YOUR RIGHTS IN A UNION SITUATION

Union membership has been on a steady decline since the 1950s. The overall percentage of U.S. workers who are members of a union was 11.1% in 2015, according to the Bureau of Labor Statistics. That contrasts to 20.1% in 1983 and ties with 2014’s figure as the lowest level since 1935, when the National Labor Relations Act was enacted.

The union membership rate runs much higher for public sector workers (35.2%) than in the private sector (6.7%). Police officers and firefighters had the highest union membership rate, at 36.3% with teachers and other educators coming in second at 35.5%. Sales and related occupations (3.3%) and farming, fishing and forestry workers (1.9%) had the lowest rates.

In recent years, unions, most notably the Service Employees International Union (SEIU), have made low-wage workers a priority, focusing on retail workers, fast-food employees and custodial staff. An NLRB decision (Browning-Ferris Industries of California, Inc., d/b/a BFI Newby Island Recyclery, and FPR-II, LLC, d/b/a Leadpoint Business Services, and Sanitary Truck Drivers and Helpers Local 350, International Brotherhood of Teamsters, Case 32–RC–109684) issued in August 2015 may make the union’s job easier. In its decision, the Board’s majority said it decided to update the law to move in sync “with changing economic circumstances” including “the dramatic growth in contingent employment relationship[s].”

Prior to this ruling the Board said an employer had to “meaningfully affect matters relating to the employment relationship such as hiring, firing, discipline, supervision and direction” to be subject to collective bargaining. The joint employer’s control had to be “direct and immediate.” Under the new standard, the Board will look at whether a common law employment relationship exists and whether the putative joint employer “possesses sufficient control over employees’ essential terms and conditions of employment to permit meaningful bargaining.”

Depending on the amount of control a franchisor, prime contractor or employer using a staffing service exerts, it could be drawn into a union organizing campaign. Once established, the collective bargaining agreement could serve as a template for other similarly situated entities. Employers in these situations should consult with their attorneys to determine potential exposure.

NLRA AND THE TAFT-HARTLEY ACT

In 1935 Congress passed the National Labor Relations Act (NLRA), giving workers the right to organize, bargain collectively and strike. By the late 1940s unions had become politically and economically powerful, and Congress decided to amend the act to develop a more balanced national labor policy.

In 1947 the Labor Management Relations Act, commonly known as the Taft-Hartley Act, was enacted to correct union abuse of power.
The Taft-Hartley Act changed the law by specifying six unfair union practices. Under Section 8(b), it is unlawful for unions to do any of the following:

- Force an employee to join a union.
- Force an employer to discriminate against nonunion employees.
- Refuse to bargain collectively (provided that the union is the appropriate representative of the employees).
- Engage in secondary boycotts.
- Charge excessive or discriminatory fees or dues.
- Force an employer to pay for work that is not performed (“featherbedding”).

Other important Section 8 changes added the “free speech” proviso and established the basic responsibilities of the parties in collective bargaining. Section 9 gave employers the right to petition for an NLRB-conducted election and gave employees the right to petition to decertify a union. Under Section 10(j), the board may seek injunctions to stop unfair labor practices, while Section 10(l) requires the board to obtain injunctions to stop secondary boycotts.

Also, in a bitter defeat for the unions, the act preserved from pre-emption the states’ “right to work” laws.

Examples of unfair labor practices by unions include the following: engaging in picket line violence; barring nonstriking employees from entering a plant; fining or expelling members who cross illegal picket lines; refusing to process grievances for discriminatory reasons; picketing within 12 months after a union loses an NLRB-conducted election; and insisting on the inclusion of illegal clauses in a collective bargaining agreement.

### NATIONAL LABOR RELATIONS BOARD

The National Labor Relations Board, which administers the NLRA, has two primary functions:

- To conduct secret-ballot elections in which employees choose whether or not to be represented by a union.
- To investigate and remedy unfair labor practices committed by either employers or unions.

The five-member board decides cases brought before it on appeal from administrative law judges’ decisions. Board decisions may be appealed directly to one of the federal courts of appeal. The NLRB’s Office of General Counsel is responsible for investigating and prosecuting unfair labor practice charges and for supervising the work of the board’s regional offices.

The board and the general counsel cannot act on their own initiative to bring charges of unfair labor practice or to file representation petitions to hold secret-ballot elections.

An employer, a union or an employee must file a complaint or a petition with one of the board’s regional offices to start proceedings under the NLRA.
**IF YOU’RE TARGETED BY A UNION**

If yours is a nonunion company, it’s important to understand what factors might make you a target for unionization:

- Job insecurity or lack of opportunity
- Poor communication with management
- Noncompetitive compensation or benefits
- Perceived favoritism in the workplace
- Poorly trained supervisors
- Lack of standards or feedback

Employers have control over some of these factors, but not all. Job insecurity may be due to market conditions. Lack of opportunity also may stem from the economy or may be due to company policies, such as an unwillingness to train or promote from within. Many issues that make a company vulnerable to organizing efforts deal with fairness. Unions sell the idea that a collective bargaining agreement eliminates favoritism.

You should evaluate all aspects of employee relations. How do your pay and benefits compare with the rest of your industry? Look at terminations, disciplinary actions and lawsuits to see if certain practices or particular supervisors show a pattern of causing problems. Survey employees to discover potential problems. Make changes if necessary.

If you find yourself the target of an organizing effort, keep your head. Some activities can spell disaster. Both the NLRA and the Taft-Hartley Act prohibit employers from discriminating against employees for participating in union activities.

Ultimately, whether you’re targeted or not may depend more on your geographic location and industry than on actual working conditions. That’s because many unions target specific areas or industries to gain momentum and credibility with workers. Then they try to negotiate a “model” compensation plan that they can use at other companies to attract new members.

**YOUR RIGHTS IN A UNION-ORGANIZING CAMPAIGN**

Labor law gives your employees the right to join a union. Assuming you prefer to operate as a nonunion company, what are your rights?

In 2008, the U.S. Supreme Court dealt employers a victory in *Chamber of Commerce of the United States et al. v. Brown*. The ruling overturned a California law that restricted some employers’ rights to communicate with workers during union drives. The case underscores the fact that you have the right under the NLRA to communicate your views with employees during a union-organizing campaign, and you also have the right to run your business.

Use and protect those rights by exercising caution and controlling your own behavior:

- **Don’t act emotionally or with a feeling of betrayal.** Be sure you have a thorough knowledge of the labor law rules and have expert help. Your own conventional wisdom won’t suffice, nor will your own determination of what is fair, no matter how objective you think you are.
**Case in point:** When some employees at Dynasteel Corporation started talking openly about organizing a union, the company got worried and reacted emotionally, threatening to “shut the doors and fire everyone” rather than let in a union.

Shortly after, union organizers sent several applicants to the company, each wearing a pro-union button or shirt. They were told either it had no openings or their applications were accepted but less qualified applicants were hired.

Then, several pro-union employees let it be known they were meeting other interested employees at a local diner to discuss strategy. A supervisor just happened to show up long enough to count the number of employees who came to the meeting.

The NLRB ruled that Dynasteel committed unfair labor practices by refusing to hire union supporters and trying to intimidate or spy on employees interested in joining the union by stopping by the diner. Dynasteel appealed, but the 5th Circuit upheld the ruling. *Dynasteel v. NLRB*, No. 06-60006

- **Present your side and get the hearing you want** by following the game plan the law allows. It may appear too restrictive, but you clearly have weapons available. Despite labor law pitfalls and restrictions and the frustrations they may cause, you can emerge intact from a union’s organizing campaign.

- **Don’t allow union organizers to harass your employees.** Union campaigns can’t invade employee privacy.

**Case in point:** When the Union of Needletrades, Industrial & Textile Employees (UNITE) tried to organize Cintas, a large uniform laundry company, employees complained that union organizers showed up at their homes. Apparently, UNITE had taken down license plate numbers and run Internet database searches on their plates. That’s how they found their home addresses. A federal court agreed that action amounted to an invasion of privacy and ordered the union to pay each affected employee $2,500. *Pichler v. UNITE*, No. 04-2841 (ED PA)

Whatever route you choose—whether to accept the union or resist it—you can exercise your rights effectively. Make sure you do so systematically, lawfully and intelligently. Also, remember: Just because a union-organizing campaign is underway doesn’t mean you have to relax discipline. You can hand out punishment for infractions of rules even to the most vocal of the union sympathizers as long as you can show that the sanctions are consistent with the way you handled similar situations before the organizing drive began.

**What you can’t do**

The following list covers some activities that constitute unfair labor practices. Make sure that you don’t:

✔ Discriminate in *any* way against any employee for participating in union activities. This prohibition applies to all aspects of employee relations.

✔ Promise or grant benefits to your employees (such as wage increases, holidays, benefits or improvements in working conditions) to encourage them to abandon the union.

✔ Make threats based on employee support of the union, including threats of discharge, layoffs, plant closure or discontinuing current benefits.

✔ Interrogate your employees or prospective applicants concerning union-organizing activities.

✔ Prevent pro-union oral solicitation by employees during nonworking hours and breaks.
✔ Prohibit union insignia on shirts and jackets.
✔ Engage in surveillance of employees to determine their views on the union.
✔ Take a straw vote of employees as to whether they favor or don’t favor the union, except in special circumstances and in accordance with legally mandated procedures designed to protect employees. (Consult your legal counsel.)

Although not necessarily unfair labor practices, the following conduct may result in invalidation of an election:

✔ Campaigning on company time and premises within 24 hours of an NLRB-scheduled election. Meetings held off-premises may take place under special circumstances.
✔ Reproducing and distributing official NLRB ballots and showing employees how to mark them.
✔ Discussing the union with employees in a supervisor’s office, regardless of the noncoercive tenor of your remarks.
✔ Prohibiting distribution of union literature in nonwork areas during nonwork time, such as in the lunchroom during the lunch hour.
✔ Requiring employees to wear “Vote No” buttons in the plant or office.

What you can do

You may hold meetings with your employees on company time and property to answer questions and discuss the company’s position and unionization. Just make sure the meetings aren’t held in a supervisor’s office. Talk with employees at their own workstations or in a group meeting. You can also mail literature to the employees’ homes, stating the company’s position, but be careful what you say.

Here are some of the things you can say:

✔ Describe the good features of working for your company, such as existing benefits, job security and steady work.
✔ Remind them that signing union authorization cards does not mean they must vote for the union.
✔ Inform them of the disadvantages of belonging to a union, such as the possibility of strikes, serving on picket lines, paying dues, fines and assessments.
✔ Explain the meaning of the phrases “dues checkoff” and “union shop.”
✔ Inform them of any prior experience you’ve had with unions and what facts you know about the particular union that’s trying to organize them.
✔ Tell your employees how their wages and benefits compare with other unionized and nonunionized companies with less desirable packages.
✔ Disclose the names of known gangsters or other undesirable elements who may be or have been active in the union, provided this is accurate information that can be verified by official sources.
✔ Inform them that, insofar as their status with the company is concerned, they are free to join or not to join any organization they choose.
✔ Express the hope that your employees vote against this or any union.
A lawfully waged campaign may defeat an organizing drive. Violation of the rules of conduct, however, can result in invalidation of a company-won election or certification of a union that lost an election. It’s important, therefore, that you seek legal advice promptly.

➤ Observation: You don’t have to bend over backward to cooperate with unions either. In a recent court of appeals decision, a company had refused to let union organizers post notices of their upcoming meetings on a company bulletin board. The NLRB ruled this discriminatory because the company had allowed other worker notices to be posted. However, the appeals court said the only notices previously allowed on the bulletin board were by employees selling cars and household goods, so it was not discriminatory to say “no” to union backers. To take advantage of your right not to be cooperative with union organizers, don’t allow your bulletin boards to become a general forum for workers. As the court noted, the company never posted notices for any type of meeting, so it was not discriminatory in preventing workers from posting union meeting notices.

Caution: If you try to pick and choose the meetings you think are worth publicizing and those that are not, you will have a hard time showing a judge that the rejection you gave to the union supporters was not discriminatory. Also, you must not seem to be designing a policy for bulletin boards or other communications channels that appears to target unions. Put a policy in place—and strictly adhere to it—when there is not a threat of unionization in the air, and it will stand you in good stead should the organizers later target your company.

**IF YOU’RE A UNIONIZED EMPLOYER**

Let’s say you become a unionized employer—that the union has won the representation election. Suddenly, after running your own business, you’ve got a partner. No more unilateral decisions in dealing with your employees.

The key question: How do you protect yourself in your decision-making and thus prevent union encroachment on your prerogatives as a boss—including your right to terminate deadwood employees? It may seem ironic, but your best defense is something that comes with a union: the negotiated contract. The contract language spells out your management rights. So what you do in negotiating that contract—the goals you formulate—is vital to protecting your interests.

Through the years, decisions of the NLRB and the courts have tended to narrow management’s rights, in what has seemed to be an invasion of business decisions. An example is the area of subcontracting, interpreted to involve “terms and conditions of employment”—the definition for union involvement. Even such issues as dropping a product line, automating or moving a plant and having an in-plant cafeteria or food vending machines have been held to be subject to bargaining.

In negotiating a contract, nail down your right to make a wide variety of business decisions. The contract language becomes your protection because it will surely be scrutinized if a dispute with the union arises.

You will want to assert your rights in a variety of contract clauses, such as the right to discipline for absenteeism, the right to discharge for excessive time spent away from work, and the right to discipline and discharge. Arbitration clauses—another factor that can seriously intrude on your rights—should meticulously define which issues in conflict are to be dealt with exclusively by an arbitrator.

At the same time, avoid going overboard with a blanket management-rights demand aimed at covering all bases. In its decisions, the NLRB has interpreted this strategy as an effort to strip the union of its statutory prerogatives by holding that it was not a good-faith approach to bargaining.
There are other pitfalls to avoid. In case the contract language is imprecise where your rights are concerned, you should have an accurate record of contract negotiations to fall back on. This means keeping a well-documented account of bargaining history throughout all contract negotiations. In addition, the practices you follow with the ongoing contract can affect your rights. If you relax discipline or give benefits not called for, these concessions can become an inherent part of the company relationship with the union, without benefit of contract language.

On the bright side, a well-crafted collective bargaining agreement can keep an employer out of court. The U.S. Supreme Court ruled in *14 Penn Plaza v. Pyett*, 129 S. Ct. 1456 (2009) that a collective bargaining agreement that “clearly and unmistakably” compels a union member to arbitrate claims under the Age Discrimination in Employment Act (and presumably other employment laws) is binding on the employee.

**PREPARE FOR ‘AMBUSH’ ELECTIONS**

In December 2014, the NLRB issued a controversial rule that it says will “streamline” union elections. But critics say the result will be “ambush elections” in which voting happens so quickly that employers stand little chance of persuading employees to reject union representation.

The new final rule, effective April 14, 2015, covers elections that certify a union to represent workers. Under previous rules, an automatic one-month delay followed after the NLRB received a petition for a union election. The new rule eliminates the one-month pause, clearing the way for so-called “ambush” or “quickie” elections, which usually come within days. Prior to this ruling, the standard time period for elections was 42 days. Now, most elections will likely be held within 10 to 21 days, experts say. Also, employers will have to provide more contact information to unions, including employees’ personal phone numbers and email addresses.