their demonstrated concern for their employees' welfare will increase employee loyalty to the company and resistance to the blandishments of union organizers.

1. Eliminate or lessen visible differences between labor and management.

GENERAL CONSIDERATIONS:

A key aspect of all union campaigns is to divide labor from management. To create an "Us versus Them" campaign theme, unions like to point out the advantages, real or perceived, enjoyed by management that labor does not get to share. They build support by convincing employees that the only way to get recognition, job security, and protection from unfair treatment is by banding together to fight management. Accordingly, one of the best ways to eliminate in advance a key union campaign tactic is to create an environment where there is no "Us versus Them" to begin with. There is only an "Us". That way when a union begins a campaign, the "Us" is the entire company — management and labor — with "Them" being the union, an outside third party who is trying to divide "Us".

- a. Key aspects of the team concept.
 - i. **Same** benefits for management and labor.
 - ii. **Same** working conditions.
 - Dress.
 - Parking Spaces.
 - Same perks for both groups (e.g. no free coffee for management unless all employees get it too).

2. Developing positive employee relations programs with ongoing feedback.

- a. Developing and implementing communications network.

GENERAL CONSIDERATIONS:

Effective communication of employment policies is one of the best ways to avert an organizing campaign or thwart one

once it begins. Good communications policies can give an employer the opportunity to advise employees of the benefits they already receive. In addition, good communications enable the company to remain aware of employees' attitudes and concerns and to eliminate sources of dissatisfaction before they can become huge problems. A good communications network enables the employer to demonstrate its willingness to seriously consider and respond to employees' concerns. In many cases it is not necessary to make changes in response to employees' concerns so long as the employer responds to employees' concerns and explains its position. **Employees who believe that management is listening to them are much less likely to turn to a union for help in getting management to address their concerns.** In addition, employers who have effective communication techniques in place prior to the advent of a union campaign along with a history of responding to employee suggestions or grievances can continue to utilize those techniques during the course of a union campaign -- thus avoiding an unfair labor practice charge that could be leveled at employers who solicit grievances only in response to a union campaign.

- b. Develop a team and invest all employees in failure or success of Company.

GENERAL CONSIDERATIONS:

In addition to using its communication techniques to make certain that employees are aware of the cost of their benefits packages and of how they can get the most value from the benefits, the employer can also use its communication network to enhance employees' loyalty to the company and make them feel as though they are part of an extended company "family". Communications therefore could and should include the following topics.

- Company news and future business prospects.
- Employee recognition for special achievements on the job or years of service.
- Changes in company rules and the reasons for the change.
- Changes in company benefits and reasons for changes; promotional and training opportunities.

- Community activities in which the company and employees have been involved.
- Personal news concerning employees and management.

- c. Implement positive approach to discipline.

GENERAL PRINCIPLES:

A good disciplinary system educates and rehabilitates rather than punishes. A written handbook, with clear work rules and job expectations, is key to making sure employees know what is expected of them. Handbooks also let employees know what they can expect from the company. When rules are violated, company should take a “positive” approach to discipline and try to help employee succeed. Managers and supervisors need to be consistent and fair in applying rules.

- d. Written dispute resolution procedure culminating in peer review for discharges.

GENERAL CONSIDERATIONS:

Besides promising to improve wages and benefits, unions also target employers’ “at-will” policies and promise to provide employees with job security and the protection of a grievance and arbitration procedure so that employees are not subject to unfair and arbitrary treatment by management. Accordingly, a key to countering this as a potential campaign issue is for the employer to promulgate a written dispute resolution procedure. This can include an appeals process which allows employees who believe that they have been unfairly discharged to seek a hearing before a neutral third party, such as an arbitrator, or a peer review panel hearing. Eliminate concerns over job security and the need for third party protection.

- e. Other techniques for improving employee morale and performance.

GENERAL CONSIDERATIONS:

Since employees are not solely motivated by wages, enhancing job satisfaction is a vital component of union avoidance techniques. Accordingly, the development and implementation of different kinds of employee development and training programs should be thoroughly explored such as:

- i. Worker involvement programs: These are plans in which employees offer suggestions on the structure of their work specifically and how the company can operate more efficiently in general.

- ii. Job enrichment programs: These are programs that seek to improve the daily tasks of a job itself by making the job more interesting.
- iii. Flex time hours.
- iv. Creative fringe benefits.
- v. Proper training of supervisors.

GENERAL CONSIDERATIONS:

Supervisors play a crucial role in union organizing campaigns. Supervisors are the primary way in which employers can create positive working atmosphere and monitor employees' sentiment on an ongoing basis. In addition, during a union campaign, a supervisor's relationship with the employees whom he supervises will be critical in either gaining support for the company or in throwing support to the union. Accordingly, it is important that all supervisors be well trained in company policies, apply them in a fair and equitable manner, and treat the employees whom they supervise in a respectful and consistent fashion.

III. PREPARING FOR A UNION CAMPAIGN —You can't please all the people all the time!

A. Lay The Groundwork.

OVERVIEW:

Even with the best employee relations programs in place, employers may be targeted for a union campaign. While union membership is at all time lows, union election percentages are at an all time high. Unions have been increasing their focus on organizing in order to increase the number of their dues-paying members. Additionally, there will always be some employees who are discontented and will seek out the assistance of a third party. Once a union campaign begins, certain rules apply that severely circumscribe an employer's flexibility in rule making; responding to employee grievances; and in disciplining and discharging union supporters. Accordingly, it is important that the employer be prepared ahead of time so that it will be able to enforce certain rules and maintain productivity even in the face of a union campaign.

B. Weed Out The Bad Apples.

GENERAL CONSIDERATIONS:

While there is usually at least one, if not more, outside Union organizer, no union campaign succeeds without the assistance of pro-union employees. The outside organizer therefore will establish a committee of pro-union employees to conduct the union's campaign in the plant. These employees solicit their co-workers to sign union cards and to attend union meetings. They will convey the union's campaign messages both orally and by passing out the union's campaign literature. The employees who comprise the union's in-house organizing committee are seldom the best and most productive employees.

1. Enforce rules.
2. Document the enforcement.
3. Turn the employee around or discharge him.

C. The Scope of Employee Rights Under The National Labor Relations Act (NLRA).

OVERVIEW:

The National Labor Relations Act was created during the Depression to foster Unions in the United States. Specifically, Section 7 of the NLRA provides that employees have the right to organize themselves and to form, join or assist labor organizations; to bargain collectively through their own representatives; to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; and to refrain from any or all of such activities. Activities on behalf of a union when a union organizing campaign is in progress are the easiest to recognize as protected activities. It is important to note, however, that the Act protects employees' rights to engage in other "concerted activities for the purpose of mutual aid or protection". Employers who fail to recognize when their employees are engaged in protected concerted activity, even without a union, often find themselves facing NLRB charges. Moreover, a history of denying employees rights to act in concert for "mutual aid and protection" frequently draws the attention of a union thereby increasing the employer's chance of becoming a target.

It is important to note that Section 7 protects the rights of *employees* only. Supervisors and managers are not protected by Section 7 of the NLRA because they are not considered to be employees. Accordingly, the employer has the right to expect its supervisors and managers to assist it in its effort to remain union-free. By the same token, however, the

employer can be held liable for unlawful statements and conducts attributed to supervisors, so it is important that supervisors are trained to recognize concerted protected activity and train to respond appropriately in the face of concerted protected activity including union organizing campaigns.¹

D. Enforcing No-Solicitation Policy.

OVERVIEW:

The right to act in concert for mutual aid and protection includes the general right to speak to one another on subjects of mutual interest including joining a union. Thus an employer may not generally prohibit employees from talking to each other during working hours so long as their discussions do not interfere with their work and is not barred by an employer's lawful no solicitation rule. It is essential that a company establish a no solicitation rule *before* any union appears on the scene!

In order to be able to enforce a no-solicitation/no-distribution rule during a union campaign, it is important that the company consistently enforces the rule against other types of solicitation before the union enters an appearance. Enforcing a rule prohibiting solicitation on behalf of a third party can be an unfair labor practice if it is applied to forbid the union but not anti-union or non-union solicitation. This means the rule must be enforced against the following:

- Solicitation for Girl Scouts, school candy, church raffle tickets, race pools, flowers for funerals.
- An employer may lawfully make limited exceptions to its otherwise broadly applied no-solicitation rule for certain types of charitable solicitation such as United Way, but the more exceptions that are permitted the more likely that the NLRB will find disparate enforcement if the rule is applied to union solicitations.
- Accordingly, solicitations for other charitable events such as school fundraisers, Red Cross, blood drives, American Heart Association, walkathons, etc., as well as solicitations for fellow employees' significant events (weddings, funerals, graduations, etc.) should be confined to non-working times and non-working areas. It is

¹ Since Section 7 protects the rights of employees to act in concert for mutual aid and protection on the flip side if employees are not acting in concert or are not acting for the purpose of mutual aid or protection, their activities are not protected. In addition, if employees utilize inappropriate or unlawful means to obtain a lawful objective, their activities may not be protected (for example, sit-down strikes in which employees "take possession" of the employer's premises in order to obtain the lawful objective of redress of grievances is considered to be unprotected). Activities by employees which may implicate the NLRA but are in fact unprotected are outside the scope of this seminar. It is important to seek legal advice if you believe that employees may be acting together but exceeding their rights under the NLRA.

important to familiarize yourself with the Company's no-solicitation/no-distribution rule so as to be sensitive to what areas are considered to be non-working areas in which solicitation can occur. In addition, non-working time is not the same as paid time. When employees are on break, they are on non-working time even though they may be being paid by the company.

E. Enforcing No-Distribution Rule.

OVERVIEW:

Employees' right to act for mutual aid and protection includes the right to distribute union literature during a union organizing campaign. Again, in order to be able to enforce a no-solicitation/no-distribution rule against distributing union literature it is important that the rule be uniformly applied against other types of literature including anti-union literature. Again, this includes enforcing the rule against distributing literature on behalf of charities, political literature, or fellow employee. It is also important that the discipline applied for violating the no-solicitation/no-distribution rule be consistent. An employer should not follow a milder form of progressive discipline for anti-union or non-union violators of the rule while threatening to discharge union activists who violate the rule.

F. Recognizing Other Concerted Activity That Does Not Involve Union.

The following are examples of other kinds of protected concerted activities in non-union companies where union activities are not involved. The NLRB, with the approval of the courts, has defined "concerted activity" within the meaning of the NLRA as "any group action by employees for the legitimate furtherance of their common interest, and on authority of, or engaged in with, or on behalf of, other employees, and not solely by or on behalf of particular employees themselves, provided the employer is aware of the concerted nature of the action".

1. Acting together to present grievances is protected.

GENERAL PRINCIPLES:

Both union and non-union employees have the right to present complaints and grievances to the employer that are directly related to the terms and conditions of their employment. The right to present grievances along with, or on behalf of, other employees is protected regardless of the merit or lack of merit of the particular grievance. This includes, for example:

- Two employees confronting the employer’s production manager on behalf of the entire shop regarding abusive behavior by their direct supervisor.²
- Employees sent a letter to an employer’s parent corporation discussing employees’ concerns regarding wages, education, and training.³
- Employees demanded that their new employer recall workers in order of seniority after the employer took over the operation from a bankrupt firm.⁴
- A group of foreign born employees questioned a management decision to discharge a fellow employee — the employer unlawfully retaliated against the employees who protested by disciplining them for the protest.⁵
- An employee who arranged a meeting between an employer and employees to discuss a rumor that newly hired employees were being paid more than existing employees was engaged in concerted activities even though she disclaimed being the group’s spokesperson.⁶
- An employee requested a wage increase for himself and a similarly situated employee.⁷
- An employee drafted a letter expressing employees’ collective concern about the selection of a particular person as the manager with authority to control the employees’ day-to-day working conditions.⁸
- An employee posted a notice in the employer’s break room inviting employees to a meeting if they did not “like being poisoned” when there had been a series of incidents requiring the entire building to be evacuated due to headaches, sore eyes, sore throats, dizziness, and nausea.⁹
- In addition there are several cases where employees have been deemed to engage in concerted protected activity

² *Hamilton Plastics*, 291 NLRB 529 (1988)

³ *Mitchell Manuals, Inc.*, 280 NLRB 230 (1986)

⁴ *Signal Deliveries Services, Inc.* 226 NLRB 843 (1976)

⁵ *Webasto Sunroofs Inc.*, 342 NLRB No. 124 (2004)

⁶ *Manufacturing Services*, 295 NLRB 254 (1989)

⁷ *Garment Workers*, 295 NLRB 411 (1989)

⁸ *Atlantic-Pacific Construction Co., Inc.*, 312 NLRB 242 (1993)

⁹ *Martin Marietta Corp.*, 293 NLRB 719 (1989)

when they have contacted the Department of Labor, OSHA, or other government agencies regarding common working conditions.

NOTE: While employees have the right to present grievances as a group, this does not mean that they have an unlimited right to present their complaints on company time. It is important for the employer to listen to the complaint and not discipline employees simply for presenting complaints as a group. The employer has the ability, however, to insist that employees return to work while it considers their grievance or after it denies (or grants) the relief requested.

2. Right to discuss wages/working conditions.

GENERAL PRINCIPLES:

Section 7 also protects the employees' right to talk to each other about working conditions so long as the discussions do not interfere with the employer's business. Employers may not, therefore, promulgate or enforce rules that prevent employees from discussing wage levels with other employees. Many non-union employers have a policy providing that wage and salary information is confidential and prohibiting employees from discussing their wages and salaries with other employees. This policy is considered to be *per se* unlawful under the National Labor Relations Act and an employer who enforces it by disciplining or discharging an employee for violating it can be required to expunge the discipline and reinstate the employee with back pay.

3. Investigatory interviews (*Weingarten* rights).

In a union setting, employees have the right to be accompanied by a union representative of the employee's choosing when the employer is conducting an investigatory interview that could lead to the employee's discipline. On occasion, the NLRB has extended this *Weingarten* right to non-union settings and has required employers to allow a non-union employee, who is the subject of an investigatory interview which could lead to discipline, to have another employee at the interview as his representative. Currently, the law does *not* extend to non-union settings, but it might be wise to grant such a request for representation anyway to help avoid union claims that the union can provide a benefit — representation during an investigatory interview — not available to non-union employees.

IV. RESPONDING TO UNION CAMPAIGN.

A. Employers' Right To Express Opposition To Unions.

OVERVIEW:

The First Amendment to the United States Constitution protects an employer's right to express its view about unions and to discuss and inform its employees concerning the advantages and disadvantages of unions. The NLRA contains a "free speech proviso" that incorporates the First Amendment safeguards concerning an employer's rights to communicate its views to employees. The free speech proviso, however, is restricted by the NLRA's prohibitions upon employer's speech and conduct that tends to interfere or coerce employees in the exercise of their Section 7 rights. Accordingly, in considering the legality of employers' statements and conducts during a union campaign, the NLRB and the Courts must balance the employer's right to free speech against the right of employees to self-organization. Examples of employer statements which are protected by the free speech proviso include:

- Advising employees of its opposition to the union;
- Telling employees of the employer's experiences with unions;
- Truthfully advising employees of a particular union's history including its predilection for strikes, the number of unionized plants that have closed, the salaries made by union officers and organizers, and the amounts of dues employees could expect to pay if they vote the union in.
- Truthfully advising employees of their legal rights *vis-à-vis* a union including, for example, how to request the return of an authorization card, so long as the employer makes no promises or threats in connection with how the employee chooses to exercise his legal rights.

B. Designate Management Spokesperson(s) For Written Communications/Mass Meetings.

GENERAL CONSIDERATIONS:

When the union campaign begins it is critical that the Company develops a coherent counter-union strategy. At the outset of any such campaign, the Company must create an effective and believable method to communicate with employees. Depending on the size of the work force a company will designate one or more employees as spokespersons for the company during the campaign. The number of people who will speak for the company will vary depending on the size of the plant and the message

to be conveyed. For example, the plant manager could be the primary spokesperson with respect to the history of the plant, the future of the plant, the profitability of the plant, etc., whereas the employee relations manager might be the primary spokesperson with respect to explaining wages and benefits and how they compare to other plants in the area or to the competition.

C. Developing Overall Campaign Theme.

GENERAL GUIDELINES:

Like a political campaign, a union campaign has a general overall theme that carries the thrust of the employer's message.

1. Sub-theme: Company positives----Examples of positives about Company:
 - Competitive wages and benefits.
 - Job growth.
 - Good management.
 - Open door policy.
 - Employee recognition.

2. Sub-theme: Negative consequences of unionizing. Examples:
 - a. Research union's strike history, etc.
 - b. Get union disclosure forms filed with Department of Labor — shows salaries of union officials and organizers; dues charged.

3. Sub-theme: Responding to specific union propaganda.
 - a. Explain true facts of what union can and cannot do.
 - b. Rebut union lies and misstatements of the law.

D. Guidelines For Campaign Conduct.

OVERVIEW:

While the primary spokespeople will author the majority of written communication and hold mass meetings with groups of employees, the victory takes place in the trenches! It is the supervisors, and managers who work with employees on a daily basis that effectuate a company's success in countering a union campaign. Given the importance of supervisors and managers in the union campaign, it is vital that supervisors and managers properly convey the company's campaign messages to the employees under their supervision on a daily basis.

It is the first level supervisor who will help make the assessment of the validity of the Company's strategy. The company can, however, be held liable for supervisors' campaign statements that violate the NLRB's election campaign rules. Accordingly, it is also important that supervisors be educated in what they can say or do in a union campaign and what they can't.

E. Avoiding Illegal Conduct.

1. In evaluating an employer's statements and conduct during a union campaign, the NLRB determines whether particular statements or conduct constitute a lawful expression of the employer's opposition to the union or whether it crosses the line into intimidating or coercive conduct that unlawfully interferes with employees' right to organize. Illegal campaign statements or conduct generally fall into one of four categories which can be remembered by the acronym "TIPS".

Threats
Interrogation
Promises
Surveillance

1. **(T)**hreats. Cannot threaten employees for engaging in union activities.

GENERAL CONSIDERATIONS:

Employers may not threaten employees in order to intimidate or coerce them with respect to the exercise of their Section 7 rights. The context in which the allegedly threatening statements are made or threatening conduct occurred, the type of action threatened and the overall circumstances will determine whether unlawful conduct occurred. Because employees are economically dependent upon the employer, a statement containing an implied threat must be judged from the employee's point of view and ambiguous statements may be deemed to be coercive because of the context.

a. Examples of illegal threats.

- A supervisor was held to have unlawfully threatened employees by stating that after the election “they were going to weed out all the people that didn’t work”.¹⁰
- A supervisor unlawfully told employees that he was going to have to “do something” about workers who signed union cards.¹¹
- A letter distributed three days before the election predicting loss of employment and adverse consequences if the union were selected was unlawful since the employer could not show that its prediction was based on objective facts.¹²
- Supervisor unlawfully threatened an employee when he told the employer that he would be discharged if he kept talking in favor of the union.¹³
- The employer’s managing officer unlawfully threatened four union activists when he told them he had lost confidence in them and that it would be best for them to quit and find another job since there were many ways and causes that could be found to discharge them.¹⁴
- An employer unlawfully threatened its employee with loss of benefits by continually telling them that disagreements during bargaining were inevitable, that a strike would ensue, and that the plant might be forced to close.¹⁵
- Employers have been found guilty of unfair labor practices by threatening to curtail or otherwise adversely affect existing benefits and privileges such as vacation pay, bonuses, pension, insurance, merchandise discounts, time off for personal business, leaves of absence, and coffee breaks.

¹⁰ *R.L. White Co., Inc.*, 262 NLRB 575 (1982)

¹¹ *J.P. Stevens Co., Inc.*, 163 NLRB 217 (1967)

¹² *Lifesavers, Inc.*, 264 NLRB 1257

¹³ *Colson Corp. v. NLRB*, 347 F.2 128 (8th Cir. 1965)

¹⁴ *NLRB v. East Texas Motor Freight Lines*, 140 F.2d 404 (5th Cir. 1944)

¹⁵ *NLRB v. Riley-Beaird, Inc.*, 681 F.2d 1083 (5th Cir. 1982)

Likewise, threats to reduce an employee's hours or discontinuing overtime or reducing the workforce have been found to be unlawful.

- Employers also have unlawfully threatened employees by telling employees that if the union got in the plant would close or the company would go out of business.

b. Examples of legal threats.

- Employers may lawfully advise employees that they will be discharged for violating a valid no-solicitation/no-distribution rule so long as the employer has not disparately enforced the rule.
- Employers may lawfully threaten to enforce other company rules, and actually enforce the rules, so long as this is consistent with its treatment of similarly-situated employees in the absence of union activity.
- An employer is free to make predictions concerning the effect of unionization on the business and the employees as long as the predictions do not contain a threat of reprisal or promise of a benefit and as long as the prediction of the effects of unionization is based on objective facts. For example, an employer responded lawfully to employee concerns that business contracts would be cancelled if a union came in by stating that the company had to maintain its competitive posture and if it were no longer competitive, its clients could cancel their contracts.
- Employers may lawfully advise employees that bargaining starts from scratch or zero provided that the statements are not made in the context of other coercive comments but are simply designed to simply reflect the realities of collective bargaining. When making "bargaining from scratch" or "bargaining from zero" comments, it is advisable to include a statement that wages and benefits can go up, down, or stay exactly the same as a result of negotiation. Then the "bargaining from scratch" statement is not considered a threat but an accurate description of the bargaining process.

- Likewise, statements concerning the likely adverse effect of the union's coming in to the plant can be lawful if based upon objective facts such as company current benefits and working conditions to the terms contained in union contracts at other facilities of the employer or of the employer's competitors.
2. Interrogate. Cannot interrogate employees about theirs or others' union activities or sympathies.

GENERAL CONSIDERATIONS:

Employers may not interrogate their employees about the employees' union sympathies or the union sympathies and activities of others if the questioning has a tendency to intimidate and thus to interfere with employees' exercise of their Section 7 rights. As with other potentially unlawful conduct, in determining the lawfulness of employer interrogation, the NLRB looks to the type of questioning involved and all the surrounding circumstances to determine whether it is coercive. The following are the types of factors looked at to determine whether interrogation is coercive: (1) The history of the employer's attitude towards its employees; (2) The type of information sought or related; (3) The company rank of the questioner; (4) The place of conversation; (5) Truthfulness of the employees' responses; (6) The manner of the conversation; (7) Whether the employer had a valid purpose for obtaining the information; (8) Whether the purpose was communicated to the employees; (9) Whether the employer assured the employees that no reprisals would be taken if they supported the union. In general, questioning that takes place in the open in a training room or break room or in a social setting, and conducted by a lower-level supervisor, is less likely to be deemed coercive than interrogation that takes place in unusual or extremely formal setting such as being called to the plant manager's office, being questioned behind closed doors, or being summoned to a Board of Directors' meeting.

a. Examples of illegal interrogation.

- Unlawful interrogation occurred when a manager stated, in response to an employee's request to be excused from overtime, that the manager was "stuck between a rock and a hard place because we have a union campaign going on here" and he did not know who was involved. This was found to be coercive because the employee was placed in a position of being forced to offer his knowledge of union

adherence for the privilege of being excused from overtime.¹⁶

- Unlawful interrogation occurred when employees lied in response to questions concerning whether they had attended a union meeting where each employee denied knowledge of attempted union organization although each had signed union cards.¹⁷
- Company president unlawfully asked an employee about whether union organizers had talked to them where the employee answered untruthfully they had not and the inquiry occurred one hour after the sudden discharge of three co-workers under circumstances indicting that the co-workers had been discharged for their union activities.¹⁸
- In a meeting with employees, the company's assistant manager explained the employer's opposition to the union and then required an employee to take a stand either for or against the union in front of other employees.¹⁹
- Employer unlawfully interrogated an employee when the employee was called in to the plant superintendent's office and questioned about his wife's union activities.²⁰
- The Board Chairman asked an employee about his attendance at a union meeting, his knowledge of others who had attended the meeting and then the employee offered to try to point out those who had attended.²¹

b. Examples of legal interrogation.

- A low level manager did not violate the Act by asking an employee why employees wanted the union when the employee brought up the topic of the union. There was no evidence of employer hostility towards

¹⁶ *NLRB v. Pizza Crust Company of Pennsylvania, Inc.*, 862 F.2d 49 (3rd Cir. 1988)

¹⁷ *NLRB v. American Casting Service, Inc.*, 365 F.2 168 (7th Cir. 1966)

¹⁸ *Corrie Corp. of Charleston v. NLRB*, 375 F.2 149 (4th Cir. 1967)

¹⁹ *Hechts, Inc.*, 273 NLRB 202 (1984)

²⁰ *NLRB v. Standard Container Co.*, 428 F.2d 793 (5th Cir. 1970)

²¹ *NLRB v. McCann Steel Company*, 448 F.2d 277 (6th Cir. 1971)

the union and the manager was simply carrying on a sociable conversation about the union in response to statements made by the employee.²²

- A supervisor lawfully asked a pro-union employee why he thought employees needed union representation. Then when the employee told him why employees needed the union, the supervisor responded that union representation did not insure that employees would obtain everything they sought and that, in bargaining, one had to negotiate for everything.²³
- Employer did not unlawfully interrogate an employee by asking the names of employees who were harassing her about the union when the employee initiated the conversation and volunteered information that co-workers were harassing her about the union. In this context the questioning was the same type of investigation the employer would undertake in any disciplinary matter whether it related to union activity or not.²⁴
- An employer's interrogation of an open and active union supporter concerning the reasons employees felt they needed the union was not unlawful where the employee was most senior union adherent and in the best position to explain why the employees felt the need for the union and the discussion was an honest exchange of views without threats, promises, or other coercive conduct on the part of the employer.²⁵

c. Interrogating employees about rule violations or in preparation for an NLRB hearing.

GENERAL CONSIDERATIONS:

Employers may lawfully interrogate employees who may be witnesses to alleged violations of company rules, including no-solicitation/no-distribution rules. The employer may also lawfully interrogate employees who may be witnesses in an unfair labor practice case or a union election hearing. In

²² *Lord & Taylor v. NLRB*, 703 F.2d 163 (5th Cir. 1983)

²³ *UARCO, Inc.*, 286 NLRB 55 (1987)

²⁴ *Bates Nitewear Co.*, 283 NLRB 1128 (1987)

²⁵ *McDonald Land & Min.*, 301 NLRB 463 (1991)

such cases, however, it is important that the employer follow certain guidelines required by the NLRB including:

- i. Telling the employees the purpose of the questioning;
 - ii. Assuring the employees that no retaliation will take place;
 - iii. The employees' participation must be voluntary;
 - iv. The questioning cannot be coercive;
 - v. The questions must be relevant to the issues in the hearing or rule violation being investigated;
 - vi. Employees must be assured that the employer is not seeking to discover his union sympathies or those of others (unless specifically relevant to the matter being investigated).²⁶
3. **(P)romises.** Cannot promise benefits or other economic rewards, or to remedy specific grievances in exchange for employees not supporting union.

GENERAL CONSIDERATIONS:

It is unlawful for an employer to implicitly or explicitly promise to correct grievances during a union campaign where the circumstances suggest grievances would be remedied following a defeat of the union. Again, however, it is not a *per se* violation of the NLRA for an employer to solicit an employee's grievances during a union campaign. The legality of the grievance solicitation will depend on a number of factors including:

1. The purpose of the solicitation;
 2. The employer's past practice with respect to soliciting grievances; and
 3. Whether the promise is made in response to the union campaign or whether the benefit being promised was under consideration prior to the onset of the union.
- a. Examples of illegal promises.

²⁶ *Johnnies Poultry* statements should be utilized when this type of questioning occurs. Seek legal advice to prepare forms that comply with the guidelines and are tailored to purpose of interrogation.

- Management told employees that the company would “give them more than the union” and promised employees that once “we get past this thing, we can move on to something bigger and better”.²⁷
- Supervisor unlawfully promised a wage increase if employees took off their union insignia.²⁸
- Supervisor promised employees that they would get their requested shift changes if they stopped wearing union insignia.²⁹
- In a pre-election speech and letter, the employer promised employees that it would correct wage inequities very quickly after “the union matter was settled” and also told employees that if the union came in and wages rose appreciably, the employer would have to retrench.³⁰
- A foreman told three employees on the execution of the election, that if they voted against the union they would get wage increases and would be given Saturdays off.³¹

b. Examples of legal promises.

- Employers with a past practice of soliciting grievances may continue to do so during a union campaign.
- Employers lawfully told employees that the employer was “working on” a raise in reply to an employee question concerning the status of wage increases.³²
- Employer lawfully told employees that it was studying various dental plans and had not yet decided which one to implement. This was lawful as the employer had been considering several dental plans for six months and promised nothing that had not been promised before.³³

²⁷ *Swift Produce, Inc.*, 203 NLRB 360 (1973)

²⁸ *Murray Ohio Manufacturing Company*, 128 NLRB (1960)

²⁹ *NLRB v. Styletek, Division of Pandel-Bradford, Inc.*, 520 F.2d 275 (1st Cir. 1975)

³⁰ *Wausau Steel Corp.*, 160 NLRB (1966)

³¹ *Cadillac Inc.*, 169 NLRB 315 (1968)

³² *Beverly Enterprises, Inc. v. NLRB*, 139 F.3r 135 (2nd Cir. 1998)

³³ *Cartridge Actuated Devices*, 282 NLRB 426 (1986)

- Employers may lawfully refer to existing benefits or promise changes in wages and benefits that were in place or under consideration prior to the onset of the union campaign.
 - An employer did not illegally promise to cut back work hours even though the promise closely followed the receipt of the union's election petition because the employer was able to show that the change had been under consideration for some time and was derived from legitimate business considerations.³⁴
 - Employer lawfully announced a wage increase two days before a representation election as the timing of the announcement was consistent with the employer's past practice.³⁵
 - Employer lawfully announced a grant of a Thanksgiving Day cash bonus and a stock option plan that had been formulated and approved before the start of the union activity and had already been given to employees at other facilities.³⁶
4. **(S)**urveillance. (Spying). Cannot engage in surveillance (spying) upon employees' union activities.

GENERAL CONSIDERATIONS:

Like the other potentially unlawful activities, employers' surveillance of employee activities may be either lawful or unlawful depending upon the surrounding circumstances. Whether unlawfully coercive surveillance has occurred depends upon a number of factors such as the purpose of the surveillance, its location, the identity of the observers engaged in the surveillance, and the method of surveillance. Moreover, in addition to unlawfully engaging in surveillance of its employees' union activities employers may be found to have unlawfully created the impression of surveillance even when they may not have actively engaged in surveillance.

a. Examples of illegal surveillance.

- An employer engaged in unlawful surveillance where it hired security guards during the union campaign

³⁴ *Fluorocarbon Company*, 168 NLRB 627 (1967)

³⁵ *Arrow Elastic Corporation*, 230 NLRB 110 (1977)

³⁶ *Cardivan Company*, 271 NLRB (1984)

who constantly observed the employees handbilling, plus the employer specifically identified the union activists to the guards for specific observation.³⁷

- Employer created unlawful impression of surveillance where a management official moved his vehicle closer to where an employee was engaged in leafleting and spoke on his car phone until the employee left.³⁸
- Employer created unlawful impression of surveillance when the employer told an employee that he could lose his job because of his union activities.³⁹
- A foreman told employees that he was aware that 35 people had attended a union meeting the night before.⁴⁰
- A radio station general manager stated that he knew that a certain employee was the leader in union organizational activity. That he did not want the union in his radio station and would do “anything to keep it out”.⁴¹
- Also, while an employer may legally observe handbilling activities that take place openly, the employer may not engage in activities designed to intimidate the handbilling employees such as ostentatiously taking notes while watching the employees or training a video camera on the handbilling employees.⁴²
- Company unlawfully engaged in surveillance of employees’ activities when three company officers appeared in the lobby of a hotel nine miles from the employer’s plant at the time the company’s employees were attending a union meeting there.⁴³
- A company personnel director engaged in unlawful surveillance when he sat in a parked automobile across from a poolroom where a union meeting was

³⁷ *Bardcor Corp.*, 270 NLRB 1083 (1984)

³⁸ *Eddyleon Chocolate Co.*, 301 NLRB 887 (1991)

³⁹ *NLRB v. Grand Canyon Min. Co.*, 116 F.3d 1039 (4th Cir. 1997)

⁴⁰ *Precision Products & Controls, Inc.*, 160 NLRB 1119 (1966)

⁴¹ *Capitol Broadcasting Corp. v. NLRB*, 479 F.2d 329 (6th Cir. 1973)

⁴² *Crown Cork & Seal Company*, 254 NLRB 1340 (1981) and *Tipton Electric Co.*, 242 NLRB 202 (1979)

⁴³ *NLRB v. Vermont Am. Furniture Corp.*, 182 F.2 842 (2nd Cir. 1950)

being held and remained there for more than an hour.⁴⁴

b. Examples of legal surveillance.

- An employer lawfully made statements concerning its knowledge of the time and location of union meetings where the information was common knowledge.⁴⁵
- Supervisor lawfully indicated his knowledge of an employee's participation in a union rally when the rally took place at a gate to the employer's premises which was commonly used by supervisors.⁴⁶
- Employer lawfully conducted surveillance of employees who were violating company rules.⁴⁷
- Employer lawfully commented upon its knowledge of union activities where the activities were common knowledge and openly displayed.⁴⁸
- Supervisor lawfully stationed himself in front of an employer's facility to watch union organizers solicit employees since the employees conducted their activities openly on company property.⁴⁹
- Unlawful surveillance did not occur where a supervisor remained seated in a lunchroom while employees began a discussion about the union since the lunchroom was commonly used by supervisors and the supervisor did not intend to intimidate the employees with his observations.⁵⁰

⁴⁴ *Fountain Converting Works, Inc.*, 77 NLRB 1386 (1948)

⁴⁵ *Chelsea Clock Company*, 167 NLRB 640 (1967)

⁴⁶ *Swan Coal Company*, 272 NLRB 862 (1984)

⁴⁷ *NLRB v. Montgomery Ward & Company*, 157 F.2d 486 (8th Cir. 1946)

⁴⁸ *Precision Products & Controls, Inc.*, 160 NLRB 1119 (1966); *Owens-Illinois*, 265 NLRB 931 (1982)

⁴⁹ *Emenee Accessories, Inc.*, 270 NLRB 1344 (1983)

⁵⁰ *Rosewood Manufacturing Co.*, 269 NLRB 782 (1984)