



# POSITIVE EMPLOYEE RELATIONS: REMAINING UNION FREE

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## A MANAGEMENT GUIDE

- *Steps To Take Now To Prepare*
- **How To React When The Union Comes Knocking**

*PRESENTED BY:*

Richard A. Russo  
rarusso@dcamplaw.com

**DAVIS & CAMPBELL L.L.C.**  
401 Main Street, Suite 1600  
Peoria, Illinois 61602  
309-673-1681  
www.dcamplaw.com

## INTRODUCTION

Pushed for years by organized labor, the “Employee Free Choice Act” (“EFCA”) passed the U.S. House of Representatives in 2007. The Act was stalled in the Senate by procedural rules. However, EFCA was reintroduced in the House (H.R. 1405) and Senate (S. 560) in March of 2009. President Obama has stated that EFCA is high on his agenda for passage and has publicly announced his support for the Act. Given the Democratic control of Congress and the White House, it is a probability that the Act will be passed in some form.

If enacted, EFCA will dramatically ease the process by which unions enter into a private workplace, and will replace the traditional labor contract bargaining process with imposition of contract terms by an arbitrator.

To minimize the effects of EFCA, employers must do two things. First, they must exercise whatever political muscle is available to attempt to influence their Congressional representatives to modify EFCA from its present form to eliminate some of the ill-conceived provisions which will be of tremendous damage to private industry. Secondly, employers must prepare NOW to combat the ease by which unions will be permitted to organize employees and obtain “certification” as a bargaining representative.

## I. UNION RECOGNITION PROCEDURES

### A. Current Law -- Employers Can Force Secret Ballot Elections

Under the current language of the National Labor Relations Act, the process by which unions are certified as bargaining representatives allows for full discussion of workplace issues, a period of time for both sides to “campaign,” and a secret ballot election to determine the actual desires of employees. The steps are as follows:

1. The union obtains employee signatures on “union authorization” cards. Once a union obtains authorization cards for at least 30% of the employees in the group it wishes to represent, it can file those cards with the NLRB and request that a secret ballot election be held. Typically, the union will wait to file until it has more than 50% of the employees signed to authorization cards. (If the union has more than 50%, it can present the cards to an employer and request that the employer voluntarily recognize the union -- but the employer has the right to decline and force a secret ballot election.)
2. Once the cards are filed with the NLRB, the NLRB notifies the employer of the filing. A secret ballot election is typically scheduled 21-42 days after the date the cards are filed.
3. During the period of time before the election, the employer has the right to discuss the issues with the employees, correct any misinformation which may have been given by the union, educate employees as to the risks of unionization, educate employees as to why it is more beneficial for them to remain non-union, etc. The law allows an employer to fully communicate with the employees regarding the issue, as long it does so without threats or promises of benefits.
4. On the election date, the employees vote by secret ballot. They do not sign their names to the ballot. Employees can vote “against” the union even if they signed a union authorization card. Voting in secret is a time-honored American political process, and is a balance against the employee having signed the authorization card either because of peer pressure, or because of not having fully understood all of the issues or facts at the time.

5. The union needs to have received the votes of the majority of voters (50% plus one) to win.

**B. Law Under EFCA -- Card Checks Only; No Secret Ballot Elections**

Under EFCA, this process will be dramatically altered. No longer will there be time for employers to discuss issues with employees before an election. No longer will there be an election. Rather, upon receipt of more than 50% of the authorization cards, a union will be able to present the cards to the NLRB. After minimal investigation (with minimal employer input) to determine the validity of the cards, the NLRB will certify the union as representative and order the employer to begin bargaining. This means:

1. A union can operate “under the radar” and obtain certification without the employer even knowing an organization drive is under way.
2. Employers will be unable to respond to the organization drive with information as to the possible effects of unionization, impact on the business, impact on personal lives, etc.
3. Employees who may have signed cards as the result of peer pressure will be unable to vote their true desires anonymously.

**II. INCREASE IN POTENTIAL RISK FOR EMPLOYERS OPPOSING ORGANIZING DRIVES OR NEGOTIATING FIRST UNION CONTRACTS**

**A. Current Law -- Backpay & Reinstatement**

The National Labor Relations Act currently provides the NLRB with the discretion to seek an injunction in response to charges of unfair labor practices engaged in by employers during an organizing drive or contract negotiations. If an employer is ultimately found to have engaged in an unfair labor practice resulting in the loss of

income for an employee, the NLRB is authorized to award back pay and reinstatement as the sole remedy for that employee.

**B. Law Under EFCA -- Injunctions, Treble Damages, & Civil Penalties**

EFCA requires the NLRB to always seek injunctive relief for certain alleged conduct and provides a potential windfall for employees by allowing awards of treble damages and civil penalties. At the same time, EFCA does not increase the penalties that unions face for engaging in unfair labor practices.

1. Mandatory Injunctive Relief -- Requires the NLRB to seek an injunction from a federal court whenever there is reasonable cause to believe that an employer has discharged or discriminated against employees, threatened to do so, or engaged in conduct that significantly interferes with employee rights during an organization campaign or first contract negotiations. The NLRB loses its discretionary authority to determine which matters merit court involvement.
2. Civil Penalties and Treble Damages -- Subjects employers to a civil penalty of up to \$20,000 per violation for willfully or repeatedly violating employees' rights during an organizing campaign or first labor contract negotiations. Additionally requires the NLRB, when awarding back pay to an employee, to also award the employee with liquidated damages equaling twice the back pay amount.

**III. BARGAINING FOLLOWING UNION CERTIFICATION**

**A. Current Law -- Economic Freedom for Parties to Negotiate Contracts**

Under the current language of the National Labor Relations Act, negotiations for an initial labor contract following unionization require the parties to "bargain in good faith." The union is "certified" as the exclusive representative for at least a full year, and during that time the employer cannot unilaterally make any changes affecting the

wages, hours, or terms or conditions of employment without giving the union notice and the opportunity to negotiate over them. The certification guarantees the union the exclusive right to represent and negotiate on behalf of the employees without fear of being voted out by the employees or replaced by another union within that first year. However, the current law does not require that negotiations be completed within a certain time, and does not require the parties to ever agree on a contract.

The collective bargaining process is designed to be a balancing of power amongst management, labor, and the free economic market. Employers and unions are not compelled to agree to a proposal or to make a concession. At all times during the bargaining process, employers and unions retain the right to utilize economic weapons (e.g. strikes or lock outs) in an effort to persuade the other side to modify its positions. If a union strikes, the employer can potentially counterbalance the strike by hiring permanent replacements to continue operations. It is always the fundamental principle of a voluntary agreement between the parties that drives and governs the bargaining process. Bottom line -- taking into account their respective positions and overall economic environment, the parties alone decide the terms of any labor contract without interference by the government or any other third party.

## **B. Law Under EFCA -- Authority for Government to Impose Terms of Contract Via Binding Interest Arbitration**

### **1. EFCA's First Labor Contract Mandate**

Under EFCA, the economic freedom to negotiate mutually agreeable wages, benefits, and terms of employment will be eliminated. Instead, EFCA requires employers to enter into a first labor contract by mandating third-party arbitration to impose contract terms on the parties if there is no agreement. This is a radical departure from existing law. EFCA's bargaining requirements are as follows:

- a. Bargaining must commence within 10 days after a written request from a newly organized or certified union.
- b. If the parties do not reach an agreement within 90 days after the commencement of bargaining, either party may request that the Federal Mediation and Conciliation Service ("FMCS") act as a mediator for the negotiations.
- c. If the parties have not reached an agreement within 30 days after the mediation request to the FMCS, the matter shall be referred to an arbitration panel, which will decide the terms and impose a binding 2-year contract on the parties.

### **2. Problems with EFCA's Bargaining Requirements**

- a. Compressed Negotiations -- The parties face an unrealistic 120-day time frame to resolve all outstanding first contract issues. In a typical bargaining environment this is an inadequate amount of time for parties to engage in good faith negotiations concerning all of the items that must be covered in a first labor contract.
- b. Invites Posturing by Parties -- Due to the fact that arbitrators may impose contract terms upon them after just four months of bargaining, the parties have an incentive to "protect their positions" and maintain as much of their bargaining position as possible. Additionally, the parties may be less likely to explain

their respective positions to the other in an effort to achieve mutual understanding, instead focusing on being able to convince the arbitrators that their respective positions are the better proposals.

- c. Imposition of Contract Terms by Unfamiliar Third Party -- Binding contracts will not result from employers and unions reaching a mutually acceptable contract. Instead, both sides will be bound by the decision of arbitrators under a flawed arbitration process that allows the arbitrators, not the parties, to decide what weight to put on factors like the financial condition of the employer and the compensation levels of competitors. Moreover, the decision is binding on the parties for two years.
- d. Uncertain Arbitration Process -- EFCA does not specify how the arbitration panels will be set up. Rather, it allows the FMCS to establish arbitration rules and procedures with no statutory guidance. For instance, there is no indication as to how long the process may take, how decisions are rendered (i.e., whether arbitrators must pick the proposal of one party or whether arbitrators can “split the baby”), the factors to be considered (e.g. external/internal comparables, employer’s financial condition, and consumer price index) and whether unions retain the right to strike before or during the arbitration process. There is also no indication that the arbitrators’ decision may be subject to review by the NLRB or a court.
- e. Employees Stuck with an Unwanted Union -- Currently, once a labor contract is reached by mutual agreement, a decertification election may not be held while the contract is in place, for up to three years. Under EFCA, it is unclear whether the “imposed” contract will bar decertification petitions during the two-year period.

### **3. Illinois Interest Arbitration Model**

As discussed, EFCA does not describe the process for binding interest arbitration, leaving it to the FMCS to determine how an arbitration panel will be chosen, what sort of evidence will be considered, and the decision-making process. One

possible model would be the process used in the State of Illinois to resolve bargaining impasses involving public security employees, fire fighters, and paramedics employed by state and local government. The Illinois model is fairly typical of interest arbitration.

The interest arbitration is conducted by a panel of three arbitrators -- one chosen by the public employer, one chosen by the union, and one neutral arbitrator chosen by both parties. The neutral arbitrator serves as the chairman for the arbitration hearing. The arbitration panel may administer oaths and require the attendance of witnesses as well as require the production of books, papers, contracts, and other evidence. The expense of the arbitration proceedings, including a fee for the chairman, must be paid in equal shares by the parties.

The arbitration panel must provide its written findings and decision within 30 days after the conclusion of the hearing. As to each economic issue, the arbitration panel must adopt the last offer made by either the public employer or union which more nearly complies with certain specified factors. There is no "splitting the baby" or compromise option for the arbitration panel. The panel must choose the last offer of one of the parties on each issue. This has the effect of making each party's last offer more reasonable for fear that the arbitration panel will select the other side's last offer.

The factors considered by the arbitration panel are:

- a. Lawful authority of the employer;
- b. Stipulations of the parties;

- c. Interests and welfare of the public and the financial ability of the unit of government to meet those costs;
- d. Comparison of the wages, hours, and conditions of employment in public and private employment in comparable communities;
- e. Average consumer prices for goods and services, commonly known as the cost of living;
- f. Overall compensation presently received by the employees;
- g. Changes of any of the foregoing circumstances during the pendency of the arbitration proceedings; and
- h. Any other factors which are normally or traditionally taken into consideration in the determination of wages, hours, and conditions of employment.

Will this be the process under EFCA? No one knows.

#### **4. Fallacious Argument Promoting EFCA Interest Arbitration**

The proponents of EFCA argue that mandatory interest arbitration is needed because employers can hinder employee free choice (to unionize) by dragging out bargaining beyond the one year “certification” period, which leaves the union vulnerable to decertification proceedings by dissatisfied employees. However, this claim is a fallacy. The National Labor Relations Act expressly requires employers to bargain in good faith with unions, and makes it an unfair labor practice for employers to stall or otherwise engage in actions designed to subvert the good faith bargaining process. The remedies ordered by the NLRB for bad faith bargaining include an extension of the certification year if the employer fails to negotiate in good faith. Moreover, the filing of an unfair labor practice charge with the NLRB against an

employer for bad faith bargaining blocks the processing of a decertification effort until there has been a full investigation and resolution of the charge.

#### IV. HOW TO PREPARE FOR EFCA

##### A. Understand Why Employees Organize

Employees join unions because they *feel they need to*. Rightly or wrongly, employees may feel they need to join a union for a variety of reasons. Whether the reasons are accurate or not, if the employees feel that a union is necessary, there is a problem. Many of the problems can be addressed by the employer ahead of time, and can avoid employees turning to a third party for “help.” Listed below are some of the most common reasons employees organize into unions. Understanding these, performing a frank self-audit, and correcting any problems when you can will go a long way towards making sure your employees do not feel the need to sign a union authorization card.

##### **1. Lack of information about the status of the Employer, its goals, and the results achieved.**

Employees want to feel that they are important to the Company and that management will tell them the information that affects their jobs and their futures.

##### **2. Favoritism or discriminatory treatment of employees/front line supervisors.**

When management makes exceptions for certain employees or groups of employees (whether positive or negative), it tends to raise questions regarding

whether management can be trusted to treat all employees fairly. Front line supervisors can dramatically impact how an employee perceives the Company.

### **3. Poor or substandard working conditions.**

One of the oldest and most consistent issues that has motivated employees to organize has been unsafe working conditions. However, it is usually not the actual working conditions that cause union organization, but the feeling that management is not interested in addressing this issue.

### **4. Unfair seniority and lay-off procedures.**

Although the thought of being laid off is threatening to all employees, if a layoff is administered on a fair and predictable basis, and proper communications are utilized, any threat or anxiety to the majority of employees will be reduced significantly.

### **5. Below par wages and fringe benefits.**

Wages and benefits have always been a source of dissatisfaction with employees. Unions have generally used this issue as a primary rationale for joining a union. Management must always review its wage rates and benefit levels to determine if they are comparable to similar type employees.

### **6. Fear of arbitrary discharge.**

This issue is one of the strongest arguments to employees for union organization. However, if a discharge is based on a well-established reason, documented with facts, and is administered fairly and equitably, employees will not organize against it in protest. On the other hand, if employees perceive that management's actions have been arbitrary and unpredictable, and they feel they no longer have sufficient control over their job security, they tend to seek unions in order to regain their control and protect themselves.

### **7. Changes made without explanation.**

Employees tend to resist any changes they do not fully understand, and often perceive these changes as a threat to their job security. When changes are made without advance notice and subsequent explanation, it tends to increase feelings of employee insecurity.

**8. Weak or non-existent upward communications.**

This involves management's efforts in gaining "feed-back" or "input" from the workers regarding their concerns, their needs, and their area(s) of dissatisfaction. If supervisors do not meet regularly with their employees, and if the grievance procedure does not work properly, decisions may be made in a vacuum without understanding what employees really want or need. Employees will then seek a union to make management listen to, and act on, their area(s) of dissatisfaction.

**9. Lack of response or action on bona fide employee dissatisfaction.**

When employees do succeed in communicating their concerns or dissatisfactions to management, but they are "played down" or not responded to, employees tend to interpret and infer that management is not concerned about them or their welfare. In order to protect themselves against "uncaring" management, they seek a union.

**B. Conduct Employee Satisfaction Surveys**

If an employer does not have confidence that it has, or can get, its "finger on the pulse" of employee issues and sentiments, there are numerous products and/or vendors that can be used to conduct employee satisfaction surveys. These can be anonymous and the results can be compiled in order to determine if there are real issues that need to be addressed in some fashion.

One downside to conducting surveys of this nature -- which must be balanced against the benefit -- is the fact that once a survey is conducted, employees will want to know the results and will expect some degree of action to address the important issues. "Hiding" the results, or not taking appropriate action with respect to the issues, can often fuel employee discontent and lead some employees to seek a union based upon the perception that the employer really "doesn't care."

### **C. Put Good Supervisors in Place**

Your front-line supervisors and managers are key players in determining your chances of remaining union free. Statistics demonstrate that in most union organization drives, the key issues do not relate to wages or benefits, but rather to “treatment” issues by management. Examples are issues of fair and equal enforcement of rules, favoritism, heavy-handedness, dishonesty, lack of respect for employees, changes without explanation, and failure to respond to requests for information. These types of issues are the ones that drive employees to unions for help. But these are also issues that can be easily solved.

Employers must be sensitive to the relationship between a supervisor and the employees being supervised. A key issue is respect -- does the employee respect the supervisor as someone who is honest? Who is fair? Who demonstrates some concern for issues employees may bring up? Or is the person one who takes the attitude that employees should shut up, do their job, and if they don't like it they can quit? The latter type of supervisor can frequently be the “spark” that leads employees to group together in rebellion and seek union assistance.

Therefore, in addition to having supervisors who know the “nuts and bolts,” it is essential that employers understand the need to put in place supervisors who have the proper personality to be respected leaders. They are the day-to-day “faces” of the business.

Finally, make sure that your supervisors are “true” supervisors under the current state of the law. It is only those individuals who have authority to *hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, discipline, responsibly direct, adjust grievances* (or *who can be shown to have effectively recommended such actions*) who are supervisors exempt from being organized. “Lead persons” are typically not supervisors under the federal labor laws. If there are individuals who you need to be out of any union bargaining unit, but who do not currently fit the definition of supervisor, take steps now to vest them with the required authority.<sup>1</sup>

**D. Make Your “Union Free” Philosophy Part of the Express Company Policies**

No longer can employers avoid talking about unions unless forced to do so. Employers now need to educate employees about the benefits of being union-free, and why it is important for them and for your Company. Include your position on unionization in new employee orientation materials, employee handbooks, and periodic training and information materials and in other routine employee communications.

- Employees must be educated about what a union authorization card is and what it means to sign one.
- Employees must be warned that other employees, or outside organizers, may approach them at work, at home, or at a social function and put pressure on them to sign a card. Educate employees on how to respond to such an approach.

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<sup>1</sup> There is also legislation pending, promoted by organized labor, to make the definition of “supervisor” even more restrictive, thereby putting more individuals into a bargaining unit.

- Employees must be educated that if they sign a union card, they are obligating themselves to be bound to the union's by-laws and constitution, which likely contain many different opportunities for a union to “fine” a member for certain types of conduct not supportive of the union.
- Employees must be told that if there are workplace discussions about unions or card-signing, they are encouraged to discuss the issues with management and hear both sides of any issue.

**E. Install a No-Solicitation/No-Distribution Policy**

In order to prevent wide-scale solicitation for card-signing on company property, or during working hours, employers should have written policies in place which: (1) prohibit solicitation by employees, or of employees, during working time; and (2) prohibit distribution of non-work-related literature at all times in working areas. These types of policies are legally permissible as long as they are uniformly enforced. Problems arise when they are not enforced with respect to other commercial activities (e.g., selling cosmetic products, Tupperware, etc.) but then are attempted to be enforced with respect to union solicitation activities. In that case, the NLRB will find an employer to have engaged in an unfair labor practice.

**F. Provide Training for Supervisors on Common Signs of a Union Organization Drive**

Instruct supervisors to be alert for the following activities, which may be signs that employees are talking about a union, or that card-signing might be occurring.

1. Employees clam up in your presence.
2. Employees meet and talk in out-of-the-way places.

3. Employees who don't normally associate with each other start congregating.
4. Unionized vendors or service people begin to have contact with your people.
5. Employees start leaving the premises for lunch or are absent from customary "social" get-togethers.
6. The "grapevine" shuts down.
7. The nature of employee complaints changes and the frequency increases.
8. Complaints begin being made by a delegation, not single employees.
9. Friendly conversations with employees become unpleasant.
10. Strangers appear on Company premises.
11. Employees avoid being seen with you.
12. Down to earth employees develop "social consciousness" or begin using a strange vocabulary.
13. Good workers begin doing poor work.
14. Poor workers begin doing good work.
15. Respected and popular employees suddenly become unpopular.
16. Employees or strangers show unusual curiosity about Company affairs and policies.
17. Small groups of employees congregate, but break up when a supervisor approaches.
18. A boisterous employee becomes quiet.
19. There is an unusual increase (or decrease) in requests for information.

**G. Provide Training for Supervisors on How to Respond to Employee Questions About Union Issues**

Supervisors must be trained to be able to respond quickly and accurately to employees about the Company's position on union issues, and why it is in the interest of the Company and the employees to remain union-free. Below are some questions that might be posed by an employee to a supervisor or manager, and some appropriate responses.

**1. Organizational Activities**

**a. Are we entitled (allowed) to pass out union materials on Company premises?**

-- Yes, but not during time you are supposed to be working. That is, you can do this only on your own time and not in working areas (as distinguished from locker room and lunch areas).

-- You can't disturb other employees at work, even though you may be on your own time. (Working time is for work.)\*

**b. Can a union supporter rightfully ask us to sign a union card on Company premises?**

-- Yes, but only on your nonworking time and his nonworking time.

**c. Can we have any time off work to discuss this question of having or not having a union?**

-- We can't start a practice of allowing discussions on "unions," politics, or any subject of general interest on working time. If we did, there would be no stopping it, since there will always be some current subject of general interest. We must insist that working time is for work.

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\* This can only be stated if you presently have a rule prohibiting solicitation on working time.

(Note: This “working time is for work” rule must be enforced impartially -- not just against union discussions.)

**d. Would it be possible for you to talk to us at our homes as the union representative is doing?**

-- We would like to sit down with you at home and discuss this very important subject, but the National Labor Relations Board has ruled that an employer cannot do so, even though a union can -- so my answer has to be “no,” I can’t visit you at home to discuss why we don’t need a union.

**2. Threats**

**a. If the union gets in here, will our customers leave us?**

-- It is possible, depending upon what occurs and their wanting to deal with a company saddled with a union. If the cost of providing our services goes up because of wage rates, fringes, and working rules which the union has brought about, and if the customer can obtain its services cheaper somewhere else, or without threats of disruption, then it could legally do so.

**b. If the union gets in this Company, will there be a strike?**

-- A union often attempts to enforce its “promise” of “more” of this and “more” of that by striking.

-- You know the kind of "promises" they make and are making. The Company has to sell its services in competition with other businesses and must watch its costs. If the Company says "no" to promises of the union, there could very well be a strike. Unions have had many, many strikes with loss of earnings and loss of jobs. The law expressly provides that the Company does not have to agree to any union demand. If the union wants to try and “force” its demand, a strike is entirely possible.

**c. If the union wins, will we lose any of our present benefits?**

-- All benefits are negotiable if the union wins. This means they can be left alone, increased, decreased, or eliminated -- it all depends upon the outcome of the bargaining process.

**d. Will the Company fire the union supporters?**

-- No, not because they are union supporters. But this does not give them any special privileges. They are expected to and must abide by all the rules just as any other employee.

**e. Will you fire the union supporters if the union doesn't get in?**

-- No, but they will probably be so discontented because they didn't win, that they will quit.

**f. If the union gets in here, will the bargaining on wages and benefits begin from "scratch"?**

-- All subjects relating to employment will be open for negotiations. What you mean by "scratch," I don't know, but all wages and working conditions as they now exist are negotiable; they can be left alone, added to, reduced, or eliminated, depending upon negotiations.

**3. Promises**

**a. If the union is not successful in getting employees signed up, how will I be better off?**

-- (Must be careful not to promise a benefit for rejecting the union.)

-- Under the law, I can't promise you any benefit for rejecting the union -- even though the union can make all kinds of wild promises to you to get you to accept it.

-- I can tell you this: If you reject it, you will be better off because (1) you will still have your freedom from dictation by the union; (2) you won't be paying dues for the wages and benefits you have and can have without paying the union such tribute; (3) you will be free from the threat of strikes and the loss of income and jobs that go with strikes; and (4) you won't have a plant to work in which there are union people who have an interest in creating trouble, dissension, and grievances in order to justify the union's existence.

-- I think you will be much better off if the union does not get in here.

**b. If the union does not get in, will you set up a better grievance procedure?**

-- (Again, you must be careful not to promise a benefit for rejecting the union.)

-- I cannot promise you any benefit for rejecting the union --even though the union can make all kinds of promises to you to get you to accept it.

-- I can tell you this: Union or no union we will continue to have an open mind as to any employee problems, and if a better grievance procedure is needed, whether the union wins or loses we will, as we have in the past, consider and attack the problem. That has been our practice, and it will continue to be our practice.

**c. Will our benefits improve (or continue to improve) if there is no union?**

-- You know we can't "promise" you anything for rejecting the union. But we can say: Look at our record -- without a union your benefits have increased year by year. We have no intention of changing our policy.

**d. When will we get a wage increase [or some other benefit improvement]?**

-- With this union organization drive going on we can't make any promises of increases or of benefit improvements, or we will violate the law.

-- However, we are allowed to continue business as usual, and any increases or improvements that either have been planned prior to the union drive, or that are to come up in accordance with our usual policy or procedure, will be placed in effect.

**4. Surveillance of or Interrogation of Employees**

**a. Who do you think favors the union?**

-- I don't keep a record of those who I think are for or against the union. Some employees have voluntarily told me one way or another, but I am not publishing a score card, since that is their own business.

**b. Do you want me to go to a union meeting and report back?**

-- It would be unlawful for me to ask any employee to do this. If anyone chooses to tell me -- voluntarily, without my asking him -- about attending a union meeting, that's his business, but I am not requesting or seeking it.

**c. Do you know why I'm for the union? (Attempt to set up "interrogation" charge)**

-- No, I don't know and I'm not asking you to tell me! If you want to tell me or discuss it with me, that is completely up to you -- it is completely your decision; I'm not asking for it.

-- Now, if you still want to discuss it, go ahead.

**d. Does the Company think the union has a majority? (In addition to surveillance, to attempt to set up the fact that Company knows union has majority already and therefore should bargain without an election)**

-- I don't know what the "Company" thinks about whether the union has a majority.

-- I feel from what little I have seen and what employees have volunteered to me, that the union does not.

**e. Can we (I) discuss our employment problems with you individually? (Careful, this may be an attempt to set up an "interrogation" charge.)**

-- Sure you can. We have always done this in the past, and we will continue to do so.

-- I want to make it clear though, if you also want to discuss union matters, this is solely up to you -- I am not seeking to hear about that.

-- Now, if you want to discuss any problem, let's go. (Be careful of being "sucked in" to making any "promises" for rejecting the union.)

**f. Why are you being so tough on me? Is it because I'm for the union?**

-- I'm not being "so tough" on you. All I'm asking of you is that you work and follow the rules the same as any other employee.

-- If you think I'm not treating you the same as any other employee, you tell me, and I'll investigate it -- since all of you are to be treated fairly and equally, whether or not you may favor the union. That's always been our policy.

-- However, if you favor the union, this doesn't give you any special privileges or status. You must work and follow the same rules as all other employees.

**5. Pros and Cons of the Union**

**a. If we don't have a union, what voice do we have in what happens here?**

-- You don't need a union to bring up your viewpoints around here. You never had to in the past. We have an open door and an open mind. That policy won't change, and you don't need an outsider to create problems between you and me in order to justify his dues "take."

-- Your viewpoint has been and will continue to be considered, and you don't need an outsider to speak for you!

**b. Why do you care how we spend our money on dues and assessments? You don't seem to care how we spend our money on other things or what we join or should not join, except when it comes to a union?**

-- What you join or not join or how you spend your money in other instances does not affect your job and our business, as does the coming of a union between you and management.

-- A union only survives by creating a need for itself -- by creating trouble, grievances, and discontent. In that way it makes you feel you need it and are getting something for the money you pay to it.

-- Its only real interest in you is in the money it will take out of your pockets to pay its officers and representatives, and this we want to point out to you since it also affects us in the management.

-- We don't want an outsider constantly stirring up trouble, grievances, between you and us -- we can't run as efficient a business that way and this is bad for you and bad for us in the long run. After all, the only real security either of us has is to continue this as a successful, efficient plant. We don't want anyone to interfere with that. We believe a union must and will, and we don't believe you need one to be treated fairly by us.

-- This is why we tell you about the dues, and not to join or support the union.

**c. If we don't have a union contract, what is to protect us against the Company's taking away any benefits?**

-- As a Company we have to live in this community; we have to hire and retain good employees.

-- We couldn't have gotten where we are today unless we paid fair wages and benefits and unless we kept them up to date.

-- We certainly aren't going to change that policy -- we couldn't and survive in this community. The Company hasn't ever taken away any benefits -- the union is raising a phony issue of taking things away in order to sell the idea of a contract.

-- So a union contract with all of these things in it is not necessary. You already have received these benefits, and they have been retained for years without a contract. So obviously you don't need it.

**d. Now you can fire us any time you want; but with a union contract you couldn't, could you?**

-- A union contract wouldn't change a thing. I'll tell you why.

-- An employee is either fired for "cause" or without cause.

-- Consider the years we have been here -- we have never fired an employee without a proper cause. So a union contract would not change anything as to firing without cause.

-- As to discharge for "cause," every union contract recognizes an employer's right to discharge for "cause"-- and that is all we have ever done here!

-- So again, a union contract would not add anything to what you already have.

**e. Where would the working man be, if it weren't for the unions?**

-- Times have changed. Unions grew up in large cities in large plants during the Depression of the 30's. Working conditions were pretty bad. At many establishments unions have been necessary, but a union certainly isn't needed here.

-- Your situation here is in no way comparable.

-- You have excellent working conditions.

-- You have good wage rates -- which have progressed over the years we have been here.

-- You have fringe benefits equal to or better than the community.

-- You haven't needed an outsider -- a union -- to intercede for you to get any of this or to work out any problems.

-- So, here you don't need a union.

-- (A union can do lots of harm, too. Look at all the employees and employers that unions have put out of business across the country and the disruption unions have caused at other plants in this area.)

**f. If we had a union, wouldn't we have "seniority rights"?**

-- Here, too, a union contract is no different than our practices. Under any contract both seniority and ability are considered. We do the same. That's the fairest approach.

**6. Miscellaneous**

**a. Can employees be fired for engaging in a strike?**

-- No, not for engaging in it, unless the strike violates a provision in a labor agreement prohibiting strikes. But a striker can be permanently replaced if he strikes over economic conditions during negotiations for a contract. That means he doesn't get his job back when the strike is over unless his replacement quits or is fired, or unless there are other vacancies for which he is qualified.

## H. Organize a “SWAT” Team to Respond to Hints of Card-Signing

Companies should prepare NOW for what may happen in the future. If there is card-signing going on, it has likely been going on for some time. Companies need to respond quickly and forcefully to such activity with communications, meetings, and information to employees. Trying to figure out what to say in a reactive situation will not be as successful as being fully prepared before events start to unfold.

In this regard, employers should make plans NOW for:

- what your message will be
- who will deliver the message
- how the message will be delivered

## I. Provide Training on What the Law Prohibits During a Union Organizing Drive

The basic labor-management relations policy of the United States is contained in the National Labor Relations Act. The NLRB administers the Act. The “basic rights” of employees which the Act seeks to guarantee are stated in Section 7 of the National Labor Relations Act:

Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and [employees] shall also have the right to refrain from any or all such activities . . .

In order to “guarantee” that employees are free to exercise those rights, the Act labels certain offensive employer conduct an “unfair labor practice.” For example, it is an unfair labor practice for an employer to:

1. “interfere with, restrain or coerce” employees in the exercise of their Section 7 rights; or to
2. discourage membership in a union by discrimination in regard to hire, promotion, discharge, or conditions of employment.

If a union is attempting to organize a group of Company employees, your conduct will be subject to close scrutiny by the NLRB. Conduct violating the Act (unfair labor practices) can result in an order requiring the Company to bargain with the union even though the union may not actually represent a majority of the employees. The NLRB also has the power to compel the Company to reinstate and pay back pay to employees improperly discharged or laid off. Stated in simple terms, the law requires:

1. that the employer not discriminate against an employee because of his union sympathies or activities;
2. that the employer not threaten to take action because of an employee's union sympathies or activities;
3. that the employer not question his employees about their union activities or their reasons therefore;
4. that the employer make no promises to his employees during the campaign; and
5. that the employer make no changes in wages or benefits during a campaign unless pursuant to an established pattern or announcement made prior to the beginning of organizing efforts.

Despite these restrictions, you have the opportunity to present strong and direct arguments against unionization to your employees. Section 8(c) of the Act expressly provides:

The expressing of any views, argument, or opinion, . . . shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

What follows is a guide to indicate what you can and cannot do, what you can and cannot say. We recommend that in addition to reading this material, you review all proposed letters, speeches, statements, and campaign tactics with legal counsel, as well as proposed discipline or other actions adversely affecting an employee.

#### **1. Promises and Threats**

The Board is quick to find that employer speech or conduct which conveys to the employee a threat of loss or promise of benefit in an attempt to sway his opinion on the union issue constitutes an unfair labor practice.

Direct threats to close a facility, to fire union adherents, to reduce wages, or to discontinue benefits as a method of combating an organizational drive constitute unfair labor practices which, in the least, would merit setting an election aside.

More troublesome are those areas of employer communications which are “on the line” between being implied threats and legitimate statements of the possible consequences of unionization. The Board’s general rule is that a prophecy that

unionization might ultimately lead to the loss of employment or a reduction in benefits is not coercive where there is no threat that the employer will use its economic power to make the prediction come true. Therefore, an employer may state that if a union is elected and strikes the employer to force acceptance of its proposals, the strike could have an adverse effect on the employer's business which would necessitate a reduction in the work force. However, depicting strikes and violence as the inevitable consequence of unionization constitutes grounds for setting an election aside. Similarly, the assertion that it would be futile to select a bargaining agent since the employer will continue to set wages unilaterally is unlawful.

## 2. Interrogation, Polling, and Surveillance

Curiosity purportedly killed the cat. Similarly, employer curiosity can result in an election being set aside where interrogation, polling, and surveillance are involved.

Interrogation as to union sympathy and affiliation is unlawful because of its natural tendency to instill in the minds of employees fear of discrimination as the result of the information the employer has obtained. Individual questioning, when the employer seeks to force an employee to disclose his union sentiments, is normally unlawful. Similarly, when questioning places an employee in the position of being an informer, the employer's conduct is objectionable. But a mere expression of sentiments in casual conversation initiated by the employee is not objectionable.

Systematic “polling” of employees to determine the strength of the union is also unlawful. The NLRB has observed that such conduct will not “serve any legitimate interest of the employer that would not be better served by the forthcoming Board election.”

“Surveillance” of employees by an employer also violates the Act. It makes no difference that the employees do not know of the surveillance. When the employer’s willful conduct gives the impression to his employees that it is conducting surveillance of employees, the Board will find that a violation has occurred.

### **3. Restrictions on Union Activity on Employer's Property**

The fundamental rule is that working time is for work, but an employee’s time outside of working time is his to do with as he wishes without unreasonable restraint, even though he is on the employer’s premises.

The law that applies to non-employee campaigners (union organizers) differs from the law that applies to employees. The Company may prohibit campaigning by nonemployees on Company property if the nonemployee campaigners can reach the employees through other reasonably available means and if the employer does not discriminate against the union by allowing other nonemployees to campaign on Company property.

Distribution of literature by employees may be prohibited both during working time and in working areas. Oral solicitation, including the solicitation of authorization

cards, may be prohibited during working time. But such a rule can be invalid if enforced in a discriminatory manner. The Company must enforce the rule as to all solicitation and not only as to union solicitation.

Employees have the right to wear pro-union buttons or insignias while at work as long as such actions do not result in the disruption of work.

### CONCLUSION

If enacted, EFCA will present the most dramatic labor relations challenges to private employers since 1935. Even if enacted in a more modest form, union organizers will be taking more aggressive steps to organize employees regardless of EFCA. Employers need to be aware of the laws, and prepared to take steps now to prevent card-signing.

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