



CS11

# Don't Let Union Organizing Derail Your Workplace: Responding to Organizing Efforts and Enhancing Organizational Communication Strategies



# Don't Let Union Organizing Derail Your Workplace: Responding to Organizing Efforts and Enhancing Organizational Communication Strategies

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NHRMA 2024 Annual Conference

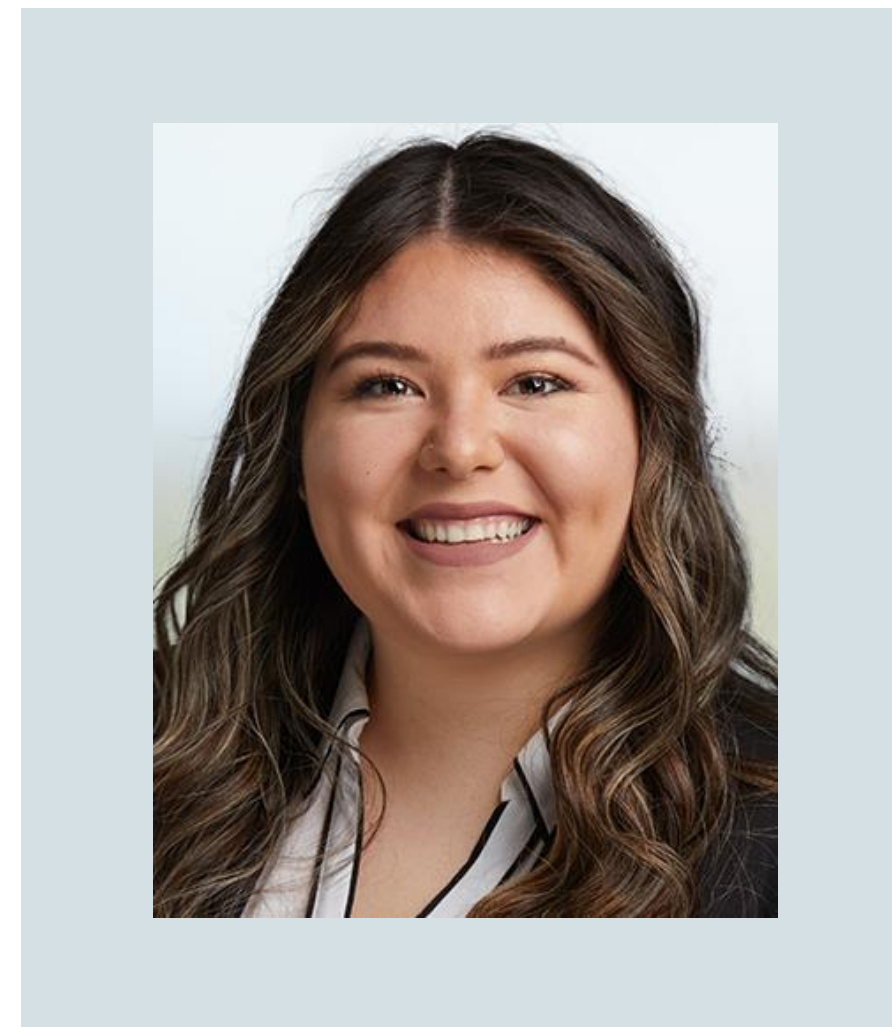
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# Who We Are



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Partner



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This presentation is not legal advice and is based upon current statutes, regulations, and related guidance that is subject to change. It is provided solely for informational and educational purposes and does not fully address the complexity of the issues or steps employers must take under applicable laws. For legal advice on these or related issues, please consult qualified legal counsel directly.

# Obligatory Disclaimer



# **Prior Labor Relations Experience and Familiarity with National Labor Relations Act**

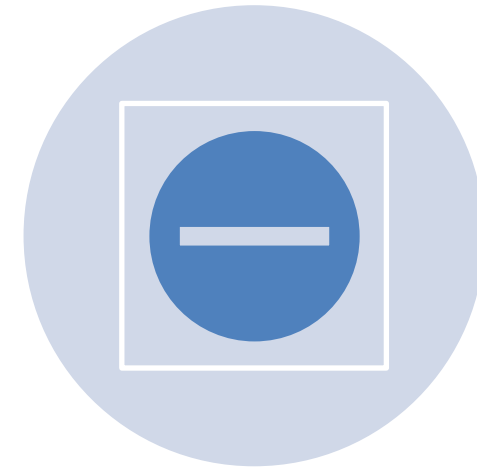




# POLL: Do you currently have at least one union in your workplace?



(A) YES

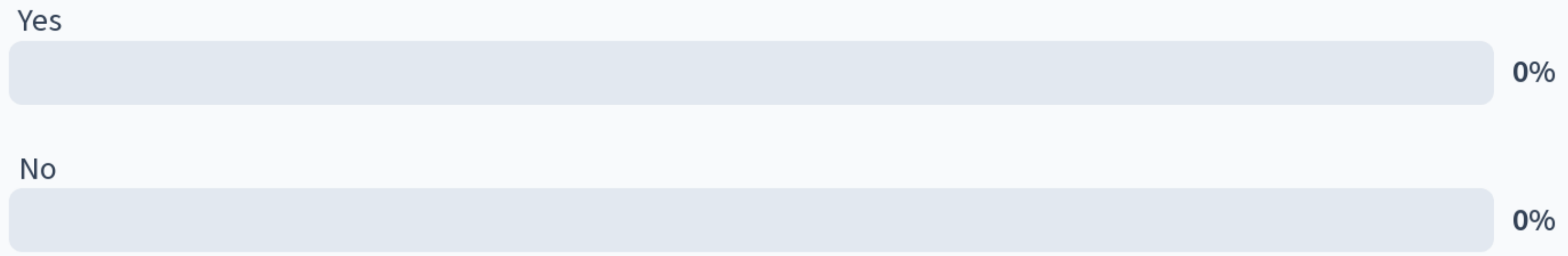


(B) NO

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## Do you currently have at least one union in your workplace?

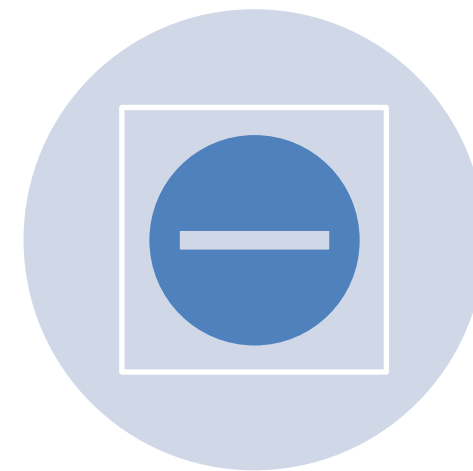




**POLL: Do you have prior experience with union organizing efforts or union elections in your workplace?**



**(A) YES**



**(B) NO**

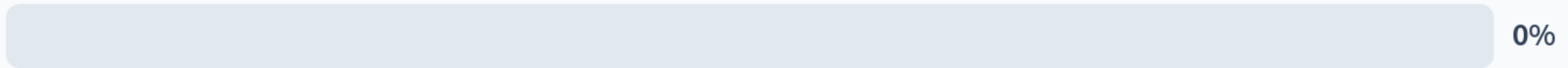
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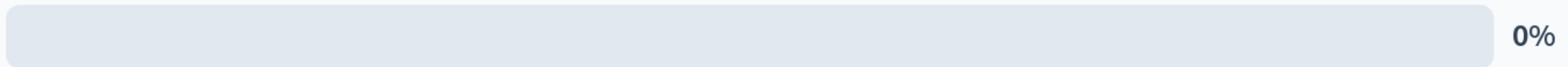


Do you have prior experience with union organizing efforts or union elections in your workplace?

Yes



No



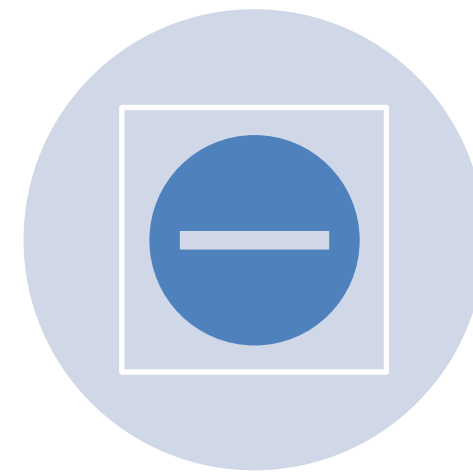


# POLL: Do you have prior experience working in labor relations?

(e.g., National Labor Relations Act or state equivalent for public sector)



(A) YES



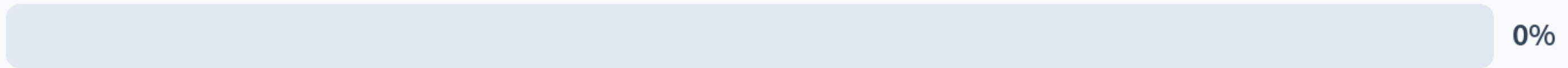
(B) NO

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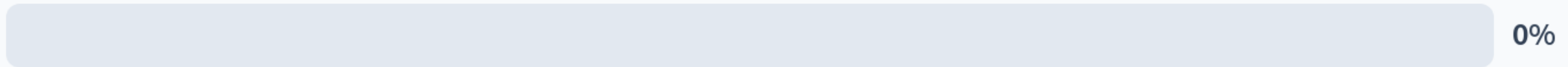


Do you have prior experience working in labor relations (e.g., National Labor Relations Act or state equivalent for public sector)?

Yes



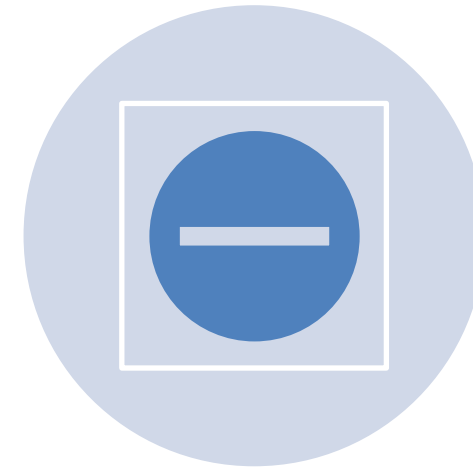
No



# POLL: Do you work for a private sector employer?



(A) YES



(B) NO

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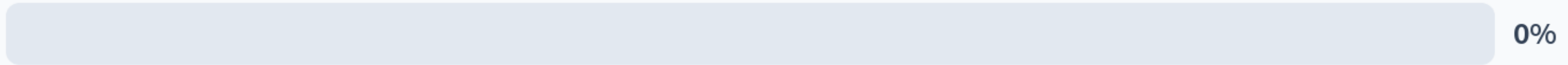


## Do you work for a private sector employer?

Yes



No





# Overview of the National Labor Relations Act



# The National Labor Relations Act (NLRA or the Act)

- Wagner Act (1935) and Taft-Hartley Act (1947)
- Established the National Labor Relations Board (NLRB or the Board)
- Right to unionize and engage in collective bargaining
- Elections
- Right to engage in protected concerted activity (e.g., strikes)
- Employee right and mechanism to bring complaints against employers
- Later amended to regulate unions



President Franklin D. Roosevelt signed the Wagner Act into law on July 5, 1935.



# NLRB



The Board has two main functions:

- Elections
  - Conducting and overseeing elections to determine if employees want to be represented by a union.
- Investigation and prosecution
  - Investigating violations of the NLRA (Unfair Labor Practice (ULP) charges) and remedying violations. When necessary, this involves prosecuting violations.







# Who Is Covered by the NLRA? Who Is Excluded?

Covered by NLRA	Excluded from NLRA
<p data-bbox="503 851 1452 911"><b>Nearly all private sector employees</b></p> <p data-bbox="503 1009 769 1065">Examples:</p> <ul data-bbox="503 1089 1426 1609" style="list-style-type: none"><li data-bbox="503 1089 1059 1140">• Restaurant workers</li><li data-bbox="503 1164 926 1215">• Retail workers</li><li data-bbox="503 1240 736 1290">• Nurses</li><li data-bbox="503 1315 813 1365">• Engineers</li><li data-bbox="503 1390 1426 1534">• Employees in private schools and colleges</li><li data-bbox="503 1558 1169 1609">• Building trades workers</li></ul>	<ul data-bbox="1682 851 2802 1609" style="list-style-type: none"><li data-bbox="1682 851 2269 902">• Agricultural laborers</li><li data-bbox="1682 926 2219 977">• Domestic servants</li><li data-bbox="1682 1001 2802 1052">• Persons employed by a parent or spouse</li><li data-bbox="1682 1076 2385 1127">• Independent contractors</li><li data-bbox="1682 1151 2435 1202">• <b><u>Supervisors and managers</u></b></li><li data-bbox="1682 1226 2635 1446">• Persons employed by an employer subject to the Railway Labor Act (railroads and airlines)</li><li data-bbox="1682 1470 2652 1609">• Federal, state, or local government employees</li></ul>



# Establishing Union Representation: Overview of the Election Process



# NLRB Elections and Union Representation



Generally, employees have the right to decide if they want to be represented by a union.

## ***Step 1: Interest***

Minimum 30% showing of interest to file a petition with the NLRB

## ***Step 2: Election campaign***

Union wants to gain majority support before election

## ***Step 3: Secret ballot elections arranged by NLRB***

In-person or by mail





***Cemex  
Construction  
Materials Pacific  
LLC, 372 NLRB No.  
130 (2023)***

- Overruled election precedent

- When a union requests recognition, an employer must either (1) recognize and bargain with the union, or (2) “promptly” file a petition for an election

- If an employer seeks an election, and then commits a violation of the NLRA, the Board will dismiss the petition and issue a bargaining order



# Best Practices for Effective Communication



# Why\* Employees Organize

- **Perceived lack of a voice in the workplace**

- Employer doesn't listen to problems or investigate complaints
- Employer doesn't care what employees think or value their input

- **Lack of advancement opportunities**

- No pathway to move up if employee desires to
- No opportunities for training or personal improvement

- **Bad managers and unfair treatment**

- Inconsistent application of policies
- Unaware of expectations or direction of work
- Discipline process unfair
- Unfair = similarly situated people were treated differently

- **Wages/benefits**

- Perceived unfair wages
- Wages not competitive with other companies in the industry
- Lack of healthcare, bonuses, fringe benefits



# The Role of the Union in Organizing

- At the end of the day, unions are businesses, too
- Union revenue is largely generated from membership dues
- Unions can organize working directly with employees
- Unions campaign employees to gain support



# How Union Campaigns May Work

- **Problem:** Lack of voice in the workplace
  - **Union Promise:** Voice in collective bargaining
- **Problem:** Job security
  - **Union Promise:** CBA with just cause and seniority
- **Problem:** Inconsistency or favoritism
  - **Union Promise:** CBA will require consistent treatment
- **Problem:** Wages and benefits
  - **Union Promise:** Better wages and benefits





# Unlawful Employer Conduct During Election Campaign

- Interfere with, restrain, or coerce employees in exercising protected rights—Section 7 of the NLRA
- *Encourage or discourage* membership in labor organization
- “Chill” employee speech





# Remember “TIPS”

- Threats
- Interrogation
- Promises
- Surveillance (and discrimination)

# Limits on Employer Activity: Threats



- Threatening employees because of union sympathies or activities
- *Encourage or discourage* membership in labor organization
- “Chill” employer speaker
- For example:
  - [X] will happen if the union wins
  - We will have to close [X] stores

# Limits on Employer Activity: Interrogation



- Threatening employees because of union sympathies or activities
- *Why do you think you need a union here?*
- *Who are the organizers?*
- *What do you think about the union or organizers?*

# Limits on Employer Activity: Promises



- Implying or explicitly promising future benefits if there is no union:
  - *Wage increases*
  - *Fringe benefits*
  - *Paid time off*

# Limits on Employer Activity: Surveillance



- Surveillance of employees engaged in union activity = illegal
- Is a supervisor's presence where employees are being solicited by union legal?
  - *Permissible, if it is the supervisor's normal practice*
- Can a supervisor show up at a public place where a union is meeting?
  - *Likely unlawful*
- Can a supervisor review a union organizing public Facebook page? Reddit thread? An employee's public Facebook posts?
  - *Is this a normal practice?*
  - *Are they friends with the employee?*



# Limits on Employer Activity: Discrimination

- “Concerted activity” (aka Section 7 Rights)—two or more employees acting together to improve wages, hours, or working conditions
- *Unlawful to discriminate against an employee because of concerted activity*

# Limits on *Union* Activity: “TIPS” ?



- Unions are not limited by similar rules
- **Unions can make promises (and do not have to follow through on those promises)**
  - Unions cannot implement those promises
  - (as in --- the union also has to bargain for changes with the employer)





# What Can (or Should) an Employer Do During Organizing?





# Communicate with Employees—Carefully

What employers can discuss during union organizing:

- Providing an answer or response to questions or claims about union organizing is better than saying “I can’t talk about it”
- So, what can you say?

# Remember Your Friend...

## “FOE”

### FACTS, OPINIONS, EXPERIENCES

- **F**acts employer knows to be true
- **O**pinions managers have, or the opinion of the company
- **E**xperiences managers have had with unions



# You Can State FACTS

- Employees will not have the facts
- ***Employees will look for a source with the facts***
- You want to be a reliable source of information
- Be available and willing to speak with employees
- For example, facts that can be shared:
  - Unions represent less than 7% of the private sector
  - Dues from members is a union's main source of income
  - Wages can go down, stay the same, or go up during bargaining (*but nothing is guaranteed*)



# You Can State OPINION

- Employers, including managers and supervisors, can share their opinions
- You can share why you believe a union is not right for your work environment and employees
- The Company may express:
  - The Company opposes a union because it believes in the strong culture it has built with its employees
  - The Company would prefer to continue to deal with employees directly, rather than through a union
  - Paying union dues does not guarantee anything



# You Can Share Your EXPERIENCE

- Have you or anyone you know worked for a unionized employer?
  - Collective bargaining experience?
  - Union promises that did not materialize?
  - Results that did not match the union's promises?
- Have you experienced limited access to supervisors or managers, such as employees having to go through a union steward?
- Do you have any experience with strikes?





# Conduct Manager- and Supervisor-Focused Training

- Managers and supervisors are not “employees” under NLRA and will be asked questions by employees who will vote and be members of the union
- They need resources to help navigate the changing dynamics, such as:
  - Presentations, training sessions, FAQs, tips, and frequent communication
- **TOPICS:**
  - Employee retention, union awareness, and guidelines for employee communications, including what you can say and not say during organizing
  - Employer benefits, including healthcare, retirement, bonuses, opportunities for advancement, ability to provide feedback, PTO, etc.



# Establish and Maintain a Positive Work Environment

- Inventory your Company culture
- What is your workplace environment like? Do you have an inclusive culture?
- How do you maintain effective open communication with employees? (handbook, orientation, one-on-ones, complaint resolution process, employee group meetings, surveys, etc.)
- Career advancement opportunities?
- Competitive wages and benefits





# Inventory but Don't Change (Without Guidance)

- Finicky *status quo*... Status quo requires an employer to continue to not unilaterally implement changes to employees' mandatory terms and conditions of employment absent agreement with the union
- This means, keep doing what you were doing unless doing so is based on subjective bases—such as wage changes that are not set to an objective basis
- Do not engage in activities that can be seen as punishing or swaying staff for their interest or non-interest in the union



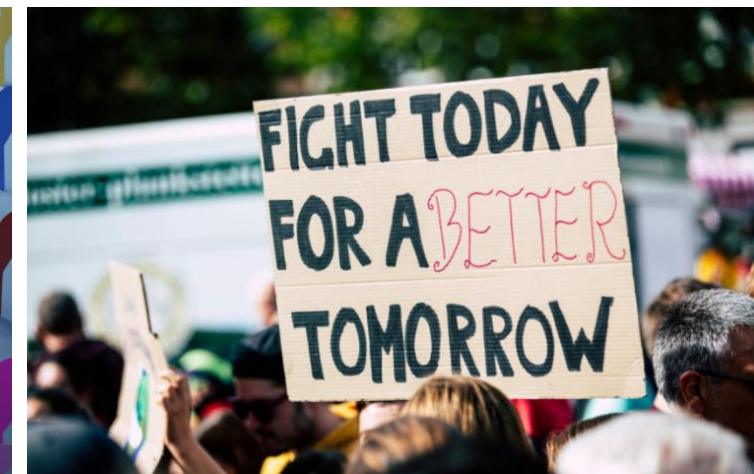
# Additional Considerations During Union Organizing and Elections





# Appropriateness of Proposed Bargaining Unit

- Community of Interest:
- What is the proposed geographical location?
- Is the proposed unit only a single work location or multiple facilities?
- What job titles, types, and/or duties are proposed to be included?
- Does the proposed unit include any positions that are supervisors or managers?
- Should other employees be included in the proposed unit?
  - Should there be employees who are excluded?





# Key Takeaways

- Consult labor counsel early and often when there *might* be a union organizing effort in your workplace
- Be mindful of communications and what an employer can do:
  - Share FACTS
  - Provide OPINIONS
  - Detail prior EXPERIENCES
- Pitfalls/roadblocks are easy to trip up on and can have unfortunate consequences that prevent any type of effective communication against an organizing effort



# Thank You

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