



## **RAPID RESPONSES TO UNION ORGANIZING: A GUIDE FOR RESTAURANT FRANCHISEES**

Because of recent changes to the rules governing union organizing, restaurant franchise owners have less time than ever before to learn about this important issue once an election petition is filed. All employers have the right to communicate with their employees on the subject of unions and the right to express opposition to unionization, within legal limits. Employees have the legal right to support unions or to just say “no.” But under the new rules issued by the National Labor Relations Board (NLRB), time is short.

The purpose of these materials is to help franchisees quickly understand their rights and communicate basic messages about unions to their employees if union organizing starts. It is strongly recommended that a franchise owner consult experienced labor counsel when it becomes aware of union organizing activity, and nothing in these materials constitutes legal advice or opinion. FBS has created a number of helpful resources to give additional guidance to members facing union organizing, including quick access to attorneys at the Littler Mendelson law firm, the nation’s largest firm focused exclusively on labor and employment law.

Unions typically try to organize in one of two ways: Sometimes they use “top down” pressure tactics on ownership (picketing, demonstrations, complaints to government agencies or courts, and political pressure tactics). More often unions conduct “bottom up” election campaigns among the workers. These materials will focus primarily on the “bottom up” election process and how to respond to it.<sup>1</sup>

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<sup>1</sup> This document is intended for informational purposes only, and does not constitute legal advice or opinion. This information does constitute exempt advice to employers within the meaning of Section 203(c) of the Labor Management Reporting and Disclosure Act. None of the materials or information provided here constitutes direct or indirect persuasion of any employees of any employers. Employers should make their own decisions on what to communicate to their employees on the subject of unions. More information on the NLRB’s new rule can be found at NLRB’s website. **For additional information contact our “hotline” member service at 202-772-2526 or email [MBaskin@littler.com](mailto:MBaskin@littler.com).**

## **STEP ONE: UNDERSTANDING THE PROCESS**

Under a federal law called the National Labor Relations Act, employees have the legal right to engage in “concerted” (collective) activity, such as joining or asking unions to represent them in negotiating with their employers. The employees also have the protected legal right to refrain from any union activity. Employers and employees have the legal right of free speech on the subject of unions so long as they obey certain legal ground rules discussed below.

If a union gathers enough support (usually in the form of a petition or signed “authorization cards”) from employees in an “appropriate unit,” the union can ask the employer to voluntarily recognize the union as the employees’ bargaining representative. Employers do not have to agree to such voluntary recognition, however, and most employers choose not to. There are many reasons why union cards are not reliable indicators of employee support—employees may feel pressured into signing them or may not understand what the cards mean. Very few employees understand all the facts about unions and most do not understand their legal right to say “no.”

If the employer refuses to voluntarily recognize the union claiming majority support, then the union has the right to “petition” the NLRB to conduct a secret ballot election among the employer’s employees in an “appropriate unit” for bargaining. Under the new NLRB election rules, if the union petition meets legal requirements for an election, a vote will be held within a few weeks after the petition—sometimes within less than two weeks, but on average within 25 days. Employers have the right to contest the petition in a legal hearing before any vote takes place, if there is something wrong with the petition itself or the unit of employees petitioned for. Employers also have the right to talk to their employees to explain why voting for the union is a bad idea.

**Q: How does the union get an NLRB election?**

A: The union must file a petition with the NLRB asking for a secret ballot vote. The petition must be supported by authorization signatures from at least 30% of the employees in the petitioned-for unit in order for the NLRB to set the vote.

**Q: How many votes does the union need to win the election?**

A: In order to win an election, the union must get the votes of a majority (50% + 1) of the employees who vote in the election. The vote must be a secret ballot.

**Q: Will an election always be held once a petition is filed?**

A: No, there are many reasons why the NLRB may find that the petition is insufficient to hold an election. Employers have the right to a hearing after the petition is filed in order to challenge the union’s right to an election.

## STEP TWO: PRE-PETITION CONTACTS WITH UNIONS AND EMPLOYEES

Because there will be so little time to respond to union organizing once the petition for an election is filed, employers are well advised to respond to “early warning” signs of union organizing. Unions often spend several months talking to employees in secret (and sometimes openly) to convince them to sign union cards.

If a union approaches management and offers to show signed petitions or cards or requests voluntary recognition, the employer **should not agree to look at any union cards** and should not acknowledge that the union represents a majority of employees. Any such recognition or acknowledgement could waive the employer’s right to insist on a secret ballot election. **Instead, the employer has the right to simply say:** “I have a good faith doubt that your union represents a majority of our employees in an appropriate unit. We exercise our right to insist on a secret ballot election conducted by the National Labor Relations Board before recognizing any union in our business.”

If the employer hears about union organizing efforts, then the employer is well advised to start communicating with employees about the reasons why they should NOT sign union cards. There are legal ground rules governing employer talks or written messages to employees during union organizing. An easy way to remember what is not permitted is to remember “TIPS.”

### **Employers should NOT:**

**T**hreaten employees to stop them from supporting a union;

**I**nterrogate employees about union support;

**P**romise employees increased wages or benefits to discourage union activity; or

**S**py on employees engaged in union activity.

Employers should also **not discriminate** against union supporters.

### STEP THREE: COORDINATE THE EMPLOYER'S RESPONSE TO ORGANIZING

With the basic ground rules in mind, employers who become aware of union organizing are advised to do the following:

- Identify the key members of the leadership team with responsibility for coordinating the response and the message to employees
- Train managers on how to respond to organizing (TIPS)
- Protect your facilities against unwanted union access
- Prepare a rapid response plan for union petitions
- Examine bargaining unit questions for possible restructuring
- Review Company handbook policies for vulnerabilities
- Identify potential employee "sore points"

Additional early action steps:

- Discuss with your senior management team **why** the union is attempting to organize employees, and exactly what organizing activity they are aware of.
- Call a meeting of supervisors and others who exercise authority for management, usually with labor counsel present. State to all supervisors the company's position with respect to the union drive.
- Explain the legal "do's and don'ts" to both supervisors and the members of the senior management team.
- Set up a method for the senior management team and supervisors to report regularly and promptly what they find out in their conversations with employees.
- After proper briefing by labor counsel, the employer should set up a series of small group meetings with employees during which a member of high-level management discusses the union organizational drive, and the reasons why the employees do not need a union.
- The main message during these pre-petition contacts should be: "Don't Sign A Card."

## **STEP FOUR: ONCE THE UNION PETITION IS FILED**

Under NLRB rules effective April 14, 2015, the union is required to serve its petition directly upon the employer. This will be followed immediately by a Notice of Petition from the NLRB to the employer. Do not ignore these papers!

Within **two business days** of receiving the official NLRB Notice of the petition, the employer is required to post an official NLRB notice to employees that should accompany the NLRB documents.

**By noon on the seventh calendar day** following receipt of the official NLRB Notice of Hearing, the employer is required to file a detailed Statement of Position regarding the union petition if the employer wants to request a hearing on any questions concerning representation. **Failure to file the Statement of Position can result in waiving important rights to present evidence.** The Statement of Position must be accompanied by a list of names of employees covered by the petition, and potentially other employees who might be included in an appropriate bargaining unit, along with other information.

A **hearing** on the union petition will normally be held on the **eighth calendar day** following receipt of the official NLRB Notice, absent special circumstances or a stipulated election agreement between the employer and the union.

The employer is not required to go through the hearing process. Many employers simply agree to a “**stipulation**” setting forth the details of the election. The choice whether to stipulate to the election or exercise the right to contest the petition in an NLRB hearing is an important one. Employers should get advice from experienced labor law attorney before making this decision.

The NLRB could schedule the election within as little as 15 to 25 days following the filing of the union petition. (**See sample activity calendar on page 10 for further guidance**)

**It is strongly recommended that employers obtain experienced labor counsel to advise them immediately upon receiving a union petition.**

## DO'S AND DON'T'S FOR SUPERVISORS

The National Labor Relations Act (NLRA) gives employers the right of “free speech” on labor matters. Employers have the right to talk to their employees about unions and to express their views on why a union would not be in the employees’ best interest. Supervisors are allowed and should be encouraged to state facts and give their opinion on unions and why employees should vote “no.”

Further, employers have the right to continue running their businesses during a union election campaign. As a practical matter, it is advisable to consult with labor counsel before taking any action that would adversely affect a pro-union employee because you may have to prove the action was not taken because of the employee’s union activities.

### The DO's

Following are some of the key things an employer **CAN** and **SHOULD** do when communicating with employees about a union.

- Supervisors **CAN** and **SHOULD** talk with employees individually or in groups at any time in any public place or open working area where you would normally talk with employees, but NOT in a private management office.
- Supervisors **CAN** and **SHOULD** tell employees about any bad experiences you or others you know have had with unions.
- Supervisors **CAN** and **SHOULD** talk about what harm you believe (or can show) unions have done in the nation, in your geographic region, in other divisions of your own operations and in other specific firms.
- Supervisors **CAN** and **SHOULD** state what you believe is (or can show) to be the answer to any union propaganda, argument or claim.
- Supervisors **CAN** and **SHOULD** say you **THINK** employees should vote “no” in a union election.

## What Should Employers Do?

Even before there is any sign of union organizing, it is vital for employers to train their entire management team on the proper responses to union organizing. In particular, managers need to be aware of the importance of early warning and quick response to any card signing union activity. Start by making sure managers understand why the company is non-union in the first place.

## Know the Reasons Why Employees Do Not Need a Union

- Unions are expensive; employees often have to pay hundreds of dollars per year out of their paychecks in union dues, fees, fines, or assessments.
- Individual needs are often sacrificed for the group's needs and union work rules.
- Unions can use strikes to try to force demands on employers; strikes often hurt employee earnings.
- In the bargaining process, everything would be negotiable; employees can wind up with the same things they have now, or even less. Wages are normally frozen during bargaining.
- Favoritism, political favors and internal rivalries are common to unions and may lead to member dissatisfaction; remember, unions are "big business."
- Unions have a lot of control over members: fines, discipline and even expulsion.
- Mandatory seniority may prevent hardworking, ambitious employees from moving forward based on **MERIT**.
- Employees may have less job security if employers become uncompetitive and lose work due to union wage demands, strikes or work rules.

## The DON'Ts

Employers do not have the right to threaten, intimidate or coerce employees into adopting the employer's view on unions, or to interrogate or spy on employees to find out about their union activities or how they feel about the union.

An easy way to remember the things employers and supervisors cannot do or say during a union organizing attempt is to think of the word **T-I-P-S**.

### Owners, Managers and Supervisors Should Not:

**“T” MEANS THREATEN.** Management must not threaten individuals participating in union activities with reprisals such as reducing employee benefits, firing the employee or retaliation of any kind, and, of course, you cannot take such reprisals.

**“I” MEANS INTERROGATE.** Management must not interrogate employees about whether they signed a union card, whether they are supporting the organizing activity, how they intend to vote or what they think about union representation.

**“P” MEANS PROMISE.** Management must not promise wage or benefit increases, promotions or any other future benefit to employees for opposing the union, nor can you give such benefits for this reason.

**“S” MEANS SPY.** Management must not spy on union activities to determine who is attending union meetings, or who is signing union cards or supporting the union. This applies to both work time and non-work time, on and off the firm's premises.

Definitions of unlawful “threats,” “interrogation,” “promises” and/or “spying” are subject to complicated legal rules and decisions that are too numerous to list here.

Finally, employers should never **DISCRIMINATE** against employees based on their support for a union or based on union opposition



## REASONS TO VOTE “NO UNION”

1. **UNIONS COST MONEY.** If the union is voted in and gets a contract, each of the company’s employees could be forced to pay hundreds of dollars per year out of their paychecks in dues, fees, fines or assessments.
2. **UNIONS ARE IN DECLINE.** Fewer than 10 percent of all American workers belong to a union. Why join such a small group?
3. **AT THE BARGAINING TABLE, EVERYTHING WOULD BE NEGOTIABLE.** If the union gets in, the company would be required to bargain in good faith. But the law says that management cannot be forced to agree to any union demand. The company also would have the right to make counter-demands. Employees could wind up with the same things they have now, or even less. Wages are normally frozen during bargaining.
4. **THE UNION MAY CALL A STRIKE.** Strikes do not always happen, but they happen a lot when unions and management disagree. If there is a strike, the company would be allowed to consider hiring replacements, if necessary, in accordance with applicable law. Everyone would lose during a strike.
5. **THE UNION WILL MAKE IT HARDER FOR THE COMPANY TO COMPETE FOR WORK.** Jobs come from the restaurant’s ability to provide great customer service at affordable prices. The union will do nothing to help us attract customers, and the union could make it harder for us.
6. **UNION WORK RULES WILL WORK AGAINST EMPLOYEES.** Most unions have restrictions on who can work and under what conditions. Many union work rules make it harder for individual employees to get ahead in the business.
7. **DOES THE UNION WANT TO HELP EMPLOYEES OR DOES THE UNION MERELY WANT TO HURT THE COMPANY?**

**DON’T SIGN A CARD! NO UNION MEANS NO DUES, NO STRIKES  
AND NO FALSE PROMISES!**

## Sample 21-Day Campaign

(No Representation Hearing)

SUNDAY	MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	SATURDAY
<p>1</p> <p>WEEK 1</p>	<p>2 <b>Pre-Campaign Period</b><sup>1</sup></p> <ul style="list-style-type: none"> <li>Pre-Campaign Period: See Sample Letter to Employees.</li> <li>Pre-Campaign Period: Don't Sign the card Speech. <i>See Sample Pre-Campaign Speech.</i></li> <li>Bargaining unit analysis based on possible units: unit scope and placement issues as well as supervisory status</li> <li>Review handbook rules for conformance with NLRB guidelines</li> <li>Prepare position statement for possible NLRB hearing</li> </ul>	<p>3</p> <ul style="list-style-type: none"> <li>Pre-Campaign Period: Warning About cards. <i>See Sample Pre-Campaign Handout</i></li> </ul>	<p>4</p> <p><b>Petition Received</b></p>	<p>5 <b>Day #1</b></p> <ul style="list-style-type: none"> <li>Meet with supervisors regarding their role in the campaign</li> <li>Management training on campaign</li> <li>Handouts for supervisors—TIPS and FOE</li> </ul>	<p>6 <b>Day #2</b></p> <ul style="list-style-type: none"> <li>Meet with supervisors regarding their role in the campaign</li> <li>Management training on campaign</li> <li>Initial facility-wide speech to employees: focus on union irrelevancy; why company is great place to work; and Impact of negotiations</li> </ul> <p><b><u>Post Notice of Petition</u></b></p>	<p>7 <b>Day #3</b></p> <ul style="list-style-type: none"> <li>If facility operates 7 days a week, continue initial facility-wide speech to employees: focus on union irrelevancy; why company is great place to work; and impact of negotiations</li> </ul>

<sup>1</sup> The Pre-Campaign Period would not necessarily be immediately before the election. The letter and speech to employees regarding card signing as well as the postings and handout might take place weeks before the petition for election is filed. We placed it immediately before the election on this calendar for purposes of space.

SUNDAY	MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	SATURDAY
<p>8 <b>Day #4</b></p> <p><b>WEEK 2</b></p> <p>Prepare week 2 materials</p>	<p>9 <b>Day #5</b></p> <ul style="list-style-type: none"> <li>Create campaign bulletin board with information regarding union</li> <li>Meeting/training with supervisor team; review union financial information, such as LM-2s, fines, etc.</li> <li>Review status of campaign after first weekend</li> </ul>	<p>10 <b>Day #6</b></p> <ul style="list-style-type: none"> <li>Small group meetings with employees about union security/dues/closed shop/financial information—union is more interested in dues than their members</li> <li>Update bulletin board with dues/fines information</li> </ul>	<p>11 <b>Day #7</b></p> <ul style="list-style-type: none"> <li>Small group meetings with employees about union security/dues/closed shop/financial information—union is more interested in dues than their members</li> <li>Handout regarding union dues and rules</li> <li>Handout regarding Excelsior List<sup>2</sup> and why company must provide their names, addresses, and available home and cell phone numbers</li> </ul>	<p>12 <b>Day #8</b></p> <ul style="list-style-type: none"> <li>Meeting with supervisor team; regarding negotiations and collective bargaining</li> <li>Small group meetings with employees about what employees stand to lose at negotiations—nothing is guaranteed in negotiations—everything is on the table and employees can end up with less.</li> <li>Post information about date/location/time of election</li> </ul>	<p>13 <b>Day #9</b></p> <ul style="list-style-type: none"> <li>Small group meetings to Employees about what they stand to lose at negotiations—nothing is guaranteed in negotiations—everything is on the table and employees can end up with less</li> <li>Handout to employees regarding negotiations</li> <li>Update bulletin board with information for weekend employees</li> </ul>	<p>14 <b>Day #10</b></p> <ul style="list-style-type: none"> <li>If facility operates 7 days a week, continue small group meetings summarizing union financial information and negotiations</li> <li>Distribute memo to employees regarding negotiations</li> </ul>

<sup>2</sup> The “Excelsior” list is an alphabetized list of the names, work locations, shifts, job classifications, and contact information, including home addresses and available phone, cell phone and email addresses of eligible voters. The Excelsior list must be given to the NLRB for distribution to the union within 7 days of the stipulated election agreement or decision and direction of election. The NLRB will not schedule an election within 10 days of the acceptance of the Excelsior list. However, under the new NLRB Rules, the union may waive part or all of this 10 day period. For purposes of this campaign, we assume the union would request an abbreviated post-Excelsior period of 7 days.

SUNDAY	MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	SATURDAY
15 <b>Day #11</b>  <b>WEEK 3</b>  Prepare week 3 materials	16 <b>Day #12</b> <ul style="list-style-type: none"> <li>Meeting with supervisors to encourage informal one-on-one discussions with employees about positive aspects of company: <ul style="list-style-type: none"> <li>- Flexible scheduling</li> <li>- Flexible hours</li> <li>- Non-restrictive time-off requests</li> <li>- Culture of teamwork</li> <li>- Family atmosphere</li> </ul> </li> <li>Update bulletin board</li> </ul>	17 <b>Day #13</b> <ul style="list-style-type: none"> <li>Meeting with supervisors re: strikes and strike history.</li> <li>Post-strike examples and media stories on bulletin board</li> <li>Determine observers and confirm employees will act as observers</li> </ul>	18 <b>Day #14</b> <ul style="list-style-type: none"> <li>Small group meetings regarding strikes</li> <li>Determine observers and confirm employees will act as observers</li> </ul>	19 <b>Day #15</b> <ul style="list-style-type: none"> <li>Small group meetings regarding strikes</li> <li>Distribute strike cost calculator to employees</li> <li>Meeting with supervisors to thank them for hard work and encourage “final push” toward election</li> </ul> <u><b>Post Notice of Election</b></u>	20 <b>Day #16</b> <ul style="list-style-type: none"> <li>Update bulletin board with strike materials</li> </ul>	21 <b>Day #17</b> <ul style="list-style-type: none"> <li>Distribute strike cost calculator and strike materials</li> </ul>
22 <b>Day #18</b>  <b>WEEK 4</b>  Prepare week 4 materials and prepare for election	23 <b>Day #19</b> <ul style="list-style-type: none"> <li>Distribute handout regarding employee’s ability to vote NO even if they signed a card</li> <li>25th hour speech (PM)</li> <li>Supervisors to engage in informal one-on-one discussions with employees about positive aspects of company</li> <li>Review election week rules checklist with supervisors</li> </ul>	24 <b>Day #20</b> <ul style="list-style-type: none"> <li>25th hour speech (AM)</li> <li>Supervisors to engage in informal one-on-one discussions with employees</li> </ul>	25 <b>Day #21</b>  <u><b>ELECTION DAY</b></u> <ul style="list-style-type: none"> <li>Review (again) the election day checklist</li> <li>Meet with observers and review list of names to be challenged</li> <li>Pre-election conference with NLRB</li> </ul>	26	27	28

<sup>3</sup> Election notices must be posted at least three full working days prior to 12:01 a.m. on Election Day. If employees do not work on the weekends, then the weekends do not count as a day.