



Union Organization Process

This Note provides a general overview of the union organizational process under the National Labor Relations Act (NLRA). It does not address relevant state or local law. To a large extent the NLRA preempts state law with regard to employer-union relations, but the information contained in this resource will be useful and relevant to employers in every state. Applicable state-specific surveys will be available to provide state-specific guidance in the near future. This Note also does not address the Railway Labor Act which covers employer-union relations in certain transportation industries.

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This Note outlines the union organization process under the National Labor Relations Act, 29 USC § 151-169 (2000) (NLRA). Specifically it describes the causes and early signs of unionizing activity, as well as the process and rules for employers and employees both when a union seeks recognition and in any resulting election.

WHY EMPLOYEES UNIONIZE

Employees unionize for a variety of reasons. The following are some of the most common reasons employees consider unionization:

- Dissatisfaction with current wages and benefits.
- Dismay with treatment by management, particularly first line supervisors.
- A perception that supervisors are playing favorites.
- A perception that supervisors are not listening to them.
- A perception that they are powerless within their organizations.

To avoid unionization of their workforce, employers must be aware of these issues, monitor their workforce for signs of problems and take immediate action to improve employee relations before a union organizes their employees (see *Boxes, Early Signs of Union Organization* and *Employer Best Practices*).

SEEKING UNION RECOGNITION

The NLRA gives employees the right to bargain collectively with their employer, and to choose a union as their

exclusive bargaining representative (see *Practice Note, Labor Law Overview: National Labor Relations Act* (www.practicallaw.com/6-500-9554)). Even if presented with evidence suggesting that a majority of employees desire to be represented by a union, an employer will often decline to recognize the union and requires the union to go through the NLRA's secret ballot election process. This requires the union to demonstrate its right to an election.

Demonstrating Right to Election

A union is entitled to an election if at least 30% of the employees in an appropriate bargaining unit express their desire to be represented by the union. This desire is usually expressed through "authorization cards" (authorizing a union to negotiate employment terms and conditions on their behalf) signed and dated by the employees. Alternatively, it may be expressed through a written petition. An appropriate bargaining unit does not have to be the most appropriate unit, it need only be an appropriate unit, that is, a group of employees that share a similar community of interests (for example, substantial mutual interest in the terms and conditions of employment) (see *Practice Note, Labor Law: Overview: Triggering the Election* (www.practicallaw.com/6-500-9554)).

The National Labor Relations Board (NLRB) is the government agency charged with enforcing the NLRA, which includes overseeing the election process (see *Practice Note, Labor Law: Overview: National Labor Relations Board* (www.practicallaw.com/6-500-9554)). A union that has the requisite number of authorization cards presents these cards to a Regional Office of the NLRB, along with a representation petition which identifies the union, the employer and the unit of employees it seeks to represent.



EARLY SIGNS OF UNION ORGANIZATION

Signs that employees are considering unionization include:

- Employees acting secretly.
- Employees talking amongst themselves in small groups and shying away from supervisors.
- Any sudden coolness to supervisors by normally friendly employees.
- Incidents of insubordination from normally well-behaved employees.
- Union literature in the workplace.
- Employees gathering together who have never associated in the past.
- Complaints made by groups instead of individuals.
- Strangers on the premises.
- Hostile management rhetoric.
- Increased interest in company policies.
- Argumentative questions at meetings.
- Sudden increase in questions regarding wages and benefits.
- Increase in employees requesting to see their employee file.
- Questions regarding the company's view of unions.
- Sudden use of labor terminology, such as grievance or labor practice.
- Employees gathering in the parking lot, restrooms or other private areas.
- Complaints about fairness and terms and conditions of employment.

The employer may either contest the petition and the holding of an election, or agree to the holding of an election. Typically, an employer contests the election if it disagrees that the union has identified an appropriate bargaining unit

with a sufficient demonstration of interest by employees. The employer often argues that a larger unit is an appropriate bargaining unit (and not the smaller unit advocated by the union) in hopes that the union has not obtained and cannot obtain enough signatures (30% of the larger unit) to get an election. Conversely, an employer may argue that a smaller unit is appropriate to reduce the impact of a successful union campaign. If the size of the bargaining unit and other issues (time, place and date of the election) are not in dispute, the parties can agree to the election.

Uncontested Elections

There are two types of uncontested elections:

- Consent election.
- Stipulated election.

In both, the parties agree to waive the pre-election hearing to resolve disputes about whether the union is entitled to an election. In a consent election, however, questions that arise from the election proceedings (including objections to the election) are decided by the Regional Director and are final. In a stipulated election, such questions are reviewable by the NLRB.

Contested Elections

If the petition is disputed, the issue is resolved by the parties' presentation of evidence at a representation hearing, usually conducted at the NLRB Regional Office where the petition is pending. The hearing includes questioning of witnesses and presentation of documents. For example, the employer may have supervisors or other management personnel testify about the shared interests among the larger group of employees that the employer advocates as an appropriate bargaining unit. Among other things, job descriptions, personnel policies and payroll records may also be presented in support of this position. Parties to the hearing may submit briefs following the hearing. The petition is then either dismissed or an election scheduled.

If the union establishes it has sufficient support from the employees in an appropriate bargaining unit, the Regional Director of the NLRB directs an election. The NLRB Regional Director usually provides a written decision within 45 days (generally, however, the NLRB does not direct an election if there are pending unfair labor practice charges that affect the bargaining unit (see *Practice Note, Labor Law: Overview: Unfair Labor Practices* (www.practicallaw.com/6-500-9554))).



The election is typically set for within 30 days of the date of the direction of an election. The date, place and time frame of the election are usually agreed on, although these matters can be directed if agreement is not reached.

The employer must provide the NLRB with an Excelsior List within seven days of the NLRB's direction of the election, and at least ten days before the election. This list provides the name and address of all employees in the proposed bargaining unit. The NLRB gives the list to the union so that the union may directly contact the employees. The NLRB also uses this list to conduct the election. The employer is required to post an official notice of election several days before the election date.

THE ELECTION CAMPAIGN

An organizing campaign is very similar to a political election. Each party attempts to persuade the employees how they should vote at the election. Campaign speeches and materials are common. Union organizers conduct meetings away from the employer's premises, but sometimes attempt to talk with employees while at work. Pro-union employees also attempt to persuade their co-workers while at work.

Restrictions on Union Campaigning

Employers may prohibit non-employee union organizers from coming on their premises, provided that they do not discriminate against union organizers in comparison to other types of non-employee solicitations. In other words, if the employer allows various forms of solicitation on its premises by third parties, it is more difficult for the employer to lawfully prohibit union organizers from campaigning on company property.

It is more difficult for employers to restrict the organizing activity of its pro-union employees. An employer can prohibit employees from soliciting their co-workers during working time (of both the employee being solicited and the employee doing the soliciting). Similarly, an employer can limit the distribution of literature to non-working time and then only in non-work areas such as break rooms (special rules apply to health care institutions such as hospitals, which can prohibit solicitation and distribution in patient care areas). An employer should have a solicitation and distribution policy in place, communicating these restrictions.

Campaign Rhetoric

An employer's campaign can take various forms. Employers often tell employees that they do not need an outsider to represent them and point to the competitive wages

EMPLOYER BEST PRACTICES

Employers should adhere to the following best practices:

- Do not take employees for granted.
- Monitor employees' job satisfaction, so that any problems can be observed ahead of time and action can be taken to resolve employee concerns.
- Train supervisors to treat employees fairly and without favorites.
- Train supervisors in the warning signs of union interest.
- Provide competitive wages and benefits to employees.
- Ensure a safe working environment.
- Ensure there is a process for employees to speak their mind without fear of reprisal.
- During a campaign, follow these no TIPS rules:
 - no Threats;
 - no Interrogations;
 - no Promises; and
 - no Spying.

Violation of the no TIPS rules during an organizational campaign results in the setting aside of an election won by the employer.

and benefits that the employees already receive. Unions commonly try to depict the employer as unfair (for example, not paying top wages or providing the best benefits, pointing to other employers who are unionized and paying more with better benefits). Unions also often claim that supervision or management is unfair and plays favorites.

An employer should, before a union organizing effort is even suspected, strive to pay competitive wages, provide competitive benefits and monitor the workforce and its employment practices to ensure that all employees are treated fairly. Open door policies designed to allow employees to vent and express their grievances also help alleviate employee concerns that sometimes lead to unionization.



Delivering the Campaign Message

Materials used to deliver the campaign messages vary. Union supporters typically wear buttons and promote examples of improved wages and benefits they have negotiated for employees of other companies. Unions also use technology (videos, cell phone campaigns and so on) to influence employees.

Employers typically pass out pamphlets and other materials, explaining the cost of unionization to employees both monetarily (initiation fees and dues) and in terms of their own negotiating freedom. Because the employer has more ready control and access to its employees, and therefore can give speeches to a captive audience at will, the NLRB has developed a rule prohibiting employers from holding mass group meetings with employees on the employer's time and premises during the 24 hours before an election. Campaigning of individual employees is permitted, however, during these last 24 hours.

THE ELECTION

The actual election is conducted by NLRB agents. The election site, or polling place, is usually in an office or room at the employer's premises, separated from any other activity. This provides the employees easy access to the site. In some cases, mail-in ballots are used. The election area typically consists of:

- A check-in table where the NLRB agent and observers sit to check the names of intending voters against the Excelsior List.
- One or more voting booths surrounded by drapes or other covering so that no one can see how any employee votes.
- A ballot box in which voters place the marked ballots.

The union and the employer may each be represented by an equal number of observers who monitor the election process and challenge the right of any voter they do not believe to be eligible to vote. Observers should be employees of the employer but not supervisors or union officials. Eligibility to vote is often a highly-contested issue, including the ineligibility of supervisors. A pre-election conference is also conducted during which last-minute changes to the Excelsior List are discussed, as well as the basic election protocols and logistics.

The NLRB requires that elections be conducted under "laboratory conditions", or conditions that, as closely as possible, offer the opportunity for employees to reveal their uninhibited preference. Employees vote by secret ballot in

a voting booth. Employees vote either yes for the union or no against the union (and for the employer). If a voter's eligibility is challenged by an observer or the NLRB agent, the voter can still vote using a challenged ballot. In that case, the ballot is placed in a challenged ballot envelope which identifies the voter, the challenger and the stated reason for the challenge, and the envelope is then sealed and placed in the ballot box. The envelope will be opened only if it may be determinative of the outcome and the NLRB rules after investigation and/or hearing that it was proper for that employee to vote. Electioneering (to actively campaign for a party) is not allowed at or near the polling place during election hours.

Typically, the NLRB agent removes and counts the ballots at the voting area immediately after the close of voting, unless there is more than one voting place (for example, an election involving several employer locations). In this case, the ballot boxes are sealed and taken to a central location (usually the NLRB regional office conducting the election) to be opened.

A tie vote goes to the employer. This means the union must get "yes" votes from the majority of employees voting. That is, the union must get half of the employees voting plus one more voter to vote yes to win. Even more importantly, because elections are determined by the employees who actually vote, if a small number of eligible voters vote, they will be making the decision for all the employees in the proposed bargaining unit. For example, if the proposed bargaining unit has 100 employees, but only 40 vote, and 21 vote yes for the union, those 21 employees have determined that all 100 employees will be represented by the union. Because of this, employers should strongly encourage employees to vote during the campaign.

POST-ELECTION ISSUES

A losing party has the right to contest the election by objecting to conduct allegedly affecting the results of the election (for example, the winning party's behavior) or the conduct of the election (for example, alleged departures from polling standards that influence voters). A losing union may claim that the employer violated Section 7 of NLRA (which prohibits interference with employees' rights to join or not join a union) by threatening, interrogating or spying on employees during the campaign, or that the employer otherwise engaged in improper campaign tactics such as violating the 24-hour rule. Likewise, a losing employer may claim that the union unlawfully threatened or coerced employees.



If objections are made, the NLRB Regional Office investigates and/or holds a hearing. The Regional Director makes the final determination in a consent election or a recommendation to the NLRB in a stipulated election. The Regional Director and/or NLRB sets aside the results of the election if it determines that the winning party engaged in unfair labor practices or in other improper conduct destroying the "laboratory conditions" for an election.

If the election is set aside, a new election (also called a re-run election) is conducted. If an election won by the union is not contested (or if contested not set aside), the

union is certified as the exclusive bargaining representative of the bargaining unit. There is no direct court review of this certification. However, disputed issues arising in representation proceedings (for example, appropriateness of bargaining unit or certification of the union) may be brought before a federal appeals court in connection with a later ruling by the NLRB that the employer committed an unfair labor practice by refusing to bargain with the union. If an election won by the employer is not contested (or if contested but not set aside), the union is not certified and is barred from having another election for one year.