Monday, October 25
2:30pm-4:00pm

306 - Look Who's Knocking at Your Door: How to Prevent and Prepare for Union Activity

John Duncan
General Counsel and Corporate Secretary
MORPHOTRAK, INC.

Michael Lotito
Partner
Jackson Lewis

Julie Waas
Assistant Vice President & Associate General Counsel
Baptist Health South Florida

Darryl Weiss
Former General Counsel/Secretary
Telgian Corporation

Session 306

Faculty Biographies

John Duncan

John Duncan served as general counsel and corporate secretary for MorphoTrak, Inc. (a high tech company specializing in biometric identification systems for government, military, law enforcement, and corporate security applications). He is currently adjunct faculty at the Western Washington Campus of the University of Phoenix teaching employment law, labor law, and business law courses.

Prior to MorphoTrak, he was an associate counsel at Trendwest Resorts, focused on employment law and labor law matters. He has also worked as an EEO manager and investigator for employee relations, ethics, and union relations at The Boeing Company (Everett, Washington manufacturing facility). Mr. Duncan has also served as an assistant attorney general for the State of Ohio, Chief Counsel's Staff.

Mr. Duncan received his JD from the University of Dayton School of Law. He also earned his MBA from Howard University and his BS from Ohio University.

Michael Lotito

Michael J. Lotito is a partner at Jackson Lewis LLP. Mr. Lotito practices all aspects of traditional labor relations and has extensive experience advising clients regarding corporate campaigns. He regularly assists clients in conducting internal and external vulnerability assessments to create stronger organizations which, as a by-product, help pre-empt union organizing.

Mr. Lotito is also one of the nation's leading authorities on preventive strategies in the workplace and regularly advises organizations on all matters affecting the employer-employee relationship. A noted speaker and presenter, Mr. Lotito addresses an extensive variety of management groups including boards of directors, company executives, managers and supervisors, and trade association representatives. Mr. Lotito has been recognized with a lifetime Senior Professional in Human Resources (SPHR) certification. He chaired the 260,000-member Society for Human Resource Management (SHRM), served as chairman of SHRM's National Legislative Affairs Committee, and was a member of its Employee and Labor Relations Committee. Mr. Lotito is a member of Vistage 200, an honor and designation that places him among the top one percent of all Vistage presenters in the world. He is a member of the Labor and Employment Case Selection Committee of the National Chamber Litigation Center. Mr. Lotito is also a member of the California Bar Association and an ABA fellow.

Mr. Lotito received both his BS and his JD from Villanova University.

Julie Waas

Julie Reby Waas is assistant vice president and associate general counsel for Baptist Health South Florida. Baptist Health is South Florida's largest faith-based, not-for-profit healthcare organizations and is comprised of a network of 5 hospitals, outpatient diagnostic and surgical facilities, and home health care services. Ms. Waas provides in-house legal support to Baptist Health's human resources department regarding issues involving workplace law.

Prior to joining Baptist Health South Florida, Ms. Waas was a partner at Jackson Lewis, LLP where she practiced exclusively in the area of labor and employment law, regularly litigated matters on behalf of the firm's clients, and counseled and provided training for clients on a variety of labor and employment law matters as well as matters involving accessibility of public accommodations to individuals with disabilities.

Ms. Waas is vice president-education for the Miami-Dade Business Leadership Network, an organization composed of volunteers from the Miami-Dade County business community. Offering leadership by example and a supportive employer-to-employer network, the Miami-Dade BLN seeks to promote and support the employment of qualified people who just happen to have disabilities.

Ms. Waas earned her BA from Bryn Mawr College and her law degree from the University of Miami School of Law.

Darryl Weiss

Darryl Weiss was most recently the general counsel and secretary to Telgian. While at Telgian he provided counsel to the board of directors, general legal oversight in the US and foreign sites, aided in benefit design, contracts, M&A, international employee relations, and union avoidance.

Prior to working for Telgian, Mr. Weiss worked in the telecommunications, medical manufacturing, and aerospace field in 13 countries. He was usually, as he puts it, "the HR Guy, The Legal Guy, or Both"

He is currently spending his "down time" volunteering for the San Diego Brain Injury Foundation, the Grand Canyon State Fencing Foundation, one of the regional Paralympic Wheelchair Fencing Centers, and the ABA Mentor program. Mr. Weiss currently competes in both national and International Wheelchair Fencing Competitions. He is also part of the Kennedy Center's "Leadership Exchange in the Arts and Disability" program.

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What to do if the Union Comes Knocking

Presented By:

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John Duncan
Darryl Weiss
Michael J. Lotito

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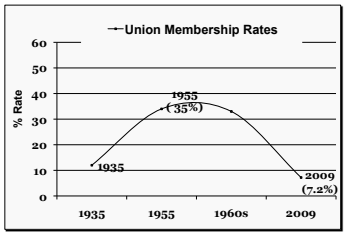
Unions Highly Motivated to Increase Organizing



Source: BLS Division of Compensation Data Estimation, Office of Compensation and Working Conditions

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Labor's Plans for the Future

"[T]he only way to rebuild the labor movement is to organize wholesale, not retail, to organize all of a company at one time, not one plant, one shop, one worksite at a time."
-Andrew Stern, Former President SEIU

"We want to identify jobs that can't be shipped overseas."
-James Hoffa, General President Teamsters

"If we do not drastically change, there will be no labor movement in this country."
-Joe Hanson, President UFCW

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Fast Facts: Recent Organizing Trends

- *Unions have started to reverse the decline in membership*
- *Labor Spent over $400 million in 2008 election cycle*
- *Unions now win 67% of all NLRB elections*
- *More than 70% of new union members come in through card check deals*
- *SEIU and AFL-CIO both recently elected new presidents who are both focused on increasing organizing activities*

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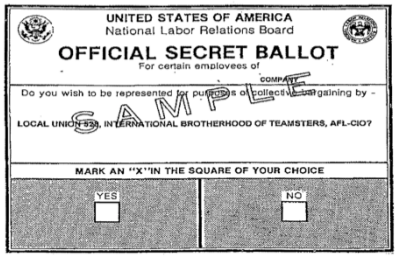
Secret Ballot Elections


UNITED STATES OF AMERICA
National Labor Relations Board
OFFICIAL SECRET BALLOT
For certain employees of
COMPANY
Do you wish to be represented for purposes of collective bargaining by -
SAMPLE
LOCAL UNION 538, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO?
MARK AN "X" IN THE SQUARE OF YOUR CHOICE
YES
NO

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Potential EFCA Compromise…

- *No "card check"*
- *"Quickie" elections -- 10-21 days from petition*
- *Enhanced remedies*
- *Possible "baseball style" arbitration for 1st contracts*
- *Binding interest arbitration -- right or remedy*
- *Equal access to employees for unions*

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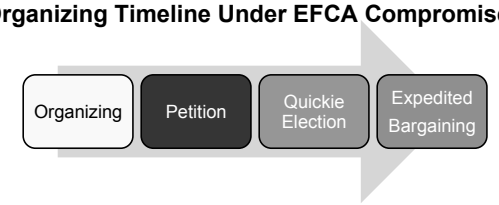
Organizing Timeline Under EFCA Compromise



Caution: Employers will find it harder to win elections in 10-21 days with union access and triple penalties.

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E.O. 13496: Contractor Posting Requirement

EMPLOYEE RIGHTS

UNDER THE NATIONAL LABOR RELATIONS ACT

The NLRA guarantees the right of employees to organize and bargain collectively with their employers, and to engage in other protected concerted activity. Employees covered by the NLRA are protected from certain types of employer and union misconduct. This notice gives you general information about your rights, and about the obligations of employers and unions under the NLRA. Contact the National Labor Relations Board, the Federal agency that investigates and resolves complaints under the NLRA, using the contact information supplied below. If you have any questions about specific rights that may apply in your particular workplace.

Under the NLRA, you have the right to:

- Organize a union to negotiate with your employer concerning your wages, hours, and other terms and conditions of employment.
- Form, join or assist a union.
- Bargain collectively through representatives of employees' own choosing for a contract with your employer setting your wages, benefits, hours, and other working conditions.
- Discuss your terms and conditions of employment or union organizing with your co-workers or a union.
- Take action with one or more co-workers to improve your working conditions by, among other means, raising work-related complaints directly with your employer or with a government agency, and seeking help from a union.
- Strike and picket, depending on the purpose or means of the strike or the picketing.
- Choose not to do any of these activities, including joining or remaining a member of a union.

Under the NLRA, it is illegal for your employer to:

- Prohibit you from soliciting for a union during non-work time, such as before or after work or during break times; or from distributing union literature during non-work time, in non-work areas, such as parking lots or break rooms.
- Question you about your union support or activities in a manner that discourages you from engaging in that activity.
- Fire, demote, or transfer you, or reduce your hours or change your shift, or otherwise take adverse action against you, or threaten to take any of these actions, because you join or support a union, or because you engage in concerted activity for mutual aid and protection, or because you choose not to engage in any such activity.

Under the NLRA, it is illegal for a union or for the union that represents you in bargaining with your employer to:

- Threaten you that you will lose your job unless you support the union.
- Refuse to process a grievance because you have criticized union officials or because you are not a member of the union.
- Use or maintain discriminatory standards or procedures in making job referrals from a hiring hall.
- Cause or attempt to cause an employer to discriminate against you because of your union-related activity.

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New Labor Board: "Labor Law Reform without an Act of Congress"

Current Members (As Of June 2010)

CHAIR WILMA LIEBMAN — ***Term Expires 2011***
Clinton/Bush/Obama Appointee

PETER SCHAUMBER — ***Term Expires August 2010***
Bush Appointee-Former Arbitrator

CRAIG BECKER — ***Term Expires 2011***
Previously Assoc. General Counsel SEIU & AFL-CIO

MARK PEARCE — ***Term Expires 2013***
Previously Partner at Creighton, Pearce, Johnson and Giroux

BRIAN HAYES — ***Term Expires 2012***
Previously Republican Staffer, Senate HELP Committee

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Anticipated Rulemaking from the New NLRB

- *New Election Rules to Favor Unions*
  - *Mandatory union rights postings*
  - *Expedited election processing*
  - *Mail and e-balloting*
- *More Aggressive Remedies in Initial Organizing and First Contract Cases*
  - *Union access to premises*
  - *Equal time rules in campaigns*
  - *Mandated bargaining schedule and monitoring in bad faith bargaining cases*

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Scenario: Part 1

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- Union organizers outside gate of your facility handing out union flyers
- An off-duty employee is in the break room passing out union flyers and is trying to get employees to sign union cards
- Another employee asks whether he can post a flyer on the bulletin board re: tonight's union meeting at Chili's

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- Operations manager wants to do the following and needs you to tell him whether his acts would be lawful in next 15 minutes:
  - 1) force the union organizers to leave
  - 2) go into break room and tell the off-duty employee to get out and tell the other employees they can't solicit or distribute union literature/cards on company property
  - 3) forbid the employee from posting the notice of the union meeting

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Solicitation/Distribution Rules for Non-Employees

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Solicitation/Distribution Rules for Non-Employees

- *Solicitation by employees*
  - *Permitted ONLY if all employees involved are on non-work time*
- *Distribution by employees*
  - *Permitted in non-work areas ONLY if all employees involved are on non-work time*
  - ***NEVER** permitted in work areas*

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Off Duty Access Rules

- *Rule must be limited to interior areas and outside work areas*
- *Employees must have clear notice of the rule (e.g., it is in the handbook)*
- *Rule must be equally enforced for all off-duty employees' access, not just for employees engaged in union-related activity*

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Scenario: Part 2

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- HR finds out about tonight's union meeting and wants to shut down production in 30 minutes for the rest of the day so you can hold an all staff meeting
- They want you to talk to employees about the following:
  - Why employees should not sign union cards
  - Disadvantages of joining a union

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Your Right to Speak Out

Section 8(c)

"The expressing of ***any*** views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic or visual form, shall not constitute or be evidence of an unfair labor practice…"

---- National Labor Relations Act

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Your Free Speech Rights

You may share "FOE":

- **F**acts
- **O**pinions
- **E**xamples/**E**xperiences
  - Okay to initiate conversation, but not in management office

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Limitations on Employer Speech Rights

You may NOT engage in "TIPS":

- **T**hreats
- **I**nterrogation
- **P**romises
- **S**pying/**S**urveillance

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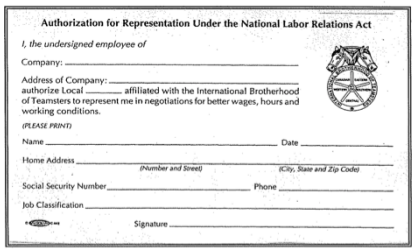
Union Authorization Card



Authorization for Representation Under the National Labor Relations Act

I, the undersigned employee of

Company: _____

Address of Company: _____

authorize Local _____ affiliated with the International Brotherhood of Teamsters to represent me in negotiations for better wages, hours and working conditions.

(PLEASE PRINT)

Name _____ Date _____

Home Address _____
(Number and Street) *(City, State and Zip Code)*

Social Security Number _____ Phone _____

Job Classification _____

Signature _____

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The Truth About Union Cards

- Legal document binding the employee
  - Often includes application for membership
  - Some include Dues Deduction Authorization – irrevocable for a year
- A "Power of Attorney" empowering the Union
  - "I wish to be represented …"
- A "blank check" with no expiration date…
  - You don't know what it could cost

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Disadvantages of Being in a Union

- Costs of Membership- Dues, Fees, Fines, Assessments
- Loss of flexibility and individual rights
- Forced Union Dues in Most States
- Truth About Bargaining
  - You can win, lose or stay the same
  - Management does not have to agree to union demands
- Potential Strikes

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Scenario: Part 3

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- After the full staff meeting, you go back to your office. You find the CEO waiting there for you with a piece of paper she said was just handed to her by a union official
- The paper has a bunch of signatures on it and is entitled "Demand for Recognition"
- The CEO also tells you that the union told her if she doesn't recognize the union they will file a petition with the NLRB for 50 of the 200 production employees tomorrow and a hearing will be held 5 days later to set the date for the election

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- The CEO wants to know the following in the next 45 minutes before she goes to her Board meeting to give them an update:
  - 1) should she accept the union's demand for recognition?
  - 2) is the union able to take only the 50 employees for their unit?
  - 3) should they go to the hearing?

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Handling a Demand for Recognition

Whether in person or by mail:

- **DO NOT look at any list.**
- **DO NOT look at any cards or petitions.**
- **DO NOT accept, hold or examine any cards or signatures.**

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Defining the Unit: The Employees

- Supervisors
- Professionals
- Technical
- Clerical
- Part-time
- Seasonal
- Temporary
- Joint employer

- *Leaves of absence*
- *Laid off*
- *STD/LTD*
- *New hires*
- *Guards*
- *Confidentials*
- *Independent contractors*

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Defining the Unit: "Community of Interest"

- Integrated operation
- Common supervision
- Common seniority
- Common progression
- Transfers

Plus

- *Pay ranges*
- *Benefits*
- *Handbooks*
- *Uniforms*
- *Lunch/breaks*
- *Complaint resolution*
- *Parties*
- *Tools*
- *Education*

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Defining the Unit: "Community of Interest"

- Single site
- Common site – the campus
- Multiple sites

What are you doing now to determine your unit? Or will it be the union's unit?

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Scenario: Part 4

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- You convince the CEO not to voluntarily recognize the union, and you go to the hearing and challenge the appropriateness of the unit selected by the union which is delaying the holding of an election
- CEO calls you and says the Interfaith Council of Churches wants to meet with the CEO to find out why the company is trying to bust the union
- CEO tells you that one of the company's Board members is also an officer at a bank that holds the assets of the Teachers' Union Pension Fund and the Teachers union is putting pressure on him to get the company to capitulate to union demands
- You get wind that at the upcoming zoning board hearing to get clearance to add onto your facility the union is going to show up to try to block your application

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Corporate Campaign: Pressure Points

- Quality of Services
- Pricing of Services
- Tax Exempt Status
- Not-for-Profit Status
- Executive Compensation
- "Discriminatory" Practices

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Corporate Campaign: Modes of Attack

- Solicit Customer Complaints
- Establish Workers' Rights Board
- Political Interference
- Intervention from Religious Figures
- Union Proxies
- Union Presence at Your Facility
- Class Action Lawsuits
- Websites
- "Hit Pieces"
- Interfere with Corporate Development

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Interference with Corporate Development

New Haven Mayor predicted "a proposed $430 million cancer center is dead in the water unless there is an agreement on holding a union election…"

***New Haven Register*, Feb. 26, 2005**

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Picketing Where you Work and Where you Live

http://money.cnn.com/2010/05/19/news/companies/SEIU_Bank_of_America_protest.fortune/index.htm

http://online.wsj.com/article/SB10001424052702304604204575182441827342142.html

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Next Steps: Employer Strategies

- No better time than now for non-union employers to talk to employees about the disadvantages of unions
- Conduct an assessment of vulnerability to union organizing
- Enhance employee engagement, participation, due process and a sense of security
- Identify and educate supervisors on preventive labor relations
- Ensure policies are compliant and employee friendly

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NLRB General Counsel: NLRA No Per Se Bar to Mandatory Class Action Waivers in Arbitration Agreements

July 1, 2010

Departing National Labor Relations Board General Counsel Ronald Meisburg, addressing whether class/collective action waivers in mandatory arbitration agreements unlawfully restrict employees' protected concerted activity under the National Labor Relations Act, has told the agency's Regional Offices:

- While such class action waivers are enforceable, the filing of a class action lawsuit or arbitral claim seeking to enforce an employment-related statute and challenging such a waiver is protected by Section 7 of the NLRA, which provides employees the right to engage in concerted activities for the purpose of mutual aid and protection.

- Arbitration agreements should make clear that employees have the right to challenge the enforceability of these agreements without discipline, separation or other retaliation, since this right is protected under Section 7 of the NLRA.

- If an employer threatens, disciplines or discharges an employee for filing a class action lawsuit or for challenging the arbitrability of class-related claims, the employer violates the NLRA; however, the employer may lawfully seek to enforce the waiver in a legal forum.

The Board's chief prosecutor's views were expressed in a Guideline Memorandum dated June 16, 2010, and issued on June 24, 2010, only days before his tenure at the NLRB ended. While these Memoranda are not legally binding on the five-member Board, which ultimately passes upon alleged unfair labor practices, they do instruct the agency's Regional Directors on whether to issue an administrative complaint on unfair labor practice (ULP) charges raising these issues

Reiterates and Clarifies

Meisberg's Memorandum in large part reiterated certain principles established by NLRB precedent. The Board has said previously that employees' collective and class action lawsuits over employment matters are protected concerted activity. NLRA claims also are not subject to arbitration, Meisberg noted.

While class action waivers may be enforceable, the General Counsel clarified, mandatory arbitration agreements that could reasonably be read by an employee as prohibiting the employee from joining with other employees to file a class action lawsuit is impermissible under the NLRA. He urged Regional Offices to "examine the wording of all employer documents distributed to and/or signed by employees relating to the employer's mandatory arbitration agreements."

What Employers Can Do

In light of this directive, employers with arbitration agreements that contain class or collective action waivers should consider the following:

- Including a provision in any mandatory arbitration agreement stating to employees that they have the right to challenge the enforceability of the agreement in federal or state courts without fear of reprisal, and that they will not be retaliated against if they choose to do so, even though the employer will seek to enforce the waiver;

- Including a provision stating that the arbitration agreement does not preclude filing unfair labor practice charges regarding the waiver with the NLRB; and

- Where an applicant refuses to sign an arbitration agreement as a condition of employment, prior to revoking any job offer, advising the applicant that the agreement does not prohibit a challenge to the validity of the class action waiver.

These measures could assist in the defense of an unfair labor practice charge that such an agreement restrains an employee's exercise of Section 7 rights. However, this is an unsettled area of law and the NLRB could find that any adverse personnel action against an individual for refusing to sign an arbitration agreement with a class action waiver is unlawful.

* * *

This Guideline Memorandum also emphasizes the importance of ensuring that all company agreements and policies comply with the NLRA. This concern is heightened by the installation of a new, employee-friendly NLRB.

Impact of the Obama Administration's LMRDA "Advice Exception" Rulemaking Initiative on the Employer Community

On or about December 7, 2009, the Department of Labor ("DOL" or "Department") announced its intention to publish a Notice of Proposed Rulemaking with respect to the "advice exception" contained in of Section 203(c) of the Labor-Management Reporting and Disclosure Act ("LMRDA"). The DOL defined the regulatory issue as follows:

> Regulatory Issue: The Department believes that its current policy concerning the scope of the LMRDA section 203(c) "advice exception" is over-broad and thus excludes information that should be reported. A narrower construction would better allow for the employer and consultant reporting intended by the LMRDA**.**

Based upon the available information, the actual Notice of Proposed Rulemaking ("NPRM") will be published no earlier than November, 2010.

On May 24, 2010, the DOL, pursuant to a previously published notice, held a public hearing regarding "Employer and Labor Consultant Reporting under the LMRDA." The DOL's Office of Labor-Management Standards ("OLMS") subsequently issued the following report:

> The Department's Office of Labor-Management Standards (OLMS) held a public meeting on May 24, 2010 seeking comments on several significant matters concerning employer and consultant reporting pursuant to section 203. The first matter was the so-called "advice exception" of LMRDA section 203(c), which provides, in part, that employers and consultants are not required to file a report by reason of the consultant's giving or agreeing to give "advice" to the employer. Under current policy, as articulated in the LMRDA Interpretative Manual and in a *Federal Register* notice published on April 11, 2001 (66 Fed. Reg. 18864), this so-called "advice exception" has been broadly interpreted to exclude from the reporting any agreement under which a consultant engages in activities on behalf of the employer to persuade employees concerning their bargaining rights but has no direct contact with employees, even where the consultant is orchestrating a campaign to defeat a union organizing effort.
>
> The Department views its current policy concerning the scope of the "advice exception" as over-broad, and that a narrower construction will result in reporting that more closely reflects the employer and consultant reporting intended by the LMRDA. Regulatory action is needed to provide labor-management transparency for the public, and to provide workers with information critical to their effective participation in the workplace. As a result, the Department announced in its Spring 2010 Regulatory Agenda the intention to engage in such rulemaking to narrow the scope of the "advice exception."
>
> * * *
>
> Another exception to reporting is in section 203(e), which provides that no "regular officer, supervisor, or employee of an employer" is required to file a report covering services undertaken as a "regular officer, supervisor, or employee of an employer." Further, the employer is not required to file a report covering expenditures made to a "regular officer, supervisor, or employee" as compensation for service as a "regular

> officer, supervisor, or employee." The Department sought comments on the application of this exemption to the scope of employer reporting under sections 203(a)(2) and (a)(3), which require employers to report payments to their own employees for purposes of causing them to persuade other employees as to their bargaining rights, and to report expenditures to "interfere with, restrain, or coerce employees" in their bargaining rights and to obtain information concerning activities of employees and labor organizations in connection with a labor dispute.

(Emphasis added.)

* * *

This white paper primarily summarizes the provisions of the Labor-Management Reporting and Disclosure Act, as it relates to "persuader communications" and "persuader activity" and addresses some of the key points regarding the likely interpretation and enforcement of those provisions during the Obama Administration.[1] The issues relating to the scope of employer reporting under Sections 203(a)(2) and (a)(3), which were raised for the first time at the May 24th hearing and which require employers to report payments to their own employees for purposes of causing them to persuade other employees as to their bargaining rights, will be addressed in Appendix A to white paper.

[1] In preparing this white paper, the preparer has relied principally upon a reading of the statute, Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. Sec. 433 et seq., the Interpretation of the "Advice" Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act, issued by the Department of Labor Office of Labor-Management Standards, on January 21, 2001, and the case of *International Union United Automobile Workers v. Dol*e, 869 F.2d 616 (D.C. Cir. 1989). The preparer has liberally used material from each of these sources, sometimes without further attribution.

The LMRDA

LMRDA Section 203(b) imposes a reporting requirement on labor relations consultants and other persons, including attorneys, if they engage in activities which require such reporting.[2] The Section provides:

> (b) Every person who pursuant to any agreement or arrangement with an employer undertakes activities where an object thereof is, directly or indirectly.
>
> > (1) to persuade employees to exercise or not to exercise, or persuade employees as to the manner of exercising, the right to organize and bargain collectively through representatives of their own choosing;
> >
> > or
> >
> > (2) to supply an employer with information concerning the activities of employees or a labor organization in connection with a labor dispute involving such employer, except information for use solely in conjunction with an administrative or arbitral proceeding or a criminal or civil judicial proceeding;[3]

(Emphasis added.)

The statute contains an exception to the reporting requirements. The exception is known as the "advice exception." LMRDA Section 203(c) provides:

> Nothing in this section shall be construed to require any employer or other person to file a report covering the services of such person by reason of his giving or agreeing to give advice to such employer or representing or agreeing to represent such employer before any court, administrative agency, or tribunal of arbitration or engaging or agreeing to engage in collective bargaining on behalf of such employer with respect to wages, hours, or other terms or conditions of employment or the negotiation of an agreement or any question arising thereunder.

(Emphasis added.)

Of equal, if not greater importance, is the fact that LMRDA Section 203(a)(4) similarly requires *reporting by employers* who enter into the same type of arrangements with labor consultants and other third parties, including attorneys.

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[2] LMRDA Section 203(a)(4) similarly requires reporting by *employers* who enter into the same type of arrangements with labor consultants and other third parties, including attorneys.

[3] A law firm that engages in reportable activity is required to report the nature of all arrangements in which the firm engages in "persuader activity" and is required to report all "receipts of any kind from employers on account of labor relations advice or services." Under the prevailing DOL interpretation, the reporting of receipts is not limited to receipts from employers for which a firm performs persuader activity. LMRDA Section 203(b). The statute contains civil and criminal enforcement mechanisms. LMRDA Sections 209 and 210.

The DOL's Long Standing Interpretation of Reportable Activity and the Advice Exception

"Persuasive communications" include, but are not limited to, speeches, scripts, letters, handouts posters and videotape presentations that, in the words of LMRDA Section 203(a) and Section 203(b), are designed:

> [T]o persuade employees to exercise, or not to exercise, or persuade employees as to the manner of exercising, the right to organize and bargain collectively through representatives of their own choosing.

Examples of "persuasive communications" would include, but would not be limited to, materials explicitly or implicitly urging employees to vote against union representation, to take a certain position with respect to collective bargaining proposals, or to refrain from concerted activity, such as a strike.

Thus, much, if not all, of the material that attorneys and consultants and, sometimes, trade associations draft for potential use by an employer in an organizing or pre-election campaign, as well as in other contexts, fall within the definition of "persuasive communications." The issue is whether, and under what circumstances, these activities constitute *"advice"* within the meaning of LMRDA Section 203(c) and thus are *exempt* from reporting.

Since 1962, the "advice exception" to the reporting statute has been consistently interpreted. This interpretation appears in Section 265.005 ("Scope of the Advice Exemption") of the *LMRDA Interpretative Manual.* The Interpretive Manual presents various possible scenarios to illustrate the scope of the exemption. The first scenario contemplated by the statutory interpretation of the "advice exception" deals with *direct* contact between the consultant or attorney and an employer's employees. The interpretation states such conduct is not advice and is reportable:

> [I]t is plain that the preparation of written material by a lawyer, consultant, or other independent contractor which he directly delivers or disseminates to employees for the purpose of persuading them with respect to their organizational or bargaining rights is reportable.

The Interpretive Manual also deals with a scenario under which the employer client drafts the "persuasive communication" intended to be delivered to the employer's employees by the employer, and the attorney or consultant offers advice with respect to the employer's draft:

> [W]here an employer drafts a speech, letter or document which he intends to deliver or disseminate to his employees for the purpose of persuading them in the exercise of their rights, and asks a lawyer or other person for advice concerning its legality, the giving of such advice, whether in written or oral form, is <u>not</u> in itself sufficient to require a report.

(Emphasis supplied.)

The Manual goes on to contemplate a situation in which the advice takes the form of the client's draft actually being revised by the attorney or consultant:

> [W]e are . . . of the opinion that the revision of the material by the lawyer or other person is a form of written advice given to the employer which would not necessitate a report.

The most potentially controversial area relating to the "advice exception" is next addressed in the 1962 Manual. In this scenario, the attorney or consultant drafts in its entirety the "persuasive communication" intended for delivery or dissemination by the client-employer to its employees. The DOL concluded:

> [S]uch an activity can reasonably be regarded as a form of written advice where it is carried out as part of a bona fide undertaking which contemplates the furnishing of advice to an employer. Consequently, such activity in itself will not ordinarily require reporting unless there is some indication that the underlying motive is not to advise the employer. In a situation where the employer is free to accept or reject the written material prepared for him and there is no indication that the middleman is operating under a deceptive arrangement with the employer, the fact that the middleman drafts the material in its entirety will not in itself generally be sufficient to require a report.

(Emphasis added.)

Organized labor attacked the DOL interpretation of the "advice exception" during the Reagan Administration. A union first administratively sought to have the DOL enforce the LMRDA reporting requirements against *both* an employer and a consultant retained by the employer. When the DOL rejected the union's administrative foray, the UAW challenged in the federal courts the DOL's interpretation of the LMRDA reporting requirements and application of the "advice exception." One matter at issue involved an employer retaining a consultant to draft personnel policies for the employer's employees. The DOL conceded that the drafted policies were persuasive communications, but took the position that the activity constituted "advice" under Section 203(c). In explaining its rationale for not proceeding against either the employer or the consultant for failing to report, the DOL relied upon Section 265.005 of the *LMRDA Interpretative Manual* and stated:

> An activity is characterized as advice if it is submitted orally or in written form to the employer for his use, and the employer is free to accept or reject the oral or written material submitted to him.

The union's court challenge endured in various forums until 1989, when the U.S. Court of Appeals for the District of Columbia Circuit issued a decision that defers to the DOL's interpretation of LMRDA Section 203 as reasonable in the context of the case since the statute itself was "silent or ambiguous with respect to the issues before" the court. *International Union, United Automobile Workers v. Dole,* 869 F.2d 616, 617 (D.C. Cir. 1989).

Following the D.C. Circuit's decision, the DOL reaffirmed its position with respect to the interpretation of the "advice exception" in what is known as the Lauro Memorandum (1989), which relied upon the 1962 *LMRDA Interpretative Manual* Section 265.005 and stated:

> [T]here is no purely mechanical test for determining whether an employer-consultant agreement is exempt from reporting under the Section 203(c) advice exemption. However, a usual indication that an employer-consultant agreement is exempt is the fact that the consultant

> has no direct contact with employees and limits his activity to providing to the employer or his supervisors advice or materials for use in persuading employees which the employer has the right to accept or reject.

(Emphasis added.)

At the End of the Clinton Administration the DOL Attempted to Redefine the "Advice Exception"

On January 8, 2001, the Clinton Administration DOL promulgated a "revised" statutory interpretation of LMRDA Section 203. The revised interpretation confirmed that an attorney's or a consultant's direct communications with employees in an effort to persuade them is not protected by the "advice exemption" and is reportable. The revised interpretation went on to reverse the long-standing DOL position with respect to the drafting of "persuasive communications":

> The duty to report can be triggered even without direct contact between a consultant or lawyer and employees, if persuading employees is an object (direct or indirect) of the person's activity pursuant to an agreement or arrangement with an employer. For example, when such a person prepares or provides a persuasive script, letter, videotape, or other material for use by an employer in communicating with employees, no exemption applies and the duty to report is triggered**.**

(Emphasis added.)

Based upon this revised interpretation, labor attorneys representing employers could no longer draft "persuasive communications," even if the client had the right to reject or accept the drafts, without triggering a *reporting obligation for both the law firm and the firm's client, the employer.*

Under the revised statutory interpretation, an employer and its counsel would only be exempt from reporting if:

> [A]s a means of providing legal or other advice (the firm) simply reviews and revises "persuasive communications" prepared by the employer . . . .

> The revised statutory interpretation although promulgated did not become effective. Its effective date was first delayed after President Bush took office on January 21, 2001 and the Bush Administration DOL subsequently rescinded the revised interpretation.

The Obama Administration's Initiative to Re-Define the "Advice Exception"

There is every reason to believe that as a result of the current DOL rulemaking initiative, the Clinton-era statutory interpretation will be re-issued by the Obama DOL. This will mean that employers will no longer be able to retain the services of competent counsel to draft persuasive communications without triggering the LMRDA's reporting obligations for both the employer and its counsel. It is possible that the Obama DOL will go further and revise the statutory interpretation so that employer and counsel reporting is required even in situations where counsel is retained to revise or offers advice with respect to persuasive communications initially drafted by the employer.

The Impact of the Obama "Advice Exception" Rulemaking Initiative on the Employer Community

Organized labor refused to accept responsibility for its own decline. Instead, it attempts to shift the blame to employers and those who represent employers, charging that "management," through its unlawful rhetoric, has stifled labor union support. Instead of taking responsibility for incompetent organizing efforts and marginal relevance, labor unions, through their support for EFCA, corporate campaigns designed to secure neutrality agreements and other organizing initiatives, are attempting to silence the employer community. Labor unions believe that if they restrict the free speech rights of employers, and if employees hear only the unions distortions and promises; union membership in the private sector will blossom. The "advice exception" rulemaking initiative is another step in organized labor's manipulation of the Obama Administration to secure their organizing goals. If this initiative is successful, it will encourage many employers to forgo legal advice and it would become more difficult and less attractive for those who seek advice to obtain the specialized services of competent labor counsel.

Appendix A

LMRDA Sections 203 (a)(2), (a)(3), and 203(e)

Sections 203(a)(2) and (a)(3) of the LMRDA provides:

> any payment (including reimbursed expenses) to any of his employees, or any group or committee of such employees, for the purpose of causing such employee or group or committee of employees to persuade other employees to exercise or not to exercise, or as the manner of exercising, the right to organize and bargain collectively through representatives of their own choosing unless such payments were contemporaneously or previously disclosed to such other employees;
>
> any expenditure, during the fiscal year, where an object thereof, directly or indirectly, is to interfere with, restrain, or coerce employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing, or is to obtain information concerning the activities of employees or a labor organization in connection with a labor dispute involving such employer, except for use solely in conjunction with an administrative or arbitral proceeding or a criminal or civil judicial proceeding;

In 1984, Congressional oversight hearings were held on the enforcement of the LMRDA. During those hearings, the DOL was criticized for its interpretation of the 203(e) exemption:

> The staff report also criticizes the Secretary for his failure to properly adhere to the limited reporting exemption defined in section 203(e), which creates a regular wage exemption. This provision exempts from the reporting requirements payments made in the form of compensation to officers, supervisors, and employees for performance of their regular duties. The "split income" theory urged by the staff report requires that only those payments for "regular duties" be exempted and that payments compensating for activities that constitute unfair labor practices must still be reported. An example is the salary paid to a supervisor for time spent interrogating an employee about his union sentiments.

The criticism went further, advocating “split income” reporting for supervisory activity that included any persuader communications. The Secretary of Labor addresses the “split income issue”:

> Early in the administration of the Act it had been considered that a prorated share of regular salaries and wages paid to supervisors or other employees who engaged in conduct referred to in sections 203(a)(2) and (3) of the Act, 29 U.S.C. § 433(a)(2) and (3), might be reportable by the employer. This was known as the "split income theory.". . . In recent years, a large number of complaints were filed with the Secretary on this theory, and an examination of the many different fact situations presented by these complaints caused the Department of Labor to re-examine the split income theory and its relationship to section 203(e) of the Act. Reviewing legislative history, it was found that "[u]nder section 203(e) ... none of reporting requirements are applicable when the services are rendered by a regular officer, supervisor, or employee of the employer." * * * Given the ambiguity of the language of section 203(e) together with the purpose of the Act to expose hidden amounts of money spent by the employer in his attempts to convince his employees not to unionize, and given that wage payments are known facts. *It is the*

> *Department's view that employers are not required to report regular wages paid to regular supervisors and other employees.*

(Emphasis added.)

Clearly this current DOL, at the bequest of organized labor, resurrected this issue at the May 24 hearing for the sole purpose of adding cumbersome bookkeeping requirements in order to further erode an employer's right to free speech and to make it more difficult for employees to receive factual information about union representation.

Ten Significant Decisions Rendered By The NLRB During The Two-Member Period

1. In *Saigon Grill Restaurant and 318 Restaurant Workers Union*, Case No. 2-CA-38252, an ALJ held that the Employer violated the Act by ceasing its delivery operation and terminating its delivery workers. Generally, Section 7 of the NLRA protects employees' right to engage in union activity. Under established Supreme Court precedent, Section 7 protects employees from discharge or other forms of retaliation for engaging in concerted activity for the purposes of improving their working conditions by way of "administrative and judicial forums." While the ALJ found that the Employer was not aware of any union activity, he found that the Act was still violated because the delivery workers were terminated due to the Employer's knowledge that the workers were planning on filing an FLSA collective action, protected concerted activity. The ALJ concluded that the actions of employees in preparing for the filing of an FLSA action was concerted activity because Section 7 of the Act is not limited to union activity, but includes concerted activity for "mutual aid and protection." The ALJ further found that the termination of delivery operations did not amount to a partial closure of operations since the restaurant itself did not close, such as permanently closing a plant or terminating a separate operation, which may not be in violation of the Act despite unlawful motivations. Additionally, the ALJ noted, because the delivery employees worked hand in hand with other restaurant employees, the discharge would most likely deter those other employees from pursing wage and hour or other claims in violation of labor laws.

2. In *The Crowne Plaza Hotel*, 352 NLRB No. 55 (4/30/2008), the NLRB rendered a split decision determining that some, but not all, of the employer's work rules contained in a revised employee handbook violated Section 8(a)(1) of the Act. The rules at issue consisted of: (i) a broad no solicitation/no distribution policy; (ii) a ban on off-duty workers from use of hotel facilities without permission; (iii) a ban on all hotel employees with the exception of the General Manager from talking to the press about hotel issues; (iv) a ban on any discussion of hotel business or work difficulties by hotel employees while on duty; (v) a prohibition against leaving the work area without permission; (vi) a ban on walking off the job; and (vii) a prohibition against any 'insightful' [sic] (inciteful) actions against fellow employees, supervisors or department heads.

Balancing Crowne Plaza's business needs and the Section 7 rights of the hotel employees, the Board found the no solicitation/no distribution rule too restrictive on employees' rights. Unlike other industries, where work areas and customer service areas are clearly differentiated from locker rooms, cafeterias and other non-public areas, the Board found that hotels are not as clearly defined, and the rule violated the Act because it designated the entire hotel facility as a customer service/work area, including parking lots, sidewalks, and public restrooms. Similarly, the Board viewed the policy prohibiting employees from talking to the press as facially overbroad, reasoning that the policy could be interpreted to prevent employees engaged in concerted activity from talking to the press during labor disputes.

In addition, the rules against leaving the work area without authorization and walking off the job were deemed violations of the Act because the rules infringed on employees' rights to engage in a mid-day strike. In protecting this right, the Board noted that unlike other industries, such as healthcare, where striking is often unlawful and likely to result in "imminent danger" to customers, the hospitality industry does not pose the same risks. Also, the Board ruled that the policy language banning inciteful actions was unlawfully overbroad because it not only limited violent or uncivil acts, but banned any actions of individuals challenging supervisors and department heads.

Finally, the Board found the remaining two rules did not violate Section 8(a)(1). The rule banning discussions of company business while on duty was viewed as appropriate because it only placed restrictions on such conduct while on duty in the hotel, but no such restrictions were on off-duty employees. Second, the Board held that the rule regarding off duty use of the hotel facilities was permissible because it only covered the hotel building and employees would not interpret the rule to encompass the parking areas and other non-working areas. The Board recognized the employer's legitimate business reasons for requiring employees to obtain permission from a department manager before utilizing the facility to entertain friends or using the food and beverage outlets.

3. In *Sacred Heart Medical Center*, 353 NLRB No. 19 (9/26/08), on remand from the Ninth Circuit Court of Appeals, the Board adopted the initial holding by an ALJ that the Employer violated Section 8(a)(1) of the Act by "promulgating, maintaining, and enforcing" a policy prohibiting hospital employees from wearing union buttons in areas accessible to patients and their family members. The Ninth Circuit, in *Washington State Nurses Association v. N.L.R.B.*, 526 F.3d 577, 2008 U.S. App LEXIS 10698 (9th Cir. 5/20/08), reversed the June 2006 decision and reinstated the holding of an ALJ that a hospital's order, restricting the wearing of union-related buttons, violated employee rights under the Act. During negotiations for a new collective bargaining agreement, the Union issued buttons to nurses stating, "RNs demand safe staffing." The Employer, concerned with the message that the buttons would send to the patients and their families, issued a memorandum prohibiting the wearing of the button in any area of the hospital where they could encounter patients or family members. The Union filed an unfair labor practice charge and the ALJ held that the policy banning the wearing of the buttons in areas outside of immediate patient care areas was presumptively invalid and violated the Act. The Board reversed, finding the Employer rebutted the presumption of invalidity by presenting special circumstances justifying the restriction. The Board reasoned that the hospital was an acute care setting that required calm and tranquil surroundings to provide the best care. The message on the buttons implied that the hospital was not currently staffed properly and unsafe. Therefore, the buttons were disruptive to the hospital by causing anxiety about the quality of care among patients and families. The Board also stated that previous buttons had a more cryptic message requiring visitors or patients to infer or interpret the message which was less provocative than the current, more explicit buttons.

Reversing the Board, the Ninth Circuit held the hospital presented no tangible evidence to show that the button had an impact on the perception of patient care and did not demonstrate the special circumstances, outlined by the Board, to justify the restriction. The Court applied the substantial evidence test developed by the U.S. Supreme Court in *N.L.R.B. v. Baptist Hospital 442 U.S. 773, 99 S.Ct. 2598, 61 L. Ed 2d. 251 (1979)*, calling for clear evidence of disruption to patients and staff to be presented to justify restrictions on union solicitation in non-patient care areas such as the cafeteria, gift shop and lobby. The Court noted that there was no testimony from hospital administrators of complaints from patients or families regarding the button, no official reports were written regarding any disruptions that the button caused, no work stoppages were caused due to the button and no evidence of nurses or employees discussing the button with patients and families. In addition, the Court found the Employer's testimonial evidence was too speculative.

4. In *Union-Tribune Pub. Co*, 353 NLRB No. 2 (9/9/2008), the Board, affirming an ALJ's decision, found that a California newspaper publisher violated its duty to bargain by unilaterally changing its drug and alcohol testing policies without providing the Union an opportunity to negotiate over the issue. This case involved both the packaging and pressroom bargaining units. Although no written drug or alcohol policy existed in the previous collective bargaining agreements, the Company had applied a substance abuse testing policy to pressroom employees since at least 1986. In 1991, the Company advised the Union that those employees with a "certifiable" cumulative trauma injury or disorder (CTD) would not be subject to drug testing. A CTD was defined as a "repetitive injury to a

body part occurring over a long period of time." In 2006, however, the Company required an employee who filed a Worker's Compensation claim for cumulative trauma hearing loss (a CTD) to undergo drug and alcohol testing. Instead of waiting to determine if the employee was in fact suffering from a CTD through a doctor's examination, the ALJ found that a loss control manager, who did not possess a medical degree, "decided that [the employee's] injury should not be classified as a CTD" and directed the employee to take a drug and alcohol test. This procedure contradicted the terms of the 1991 letter excusing employees with CTDs from undergoing drug testing which the ALJ found was an effective addition to the Company's drug and alcohol policy. The ALJ found that employees had no "choice" but to submit to the drug and alcohol testing. Accordingly, the ALJ determined that allowing an individual without a medical degree to decide whether an employee had a CTD, excusing him/her from drug and alcohol testing, was a unilateral change to company policy for which the Union was not given notice.

With respect to the packaging unit, at the time of the unfair labor practice charge, the Employer and the Union had not yet reached an agreement on the terms of an initial contract. However, a drug and alcohol policy, similar to the one governing the pressroom unit, applied. The Company provided free annual hearing tests to employees where a standard threshold shift (STS) had occurred in either or both of the tested employee's ears. In 2006, the Company required seven employees, whose annual hearing tests demonstrated an STS, to have their hearing retested and also be tested for drugs and alcohol. The ALJ concluded that requiring employees who experienced an STS on their annual hearing test to submit to drug and alcohol tests, constituted an unfair labor practice. The ALJ explained that there was no "evidence that [the Employer] ever gave notice to the Union of its intent to change the terms and conditions of its drug and alcohol policy [i.e. by requiring those with an STS to undergo substance abuse testing] or afforded it an opportunity to bargain over said change." As a result, the ALJ concluded that regarding both the pressroom and packaging units, the Employer violated Sections 8(a)(1) and (5) of the Act.

5. In *Ashley Furniture Industries*, 353 NLRB No. 71 (12/31/08), the Board, adopting and affirming an ALJ's decision, found the Employer violated Section 8(a)(1) of the Act when it informed employees they were not to talk about certain "workplace matters" with others. An employee received a warning regarding an alleged mistake he made constructing furniture, but was told not to discuss the disciplinary action with anyone. Two months later, the employee was called to the HR office and told if he did not produce a valid work permit within 45 days, he would be discharged and "not to say this to anybody." Around the same time, another employee was called to the HR office and was told the Employer had been advised by the Social Security Administration her social security number and name did not correlate. The HR official informed the employee she had a specified period of time to correct the matter or she would be terminated. The employee testified the contents of this discussion could not be discussed with supervisors or coworkers. The ALJ ruled Section 7 grants employees the right to discuss workplace concerns with each other, especially those regarding discipline, and this right outweighs the Employer's proffered confidentiality interest. Further, the ALJ determined the Employer's "gag order" was impermissible because the male employee was unable to "exercise his Section 7 right to obtain from his fellow employees information relating to their mutual aid and protection." The ALJ was not persuaded by the Employer's contention that confidentiality of these discussions was necessary to both prevent employees from becoming victims of identity theft or harassment and to dispel rumors of an imminent immigration raid which could drive away recruited candidates.

6. In *Southern Power Company*, 353 NLRB No. 116 (3/20/09), the Board, affirming in part and reversing in part an ALJ's decision, held the Employer violated Sections 8(a)(5) and (1) of the Act when it did not adhere to its successorship obligation to bargain with the Union. The Board agreed

with the ALJ who found the employees hired to work at the Employer's power plants "worked at the same location, performed the same jobs on the same equipment and reported to the same supervisors and managers [and] there was no hiatus between the operations of the predecessor and the successor." Accordingly, the successor Employer's refusal to bargain and recognize the Union was unlawful. At the same time, the Board rejected the ALJ's reasoning in determining the appropriate scope of the bargaining unit. Before the Employer took over the predecessor's operations, the Union's bargaining unit included employees at three separate plants. The ALJ ruled "a three-plant unit was not appropriate because the plants were part of a grouping of eight plants owned and operated by the [Employer], were located between 70 and 185 miles away from each other in two different States, and there was no evidence of interchange of employees or functional integration for those plants." Nevertheless, the Board rejected the ALJ's "community of interest" analysis given the historic bargaining arrangement the Union maintained with the predecessor. As a result, the Board rejected the Employer's objection to the unit's makeup and found the three-plant unit to be proper.

7. In *Loparex LLC*, 353 NLRB No. 126 (3/31/09), the Board, adopting an ALJ's findings, ruled the Employer violated Section 8(a)(1) when it implemented a new policy preventing employees from posting materials on its bulletin board without management consent. Two employees initially posted union organizing material on one of the Employer's bulletin boards, but the material was removed, prompting the employees to repost the materials, only to have it removed again. About a month later, the Employer announced a rule which stated in relevant part:

> The company has placed several bulletin boards around the plant as a way of communicating more effectively with all of you. The bulletin boards are for the exclusive use of company for its postings. Accordingly, any employee who wants to post anything on a Company bulletin board must first get the approval of Human Resources.

The ALJ ruled this new policy demonstrated the Employer's anti-union animus because previously there had been "no such restriction on employees who used company bulletin boards to communicate non-work information—including sports schedules and offers to sell personal items." In support of this finding, the ALJ noted the timing of the new policy to be suspiciously close to the posting/removal incidents. In addition, the ALJ specifically rejected the Employer's argument that the new bulletin board policy did not have an unlawful purpose because it was unaware of any union activity. The ALJ pointed to the fact the Employer was likely cognizant of the materials which had been posted and subsequently removed, and even assuming it was not, the evidence showed that around the same time the Employer's officials informed another employee who wore union attire "to just work and not talk about the Union." Accordingly, the ALJ found the Employer was aware of union activity, and thus concluded the new bulletin board policy violated Section 8(a)(1) of the Act.

8. In *Mammoth Coal Co.*, 354 NLRB No. 83, (9/30/09), the Board, affirming an ALJ's decision, held the Employer, a mining company, violated Sections 8(a)(1), (3), and (5) of the Act when it refused to hire 85 union members who worked for the mine's former owner. The Employer purchased the mining operation out of bankruptcy and thereafter refused to recognize the Union and implemented its own terms and conditions of employment. Rather than hire the employees who worked for the previous mine operator, the Employer hired nonunion employees. The Employer also affixed "the mine is non-union," on the employment application. In response to the allegations of union animus, the Employer contended the General Counsel failed to meet its burden of showing the employees at issue were genuinely interested in being hired. The Board rejected the Employer's argument, noting "[u]nion officials as well as individual employees repeatedly informed the [Employer] that the predecessor work force was ready, able, and willing to fill any and all available mining positions." The Board also concluded the Employer was a successor to the former mine operator because "(1)

[the Employer] conducted essentially the same business at the same location as [the former mine operator], and (2) the majority of the newly constituted bargaining unit employees would have been composed of former employees of the predecessor, absent [the Employer's] unlawful discrimination." Finally, the Board noted that a successor employer which "acts lawfully is not legally obligated to accept a predecessor's collective-bargaining agreement, but only [must] bargain with the majority representative of its employees." *NLRB v. Burns Security Services,* 406 U.S. 272, 284 (1972). However, in this case the Board ruled the Employer's discriminatory hiring practices to avoid its successorship obligations precluded it from unilaterally establishing initial terms and conditions for the employees. Accordingly, the Employer's failure to bargain over these issues constituted a Section 8(a)(5) violation.

9. In *Trump Marina Associates*, 354 NLRB No. 123 (12/31/09), the Board, affirming an ALJ's decision, held the Employer violated Section 8(a)(1) of the Act when it promulgated a rule precluding employees from speaking to the press about organizing activity. A separate ALJ previously determined that one of the Union's members was unlawfully suspended during an organizing campaign because of his support for the Union. After the ALJ released his decision, a Union representative contacted the discriminatee for comment on the ruling. The discriminatee stated that he believed "the judge had gotten 'it exactly right,'" and was aware that his comments would be included in a Union press release regarding the decision. Subsequently, the quotes appeared in a local newspaper. After reading the article, the employee's shift manager summoned the employee to her office and referenced the Employer's rule against speaking with the media. The rule stated:

> It is the policy of Trump Hotels & Casino Resorts that only the following employees, Chief Executive officer, the respective property's Chief Operating Officer, General Manager or Public Relations Director/Manager is authorized to speak with the media.

The ALJ cited the Board's precedent in *Crowne Plaza Hotel*, 352 NLRB 382 (2008) which held that a policy precluding employees from discussing matters with the media was overbroad because it could in effect "'prohibit[] all employee communications with the media regarding a labor dispute….'" The ALJ noted the inference of discrimination was even stronger in the instant case. Specifically, the ALJ explained "the meeting at which [the supervisor] made clear that [the Employer's] rules applied to [the employee's] comments shows in dramatic fashion that [the Employer] not only maintained its unlawfully broad rules against talking to the media, but that it was enforcing them—indeed enforcing them specifically to encumber communication related to an ongoing labor dispute." Therefore, the ALJ determined the Employer violated Section 8(a)(1) of the Act with respect to its media policy.

10. In *Sleepy's Inc.*, 355 NLRB No. 21 (3/29/10), the Board reversed and remanded a Regional Director's Decision and Direction of Election which found appropriate a unit of 32 retail stores in Connecticut. The Regional Director determined that the unit was appropriate because the stores were all located in the southwestern part of the state and were under the direction of the same regional manager. The employees performed the same work, and had both the same skills and terms and conditions of employment. However, the Board found the state was divided among five regional managers and employees in stores outside the regional manager's domain also possessed the same work, skills, and terms and conditions of employment. The Board noted there was centralized control of management and labor relations in the New England market and the regional manager for this unit did not have sufficient autonomy and control over the stores assigned to him. The Board also noted the geographic proximity rationale for the unit failed because there were stores located in the state which were excluded from the unit which were in fact closer in proximity to the majority of stores included in the unit. Further, the assignment of stores to regional manager often changed and employees frequently interchanged between stores and regions. Therefore, the Board reversed the Regional Director's ruling that the unit was appropriate and remanded the case for further appropriate action.

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The New Face of Union Organizing Success: Neutrality Agreements, Ballot-Free "Elections" and Corporate Campaigns

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In recent years, organized labor has employed new organizing issues, aggressive campaign strategies, and innovative techniques designed to catch unwary employers off guard. Minimizing vulnerability to union-orchestrated "corporate campaigns" should become part of every company's overall risk management strategy. The steps discussed in this InfoPAK[SM] will assist in-house counsel improve their company's ability to avoid or survive a corporate campaign and enhance their overall human resource posture.

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I. Introduction

Ask any in-house counsel to name the most pressing legal issues facing their clients, and likely few, if any, would include the threat of unionization. This seems logical given recent statistics showing the rate of union membership in the United States has steadily declined over the past 25 years. Nevertheless, complacency about the threat of initial or increased unionization is unwise and potentially dangerous.

The simple fact is that unions are becoming increasingly aggressive about organizing. Rather than relying on direct appeals to workers, unions are utilizing their political and economic clout to coerce employers into foregoing their legal right to communicate their views on unionization and to waive their employees' right to participate in the secret ballot election process provided by the National Labor Relations Act. A lack of awareness of these changes may leave in-house counsel unprepared to recognize and respond to the new union strategies for exposing an organization's vulnerability.

II. The Sleeper Behind the Statistics

A. Unions Are Winning More Often

In recent years, and particularly since the birth of the Change to Win Federation in 2005,[1] which splintered from the AFL-CIO because of its perceived failure to support aggressive organizing efforts, organized labor has been pushing the envelope with new organizing issues, aggressive campaign strategies, and innovative techniques designed to catch unwary employers off guard. Thanks to these tactics, unions won 73% of resolved elections in the first half of 2009.

B. Election Process Is Used Less Often

According to the most recent statistics from the Bureau of Labor Statistics (2009), union membership in the United States (including public employees) dropped to 12.3% from 12.4% in 2008. In the private sector, unions currently represent just 7.2% of the work force, continuing a steady 25-year decline in membership–in 1983, unions represented just over 20% of the American work force.

Given these statistics, many employers perceive the threat of unionization to be minimal or nonexistent. However, these statistics do not reflect the true extent of current union activity. Alternative methods of boosting membership, such as "voluntarily" negotiated neutrality agreements, union recognition through signed authorization cards ("card check"), and other approaches, are being used increasingly to circumvent the traditional secret ballot election process. In fact, the AFL-CIO reported that 70% of all new private sector union members in 2005–approximately 150,000 employees–were organized through card check procedures, while just 25 years ago, only 5% of union members were gained through card check. Of course, it is not surprising that card check procedures are more effective for unions than secret ballot elections supervised by the National Labor Relations Board. Typically, unions will obtain authorization cards from employees before an employer even knows its employees are considering unionizing. As a result, employees sign cards without the benefit of hearing both sides of the issues.

The net effect of this strategy is that unions routinely already have authorization cards from well over half of the employees they are seeking to organize when they ask an employer to extend recognition based on the signed cards.

This change in organizing strategies and tactics has been gaining ground steadily as the percentage of private sector employees who belong to unions has continued to decline. Aggressive unions, such as the Service Employees International Union and UNITE HERE, have taken the fight directly to corporate management, bypassing the established route of a traditional union campaign and NLRB-supervised election in which the employees, not corporate directors and executives, must be convinced they need union representation. Clearly, there is a consensus that the traditional approach has failed, and in its place, some unions have recognized the power of what has been called "reputational warfare waged through broadsides, half truths, innuendo, and a staccato rhythm of castigation, litigation, legislation and regulation. It is fought in the press and on television, on the internet, in the halls of government, in the marketplace, on the trading floor, and in the boardroom."[2]

Consequently, employers–especially those who have maintained non-union status or are only partially unionized–may be at greater risk of sustaining a union assault than in the past. Raising management awareness of the potential for such nontraditional organizing is an important step in equipping them to resist union penetration. However, the most effective insulation is continuing the practice of positive employee relations in order to create and maintain an issue-free workplace where unions are irrelevant and organizing would be unproductive.

III. The Corporate Campaign: Not Your Grandfather's Fight for Better Wages

Alternative organizing processes often are implemented through so called "corporate campaigns" which have proven extremely effective against employers in certain industries and geographic areas. Corporate campaigns are a form of economic and public relations pressure by unions to soften an employer's position in collective bargaining negotiations or weaken opposition to organizing. In the latter case, unions often use a corporate campaign to persuade an employer to sign a neutrality agreement promising not to oppose unionization, granting the union special access to employees, and/or recognizing the union if it can establish that it has union authorization cards signed by a majority of employees in a sought-after bargaining unit. While they were relatively rare in the 1980s and '90s, corporate campaigns are becoming standard practice in hard-fought organizing or contract campaigns.

A. The First Step: Finding the Employer's Pressure Points

For a corporate campaign to work effectively, unions profile and research employers for vulnerabilities and weaknesses, create opportunities to communicate their message through aggressive strategies and tactics, and pressure nonunion employers targeted for organizing, as well as unionized employers facing contract negotiations related to an existing collective bargaining agreement.

Since the Industrial Union Department of the AFL-CIO published their book, "Developing New Tactics: Winning with Coordinated Corporate Campaigns,"[3] labor unions and employers alike have studied its

pages for the keys to waging and defending against "top down" organizing strategies. For management, the book provides useful inside information on the thinking, tactics, and objectives of this type of organizing. Generally waged as a multipronged attack on a company through its shareholders, customers and creditors, other unions, government regulatory agencies, community and civic organizations, and the press, a corporate campaign's objective is to find and make use of any actual or perceived vulnerabilities the employer has. Those pressure points often are used as leverage to negotiate neutrality agreements or recognize card check procedures.

B. Typical Corporate Campaign Objectives and Tactics

1. Economic Pressure

a. Boycotts

Boycotts are most effective against consumer products corporations whose goods carry an easily identifiable brand name. Producers of commodities and industrial products are less susceptible to consumer boycotts, since any effect is less directly traceable to the boycott. Although total product boycotts are difficult to achieve, a noticeable impact accompanied by significant press coverage may harm the carefully cultivated reputation of a product or corporation.

b. Product Disparagement

Corporate campaigners also create pressure by publicly questioning the wholesomeness or quality of the product or service sold by the employer. For example, the Farmworkers Union has linked carcinogenic pesticide use with grapes and lettuce, raising concerns among consumers and tarnishing the reputation of targeted employers. In the health care industry, unions have publicized damaging information about the quality of patient care, including survey results and malpractice claims, creating the perception among consumers that they are at risk.

2. Public Pressure

A major component of a successful corporate campaign is gaining public attention by casting the employer in a negative light. Often, this is accomplished through attracting media attention, particularly through appeals to the community at a grass roots level. There are a number of approaches that have been used successfully, including the following.

a. Unfairness to Organized Labor

Organized labor may attempt to brand the targeted employer as antiunion by publicizing and criticizing alleged unfair labor practices, resistance to union organizing, or strident bargaining demands.

b. Disrespect for Consumers

Another tactic portrays the employer as avaricious, greedy, exploitative, and engaging in business practices inconsistent with the general welfare of the public and consumers. To cultivate this viewpoint, for example, unions have publicized a government contractor's allegedly abusive pricing ($9,000 for a 12 cent wrench), a nursing home's record of alleged patient abuse and neglect, and an employer's purported production or distribution of unsafe or unwholesome products.

c. Exploitation of "Vulnerable" Groups

Characterizing corporate actions as exploiting disadvantaged and vulnerable constituencies may appeal to social consciousness and influence the decisions of the buying and investing public. Groups that unions have effectively identified as corporate "victims" include the elderly and disabled, migrant farm workers, minorities, women, and child laborers.

d. Aligning Union Position with Social Causes

Unions often attempt to merge their demands with the "public interest" and with social cause movements to expand the reach and appeal of a corporate campaign. The more altruistic the union appears, the more public support it may attract. To serve their own organizing objectives, unions have championed environmental concerns, social and economic equality, equal access to justice, worker and consumer health and safety, and patient abuse and neglect.

e. Xenophobia

Some unions have attempted to play on the fear of foreign influence in United States' affairs, in the hope of galvanizing public opinion against a target employer. This tactic may be used where there is a strong perception of foreign control, unfair advantages for international businesses employing American workers, the export of "American jobs" overseas, or unpopular differences between the employer's foreign and domestic labor policies.

3. Legal Pressure

In the course of a corporate campaign, unions may employ myriad legal processes besides those available through the National Labor Relations Board. Campaigners may find employers vulnerable to inspections, audits, fines, and lawsuits by governmental regulators. To determine the employer's vulnerability, a union may conduct a systematic examination of their wage, hour, and safety practices, hiring and promotion practices, use of independent contractors, etc., and attempt to identify areas of non-compliance with various other state and federal laws and regulations. If vulnerable in any of these areas, employers may expect pressure from these and other sources:

- Occupational Safety and Health Administration;
- Employment litigation via Equal Employment Opportunity agencies, discrimination claims and class

actions, and/or wage or hour claims and collective actions;

- Trade regulation authorities;
- Securities and Exchange Commission;
- Department of the Treasury;
- Department of Justice, Antitrust Division;
- Shareholder derivative suites; and
- Community safety and health authorities, such as environmental protection agencies, zoning and planning commissions, building departments, health departments, and state and local regulatory and licensing agencies.

4. Political Pressure

When waging a corporate campaign, unions often will use their political influence to highlight their disputes with an employer. Politicians are highly susceptible to union pressure, given the ability of unions to mobilize member support or opposition, deliver votes, staff phone banks, and make or withhold campaign contributions. In return for such political support, politicians often are willing to support union causes that attract media attention. In addition to securing the support of elected or appointed officials, political pressure as a corporate campaign tactic gives unions a common cause with a panoply of special interest groups, community alliances, and citizen organizations, adding leverage to the union's ability to press its organizing demands.

a. Coalitions

Building coalitions gives an instigating union access to other organizations' personnel, resources, and members, who can be enlisted to leaflet, canvass, operate phone banks, and attend demonstrations to publicize the purported wrongdoing of the corporate target. Corporate campaigners often forge alliances with other local and national labor organizations, religious groups, and special interests, such as environmentalists, women's groups, civil rights and civic organizations, and senior citizens.

b. Federal Government Officials and Processes

If the campaign target is a large employer, government contractor, or foreign-based corporation, officials and processes of the federal government may become unwitting partners in a corporate campaign. A union and its allies may call for congressional hearings or the introduction of legislative initiatives, or appeal to cabinet members and elected officials to investigate and take action in the public interest.

c. State Governments

Because of their close proximity to the electorate, elected state officials may be even more susceptible than federal officials to constituent and grassroots action in the form of legislative initiatives, hearings, task forces, and the like. Additionally, state governments often control purse strings vital to industrial expansion. Tax abatements, industrial development bonds, and land acquisition may be stalled or

withdrawn when elected officials are put under the spotlight of a corporate campaign.

d. Foreign Governments

By directing unwanted attention to a foreign company in the domestic or international arena, a corporate campaign can instigate intercession by an employer's home government, their parent corporation, or international business organizations. For example, corporate campaigners have contacted or demonstrated at the embassies of foreign governments, sent letters to foreign government leaders, used influence at the State Department, and commenced investigations by the Organization for Economic and Cooperative Development.

5. Corporate Pressure

Perhaps the most fertile field for a corporate campaign is the organization itself – its officers, directors, financial sources, investors, shareholders, and governance mechanisms. By directing public attention to the often publicly discreet corporate power structure, a union's goal is to embarrass, coerce, or cajole high-level corporate officials into changing the corporation's response to unionization. The tactics used to do so are often tailored to the employer's perceived or actual weaknesses.

a. Executives, Officers, and "Inside" Directors

Especially vulnerable to the public, press, and regulators because of their real or perceived responsibility for corporate behavior, these individuals usually avoid publicity outside of the corporate world. A union will often seize upon this as a particularly important pressure point and use tactics such as directly contacting corporate officials through the mail, confronting them at shareholder meetings, picketing at their homes, accusing them of indifference or hostility to workers and working conditions, and initiating lawsuits against them alleging breach of fiduciary duties.

b. Outside Directors

Outside directors are particularly susceptible to corporate campaign tactics because they typically have no attachment to the corporation other than their honorary or symbolic position. These individuals often are executives or directors of other corporations, and campaigners may follow these connections to find a weak link susceptible to the union's appeal.

c. Creditors

Financial institutions that lend capital to corporations also commonly manage union pension funds. This gives unions leverage with corporate lenders. A union can use this leverage to prevent or delay the extension of credit, putting significant pressure on the targeted employer. At the same time, a strike or other campaign tactic may force an employer into difficult financial circumstances, making access to needed capital more urgent and more expensive to obtain.

d. Investors

A union's creative use of adverse publicity can place significant pressure on a public company's stock price. A drumbeat of negative stories about working conditions and labor strife may lead to downward pressure on share price if investors believe a company will be unable to meet earnings predictions because of workplace unrest. Similarly, if a union effectively thwarts a business's plans for development by raising zoning or environmental concerns, the economic outlook for the business may be dimmed, resulting in a loss of investor confidence. Even for private companies, such unfavorable publicity may inhibit their ability to obtain a needed loan or otherwise raise capital for expansion.

e. Shareholder Initiatives

Through their pension funds, union members may control large blocks of stock in the target employer or its vendors, suppliers, and other business partners. Campaigners may exploit this control and publicly assert pressure at annual shareholder meetings by threatening or attempting shareholder resolutions, voting to replace directors and officers, limiting executive compensation, opposing or favoring various strategies to respond to corporate take-over possibilities, making speeches, and demanding answers to campaign-related questions. A union and its supporters also may threaten to unload blocks of company stock or orchestrate takeover attempts, and in some cases may do so without even making a threat.

f. Pressure on Corporate Customers

A final strategy being used with increasing frequency when the target employer otherwise resists a union's pressure is to take the fight to the target's corporate customers, seeking to coerce the customer into pressuring the target company to reach an accommodation with the union. This strategy has been particularly effective when the target company's customer is a larger, more visible entity that has no interest in being ensnared in its contractors' or vendors' labor disputes, particularly if the disputes are generating adverse publicity. Unless the target company plays a unique or indispensable role in the operations of its customer, it may be compelled to reach an accommodation with the union to avoid losing its customer's business.

A highly publicized example of this strategy has arisen in campaigns against janitorial services contractors. Typically, a union will engage in picketing or pamphleteering directed toward the owner of a high profile office building who contracts with the target janitorial service. This public spectacle is designed to pressure the building owners to "encourage" the janitorial contractor to accede to the union's demands.

The corporate customer has a number of possible responses in such situations. It can simply fold under the union's pressure and induce the target to agree to the union's demands. Conversely, it can simply ignore the union's entreaties if it is willing to deal with increasingly aggressive adverse publicity. The corporate customer may also engage in its own publicity campaign to rebut the union's allegations.

Finally, depending on the union's specific conduct, the target company and its customer may consider taking legal action, potentially filing a claim for defamation or a lawsuit alleging violations of the RICO Act. Such actions can be highly successful – in 2006, a jury ordered UNITE-HERE to pay $17.3 million

for defaming a group of Northern California doctors and hospitals when it mailed defamatory postcards about the employer, claiming it used inadequately cleaned bed linens in its hospitals. The linens were cleaned by a commercial laundry service that was embroiled in a labor dispute with the union. Also, legal action may be initiated with the National Labor Relations Board alleging that the union has engaged in unlawful secondary boycott activity.

C. Case in Point: A Nearly Decade-Long Campaign to Organize Service Workers at Yale-New Haven Hospital

The outline of an actual recent corporate campaign may be the most effective teaching tool to emphasize the scope, depth, and tenacity of the unions' tactics. The highlights of the SEIU's campaign against Yale-New Haven Hospital are instructive:

- Through 2008, the campaign was in its ninth year in efforts by District 1199 (SEIU) to organize 1,800 service workers.
- District 1199 already represented 150 of the hospital's dietary workers.
- Yale University is a legally separate entity but the public perceives that it is linked to the Hospital.
- 4,300 Yale University employees were represented by the Hotel and Restaurant Employees union (HERE).
- The union had political clout and access to the state and local media.
- The union's points of attack included pricing, billing, and debt collection practices; charity care and service to poor communities; diversity and demographic issues, assets and investments; executive compensation; tax exemption status; patient outcomes and safety issues; treatment of employees; and alleged unfair labor practices.
- Under union pressure, the state Attorney General launched repeated investigations into the hospital's charity care practices.
- The union made allies and proxies including local politicians and clergy, NAACP and Hispanic rights groups, Rev. Jesse Jackson, the Association of Community Organizations for Reform Now (ACORN), Community Organized for Responsible Development (CORD), "Residents for a Healthy Open Debate," and the Center for a New Economy.
- The union's "permanent campaign" had numerous public elements, including demonstrations, picket lines, concerts, other public events, TV commercials in heavy rotation, website information, newspaper ads, postcards, fliers, petitions, communication with Board members and picketing at their private residences, influencing elected officials, on site solicitation, and strikes by unionized groups.
- The Hospital showed no signs of ever agreeing to the Union's proposed neutrality agreement – until the Hospital announced its plans to consolidate cancer services in a new, 14-story, $430 million facility. In response, the mayor predicted that the cancer center was "dead in the water unless there is an agreement on holding a union election for Yale-New Haven Hospital employees" (New Haven Register, Feb. 26, 2005).
- A deal with the union cleared the way for construction of the cancer center, as reported by the

Associated Press in March 2006:

> "*Yale-New Haven Hospital struck a deal with city and union leaders Wednesday that clears the way for a 14-story cancer center that administrators hope will give Connecticut one of the nation's premier centers for cancer research and treatment. ...*
>
> *The proposal had been in doubt because of a long-standing dispute between the hospital and the Service Employees International Union, which wants to unionize about 1,800 hospital workers.*
>
> *Once the city signs off on the construction deal this spring, the hospital will allow union leaders to hold an organization vote by secret ballot. Both sides agreed to choose an arbitrator to oversee the union drive."*[4]

- The agreement included, among other things, that the union would not introduce any major new issue during the final 72 hours before the vote or directly mail literature unless they were given home addresses; and that the hospital would not disparage the union; coerce, intimidate, or "threaten" employees with a loss of benefits, wages, or less favorable working conditions; initiate one-on-one conversations with employees; or hold mandatory meetings about the union.
- The hospital also agreed to meet to discuss its position on the composition of the voting unit; provide a list of names, home addresses, and other employee information; provide a room on the grounds for union organizers to use 3 days per week for 2½ continuous hours; and to provide access to other interior and exterior areas.
- The agreement called for a secret ballot election process but subjected disputes to arbitration and waived any right to an NLRB hearing.
- In 2007, an arbitrator ruled that the hospital had violated the election-principles agreement and ordered it to pay an aggregate $2.23 million to eligible voting employees. This decision came after the NLRB thwarted an initial representation vote that was to take place in December 2006, finding that the hospital had engaged in unfair labor practices in connection with the election. The arbitrator also ordered the hospital to compensate the union $2.3 million for organizing expenses, which the hospital challenged.

  On August 15, 2008, the parties reached a settlement in which the hospital agreed to pay the union $2 million for its organizing costs.

IV. The Meaning of "Neutrality" in Nontraditional Union Campaigning

A. Playing by the NLRB's Rules

The National Labor Relations Act is the primary federal law governing the rights and responsibilities of employees and employers in the context of concerted and protected activities relating to the terms and conditions of employment, including hiring, wages, benefits, discipline and termination, among others. Under the NLRA, an employer is only required to recognize a labor organization as an employee representative after the organization prevails in a secret ballot election supervised by the National Labor Relations Board. Prior to an election being held, an employer generally has four to six weeks to communicate to employees about unionization. During that time, the employer has a legally protected right to communicate the disadvantages of union representation and may lawfully urge employees to vote against union representation.

B. Unions Need Another Way to "Win"

Unions have fared badly under the traditional NLRB conducted election model, as the election statistics noted above attest. In response, unions have seized on neutrality agreements, authorization card recognition, and variations of these methods in the context of a corporate campaign or collective bargaining to rearrange the playing field. As the reported numbers above demonstrate, these tactics are yielding positive results for unions.

C. Neutrality Takes Many Shapes

An employer's pledge to remain neutral during a union campaign can take many forms. Some employers simply agree to recognize a union if it proves a majority of employees has signed union authorization cards. Other employers pledge to remain neutral during the course of an election campaign. More comprehensive agreements require the employer to provide the union with the names and home addresses of unrepresented employees and grant union organizers access to employees during their work hours. In some cases, the employer may even agree in advance to abide by a model contract for unionization, if the union can prove it represents a majority.

D. The Legal View of Neutrality May Be Changing

Although the NLRB historically has upheld contested neutrality agreements, the Board's General Counsel has expressed reservations about "the expanding use of neutrality agreements as an organizing tool."[4] While the General Counsel's views do not necessarily reflect those of the Board itself, a recent decision by the Board may have weakened the strength and availability of neutrality agreements for unions.

In *Dana Corp.*,[5] the NLRB reduced the permanency of an employer's voluntary recognition of a union through card check, even when under a neutrality agreement. Prior to the decision, if a union was recognized pursuant to a voluntary card check agreement, a temporary "recognition bar" applied, prohibiting employees for a "reasonable period" of time (typically six months) from petitioning for an NLRB election to decertify the recognized union or elect a rival union. Similarly, prior to *Dana*, once an employer entered a collective bargaining agreement with a union recognized via card check, a "contract bar" applied, prohibiting new petitions for up to three years.

Under *Dana*, though, employees may file such petitions immediately after recognition and may utilize signatures obtained before the union was recognized. Once employees are given notice of the union recognition and their right to file a new petition (via an official form obtained from the NLRB), they have a 45-day period in which to file a new petition or their ability to do so is waived and the same "reasonable period" recognition bar as before applies. Additionally, the right to file a new petition exists even if the employer enters a collective bargaining agreement before or during the notice period, but once the notice period expires, the same contract bar applies as before.

This possibility of immediate decertification can be a boon to an employer attempting to avoid entering a neutrality agreement and weakens the bargaining position of a recently recognized union. Though the full effects of the decision are still unclear, the *Dana* decision may ultimately force unions to return to many traditional – and less successful – organizing tactics. As discussed in Section V, though, it is also possible that the current Board may overturn or heavily modify *Dana*.

E. Economics of Gaining Employer Neutrality

An aggressive and extended union campaign to exact a neutrality agreement or card check agreement from an employer can be very expensive for unions. However, if successful, it achieves a number of important union goals. First, a neutrality agreement makes it easier and less expensive for a union to organize unrepresented employees. Second, if the employer remains neutral, a union will likely be able to obtain authorization cards from a higher proportion of the employer's workforce, increasing its leverage at the bargaining table. Lastly, a union will have demonstrated its strength and resolve to the employer and the business community. At the bargaining table, the threat of a renewed corporate campaign will loom over the negotiations and demonstrate the union's power to other employers, who may then be more willing to reach an agreement, rather than engage in a protracted and damaging confrontation.

In the 1990's, the SEIU aptly demonstrated the strategic benefits of neutrality agreements, successfully using extensive and damaging corporate campaigns against several large health care systems, leading them to reach neutrality agreements. Under the agreements, the health systems were forced to remain neutral while the union organized employees into new bargaining units, using its increased bargaining power to secure additional employee benefits, and setting the terms of the collective bargaining agreements.

V. The Employee Free Choice Act: An Attempt to Legislate Ballot Free "Elections"

As union membership has declined sharply – to its current 7.2% of the nation's private sector work force from 35% in the 1950s – organized labor has garnered political support for legislation that would codify card check and other nontraditional organizing tactics. The labor movement has multiple objectives in seeking such legislation: to obligate employers to recognize and bargain with a union as the employees' representative based solely on signed union authorization cards; to impose mandatory mediation and arbitration during first contract negotiations; and to deter employer opposition to organizing generally through increasing penalties for unfair labor practices, including treble back pay damages and hefty civil penalties.

A. Congressional Attempts: Current Status in the 111th Congress

After years of lobbying, these concepts have been incorporated into the Employee Free Choice Act ("EFCA"), first introduced during the 2003 congressional term. Although the effort to pass the legislation failed in 2003 and 2005, EFCA was passed by the House of Representatives in March 2007 but died in the Senate without the supermajority required to overcome a filibuster threatened by its opponents. EFCA was reintroduced in the current session of Congress on March 10, 2009, but has been deemphasized by Congress and the White House as they attempt to take the country out of an economic recession.

B. Goodbye to Secret Ballots, Hello to Arbitrated Contracts

If enacted, EFCA would eliminate the employer's right to require an NLRB-conducted election and deprive employees of the opportunity to make a considered choice on union representation in the privacy of a voting booth. In addition to circumventing the election process, EFCA contains a provision mandating arbitration after 120 days of bargaining for a first contract, contrary to the interests of most employers – an arbitrator could impose uncompetitive wages, benefits, or arbitrary rules for leaves of absence, absenteeism, and lateness if the parties are unable to reach an agreement in a relatively short period of time (on the other hand, this requirement could be a valuable bargaining chip for employers since it effectively eliminates the possibility of a strike after arbitration). Furthermore, EFCA would mandate mediation after only 90 days of unsuccessful negotiation, an impractically short period for developing and implementing a bargaining strategy, effectively rendering negotiation itself moot.

In addition, EFCA would make the results of arbitration binding, depriving employees of their ability to vote on the collective bargaining agreement to which they would be bound and to reject a contract that does not meet their expectations. Dangerously, the unintended consequences of this provision could practically do away with employees' ability to strike and severely delay or eliminate entirely the ability of employees to decertify a union that fails to fulfill its promises or represent them effectively.

EFCA as proposed in 2009 would substantially increase the penalties for unfair labor practices and hinder an employer's right to communicate with employees regarding its views on unionization. EFCA

would award treble back pay and assign civil fines of up to $20,000 per employer violation during organizing campaigns or during the period between initial recognition of the union until a first contract is reached. Such stepped-up penalties are unwarranted, excessive, and likely would have a chilling effect on the free flow of communication between employers and employees, impeding the principle of employee "free choice."

VI. The Effects of a New National Labor Relations Board

Even without the actual passage of EFCA, the union movement still has a good chance of realizing many of their goals through the new composition of the NLRB. After undergoing significant personnel changes in the past year, the NLRB is now dramatically more "labor friendly" and likely will take a more activist approach to handling labor disputes.

Almost immediately after President Obama was sworn in, he named Wilma Liebman as the new Chairwoman of the NLRB.[6] Liebman, a former union attorney, has served as a member of the NLRB since 1997, when she was appointed by then-President Clinton. During the years of the "Bush Board," when George W. Bush appointees constituted a majority of the Board, Liebman dissented in virtually every major decision. Chairwoman Liebman has repeatedly stated that her goal is to make federal labor law more "dynamic" and in tune with the "economic realities" of the 21st century.

To fill out the new NLRB, in the summer of 2009, President Obama nominated Craig Becker, Mark Pearce, and Brian Hayes as Board members. On March 27, 2010, after much controversy and with their official nominations still pending before the Senate, Becker and Pearce were given recess appointments to the Board by President Obama. Becker previously served as the Associate General Counsel for the Service Employees International Union (SEIU) and the AFL-CIO. Pearce is an experienced union-side labor attorney from Buffalo, NY. Hayes (whose appointment is still pending) is a management-side labor attorney who currently serves as the Republican Labor Policy Director for the U.S. Senate Committee on Health, Education, Labor and Pensions (HELP). On June 22, 2010, both Pearce and Hayes were confirmed by the Senate.

As a result, and particularly after the addition of Becker, the NLRB is expected to be much more activist. Becker, widely known for his strong pro-union views, incited far more controversy than any of President Obama's other nominees for the NLRB.

There will be additional changes at the NLRB during 2010. The term for Peter Schaumber, who was originally appointed by President George W. Bush, expires on August 27, 2010.[7] Similarly, the term for the NLRB's General Counsel, Republican appointee Ronald Meisburg, was set to expire in August 2010. However, Meisburg has joined private practice. On June 21, 2010, Lafe Solomon was named Acting General Counsel. The General Counsel's position, by design, is independent from the Board. He or she is responsible for the investigation and prosecution of unfair labor practice cases. Essentially, the General Counsel acts as a "gatekeeper," deciding which cases to prosecute and under what theories. The successor to the current General Counsel will be nominated by President Obama and likely approved thereafter by the Senate. It is anticipated that he will nominate a new labor-friendly General Counsel to replace Meisburg.

Regardless of EFCA's fate, the new NLRB has the opportunity to liberalize existing labor laws dramatically. It is likely that the Liebman Board will effect this change using a combination of two approaches: the process of adjudication, establishing new NLRB precedent either by deciding new cases or overturning existing case law; and administrative agency rulemaking.

It is expected the new pro-labor NLRB will overturn a number of "Bush Board" decisions, including those allowing various facially neutral employer work rules that inadvertently limit workplace organizing activity, such as restricting the use of company e-mail for personal business,[8] restricting bulletin board or e-mail solicitations for outside organizations while permitting personal solicitations,[9] and prohibiting abusive language or harassment.[10]

Additionally, the new Board will likely make it more difficult for employers to claim that front-line supervisors, such as charge nurses or lead persons, are "supervisors" under § 2(11) of the NLRA. If such employees are not supervisors within the meaning of § 2(11), they are eligible to become part of an employee bargaining unit and unionize. Recent decisions already suggest that the authority to responsibly direct subordinates is not itself sufficient for a finding of supervisory status, unless the supervisor also has the authority to impose discipline. The new Board may even overturn recent case law on this very issue, enabling unions to organize a facility's first-line supervisors – who could then legally solicit their subordinates to join the union.[11]

Another area likely to be changed is the status of contingent, temporary, and contract workers. Historically, such employees do not have organizing or collective bargaining rights equal to those of regular employees. For example, the Bush Board reinstated the long-standing rule that a union cannot petition to represent contingent or contracted temporary workers in the same unit as the facility's regular employees, unless both the facility and the contractor consent.[12] In dissent, Chairperson Liebman strongly criticized the outcome of that case.[13] She argued that contract employees represent a growing part of the economy, and the traditional rule unfairly disenfranchises them from the benefits of collective bargaining.[14] In addition, Liebman has stated that she looks forward to deciding a pending case regarding the rights of a contractor's employees to solicit or distribute literature on the facility's property while they are off-duty.[15]

It is also expected that the Board will again "flip flop" on whether non-union employees are entitled to "Weingarten" rights. Weingarten rights provide employees with the right to have a representative present during any investigatory interview if the employee reasonably believes that meeting could lead to discipline. The Board has changed its stance on this matter no fewer than four times. Under the Board's decision in *IBM Corp.*,[16] only unionized employees can exercise Weingarten rights. However, in dissent, Liebman vehemently decried the decision as resulting in "American workers without unions, the overwhelming majority of employees, [being] stripped of a right integral to workplace democracy."[17]

VII. Legal and Preventive Strategies: Preserving Management Rights Through Positive Employee Relations Solutions

Although unions are using creative and aggressive tactics more frequently and with greater success against both partially unionized and union-free employers, in-house counsel can play a leadership role in positioning an organization to resist those efforts. Companies with knowledge and awareness of the new face of organized labor will be equipped to commit to a program of positive employee relations in order to maintain their union-free status or prevent the expansion of a union footprint.

The first step in resisting union pressure is educating and preparing senior managers and boards of directors about the threat and negative consequences of unionization. The key question at this level of corporate preparedness is whether the company will make a broad commitment to take any action necessary to preempt or withstand a corporate campaign. Once managers are aware of the threat and committed to preventing a union campaign, in-house counsel should start preparing to take responsive action.

An employer's first, best, and most efficient defense, though, is maintaining an issue-free work environment, rendering unions irrelevant because they have nothing to offer employees. Even without an immediate threat of unionization, concerned employers should conduct a thorough analysis of their vulnerabilities and weaknesses in employee relations. Periodic examination of policies, practices, supervisor's actions and accountability, and prompt resolution of any shortcomings will limit an employer's exposure to corporate campaigns and create an environment in which employees are less likely to perceive a need for representation. In anticipation of potential liberalizing changes to the law (courtesy of EFCA and the new NLRB), this strategy must be reinforced through constant communication with employees about the disadvantages of unionization and the significance of signing union cards.

A. Assess Vulnerability

The company can begin to assess its vulnerability by learning as much as possible about its potential union adversaries and the tactics they are likely to use. Review those tactics and determine which ones might be effective against the company. Analyze the general labor climate in the geographic region and contact other companies that have been the target of union campaigns in the same area or industry or waged by the same unions.

In particular, the company must assess its compliance with statutory obligations, such as wage and hour laws and regulations, health and safety standards (including OSHA and state right to know laws), and all other applicable laws – unions will often use even minor noncompliance as justification for starting a campaign.

B. Establish Coalitions

To counter a corporate campaign, the company should establish its own coalitions and strategic alliances demonstrating its good corporate citizenship to any special interest groups that may be involved in union issues, such as environmental, religious, women's, disability, or minority organizations. Whenever possible, the company should also transact within the local business community to establish relationships which may later become valuable support for the company's position in opposing the union.

C. Develop Government Relations

The company also should develop and nurture its contacts and relationships with elected and executive local, county, state, and federal government officials while also ensuring that these relationships remain appropriate and businesslike.

D. Nurture Corporate Involvement

It is vital to have an informed, educated management committed to maintaining positive employee relations and, if it becomes necessary, to defend against an organizing campaign. Support should come from every level of company management – but particularly top management – in conjunction with senior labor relations and human resources officials. The most effective way to coordinate corporate involvement is establishing a task force to prepare and deploy strategies developed by in-house counsel and the company to oppose a union campaign.

It is also important that the task force have central control over the public relations aspect of a campaign. A public relations counter campaign should always emphasize a positive tone, build the company's reputation, and praise the company's employees rather than attacking a union. If it becomes necessary to respond to a union's public attacks, the company should phrase its response in positive tones, stick to the issue raised, and avoid disparaging the union or its officials.

E. Conduct Education and Training

Managers and supervisors should be trained in maintaining an issue-free environment and should take part in informational sessions and strategy meetings regarding corporate campaigns. They should understand how to respond lawfully and responsibly to organizing efforts and how to recognize the early warning signs of potential union intrusion. They should also be trained to handle questions and claims from employees, customers, the community, and the press with composure and poise – it must always be reinforced that managers and supervisors are often the "public face" of the company.

As a typical part of a corporate campaign strategy, a union will sometimes try to exert pressure upon corporate boards of directors by picketing the directors' homes, and often pressure related businesses that board members own or other organizations with which they are associated. Board members should be alerted about this possibility, educated about the stakes involved, and asked for their commitment to "weathering the storm."

F. Develop an Action Plan

In-house counsel should coordinate with management to develop an action plan reporting on the likelihood of a union campaign, including assessing potential issues and the any special interest groups that may seek to involve themselves, and planning the company's response. The action plan should establish a timetable and designate specific individuals to carry out the plan's various components and to anticipate and respond to a union's tactics.

G. Explore Potential Legal Action

Though not readily available, there may be certain situations when a company has a legal remedy against tactics employed by a union in a corporate campaign. Several employers have invoked the Racketeer Influenced and Corrupt Organizations Act (RICO) as a comprehensive counterattack against unions, their consultants, and occasionally their supporters and affiliates. Defamation and invasion of privacy claims also have been used effectively against unions.

H. Take Advantage of the Public Outcry Against Corporate Campaign Tactics

Recently, there has been a public outcry from the business community against the smear tactics employed by some unions in corporate campaigns. Business leaders have criticized unions' misuse of federal regulatory agencies, such as OSHA and the Environmental Protection Agency, and filing of frivolous claims. Consequently, the U.S. Chamber of Commerce and the National Association of Manufacturers have undertaken an effort to curb the use of legislative proposals and regulatory action as corporate campaign tactics.

I. Recommit to an Issue-free Workplace

Practicing preventive labor relations requires anticipating employee-related problems before they are manifested by employee complaints, deteriorating morale, union organizing activity, agency proceedings, litigation, or possibly the start of a complete corporate campaign. The company should periodically use a preventive labor relations audit to identify potential issues. The audit should have the following major components:

- A review of the company's policies, practices, and procedures to ensure compliance with applicable labor and employment laws, paying particular attention to key personnel policies and practices regarding overtime, leave, promotions, transfers, employee selection techniques, etc., and the company's sensitivity to "family" and "diversity" issues.
- An assessment of fairness and consistency in the administration of personnel policies, as well as employees' perceptions of such policies.
- An evaluation of the effectiveness of all employee communications programs and the company's dedication to continuous improvement.

- An evaluation of the effectiveness of all employee complaint and problem resolution procedures and the company's dedication to continuous improvement.
- An identification and resolution of health and safety issues that may be of concern to employees.
- An identification of all supervisory and managerial personnel.
- A schedule and summary of training for supervisors and managers on their rights and responsibilities under relevant labor and employment laws, including open discussion of techniques and strategies that can be used to continuously maintain an effective preventive labor relations posture.
- An evaluation of the development of employee orientation programs, particularly those segments dealing with the employer's philosophy of employee relations and policies concerning third-party intervention.
- An evaluation of the effectiveness and legality of employee handbooks and/or manuals.
- An evaluation of the development of guides for management on maintaining non-union status.
- An analysis of potential bargaining units and development of plans for any necessary remedial action.
- An evaluation of the development of a system for monitoring, reporting, and maintaining accountability in preventing and resolving workplace conflict.
- Proposals and action plans for any of these programs or systems that do not exist yet.

J. Communicate Company Position on Unionization to Employees

Employees educated on the disadvantages of union representation are much less likely to sign cards or support a union campaign. This is critical if the employer is compelled to agree to a card check procedure or if legislation such as EFCA is enacted allowing unions to bypass the secret ballot election process. Accordingly, employers should convey their union-free philosophy to employees regularly and unambiguously. Strategies for doing so include placing a policy statement in the employee handbook (though the company cannot specifically require employees to agree with the policy[18]) and in regular communications, such as at annual "state of the business" meetings.

Maintaining a consistent and comprehensive communication strategy requires:

- Crafting the company's position and supporting messages to be consistent with its mission and values, such as compassionate concern for employees, customers, and public; financial stewardship; community service; promoting dignity, respect and fair treatment in the employment relationship; and openness and full disclosure.
- Incorporating a consistent message in all communications with employees.
- Recognizing the validity and accomplishments of the labor movement generally while conveying its inapplicability to the company specifically.
- Communicating the message completely to all supervisors, applicants and employees.
- Maintaining positive press and public relations and considering proactive public discussion to frame

the issue positively.

- Revisiting and strengthening community and political ties.
- Enlisting and encouraging active employee support.

K. If Neutrality Is Unavoidable

In a situation where forming a neutrality agreement may be unavoidable, the employer should consider the following negotiation strategies:

- Limiting the duration of the neutrality agreement.
- Limiting the scope of the neutrality agreement and potential organization (for example, agreeing that the union will not organize other facilities or branches of the company).
- Conditioning the neutrality agreement on the union's agreement to favorable contract terms.
- Negotiating for an NLRB-conducted election (or at least a private secret ballot election) instead of card check recognition.
- Negotiating for a super-majority requirement if card check is necessary.
- Negotiating specific rights to communicate with employees (for instance, requesting to be allowed to provide simply "full and accurate" information about the impact to the company of unionizing without stating a position) in lieu of remaining fully silent.
- Including a right to respond to employees' questions or union communications.
- Prohibiting intimidation or other improper union conduct.
- Limiting the time, place, and manner of union access to the company's premises for engaging in organizing activity.
- Carefully reviewing and negotiating provisions regarding the private resolution of any dispute (for example, using a specific arbitrator)
- Avoiding liquidated damages or attorneys' fees provisions for any claimed breach of neutrality.
- Requiring that the union refrain from picketing, hand billing or inciting a strike.
- Limiting the actual organizing activity to a reasonable period of time (e.g., 90 days) and requiring advance written notice of intent to organize.
- Establishing a time period following an unsuccessful organizing effort during which the union waives its right to attempt organizing again.
- If agreeing to disclose names, addresses, and telephone numbers to the union, providing a mechanism for employees to opt out of having their personal information (or at least their home telephone number) given to the union.
- Requiring both parties to promote the message that choosing whether or not to unionize is the employees' decision and that both parties will respect the employees' choice.
- Including a provision that the union and its agents will not impede or interfere with the normal operations of the company.
- Including a provision that the union waives its right to file lawsuits and will not encourage or assist

employees in filing lawsuits against the company.

- Including clear provisions for resolving bargaining unit issues, challenging voter issues, and alleging violations of the neutrality provisions. This provision should also include limits on the remedies available in the event of a violation by the employer (e.g., the union cannot seek a direct bargaining order). Similarly, the agreement should specify potential remedies if the union violates the agreement.

VIII. The Bottom Line: Organizations Are at Risk Without a Commitment to Minimizing Vulnerability and Maximizing Positive Employee Relations

Organized labor has recommitted itself to reversing the decline in union membership through non-traditional strategies and tactics unfamiliar to many employers. As unions use more sophisticated methods of accessing employees and campaigns become more aggressive in finding and exploiting vulnerable employers, ignoring the issue or assuming that only certain industries or geographic areas are at risk is ill-informed and dangerously careless. Employers also face a newly hostile political landscape, with the possibility that EFCA or similar union-friendly legislation will be enacted and the NLRB likely to take a newly activist, pro-union stance in upcoming cases.

Each corporate campaign is a unique, tailored operation demanding that management's response is targeted to the campaign's particular objectives and audiences. Accomplishing this goal depends on the company, its philosophy of employee relations, and the objectives and tactics of its adversary.

Minimizing vulnerability to corporate campaigns should become part of every company's overall risk management strategy. Additionally, the company should create a corporate campaign task force, which meets on a regular basis, monitors changes in the internal or external environment, and recommends preventive or corrective measures. These steps will improve the company's ability to avoid or survive a corporate campaign, and will enhance their overall human resource posture.

Ironically, corporate campaigns often alienate the very employees a union seeks to organize. Many employees have a strong allegiance to their employer, particularly those with strong community roots. While such employees may gripe occasionally among themselves about working conditions, an outside group attacking their employer will often offend them. Thus, when the employer runs an effective counter campaign to capitalize on this sentiment, an aggressive union may be unable to force a neutrality agreement and may fail to garner enough employee support to prevail in an NLRB supervised election.

IX. About the Authors

Founded in 1958, Jackson Lewis is dedicated to representing management exclusively in workplace law with almost 650 attorneys practicing in 46 cities nationwide. Jackson Lewis has a wide-range of specialized practice areas, including: Affirmative Action and OFCCP Diversity Planning; Disability, Leave and Health Management; Employee Benefits, including Complex ERISA Litigation, Workplace Privacy and Executive Compensation; Global Immigration; Labor, including Preventive Practices; Litigation, including Class Actions, Complex Litigation and e-Discovery; Trade Secrets, Non-Competes and Workplace Technology; Wage and Hour Compliance; and Workplace Safety Compliance.

In addition, Jackson Lewis provides advice nationally in other workplace law areas, including: Reductions in Force, WARN Act; Corporate Governance and Internal Investigations; Drug Testing and Substance Abuse Management; International Issues; Management Education, including e-Based Training; Alternative Dispute Resolution; Public Sector Issues; Government Relations; Corporate Diversity Counseling and Professional and Collegiate Sports Employment Law and Compliance. Additional information about Jackson Lewis can be found at www.jacksonlewis.com.

X. Additional Resources

Richard Mosher and Owen Warnock, "All for One and One for All: Navigating Trade Unions and Work Councils in Europe," *ACC Docket* 23, no. 2 (Feb. 2005): 48-67, *available at* http://www.acc.com/legalresources/resource.cfm?show=17005.

"Resisting Union Neutrality Agreements, Ballot-Free "Elections" and Corporate Campaigns," ACC Webcast (Sept. 6, 2006), *available at* http://www.acc.com/legalresources/resource.cfm?show=16361.

"The In-House Counsel's Playbook: Assessing Corporate Vulnerability to New Union Organizing Tactics, Corporate Campaigns, and Two Labor Federations," ACC Webcast (Mar. 8, 2006), *available at* http://www.acc.com/legalresources/resource.cfm?show=16367.

"Trade Unions and Work Councils and How They Work in Europe," ACC Webcast (Jun. 29, 2004), *available at* http://www.acc.com/legalresources/resource.cfm?show=16430.

XI. Endnotes

[1] Change to Win was formed by the Service Employees International Union, International Brotherhood of Teamsters, United Food & Commercial Workers Union, International Brotherhood of Carpenters & Joiners, the United Farm Workers Union, the Laborers International Union of North America, and UNITE HERE. The stated mission of CTW is "to unite the 50 million workers in Change to Win affiliate industries whose jobs cannot be outsourced and who are vital to the global economy. We seek to secure the American Dream for them, and for *all* working people, including:

- A paycheck that supports a family
- Universal health care
- A secure retirement
- The freedom to form a union to give workers a voice on the job." (Mission: Change to Win, http://www.changetowin.org/about-us/mission.html (last visited June 11, 2010)

[2] Jarol B. Manheim, *Corporate Campaigns: Labor's Tactic of The 'Death of A Thousand Cuts,'* LAB. WATCH, Jan. 2002, at page 2.

[3] INDUSTRIAL UNION DEP'T, AFL-CIO, DEVELOPING NEW TACTICS: WINNING WITH COORDINATED CORPORATE CAMPAIGNS (1985).

[4] *Yale-New Haven Hospital Reaches Cancer Center Deal*, Conn. Post (Bridgeport, Conn.), Mar. 23, 2006.

[5] Press Release, Office of the General Counsel, National Labor Relations Board, NLRB General Counsel Arthur Rosenfeld Issues Report on Recent Case Developments (Nov. 17, 2004), *available at* http://www.lawmemo.com/nlrb/gcreportNov2004.htm.

[6] 351 N.L.R.B. 28 (2007).

[7] *See* NLRB, Chairman Wilma B. Liebman, http://www.nlrb.gov/about_us/overview/board/wilma_b_liebman.aspx (last visited May 11, 2010).

[8] *See* NLRB, Peter C. Schaumber, http://www.nlrb.gov/about_us/overview/board/peter_c_schaumber.aspx (last visited May 11, 2010).

[9] *Guard Publ'g Co.*, 351 N.L.R.B. 1110 (2007), *enforced in part, review granted in part,* 571 F.3d 53 (D.C. Cir. 2009).

[10] *Id.*

[11] *Lutheran Heritage Village-Livonia*, 343 N.L.R.B. 646 (2004).

[12] *Oakwood Healthcare, Inc.,* 348 N.L.R.B. 686 (2006).

[13] *Oakwood Care Ctr.,* 343 N.L.R.B. 659 (2004).

[14] *Id.*

[15] *Id.*

[16] *New York New York Hotel & Casino,* 334 N.L.R.B. 762 (2001).

[17] *IBM Corp.*, 341 N.L.R.B. 1288 (2004).

[18] *Id.*

[19] *Heck's, Inc.,* 293 N.L.R.B. 1111 (1989) (making employees sign handbook receipt specifying "agreement" with employer's union stance violates NLRA).

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