



# Unionization in the Surveying Industry – Do you know how to protect your business?



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**U**nions have a renewed interest in the practice of land surveying in Ontario. Union certification can happen extremely quickly and have an extraordinary impact on a business. Being unionized means an employer is required to negotiate with a union in respect of its employees' terms and conditions of employment, including, but not limited to, items such as wages, benefits, hours of work, overtime, layoffs and recall, etc.

This article considers how unions could impact the practice of land surveying in Ontario, outlines the union certification process, and offers practical tips on what an employer can, and cannot, do to respond to a union organizing campaign.

## Unionization

### *Who can form a bargaining unit?*

Ontario's *Labour Relations Act, 1995*, prohibits managers and licensed professional land surveyors from being included in a bargaining unit. A manager is someone who exercises managerial functions or, at a minimum has a significant role in decisions related to the economic well-being of other employees (i.e., hiring and firing, granting raises, promotions, scheduling, etc.). As a general rule, a "party chief" may be included in a bargaining unit, if their level of responsibility is restricted (i.e. they do not have the ability to hire and/or fire other workers). The exclusion for a licensed professional land surveyor refers to an Ontario Land Surveyor. All other employees engaged in land surveying may be included in a union's proposed bargaining unit.

### *Is a land surveyor in the construction industry?*

As explained in greater detail below, different considerations and rules apply to the unionization of employees in the construction industry. Whether a group of employees is in the construction industry depends on the nature of the work they perform. The practice of land surveying does not fall neatly into either category (construction or non-construction).

An employee engaged in preparing a layout for a construction site may be considered part of the construction industry. However, an employee engaged in the preparation of a real property report may be considered part of the non-construction industry. As a result, a union's organizing campaign of employees engaged in land surveying may be subject to either set of rules, depending on the nature of the work performed by the employees in the proposed bargaining unit.

## Union Certification Process

The *Labour Relations Act, 1995* provides two different processes for union certification: vote-based certification, which is available to all unions, and card-based certification, which is only available to unions with an established trade union practice in the construction industry ("construction industry unions").

### *Vote-Based Certification*

A union may initiate the certification process by filing an application with the Ontario Labour Relations Board (OLRB) asking to be certified to represent an identified group of employees working for a particular employer. The union needs the support of only 40 per cent of employees to file the application.

An employer then has two business days to file its response to the application, including providing its view of which employees fall within the union's proposed bargaining unit, and deciding what legal positions the employer wishes to take on the issues raised in the application.

The OLRB will typically conduct a vote of the employee group five days after the application has been filed. The union will be certified if it receives the support of more than 50 per cent of the employees who vote. That means if a proposed bargaining unit is for 100 employees, only 10 employees vote, and six vote in favour of the union, the entire 100-employee group is unionized.

## Card-Based Certification

A construction industry union can be certified without a vote if it files an application for certification with more than 55 per cent support of its proposed bargaining unit (except in rare cases where a vote must be held). If a construction industry union applies for certification with between 40 per cent and 55 per cent support of the proposed bargaining unit, the OLRB will conduct a vote. An application with less than 40 per cent support will be dismissed.

Similar to vote-based certification, an employer has two business days to file its response to a construction industry union's application.

## Responding to a Union Campaign

Once an application for certification has been filed, an employer (construction and non-construction) has limited time and options. Addressing union organizing proactively, **before** an application is filed, can therefore be extremely valuable.

Many employers, and even legal counsel, misunderstand what an employer is and is not permitted to say and do during a union campaign. A common misunderstanding is that an employer must remain neutral. In Ontario, like most Canadian jurisdictions, an employer actually has a legislated, protected right of free speech that entitles it to express its preference that employees not be unionized, provided it does so in a manner that is not coercive, intimidating or threatening. An employer can also point out the benefits of working in a non-unionized workplace and some of the negatives of being unionized (i.e. the requirement have union dues deducted from their paycheques).

It can be a mistake for an employer to refrain from exercising its right of free speech because, while some employees may be committed to a union, often a number are undecided. It is therefore critical that employees hear and understand management's perspective.

That said, employers must respect that the decision whether or not to join a union is to be made freely by the employees. If an employer unduly interferes with an employee's decision to join a union, the OLRB has broad authority to make a remedial award which could include ordering a vote or outright certifying the union *even where a majority of employees voted against the union*.

In light of the serious potential consequences of a response to an union's organizing campaign, an employer may want to consider proactive training of its management team so they are ready to respond to organizing, including

knowing what they can and cannot say and do during a union campaign.

In addition, an employer may reduce the risk its employees might seek representation by a union by proactively implementing a plan to establish and maintain positive employee relations.

Under the *Labour Relations Act, 1995*, an employer, and anyone speaking on behalf on an employer (which can include a supervisor or other management employee), is prohibited from doing any of the following in relation to a union campaign:

- Threaten or intimidate employees, i.e., "if our workplace gets unionized, everyone will lose their jobs".
- Interrogate employees about their interactions with union representatives or their opinions about unionization.
- Make promises to employees, i.e., "if you vote against unionization, you will get a promotion".
- Spy on employees, including inquiring about employee attendance at union meetings.

**Significantly, an employer may tell its employees it does not want to have a union, and explain how unionization may affect the terms and conditions of employment, as long as this does not engage in words or deeds that amount to threat or intimidation.**

**Bottom line:** Unionization can have a drastic effect on business; and happen almost overnight. Employers must therefore know their rights, understand the process of unionization, plan and execute proactively and work closely with labour counsel knowledgeable of and experienced with union organizing drives. 

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