



# Workplace Policies May Open Door to Unions

Publication

6.26.09

With Congress debating the Employee Free Choice Act and the secret ballot option for employers and employees in jeopardy, it is important for business owners and managers to understand the labor laws that organizers use in order to campaign for unionization. Labor leaders regularly look for legal violations by management in order to embarrass companies and persuade employees that a company is violating their rights. Make sure you don't make a mistake that plays into an organizer's hands. Start by paying close attention to your policies, especially those pertaining to confidentiality and solicitation.

## Confidentiality

The Americans with Disabilities Act (ADA) and Health Insurance Portability and Accountability Act (HIPAA) provide that employers must protect certain confidential information pertaining to employees. However, don't let the "absolute secrecy" implications frighten you into broad, sweeping confidentiality rules that prevent anyone from talking at any time about health benefits or disability. Under the National Labor Relations Act (NLRA), employees are permitted to discuss wages, benefits and other terms of employment. Having a policy that prevents employees from exercising these rights is an unfair labor practice, even if the policy labor practice charge and then argue to employees that they need a union to protect them from this lawless employer.

## Solicitation and Distribution

It is legal to prohibit solicitation by union organizers on company property, so long as other non-employees are also prohibited from soliciting or distributing on company property. But if the company allows a Girl Scout troop to sell cookies in its parking lot, then it is going to have to allow an organizer to sign up new members in its parking lot. The law also permits regulation of employee solicitations and distributions at work. But employees can engage in solicitation and distribution under certain circumstances. The basic rule is that if the employee soliciting and the employee being solicited are on break, then the solicitation must be allowed. An employer can prohibit employees who are "on the clock" from engaging in solicitation, because that interferes with work. The NLRB considers "working hours" to encompass all times an employee is in his or her place of work, including break and meal periods, during which solicitation must be allowed. Instead, you should limit employee solicitation to "non-work time," which the NLRB interprets as designated breaks, meal times, and before and after work. Furthermore, these times must be concurrent for both the employee soliciting and the one being solicited. While it is not unlawful to ban solicitation before and after work, you must enforce the rule consistently. Distribution is like solicitation in that it

can be limited to non-work time. But distribution is different in that the company has the right to prohibit distribution in work areas at any time. This may seem odd. If two employees are on break, but standing in a work area, one can invite the other to come to a church revival. That is a solicitation. But the employee cannot give his co-worker a handbill announcing the revival. This is a distribution. Why the difference? Distributions can create litter. Solicitations do not. The NLRB will allow distributions to be banned in work areas because the litter can create housekeeping, safety and quality problems. Distribution must be allowed in nonwork areas like break rooms and parking lots, so long as employees are on non-work time.

Consistency is a key term in company policy, both in its writing and its enforcement. If you allow employees to solicit during work time for other purposes - whether it's a side business or Girl Scout cookie sales - then union solicitation must be allowed during work time as well. If not, the NLRB has a sturdy leg to stand on in finding illegal discrimination.

Ultimately, having lawful, properly enforced policies is no guarantee against unionization. Rather, such policies and practices deny a union a weapon to use in organizing. The real key to preventing unionization is good communication with your employees. That does not just mean management talks to employees; it means management listens to employees and responds to their concerns.

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This article appeared in the June 26, 2009 issue of *The Mecklenburg Times*.