# How to LOSE a Union Application for Certification

By Jeremy Schwartz

The prospect of becoming unionized is unwelcome for many employers. Along with increased costs and workplace rules, an us-vs-them mentality often creeps in making it difficult to manage your business. In addition to commonplace restrictions on hiring and subcontracting, construction employers often become bound to terms negotiated by other parties and are forced to give up competing for jobs with non-union owners, general contractors and developers. Although some niche and larger companies find new customers and scaling opportunities, for many, becoming unionized increases the cost of doing business and lowers overall efficiency.

**You have only two days** to file a detailed and comprehensive response when you receive an application for certification. 48-hours is barely enough time to gather required information, to make key strategic and legal decisions, and to file a timely response at the Ontario Labour Relations Board (the "Board"). If you're late, the Board will most likely process the application without your input solely based on the union's application (and in construction applications, where unions can be certified without a vote, that means you lose in a matter of days).

Notwithstanding this extremely brief response window, and despite the fundamental and lasting impact of unionization, in our experience most employers know little about the way unions organize, and even less about the law and how applications for certification unfold at the Board.

**Your Application LOSING Checklist**

The following is a checklist, drawn from experience as well as recent and landmark Board decisions, to **help ensure you RECEIVE and LOSE** a union application for certification. This is a tongue-in-cheek list of what **NOT** to do (don't try this at home):

**WHEN THE APPLICATION IS DELIVERED**

- **Wait a day or two to open it:** The Board rarely permits extensions to the statutory two-day deadline to file a response to the application taking certain positions, and never without compelling reasons for the delay. But rules are for those 'other people'. Just explain that you were really very busy and say "please" when you ask for an extension. No doubt the Board will grant it and you won't lose by default without recourse or right of appeal.

- **Don't call your labour lawyer immediately:** The application and response forms are straightforward and written in plain English. It won't take much time to gather the information you need and make key strategic and legal decisions. There are no legal nuances here. Lawyers who specialize in labour relations just make this stuff sound complicated so they can charge more. There must be a how-to-video somewhere online.

  

In any event, if you miss something or make a mistake in the response, the union will be more than happy to consent to prejudicial amendments later.

- **Flood the list:** Add as many employee names to the list of employees in your response as possible, regardless what work they performed and where they were working. On second thought, make up employee names and add them to the list too. What consequences could there possibly be for lying to the Board? Plus, you can always strike their names off later – and striking out large swaths of employee names won't be viewed as an abuse of process and certainly won't irreparably destroy your credibility.

- **Don't verify before you file:** You spoke to your VP and she told you where the employees were and what work they did. Why waste time calling on-site supervisors or checking logs and timesheets to confirm? Plans never change and your VP is never wrong. And be sure to misspell as many names as possible on the list included with your response and refer to people by their nicknames – every knows who you meant.

- **Tell employees to withdraw their support:** After you get the application, you're going to feel betrayed and frustrated. Explain to employees, one-on-one, the error of their ways and how bad the union would be for them. Then tell them to write the union asking for their cards back and insist they make submissions to the Board against the union.

  What's that? You say you received a construction industry card-check application (where post-application changes in support are basically irrelevant)? Do it anyways on principle and to make yourself feel better. Plus, on a scale of 1 to 10, with 10 being the most egregious unfair labour practice and 1 being the least, this would only be about a 6.8.

- **Gather as little evidence as possible:** You might not like what you find. So only gather the bare minimum of records to prove your positions and omit the rest. And don't produce relevant records that are bad for you. It's only illegal if you get caught.

- **Be vague and cagey whenever possible:** It's best to make unparticularized, bald statements of fact in your status submissions, and to avoid taking any firm positions. You need to leave your options open (especially since you're not so sure your VP gave you the right information for the response). No one follows the Board's rules that require parties to plead sufficient material facts, prohibit parties from taking new positions late, or preclude resiling from admissions and agreements.

**BEFORE THE APPLICATION COMES (why wait to shoot yourself in the foot?)**

- **Don't educate yourself:** People who say, "knowledge is power," are just trying to sell you something. The 'law' is just rules based on common sense – right? Besides, unions never apply unless they are certain they already have enough support to win. So, if they file you've already lost. Why bother preparing or taking steps to prevent it?

  

- **Avoid reviewing industry collective agreements and adjusting:** There's no point comparing. You don't need to be competitive in your industry, and employees don't care about things like terms and conditions, wages, benefits and saving for retirement. You're a fantastic company and your employees love you for you.

- **Don't inspire loyalty or reward hard work:** Labour is just a commodity. I know most collective agreements provide zero performance-based bonuses, profit sharing or merit-based wage increases, and even though most construction collective agreements don't recognize seniority, that's no reason to consider offering those and other perks to your steady and productive employees. When the union starts campaigning, just remind employees about that barbeque you had that time.

- **Ignore employment standards and health and safety laws:** The ESA and OHSA aren't strict requirements – they're just aspirational wish lists. Certainly, no employee has ever approached a union for help when their employer wasn't paying overtime properly, routinely classified employees as independent contractors to lower overhead, or hadn't enough PPE to go around. If that's your business, best to bury your head in the sand and hope no one notices (or gets hurt). Fixing those issues can be expensive, and those are DEFINITELY NOT lightning-rods that attract union support.

- **Don't employ professional managers and supervisors:** "Work-life balance" and "respectful workplace" are just buzzwords for Millennials. Your employees are lucky to have a job at all. Employees who feel mistreated and without internal recourse never succumb to union organizers' promises to fight for them. Of course, the best way to run an efficient workplace is to have old-school supervisors who know how to *crack the whip*. I know you implemented a violence and harassment policy when that Ministry of Labour Inspector kept haranguing you (but we both know you didn't really mean it).

- **Fear is the best weapon:** If you learn a union is trying to organize your workforce, hold a mandatory meeting during working hours and warn your employees the company would go under and they would all be out of a job if the union got in. Be sure to ask every employee if they've signed a card and don't forget to lay off key union supporters to stop the spread. The Labour Relations Act has only a few prohibitions against that sort of thing, and come to think of it, what's so "unfair" about an unfair labour practice? Just because the Board remedially certifies every employer who knowingly terminates an inside union organizer during an organizing drive, that doesn't mean they would in your case. It really is the best way to nip the campaign in the bud.

  Scratch all that. Best to say nothing at all to employees for fear of crossing the line. The union is making all sorts of promises, but organizers always provide a fair, balanced and objective view. No need to set the record straight.

  

The above was obviously intended as a tongue-in-cheek checklist of what we would recommend employers **not-do**. While we are experienced and passionate advocates for our clients' rights in litigation at the Board (and while it's hard to say this without it sounding like a sales pitch), planning and prevention are often your only defence.

Our experienced, labour relations lawyers regularly help employers to avoid and respond effectively and lawfully to union organizing. We help our clients identify hot-button issues, train managers and supervisors respond while avoiding costly (and unlawful) unfair labour practices, and we develop plans that can be activated with confidence should a drive commence or an application arrive.

Let us know if we can help.

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