

Webcast: The In-House Counsel's Playbook: Assessing Corporate Vulnerability to New Union Organizing Tactics, Corporate Campaigns, and Two Labor Federations

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Presented by ACC's Employment & Labor Law Committee and [Jackson Lewis LLP](#)

ASSOCIATION OF CORPORATE COUNSEL

Moderator: James Baine

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Operator: This conference is being recorded. Please go ahead, James.

James Baine: Welcome. I am James Baine, Moderator of today's Webcast entitled "Assessing Corporate Vulnerability to New Union-Organizing Tactics, Corporate Campaigns, and (Two) Federations – The In-House Counsel's Playbook." Today's program is sponsored by the Employment and Labor Law Committee of ACC and the law firm of Jackson Lewis. If anyone listening has a question during the program, please use the question box on the screen to type a question to the presenters and click "Send." Today's presentation is being recorded and will be available for replay on Thursday and remain available for one year. If you need tech support, e-mail to accwebcast@comm-C-O-M-M-partners.com.

Recently I noted at www.jacksonlewis.com that Jackson Lewis was sponsoring in April and May of this year a two-day program on how to stay union-free at a number of locations from Las Vegas to Orlando. I asked the firm if they could give us an overview of such, which has resulted in this Webcast. Today's presenters are as follows.

(Barbara Ann Salinger), who resides in Morristown, New Jersey, is a labor and employment law consultant with Honeywell International, Inc., where she started in 2005. She is a graduate of Syracuse University with a BA degree and a Masters degree in Public Administration, and holds a law degree from American University. Ms. (Salinger) has an extensive background in labor and employment law, having worked for the Department of Labor as a Labor Economist, worked for the NLRB, Division of Judges, practiced as a partner with a national labor and employment law firm, besides serving as Chief Labor and Litigation Counsel for RJR Nabisco and American Standard Companies for over 20 years. She is a former board member of ACCA, the former president of the New Jersey chapter, and a current board member with the New Jersey chapter.

Michael Lotito is a partner in the Jackson Lewis' San Francisco office. Mr. Lotito received his BA and law degree from Villanova. Mr. Lotito has practiced exclusively in the area of labor and employment law his entire legal career, and he currently chairs the Jackson Lewis Management Training practice group. He has extensive labor relations experience and has represented hundreds of clients who have wanted to stay union-free. Mr. Lotito has frequently testified before federal and state legislative and administrative tribunals on behalf of employees on issues of critical importance, such as the Americans with Disabilities Act and California (ABA) 1825 Sexual Harassment Training proposed regulations. In 2000, he chaired the 200,000-member Society for Human Resource Management. He has co-authored three books about Americans with Disabilities Act and is frequently quoted in the press on a variety of workplace law issues.

(Barbara Ann Salinger): Thank you so much, James. I also want to just reiterate that Michael and I really, truly welcome questions. We think they're key because we want this program to be responsive to you. Ask the questions. Know that I will make sure – and Michael will kill me for this, but I will make sure that they are raised throughout the hour so we can discuss them where they are relevant. We want this to be as interactive as possible and keep it interesting because, frankly, we don't want any of you to go to sleep. I get enough snoring through the night from my husband, so we don't want to get it from you.

Michael, can you give us an overview of the current state and status of organized labor today?

Michael Lotito: Thank you, Barbara. As this chart on Page 4 of the slides indicates, union membership hit its high-water mark back in 1955, when they represented about 35 percent of the workforce. And they have been in a relative constant state of decline since the '60s for reasons that we really don't have time to develop. But they're currently down to about 7.8 percent of the private sector.

The next slide, just ...

(Barbara Ann Salinger): Michael, question on that. Doesn't it mean that it's safer for companies if they're on the decline?

Michael Lotito: Well, I think that one of the reasons why many organizations do not have a particular labor relations strategy and, frankly, even somebody responsible for a labor relations strategy in-house is because given the decline of organized labor over the last 20 –

25 – 30 years, many organizations do not see an attack from labor as particularly relevant.

And with their decline to about 7.8 percent and with this continuation, many organizations are much, much more concerned about employment law issues than they are with respect to labor issues. And as a result of the fact that unions are down to about 7.8 percent, I refer to what's going on in the country today as (union survival – yes or no – do you want to play)? Because I think that that's exactly what's happening. I think the fact that they're at this level is creating the imperative where at least some of them are recognizing that there has to be fundamental change.

(Barbara Ann Salinger): Why do you – what is your thought in terms of – because I know you're absolutely learned on this, as to why the union number is really going down that significantly?

Michael Lotito: Well, I think that, you know, some of the critical factors are that there's been a lot of change in the workplace over the last 30 or 40 years. The demographics have changed, the way management approaches their workforce through the creation of an issue-free environment is very different, employees have a large number of options to express their views in the event that there's a problem, from the "Let me tell you how to sue the company for free" bulletin board with all of the governmental agencies noted, to robust internal problem-solving procedures that the company may have. So, as a result, many organizations really strive not so much the creation of the union-free environment, but really strive for the issue-free environment. And while all of these changes have been taking place, the real question that organized labor has had to answer for itself is whether or not they've changed.

(Barbara Ann Salinger): Thank you.

Michael Lotito: When you take a look at some of the most recent statistics, though, despite the fact that organized labor is in this state of decline, (at least) through a survey that was done last Labor Day by the AFL-CIO, they found that a large number of individuals – the majority of non-union workers, would vote to join a union. There're other polls that are out that refute that number a little bit, but it is fairly clear to me, as Professor Manheim notes in this Labor Day message, that there is a great deal of worker anxiety today. And whether it's the gasoline prices or declining wages or job security issues, I think that organized labor feels that there are some real possibilities for them to gain some advantages here.

(Barbara Ann Salinger): And I also have seen that with a lot of companies increasing layoffs, increasing consolidations, increasing closings of facilities, and frankly, moving a lot of the business outside the U.S. to where it's competitive in terms of wages, like Mexico, like Asia, that it gives an impetus for employee – well, first of all, the number of members goes down, its great insecurity for employees, and clearly the unions have to start looking as to where else they can go.

Michael Lotito: Well, and that's right. And part of the problem that unions have to confront is that now that we've got an international economy where we're competing on a global basis, you can make your product almost anywhere, and that creates different competitive advantages and disadvantages. And with some of the things that are happening with our automobile industry and the more traditional industries in the United States, it demonstrate that unions are having a very difficult time in those core industries providing a real value proposition. And that's part of the reason for the decline.

(Barbara Ann Salinger): I would also see that in terms of, you know, where we're talking about labor saying "Employees really want us," wouldn't it, also – the healthcare cost and their lack of trust in upper management play a part in that, as well?

Michael Lotito: I think that those are two critical issues. I'm spending a lot of time these days in Houston. The front page of the newspaper every single day is about the Enron trial. And it just sort of reinforces the message of this level of distrust that exists. I think throughout a number of workers in the country as to whether or not they can really rely upon what management is telling them. I think that's a big issue.

I think the other big issue that you touched upon is healthcare. We clearly have a healthcare crisis going on in the country. Employees are feeling really jammed. It's not just the employees who do not have healthcare, but it's those employees who do that are feeling the stress from increased contributions and the like and employers are struggling with these issues because of the cost. They're just out of control. So, this is a major, major problem, and unions are certainly trying to exploit that.

(Barbara Ann Salinger): You know, you've raised the issue again with respect to distrust in management, and certainly Enron and so forth, but if you take a look also, and I've had it companies that I've represented where they say, "Senior executives here – the President and CEO make so much money, and he's claiming that I could take a freeze or a reduction or give concession in my wages. I have to take – give up my vacations. I have to pay for healthcare." Is that a major issue here, as well?

Michael Lotito: Well, executive compensation can be a problem, and depending upon the organization and depending upon the way the union handles that issue, there are Web sites that employees can go to where they can even compute what their wages are and compare that to the total compensation of the CEO. So, if this type of data is published because it's a public company, that's certainly something to be concerned about because it makes it very difficult for the quote, unquote average worker to make a connection with what their pay is and what the CEO's pay is because the differential, depending upon what stat you believe, is somewhere in the neighborhood of 457 percent.

(Barbara Ann Salinger): Wow. Can you give us more input with respect to the new breakup with the AFL-CIO and Change to Win? Kind of explain what Change to Win is for those of us who don't really understand it and what really happened this past summer.

Michael Lotito: Well, the AFL-CIO was the parent organization for approximately 70 unions, and ironically, the AFL and the CIO were two competing labor organizations or federations, rather, that merged in 1955. That's when they hit that high-water mark of about a 35 percent market penetration. Last year at the AFL-CIO's convention, a grouping of unions, which we'll talk about in a second, withdrew from the AFL-CIO and created what's known as the Change to Win Federation.

And Change to Win is, I think, the group that is trying to put a great deal of impetus with respect to organizing today. So, this was a tremendous event – an historical event in the history of organized labor, so that there are really now two competing labor federations – the more traditional AFL-CIO that, for example, the United Autoworkers Union is still a member of, and then you have the Change to Win Federation.

(Barbara Ann Salinger): What percentage, can you tell us, did these seven unions make up of the AFL-CIO approximately?

Michael Lotito: Well, ...

(Barbara Ann Salinger): Very large unions.

Michael Lotito: ... the unions that withdrew, the Service Employees is one of the fastest-growing unions in the country, the Teamsters, Unite Here – this was the merger of basically the old Clothing and Textile Workers Unions with the Hospitality Union, the United (Food) and Commercial Workers Union, of course, is the old Retail Clerks, the laborers – United Farm Workers, and the Carpenters. But these unions represented a tremendous percentage – close to 40 percent of the membership of the AFL-CIO. And that has really impacted the AFL tremendously.

The AFL just finished their mid-winter meetings in San Diego last week, and the NEA, the Teachers Association, agreed with the AFL-CIO to let their locals actually participate. And I think one of the reasons for that is because the AFL is in need of cash because they've had this tremendous loss because all of these unions were paying per capita taxes. The AFL just settled a dispute over how much the SEIU owed them in dues. I think they agreed to a settlement of approximately \$4 million in pay dues.

Having said that, I don't want to give the impression the AFL-CIO is a totally defeated tiger because at their convention in San Diego last week, they voted to spend \$40 million in

the upcoming November elections, which I think is five million more than they did the last time around. But the “Change to Win” group – and Andy Stern, the head of the Service Employees, who was the protégé of John Sweeney because John Sweeney came out of the Service Employees, he is being very, very aggressive and very assertive with organizing.

(Barbara Ann Salinger): Do you think that the AFL-CIO will also be as aggressive or try to come up with more creative ideas as to how organize like CTW is doing?

Michael Lotito: I believe so. I think that the people that have looked upon this split as really the total demise of organized labor forget that competition is really one of the driving principles of our society. And when there is competition, it forces individuals to be more creative and to provide a different value proposition. I think that it's no coincidence with the benefit of hindsight that when the AFL-CIO agreed to come together, that that was the high-water mark of their market penetration.

They had been competing for membership up to that point in time, so, now, what you see are again, two different competing organizations, and I think that this has been a huge wakeup call to the AFL-CIO. What they key differentiator is, however, is that the Change to Win group, at their founding convention on September 27, they agreed to devote 75 percent of their budget to organizing. And the AFL-CIO is at a commitment for their member unions to spend 25 or 30 percent of their income to organizing, but they really don't have a very, very good enforcement mechanism for that. But these unions that are part of CTW, they are very, very, very serious about organizing and putting their money into that resource and trying to expand market share.

(Barbara Ann Salinger): Aren't they also identifying really – they want to identify which people

they're trying to organize, so they're diversifying their top organizers, like, for example, the CTW Chairwoman is a Chairwoman, not a Chairman – Anna Berger. And in addition, they're really trying to target companies as a whole instead of just saying, "I'm going to go after one branch or one location or one plant," but in fact going against each company as a whole.

Michael Lotito: Well, yes, a bunch of agreements on that. First, I don't think there's – I don't – I don't think it was just coincidental that Anna Berger is the Chairwoman of CTW despite the fact that CTW is to a great extent the brainchild of Andy Stern. When you think about the workforce of today, it's just about 50/50 with respect to male/female, and I think that's part of the diversification of the organizing. Part of the 750 million that they want to spend in order to put 500,000 new people is to put that into diversifying the type of organizers that they have.

But just quickly going back to this other point that you made about the AFL-CIO, you know, they, too, have put a renewed emphasis on organizing, but they want to also make an investment in politics. And that's one of the things that distinguishes these two groups because the AFL-CIO is more interested in trying to create political change to put the kind of political candidates in office who will amend the National Labor Relations Act and do some other things that makes it easier for unions' organizing, whereas what Andy Stern really wants to do is he wants to put the muscle into organizing and he doesn't want anybody else to be the master of his ship.

(Barbara Ann Salinger): You know, some companies take a look at, like, the C – the SEIU or

Teamsters, Unite Here, UFCW, Laborers – you know, Carpenters Union, et cetera, and say, “This is not the type of union that would go after my industry or my company.” But isn’t it true that they’re really trying to diversify the types of companies and membership as, you know, expanding it, broadening their sights to bring in different types into their organizations?

Michael Lotito: Well, they are, but I think that in-house counsel has to help the organization conduct an assessment of just how vulnerable to this sort of an attack the organization might be.

(Barbara Ann Salinger): Along those lines and just to kind of bring it to home for in-house counsel and I think you made an excellent point – we’ve got to sensitize our senior management and, frankly, you know, your immediate management and senior and above, that this is an issue that must be on our radar screens. We have to somehow come up with a way of dealing with it and be sensitive that, “You know what? It can hit us. It can hit our company. Even though a number of employees or the union number is going down, we’re still vulnerable. The union needs to increase its membership, so they may very well come after us.”

So, as you were saying, we have to look at our vulnerability, and I know we’re going to discuss that later, so I won’t really go into much right now.

Michael Lotito: There’s different levels of vulnerability. One of the vulnerabilities is, “Who are you and where are you?” I mean if, for example, you are a retailer, clearly you are right in the midst of the sweet spot of the UFCW. They’re targeting you because, among other things,

the retailer – if you want to have a retail store in Cincinnati, you can't put the store in Taiwan. You cannot move that function. The UFCW will attempt to organize, as they say, the front of the house, while the Teamsters will attempt to organize the back of the house, which is basically your distribution centers. If you're involved with any kind of construction, obviously the laborers and the carpenters should be a concern.

If you're in hospitality, restaurants, Unite Here is certainly taking a hard look at you. The SEIU is focused on healthcare, laundry workers, low-wage earners, you know, there's a lot of discussion these days about what's going to happen with respect to potential immigration reform in the country. The AFL-CIO took a very expansive view the other day to basically embrace everyone who's in the country today. The Change to Win coalition has taken a slightly modified view of that. Traditionally they shied away from low-wage workers because dues, being twice the average rate per month, there wasn't a lot of money in it for the unions. But they've changed their focus.

But that doesn't mean that if you're not one of those sweet spot companies that you don't have some vulnerability. If you're a partially unionized company, I don't care what the union is, you can expect that in the next round of negotiations, there are going to be requests for a card check and neutrality agreements in order to go get the rest of the organization. If you're – if you're in an area of the country that traditionally has not been heavily unionized, that's exactly the sweet spot that the unions are going after. Who would have predicted that the number one success in the last 25 years would – organizing in the south, would have been the Justice for Janitors situation in Houston, Texas?

So, organizations have to begin taking a look at themselves because these unions are taking a look at you because as you said, they want to organize wholesale and not retail. They want to go after the whole enchilada. You're not going to be able to expand your membership base by 500,000 by going after the 22 people that are working in a retail store, 15 of whom are part-timers. It's a totally, completely different mindset.

(Barbara Ann Salinger): Do you see any geographic trend because you did – you know, you referenced to it. You've indicated an industry trend and primary targeted industries, but what about a geographic trend? Are they staying away from those right-to-work states or are they really going after them, as well?

Michael Lotito: Some of the most aggressive organizing that's taking place in the country right now is in Texas, which is a – you know, an old right-to-work state – union market penetration very, very modest. Certain areas in Texas, the union penetration was essentially zero. And there's tremendous organizing going on there. There's organizing taking place in Miami – again, a right-to-work state, Florida. So, there're hot spots all over the country.

But, of course, there's also organizing that's going on in California, in Washington, in Oregon, so it really just depends. But I don't think anybody is immune to these types of issues, and you also have to think about whether or not your employees have these type of concerns because you're really trying to work ultimately to the hearts and the minds of your employees. But, you know, Barbara, as we discussed the other day, on Slide 12, these are some of the major issues that employees are confronted with today.

(Barbara Ann Salinger): Right. So, let me just take you back again – North Carolina, South

Carolina – again, right-to-work states. There are a lot of companies that look at certain, quote, right-to-work states, especially the Carolinas, “Why don’t I open a location there? I’m guaranteed it’s going to be non-union.” I have seen organizing efforts in those states in the recent past and in fact the use of political and religious organizations to assist the union in those organizing efforts. Are you seeing it increasingly or not?

Michael Lotito: Unions are trying to become part of the fabric of the particular community. That’s what they did, for example, in Houston with voter registration drives, reaching out to the clergy, et cetera, before they really even started to organize. Whether it’s in North Carolina, South Carolina, New Mexico – I don’t care where the organization is. If the organization says, “If we put our facility here and we are guaranteed to be union-free, that is extraordinarily naïve. I think that no one at the level of sophistication of the people on this call would ever say that there’s a guarantee that we’re going to be union-free, but the fact of the matter is I really don’t have to worry about it.

I think the message that we’re trying to convey here is not necessarily that you have to worry about it. I mean if you’re a major hospital organization, you have to worry about this. But I think everybody should be at least somewhat familiar and concerned and put it on their to-do list of going to the senior executives and say, “Do we have any issues here? Do we have any concerns? Should we be doing something from a preventive standpoint now as opposed to putting ourselves in a reactive standpoint?”

I believe that your union-free status, if it's important to the organization, now has to be thought about just like how are you going to avoid the next class-action wage-an-hour case or whatever the employment situation is. People need to start focusing on it again.

(Barbara Ann Salinger): But now a lot of companies, what they do is they say, number one, "I want to maintain positive employee relations." What does that mean? One, where you have unions, the relationship with employees is still really important. Two, the relationship with the union is important. And three, in all honesty (in that), they may look at decertifications.

Secondly, where you don't have unions, maintain non-union status, and I think, again, going back to taking the temperature in various locations, doing assessments, identifying what the issues are and really dealing with them. I've dealt with that in various companies that I've worked at and you see situations where management did not have a clue what the issues were. I went into one of the facilities and there were racial undertones that management didn't have a clue went on.

And there was a wall there that said, "This is the wall of – or the hall of success." And there was not one minority on that wall. And then when you go out and you talk to the employees, you find out that they feel that they're being discriminated against, and is there some organization that can help us. They didn't have a clue, so, again, it's extremely important to make sure that there is some kind of identification of issues, some kind of vulnerability assessment to do so and that management is sensitive to the fact that they really don't know everything going on in their organizations, be it as plant management, regional management, going all the way up.

Michael Lotito: Slide 12 has some of the issues for example that are important to employees today.

What some organizations do is they'll have outside third parties come in and they'll do, you know, some kind of in a survey in order to determine whether or not these are the type of issues that they should be focused on. Then there's the question of, "What's the commitment? What are we going to try to do about this? How are we going to communicate these things?"

(Barbara Ann Salinger): But ...

Michael Lotito: But the last bullets on Slide 12 on workers' rights, and then I'll turn it back to you,

I think is important. The (let me tell you how to sue the company for free bulletin board) works real well when there's a violation or a perceived violation of the law – "I've been discriminated against," et cetera. Unions have a different approach. Unions step in when there's a violation of the F-word. You know, the F-word. It's got to be fair.

If I do not perceive the way I'm being treated as quote, unquote fair, whatever that means, regardless of whether or not I'm being treated legally correct, that is when the union has a competitive advantage and a potential value proposition to step in. I mean for example, in the Janitors situation in Houston, it's not that anybody was being treated unlawfully.

People were being paid the minimum wage or slightly above. The issue wasn't legality. The issue was one of quote, unquote fairness.

(Barbara Ann Salinger): And you raised another point with respect to if you can go in, have an outside company or an internal one, do a survey of (sorts). My recommendation on that, I think it's a great idea, but the facility or the company that's doing that – looking at doing it

has to be prepared to get the information, analyze it, discuss it with the employees, be responsive, and if necessary, take action. Because if they do, do an assessment or if they do, do a survey and do nothing in response, then it ends up being more negative than it could have been in the first place if they didn't do it at all.

Michael Lotito: If there's no commitment, you might as well not do it because you will raise the level of expectation and everything needs to be done pursuant to your basic value proposition. And if you have on the wall in the corporate office a vision and mission or core value that says people are important to you, then presumably the commitment is there.

I just want to move a little bit more to this vulnerability assessment from an industry standpoint. These are clearly some of the targeted industries. Again, not to say that somebody not on this list shouldn't be concerned; it is to say that if you are on this list, you should have a higher degree of concern. And there's one thing that many of these jobs have in common, and that is you can't move them. You know, we made reference to the fact that, you know, you can move your plant to Mexico or wherever, but, you know, if you want to construct a high-rise building in San Francisco, you can't put it up in Taiwan. Healthcare – if you want to be a hospital in Portland, Oregon, you're not going to be able to put it in Everett, Washington.

So, you can't move these type of jobs. So, there is clearly this level of focus, and the Change to Win is having a meeting in Las Vegas – I think it's March 20 or 21, and they're going to, out of that meeting, I think announce some more defined targeted companies that they are going to go after in these industries, perhaps others, and they're going to do it with a corporate campaign.

(Barbara Ann Salinger): Will they also identify, you know, what other industries they're looking at and what are the type of campaigns they're going to be looking at implementing?

Michael Lotito: Yes, I think that they will. But, again, when you look at jurisdiction of Change to Win, you know, that's going to be their focus. When you start looking at the AFL-CIO, if they're going to overcome this tremendous loss of 40 percent of their membership and if they're going to create the economic [[inaudible]] vehicle that they need (to the) payment of per capita taxes to engage in the type of political activity that they want to do. And if they want to reverse the decline that's taking place, I mean I feel awful for so many people that have been represented for years by the United Auto Workers Union that see their job security dissipating. The UAW's membership ranks continue to decline.

You know, when we see what's happening with those industries, you can see that if those unions don't do something dramatic to begin to expand their base, they are going to risk becoming really irrelevant within the particular workforce. And that's where the corporate campaign comes in. And I really commend our listeners to this book by Professor Manheim. It was published in 2001. You might also note that on the U.S. Chamber of Commerce Web sight, if you do some clicking, there's a booklet that you can download by Professor Manheim that was published in either late '05 or early '06, and it's about 30 pages, and it gives you a great primer as to what a corporate campaign is.

And I've used that book for executives within organizations to give them some sense of what a corporate campaign is. So, I think our listeners may find that that's valuable. And [[inaudible]] (professor) and, you know, it's – somebody doesn't particularly have an agenda,

but he's studied these corporate campaigns. He discusses what these tactics are and he gives case studies of the way these things have rolled out and what a corporate campaign is about.

It's defining the organization as a corporate outlaw. Because if you're going to organize wholesale, you've got to go after the whole enchilada. You just can't go after location to location. And a corporate campaign means this. Once you get targeted, the union wants to have your employees regardless of whether or not your employees want them. And that's a huge mind shift because I go to companies today and they say, "We don't have to worry about this because our employees don't want to have a union." Well, that may or may not be correct, but if there's a corporate campaign, it's not happening because the employees necessarily want to have the union. It's happening because the union wants the employees regardless of whether or not they want them.

(Barbara Ann Salinger): Isn't the union also in effect utilizing threats in this corporate campaign?

For example, going to the vendors, going to the customers and saying if – you know, [[inaudible]] go back. Going to the company and saying, "If you don't go through a neutrality agreement with me or a card check agreement with me with this union, then we're going to get you out of business and we're going to go after your customers, we're going to go after your vendors and try to get their support. Otherwise – and you're going to be out of business.

Michael Lotito: The corporate campaign has as its origins things that occurred back in the '60s that I can relate to – the old SDS movement, that radicalism, and it has been described as "death by a thousand cuts." Unions, as part of that \$750 million that they are investing into

organizing, are hiring researchers. And there are organizations that are dedicating to just researching your company.

You know, the old days of showing up outside the plant and handing out some fliers, it still happens, but that's not really what we're talking about here. This is a targeted approach depending upon who is going to be most vulnerable. And they will look at everything that they can about the organization. So this means that, for example, public companies may have a higher degree of vulnerability than private companies because there's so much more that you have which is – which is public.

But they take a look at the union-free employers, especially those within some of these targeted industries. If you're partially unionized, the philosophy is why aren't you totally unionized. They can try to expand their organizing as a result of contract negotiations. I mean that's happening out here in California now. There're two strikes going on, one which may settle this afternoon, where one of the things that's so critical – critical in the contract negotiations is to have the company agree to an alternate method of recognition. But they will look at your financial records. We have situations – we're dealing with a situation tomorrow where a company is trying to expand into a particular community and we're having difficulty at a public hearing which is all orchestrated by the SEIU with respect to getting the building permits.

You can see some of these other issues. Everybody on this call is familiar with some of the Title 7 litigation that is taking place, including the class actions against ...

(Barbara Ann Salinger): ... in those [[inaudible]] what happens is, for example, Teamsters go and represents a class who are not organized by the Teamsters. And they say, "Look what we can do for you when we don't even represent you. Look what we can do for you if we did."

Michael Lotito: Well, I've even had situations, I won't name the union and obviously not the company, where the company had a closure and the union brought a class action on the basis of an alleged violation of Warn and told us that if you want the Warn class action to go away, all you have to do is agree to neutrality in card check.

And maybe I should make sure that everybody understands what those concepts are.

(Barbara Ann Salinger): That was my next question, Michael. Thank you.

Michael Lotito: You know, when the statute was passed in 1935, there was a real issue as to what companies could say about a union. In 1947, Section 8(c) for Charlie was asserted into the statute that gave employers the very expansive right of speech, which a lot of employers were surprised about, but you can essentially do almost anything that you want to do, provided you don't threaten, interrogate, promise, and spy. So there's a very expansive right of free speech, so naturally an employers can talk to their employees about why they might want to – might not want to sign a card because of dues or fees or fines or whatever the issues are that you want to point out.

Neutrality basically takes the statute and it tends to make it irrelevant because the union doesn't want the employer to communicate. Neutrality is really not neutrality; it's really a

gag order. It gives the union the absolute right of free speech and it gives the employer no right of free speech.

(Barbara Ann Salinger): But what exactly is a neutrality agreement?

Michael Lotito: Well, it basically comes in different forms. It's a contract. And it might say that the employer is not permitted to talk about the topic of unions at all, or it might say that the employer can't say anything disparaging about unions, or it might say that it's in existence for three years, or it might say that it's only limited to your operations in California. It might say that you also have to provide a meeting space for the union to come in into your break room and to invite the employees to come in and listen to their pitch, or it may say that you the employer are not allowed to have captive audience meetings with your employees. So they come in different forms.

(Barbara Ann Salinger): Are a lot of companies agreeing to these neutrality agreements? And if one company in an industry does, will it then have a negative impact on other companies within the same industry in effect saying to the union, "If you use this kind of pressure tactic with me, I will roll over for you?"

Michael Lotito: Yes and yes. Again, the Janitors situation in Houston is an example of that. That's four or five companies that are agreed simultaneously to neutrality. So, once you get one, it's easier to get more. And is this happening more and more? It is. And in the Manheim book, he has a list of companies that have agreed to neutrality. We're even starting to get some cases – arbitration decisions – there was one recently interpreting neutrality agreements.

And what goes with neutrality is they do not – unions do not want to have a secret ballot election. They want to have a card check. It is very, very easy to get people to sign a union authorization card. It is enormously much more challenging effort for the union to get an employee to go into a secret ballot election and actually vote yes for the union. And ...

(Barbara Ann Salinger): You explained – you referenced a card check. For those who may not understand exactly what that is, can you just expand on that for a sec?

Michael Lotito: I mean fundamentally you get a majority of the people in some kind of a unit to sign a card. And you get a local person who's respected like an arbitrator to look at the cards against some kind of a list of employees, and if they have 51 percent, then there's recognition. Again, I'd go back to the Houston Janitorial situation. That's what occurred there. There was no election. There's about 4,600 individuals that were in the bargaining unit of those employers, and I think there was a member of the AAA that was selected who did the card examination. And once that was established, it was over.

The card check process is by statute what a number of provinces in Canada have, and it's a great appeal to the AFL-CIO because, as you can see, most of their membership gain is coming through card check as opposed to elections. Unions are winning 60 percent of their elections, but they would prefer not to have them at all.

(Barbara Ann Salinger): We have a question that just came in and I'd like to read it for you. "Many companies have subscribed to a UN compact globally, and one of the things it says is

something about neutrality towards unions. This is not the same as the neutrality agreement that we were talking about. What, if any, impact does this have?”

Michael Lotito: I – it’s an excellent question. And for international companies, I have found that they have agreed to various sorts of principles, such as the one that the questioner described. There’re European Union ones. And the definition of neutrality within those kinds of contacts is not – is not necessarily the same definition that I’m talking about here. But it raises the larger question from the standpoint of potential vulnerability and exposure. There are many companies that operate within the United States union-free that operate elsewhere heavily unionized. And one of the things that organized labor is doing is that they focus on the international operations and they try to put pressure to the international operations, whether it’s through those unions or otherwise, to put pressure on the United States operations to agree to a union.

And I’ve been involved in situations where I literally had to explain to the international people where the corporation was based what a union was in the United States and what it wasn’t. We’ve had to prepare white papers for companies to get people in Europe, for example, to understand the different social context and legal context that a union takes in the United States as opposed to internationally. And that goes a little bit to commitment, which I think we’ll talk about in a few minutes. So, it’s a good question.

(Barbara Ann Salinger): There also a couple of questions relating to tactics. Can you explain, first of all, what salting is, whether or not it’s part of the corporate campaign or any kind of campaign or tactics, it is still being used, and what impact that can have?

Michael Lotito: Well, first, the concept of salting is basically the union takes a paid representative and gets that individual to apply to a particular workplace. Part – and they get hired on, and that's – the United States Supreme Court has said that's legal. Sometimes they do this under cover; sometimes they do this very, very openly in order to try to create an unfair labor practice. Bottom line is that salting is utilized and it's utilized I think more and more and more because it goes to the research that I talked about earlier. There's no better way of finding out what the issues are among employees than being with them for 30 or 60 days.

So, that salting process is very important and it's something that companies I think should be concerned about and clearly companies do the hiring need to understand that. Obviously it's totally unlawful to refuse to hire someone solely based upon their union activity, and it's unlawful, even though the individual's a union official. But, you know, we've had situations where individuals are salts, they may expose themselves after 30 days, et cetera. Sometimes we've had situations where five or six union people with a union cap and a union windbreaker show up in response to an ad. Company says we don't hire your kind here. And bingo – bang, that starts the process.

(Barbara Ann Salinger): Now, another question – you raised up earlier with respect to preventative methods that you can take, again, the vulnerability tests and so forth. Question is should you have a non-solicitation, non-distribution rule in effect? And if you do, would that also prevent any third party not only from coming on the property but also from sending e-mail utilizing the computer in order to contact them?

Michael Lotito: Well, ...

(Barbara Ann Salinger): And to have some kind of policy dealing with that?

Michael Lotito: There's a bunch of questions there. Should a company have solicitation distribution rules? The answer is yes. I mean if I show up at a facility and I see a sign outside that says, "No soliciting," I know immediately that that company is not very much aware of labor relations principal because the labor board would hold that that rule is over-broad.

So, somebody ought to take a look at those rules and somebody ought to post them. The most important thing, though, is to have uniform enforcement of them. I dealt with a situation earlier this week where the SEIU called the organization and said, "We'd like to use your conference room to have a meeting among all of your employees. This Thursday afternoon sounds great." And naturally the company responded by inquiring whether or not the individual had lost her mind. We're now waiting for the unfair labor practice charge to be filed because the union had not lost its mind. Because the company is part of its community outreach, it let all kinds of community groups come in and use their conference room.

(Barbara Ann Salinger): Now, [[inaudible]] to dealing with the Internet and with e-mails. Will you be able to – if you had a rule and if you applied it evenly to all employees, would you have a problem with respect to it going through that?

Michael Lotito: We don't know. The labor board is dealing with this issue with respect to e-mailing. The labor board is at full strength for the first time in a long time. We're expecting a decision on that. My own personal view is the way it's going to come down is if you have a

uniformly enforced rule that individuals can only e-mail relevant to company business, and I can't, for example, send my spouse an e-mail that says, "Do you want me to stop and pick up the milk on the way home?" – if you don't permit any of that and it's solely and exclusively for company business, then I think you're going to be able to enforce it.

As a practical matter, I'm very, very skeptical. The board is struggling with this just like they're struggling on some other issues. Remember, you have a 1935 statute that wasn't designed to deal with these type of concerns. But I think in 2006, we're going to get an e-mail decision from them, and in 2006, we're going to get a decision in this (Dana Meadowline) situation where the board has an opportunity to talk about these neutrality agreements, these recognition agreements. For somebody who's interested, there's a site for (Dana Meadowline) which have now been combined. I just want to very briefly mention there's a great article about this in the "Labor Lawyer," put out by the ABA late in 2005. It's called "On the Road Again." And it's a discussion of these – of these cases.

So, for the practitioner here, you should be aware that there's federal legislation pending, the Employee Free Choice Act, has 42 Senators and 200, I think, 15 Representatives signed, which would basically eliminate secret ballot elections and have the card check process as part of federal legislation. The Secret Ballot Protection Act goes the other way. There's very few sponsors of that. You can read more about that on the Chamber Web site. Be aware of what the board is doing in e-mail decisions and be aware of what the board is doing in (Dana and Meadowline).

(Barbara Ann Salinger): What about the new Maryland legislation? Can you comment on that?

Michael Lotito: Well, I think what you're referring to is the legislation that was enacted in Maryland and which is pending in about 30 states. And it's really a tactic. I'm going through what we've got on Slide 18 that unions have. The legislation comes in different forms, but it basically says that if there's an employer and they have X number of employees in the state, say, 10,000 or 8,000, whatever the number is, that that employer has to devote a certain percentage of their payroll – eight percent, ten percent – whatever the number is to healthcare benefits.

Maryland is the first state to have done this. There're other states where all of this is pending. I think many, many labor and employment lawyers will tell you that this legislation is going to wind up being pre-empted by (Arissa), but it doesn't stop the legislation from being enacted, it doesn't prevent companies from having to spend hundreds of thousands of dollars in uncertain litigation in order to try to get the legislation reversed, and it certainly doesn't deal with the F-word, the fairness issue. And one of the reasons why organized labor has other legislation in different states, asking for there to be public presentations of companies that have employees that are using the state's Medicare system for the purposes of their healthcare is part of the targeting.

So, they are initiating this type of legislation at the state and local level, but they're not stopping there, at the federal level with the legislation that we talked about. A couple of others on here – joining with the community in the faith-based groups. The Janitors situation was initiated in Houston with a Mass by the then-Archbishop, he recently retired, that housed 15,000 individuals. We mentioned the online organizing. You should – if you're in one of those targeted industries, you should be going to the Change to Win Web

site, you should be going to the particular unions Web sites. You'll find all sorts of things on there. You may even find the name of your company.

(Barbara Ann Salinger): Aren't Web sites really much more sophisticated than they were ever before and that they're really an incredible sales tool that unions are now notifying potential members of so that they can really try and sell them with it?

Michael Lotito: Well, there's no doubt that this has a whole different level of sophistication. This is an issue that has come across from a media standpoint, and these people are extremely good at messaging. Some people may have seen Andy Stern. I mean he's very public about his positions. He's actually spoken to the Labor Employment Law Committee of the Chamber of Commerce. He's been on, you know, different CNN-type things. He's very, very open about what it is that he's doing.

And when you listen to him and you listen to his message, I've got to tell you, it's a very, very difficult message to disagree with. "We want justice. We think everybody should have healthcare. We think everybody should make a quote, unquote living wage. We think everybody should be treated respectfully." Who's going to stand up and say, "Boy, those are awful conditions as far as I'm concerned." This is very sophisticated stuff, and organizations are by and large unaware.

And I was with four CEOs the other day who are in a targeted industry in a particular location, and they had called some of their similar companies in other locations who have been through this, and there was one common thing that all of the companies said to these

four CEOs who were about to experience it, and that is, “We should have been more proactive.”

(Barbara Ann Salinger): Wow. Another question for you – some organizations are really trying to use their positive relationship with the union to expand their business. And the question is whether or not that’s – well, it’s not normal; it’s certainly unorthodox. These partnerships are proving valuable to some organizations or corporations especially when breaking into new market geographies. Can you tell us what you think in terms are the upsides and downsides of these types of relationships?

Michael Lotito: Well, first of all, a union is not, you know, this evil Communist conspiracy. You know, they’ve provided a value proposition in the past, and depending upon the nature of the organization, (it may) today. Part of the pitch, for example, in the janitorial situation was, “We’re going to provide training, we’re going to provide education, we’re going to, you know, give you a constant source of supply of individuals. We’re going to take the –” ...

(Barbara Ann Salinger): “We’ll help you get more business.”

Michael Lotito: ... exactly. “We’re going to take the wage and benefit issue off the table because basically everybody’s going to get paid the same. That’s not going to be the differentiator. You’re not going to be able to compete with respect to unit labor cost. You’re going to have to compete with respect to quality. We’re going to provide you with assistance.” If you look at the healthcare situation, they’re going to tell you that part of the deal is that we have all different kinds of training and we have a higher level of commitment to our patients as a

result of the ratios because if you listen to the healthcare campaign, it has nothing to do with employees. It's all about patient care.

So, might there be a situation where organized labor is saying, "We can help you. We can take these issues away." The answer is, "Yes." I mean I'm aware of a – to be careful here, but transportation company where the Teamsters notifying them and they're partially unionized, and a presentation was made as to how the union can help them expand their business as a result of their political contacts in different communities around the country to sort of smooth the way with respect to giving them heads-ups when certain contracts are going to be up for bid.

So, there're a lot of things that are going on that are not getting very much publicity, but I believe it's the role of in-house counsel not to go to senior leadership and say, "Unions are evil and we have to do everything that we can in order to remain union-free."

My own personal view is that there should be no organization that has a commitment to be union-free. The commitment should be to be issue-free, to treat employees respectfully and with justice, and a by-product is that you stay union-free. But it's not because you hate unions, but it's because of your core value that says we respect our people.

(Barbara Ann Salinger): Now, going to you respecting people and using the big F – fairness to employees, is it really, truly fair to the employees that the company would, quote, work and partner with the union to expand into other locations, and then if that's voluntarily recognized from there when in fact they had not voted or by a majority determine they wanted the union?

Michael Lotito: Well, that in essence is what (Dana and Meadowline) in part are about because what happened there is that they company did agree to a neutrality card check type of situation, and within I think it was two or three weeks after this was announced to the employees, there was a decertification petition that was filed. And the question for the board is whether or not the one-year traditional contract bar prevents the processing of the decertification petition. And the general counsel of the board – former general counsel of the board, has taken the position that the board should adopt a rule that if a decert under those circumstances is filed I believe his position is within 30 days of the recognition that that decert should be processed.

Obviously people on the other side say there should be a one-year contract bar. So (Dana and Meadowline) are a lot about that because remember, the issue is not – it is called the National Labor Relations Act for a particular reason. It's not called the National Union Act. It's not called the National Employer Act. It's called the National Labor Act. The issue isn't whether or not the company wants to be union-free. The issue isn't whether or not the union wants to be unionized. The issue is whether or not your employees want to select a union. And that, it seems to me, really is best decided through secret ballot election and free speech. But that's my own personal view.

(Barbara Ann Salinger): And I happen to totally agree with you on that one.

Michael Lotito: So, as we, you know, come down here towards the end, I think one of the things that we tried to do on some of these remaining slides for our listeners is to try to give them a

checklist of things that they should be thinking about. You know, what do I take away from this?

(Barbara Ann Salinger): ... to the vulnerability assessment, as well.

Michael Lotito: Yes, I think so. I mean I think, you know, we've talked about informing the (C suite) and the boards.

(Barbara Ann Salinger): And sensitizing management so that they recognize that their company is vulnerable.

Michael Lotito: Not only is the company vulnerable [[inaudible]] preparing them for personal attacks. And so what ...

(Barbara Ann Salinger): And also thinking about the need for some kind of a budget, some kind of group, be it labor relations, be it HR law, that would be setting up a team to be able to work out, keep on the radar screen that these issues are there and they need to be dealt with.

Michael Lotito: I mean if you're going to be proactive and if you know, for example, the SEIU coming after you, it seems to me that somebody in the organization ought to be taking a look at the SEIU's Web site at least once a week. I find that the traditional labor issue falls through an enormous crack within the organization. It's clearly not risk management. You know, the HR people will worry about whether or not somebody's entitled to leave under

the FMLA and what their strategic position is in order to be able to get and retain a qualified workforce.

The in-house counsel is trying to figure out how to minimize your exposure from wage and hour and (Title 7) claims. Well, where does the labor bucket fit? The point is it doesn't fit anywhere. Why? Because there hasn't been a drip from the ceiling and there hasn't been a need for a bucket. Now I think that there's a drip from the ceiling. But I also think that organizations need to prepare the senior leadership for personal attacks because in death by a thousand cuts, they're not just going to try to define the organization. They're also going to try to define your leadership, and that can be very, very, very disconcerting.

(Barbara Ann Salinger): And what in training also significantly help in order to make sure that people out in the work force – when I worked at a former company, we literally rolled out effective employee relations training for 11,000 employees. And one of our first meetings, we had 100 supervisors in the meeting and we said, “OK, during the last six months, how many of you had heard the word “union?” Fifty of them raised their hands. We said, “OK, how many of you have (raised) asset management – waived it to HR?” Not one.

Michael Lotito: Well, I think that because unions represent 7.8 percent of the workforce, the vast majority of people in the workforce today have no knowledge of unions. And while supervisors have been trained in principles of sexual harassment and equal opportunity employment, they have had no labor relations training whatsoever.

So, just trying to go back and just quickly go through these slides here and we'll capture some of these points. On the vulnerability assessment, we've given you some of what we call

the hard issues to look at. Keep in mind dispute resolution procedures, what are your alternate dispute resolution systems that you've got in place because the union's going to sell (groups and arbitration) procedure. The (EMU) is going to sell just cause in their contracts versus your at-will disclaimer if your partially unionized and everybody in the union has a just cause procedure and everybody else has got at-will, you've got a vulnerability. You've got to be thinking about the softer issues, including supervisory treatment. You know, one of my partners says that you can make 50 percent of all employment law go away or employment law litigation by having every single first-line supervisor in the country ask every one of their people at least once a month, what can I do for you?

People don't do those kinds of things, so those are issues. You know, we talked a little bit about the recommitting on an issue (3) statement. What is your philosophy statement? Can everybody articulate? You mentioned, Barbara, the training. Does everybody know what the company's position is on unions? If an employee went to their supervisor and said, "Hey, do you think our company would even care if we had a union here?" What would the supervisor say? And if the supervisor could not articulate the company's position that we work very hard in order to make the union completely irrelevant, I submit that there's a vulnerability.

(Barbara Ann Salinger): And if they're not aware of what the early signs are or what would make their employees happy or not or whether or not they're being fair, that's a major issue.

Michael Lotito: Those are all major issues, but I think in addition to looking internal to the organization, you also have to look external to the organization. What are you doing within your community? What ties do you have to religious and other political leaders and

community groups because they're the ones that the unions are going to go after from a tactical standpoint. What are those groups saying about you? How are your shareholders going to react? What are going to do when the union buys a share of your stock and shows up at your annual shareholder meeting or submits an initiative for shareholder consideration that deals with some issue such as we believe it's only right and just that the company be neutral in a campaign. How do you deal with those type of things?

So, messaging is important. And I ...

(Barbara Ann Salinger): And when you say "consistent messaging" would be ...

Michael Lotito: Everybody's got to be able to say the same thing at the same time and be on the same page and to figure out who's going to communicate that and when you're going to communicate it, how aggressive do you want to be? But it's got to be consistent with those missions and those values propositions and it's got to be to all of your stakeholders and it's a very, very positive message. It is not a negative message. But you're trying to not defeat a corporate campaign. Don't go there. You're trying to preempt it a best you can. If you want to play the game or if your organization wants to play the game union survival yes or not, I've got to tell you. This is one expensive board game. One organization told me the other day, I don't know if it's true, that another organization that's been one of these things for 13 years, the first year alone they spent \$45 million in a variety of different outside support mechanisms, et cetera, in order to combat it, let alone the impact that it had on their particular reputation.

You do not want to play the board game union survival yes or no? You want to preempt it.

And these are some of the ideas which that you can utilize to pre-empt it and hopefully some of these remaining slides have created at least a template that individuals can use to begin to assess their own organization and to see what if any steps they may want to make in order to try to preempt.

(Barbara Ann Salinger): Thank you so much, Michael.

Michael Lotito: Thank you, Barbara.

(Barbara Ann Salinger): James, any other ...

James Baine: Barbara and Michael, thank you. Each ACCA member listening today is asked to complete the satisfaction survey on the screen before leaving the program. Thank you so much.

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