

CHECKLIST FOR ALRB ORGANIZING ACTIVITY

REMEMBER! FOR THESE PURPOSES, EMPLOYEES OF FARM LABOR CONTRACTORS ARE EMPLOYEES OF THE GROWER!

If you receive a Notice of Intent to Take Access (NA):

- Contact labor counsel.
- Check to see if the document has been filed with the ALRB. If it has, it will have an ALRB stamp showing the date and time of filing in the upper right hand corner.
- Check whether the union has taken access during the current calendar year. If so, note how much access has been taken.
- Check and see if there has been an election within the last year. There is no right of access until 30 days prior to the one-year anniversary of the prior election.
- Calculate 30 calendar days from the date of filing. Access will end on this date. Mark calendars accordingly. **Note: If there is an election, access will terminate 5 days after ballots are counted, or 10 days after the filing of objections.**
- Note that access is permitted for one hour before work, one hour after work, and up to one hour during lunch. **If the lunch period is less than one hour, access is only permitted for the duration of the lunch period.**
- Organizers may take access in usual employee gathering places, including buses.
 - Organizers may take access aboard buses provided by an employer or FLC while buses are parked in areas where employees are picked up or dropped off from work. When employees board the buses more than one hour before the start of work, organizers may have access to the buses from the time when employees begin to board until the buses leave.
- Access is limited to two organizers for each crew. If there are more than 30 workers in a crew, then on additional organizers is permitted for each **increment** of 15 workers. Violations should be documented, but no action should be taken without consultation with counsel.
- Organizers must wear badges that identify them, and they must identify themselves by name and organization upon request by the employer or a supervisor. Violations should be documented but no action should be taken without consultation with counsel.
- Organizers may not disrupt the employer's property or operations, including damaging crops or machinery or interfering with boarding buses. However, speech alone is not interference. Supervisors must carefully document any suspected interference, but should not take action until consultation with counsel.

If you receive a Notice of Intent to Organize (NO):

- Contact labor counsel.
- Check to see if the document has been filed with the ALRB. If it has, it will have an ALRB stamp showing the date and time of filing in the upper right hand corner.
- Check to see if an NA was filed within the previous thirty (30) days. **The union must file the NA prior to filing the NO.**
- Check to see if an NO has been filed within the last 30 days. **An employer is not required to provide more than one list of employees pursuant to an NO in any 30 day period.**
- Begin preparing the employee **List #1** in the format described below.
- If 10% of the employees have signed union authorization cards or petitions, the employer must provide **List #1** within **5 days**.
 - The ALRB will check the cards or petition for validity.
 - No card dated more than one year before the filing of the election petition will be counted in the showing of support. However, cards signed at a time when the employee was not working for the employer will be counted if it is otherwise valid.
- Be prepared to produce the signature portions of W-4 forms and/or I-9 forms for employees and labor contractor employees on short notice. **This is your first, and maybe only opportunity to demonstrate the union has produced fraudulent signatures.**
- Obtain payroll records from any farm labor contractors used in the payroll period immediately preceding the filing of the NO if they are not already in your possession.

If you receive a Petition for Certification:

- Contact labor counsel.
- Check to see if the document has been filed with the ALRB. If it has, it will have an ALRB stamp showing the date and time of filing in the upper right hand corner.
- Determine the “eligibility period.” **Your eligibility period is the last payroll period completed immediately preceding the filing of the petition. If the payroll period was less than five days, use the five days immediately preceding the filing.**
- Review the petition carefully and note any areas that appear inaccurate.
- Compile the following information:
 - Correct legal name of employer
 - Type of entity (i.e., partnership, corporation, sole proprietorship, etc.)
 - Address and telephone number
 - Duration and timing of payroll periods (**including all FLCs**) (i.e., Sunday through Saturday or bimonthly commencing on the 1st and 15th of the month).
 - Determine the number of employees employed during the eligibility period
 - Commodities produced
 - Field locations statewide (with maps if possible)
 - Examine Numbers 6 and 7 on the petition. Determine whether the unit proposed by the union includes all of the agricultural employees statewide, **including labor contractor employees.**
 - Farm labor contractors used, if any. **If labor contractors were used during the eligibility period, compile payroll records for their employees in the format listed below.**
 - Determine your peak payroll period: This is the payroll period when the employer employs the largest number of employees in the year. Typically, this is based on previous years. If it is going to change based upon higher or lower acreage (or other reasons), document the increase or decrease and be prepared to demonstrate the change or you will be held to past practice. If it has already occurred in the current season, note the inclusive dates of the pay period and the number of employees employed. If it has not yet occurred, estimate the dates when it will occur and the number of employees who will be employed.
 - Identify non-field (“secondary operations”) operations (packinghouses, greenhouses, coolers, warehouses, etc.) and their locations.
 - Determine whether the secondary operations above handle product grown by entities other than your company. If so, be prepared to produce documentation, including but not limited to, purchase orders, contracts for the supply or purchase of the commodity (i.e., grower-shipper agreements, invoices, etc.)
 - Determine the languages spoken by the workers. **Are you sure of all dialects spoken (e.g. Oaxacan, etc.)?**
 - Be prepared to produce signature portions of W-4 and/or I-9 forms for employees and labor contractor employees on short notice. **You may only have a limited opportunity to challenge a union’s showing of support due to fraud in the signatures.**

- Prepare employee lists. **(List #1 and List #2)**
- Elections are typically held seven days from the filing of the Petition for Certification. If more than half of the employees are engaged in a strike, the ALRB will use its best efforts to hold the election in 48 hours.
 - If the timing works out, the ALRB can and will hold elections on weekends, including Sundays. While a number of factors will be considered in deciding whether to hold a weekend election, the most important factor will be whether the company is open on the weekend. Thus, if employees are working on Saturday or Sunday, the ALRB will order an election on that day.

FORMAT OF EMPLOYEE LISTS

List #1:

- The list must provide names, complete street addresses (**no P.O. boxes**), and job classifications of all agricultural employees in the unit described in paragraphs 6 and 7 of the Petition or Paragraph 3 of the NO, unless instructed otherwise by labor counsel.
- The list should include employees who **actually worked** (with some exceptions; see below under “Included on Employee Lists”) during the payroll period immediately preceding the filing of the NO or Petition for Certification. Look at the date the NO or Petition was filed, and examine the records from the last completed payroll period before the filing. **If the payroll period immediately preceding the filing was shorter than five days, then use the five day period immediately preceding the filing.**
- The list should be in alphabetical order, or by crew or job classification. If done by crew or class, it should be alphabetical within each crew or class. If the list only includes harvesters, then it should list employees alphabetically by crew, and should include the crew designation. Others, such as tractor drivers, sorters, cutters, harvesters, punchers, checkers, irrigators, and others may not be included within the crews and should be listed by job classification in alphabetical order.

List #2:

This will be a payroll list from the last payroll period completed before the petition was filed, and may be copies of your original payroll records.

- Remove Social Security Numbers and other confidential information.

<u>INCLUDED ON EMPLOYEE LISTS</u>	<u>NOT INCLUDED ON EMPLOYEE LISTS</u>
Employees on FMLA leave or other protected leaves	Management personnel
Farm Labor Contractor Employees (may be a separate list in the format described above).	Clerical employees
Employees on sick leave	“Supervisors”: Any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if, in connection with the foregoing, the exercise of authority is not of a merely routine or clerical nature, but requires the use of independent judgment.
Employees on workers’ compensation leaves	P.O. Boxes: Street addresses must be given
	Social Security Numbers and other confidential personnel information.

PEAK

- The ALRA requires that the elections take place when the company is employing **50 percent of the number of employees employed during its “peak” season.**
- If the employer claims it did not employ 50% of its peak, must provide the ALRB with a statement, based on evidence available to the employer, of the highest single payroll period of employment during the preceding year within 48 hours after the petition is filed. **The employer's failure to provide this information may give rise to a presumption the petition is timely filed with respect to the employer's peak.**
- **Peak is the payroll period with the highest number of employees for the current calendar year.**
 - The “calendar year” is the calendar year in which the payroll period immediately preceding the filing of the petition falls.
 - The peak for the current calendar year can be determined by examining “past peak” (the peak payroll period from the current year that has already occurred) or “prospective peak” (the estimated peak for the current year based on acreage, crop statistics, and any other information relevant to what the peak will likely be for the current year). **Acreage statistics will be critical.**
 - In prospective peak cases, the Regional Director will examine the peak payroll period from prior years, along with any other information that is relevant to what the current peak will be. **Payroll records from prior years will be critical.**
 - *The ALRB may disregard a previous year's peak period if it appears that an unusually high peak was due to unusual conditions that do not reflect what the likely peak for the current year. For example, unexpected weather conditions may result in an unusually high peak in a given year. **Be sure to compile records from a number of past years to demonstrate the numbers reflect the likely peak for the current year.***
 - *Relevant information can include changes in acreage, weather and crop conditions, changes in crops harvested, or any other information that will show either an increase or decrease in the peak employment from the past. **Begin to compile any such information immediately! The burden is on the employer to demonstrate a projected peak.***
 - *Accurate and complete information is critical – **the Regional Director's peak determination will be upheld if it is reasonable based on the information provided at the time the determination is made, even if the actual peak turns out to be significantly higher.***

Methods of Determining Peak

- **METHOD #1: PAST PEAK:** Under this method, the names on the employers' payroll immediately preceding the filing of the representation petition are counted and compared with the number of names that appear on the peak payroll period that has already taken place during the current year.

In Prospective Peak Cases:

- **METHOD #2: BODY COUNT:** Under this method, the names on the employers' payroll immediately preceding the filing of the representation petition are counted and compared with the number of names that appear on the peak payroll during the preceding year.
 - The ALRB may do “body count” comparisons for prior years in order to see whether the employer is at 50% of the peak for its current calendar year in light of fluctuations from year to year. When a peak figure from a prior year or years is used, the ALRB will direct an election when the current employment level is close to half of that peak figure, even if it is less than 50%. **The ALRB has ruled that a margin of error of 2.5% is close enough, but a margin of error of 4% is too much to proceed with an election.**
 - In one case, the ALRB excluded 21 employees from the previous year’s peak who were hired to replace a crew that was mistakenly sent home early. **The Board will make adjustments so that peak reflects “the employer’s actual labor needs.”**
 - This method will be applied first. If the 50% of peak is not present under this method, the “Saikhon” approach will be applied.
- **METHOD #3: “SAIKHON”:** Under the “Saikhon” approach (named for the case in which it was developed), the number of names (the body count) on the payroll immediately preceding the petition is compared with the **average number of employees working each day during the peak payroll period.**
 - This method is designed to take into account turnover in the payroll period to reach an accurate reflection of the employer’s labor needs.
 - The average number is determined by **adding up the total number of employees working during the period and dividing that number by the number of days in the payroll period.**
 - *Hypothetically, a company may need only 100 employees per day and because it hires different employees each day may have a five-day payroll that includes 500 names.*
 - *The Board may exclude certain days in a payroll period if it feels that the day is not representative of the typical work pattern. For example, in one case only one crew worked on Sunday, so Sunday was not used in determining the average.*

- *During the week preceding filing of the petition, the company may still have 100 employees per day, but be hiring the same employees each day. If only the names on the two payrolls are counted, it will appear that the company was not at 50 percent of peak during the payroll preceding the election.*
 - *The law does not permit averaging to determine the number of employees employed in the payroll period immediately preceding the filing of the petition. A body count must always be used.*
- **METHOD #4: COMBINED AVERAGES:** In another case, the employer hired two groups of employees: regular employees, who were paid on a biweekly payroll, and seasonal employees, who were paid on a daily payroll. The Board considered an alternate approach of **determining the average for each group separately, then adding together the two averages to use as the peak for comparison to the number of employees in the payroll period preceding the petition.**
 - *Because under both the “Saikhon” and combined average methods of calculation, over 50 percent of the number of employees who worked during peak season were working during the week preceding filing of the representation petition, the Board held it was peak without deciding whether the which approach was appropriate, but it might apply the alternate approach in a given case.*
 - **METHOD #5: NUMBER OF EMPLOYEES PER ACRE:** Compare the number of acres farmed to the number of employees used per acre by other employers in similar operations to determine the likely peak.
 - **METHOD #6: EDD AND OUTSIDE DATA:** The ALRB will use EDD numbers and information from other growers in the same commodity to determine the likely number of employees to be used at peak on the number of acres to be farmed.
 - **METHOD #7: COMBINED GROWER AND LABOR CONTRACTOR:** Where there is a combination of labor contractor employees and grower employees, and there is high turnover among labor contractor employees, the ALRB has applied a peak calculation taking **the body count of the grower’s employees during the peak payroll period and adding to it the highest daily number of labor contractor employees during the peak payroll period.**

Who is counted as being employed during the payroll period preceding the petition?

- When determining the number of employees in the payroll period preceding the filing of the petition, any employee who would be eligible to vote is counted.
 - This will usually include employees on workers’ compensation leave, FMLA/CFRA leave, or other legally protected leaves of absence.
 - In order to discount an employee on a leave such as a workers’ compensation leave, the employer must show that the employee would not have worked, even if he or she were not on leave.

Number of Copies

Response to Petition for Certification (with lists): Original plus two (2) copies. **Do not provide the response to the union!** Keep several copies for internal use.

Any documents to the Regional Director: Original plus two copies.

Any documents to the General Counsel: Original plus two copies.

Any documents to the Executive Secretary, judge, or ALRB: Original plus six copies.