The National Labor Relations Act (NLRA) specifically gives employers the right of “free speech” on labor matters. Therefore, 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. In general, so long as you do not threaten workers directly or by implying you will take reprisals in the event they organize, and so long as you do not promise them any benefits for rejecting a union, you have a pretty free hand in telling your firm’s story. You can state facts and give your opinion on unions in general or in particular. You can present your arguments on why a union is not necessary in your firm.

Further, employers have the right to continue running their businesses as normal. 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 DOs

The following are some of the key things an employer CAN and SHOULD do in communicating with employees about the union.

- You 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.
- You CAN and SHOULD tell employees about any bad experiences you or others you know have had with unions.
- You 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.
- You CAN and SHOULD state what you believe is (or can show) to be the answer to any union propaganda, argument or claim.
- You CAN and SHOULD say you THINK employees should vote “no” in a union election.

* Not legal advice or opinion. Employers should obtain such advice based on individual facts before communicating with employees on issues relating to unions.
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.

It will cover most of the pitfalls you can get into until you receive professional guidance.

Owners, Managers and Supervisors Should Not:

“T” MEANS THREATEN. You cannot 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. You cannot 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. You cannot 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. You cannot 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, or spying are subject to highly complex legal rules and decisions that are too complicated and numerous to list here. Remember, that all of the circumstances surrounding a particular conversation or act are considered in determining whether it amounted to illegal threats, interrogation, promises or spying, and that implied threats or promises are just as illegal as direct ones.

Finally, employers should never DISCRIMINATE against employees based on their union activity.
Test of “Supervisor” Status

In order to implement “TIPS,” it is important for an employer at an early stage to determine who is on the management team (i.e., which management personnel are considered to be “supervisors” under the NLRA). Supervisors, as defined by the National Labor Relations Board (NLRB), are not eligible to vote, and can commit unfair labor practices as agents of management.

Primary Tests

Analysis of the statutory definition of supervisor reveals that Congress has set up 12 specific criteria in the nature of types of authority under the LMRA (Taft-Hartley Act). These test “authorities,” to be exercised upon other employees and in the interest of the employer, are the authority:

1. to hire;
2. to transfer;
3. to suspend;
4. to lay off;
5. to recall;
6. to promote;
7. to discharge;
8. to assign;
9. to reward;
10. to discipline;
11. responsibly to direct by exercising independent judgment rather than routine or clerical in nature;
12. to adjust grievances.

By adding the words "or effectively to recommend such action," Congress in effect doubled the 12 specific tests. To the authority to hire, for example, is added the further authority "effectively to recommend" hiring, and so on down the list of specific authorities listed above.

An employee must possess only one of the specific responsibilities in the statutory definition to be classified as a supervisor. However, the exercise of such authority must not merely be routine or clerical in nature, but rather require the use of independent judgment.

Secondary Tests

In many borderline cases, the character of the employee as a supervisor is not immediately clear when measured against the statutory definition. In such cases, the NLRB and the courts have looked into various secondary tests of supervisory status. Factors that have been regarded as weighing in favor of supervisory status include:

1. the employee’s designation as a “foreman” or “supervisor;”
2. the fact that he or she is regarded by himself/herself or others as a supervisor;
3. the exercise of privileges accorded only to supervisors;
4. attendance at instruction sessions or meetings held for supervisory personnel;
5. responsibility for a shift or phase of operations;
6. receipt of orders from management officials rather than from other supervisors;
7. authority to interpret or transmit the employer’s instructions to other employees;
8. responsibility for inspecting the work of others;
9. instruction of other employees;
10. authority to grant or deny leaves of absence to others;
11. responsibility for reporting rule infractions;
12. keeping of time records on other employees;
13. receipt of weekly or monthly salary, rather than hourly production wages;
14. receipt of substantially greater pay than other employees, not based solely on skill;
15. failure to receive overtime pay;
16. lack of requirement to punch a time clock;
17. non-participation in regular production work;
18. wearing different work clothes than other employees;
19. assignment of overtime work; and
20. percent of time spent in bargaining unit work.

Conversely, the absence of these various tests or existence of their opposites tends to weigh in favor of non-supervisory status.