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CHAPTER 31

UNION ORGANIZING

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UNION ORGANIZING

§ 31.1

I. RECENT TRENDS & DEVELOPMENTS

§ 31.1.1

A. INTRODUCTION

Organized labor has experienced a steady decline for decades. Despite scattered recent election successes, the number of actual union members in the private, nonagricultural sector of the workforce has dropped dramatically over time. Unions now represent well under 10% of all private sector employees. Many unions are increasingly reliant on the public sector, where between 30% and 40% of government workers are unionized.

The reasons for the decline in private sector membership are as various as they are debated. Unions have been adversely impacted by a decline in traditionally organized industries such as manufacturing and steel production; changes in industries such as transportation, utilities and communication; off-shoring of work historically done in the United States by organized workers; and improved management policies and practices, which diminish the need for third-party representation in employment.

§ 31.1.2

B. THE EMPLOYEE FREE CHOICE ACT

The decline in union membership is no secret, least of all to union leadership. Organized labor has, therefore, sought the assistance of Congress. In 2009, organized labor is looking to the political system — and specifically, the Democratic party — for a lifeline. The centerpiece of organized labor’s political agenda is the so-called “Employee Free Choice Act” (EFCA). The election of Barack Obama, one of the bill’s sponsors, and the solidification of a Democrat-controlled Congress virtually guarantees passage of the EFCA in some form.

The EFCA was first introduced during 2003, and then reintroduced in 2005.¹ Both times, it was rejected by a Republican-controlled Congress. In 2007, Senator Edward Kennedy (D-Mass.) and Representative George Miller (D-Cal.) once again introduced the legislation,

¹ H.R. 1696, 109th Cong. (2005).

but this time with a Democratic majority in Congress.² While the result was the same, the legislation drew more support than ever before. It now appears that the 2008 elections gave Democrats enough votes in Congress to put pro-union legislation over the top.

The exact form the EFCA will take is not yet known. As currently written, however, it is a revolutionary piece of legislation.³ Indeed, it would be the most sweeping legislation in this country since the original Wagner Act of 1935. The current proposed legislation contains three main provisions that, if signed into law, would significantly alter the landscape of labor relations in the United States.

First, the EFCA would amend the age-old requirement that, absent an agreement with the employer or a bargaining order from the National Labor Relations Board (NLRB), a union may be certified only through a valid, secret-ballot election. The EFCA would permit unions to attain certification by presenting the NLRB with signed authorization cards. A simple majority (50% + 1) of the employees signing authorization cards would certify the union as the employees' exclusive bargaining representative.

Eliminating the requirement of secret balloting is the most controversial of the EFCA's provisions. Organized labor believes that the EFCA will increase union representation on a nationwide basis, while others believe that permitting card-check certification undermines one of the long-standing tenets of labor relations law. Specifically, under current law, employees have a right to choose (or reject) union representation, free from threats, coercion, and misrepresentations. If the EFCA is passed, however, employees will often hear only the union's unregulated message before deciding whether to sign an authorization card. And unlike NLRB-controlled secret ballot elections, the decision whether to sign a union card will be made in a public — and often coercive and pressure-filled — environment.

Furthermore, it appears that a union could become the exclusive bargaining representative with only a little more than half of the employees even *knowing* of the union's interest. For example, consider a group of 15 employees. If a union contacted eight of them, and convinced those eight to sign authorization cards, the union would be certified as the exclusive bargaining representative of all 15 employees. Seven of the employees might not even be aware that an organizing campaign ever existed, but would suddenly be represented by the union.

The card-check provision has led to significant public opposition from various interest groups, including the U.S. Chamber of Commerce. However, the second provision, relating to mandatory interest arbitration,⁴ is perhaps even more troubling.

Under current law, after a union is certified as the exclusive bargaining representative of the employees, both parties are required to bargain in good faith, with the eventual goal being the execution of a collective bargaining agreement. Both parties may "hold out" as long as they

² H.R. 800, S. 1041, 110th Cong. (2007).

³ The following discussion assumes the EFCA will be introduced in the form proposed by Senator Kennedy and Representative Miller at H.R. 800, S. 1041, 110th Cong. (2007). The 111th Congress began in January 2009, and at the time of this writing, the proposed legislation remained unaltered.

⁴ *Interest arbitration* is when a neutral arbitrator or arbitration board determines what provisions the parties are to have in their collective bargaining agreement.

wish, insisting to the point of impasse upon the inclusion of certain terms⁵ in the contract. If an impasse is reached, both parties have economic weapons at their disposal (*e.g.*, the union may call a strike or the employer may lock out employees or implement its last offer). And, so long as bargaining proceeds in good faith, the law does not require the parties to ever reach agreement.

Under the EFCA, however, parties have only 90 days to reach a mutually acceptable agreement. At that point, if no agreement is reached, the parties would be required to engage in government-sponsored mediation for 30 days. If mediation proves unsuccessful after 30 days, the parties would be forced to undergo binding interest arbitration. Such interest arbitration would be conducted by a governmental arbitration board charged with the responsibility of setting final terms of a contract. The arbitration board's decision would be binding for a period of two years, unless the parties agree otherwise in writing.

The fact that the EFCA authorizes an arbitration board to determine the terms of a collective bargaining agreement is unsettling enough for most employers. What the EFCA is silent on, however, should leave employers even more uneasy. The EFCA provides no guidance on the processes or criteria to be used by the arbitration board in determining the provisions of an agreement. For example, would the arbitration board select one party's entire contract offer or would it pick and choose among different proposed contract provisions? Or would the arbitration board simply draft its own preferred contract provision? And on what basis would any such decisions be made? Would economic provisions reflect market labor rates, equity, or the company's financial situation? Or would political considerations enter into the arbitration board's determinations?

Such uncertainty seems just as unfair to employees as it is to employers. Instead of ratifying or rejecting a contract proposal by secret ballot, employees would be forced to accept whatever the arbitration board issues. The traditional model presented employees (through their bargaining representative) with a chance to offer concessions in return for important, but perhaps nonobvious, contract provisions. An arbitration board would seem ill-equipped to address the various concerns of today's diverse workforce.

Finally, the EFCA significantly increases the financial and injunctive relief available against employers for violations of the National Labor Relations Act (NLRA) during an organization campaign, and requires the NLRB to prioritize the investigation of allegations of unfair labor practices.

Current NLRB remedies include injunctive relief (up to and including a *Gissel* bargaining order, discussed below at § 31.2.4(b)) and financial penalties including back pay. The EFCA would require employers to pay *treble* back pay, as well as a civil penalty of \$20,000 for unfair labor practices committed during an organizing campaign. There are no corresponding penalty increases for unions that commit similar unfair labor practices.

There remains a chance that the EFCA will be substantially amended before it ultimately makes it through the Congress. As a result, it is impossible to predict with certainty how to prepare for it. However, given the dramatic impact this legislation could have, employers are advised to review company policies and procedures, in accordance with the recommendations provided in this Chapter. For more information, including a more detailed analysis of the

⁵ Parties may bargain to impasse of "mandatory subjects of bargaining," which historically include all terms concerning wages, hours and working conditions. *See generally NLRB v. Borg-Warner Corp.*, 356 U.S. 342 (1958).

EFCA and suggestions as to how employers can respond to the pending legislation, see The Littler Report: *The Employee Free Choice Act: A Critical Analysis*.⁶

While the EFCA will and should dominate discussion of changes in American labor law in 2009, employers should be aware of other developments as well.

§ 31.1.3

C. THE RESPECT ACT & OTHER EXPECTED CHANGES WITH THE NEW OBAMA ADMINISTRATION

In recent years, the Bush-appointed National Labor Relations Board (NLRB or “Board”) has issued several decisions restoring prior Board precedent, and in some cases, crafting new rules. Not surprisingly, organized labor was particularly critical of the Board’s decisions in these key cases. The important decisions discussed below are all at risk of being overturned in the upcoming years by an Obama-appointed Board or by Congress.

In late 2006, the Board provided new guidelines for determining whether a worker is to be classified as a supervisor under the NLRA. The lead case (out of three issued the same day) was *Oakwood Healthcare, Inc.*⁷

The Board’s decision followed many years of criticism by the federal courts, which had urged the Board to clarify the differences between a “supervisor” and an “employee.” Indeed, even the U.S. Supreme Court had scolded the Board for allowing charge nurses, who directed other members of the health care team, to be part of a union.⁸ In its *Oakwood* decision, the NLRB sought to provide a clear and usable standard for differentiating between true supervisors and those who merely have “lead” responsibilities. Most employer representatives welcomed the decision as providing additional guidelines, while not dramatically changing the way that supervisors had traditionally been defined.

On the organized labor side, the reaction to *Oakwood* was immediate and furious. Union leaders made claims that the *Oakwood* decision had “disenfranchised” millions of American workers. Leaders of nurses’ unions throughout the country vowed to strike rather than capitulate if hospitals sought to exclude charge nurses from bargaining units. Now, over a year after the *Oakwood* decision was issued, it appears that few, if any, employers are seeking to move individuals out of bargaining units.

That has not stopped organized labor from seeking to reverse the effect of *Oakwood*. In March 2007, Democrats in Congress introduced the Re-empowerment of Skilled and Professional Employees and Construction Trades Workers (RESPECT) Act.⁹ This proposed legislation would amend the NLRA, and change the definition of “supervisor” that has

⁶ Available at <http://www.littler.com/PressPublications/Lists/Littler%20Reports/DispReport.aspx?id=26>.

⁷ 348 N.L.R.B. No. 37 (2006) (holding that a hospital’s charge nurses had supervisory authority to assign employees under the NLRA and, therefore, were supervisors. This meant that the charge nurses were not represented by a union. In making this decision, the Board defined the word *assigned* to mean designating an employee to a certain place or time (*e.g.*, a particular location or shift) or “giving significant overall duties, *i.e.*, tasks, to an employee”).

⁸ *NLRB v. Kentucky River Cmty. Care*, 532 U.S. 706 (2001).

⁹ For the latest status of the bill, see <http://www.thomas.loc.gov> (enter search term “H.R. 1644” or “S. 969”).

existed for many decades. The bill would take out the terms “assign” and “responsibly to direct” from the NLRA duties associated with a supervisor. The legislation would also dictate that an employee cannot be classified as a “supervisor” unless the employee engages in managerial duties “for a majority of the individual’s work time.” In sum, the legislation would result in a radical rewriting of the NLRA, and would serve to sweep many individuals who have traditionally been viewed as supervisors into unionized bargaining units.

Organized labor has declared that passage of this legislation is a top priority in the new Obama administration, second only to the EFCA. At the time of this writing, the RESPECT Act is still pending.

In a second major decision that changed traditional labor law, the Board addressed the question of whether “card check” procedures should be binding on employees. Again, organized labor was not happy with the result. In *Dana/Metaldyne*,¹⁰ the employer had recognized a union consistent with the terms of a neutrality agreement it had previously executed with that union. The employer did not oppose the union’s efforts to organize its employees and then recognize the union based on verification that the union had obtained authorization cards from a majority of the employees. Employees then sought to obtain an election to vote the union out.

Faced with those facts, the Board was required to decide whether the employer’s recognition of the union should prevent employees from being allowed to vote. In a three-two decision, the Board held that “no election bar will be imposed after a card-based recognition unless (1) employees in the bargaining unit receive notice of the recognition and of their right, within 45 days of the notice, to file a decertification petition or to support the filing of a petition by a rival union; and (2) 45 days pass from the date of notice without the filing of a valid petition.” The Board went on to state: “[i]f a valid petition supported by 30 percent or more of the unit employees is filed within 45 days of the notice, the petition will be processed.” The new rules established in *Dana/Metaldyne* apply “regardless of whether a card-check and/or neutrality agreement preceded the union’s recognition.”

In this decision, the Board departed from any prior precedent, and carved out a new decertification procedure specifically designed to deal with union recognition following card checks. In one sense, the Board’s decision was consistent with a long-standing principle underlying traditional labor law — namely, that secret ballot elections are always preferable to other methods of determining employee preferences. The decision also addressed the reality that unions have increasingly resorted to card checks as a way of bypassing NLRB procedures altogether. Under the procedures announced in *Dana/Metaldyne*, employees will still have the option of going to the NLRB, and obtaining a secret ballot election, if at least 30% of the bargaining unit wished to have a vote.

Depending on the outcome of the EFCA debate, *Dana/Metaldyne* may not have much longer to live. As currently written, the EFCA would render it moot; card check victories will act to certify a union as if an election had been held.

In a third key decision that established new law, the Board dealt with the tricky issue of electronic communications within the workplace. In *Guard Publishing*,¹¹ a divided Board (in another 3-2 vote) held that a newspaper publisher had a right under the NLRA to regulate and restrict use by employees of the publisher’s e-mail system. In that case, the union had argued

¹⁰ 351 N.L.R.B. No. 28 (2007).

¹¹ 351 N.L.R.B. No. 70 (2007).

that employees should have the right to disseminate communications in favor of a union. The publisher argued that, since it provided and owned the e-mail system, it had a right to regulate the content posted by employees.

In its decision, the Board analogized company e-mail systems to bulletin boards and telephones, both of which are also provided by employers. For decades, the Board has held that employers have a legitimate property right to regulate use of bulletin boards and telephones, so long as the employer does so in a nondiscriminatory fashion. The *Guard Publishing* decision extended this same rule to e-mail systems.

The Board went one step further in the *Guard Publishing* decision, and adopted a new standard for analyzing communications regulated by an employer. Specifically, the Board found that an employer does not violate the law so long as it treats similar communications in a similar fashion. Thus, an employer may choose what categories of communication are allowed or prohibited, so long as the distinction is not based on purposeful discrimination against communications protected by section 7 of the NLRA.

From a practical standpoint, *Guard Publishing* seems to suggest that an employer could allow employees to use the e-mail system to support charitable causes (*e.g.*, the church bake sale), school activities (*e.g.*, the local high school play) or youth programs (*e.g.*, Girl Scout cookie sales), while still prohibiting employees from communicating about unions. In other words, employers may now have greater latitude to allow communications and solicitations that are common in every workplace, without worrying that they have opened the door to union-related solicitations. As a cautionary note, the *Guard Publishing* decision was confined to the specific topic of e-mail communications, and it may be premature to rely upon it for broader principles. And, as with all Board decisions, the election of President Obama will almost certainly bring a new Board majority and a possible reversal of Board precedent on this question.

§ 31.2

II. OVERVIEW OF UNION ORGANIZING

In order to understand the nature of union organizing efforts, and the significant role of politics in the process, it is important to review briefly the historical background that led to the rise and subsequent decline of union organizing in the United States. The techniques employed by aggressive union organizers today, while adapted to the realities of the modern workplace and supplemented by an array of sophisticated new tools, borrow heavily from some of the labor movement's earliest successes in the 1920s and 1930s.

§ 31.2.1

A. UNION DEVELOPMENT – A SHORT HISTORY

The development of unions in the United States began in the late 1800s and early 1900s. Workers in the railroad industry, coal mining industry, and various working crafts were the primary organizers of unions. In the formative years, the relationship between employers and their unions was virtually unregulated by the government and could safely be characterized as a battle of economic muscle frequently accompanied by physical violence.

§ 31.2.1(a)

The National Labor Relations Act & the National Labor Relations Board

In 1935, Congress decided that the ever-increasing number of strikes and other forms of labor unrest which often led to violence — as well as employer responses to such tactics — interfered with the efficient operation of the economy. Congress responded by enacting the National Labor Relations Act (NLRA), which was designed to establish a comprehensive statutory scheme to regulate employer, union, and employee conduct. As part of this new statutory scheme, Congress established the National Labor Relations Board (NLRB or “Board”). Congress delegated to the Board the authority and responsibility of ensuring that the policies of the new Act, as well as its own rules and decisions, would be adhered to by employers and unions alike.

The NLRB’s responsibilities can be broken down into two primary areas: (1) conducting union elections; and (2) enforcing the Act’s prohibitions against “unfair” conduct by employers and unions (known as *unfair labor practices*). The NLRB fulfills this function by investigating allegations of unfair labor practices and by holding hearings to determine whether a violation has occurred. After a hearing, the NLRB can order an employer or a union to “cease and desist” from continuing to commit an unfair labor practice and it can order other remedies to effectuate the Act’s purposes such as ordering an employer to reinstate and provide back-pay to any employee who is a victim of unlawful employer discrimination.

By the late 1940s, the NLRB was conducting more than 20,000 elections each year (compared to 2,849 elections in 2000). By the mid-1950s, at the height of the labor movement, roughly 35% of the American workforce was unionized, and it was not unusual for unions to win 75% of the elections that were held in any particular year.

§ 31.2.1(b)

The Rise (& Fall) of the AFL-CIO

The American Federation of Labor (AFL) originally started in the late 1800s as a conglomeration of a number of craft unions, and quickly grew to become the largest labor union in the United States. With the passage of the NLRA, however, a deep split developed within the labor movement. When the AFL was first created, it focused on unionizing skilled craftsmen, largely ignoring organizing efforts directed at less skilled industrial workers. With the advent of the NLRA, however, many within the AFL believed that the AFL should expand its horizons to include organizing efforts directed at unskilled workers.

By 1936, a splinter group of the AFL, consisting primarily of the United Mine Workers, the Amalgamated Clothing Workers, and the Ladies Garment Workers, split from the AFL and formed the Congress of Industrial Organizations (CIO) for the purpose of organizing industrial workers. Over the next decade or so, the AFL and CIO attacked each other viciously and competed in their organizing efforts. A large number of independent unions became affiliated with one of these two organizations. Other unions, such as the Teamsters, remained unaffiliated and focused their organizing efforts on particular groups of workers, such as truck drivers.

During the 1950s, there was increased pressure within both the AFL and the CIO to unite. With changes in leadership of both organizations, the prospects for unification improved. A

special subcommittee was appointed in 1952 to eliminate raiding of membership between the member unions of the two organizations. In 1953, a no-raiding pact was approved by 65 AFL affiliates and 29 CIO affiliates, representing a total of ten million workers. Under its terms, the signatory unions agreed not to try to displace another union or raid its membership in any plant where an “established bargaining relationship” existed. This no-raiding agreement led swiftly to plans for unification. To this end, a draft constitution was prepared in 1954 and was ratified by a special joint convention in 1955. The new organization became known (and is still known) as the AFL-CIO.

Over the past three years, several of the unions within the AFL-CIO — including the International Brotherhood of Teamsters, the Service Employees International Union (SEIU), the United Food and Commercial Workers Union (UFCW), UNITE HERE, and the United Farm Workers — disaffiliated from the AFL-CIO and formed the “Change to Win Coalition.” The split was a major blow to the AFL-CIO as its membership was reduced to approximately six million members. The Change to Win Coalition currently consists of approximately nine million members. The split within the AFL-CIO was caused by basic philosophical differences within the American labor movement. The Change to Win Coalition grew frustrated with the AFL-CIO’s focus on national politics, and demanded that more resources be expended on organizing.

§ 31.2.1(c)

The Decline of Modern Unions

The labor movement remained strong for many years. However, union membership began to decline steadily in the 1970s. That decline continued through 2004, as private sector representation hit a new low. While the decline can be attributed to numerous factors, the most significant reasons are listed below.

§ 31.2.1(c)(i)

Employer Sensitivity

One of the biggest factors that has led to the modern decline in successful union organizing is the ever-increasing sensitivity of employers to the needs of their employees. Employers now actively take steps to provide competitive wages and benefits. 401(k) retirement plans are now easily implemented, and have proven to be popular alternatives to traditional pension plans. Employers are providing better working conditions and are becoming more sensitive to the special needs of today’s employees, providing benefits such as subsidized child care and flexible work schedules. Employers also are placing an increased emphasis on the creation and consistent enforcement of fair policies and procedures. By granting employees such benefits without the intervention of a union, employers have taken an important weapon out of the labor movement’s arsenal and made themselves less vulnerable to organizing.

§ 31.2.1(c)(ii)

Employer Training

In addition to providing competitive wages, benefits, and fair policies, employers are now providing more training for their front-line supervisors and managers. Employer-sponsored training has become widespread. An entire industry of training providers has developed in response to these training needs. Training efforts have focused on good management practices and strategies such as effective communication to decrease disputes in the workplace. Fewer disputes, better communications, and good management make employers less attractive targets for union organizing.

§ 31.2.1(c)(iii)***Increased Protection from State & Federal Laws***

Many of the protections and benefits that unions had to fight hard to obtain in the 1930s, 1940s, 1950s, and into the 1960s are now mandated by various federal and state laws. Child labor laws, workers' compensation laws, benefit protections, notice requirements before layoffs/reductions in force, and occupational safety and health regulations are just a few of the examples of government regulation of the workplace. There also is a host of federal and state laws that protect workers against discrimination based on their age, race, sex, national origin, disability status, veteran status, sexual orientation, marital status, and personal appearance. These statutory protections have forced employers to monitor their employment practices carefully, and to decrease instances of unfair or arbitrary actions as a result. Moreover, unions have lost the ability to sell themselves as providers of such protections in the workplace. Thus, one of the labor movement's biggest selling points in the past has been lost due to government intervention and regulation.

§ 31.2.1(c)(iv)***Employment-At-Will/Alternative Dispute Resolution***

Another traditional perk of union membership has been a binding grievance and arbitration procedure for resolving all types of employment disputes. In organizing new employees, unions have always emphasized that there are no restrictions on an employer's ability to terminate or mistreat workers and that, absent a union, the employment relationship is "at will." Part of the labor movement's typical campaign strategy has been to try to convince the employees that, in the absence of binding arbitration, employers will take advantage of their power to mistreat workers.

Employers responded to this tactic by developing employee handbooks and other policies and procedures, such as progressive discipline procedures, that provide assurances of fair treatment. Such assurances, coupled with promises of continued employment, were intended by employers to make unions unnecessary and thus to dampen enthusiasm for organizing. Promises of continued employment and policies ensuring fair and progressive discipline, however, can backfire on employers. The 1980s saw a rash of "wrongful discharge" lawsuits, where nonunion employees argued that their employers had made contractual commitments through their policies and procedures, thereby limiting the employer's right to terminate the employees.

Employers responded by including disclaimer language in their handbooks advising employees that the handbook might not be followed in all cases, and that employees could be terminated at any time and for any reason. This change in policy language became a renewed target for union organizers, and the labor movement's claim to provide "job security" became a renewed campaign theme.

The most recent development in this continuing battle has been a trend by employers to implement alternative dispute resolution (ADR) procedures. ADR policies provide a multistep internal grievance procedure that an employee can use to resolve workplace disputes. If the grievance process fails, most ADR policies provide for mediation or binding arbitration as a method to finally settle the dispute. Most employers who implement ADR programs do so to decrease the litigation costs associated with all types of employment disputes, particularly discrimination claims. As employers move more towards ADR, it may eliminate yet another way that unions market themselves to workers. However, ADR policies, too, have increasingly come under attack in the courts. Organized labor has joined in

criticizing internal company arbitration plans as a weak substitute for traditional labor arbitrations under union contracts.

§ 31.2.1(d)

The Labor Movement's Emphasis on Organizing

In 1997, in an effort to reverse a decades-long decline in union membership, the President of the AFL-CIO, John J. Sweeney, announced the organization's plan to focus more resources on organizing. Among his tactics, Mr. Sweeney pledged to devote 30% of the AFL-CIO's budget (about \$30 million at that time) to organizing efforts. Apparently, that commitment was not enough to satisfy the Change to Win Coalition. The Change to Win Coalition has committed to devote 75% of its per capita taxes to organizing, which the Coalition estimates will result in the Coalition and its member unions spending nearly \$750 million annually on organizing, including spending at the local state and national levels. In response, the AFL-CIO approved the creation of a \$22.5 million strategic organizing fund. But with the departure of more than five million members, it is unclear how much the AFL-CIO can afford to increase organizing expenditures. Consistent with this trend, many unions have increased their capacity to organize workers by spending more of their resources on organizing and on training and hiring professional organizers. It remains to be seen whether these aggressive organizing efforts can reverse the recent stagnation in union membership. For example, SEIU, the most successful union at organizing in 2006, currently spends almost 50% of its budget on organizing. SEIU organizing expenditures have more than tripled since 1995. In 2002, the Teamsters Union increased its membership dues by about \$8 per member per month in order to quadruple the number of organizers in the international union and provide funds to Teamsters locals to support their organizing drives. The International Association of Machinists, in an effort to reverse a sharp decline in membership, made a \$30 million transfer from its \$150 million strike fund into a new organizing fund in 2004.

In January 2007, the Labor Department's Bureau of Labor Statistics (BLS) reported that total union membership in 2006 decreased to 15.4 million union members, down approximately 326,000 members from the prior year. The percentage of employees represented by a union in 2006 decreased slightly from the 2005 level of 12.02% to 12.0%. Workers in the public sector had a union membership rate over four times that of private-sector employees, 36.5% compared with 7.8%. The unionization rate for government workers has held steady since 1983. The rate for private industry workers has fallen by nearly half over the same time period.

All states in the Middle-Atlantic and Pacific divisions had union membership rates above the national average of 12.5%, while all states in the East-South-Central and West-South-Central divisions had rates below it. Five states had union membership rates over 20%: New York (26.1%), Hawaii (25.8%), Alaska (22.8%), Michigan (20.5%), and New Jersey (20.5%). All of those states, with the exception of New Jersey, have had rates above 20% every year since data became regularly available in 1995. North Carolina and South Carolina continued to report the lowest union membership rates, 2.9% and 2.3%, respectively. These two states have had the lowest union membership rates each year since the state series became available. The largest numbers of union members lived in California (2.4 million) and New York (2.1 million). Over half (7.9 million) of the 15.7 million union members in the United States lived in six states: California, Illinois, Michigan, New Jersey, New York, and Ohio.

§ 31.2.2

B. UNION ORGANIZING

§ 31.2.2(a)

The Petition

To understand union organizing, it is important to know the basics of elections and proceedings before the NLRB. When a union feels it is ready for a representation election, it files an election petition with the NLRB. By filing a petition, a union initiates what is called a “representation case.” The petition must be supported by a sufficient “showing of interest.” This means that the petition must be supported by a “substantial number” of the employees in question. The NLRB has adopted an administrative rule that requires a showing of support from at least 30% of the employees in the petitioned for bargaining union to satisfy the showing-of-interest requirement. Strategically, most unions will not file an election petition, however, unless there is support from a significant majority of the employees in question.

Support for a union may be demonstrated by an actual written petition or by authorization cards signed by the employees. An authorization card is a card employees can sign to indicate that they want a union to represent them in collective bargaining with an employer. Most unions, for their own internal purposes, require employees to sign cards rather than a petition.

The normal date for computing the showing of interest is the date the petition is filed, or the end date of the payroll period immediately preceding the filing of the petition. Customarily, the union’s petition is filed simultaneously with its evidence (signed authorization cards or petition) to support the showing of interest. The NLRB attempts to verify the sufficiency of the showing of interest, but it does not permit the employer to “litigate” this issue at a hearing before the election.

§ 31.2.2(b)

The Hearing

The current Board insists on scheduling hearings after petitions are filed within ten to 14 days. Because petitions are now being sent to employers via facsimile, hearings are generally scheduled within seven to 14 days after the petition is filed.

The purpose of a hearing before an election is to determine:

- whether the Board has jurisdiction over the employer;
- whether the petitioning union is a labor organization as defined under the NLRA;
- whether there is a current union contract covering the employees, or whether there is any other reason that an election should not be conducted;
- whether there are any reasons that the election day should be delayed (for example, the employer’s workforce may have seasonal fluctuations);
- which individuals should be excluded from the voting group as supervisors, managers, confidential employees, or otherwise exempt employees; and
- whether the voting group requested by the union is “appropriate.”

The hearing is supposed to be informal and nonadversarial. In practice, however, these hearings can be extremely hostile, and tend to be somewhat formal. Testimony is taken under oath, with a court reporter present. Although the rules of evidence are somewhat relaxed, the parties are permitted to examine and cross-examine witnesses, and to subpoena witnesses, records and other documentary evidence.

§ 31.2.2(b)(i)

Which Employees Are Eligible to Vote?

“Employees” vs. “Supervisors”

One issue that is frequently “litigated” at preelection hearings is whether certain persons are “supervisors.” The NLRA excludes supervisors from the definition of the term *employee*, and they are not permitted to vote in representation elections. Section 2(11) of the Act defines the term *supervisor* as:

any individual having authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

This statutory definition requires the resolution of three questions in order to determine whether an employee is a supervisor within the meaning of the Act: (1) whether the employee has the authority to engage in one of the 12 activities listed in the definition; (2) whether the exercise of that authority requires “the use of independent judgment;” and (3) whether the employee holds that authority “in the interest of the employer.”

In May 1994, the U.S. Supreme Court issued an important decision concerning the NLRB’s interpretation of the phrase “in the interest of the employer.” In *NLRB v. Healthcare & Retirement Corp. of America*,¹² the Supreme Court rejected the NLRB’s test for determining the supervisory status of nurses. The NLRB’s test focused on whether a nurse’s supervisory activity was incidental to the treatment of patients. According to the NLRB’s test, where a nurse exercises independent judgment (even as to subordinate employees) related to patient care, the NLRB would find that such independent judgment was not authority exercised “in the interest of the employer.” The Supreme Court, however, soundly rejected this “patient care” analysis.

A year and a half later, the NLRB issued a decision applying the Supreme Court’s decision in *Healthcare & Retirement Corp.* In *Providence Hospital*,¹³ the NLRB decided to apply a uniform standard for determining supervisory status. The NLRB determined that the test for supervisory status should focus on whether the supervisor’s direction of other employees mandates the use of independent judgment, or whether it is merely routine. While some circuits approved of this test, others disapproved and criticized the Board’s response to *Healthcare & Retirement Corporation*.¹⁴

¹² 511 U.S. 571 (1994).

¹³ 320 N.L.R.B. 717 (1996).

¹⁴ See, e.g., *Beverly Enters., Virginia, Inc. v. NLRB.*, 165 F.3d 290 (4th Cir. 1999).

In 2001, in *NLRB v. Kentucky River Community Care, Inc.*,¹⁵ the Supreme Court resolved the circuit split by once again rejecting the Board's narrow view of supervisory status. The Court held that the Board's exclusion of routine professional and technical judgment from the "independent judgment" factor was in clear contradiction to the express language of the Act. The Court found no textual justification for the Board's application of the professional and technical judgment exclusion to the direction of less-skilled employees.

The Kentucky River Cases

Finally, in 2006 the current Board set forth guidelines consistent with the Supreme Court's *Kentucky River* decision for determining supervisory status under the NLRA. As a result of the Supreme Court's criticism, the Board reexamined and clarified its interpretations of the term "independent judgment" as well as the terms "assign" and "responsibly to direct." In *Oakwood Healthcare, Inc.*,¹⁶ the Board held by a 3-2 vote that the permanent charge nurses employed by Oakwood Heritage Hospital exercised supervisory authority in assigning employees within the meaning of section 2(11) of the Act. The majority consisted of Chairman Battista and Members Schaumber and Kirsanow. Members Liebman and Walsh dissented.

The Board defined *assign* as the act of "designating an employee to a place (such as a location, department, or wing), appointing an individual to a time (such as a shift or overtime period), or giving significant overall duties, (i.e. tasks, to an employee)." Further, to *assign* for purposes of the Act, "refers to the . . . designation of significant overall duties to an employee, not to the . . . ad hoc instruction that the employee perform a discrete task."¹⁷

Next, the Board defined the statutory term *responsibly to direct* as follows: "If a person on the shop floor has men under him, and if that person decides what job shall be undertaken next or who shall do it, that person is a supervisor, provided that the direction is both 'responsible' . . . and carried out with independent judgment." The Board held that the element of "responsible" direction involved a finding of accountability, so that it must be shown that the "employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary" and that "there is a prospect of adverse consequences for the putative supervisor" arising from his/her direction of other employees."¹⁸

Finally, consistent with the Supreme Court's decision in *Kentucky River*, the Board adopted an interpretation of the term *independent judgment* that applies irrespective of the section 2(11) supervisory function implicated, and without regard to whether the judgment is exercised using professional or technical expertise. The Board defined the statutory term *independent judgment* in relation to two concepts. First, to be independent, the judgment exercised must not be effectively controlled by another authority. Thus, where a judgment is dictated or controlled by detailed instructions or regulations, the judgment would not be found to be sufficiently "independent" under the Act. The Board further found that the degree of discretion exercised must rise above "routine or clerical" in order to constitute "independent judgment" under the Act.¹⁹

¹⁵ 532 U.S. 706 (2001).

¹⁶ 348 N.L.R.B. No. 37 (2006).

¹⁷ *Id.* at 18.

¹⁸ *Id.* at 27.

¹⁹ *Id.* at 35-41.

In dissent, Members Liebman and Walsh disagreed with the majority's definitions of the statutory terms *assign* and *responsibly to direct*, and further disagreed with the majority's finding that the employer's charge nurses exercise supervisory authority in "assigning" other employees.

The same day that it released the *Oakwood* decision, the Board also released its 3-0 decision in *Golden Crest Healthcare Center*. Applying the definitions for assign and responsibly direct set forth in *Oakwood Healthcare*, the Board found that the Golden Crest's charge nurses at a nursing home did not exercise supervisory authority under the Act.²⁰

First, the Board found that the charge nurses at issue lacked the authority to *assign* other employees under the Act, emphasizing that Golden Crest failed to establish that the charge nurses possessed the authority to require other employees to stay past the end of their shifts, to come in from off-duty status, or to shift section assignments.

The Board further found that the charge nurses at issue lacked the authority to *responsibly direct* other employees under the Act, insofar as Golden Crest failed to establish that the charge nurses were actually held accountable for the job performance of other employees. The Board found that the "accountability" requirement set forth in *Oakwood Healthcare* was not satisfied by Golden Crest's evidence that it had a practice of rating charge nurses in their annual evaluations on their performance in directing other employees. The Board found that this evidence constituted merely "paper" accountability and was insufficient to establish that there was an actual prospect that the charge nurses' terms and conditions of employment could be affected, either positively or negatively, as a result of their performance in directing other employees. Accordingly, having found that the charge nurses at issue neither "assigned" nor "responsibly directed" other employees within the meaning of section 2(11) of the Act, the Board found that the Golden Crest charge nurses were statutory employees, not supervisors.

The Board issued another decision using the *Oakwood Healthcare* test for supervisory status in *Croft Metals, Inc.*²¹ In *Croft*, the Board applied the definitions for *assign* and *responsibly to direct* set forth in the *Oakwood Healthcare* decision to find that the lead persons at the manufacturing facility at issue did not exercise supervisory authority under the Act.

Nontraditional "Employee" Groups

Another issue that has arisen in preelection hearings is whether graduate teaching assistants and hospital residents and interns who are seeking representation are employees, as well as students, and thus covered by the Act and eligible to vote in a representation election. In November 1999, the NLRB overruled precedent which had held that "house staff," such as interns and residents, are primarily students and therefore not employees, and decided that a group of interns and residents at a private hospital are employees as well as students and thus covered by the Act.²² Recently, in *Brown University*,²³ the Bush Board reversed the controversial Clinton Board ruling that graduate student assistants who engage in teaching as part of their academic development are "employees" under the NLRA and are entitled to vote on whether to choose union representation. The Board held that such individuals are not covered by the NLRA because the relationship between the graduate student and the school is

²⁰ 348 N.L.R.B. No. 39 (2006).

²¹ 348 N.L.R.B. No. 38 (2006).

²² *Boston Med. Ctr. Corp.*, 330 N.L.R.B. 152 (1999).

²³ 342 N.L.R.B. No. 42 (2004).

primarily educational, rather than economic, and the task of teaching is an integral part of being a graduate assistant.

However, in 2006 the Board held that 36 nonstudent tutors were eligible to vote in an election in a unit of staff employees employed by a private college.²⁴ The Board's reasoning in *Columbia College* was that the tutors, many of whom were part-time faculty, were eligible to vote because they were not specifically excluded from the stipulated unit and they had a substantial community of interest with the other employees in the unit.

Similarly, the NLRB has been asked to determine whether physicians are "independent contractors" or "employees," as record numbers of physicians turn to unions in response to frustrations with managed health care.²⁵

Joint-employer questions have arisen as organizing campaigns have begun targeting temporary employees. In *MB Sturgis & Jeffboat Division*,²⁶ the Board had reversed its policy, adopted in 1973, that had required employer consent to the inclusion of employees of a temporary agency. However, in 2004, the Board overruled *MB Sturgis* and returned to its prior rule that temporary agency employees who are jointly employed by the employer and the temporary agency cannot be made part of a single bargaining unit without the consent of both employers.²⁷

Part-Time Employees vs. Casual Employees

Regular part-time employees are eligible to vote; however, so-called *casual employees* are not. The test to determine whether one is a *regular part-time employee* or a *casual employee* "takes into consideration such factors as regularity and continuity of employment, tenure of employment, similarity of work duties, and similarity of wages, benefits, and other working conditions."²⁸ The standard frequently used by the Board to determine the regularity of part-time employment is whether the employee worked an average of four or more hours per week in the quarter preceding the eligibility date.²⁹

Laid-Off Workers

The Board's test for determining whether laid-off employees are eligible to vote is whether they have a reasonable expectation of reemployment in the near future and involves consideration of four objective factors: (1) the employer's past practice of layoff and recall; (2) the employer's future plans; (3) the circumstances surrounding the layoff; and (4) what employees were told about the likelihood of recall.³⁰ In *MJM Studios of New York, Inc.*,³¹ the Board found, contrary to the hearing officer, that six laid-off temporary employees had no reasonable expectation of recall, because the evidence showed that the employer was

²⁴ *Columbia Coll.*, 346 N.L.R.B. No. 69 (2006).

²⁵ *AmeriHealth Inc./AmeriHealth HMO*, 329 N.L.R.B. No. 55 (1999) (physicians who contracted to provide services to members of AmeriHealth HMO, Inc. are independent contractors but physicians under contract to HMOs may, in other circumstances, be statutory employees).

²⁶ 331 N.L.R.B. 173 (2000).

²⁷ *H.S. Care L.L.C.*, 343 N.L.R.B. No. 76 (2004).

²⁸ *Muncie Newspapers, Inc.*, 246 N.L.R.B. 1088, 1089 (1979).

²⁹ See *Davidson-Paxon Co.*, 185 N.L.R.B. 21, 24 (1970).

³⁰ See *Apex Paper Box Co.*, 302 N.L.R.B. 67, 68 (1991).

³¹ 338 N.L.R.B. 1255 (2003).

struggling with a decline in contracts, coupled with diminished revenues that required downsizing in its administrative and managerial staffs.

Undocumented Aliens

The Ninth Circuit Court of Appeals has held that undocumented aliens are entitled to vote if they are employed at an establishment at the time of the election. The fact that their status as employees may be subject to challenge under immigration law does not alter their voter eligibility under the NLRA, which does not exclude undocumented aliens from its definition of “employee.” The court concluded that if an employer has not terminated an employee prior to the election in order to comply with the Immigration Reform and Control Act, the employer cannot challenge the employee’s status after the election in order to invalidate the election.³² In *Agri Processor Co. Inc.*, the Board agreed with the Ninth Circuit in holding that an employer violated section 8(a)(5) of the Act by refusing to bargain with a union because most of its unit employees had Social Security numbers that did match those in the Social Security Administration’s records.³³ The Board rejected the employer’s argument that it had no obligation to bargain with the employees because they were illegal immigrants.

The Board acknowledged that it is peculiar to protect the rights of employees who could be discharged under the Immigration Reform and Control Act. However, the Board concluded that the Act’s definition of “employee” under section 2(3) encompasses illegal aliens. Because this decision seems to run contrary to the policies underlying U.S. immigration law, this issue is worth watching during the next few years.

§ 31.2.2(b)(ii)

The Appropriate Bargaining Unit

Many hearings also focus on the issue of whether the requested unit is *appropriate*. The NLRB conducts elections only in units that it finds to be appropriate. A unit need not be the “most appropriate” unit — it must only be “an appropriate” unit.

Over the years, the NLRB has established a number of presumptions for determining the appropriateness of a unit. Although the NLRB has great discretion in this area, there are specific statutory limitations on its actions. For example:

- A unit may not include both professional and nonprofessional employees unless a majority of both the professional and nonprofessional employees votes for inclusion in such a mixed unit.
- The Board is prohibited from establishing a unit that includes both guards and other employees.
- The Board may not establish a bargaining unit solely on the basis of the extent to which a union has organized employees in the past.

The most important test in determining whether a requested bargaining unit is appropriate is the *community of interest* test. A multitude of factors is relied upon by the NLRB in deciding whether a community of interest exists. These factors include:

- the degree of functional integration within the proposed unit;

³² See *NLRB v. Kolkka*, 170 F.3d 937 (9th Cir. 1999).

³³ 347 N.L.R.B. No. 107 (2006).

- common supervision;
- the nature of employees' skills and functions;
- interchange of employees;
- contact among employees;
- common work locations;
- common general working conditions;
- similar benefits; and
- similar hours and shifts.

§ 31.2.2(c)

The Stipulation

At any time before or during the representation hearing, the parties may stipulate to issues that must be resolved in order to schedule an election. In fact, the parties may stipulate to an election and avoid a hearing entirely. Over 90% of Board-conducted elections are held pursuant to stipulations.

In many circumstances, a stipulation may provide significant advantages to an employer. It will eliminate the time and expense of a hearing, and it may leave the employer with greater flexibility in taking positions at a later time regarding the voting eligibility of specific individuals.

Under the Board's current time targets, an election conducted pursuant to a stipulation should be conducted within 42 days of the filing of the petition.

§ 31.2.2(d)

Direction of an Election

If a representation hearing is held, both parties are entitled to file post-hearing briefs. After the parties' briefs are submitted, the Regional Director of the NLRB will either direct an election or dismiss the petition. If an election is directed, it generally will be scheduled within 30 days of the Regional Director's decision.

§ 31.2.2(e)

Notices of Election

After the execution of a stipulation or the direction of an election, the Regional Office sends the employer copies of the Notice of Election for posting. The Notice of Election informs employees of the employees' eligible to vote and the time and place of the election. Failure to post the notices at least three working days before the election can result in overturning the election. The notices must be posted in conspicuous places, and an affidavit of posting must be signed and returned to the Regional office of the Board.

§ 31.2.2(f)

The Excelsior List

The NLRB requires an employer to provide it with a list of the first and last names and home addresses of all eligible employees in the voting unit. This so-called *Excelsior* list (named after an NLRB case called *Excelsior Underwear, Inc.*³⁴) is furnished by the Board to the union in order to allow it to contact employees. The employer must supply copies of the list to the NLRB within seven days of the date of either the Decision and Direction of Election or the approval of a stipulation. Failure to submit the list on time, in whole or substantial part, may result in overturning the election if the employer wins.³⁵

Even where the list is submitted on time, an election still may be set aside where the *Excelsior* list is deemed deficient in some way. For example, in *Laidlaw Waste Systems, Inc.*,³⁶ the employer had submitted its *Excelsior* list, listing the employees' first initials and last names instead of their full names. The NLRB found that, by failing to provide the union with the employees' full first names, the employer failed to comply substantially with the *Excelsior* list requirement. In its order, the NLRB found that the employer's failure to provide the full first names of its employees was sufficient to set aside the election, and that actual prejudice to the union was not required.³⁷

Amazingly, the Board has gone so far as to hold that even when an employer substantially complies with the *Excelsior* list requirements, but the NLRB's actions cause a delay in the union's receipt of the list, a second election must be held. In *Special Citizens Futures Unlimited, Inc.*,³⁸ the Board concluded that the employer's good faith and substantial compliance did not overcome the fact that the union was placed at a disadvantage in communicating with employees due to the Board's errors. The lesson here appears to be that employers must be vigilant in ensuring that the Board is communicating clearly with both parties and providing information to the union on a timely basis.

Nevertheless, a few minor and inadvertent errors in an *Excelsior* list may not warrant setting aside an election. In *Bear Truss, Inc.*,³⁹ the NLRB distinguished prior cases by refusing to set aside an election. Although the *Excelsior* list submitted by the employer in *Bear Truss* contained ten inaccurate addresses out of approximately 142 eligible voters, the NLRB found that the list substantially complied with the *Excelsior* requirements. As opposed to cases with higher error rates, here the error rate was only 7%. Furthermore, the employer promptly corrected errors and helped the regional office of the NLRB clarify any question the union raised about names and addresses on the list. Nevertheless, in its decision in *Bear Truss*, the NLRB reiterated the importance of timely, complete, and accurate *Excelsior* lists.

³⁴ 156 N.L.R.B. 1236 (1966).

³⁵ See, e.g., *Tom's Train Treats, Inc.*, 323 N.L.R.B. 669 (1997).

³⁶ 321 N.L.R.B. 760 (1996).

³⁷ See also *Shore Health Care Ctr., Inc. (Fountainview Care Ctr.)*, 323 N.L.R.B. 990 (1997) (election set aside where employer omitted the names of four eligible employees from its *Excelsior* list); *Mod Interiors, Inc.*, 324 N.L.R.B. 164 (1997) (election set aside even though original list containing a significant number of inaccurate addressees was corrected and employer offered to postpone the election).

³⁸ 331 N.L.R.B. 19 (2000).

³⁹ 325 N.L.R.B. 1162 (1998).

§ 31.2.2(g)

Ballots

On election day, employees vote by secret ballot either for or against union representation. The ballots contain the following question: “Do you wish to be represented by [the union] for purposes of collective bargaining?” A *Yes* vote is a vote for union representation; a *No* vote is a vote against union representation. If more than one union is on the ballot, employees also will have an option to vote for *Neither* or *No Union*.

§ 31.2.2(h)

Language Problems

Regional offices of the NLRB may use their discretion in determining whether to print foreign language translations on the ballots. In 1998, the Board reaffirmed its policy of paying for interpreter services in representation cases.⁴⁰

§ 31.2.2(i)

Observers

Each side is permitted to have an equal number of observers present in the polling place during the election. An observer's primary responsibility is to identify voters and verify the voters against the voter eligibility list (the *Excelsior* list). The observer is also present to mentally record the events in the voting area and to challenge any person he or she feels is ineligible to vote but who nevertheless attempts to cast a ballot. In large units where the observers are not likely to know personally all of the voters, the Board may require that eligible voters be identified by Social Security number or similar means, rather than merely by self-identification.⁴¹

The NLRB's Case Handling Manual states that observers must be nonsupervisory employees, although they need not be members of the bargaining unit. In 2000, the Board overturned a longstanding rule that allowed supervisors to be observers for unions; instead the Board adopted a *per se* rule prohibiting all supervisors from serving as observers for either side.⁴² If a party can only provide observers who are not employees of the employer, the Case Handling Manual provides that the party should be permitted to use such observers, subject to challenge by the other party in post-election objections.⁴³

§ 31.2.2(j)

The Preelection Conference

Before the election, the NLRB agent will meet with the representatives of the employer and the union to determine the ground rules for the conduct of the election. Matters such as the placement of the voting booth, the method for calling employees to vote, the number of observers, and the role of the observers are discussed.

⁴⁰ *Solar Int'l Shipping Agency, Inc.*, 327 N.L.R.B. 369 (1998).

⁴¹ *See Avondale Indus., Inc. v. NLRB*, 180 F.3d 633 (5th Cir. 1999).

⁴² *Family Servs. Agency, S.F.*, 331 N.L.R.B. 103.

⁴³ *Browning-Ferris Indus. of Cal., Inc.*, 327 N.L.R.B. 704 (1999).

§ 31.2.2(k)

Challenges

Only certain persons are eligible to vote in a representation election. Eligible employees are those employees who work in the voting group on a regular basis, who were hired before the payroll eligibility date set in the stipulation or direction of election, and who are active employees on the day of the election. Typically, the payroll eligibility date falls approximately 30 to 45 days before the election.

It is not unusual for other persons to come to an election and attempt to vote. Either party or the NLRB agent may claim that a particular voter is ineligible to vote. In that case, the party's observer or the NLRB agent must "challenge" the voter at the polls. When a challenge is made, the voter marks the ballot in private and places it into a "challenge" envelope, with the name of the challenged employee on a removable part of the envelope. Once all ballots are cast, the votes are counted excluding the challenged ballots. If the number of challenged ballots is such that they could affect the outcome of the election, then the resolution of challenges is made at a post-election hearing. The burden of proof of voter eligibility is generally upon the party challenging the vote.

§ 31.2.2(l)

The Ballot Count

After the polls are closed, representatives of the employer, the union, and, if practical, employees, are permitted to be present for the counting of the ballots. The union, in order to win, needs a majority of all valid votes counted, not a majority of those eligible to vote. In the event of a tie, the employer is deemed the winner.

§ 31.2.2(m)

Objections to the Election

Within seven days after the tally of ballots has been prepared and served (generally the date of the election), the losing party has the right to file objections concerning conduct that might have affected the election results. Objections must pertain either to the conduct of the election or to conduct by one of the parties affecting the results of the election. The nature and specific bases for objections will be described in greater detail below.

The objecting party has the obligation to substantiate its objections by objective proof, generally through affidavits. Failure to do so will result in dismissal of the objections. After receiving all the evidence, the Regional Office of the NLRB may dismiss the objections, sustain the objections, or set a hearing. If the Regional Office sustains an objection, it will order a rerun election. The party that won the first election may appeal that decision to the NLRB in Washington, D.C., and the rerun election will be delayed until the appeal is decided. If the Regional Office dismisses a party's objections, the party that lost the election may appeal to the NLRB. Again, the election results will not be certified until the appeal is decided.

Objections that raise material and substantial factual issues will be set for hearing before an NLRB hearing officer. After the hearing and the filing of briefs, the hearing officer issues a recommended decision. Under the NLRB's target deadlines, the hearing officer will customarily issue a recommended decision no more than 95 days after the ballots have been tallied. Determinative challenges are usually resolved at the same hearing. A party who loses

at a hearing may appeal to the Board in Washington, D.C. Unless an appeal is filed, the hearing officer's recommended decision becomes final.

In the event that a union loses an election and does not file objections, the election results are certified and the matter ends. A union may not file a petition for another election in that unit for 12 months following the date of the election. Once the NLRB certifies that the union has lost the election, the union has no further right of appeal. The union cannot ask the federal courts to set aside its loss.

§ 31.2.2(n)

Test of Certification

If the NLRB ultimately certifies that the union won a valid election, the employer may not immediately appeal to the federal courts. Instead, to test certification, the employer must first refuse to bargain with the union. By refusing to bargain, called a "technical refusal to bargain," the employer will require the NLRB to find that it has committed an unfair labor practice.

Once the NLRB finds that the employer committed an unfair labor practice, the employer may appeal to the federal courts. The employer can test the NLRB certification of the union by arguing that the election was not valid. If the federal court agrees, it will set aside the election results and the unfair labor practice finding. In addition, the court will order the NLRB to conduct a rerun election.

§ 31.2.2(o)

Objectionable Conduct by an Employer or a Union Sufficient to Set Aside an Election

Generally, *employer* misconduct prior to the election will be sufficient to set aside the election. Some *union* misconduct may also cause an election to be set aside. The misconduct normally must occur after the election petition is filed in order to be objectionable.⁴⁴

For many years, the NLRB held the view that any preelection unfair labor practice would automatically be objectionable. However, the NLRB has departed from this approach "in cases where it is virtually impossible to conclude that the misconduct could have affected the election results."⁴⁵ The NLRB noted in that case that the employer's illegal acts were limited to a small number of employees out of a large voting group and did not involve any discrimination against employees on the basis of their union activity. In other cases, however, even minor violations have been found to be sufficient to set aside the election where those violations involved a significant percentage of the voting unit. For example, in *Freund Baking Co. & Bakery*,⁴⁶ the Board set aside an election because of the company's handbook provision that prohibited employees from disclosing or using proprietary or confidential information. The Board construed this policy as potentially prohibiting the discussion of wages, hours and working conditions, despite the rule never being discussed or enforced in such a way.

⁴⁴ See, e.g., *Gibraltar Steel Corp. of Tenn.*, 323 N.L.R.B. 601 (1997) (finding that there was no basis for setting aside the election, as the objectionable conduct did not occur within the "critical period" (i.e., between the filing of the election petition and the date of the election)).

⁴⁵ *Clark Equip. Co.*, 278 N.L.R.B. 498 (1986).

⁴⁶ 336 N.L.R.B. 847 (2001).

§ 31.2.2(o)(i)

Changes in Conditions of Employment & Promises by the Employer

The general rule is that, after an election petition is filed, an employer may not make changes in wages, hours, or working conditions unless it can be shown that these changes would have been made even in the absence of the petition. Basically, employers must act as they would in the absence of a union campaign. For example, in *Evergreen America Corp. v. NLRB*,⁴⁷ the Fourth Circuit Court of Appeals upheld an order issued by the NLRB. The Board found that the employer committed an unfair labor practice when it gave employees a \$400 per month wage increase just days before an election. For most employees, the increase exceeded the previous three years' increases combined. The NLRB rejected the employer's contention that such increases were needed to remain competitive in the labor market and to reduce costly employee turnover, and compelled the employer to commence bargaining.

Conversely, if it can be shown that changes were planned before the union came on the scene, it may be considered an unfair labor practice (and cause for overturning the election) if an employer *fails* to implement the changes. Also, as noted above, if certain benefits are granted as a matter of course, it may be considered an unfair labor practice if those benefits are not conferred during the course of a union election.

§ 31.2.2(o)(ii)

The General Shoe Doctrine: Laboratory Conditions

In a case called *General Shoe Corporation*,⁴⁸ the NLRB determined that an election should take place in “an atmosphere calculated to prevent a free and untrammelled choice by the employees.” This is also known as the *laboratory conditions* test.

Examples of conduct that destroy the “laboratory conditions” for an election are:

- calling employees into the plant manager's office for an “intemperate anti-union address;”
- providing extra pay to off-duty employees in exchange for their election participation;
- attendance by supervisors at union meetings;
- visits by supervisors to employees' homes for the purpose of campaigning (although union organizers may do so);
- threatening employees that an inevitable result of unionization will be a loss of company business;
- requesting employees to wear anti-union buttons, stickers or hats; and
- preventing union supporters from campaigning in the lunchroom during breaks.

⁴⁷ 531 F.3d 321 (4th Cir. 2008).

⁴⁸ 77 N.L.R.B. 124, 126 (1948), *cert. denied*, 343 U.S. 904 (1952).

§ 31.2.2(o)(iii)

Misrepresentations

The Board's view of campaign misrepresentations has undergone numerous changes over the years. The Board has said that it will not overturn an election based solely on the basis of campaign misrepresentations.⁴⁹ However, the Board normally will overturn an election if there were forged documents that employees did not recognize as propaganda,⁵⁰ or if there were altered official documents giving the impression that the Board itself was not neutral.⁵¹

One increasingly common tactic among some of the more aggressive unions, such as the SEIU, is to gather employee signatures or photographs early in the process of an organization campaign and to subsequently use those signatures or photographs in union campaign materials — sometimes falsely attributing pro-union sentiments to the employee. The Labor Board has been hesitant to reverse elections on the basis of such conduct.⁵² However, the Board stated that it does not condone this practice, at least where the union makes no prepublication effort to verify that it is correctly reflecting the showcased employees' actual views.⁵³ Further, one member, recognizing the potential adverse impact that such campaign material may have on an election, recommended that the Board in an appropriate case, consider whether the use of employee signatures or photographs is subject to some sort of "fair use" rule (*e.g.*, that the Board will not permit a party to take an employee's signature or photograph affixed to one medium and use it in another medium where the message is different, without the express permission of the employee).⁵⁴ In light of the frequentness of this practice, it is expected that the Board will soon revisit this issue.

There has been considerable disagreement between the Board and the federal courts on this issue. For that reason, and because there is always a possibility that the Board will change its view, employers should remain very cautious regarding possible misrepresentations, particularly in the late stages of the campaign when the other side will not have time to reply. In addition, regardless of the Board's view of the legality of campaign misrepresentations, as a practical matter, misrepresentations can injure a party's credibility, which could be disastrous in an election campaign.

⁴⁹ *See, e.g., Acme Bus Corp.*, 316 N.L.R.B. 274, 281 n.32 (1995).

⁵⁰ *Albertson's Inc.*, 344 N.L.R.B. No. 158 (2005) (finding that a union's distribution of a fake letter, forged on employer's company letterhead, claiming that employer's nonunion stores would be converted to low-priced discount stores, unlawfully affected the results of the election).

⁵¹ *But see G.R.D.C., Inc. (Crystal Art Gallery)*, 323 N.L.R.B. 258 (1997) (overruling the employer's objection to the election that the union forged employee signatures on union authorization cards, thereby interfering with the employees' free choice and creating the impression among voters that opposition to the union was futile).

⁵² *See BFI Waste Servs.*, 343 N.L.R.B. No. 35, slip op. at 1, n.2 (2004) (finding that union's attribution of quotes to employees was not grounds for overturning the election because the views of only two employees were arguably misrepresented; and the employees directly involved were told that a quote would be prepared for them, and the accuracy of the employees' quotes could have been verified by the other employees).

⁵³ *Id.*

⁵⁴ *Id.* at 2 (Meisburg, M., concurring).

§ 31.2.2(o)(iv)

Inflammatory Propaganda

Campaign propaganda calculated to inflame racial prejudice and deliberately exacerbate racial tension is a basis for setting aside an election. The Board has stated that this rule applies equally to employers and unions. For example, the Board once set aside an election because the union falsely associated the employer with the Ku Klux Klan.⁵⁵ However, more recent decisions show a disturbing trend of leniency in this area.⁵⁶

§ 31.2.2(o)(v)

The Excelsior Rule

The *Excelsior* rule, discussed above, requires the employer to file with the Board an eligibility list containing the first and last names and addresses of all eligible voters within seven days after approval of a stipulation or issuance of a direction of election. The rule is strictly applied in terms of time; an employer who files the list late hands the union an automatic objection. Submission of an inaccurate or incomplete list may also provide the basis for invalidating an election, depending on the specific factual circumstances of the case.

§ 31.2.2(o)(vi)

The Captive Audience Rule

The *captive audience* rule, also known as the *Peerless Plywood* rule, applies to both employers and unions. The rule prohibits election speeches on company time to groups of employees within 24 hours before the scheduled time of an election. Violation of the rule is a ground for setting aside the election if objections are filed.⁵⁷

However, the rule does *not* apply to:

- discussions at work with individual employees;
- speeches on nonworking time (such as a voluntary invitational party); or
- distribution of written campaign appeals during the final 24 hours before voting begins.⁵⁸

Thus, employers can and should continue to engage in lawful campaigning during the final 24-hour period.

⁵⁵ See *Zartic, Inc.*, 315 N.L.R.B. 495 (1994).

⁵⁶ See *NLRB v. Flambeau Airmold Corp.*, 178 F.3d 705 (4th Cir. 1999) (widespread, but unattributed, rumor that manager had referred to employees by using a derogatory racial term, spread at the end of a campaign filled with union appeals for racial solidarity, was an insufficient reason to invalidate an election which resulted in a vote of 96 to 94 in favor of the union); *Case Farms of N.C., Inc. v. NLRB*, 128 F.3d 841 (4th Cir. 1997) (union flyer accusing employer of firing Amish workers because Latinos could be paid less and treated worse was not inflammatory appeal to racial or ethnic hatred).

⁵⁷ *Peerless Plywood Co.*, 107 N.L.R.B. 427 (1953).

⁵⁸ But see *Kalin Constr. Co., Inc.*, 321 N.L.R.B. 649 (1996) (prohibiting changes in the paycheck process, for the purpose of influencing employees' votes in an election, within 24 hours before the scheduled time of an election).

§ 31.2.2(o)(vii)***Interference with the NLRB's Election Process***

Distribution of a facsimile of an official ballot or any other material that suggests to voters, either directly or indirectly, that the Board endorses a particular party to the election may cause the election to be set aside if objections are filed.⁵⁹ Actual forgery of NLRB documents will result in the election being set aside. In the past, the Board overturned an election where a union claimed that an employer had committed unfair labor practices when in fact the employer had settled the charges without admitting liability. The Board now, however, views such misleading claims as unobjectionable.⁶⁰

§ 31.2.2(o)(viii)***Promises Made by the Union or the Employer***

Certain types of conduct that will result in setting aside an election if committed by an employer will not necessarily do so if committed by a union. Union promises of benefits fall within this category. The Board believes that because union promises of increased benefits are inherently unreliable, employees will see through them. For instance, a union may falsely promise that it will obtain a sizable wage increase for employees. In *Detroit Auto Auction v. NLRB*,⁶¹ the U.S. Supreme Court let stand the Sixth Circuit Court of Appeal's ruling that a union's preelection distribution of coupons promising employees \$150 per week in the event of a strike constituted legitimate campaign literature rather than impermissible vote-buying by the union.

On the other hand, the Board has found that employees are likely to believe employer promises, because an employer has the power to deliver on its promises. For that reason, employer promises are objectionable. For instance, an employer's promise to settle a pending class-action lawsuit with its employees was found to be an unlawful promise.⁶² However, merely informing employees that employee-initiated pension litigation had been settled, even shortly before a re-run election, was found not to be objectionable conduct.⁶³ The Board found that the employer showed that it would have announced the settlement of the litigation regardless of the ongoing union campaign. The evidence showed that the employer had a pattern of announcing developments in the pension litigation to its employees as they occurred.

Solicitation of grievances during an election campaign, in some instances, may be considered an unlawful promise to address and resolve employee needs. However, in 2003, the Board found that "stepped-up" solicitation activity during a campaign was not objectionable conduct, because the pattern of soliciting and remedying grievances during the critical period was substantially consistent with past practice.⁶⁴

⁵⁹ See *French Redwood, Inc.*, 343 N.L.R.B. No. 82 (2004).

⁶⁰ See, e.g., *Riveredge Hosp.*, 266 N.L.R.B. 1198 (1983), *aff'd sub nom.*, 789 F.2d 524 (7th Cir. 1986).

⁶¹ 528 U.S. 1074 (2000).

⁶² See, e.g., *Onan Corp.*, 334 N.L.R.B. 531 (2001).

⁶³ See *Onan Corp.*, 338 N.L.R.B. 913 (2003).

⁶⁴ See *Wal-Mart, Inc.*, 339 N.L.R.B. 1187 (2003).

§ 31.2.2(o)(ix)

Interrogations

The rules on interrogations — questioning employees about their union views — are also different for unions than for employers. A union can freely question employees about their union sympathies or the sympathies of other employees. According to the NLRB, union questioning does not convey any threat of reprisal.

In contrast, virtually all employer questioning about union activity will cause an election to be set aside.⁶⁵ However, the Board has held that certain forms of limited questioning are not unlawful or objectionable. For instance, a friendly question asked of an open union supporter may be viewed as noncoercive.⁶⁶

§ 31.2.2(o)(x)

Surveillance

In 2006, Board law changed with respect to union surveillance of employee activities. The Board, in *Randell Warehouse of Arizona, Inc. (Randell II)* — a 3-2 decision — found that a union engaged in objectionable conduct when its agents photographed employees during the union’s distribution of campaign literature.⁶⁷

The Board noted that employees have a protected right to accept or not accept the union’s literature, and that photographing them as they make that choice would reasonably be coercive. The union did not provide the employees with any legitimate justification for the photographing. Thus, the Board found that the union’s conduct tended to interfere with employee free choice in the election, and directed that a second election be held. The majority opinion was signed by the Board’s three Republican members, while the two Democrats, Liebman and Walsh, dissented.

In its prior decision in 2005 (*Randell I*), the Board had found that the photographing of employees by a union was not objectionable because it was not accompanied by other coercive conduct. At the same time, the Board acknowledged that photographing by an employer was presumptively coercive.⁶⁸ However, the D.C. Circuit Court of Appeals subsequently did not agree with the Board. The court remanded for “further consideration and a reasoned opinion.” Upon reconsideration, the majority in *Randell II* concluded that it could not justify the different standards for employers and unions. Accordingly, the Board overruled *Randell I* and found that in the absence of a valid explanation, photographing employees engaged in section 7 activity constitutes objectionable conduct whether engaged in by a union or an employer.

Likewise, an employer may not conduct surveillance, or create the impression of surveillance, of union activity. For example, in *Sprain Brook Manor Nursing Home*,⁶⁹ an employer

⁶⁵ See, e.g., *Mid-South Drywall*, 339 N.L.R.B. 480 (2003).

⁶⁶ *Appalachian Mach. & Rebuild Co.*, 317 N.L.R.B. 1343, 1347 (1995). See *Rossmore House*, 269 N.L.R.B. 1176 (1984), *enforced*, 760 F.2d 1006 (9th Cir. 1985).

⁶⁷ *Randell Warehouse of Ariz., Inc. (Randell II)*, 347 N.L.R.B. No. 56 (2006).

⁶⁸ 328 N.L.R.B. 1034 (1999).

⁶⁹ 351 N.L.R.B. 75 (2007). See also *Waste Stream Mgmt.*, 315 NLRB 1099, 1124 (1994) (explaining that whether the employer “creates an impression of surveillance” turns on “whether the employees would reasonably assume from the employer’s actions or statements that their union activities had been placed under surveillance”).

monitored a union official distributing pro-union literature during an organizing campaign, monitoring who did or did not accept the literature. The Board found that this monitoring constituted unlawful surveillance.

§ 31.2.2(o)(xi)

Waiver of Initiation Fees by the Union

In 1973 the U.S. Supreme Court held that a union may not offer to waive initiation fees before the election *only* for employees who sign authorization cards.⁷⁰ The Court said that a union may not “paint a false portrait” of the actual extent of its support to other employees by “buying” such support before the election. Nonetheless, the Court held that a union may waive initiation fees so long as the waiver applies to *all* employees, before or after the election.

§ 31.2.2(o)(xii)

Violence & Threats of Violence

Violence and threats of violence that create a general atmosphere of confusion and fear of reprisal among employees can be a basis for setting aside an election. In several NLRB decisions, union election victories have been set aside based on evidence of verbal threats of violence by union agents. By contrast, an election generally will not be set aside where an employee makes threats while campaigning for the union. For example, in *HCF, Inc. (Shawnee Manor)*,⁷¹ the NLRB found that an employee’s threats of violence, even while soliciting authorization cards, could not be construed by any reasonable person as representing “purported union policies.” Consequently, the NLRB held that there was no reason to set aside the election.

While virtually all threats from employers are automatically objectionable, the stationing of security guards and guard dogs during a contentious election campaign was found not to constitute conduct sufficient to overturn an election.⁷² In *Quest International*, the Board ruled, contrary to the hearing officer, “that the Union failed to carry its burden of establishing that the Employer’s implementation of security measures . . . had a reasonable tendency to interfere with the employees’ free and uncoerced choice in the election.”

§ 31.2.2(o)(xiii)

Threats of Job Loss or Plant Closure

Quite clearly, an employer may not threaten its employees with the loss of their jobs because employees chose to support a union. Such conduct, during an organizing campaign, can be grounds for overturning the election results. However, during an election campaign, an employer may inform employees of the factual possibility that employees may be called out on strike by the union, and that the employer may permanently replace those employees. Doing so is not typically treated as a threat to retaliate against union supporters.⁷³ An employer anticipating a strike may also seek prospective replacements to prepare for the

⁷⁰ *NLRB v. Savair Mfg. Co.*, 414 U.S. 270 (1973).

⁷¹ 321 N.L.R.B. 1320 (1996).

⁷² See *Quest Int’l*, 338 N.L.R.B. 856 (2003).

⁷³ See, e.g., *Big Brass Band, L.L.C.*, 339 N.L.R.B. 973 (2003).

strike.⁷⁴ Posting advertisements for workers during an election campaign may not be objectionable, if such postings are a common practice.⁷⁵

Just as employers may not threaten employees with job loss, they may not tell employees that the election of a union to represent them will result in the closure of the business. An employer may offer its informed opinion, but it will be a question of fact whether the statement constitutes a threat. For instance, in *Mid-South Drywall Co.*,⁷⁶ the Board found that the statement of a leadman to two employees — “If it were my business, I’d close it” — constituted an unlawful threat. Significantly, however, in 2004, the Board reversed a four-year-old precedent and held that an employer’s threat to close its facility if employees voted for union representation — if made to only one or two employees — will not be presumed to have been disseminated throughout the entire bargaining unit.⁷⁷ In those circumstances, the election will not necessarily be invalidated.

§ 31.2.2(o)(xiv)

The Milchem Rule: Conversations in the Polling Area

In *Milchem, Inc.*,⁷⁸ the Board held that prolonged conversations in the polling area between voters and representatives of either party, during voting hours, would be a basis for setting aside an election. The Board concluded that it does not matter whether the conversations relate to the election. Note that the *Milchem* rule is very narrow. If any one of its elements is not present, the *Milchem* rule cannot be used as a basis for setting aside an election.⁷⁹

§ 31.2.2(o)(xv)

Notice of Election

The NLRB Regional Office sends the employer copies of a Notice of Election at least three working days before the election. An employer’s failure to post the Notice of Election three full working days prior to the election will give the union an automatic objection. An election also will be set aside if the notice does not include important information and thereby causes a number of employees not to vote. Similarly, the failure to give due regard to the needs of foreign-language-speaking employees by providing bilingual election notices and ballots is a meritorious objection to an election. Therefore, it is important that employers consider and inform the Regional Office of any translation needs at the time the election is set, and carefully review Notices of Election when they are received from the NLRB.

⁷⁴ See *Southland Cork Co.*, 146 N.L.R.B. 906, 908 (1964).

⁷⁵ See *Big Brass Band*, 339 N.L.R.B. 973.

⁷⁶ 339 N.L.R.B. 480 (2003). See also *Health Now, Inc. d/b/a Dr. Rico Perez Prods.*, 353 N.L.R.B. No. 43 (2008) (employer committed unfair labor practice by threatening job losses, store closures and relocation in response to employees’ support of union).

⁷⁷ *Crown Bolt, Inc.*, 343 N.L.R.B. No. 86 (2004).

⁷⁸ 170 N.L.R.B. 362 (1968).

⁷⁹ See, e.g., *Crestwood Convalescent Hosp.*, 316 N.L.R.B. 1057 (1995) (*Milchem* applies only to prolonged conversations between agents of a party to the election and employees who are waiting on line to cast their ballots, and therefore no *Milchem* violation occurred where there was no evidence that the two employees who were talking immediately outside the polling place were agents of the union).

§ 31.2.2(o)(xvi)***Opportunity to Vote***

The NLRB insists that all eligible employees be given an opportunity to vote. Thus, if an employee is required by the employer to be away from the plant during the voting, and his or her vote could make a difference, the election may be set aside.

Historically, the actual polling in a union election has been conducted and supervised by NLRB agents. Voting is typically conducted by means of secret ballots in voting booths set up at the employer's place of business. As each voter marks his or her choice on the ballot, the ballot is placed directly into the ballot box provided by the NLRB. The NLRB generally does not allow absentee ballots for employees who will be absent due to vacation or illness. Absentee ballots may be provided if all parties agree.

At its discretion, the NLRB may conduct the balloting by mail rather than using the "manual" balloting process described above. In the past, mail balloting was disfavored and used only in unusual circumstances such as where an election involved long distances or widely scattered voters, making it difficult for a number of employees to get to the polling place. However, the Clinton Board demonstrated an increasing approval of and use of mail ballot elections.

In *London's Farm Dairy, Inc.*,⁸⁰ the Clinton Board found no merit in the employer's contention that the NLRB had abused its discretion by directing a mail ballot election. Rejecting the argument that a mail ballot election has less "solemnity and integrity" than a manual ballot election, the NLRB stated that, with mail ballot elections, employees have ample opportunity to cast their ballots in secrecy and without coercion.⁸¹

One study in the 1990s found that unions won a significantly higher percentage of elections conducted through mail ballots than in manual elections. Accordingly, expansion of mail balloting appears to assist union organizing efforts. It remains to be seen whether the Bush Board will cut back on mail balloting; to date, it has not spoken on the issue.

§ 31.2.2(o)(xvii)***List Keeping***

Neither party may keep a running list of employees who have voted.⁸² This rule applies equally to the observers designated by the parties. This is to avoid intimidating voters who may wonder about the purpose of the list. The Board has ruled that an employer does not violate the Act by checking off the names of workers voting in a union election where the employer's business normally involves a high degree of security.⁸³ However, that case involved the unique security needs of a nuclear power plant, and employees accustomed to

⁸⁰ 323 N.L.R.B. 1057 (1997).

⁸¹ See also *San Diego Gas & Elec.*, 325 N.L.R.B. 1143 (1998) (Board recommends that Case Handling Manual be revised to delete the old "infeasibility" standard for the use of mail ballots); *Reynolds Wheels Int'l*, 323 N.L.R.B. 1062 (1997) (finding that the N.L.R.B.'s decision to conduct a mail ballot election was not an abuse of discretion, noting that although the voters were not scattered geographically because of their duties, they were scattered by reason of working staggered shifts).

⁸² See *Piggly-Wiggly*, 168 N.L.R.B. 792, 792-93 (1967) (noting that the Board's policy is "to prohibit anyone from keeping any list of persons who have voted, aside from the official eligibility list used to check off voters as they receive ballots").

⁸³ See *American Nuclear Res., Inc.*, 300 N.L.R.B. 567 (1990).

being monitored because of those needs. It is unlikely that most employers could similarly justify such list keeping.

§ 31.2.2(p)

Objectionable Conduct by a Third Party Sufficient to Set Aside an Election

An election may be overturned because of the conduct of a third party (someone other than the employer or the union) if the conduct interferes with the right of employees to exercise their free choice. For example, in one case, the directors of the local chamber of commerce undertook a substantial campaign that included visits to employees at their homes to urge them to vote against the union. The chamber of commerce spread the rumor that, if the union won, the employer would leave the community. Concluding that the atmosphere was one of fear and confusion, even though there was no evidence that the employer was responsible, the Board ordered a rerun election.⁸⁴

In another case, events during the preelection period included extensive property damage, anonymous telephone threats, and threats of physical violence. The Board set aside the election, finding that the confusion, violence, and threats of violence created by such acts could reasonably be expected to generate anxiety and fear in the minds of the voters.⁸⁵

Sometimes an issue exists as to whether a certain person is the agent of either the employer or a particular union. An individual employee will be considered the agent of a union only when she serves as the primary conduit for communication between the union and other employees or is substantially involved in the campaign in the absence of union representatives.⁸⁶ In such cases, the union can be held responsible for statements made by the employee. Even if a prounion employee is not deemed an agent of a union, certain conduct by the individual, such as physically intimidating coworkers who are waiting in line to vote in a representation election, may be sufficient for the Board to set aside an election.⁸⁷

§ 31.2.2(q)

Overturing an Election on the Basis of the NLRB's Conduct

An election may also be set aside if there are serious irregularities in the way it is conducted. It is the responsibility of the Board agent who conducts the election to avoid any irregularities, or to minimize their impact on the election.

§ 31.2.2(q)(i)

Board Agent Conduct

The NLRB believes that its agents should be scrupulously neutral in conducting elections. An election will be set aside when there is even the appearance of impropriety. Examples of objectionable Board agent conduct include the following:

- The NLRB agent left the ballot box unattended during a break in the voting.

⁸⁴ *Mylan Mfg. Co.*, 70 N.L.R.B. 574 (1946).

⁸⁵ *Tacoma Terrace Convalescent Ctr.*, 270 N.L.R.B. 974 (1984).

⁸⁶ *United Builders Supply Co.*, 287 N.L.R.B. 1364, 1365 (1988).

⁸⁷ *See Hollingsworth Mgmt. Servs.*, 342 N.L.R.B. No. 50 (2004).

- The NLRB agent ripped an anti-union button off an observer in front of other voters.
- NLRB agents failed to secure challenged ballots properly in a sealed envelope.⁸⁸
- The NLRB agent was seen drinking beer with a union representative on the day before the election.
- The NLRB agent made disparaging remarks about the employer's product within earshot of voters.

In one case, the NLRB set aside the election where the NLRB agent included an erroneously incomplete description of the voter eligibility formula in the NLRB's Decision and Direction of Election order. The NLRB found that the employer reasonably relied on that articulation of the formula in preparing its *Excelsior* list, but that, as a result, the *Excelsior* list included two ineligible voters. Accordingly, the NLRB directed a new election, noting that it was the NLRB's responsibility to set forth properly the voter eligibility requirements.⁸⁹

§ 31.2.2(q)(ii)

The Polling Place

The decision on the location of the polling place is within the Board agent's discretion. Usually, the NLRB secures agreement from the parties to conduct the election at a designated place within the employer's facility. Although failure to consult with the parties is not automatically improper, the location of the polling place, if it affects the election, can be the basis for setting aside the election. For instance, if the polling place is in a busy work area where noise and confusion interrupt the balloting, a valid objection could be filed.

§ 31.2.2(q)(iii)

Opening & Closing of Polls

When the opening of the polls is delayed and eligible voters are prevented from voting as a result, the election will be set aside. When the polls are closed before the announced ending time, the election will be set aside as well if a showing is made that the early closing deprived eligible voters of the opportunity to vote.

§ 31.2.2(q)(iv)

Secrecy of Ballot

The Board attempts to guarantee complete secrecy of the ballot. Conduct that tends to destroy this secrecy constitutes a ground for invalidating the election. For these reasons, the Board usually uses a private voting booth and sealed ballot box. If it is possible to observe how employees are voting, the election usually will be set aside.

⁸⁸ *Laszlo & Paulette Fono (Paprikas Fono)*, 273 N.L.R.B. 1326 (1984).

⁸⁹ *Atlantic Indus. Constructors, Inc.*, 324 N.L.R.B. 355 (1997).

§ 31.2.3

C. UNION-ORGANIZING TACTICS

§ 31.2.3(a)

Traditional Union-Organizing Tactics & Strategies

Until the 1990's, union-organizing campaigns were very predictable, often employing the same basic tactics and strategies. To a large extent, these traditional strategies are still in use. Employers should be familiar with these basic union tactics in order to recognize and combat an organizing drive.

§ 31.2.3(a)(i)

Depending on Employees to Identify the Target Employer

Traditionally, unions ran very lean operations. Traditional organizing campaigns usually begin with employees of a particular employer contacting the union. Typically, an employee would choose a union because the employee previously worked at a location represented by that union or had some other connection to that union, for example, a relative who was a member. Union representatives still prefer this type of campaign, since there is already an established core of employees who are dissatisfied.

§ 31.2.3(a)(ii)

Developing an In-Plant Organizing Committee

Once the core group of employees identifies itself to the union, a union representative concentrates on the formation of an in-plant organizing committee. Committee members meet regularly as a group with a union representative away from the facility in order to discuss their campaign strategy and to figure out which issues are most effective as selling points with the employee group. The first focus of the organizing committee is to obtain support from a majority of the employees. The committee members are responsible for conveying flyers, letters, buttons, and other campaign materials to employees during work breaks or in parking lots at the employer's facility. In a traditional union campaign, the committee members have the primary responsibility for questioning their fellow employees about their union sentiments and determining who favors the union and who has not yet been convinced.

§ 31.2.3(a)(iii)

Use of the Board's Election Procedure

In order to get the NLRB to conduct an election, unions have to identify a group of employees who have similar work responsibilities, hours, and other working conditions. The union must then get a majority of the identified group to sign cards authorizing the union to act as the employees' bargaining representative. While the NLRB regulations only require a union to obtain authorization cards from 30% of the employee group in order to petition for an election, unions normally do not approach the NLRB until they obtain signed authorization cards from more than 50% of the eligible employees.

Once the requisite number of cards is collected, the union petitions the NLRB to schedule an election. Typically an employer seeks to delay any election in order to campaign against unionization and to try to correct, to the extent that it lawfully can, any perceived problems that led the employees to organize. By contrast, the union's typical goal is to get an election

as soon as possible in order to keep the momentum that was gathered during the collection of authorization cards.

§ 31.2.3(a)(iv)

The Toehold Approach—Keeping the Employee Group Small

Traditionally, unions have also sought to keep the initial employee group relatively small for purposes of organizing. It was thought that the smaller the group, the easier it was to win an election by maintaining a tight base of prounion supporters. Moreover, most unions found that once they got their foot in the door by representing one group of a company's employees, they could then approach other groups more successfully. Similarly, if an employer had more than one operation, the union would focus its attention on organizing only one location. After negotiating a favorable contract, the union would use the contract as a basis for organizing the other locations. Unions still favor these approaches in the large-scale organizing campaigns they are undertaking today.

§ 31.2.3(a)(v)

House Calls: One-on-One Campaigning with Voters

Having narrowed the voting group as much as possible, a union then works with prounion employees to target other employees who might be receptive to the union's sales pitch. The union representative travels with one or more prounion employees to a targeted employee's house for a one-on-one discussion of the benefits of union representation. These one-on-one meetings are extremely important to any organizing campaign, because they give the union an opportunity to find out the employee's concerns and then play on those concerns. Typically, this is done by pointing out the lack of restrictions, legal or otherwise, protecting the employee.

Home visits still play a vital role in those workforces of today in which employees do not work out of one central location. For example, the SEIU reported making thousands of door-to-door visits in a large-scale campaign to organize home healthcare workers which culminated in an historic election victory for the union in early 1999.

§ 31.2.3(a)(vi)

Keeping the Campaign Quiet

In a traditional union-organizing campaign, a union also strives to keep the organizing campaign secret from the employer. This is done so that the employer will not have time to respond and, once it finds out, will not know whom to target for response. Authorization cards are collected away from the facility or in quiet groups during break time. No public announcements are made regarding union meetings or about the issues that the union is using as a rallying point for its campaign. The unions reason that if the employer does not know what the employees are concerned about, then the employer has no way of combating the union's organizing efforts.

§ 31.2.3(a)(vii)

Focusing on Economic Issues & Job Security

Wages, benefits, and job security have almost always been the focus of union campaigns. Typically, the unions attack an employer's wage structure by showing that unionized employers in the same industry and same geographic area pay higher wages. Moreover, because the NLRB places no restrictions on the ability of unions to make outlandish

promises, unions can promise substantial hourly-wage increases with impunity, while employers are prohibited from making any promises at all. Unions can also make wildly exaggerated claims about the benefits that would be available to employees.

Job security remains a big selling point for unions, especially in today's economic climate. Unequal enforcement of company policies and procedures is a frequent catalyst for employee interest in union organizing. Furthermore, the recent downturn in the economy may push job security to the forefront in union organizing campaigns.

§ 31.2.3(b)

New Union Tactics & Strategies for Organizing

While union tactics are changing, unions have not completely abandoned the traditional strategies described above. However, unions have increasingly supplemented traditional organizing tactics with new techniques and approaches that, in many ways, pose greater risks for employers. Certain unions — most notably the SEIU — have been particularly aggressive in pursuing new organizing strategies.

§ 31.2.3(b)(i)

Full-Time Union Organizers

As part of their effort to increase organizing activity, unions now employ full-time paid union organizers to conduct campaigns. In fact, as part of their new focus on organizing, unions are increasing their organizing staffs. Unlike union representatives in the past who had numerous responsibilities in addition to organizing, these new professional organizers can devote all of their time to organizing a workforce. Rather than relying on obsolete campaign literature, full-time organizers are developing and using videos and custom-designed literature tailored to a specific workforce. Moreover, most unions can now draw on a diverse group of organizers from all ages, sexes, and racial backgrounds in order to match the “right” organizer to the targeted employee group. These full-time organizers supplement, rather than supplant, in-plant employee organizers.

§ 31.2.3(b)(ii)

Employer Targeting

Targeting Companies, Industries & Geographic Areas

Although unions still target employers based on employee complaints, unions are now also actively selecting their own targets for union organizing even in the absence of any demonstrated employee interest. This is done in a variety of ways.

Unions often target all nonunion employers within a particular industry and geographic area, a practice commonly referred to as the “blitz.” Sometimes the target industry or area is a core industry or area for the union; at other times, the union is attempting to branch out into new industries or areas. For example, the UAW has announced plans to increase its organizing efforts among employees of nonunion auto parts suppliers. The Building and Construction Trades Department of the AFL-CIO continues its organizing and educational campaign against temporary employment agencies in hopes of reversing organized labor's declining representation in the construction industry. The Communications Workers of America (CWA) has named particular high-tech companies as its primary organizing targets. Building and construction unions have targeted various geographic areas for mass, coordinated

organizing campaigns. The AFL-CIO and the Change to Win Coalition are also targeting professional and technical employees.

Change to Win-affiliated unions have expanded two nationwide campaigns: “Hotel Workers Rising” led by UNITE HERE, and “Justice at Smithfield,” led by the UFCW. Change to Win also sponsored a “Ports Protection” campaign for improved conditions for employees working at the nation’s ports. Uniform Justice is a multi-year campaign led by the Teamsters and UNITE HERE against Cintas. Change to Win also sponsored a Wal-Mart corporate campaign entitled “Wake up Wal-Mart,” and “Driving Up Standards Together,” a campaign against FirstGroup, a transportation company based out of the United Kingdom. In 2007 a new corporate campaign against American Eagle Outfitters, entitled “American Vulture,” was launched by UNITE HERE to pressure the popular youth outfitter, specifically targeting colleges and universities throughout America and Canada.

The SEIU won a milestone victory for the labor movement with the Houston “Justice for Janitors” campaign. In October 2006, over 5,300 janitors in Houston walked off the job and protested working conditions in an attempt to gain a new collective bargaining agreement.⁹⁰ The SEIU enlisted politicians and the national and international media to bring attention to the strike. More than a month later, the campaign ended successfully for the union when they agreed to a contract with five major cleaning companies.⁹¹

In addition to significant wage increases, the janitors also won the right to longer hours, paid holidays, vacation time and health insurance starting in 2009.⁹² Some labor analysts feel that this victory will make it easier for unions to win similar campaigns all throughout the South.⁹³ In the wake of the Houston “Justice for Janitors” campaign, industry-wide and city-wide campaigns could become a popular method for unions like the SEIU to attempt organizing large numbers of employees.

In launching these campaigns, organizers will typically use phone listings or other sources to learn employee names, addresses, and telephone numbers. The information is then used to contact employees as part of a purported “survey” of wages, hours, and working conditions within the industry. Naturally, while speaking to employees, the organizers will highlight discrepancies between the employees’ working conditions and those of union-represented employees in the area. The organizers then offer to discuss the matter further and attempt to set up meetings to convince employees to begin organizing.

Top-Down Organizing

Another popular method of targeting employers is called top-down or wholesale organizing. Using this technique, unions are now targeting employees by identifying employers who are vulnerable to adverse-publicity campaigns, political pressure, or legal pressure. Typically, unions will prey on employers who rely heavily on their consumer image or the reputation of

⁹⁰ Dale Russakoff, *Labor’s Gambit in Houston*, WASH. POST, Nov. 17, 2006, at D01, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/11/16/AR2006111601765.html>.

⁹¹ *Justice for Janitors: Houston Janitors Claim Victory in Landmark Strike*, available at <http://www.democracynow.org/article.pl?sid=06/11/21/1518257> (Nov. 21, 2006).

⁹² *Id.*

⁹³ Dale Russakoff, *Houston Janitor’s Strike Ends with Agreement: Workers to Get Higher Wages, Health Coverage*, WASH. POST, Nov. 21, 2006, at D03, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/11/20/AR2006112001280.html>.

their products or services. Unions today are even joining forces whenever feasible to wage these top-down campaigns.

The terms “wholesale” or “top-down” organizing arise from the union attack on the larger corporation rather than the individual branches through which the corporation operates. The campaign is often aimed at corporate officers and shareholders rather than simply at the employer or employees. The union’s aim is to break down the targeted company’s willingness to resist union organizing, and thereby to make it easier to organize the workers. The union then may seek to bypass the NLRB altogether by obtaining voluntary recognition from the employer, or perhaps a pledge not to actively oppose union organizing efforts.

§ 31.2.3(b)(iii)

Creating a Negative Corporate Image

Unions have found that another effective method of attacking a company is to attack its public image. This is commonly referred to as a corporate campaign. A classic example is the concerted nationwide effort by organized labor to disparage Wal-Mart. While unions have had no luck in organizing Wal-Mart employees, they at least hope to weaken Wal-Mart’s ability to compete against unionized groceries and department stores. Corporate campaigns focus on harming the sale of the company’s products or services. In larger corporations, this often has the effect of driving down stock prices. Unions typically do this by creating red-herring issues — meaning issues that make for good publicity but are not part of the union’s real agenda. Typical red-herring issues include:

- product quality;
- service quality;
- environmental concerns;
- allegations of discrimination;
- moral and ethical issues;
- safety and health issues; and
- treatment of consumers.

Many unions will attack individual management officials or members of a company’s board of directors and accuse them of insincerity and self-interest. It is often to the union’s advantage to focus the campaign on unpopular supervisors or members of management.

§ 31.2.3(b)(iv)

Focusing on Moral & Ethical Issues Instead of Economic Issues

The common characteristic of these red-herring issues is that they do not deal with the economic issues upon which unions traditionally have focused — namely, wages and benefits. The red-herring issues attack the moral character of the company and the ethical dealings it has with the public. The underlying message to employees is that if the company has these moral and ethical problems in dealing with others, the employees cannot trust the employer to deal morally and ethically with them either.

As part of their desire to shift the focus of organizing from economic issues to moral and ethical issues, unions are now frequently joining forces with community-based organizations. For instance, recently, the AFL-CIO organized a campaign to link human rights with

organizing rights. On December 10, 2003, International Human Rights Day, thousands of union supporters rallied and marched in 64 cities worldwide. Unions also occasionally affiliate with environmental groups such as Greenpeace, with immigration groups, or with various health and safety organizations. This tactic has been increasingly utilized in organized labor's ongoing attacks on Wal-Mart, on which tens of millions of dollars had been spent by the end of 2005. Today, many union leaders are taking sides in current debates for or against war. Religious groups frequently declare outright support for organizing drives. Affiliation with an "independent" organization allows a union to claim the moral high ground and use that high ground to preach its other messages.

§ 31.2.3(b)(v)

Using the Media

Unions have long known that the media are a great source of free publicity for its organizing efforts. Unions have traditionally employed the media as a weapon by making provocative accusations against targeted companies, thereby creating a newsworthy story. In recent years, however, unions have taken the use of the media to new heights. Unions have enlisted the help of television shows such as "Dateline" and "48 Hours" to investigate allegations concerning an employer's products or its treatment of consumers. Classic examples include the "Dateline" segment on the Food Lion supermarket chain, which involved hidden cameras and staged incidents at stores. Recently, unions targeting pharmacists and physicians have brought accounts of specific problems caused by certain HMOs to the media's attention in order to exert public pressure on the HMOs.

Unions also utilize the media through press conferences, rallies, marches, picketing activities, and other events that help fill space in newspapers or time on television news programs. When events promise media coverage, unions usually can enlist the help of community leaders, politicians, clergy, and other public individuals who will support the issue or cause that the union is using as a pressure point against the employer.

§ 31.2.3(b)(vi)

Political Effort

Unions have always paid great attention to the political arena. The AFL-CIO announced an aggressive plan to link politics to organizing efforts. The plan relies heavily upon the internet to expand a political network used during the last two presidential elections. The plan also calls for greater pressure on political candidates to support workers' rights to organize. Organized labor poured more resources than ever before into the 2004 campaign. In state after state, unions put tremendous pressure on lawmakers to support the Employee Free Choice Act, discussed above. AFL-CIO President John J. Sweeney requested that union officials inform him of all congressional candidates who said that they cannot support the bill. One union alone, the SEIU, spent approximately \$77 million in support of John Kerry. In all, the AFL-CIO utilized three times as many paid staffers in 2004 to work full-time on its "get out the vote" efforts as it did in 2000. The ultimate failure of the Kerry campaign led to a round of bitter soul-searching within top union circles. In fact, one of the main complaints members of the Change to Win Coalition have against the AFL-CIO is that it is too closely affiliated to the Democratic Party.

§ 31.2.3(b)(vii)

The Cellular Campaign/Small Group Approach

Another organizing technique that has gained popularity in recent years is the cellular campaign. This technique refers to a union's strategy of dividing employees into small groups, or "cells," and winning over employee support cell by cell. Typically, a union organizer will work to gain the support and trust of several different employees from different departments of the same company. The organizer, however, will not disclose the identity of these employees to each other. The union organizer will conduct separate meetings with each supporter and will encourage each supporter to develop his or her own group of prounion employees. Thus, only the union organizer knows the full scope of union support within the organization. The individual employees have only limited knowledge of the status of the union's campaign.

The primary advantage of this approach is its secrecy. Even if an employer discovers a cell of organizing activity, the employer is unlikely to discover the full scope of the union's activity. Once the organizer knows that the union has sufficient support to obtain authorization cards, the organizer can quickly and quietly have the employee supporters pass around authorization cards and obtain signatures before an employer has an opportunity to respond.

In addition, unions often find that certain groups of employees, such as professional employees, for example, are more receptive to the small-group approach to organizing. Thus, unions may rely more heavily on "collegial interaction" with such groups, meeting with small groups rather than relying on mass organizing tactics. Eventually, the union has enough support among these small groups of employees to file a petition to represent the overall unit.

§ 31.2.3(b)(viii)

The Open-Campaign Approach

Once authorization cards have been signed and the petition has been filed, some unions are now turning to an open-campaign approach. In an open campaign, union organizers encourage their in-house committees and all other union supporters to announce publicly their support for the union. This is done through flyers, videotapes, buttons, and other methods. Unions often will also send employers a list of their employee organizing committee and supporters.

Unions have gone to the open campaign for two reasons. First, public announcements of union support by fellow employees can be powerful campaign propaganda, particularly if the employees are well respected. It demonstrates a lack of fear of employer reprisal and shows confidence in the union's ability to protect employees. Moreover, once an employee makes a public commitment of that sort, it is difficult for the employee to reverse that position. Further, the open campaign makes it easier for unions to file unfair labor-practice charges against employers and to obtain hearings on such charges. An employer cannot be accused of discriminating against a prounion employee unless the employer can be shown to have had knowledge of the employee's prounion sentiments. An employee's public announcement of support for the union gets the union over that hurdle.

§ 31.2.3(b)(ix)

Debate Challenges

Shrewd union organizers will often challenge a company official to a debate. Be forewarned: This is a no-win situation for most employers. Unlike employers, unions are relatively free to

make promises in a debate, and they often take advantage of that fact. An employer, without the ability to make such promises, is always at a disadvantage. On the other hand, if the employer refuses the offer to debate, the union will make much of the refusal. Responding to a debate challenge should always be carefully considered before any action is taken.

§ 31.2.3(b)(x)

Targeting Nontraditional Groups

The AFL-CIO believes that there is a growing interest in union representation among members of professional and technical occupations. Indeed, union membership has grown to nearly 23% of professional occupations, while fallen overall to less than 12% of the total U.S. workforce. Most of the organized professional workforce comes from two disciplines: teaching and healthcare.

Unions desperate to shore up their declining membership have started targeting employees not traditionally subject to union-organizing drives. Professional employees such as pharmacists, physicians and even private attorneys have been targeted by union-organizing efforts in recent years. An increasing number of graduate school teaching assistants, interns, and residents are seeking union representation. Unions have focused organizing drives on bagel workers, gaming dealers working at casinos, fast food employees, body piercers, exotic dancers, and bicycle messengers to increase membership. Recognizing the increasing numbers of temporary or contract employees in today's workforce, many unions are attempting to add these workers to their more typical complement of regular employees. Unions have also been successful in gaining a foothold in the finance, insurance, and real estate industries.

By contrast, in the high-technology field, unions have had little success thus far, despite high-profile attempts to unionize companies like Amazon.com. Whether unions will have better success as increasing numbers of start-up and internet-based companies falter, and as employees in the industry seek greater job security, remains to be seen.

Women & Minorities

Unions are also increasingly focusing their efforts on organizing women. The AFL-CIO has described women as "key to unions' future growth." As part of its commitment to organizing women workers, the AFL-CIO now has a separate Working Women's Department. This Department encourages unions to bargain for nontraditional items such as family leave, alternative work schedules and childcare, in order to attract more women members. The International Union of Painters and Allied Trades even changed its name, dropping "Brotherhood" for "Union" as a symbolic indication of its intent to create a more inclusive union by intensifying its efforts to include minorities and women in its membership.

According to the AFL-CIO, 39.4% of all union members in 1997 were women, up from 20% in 1960. The same report stated that women represent the clear majority of all new workers being organized, and the win rates where women are concentrated average 51%, compared with a win rate of only 40% in units where men predominate. Statistics released in January 2007 verify that the gap in unionization rates between the sexes is closing. Whereas in 1983 the unionization rate for men was 24.7% and 14.6% for women, by 2007 the rates were 13.0% for men versus 10.9% for women.

The percentage of Latino, Asian American, and African American members decreased slightly in 2006. BLS reports showed that union membership rates were higher for African

Americans, at 14.5%, than for Caucasians, at 11.7%, Asian Americans, at 10.4%, and Latinos, at 9.8%.

§ 31.2.3(b)(xi)

Utilizing Legal Processes

Use of the NLRB's Unfair Labor Practice Procedure

Since the inception of the NLRA, unions have been filing unfair labor practice charges against employers with the Board. There is nothing unusual about unions using the NLRB as a weapon. However, what is new is that unions are now filing multiple unfair labor practice charges in an effort to bypass the election process and, instead, to force an employer to recognize the union voluntarily or be subject to an NLRB bargaining order. Unions now work to stage situations where prounion employees ask managers difficult questions or engage them in one-on-one conversations. In these situations, the issue often becomes one person's word against the other's, and the NLRB is required to hold a hearing to decide who is telling the truth. Defending charges of unfair labor practices can be very expensive. The union's goal in filing such charges is to break down the targeted company's will to resist the union's campaign. If there is a sufficient number of unfair labor practices, the NLRB may find that maintaining the laboratory conditions required for a fair election is impossible. In such circumstances, the NLRB can issue an order requiring the employer to bargain with the union without benefit of an election.

Union Use of Other Government Agencies

Unions often use other federal and state agencies to supplement their organizing efforts as well. For example, unions are now regularly requesting that the Department of Labor (DOL) conduct wage-and-hour audits of targeted employers. The Occupational Safety and Health Administration (OSHA) and similar state agencies are being called upon to conduct inspections and issue citations and fines for alleged safety violations. Unions are also targeting employers for inspections by the Immigration and Naturalization Service (INS) and the Office of Federal Contract Compliance Programs (OFCCP). As when they file charges with the NLRB, unions use these government agencies in organizing to break a company's resolve to resist a union's campaign. Such inspections have the added benefit of building worker resentment and allowing unions to trumpet their ability to protect the workers from violations of the law.

Independent Lawsuits on Behalf of Employees

One of the more recent union techniques most costly to employers is union funding of lawsuits on behalf of employees against a targeted employer. Again, the goal is twofold: first, to break the employer's resolve; second, to show employees the union's power to protect them. The NLRB has held that, so long as a union's lawsuit is directly related to the union's traditional role as protector of wages, benefits, and working conditions, the funding of a lawsuit does not interfere with employees' free choice in an election. In *52nd Street Hotel Associates*,⁹⁴ the NLRB found that the union did not engage in any objectionable conduct when, eight days before the election, it provided employees with free legal services to file a lawsuit against their employer under the Fair Labor Standards Act (FLSA).

However, such lawsuits are not always legally permissible. In 1999, the District of Columbia Circuit ruled that a union's sponsorship of a lawsuit against an employer, announced the day

⁹⁴ 321 N.L.R.B. 624 (1996).

before a representation election, violated the rule against providing gratuities to voters during the campaign period. The court reasoned that the lawsuit, which sought overtime pay, was “not integral to the conduct of a fair election,” unlike charges of unfair labor practices filed by a union. The court also found that the suit constituted a benefit to employees that might influence them to vote for the union, in violation of the NLRA.⁹⁵

In the meantime, however, employers who have attempted to challenge these lawsuits in the courts have for the most part been unsuccessful. For example, efforts to attack such lawsuits in civil actions for abuse of process have been rejected by the courts. Similarly, employers have had little success attacking union publicity campaigns on defamation grounds.

§ 31.2.3(b)(xii)

Blocking Charges

Certain unfair labor practice charges will act to block the holding of an NLRB election absent a waiver by the party who filed the charge. In other words, a union may block an election simply by claiming that an employer has committed an unfair labor practice. The NLRB will then insist that the election be delayed until it can decide whether any unlawful conduct occurred. If the Board finds that there was unlawful conduct, it will require the employer to remedy the conduct before an election can be held.

§ 31.2.3(b)(xiii)

Salting

The most common form of “salting” is for a paid union organizer to apply for a full-time position as an employee. The organizer will openly state on the face of his or her job application that he or she is a full-time paid union organizer seeking work for the purpose of organizing the company’s employees.

Assuming that the organizer meets the basic qualifications for an open position, the organizer’s application puts the employer in a no-win situation. If the employer fails to hire the union organizer, the organizer will immediately file a charge with the NLRB. The organizer will argue that the real reason he or she was not hired was because the employer knew that the union organizer was seeking a job for the primary purpose of organizing. On the other hand, if the employer hires the organizer, it gives the union almost unlimited access to the employer’s property and employees. The organizer will have the freedom to meet with employees during break times and lunch hours on the employer’s property. In addition, the organizer can create discipline issues and make it difficult for an employer to manage its business without drawing unfair-labor-practice charges.

Another form of salting is for regular union members, who are not paid as union organizers, to flood a job site with applications that state that the applicants are union members who intend to organize the company’s job site if hired. This type of applicant presents the same problems as the full-time paid union organizer.⁹⁶

⁹⁵ *Freund Baking Co. v. NLRB*, 165 F.3d 928 (D.C. Cir. 1999).

⁹⁶ In *Town & Country Elec., Inc.*, 309 N.L.R.B. 1250 (1992), *enforced*, 106 F.3d 816 (8th Cir. 1997), the employer was faced with an influx of applications from both paid and unpaid union organizers. The NLRB found that the employer had committed an unfair labor practice by refusing to interview the applicants because of their union affiliation. On appeal, the Eighth Circuit denied enforcement of the NLRB’s decision. On further appeal, the U.S. Supreme Court concluded that the NLRB had lawfully

Unions have rallied around the Supreme Court’s decision in *Town & Country*, seeing it as the legalization of salting. While salting is most common in the construction industry, there is absolutely no reason why it could not be used as effectively in other industries, including industries involving hotels and food services. Since *Town & Country*, salting has been gaining in popularity with all unions.

Not all salting cases have gone the unions’ way. In *International Brotherhood of Boilermakers v. NLRB*,⁹⁷ the employer had implemented a nonresponsive information policy in conjunction with its application process. Specifically, this policy warned applicants that any individual who provided information which was not specifically requested by the employment application would be disqualified from consideration. Accordingly, when several union members wrote “volunteer union organizer” on their applications, the employer disqualified them from consideration. The NLRB found that, in disqualifying these individuals because they had written the words “volunteer union organizer” on their applications, the employer had illegally discriminated against them because of their union activities. The Eleventh Circuit Court of Appeals reversed, finding that the employer’s policy was unrelated to any desire to discriminate against an applicant based on union activities. Instead, the court found the policy was implemented to avoid making any hiring decisions on the basis of nonrelevant factors such as race, disability, union affiliation, and the like. Moreover, the court found that the company had applied its policy in a nondiscriminatory manner, disqualifying not only those applicants who provided nonresponsive information relating to their union activities but also those who provided nonresponsive information such as “Passed all pipe tests in December ’91;” “See Steve of survey crew;” and “General contractor owed me \$400 and never paid me so I found out where he lived and collected.”⁹⁸

Republicans in Congress have proposed legislation, the “Truth In Employment Act,” that would halt salting. The bill would amend the National Labor Relations Act by explicitly stating that an employer is not required to “employ any person who seeks or has sought employment with the employer in furtherance of other employment or agency status.”⁹⁹ However, with President Obama in the White House, backed by a Democrat-controlled Congress, it is unlikely that this legislation will proceed in the near future.

Despite the confusion in the Board’s decisions, salting remains a viable and favored union strategy; and employers should be particularly sensitive to all of the risks associated with this particular organizing tactic.

interpreted the term employee to include paid union organizers. See *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85 (1995), *on remand*, *Town & Country Elec., Inc. v. NLRB*, 106 F.3d 816 (8th Cir. 1997).

⁹⁷ 127 F.3d 1300 (11th Cir. 1997).

⁹⁸ *FES (a division of Thermo Power)*, 331 N.L.R.B. 20 (2000) (General Counsel must prove that the employer had jobs available, that the salts were as qualified as other job applicants, and that if not for their union affiliation they would have been hired. If this is established, the burden shifts to the employer to show that it would not have hired (or considered) the applicants even in the absence of their union activity or affiliation.); *Little Rock Elec. Contractors*, 327 N.L.R.B. No. 166 (1999) (employer’s rule against moonlighting provided legitimate basis upon which to reject the job applications of two salts who were employed by a union and who did not contend that they intended to quit that employment if their applications were accepted).

⁹⁹ H.R. 1816, 109th Cong. § 4 (2005); S. 983, 109th Cong. § 4 (2005).

§ 31.2.3(b)(xiv)

Use of Technology

Unions have also learned the importance of using current technology to impress employees. Most major unions have prepared videotapes with appearances by well-known actors and actresses (who are union members themselves) describing the virtues of unions. Such tapes often offer predictions of the statements an employer will make to counter the union's organizing effort. For large elections, unions are now custom-designing videotape presentations that attack a particular employer. These customized presentations allow prounion employees to appear on the videotape and explain why they believe the union would benefit the employees. This type of campaign propaganda can be very persuasive.

Unions have also increased efforts to use the internet in their organizing efforts. The SEIU conducted a "virtual leafleting" campaign as part of its efforts to organize passenger service workers at Los Angeles International Airport (LAX). In conjunction with the AFL-CIO, the SEIU began distributing virtual leaflets through a banner ad on Yahoo! that directed individuals to a website explaining the labor dispute at LAX. The virtual leaflets were distributed in three separate areas of Yahoo! — targeted to individuals that type certain key words and also on a random basis — and the union expected to deliver well over 100,000 virtual leaflets.

In addition, unions send campaign messages via e-mail and urge their supporters to do the same. Virtually all major unions now have sophisticated home pages on the internet. These unions use their home pages to post information about union-organizing efforts and to target a particular employer as part of a corporate campaign. In addition, unions have made it easier for members to access e-mail and the internet, by offering home computers and internet services at reduced rates to union members. Of course, when members access the internet using these services, they receive information on organizing and other developments in the labor union movement. There exist numerous "How to Unionize" websites, complete with information on labor organizing, union election procedures, examples of unfair labor practices, and news about other organizing efforts. Many unions now provide strictly confidential "Unionize Your Workplace" forms for anyone interested in receiving information on organizing a union. Such forms ask for the inquiring employee's address, phone number, e-mail address, type of work, and the number of employees of his or her employer. Once completed, these quick and easy forms are sent off to the union with a mere click of the mouse. Employees can even download authorization cards off the internet.

These e-mail and internet organizing efforts pose difficult legal issues for the NLRB to resolve in coming years. In *Timekeeping System*,¹⁰⁰ the NLRB ruled that e-mail communication is protected, concerted activity. Some unions are now questioning whether *Excelsior* lists, discussed above, should contain employees' e-mail addresses. Electronic communication also raises solicitation and distribution concerns similar to those raised by more traditional union handbilling activity, as well as the question of whether unions should have access rights to company e-mail and intranet sites. Employers who wish to prohibit union access to e-mail should bar the use of e-mail for all but business reasons. This type of rule, however, may be difficult to enforce in practice, without creating problems with employee morale.

Questions have also arisen about the extent to which a company's e-mail system should be utilized in an organizing campaign or decertification process. In *Konop v. Hawaiian Airlines*,

¹⁰⁰ 323 N.L.R.B. 244 (1997).

Inc.,¹⁰¹ the Ninth Circuit held that an employer may have violated the federal wiretap statute, the Stored Communications Act, and the Railway Labor Act (RLA) by accessing a website set up by a pilot to protest the airline's effort to obtain labor concessions. Visitors to the site were required to log in with a user name and password, provided to employees but not management. Another pilot gave an airline vice president his name and password to view the site. The court found that the criticism of the airline on the website was protected union organizing activity under the RLA.¹⁰²

§ 31.2.4

D. UNION ORGANIZING WITHOUT AN NLRB-CONDUCTED ELECTION

In certain circumstances, an employer may be required to bargain with the union despite the fact there has been no election. This can happen in three ways:

- voluntary recognition of the union by the employer;
- a *Gissel* bargaining order; or
- a finding of successor status.

§ 31.2.4(a)

Voluntary Recognition & Card Check Agreements

If an employer has a reasonable basis for believing that the union represents a majority of its employees, it may choose to voluntarily recognize the union without an election. Union business agents often ask employers to review authorization cards. Such review may, standing alone, require voluntary recognition. As discussed above, the EFCA would essentially supplant the election process with the card check process. As also discussed above, in 2007, the Board did modify its “recognition-bar doctrine” modestly in an effort to safeguard the right of employees to determine for themselves, under the “laboratory conditions” of a Board-conducted election, whether they wish to be represented in collective bargaining by a union recognized by their employer.¹⁰³

A tactic that is becoming increasingly popular to coerce voluntary recognition is the use of the corporate campaign, discussed above. This is a sophisticated technique that has the advantage of leaving management at a loss in planning a response. The union (usually through an expert consultant) finds pressure points peculiar to the company (*e.g.*, a board member who favors unionism, or a hidden link to some political controversy). These pressure points are then exploited in an attempt to stifle the company's resistance to the organizing campaign. These tactics are popular among the Change to Win Coalition members, especially the SEIU and UNITE HERE, which estimate that 90% of the employees who joined the union

¹⁰¹ 302 F.3d 868 (2001).

¹⁰² See also *Lockheed Martin Skunk Works*, 331 N.L.R.B. 852 (2000) (employer did not commit objectionable conduct meriting the overturning of a decertification election by allowing decertification supporters to use company e-mail, but not clarifying that union supporters could also use e-mail during the election campaign).

¹⁰³ *Dana Corp./Metaldyne Corp.*, 351 N.L.R.B. No. 28 (2007).

in recent years were organized through card check agreements and voluntary recognition by management.

Similarly, unions are increasingly pressuring employers to enter into card check recognition agreements, whereby the employer agrees to forgo an election and recognize the union if the union is able to obtain authorization cards from a majority of employees. At times these agreements even require employer neutrality during the period of time in which the union attempts to collect the requisite number of cards. Oftentimes, a union will attempt to gain these concessions during contract negotiations, a process commonly referred to as “bargaining to organize.”

Unions unquestionably have more success in organizing employees via neutrality and/or card check agreements rather than recognition elections. One study found that unions’ success rates in organizing campaigns conducted pursuant to neutrality and/or card check agreements was 67.7%, compared to approximately a 50% union success rate in NLRB elections. Therefore, employers should carefully weigh any decision to enter into such agreements.

§ 31.2.4(b)

Gissel Bargaining Order

In *NLRB v. Gissel Packing Co.*,¹⁰⁴ the U.S. Supreme Court held that in certain circumstances, an employer may be required to bargain with a union, even if the union *never wins* an election. Generally, a *Gissel* bargaining order is limited by the NLRB and the courts to cases where: (1) the employer committed numerous and serious unfair labor practices (usually including discharges and threats); and (2) the union had previously collected signed authorization cards from a majority of the employees.

For example, in *ADB Utility Contractors Inc.*,¹⁰⁵ the employer discharged 13 pro-union employees. In response, the NLRB issued a *Gissel* bargaining order. The employer attempted to defend against the *Gissel* order on the grounds that it reinstated several of the discharged employees and that it was “making progress” toward rectifying its unfair labor practices. The Board upheld the order, noting that the employer’s reinstatement of merely two of the 13 was insufficient to justify overturning the *Gissel* order.

The NLRB generally will refuse to issue a bargaining order if an election is lost by the union and the union fails to file objections to the election. The Board also will not issue bargaining orders in cases where employers committed several unfair labor practices, but those practices were considered to be less serious (such as isolated interrogation of employees or minor changes in work rules).

The validity of the authorization cards evincing alleged majority status may be a critical issue in a bargaining order case. The Board’s rule is that when a card unambiguously designates the union as the employee’s collective bargaining representative, it will be deemed valid for purposes of establishing whether the union represents a majority of the employees. However, the employer may attack cards on the following grounds: (1) they were forged; (2) they were obtained through misrepresentations as to their meaning; (3) they were obtained through threats; (4) they were collected by supervisors; (5) the employees could not understand the cards; or (6) the cards are stale.

¹⁰⁴ 395 U.S. 575 (1969).

¹⁰⁵ 353 N.L.R.B. No. 21 (2008).

Another potential defense to a bargaining order is a change in circumstances. A federal court of appeals will sometimes deny a bargaining order due to the passage of time since the unfair labor practices or because of turnover in the workforce. In a dramatic development, former NLRB General Counsel Fred Feinstein has aggressively pursued interim injunctive relief requiring employers to bargain with a union, pending the final determination of a *Gissel* case. Employers could thus be forced to bargain with a minority union before the Board makes a final determination on the merits of a *Gissel* case.

§ 31.2.4(c)

Successorship

A successor's business is generally considered a continuation of its predecessor's business.¹⁰⁶ Therefore, under current Board law, when one employer is a successor to an employer that has a bargaining obligation, the successor will be required to continue the bargaining relationship with the union. No election is required to impose the obligation.

The key issue is whether the purchaser or new owner is a legal successor. This determination requires consideration of the following four factors:

1. continuity of the workforce;
2. continuity of the company's business;
3. continuity of the appropriate bargaining unit; and
4. the effect of a hiatus in the operations.

Of these four factors, the first is the most important, and the last is the least determinative.¹⁰⁷ In most cases, a purchaser will *not* be a successor if a majority of the employees are new (*i.e.*, they did not work for the seller).¹⁰⁸

The general rule is that a successor employer can unilaterally set initial terms and conditions of employment. However, this freedom ends either: (1) when the successor has hired a substantial and representative complement of employees; or (2) at an earlier time if the employer makes it clear that it plans to retain all the employees in the purchased unit.¹⁰⁹ Similarly, a successor is not required to assume a predecessor's labor contract unless it manifests consent to be bound.

¹⁰⁶ *Planned Bldg. Servs., Inc.*, 347 N.L.R.B. No. 64 (2006).

¹⁰⁷ *See, e.g., Straight Creek Mining, Inc. v. NLRB*, 164 F.3d 292 (6th Cir. 1998) (holding employer with continuity in workforce and in operations was a successor employer forced to bargain with union, despite a 54-month hiatus in operations).

¹⁰⁸ *See, e.g., Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987) (concluding that a purchaser is a successor employer if it "makes a conscious decision to maintain generally the same business and to hire a majority of its employees from its predecessor").

¹⁰⁹ *See, e.g., NLRB v. Burns Int'l Sec. Servs., Inc.*, 406 U.S. 272 (1972).

§ 31.2.5

E. THE DECERTIFICATION PROCESS – TRANSITION TO NONUNION STATUS

Decertification cases are initiated by an employee or group of employees filing a petition with the NLRB. The petition must be accompanied by evidence that it is supported by 30% of the employees in the unionized group. The hearing and election procedures that follow the filing of a decertification election are very similar to those followed when a union files a representation petition.

In certain circumstances, the NLRB will refuse to process a decertification petition. In fighting decertification efforts, unions will frequently attempt to claim that the petition must be dismissed for one of the following reasons:

§ 31.2.5(a)

Contract Bar

With the exception of a brief “window period” (see below), a decertification petition cannot be filed during the existence of a collective bargaining agreement. This so-called contract bar rule is designed to ensure stability during the life of a collective bargaining agreement. There is one exception to this rule: The contract bar is lifted after three years in the case of a contract that has a life of more than three years. This exception precludes a union from insulating itself indefinitely from potential decertification. Even the Clinton Board, in *Dobbs International Services, Inc.*,¹¹⁰ declined a union request to extend the contract bar period from three to four years.

In many cases, there is no question that a contract either exists or does not exist. More troublesome issues are presented when the decertification petition is filed on the same day that a contract is ratified, or in cases where the description of the unit in the petition is vague or ambiguous.

As noted above, the Board in 2007 modified the recognition bar doctrine with respect to unions certified via neutrality or card check agreements.¹¹¹ If the EFCA is passed in its present form (as of the date of publication of this book), card check certifications will have the same contract-bar effect as a valid election.

§ 31.2.5(b)

Missing the Window Period

There are only certain times that a decertification petition can be filed. As noted above, a petition generally can be filed only at a time when a contract is not in effect. However, employees also may file a decertification petition during a 30-day window period lasting from 90 days prior to the expiration of the contract to 60 days prior to the expiration (there is a 90 to 120-day window for health care employees). Obviously, an employee who is not familiar with this relatively obscure provision of the law would be likely to miss the crucial filing period.

¹¹⁰ 323 N.L.R.B. 1159 (1997).

¹¹¹ See *Dana Corp./Metaldyne Corp.*, 351 N.L.R.B. No. 28 (2007) and discussion at § 30.2.4(a) above.

If no decertification petition is filed during the window period, employees may have another opportunity to file a petition. The law allows a petition to be filed at any time when a contract is *not in effect*. Thus, if the union and the company have not reached an agreement on a new contract by the time the old contract expires, the window is opened again. A petition can then be filed any time before the parties agree on a new contract.

Sometimes, following recognition or certification of a union, an employer bargains with the union but fails to reach a contract. In such circumstances, a decertification election generally cannot be held for at least one year from the date of recognition or certification. Thereafter, if no contract is in effect, a decertification petition can be filed at any time. As discussed above, the Board's decision in *Dana/Metaldyne* limited, the existing doctrine that bars the filing of a decertification petition following a neutrality and/or card check agreement between the employer and the union.

§ 31.2.5(c)

Supervisory Involvement

Another possible impediment to a decertification petition is evidence that it was instigated, circulated or supported by an employer or its supervisors. As a general rule, any decertification effort must be free of coercive involvement by management. Traditionally, the Board has enforced this rule strictly, and has invalidated decertification efforts where it was proved that management gave financial support to the decertification effort or knowingly condoned the use of working time and company facilities to further the gathering of employee signatures for a decertification petition. However, in several NLRB cases, the Board refused to invalidate employee petitions circulated by low-level supervisors who were members of the bargaining unit.¹¹² The theory is that a fellow union member generally will not have a coercive effect on employees.

§ 31.2.5(d)

Blocking Unfair Labor Practice Charges

As with any other representation proceeding, the Board will not process a decertification petition if a blocking charge is filed. In the decertification setting, a blocking charge typically consists of an allegation by the union that a supervisor or manager has violated some provision of the NLRA — for instance, by threatening or unlawfully interrogating employees, making unlawful promises, or discharging employees in retaliation for their union activities.

When such a charge is filed, the NLRB normally will refuse to proceed with any pending election case unless the union specifically agrees in writing to proceed. Of course, if the charge is investigated by the Board and found to be without merit, the election case will be revived.

§ 31.2.5(e)

Employer Conduct During a Decertification Drive

As noted above, the Board rigorously enforces its rule against supervisory instigation or assistance in the decertification effort. This rule has particular application during the period of time prior to the filing of a decertification petition. Once such a petition is filed, an employer generally is free to state its views regarding continued union representation. An employer can

¹¹² See, e.g., *Indiana Cabinet Co.*, 275 N.L.R.B. 1209 (1985).

urge its employees to vote against the union in a decertification election. In *Lockheed Martin Skunk Works*,¹¹³ the Board held that the employer did not commit objectionable conduct meriting the overturning of a decertification election by allowing decertification supporters to use company e-mail, but not clarifying that union supporters could also use e-mail during the election campaign. The Board found that since the company's policy could reasonably be read to prohibit the decertification supporters' e-mails, and since the union was given authorization to send three mass e-mails but preferred to rely on more traditional means of communication, there was no interference with employee free choice in the election.

While the same general rules apply to employer statements during a decertification campaign and during a union organizing effort, there is one significant difference. The Board has held that it is permissible during a decertification campaign for an employer to inform employees that they will not suffer wage reductions or any loss of benefits if the union is voted out. This important difference, although little known and rarely discussed by the NLRB, can greatly alter the thrust of an employer's decertification campaign.

In many cases, decertification petitions are filed at times when an employer and a union are in the midst of bargaining for a new contract. For some time, the Board allowed an employer to suspend bargaining upon the filing of any decertification petition. That is no longer the rule. An employer may harbor a good faith doubt that a union enjoys majority support only if a majority of the bargaining unit's employees signs the petition. The Board requires an employer to continue bargaining with a union after a decertification petition supported by less than a majority is filed; if the parties reach a contract, the employer is bound by that agreement. Then, if employees subsequently vote to decertify, the contract is declared void.¹¹⁴

§ 31.2.5(f)

Alternatives to Decertification

Historically, the Board has recognized certain alternatives to the filing by employees of a decertification petition with the NLRB. Briefly, the principal alternatives are: (1) an employer petition for an election; (2) unilateral withdrawal of recognition; and (3) an employer-conducted poll of employees. However, a recent Board decision has cast doubt on whether at least one of these alternatives remains viable at the present time.

§ 31.2.5(f)(i)

An Employer Petition

In order for a unionized employer to file an election petition with the NLRB, the employer must have received objective evidence that a majority of the employees no longer wants to be represented by the union. Such evidence can come in various forms. Most often, however, the requisite objective evidence is a petition signed by a majority of the employees that states that they do not want the union as their representative. Armed with such a petition, the employer can request that the NLRB conduct an election.

Before an election is held, the NLRB will schedule a hearing. This hearing will provide the union with an opportunity to raise legal issues often designed to delay or prevent an election. The same risks apply as apply in an employee-filed decertification case. Generally, the election will not take place for at least six weeks after the petition is filed, and often much

¹¹³ 331 N.L.R.B. 852 (2000).

¹¹⁴ See, e.g., *Lee Lumber & Bldg. Mat'l Corp.*, 306 N.L.R.B. 408 (1992).

longer. During that time, the union can be expected to campaign among employees, and the employer should be prepared to conduct a campaign of its own.

§ 31.2.5(f)(ii)

Unilateral Withdrawal of Recognition

For years, many employers have avoided the NLRB election process by unilaterally withdrawing recognition of unions that have been repudiated by their employees. The federal courts have consistently held that an employer can simply stop dealing with a union if the employer can either: (1) prove that a majority of the employees no longer wants the union to represent it; or (2) show that the employer has a good faith doubt that the union represents a majority of the employees. The good faith doubt must be based on objective considerations.

In most cases, employers rely on the second alternative. Many factors can give rise to a good faith doubt but, again, the most common basis is an employee petition signed by a majority of the employees in the unit represented by the union. The petition must be instigated and circulated by an employee, not by a supervisor or manager. Once the employer receives such a petition, the union can simply be notified by letter that the employer no longer recognizes the union.

As with a decertification election, a unilateral withdrawal of recognition cannot occur in the middle of a contract. However, it can occur after the contract expires. During the last 60 to 90 days of a contract, an employer can unilaterally withdraw recognition of a union's right to negotiate a new contract. Nonetheless, the employer must continue to recognize the union's right to administer the existing collective bargaining agreement until the date of its expiration.

In 2001, the Clinton Board's decision in *Levitz Furniture*¹¹⁵ departed from the longstanding rule regarding unilateral withdrawal of recognition and held that an employer cannot withdraw recognition unilaterally when the employer has only a good faith doubt of union majority status. Rather, the employer must prove that a union has lost majority support. If *Levitz Furniture* remains good law, it is unclear whether employee petitions, standing alone, will justify a unilateral withdrawal of recognition.

Since *Levitz* was issued, the Board has never clarified the extent of its holding, and no federal courts have refused to apply the case. Thus, while employers may still wish to consider unilateral withdrawals, a degree of risk exists. Further NLRB and court decisions will be necessary to clarify what "proof" an employer must possess in order to withdraw recognition of a union.

§ 31.2.5(f)(iii)

Employee Polls

Almost two decades ago, the Board virtually eliminated polls as a practical means of showing that 50% of the employees no longer desire union representation. The Board held that a poll could be conducted only if the employer already had "valid objective" evidence that the union lacked majority status.¹¹⁶ Under that standard, the only time an employer could conduct a poll was when there was no need to do so. If the employer already had valid objective evidence

¹¹⁵ 333 N.L.R.B. 717 (2001).

¹¹⁶ *Hutchison-Hayes Int'l, Inc.*, 264 N.L.R.B. 1300 (1982).

that the union lacked majority status, the employer did not need to conduct a poll; the employer could simply withdraw recognition.

Several federal circuit courts of appeal, including the Ninth Circuit Court of Appeals, have overruled the Board in this regard, allowing polls when an employer has substantial objective evidence of a loss of union support even if that evidence is insufficient standing alone to justify withdrawal of recognition or petitioning for an election. These courts, however, still require that the polling be done with certain safeguards: (1) the poll's purpose must be limited to determining the truth of the union's claim of majority status; (2) this purpose must be communicated to the employees; (3) assurances against reprisal must be given; (4) the poll must be conducted by secret ballot; and (5) the employer must not have engaged in unfair labor practices or otherwise have created a coercive atmosphere. The Ninth Circuit also requires that the union be given notice of the time and place of the poll.

In January 1998, the U.S. Supreme Court issued a decision addressing whether the NLRB's good faith reasonable doubt test for employer polling is rational and consistent with the NLRA. In *Allentown Mack Sales & Service, Inc. v. NLRB*,¹¹⁷ the employer purchased an automobile dealership and retained 32 of the original 45 employees. Prior to the sale, the employees had been represented by the Machinists Union, Local Lodge 724. Before and immediately after the sale, some employees suggested to the new owners that the union had lost their support and the support of the bargaining unit in general. As a result, when Local 724 requested recognition and commencement of collective bargaining negotiations, the employer refused, claiming a good faith reasonable doubt as to the union's support. The employer also informed the union that it had arranged for an independent poll by secret ballot to confirm the company's good faith reasonable belief. The poll was conducted by a Roman Catholic priest and resulted in the union losing, 19 votes to 13. The union then filed an unfair-labor-practice charge with the NLRB.

Applying its objective reasonable doubt standard, the Board found that, despite the evidence presented by the employer (namely, the statements of seven employees regarding their own feelings toward the union, and the statement of two employees regarding the union's lack of support among the workforce in general), the employer violated the NLRA, because it conducted the poll without a good faith reasonable doubt about the majority status of the union. The court of appeals enforced the NLRB's decision and order. Upon review, the U.S. Supreme Court found in a 5 to 4 decision that, "although the NLRB's 'reasonable doubt' test for employer polls is facially rational and consistent with the Act," the NLRB had failed to apply this test in a reasonable manner in this case. Specifically, the Court determined that the evidence on the record simply did not support the NLRB's factual finding that the employer lacked the requisite doubt. Accordingly, the Supreme Court remanded the case to the court of appeal with instructions to deny enforcement of the NLRB's order.

Although the *Allentown* case demonstrates that the NLRB may not always apply its test in a consistent and reasonable manner, it also firmly establishes the requisite threshold for conducting an employee poll — namely, that the employer must possess a good faith reasonable doubt as to a union's majority status.

¹¹⁷ 522 U.S. 359 (1998).

§ 31.2.5(f)(iv)

The Taint of Prior Unfair Labor Practices

The three alternatives above share a common feature: They will work only at a time when the employees have not been influenced by an unfair labor practice committed by their employer. The NLRB historically has held that any unfair labor practice that has not yet been fully remedied will invalidate an effort to remove the union. However, some companies have successfully argued that some unfair labor practices, because they are minor or remote in time, are not sufficient to taint an employer's decision to withdraw recognition of a union.¹¹⁸

§ 31.2.5(g)

Deauthorization of Union Security

Although often overlooked, deauthorization of union security frequently becomes the first step toward decertification of a union as a bargaining representative. It is a Board procedure that allows employees to vote to extinguish the union's authority to impose union security membership and dues obligations as a condition of employment. If a majority of *eligible* employees (not a majority of those actually voting in the election) votes to rescind such authority, then the union security clause in the existing contract becomes unenforceable.

The election procedure for deauthorization is in many ways similar to the representation procedure. Employees file a deauthorization petition with the NLRB, supported by at least a 30% showing of interest. Contract bar rules do not apply, so there is no time limitation for the filing of the petition. Another distinction is that the majority necessary to achieve deauthorization is a majority of the eligible employees, whether or not all of the employees actually vote. This is in contrast to representation elections, where the prevailing majority need only be a majority of valid votes cast. If the deauthorization of union security is accomplished, the union remains as the collective bargaining representative of the unit; it is, however, no longer entitled to enforce union security provisions.

§ 31.2.6

F. MANAGING THE UNION-FREE WORKFORCE

§ 31.2.6(a)

The Importance of Communication

Successful union-free management provides workable avenues of two-way communication between management and employees. The following are some of the more typical features of such communication, as well as the legal concerns they generate.

¹¹⁸ See, e.g., *Lee Lumber & Bldg. Mat'l Corp.*, 322 N.L.R.B. 175 (1996) (noting that “not every unfair labor practice will taint evidence of a union's subsequent loss of majority support”).

§ 31.2.6(b)***Two-Way Communication Techniques*****§ 31.2.6(b)(i)*****Open-Door Complaint Procedure***

As stated earlier in this Chapter, employees should have a known and acceptable channel for voicing complaints and asking questions related to their work. Otherwise, undiscovered problems such as unfair favoritism by a supervisor will fester unresolved, ruin morale, drive off good employees, and open the door to a union-organizing drive.

There is no ideal complaint procedure. The most effective procedures allow multiple means of access to problem-solvers such as supervisors, trusted higher-level managers, the personnel department, or popular corporate officers. The objective is to air and resolve the problem, thereby reinforcing the perception that management is fair and will fix problems if there is a reasonable way for it to do so. Management that becomes too fussy about the form or channel of the complaint may lose sight of this objective. Management must also realize that shortsighted supervisors may try to suppress complaints or retaliate against employees who raise questions. Therefore, although employees should be encouraged to go to their supervisor first, management should not insist on following the chain of command for complaints. Employees must be told, and the employer should repeatedly demonstrate, that problems should be brought up and that employees are supposed to try to get problems fixed.

A complaint procedure does not mean that management must solve every problem to the employee's satisfaction. Often the fact that management simply listened and gave a reasonable explanation or response, but not necessarily the ideal answer from the employee's point of view, satisfies the employee's desire for fairness.

§ 31.2.6(b)(ii)***Top-Down Information***

Employees should be told important information about the company at or before the time the information becomes public knowledge. This shows to employees that they are a part of the company. If employees realize that they are a part of the company, rather than "just employees," they will care about what happens to the company. Top management should develop the habit of communicating both good news and bad news through levels of supervision. The result is that employees will look to their supervisor as a more reliable source of information than the "grapevine."

§ 31.2.6(b)(iii)***Attitude Surveys***

Attitude surveys are a formalized system of giving controlled feedback to management about employee opinions. Such surveys can be simple or highly technical, but the best are anonymous, regularly conducted, and include feedback of results to employees soon after the survey is taken. Although management will use the results for its own information about problem issues, employees also want to see what they think as a group. Obviously, management cannot report problematic results without also explaining how those problems will be addressed.

§ 31.2.6(b)(iv)

Other Communication Techniques

The job interview and new employee orientation are valuable communication tools as well. Many nonunion employers are very open with job applicants and new employees about the company's philosophy on unions. For instance, the employee handbook may contain a frank statement about why the company does not believe that a union is necessary or desirable. This statement can be one of the first things that a new employee reads after starting on the job. If such a statement is included in the employee handbook, there should also be a clear statement that no disciplinary action or other retaliation will be taken against employees who support a union.

Many companies also spend time explaining company benefits and policies to all new employees. The advantage of an early, in-depth explanation is that it avoids later confusion or disillusionment. In fact, unless a major communication effort is made, many employees often remain ignorant of the benefits they are receiving. New employees can also be encouraged to use existing company complaint procedures, or to take advantage of an open-door policy.

Another effective communication device is a company newspaper or intranet web page with an active "letters to the editor" section. This provides another avenue for eliciting employee complaints.

§ 31.2.6(b)(v)

Legal Cautions in Communicating to Employees

Certain communication devices can subject employers to liability under the NLRA, whether or not there is an ongoing union organizing campaign. However, these limits, described below, do not overcome the value and importance of proper communication with employees.

§ 31.2.6(b)(vi)

Quality Circles

Although touted more as a device for enhancing productivity than as a communication device, quality circles perform both functions. They operate to provide a framework for employees in the same work group to get together and figure out problems to promote greater work efficiency. They function not to address employee relations problems, but rather production problems, such as how to get spare parts to the operator more quickly or how to identify defects in workmanship. Ideally, a quality circle is managed by a facilitator supervisor trained to help the group accomplish the task. Effective quality circles not only perform the productivity task but also provide a solution to the typical employee complaint, "No one ever listens to my ideas."

Generally, it appears that most forms of quality circles currently in use by nonunion employers do not present a legal problem under the Act. Typically, all employees participate in a quality-circle program, meeting on a regular basis in small groups to discuss improvements in methods of operation, maintenance, safety, and production issues. As quality circles generally do not address issues of wages, hours, and working conditions, it would be difficult to argue that they constitute any kind of violation.

In circumstances where quality circles do discuss wages, hours, or working conditions, there is still a strong legal argument that the Act is not violated. Because all employees participate in quality circles on an equal basis, and no representatives or spokespersons are elected by the

employees, it does not appear that a quality-circle program establishes an employee “labor organization” within the meaning of section 2(5) of the Act.

Moreover, if employees merely present suggestions or voice concerns on wages and benefits during a period when no union organizing campaign is underway, it would be difficult to argue that any provision of the NLRA has been violated. The NLRB has long recognized that the mere solicitation of grievances itself does not violate the law; rather, such solicitations are only objectionable where their timing raises the implication that the company has made implied promises to employees in order to thwart a union-organizing drive. Thus, in the absence of an ongoing union-organizing drive, the mere fact that quality circles allow employees to raise grievances regarding wages, hours, and working conditions should not pose a legal problem.

§ 31.2.6(b)(vii)

Employee Committees/In-House Unions

For the last decade, employers have often run afoul of the NLRA when they establish employee committees consisting of representatives designated to speak on behalf of the employees. In *Electromation, Inc.*,¹¹⁹ the Board held that setting up action committees to deal with a variety of workplace issues violated section 8(a)(2) of the Act because the committees were labor organizations dominated and supported by management.

A violation of section 8(a)(2) has not been difficult to establish. Two basic elements are necessary. First, there must be an employee group — typically *elected* by employees or *chosen* by management — which is a “labor organization” and is designed to “deal with” management concerning wages, grievances, work stoppages, hours, and working conditions.

The second element necessary is employer domination or assistance. This can be established by showing that the company wrote the committee’s charter or bylaws, helped the committee conduct elections, scheduled committee meetings, provided space for committee meetings, or allowed the committee to meet during working time.

The Board’s *Electromation* decision proved to be universally unpopular. In July of 2001, the Board issued its decision in *Crown Cork & Seal*,¹²⁰ which cut back somewhat on *Electromation*. In *Crown Cork & Seal*, the employer delegated to workplace committees the authority to operate the plant within certain parameters. In holding that the committees did not violate section 8(a)(2), the Board stated that the workplace committees were not labor organizations “because their purpose is to perform essentially managerial functions, and thus they do not ‘deal with’ the [employer].”¹²¹ So far, the case has not been discussed in any subsequent Board decision or by any court. A number of administrative law judges have applied it, however, and found no violation of section 8(a)(2). However, at least one of the decisions reasoned that, although not violative of section 8(a)(2), the employer’s conduct did constitute a failure to bargain, and thus was violative of sections 8(a)(1) and 8(a)(5). What ultimately becomes of *Electromation* remains to be seen.

¹¹⁹ 309 N.L.R.B. 990 (1992), *enforced*, 35 F.3d 1148 (7th Cir. 1994).

¹²⁰ 334 N.L.R.B. 699 (2001).

¹²¹ *Id.* at 701.

§ 31.2.6(b)(viii)

Advisory or Adjudicatory Employee Committees

An employer can, however, permissibly establish and control employee committees that perform certain advisory or adjudicatory functions. The law concerning such committees is still developing, but both the NLRB and the courts have recently defined certain parameters for the establishment of such committees.

First, the Board has held that the establishment of a group of employees who sit as a “jury” to adjudicate the merits of grievances relating to discharge and discipline is not a violation of the Act.¹²² The Board’s rationale for this decision is that adjudicatory committees do not bargain with management; rather, such committees make decisions without employer input. In addition, the committees do not discuss wages, hours, or working conditions with management. However, in one case, the committee could forward recommendations to management — recommendations to which management had no obligation to respond — regarding work rules and benefits. By contrast, in another case, where management pledged to consider the employee committee’s recommendations regarding the terms and conditions of their employment, the NLRB disbanded the committee, set aside a prior representation election in which the workers voted against unionization, and ordered that a new election be held.

Similarly, the Board has found that a “disciplinary committee” that reviewed discharges and discipline was unlawful where the committee had also drafted work rules and met with management regarding the work rules. It was this latter fact — and not the committee’s role in adjudicating discipline and discharge cases — that rendered the committee unlawful.

The Board has also indicated its interest in examining whether the employee committee has engaged in a “pattern and practice” of discussing mandatory subjects of bargaining. If the committee generally discusses “permissive” subjects of bargaining, but only sporadically touches on issues concerning wages, hours, or working conditions, the committee might not be violative of the Act. For example, in one instance, the Board found that the creation of an employee handbook committee, commissioned to review the company handbook to determine its consistency with actual company practices, did not violate the Act even though the committee discussed mandatory bargaining subjects on one occasion. In another case, a quality-circle group’s brief deviation from discussing operational issues in order to discuss a dress code and an accident point system was permissible, in part because it was considered to be an “isolated incident in the long life [three years] of the QCG.”¹²³

Both *Electromation* and recent court decisions suggest that an employee committee that is strictly advisory in nature will not violate the Act, *even if the committee is dominated by the employer*. Where the committee functions as a communications device for the purpose of “defining and identifying problem areas and eliciting suggestions and ideas for improving operations,” the committee should not be found to be unlawful. Even where the committee’s purpose is to develop information and make suggestions to the company on wages, benefits, and working conditions, the committee should be found lawful, so long as the company does not “deal with” the committee by negotiating or specifically responding to its suggestions.

¹²² See *Mercy-Mem’l Hosp. Corp.*, 231 N.L.R.B. 1108 (1977).

¹²³ *Vons Grocery Co.*, 320 N.L.R.B. 53 (1995) (noting the subsequent discussions between management and the union prior to the implementation of these programs militated against a finding of unlawfulness).

§ 31.2.6(b)(ix)***Attitude Surveys***

As a general rule, the Board and the courts have recognized that attitude surveys are a permissible management tool for discovering problem areas, including dissatisfaction with wages and benefits. However, attitude surveys have been found to be unlawful when administered during a union-organizing drive and in such a manner as to suggest that management might remedy problems it detects from the survey.

For instance, in one NLRB case, an attitude survey that was administered after a union-organizing campaign had begun was found to violate section 8(a)(1) of the Act.¹²⁴ There, the memorandum accompanying the survey promised that the employer would review employee responses and try to make improvements in areas in which there had been criticism.

In another case, the Board upheld an attitude survey that was taken during a union-organizing effort, in light of uncontradicted evidence that the survey was planned before the employer had any knowledge of organizing activity. In the same case, however, the Board found unlawful the distribution of new forms on which employees could report grievances during the pendency of a union demand for recognition. Presumably, the same forms could have been distributed at an earlier time, when they would not have been viewed by employees as an implied promise of change designed to thwart the union's organizing campaign.

Another decision found unlawful an employer's practice of having supervisors regularly record their impressions of employee attitudes on unionization. The employer had engaged in a "campaign of surveillance and interrogations," which the court found was intended to intimidate employees who might support the union. In the midst of such a campaign, the court found it impermissible for supervisors to privately maintain lists of employee attitudes on unionization, reasoning that this practice might cause fear of retaliation among the employees. It is unclear whether the same result would have been reached if the survey of supervisors had occurred in the absence of other coercive practices.

§ 31.2.6(c)***Performance Evaluations***

For purposes of job security and satisfaction, employees should be told on a regular basis what the company thinks of their work. Supervisors should continually give instant feedback on unusually good or bad performance, but a regular formal system of feedback reinforces the message.

§ 31.2.6(d)***Merit-Based Pay***

Fair and regular performance evaluations can form the basis for a merit-pay system of compensation. Merit-pay systems encourage employees to understand that they are paid for making the company productive, rather than just for accruing seniority on the job.

Certain merit-pay systems have recently come under attack. Among other things, employees may argue that an employer is using a merit-pay system to discriminate against certain

¹²⁴ See *Camvac Int'l*, 288 N.L.R.B. 816 (1988).

employees. Accordingly, legal guidance should be sought before implementing such a system.

§ 31.2.6(e)

Fair Discipline System

A progressive discipline system should be integrated into a performance evaluation system. The company should strive to provide “due process” to employees, by making them aware in advance of what standards of performance and conduct are expected. Employees should also be fully aware of the levels of discipline that will correspond to a failure to meet those standards. The system must not only be fair, but it must be perceived as fair by employees. Employees should feel free to “appeal” any discipline by using the complaint procedure. This will monitor and control supervisor favoritism, as well as unusually harsh supervisors. However, such a system could, in certain states, compromise an employer’s at-will status.

§ 31.2.6(f)

Supervision

Supervisors in a nonunion setting may have more responsibilities than supervisors of unionized employees. Although supervisors in a unionized operation must follow contract grievance procedures, nonunion supervisors also must participate in the administration of complaint procedures. Nonunion supervisors must also assume the roles of listener, counselor and problem-solver. Because the communication function of the nonunion supervisor is expansive, on going effective training in employment relations is necessary.

The front-line supervisor in a nonunion setting is a pivotal management representative. Should union organizing occur, these supervisors can provide a means of positive communication between management and employees. On the other hand, as mentioned above, inadequate front-line supervision can cause employees to seek union representation.

§ 31.3

**III. PRACTICAL RECOMMENDATIONS FOR
HANDLING A UNION ORGANIZATION DRIVE**

§ 31.3.1

A. RESPONDING TO AN ORGANIZING DRIVE

Needless to say, the simplest way to win a union-organizing drive is to manage the workforce in a fair manner, so that employees are not motivated to seek a union or to fall prey to union promises. Nonetheless, all members of the management team need to be sensitive to the early warning signs of union activity and the rules for responding to such activity.

§ 31.3.1(a)

Recognizing the Subtle Signals of Union Activity***Communication Problems***

Union activity often stems from communication problems between management and employees. These communication problems may result from employees being unwilling or unable to communicate their concerns to management, or the problem may simply be management's failure to communicate adequately the reasons for its actions. Employees turn to unions when they feel unable to approach management with their concerns. An active open-door policy is a company's best means of ensuring employee interaction. Employers with such a policy should remind employees of management's availability to discuss matters.

It is equally important that management communicate its thoughts to employees. If an employer fails to communicate why it is taking a particular action, it should not be surprised when employees misunderstand its motivation. A failure to communicate creates a void which employees fill with their own perceptions or misperceptions. Employee misperceptions can often lead to dissatisfaction and distrust.

Employee Group Discussions Immediately Stop When a Supervisor Approaches

As discussed earlier, union organizing generally is kept quiet at the start of a union drive. A considerable increase in the number of employee group conversations and the tendency for discussions to stop suddenly when a supervisor approaches may indicate that a union drive is in progress.

Employees Begin Spending More Time on Their Breaks

When a union drive is underway, especially in its early stages, there is usually a great deal of discussion, inquiry, curiosity, and debate. Much of this occurs during breaks and meal periods, often delaying employees in returning to work.

Changes in Employees' Normal Work Patterns

Any change in employees' normal work routines, such as taking lunch breaks at different times or places, or interacting with different groups of employees during the day, could be an indicator of union activity. Be aware of employees never seen together who suddenly start associating with one another. A major goal of union organizing is to bring all employees together for a common cause.

A New Leader Appears

Every work location has one or more employees who command the respect and trust of their coworkers. When those dynamics suddenly change and a new leader appears, he or she may be the primary union organizer in the company. The new leader may be the one who made the first union contact, or perhaps someone the union planted in the facility to organize the employees.

Employees No Longer Talk to Their Supervisors

To prevent disclosure of union activity, the union may instruct employees to avoid nonwork-related conversations with supervisors. Another reason for a decline in communications may be that employees feel awkward about their union involvement. In

addition, management may have been characterized by the union as “villains,” thus driving a wedge between management and the employees.

Employees Start Asking About Improving Their Wages, Benefits or Working Conditions

A union will promise employees substantial improvements in wages, benefits, and working conditions. While employees normally will not start demanding changes, they may raise questions about why their pay rates are somewhat different from those of a nearby competitor. If those types of questions start coming from several employees simultaneously, it may be a warning sign of union activity.

Employee Complaints Increase

In order for the union drive to be successful, the union must stir up dissatisfaction among employees about their wages, benefits, working conditions, and supervision. The union will attempt to make employees feel that they have been deprived and exploited. A sudden increase in complaints may signal this activity.

A Noticeable Division Among Employees Develops

Tension and hostility may result between employees who are supportive of the union and those who are not. If there is an unexplained tension between groups of employees, this might be the explanation.

The Language of the Facility Changes

Be sensitive to the sudden use by employees of union terms such as “seniority,” “grievance,” “bumping,” and “job bidding.” Similarly, be sensitive to changes in the topics of employee discussions, such as a sudden focus on health insurance, pension plans, and job security.

Union Authorization Cards Are Solicited or Other Union Materials Are Distributed

The solicitation of union authorization cards or the distribution of union handbills or leaflets is, of course, the clearest indication that a union drive is underway. This activity may occur on or off company property and during or after regular working hours. It may involve employees and/or outsiders.

What to Do with Union Authorization Cards

It is absolutely imperative that management be instructed not to look at any signed union authorization cards that are sent or given to them. The NLRB has held in a number of cases that supervisors reviewing authorization card signatures and expressing their belief that the signatures are genuine can constitute union recognition without the necessity of an election.¹²⁵ Accordingly, under no circumstances should management look at the authorization cards or make any statement about them. Management should not comment on whether or not there is a majority and should not make any comments about having a secret-ballot election. Management should simply tell the presenter of the cards that he or she should contact the NLRB.

¹²⁵ See *Richmond Toyota*, 287 N.L.R.B. 130 (1987).

§ 31.3.1(b)

No-Solicitation/No-Access Policies

In a landmark decision, the U.S. Supreme Court held that nonemployee union organizers do *not* have a right to access an employer's private property to distribute leaflets or solicit authorization cards.¹²⁶ The Court held that an employer may bar nonemployee organizers from its private property when it consistently applies a rule denying access to outside groups and where the union has alternative means of communicating with the targeted employees. In *Lechmere*, the Court returned to the one-factor test set out nearly 40 years ago in *NLRB v. Babcock & Wilcox Co.*¹²⁷ In that case, the Court held that nonemployee organizers ordinarily will not be permitted on private property for the purpose of organizing, unless the union lacks reasonable alternative means to contact the employees.

It is difficult for unions to show that they lack reasonable means to communicate with employees. For example, the Board found that the company's refusal to turn over to a union the names and address of computer technicians scattered across eight states did not violate the NLRA. The Board concluded that the union failed to demonstrate that it had no other reasonable means of communicating with employees because it already had in its possession the name of some employees that could help the Union identify and contact the rest of the unit.¹²⁸

Union organizers can stand outside the gate or near driveways, contact employees by phone, send letters and e-mail, and otherwise communicate with the targeted group. Employers must be careful, however, to ensure that private property rules are consistently applied to *all* nonemployee solicitors, not just to union organizers. An employer cannot ban union organizers from its property if it allows organizations such as charitable groups to solicit on its grounds. Moreover, employers in states like California with broader free speech rights and/or weaker property rights may need to take extra precautions and consult legal counsel before excluding union organizers in questionable circumstances.

The *Lechmere* decision is extremely unpopular with organized labor.

Because of changes in the case law, considerable confusion has marked the area of no-solicitation policies in recent years. At the moment, the Board is adhering to the following rules:

- Solicitation of or by employees (which includes prounion campaigning and solicitation of authorization cards) can be prohibited during *working time*. Although working time is defined by the Board to exclude meal and break periods, it is not necessary to specifically include this definition in a written policy so long as the term *working time* is used.
- Union organizers can be denied access to all private company property where other outside solicitors have traditionally been barred. Such a rule is lawful so long as it is consistently applied and the union has other reasonable means to communicate with employees.

¹²⁶ *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992).

¹²⁷ 351 U.S. 105 (1956).

¹²⁸ *Technology Serv. Solutions*, 332 N.L.R.B. 1096 (2000).

- A no-solicitation rule may not be enforceable if implemented for the first time during a union-organizing campaign. However, an employer may adopt a valid rule during a union campaign if the rule is not intended to discriminate against the union.

One word of caution: Because of the frequent changes in the law, employers should obtain legal guidance before promulgating no-solicitation rules or before relying on a rule to discipline or discharge an employee.

§ 31.3.1(c)

Permitted & Prohibited Action by an Employer During a Union-Organizing Drive

Once there is an indication of union activity, management must react quickly to identify the reason for the union activity. There are certain lawful steps that can be taken to identify and respond to employee concerns, but management should discuss these steps with competent labor counsel before taking action. An improper step may constitute a violation of the NLRA.

For that reason, one of the most important first steps for management to take in response to an organizing drive is the scheduling of a meeting with all members of the management team, including every individual who is a supervisor or potential agent of the company. This type of meeting is helpful because it is an excellent opportunity to figure out what is motivating the employees' discontent. More importantly, it is critical that every member of management receive careful instructions as to what they can and cannot say and do during a union-organizing campaign. Errors can lead to unfair labor practices and can create employee morale problems. Charges of unfair labor practices can undercut campaign themes, can be costly to defend, and in certain circumstances can result in an order directing the company to bargain with the union. All supervisors need to be aware of the restrictions on companies in dealing with an organizing campaign.

§ 31.3.1(c)(i)

Written or Oral Communication to Employees

An employer is permitted to communicate to employees its views concerning a labor union. However, supervisors must be careful about what they say and the circumstances in which they say it. The following are the most important things to remember. The acronym "T.I.P.S." can help supervisors remember these prohibitions:

T. Supervisors must not *threaten* employees with harm or reprisals (economic or otherwise) if they decide to sign a union card, join or vote for the union. As an example, supervisors may not threaten to close down operations if the union wins an election.

I. Supervisors should not *interrogate*, or ask, any employee whether or not he or she favors the union, has signed a union card or has gone to a union meeting. Supervisors should not question employees at all about their attitudes or activities relating to the union.

P. Supervisors must not directly or indirectly *promise* any benefits or reward employees for refusing to sign a union card, staying out of the union, or voting against the union. For example, supervisors may not promise employees a wage increase if they decline to sign up with the union or if they vote against the union. Such an inducement to employees to

encourage them to withdraw or repudiate union authorization cards is also unlawful. Supervisors may not solicit grievances about working conditions while expressly or impliedly promising corrections. It is lawful to listen to employees who mention their grievances or suggestions for improving conditions. It is unlawful to promise an improvement. Supervisors should stay within the bounds of management's established grievance procedure and inform employees that they cannot make any promises concerning the grievances raised.

S. Finally, supervisors may not conduct unlawful *surveillance* of employees. For example, supervisors cannot park outside a union meeting to see which employees attend the meeting, or even give the impression of such surveillance.

§ 31.3.1(c)(ii)

Avoiding Discrimination Against Employees Who Are Engaged in Union Activity

Supervisors need to understand clearly that management wants to win the election campaign by acting within the law, and that management will not tolerate any unfair acts toward union supporters. Nothing backfires faster in a campaign than a poor disciplinary decision. It is the right of each employee to sign or not sign a union card, favor or not favor a union, and vote for or against the union, as he or she sees fit. Therefore, supervisors may not discharge or otherwise discriminate against any employee because he or she favors, or votes for, a union.

While supervisors may not consciously violate this rule, there is one practical consequence which they must remember. As soon as supervisors become aware of a union-organizing campaign, they must be very careful in dealing with all discharges and other disciplinary measures. Supervisors must be sure that they have good cause for any discharge or discipline and that the cause is completely unrelated to any union considerations. It is very embarrassing for an employer to discharge an employee for a borderline reason and then find out that he or she was the leading union adherent in the company. The NLRB is very suspicious in such circumstances and will often assume that the discharge was based upon improper union considerations.

This does not mean that supervisors should stop disciplining employees simply because a union has come upon the scene. However, it does mean that the cause for discipline or discharge should be sound, and supervisors should be able to document the cause.

§ 31.3.1(c)(iii)

Controlling Employee Union Activity

Supervisors need to be aware of the company's rules on solicitation and distribution of literature by employees. There can be no blanket rule prohibiting union activity in the workplace. Such a rule is *per se* unlawful. Working time is for work, however, and an employer has an absolute right to insist that employees refrain from engaging in union activity during their working time. Of course, supervisors must not discriminate. Supervisors cannot permit those who are against the union to campaign during working time and block those who favor the union from doing so. The rule should be that during working time, employees should not engage in any union activity, either for or against. However, employees must be informed that working time does not include meal and break periods.

During employees' free time (lunch periods, coffee breaks, and so forth), supervisors may not prevent employees from engaging in union activity on the company's premises. Employees may be prevented from bothering other employees who are working, but supervisors cannot stop employees from talking about the union on their own free time.

Sometimes union literature being passed out by employees on company premises creates a litter problem. If this happens, employers are entitled to promulgate a reasonable rule prohibiting such literature. However, an employer should not assume in advance that a litter problem will occur and establish a blanket rule forbidding the passing out of union literature on company premises by employees. Supervisors can lawfully prohibit employee distribution of union literature *in work areas at any time*, provided the rule is uniformly applied against both prounion and anti-union literature. But remember, employees can be prohibited from soliciting *only during working time*. According to the NLRB, handing out union authorization cards is a form of *solicitation* rather than *distribution*.

§ 31.3.1(c)(iv)

Changes in Wages or Fringe Benefits During a Union-Organizing Campaign

Once management has knowledge that there is a union-organizing campaign going on, it should not make changes in wages or fringe benefits for the purpose of influencing the election or the outcome of the organizational campaign. Granting discretionary benefits during an ongoing organizing campaign may constitute grounds for ordering a rerun election, unless the benefit was objectively too minor to be able to affect the results of the election or unless the employer can provide a legitimate explanation for the timing of the benefit.¹²⁹

What management may, or may not, do will depend on the particular circumstances. For example, management should not give any new, unprecedented general-wage increase until the election has been held and the results decided.¹³⁰ On the other hand, if the union's effort to sign up employees continues over a long period, management cannot be expected to hold off changes in wages and fringe benefits for an unreasonable period of time.¹³¹ Management can also unveil information about existing benefits during the election campaign, as long as the information was not withheld beforehand as part of a strategy to announce them during the campaign.¹³²

Generally speaking, the Board will look at the entire factual background of each case to decide whether the changes in wages or fringe benefits have been made for the purpose of influencing the results of the union election or organizational campaign. They will also consider the magnitude of the benefit, the number of employees receiving the benefit, how employees would reasonably view the purpose of the benefit, and the timing of the benefit. If

¹²⁹ See *B & D Plastics, Inc.*, 302 N.L.R.B. 245 (1991).

¹³⁰ See, e.g., *Amera Prods., Inc.*, 323 N.L.R.B. 701 (1997) (setting aside the election results and ordering a second election because the employer announced improved health insurance and vacation benefits on the eve of the election); *Brown City Casting Co.*, 324 N.L.R.B. 848 (1997) (setting aside the election on the ground that the employer failed to provide a legitimate business justification for announcing improved insurance benefits on the eve of the election).

¹³¹ See, e.g., *Adams Super Mkts.*, 274 N.L.R.B. 1334 (1985) (finding that the employer committed no violation of the NLRA by announcing and implementing an improved medical plan just days before the election, where the improvements had been considered and planned long before the union filed its representation petition and that the election was not held until approximately a year and a half after the union first began organizing employees).

¹³² *Beverly Enters., Inc. v. NLRB*, 139 F.3d 135 (2d Cir. 1998).

the company has a regular annual program of giving wage increases or merit increases at a certain time or if a general increase has been previously announced to be given at a certain date, management can — indeed, may be required — to put the increase into effect. What the employer can or cannot do will depend upon the facts at the particular time. This is a very sensitive area of the law, and employers should consult legal counsel before implementing any change in wages or benefits during an organizing drive.

§ 31.3.1(c)(v)

Encouraging Employees to Vote

Employers may decide they wish to actively encourage employees to vote in the election. However, recent NLRB decisions highlight how careful employers must be in their efforts to encourage employees to vote in a representation election.

The NLRB overruled earlier board decisions and has determined that election-day raffles are illegal. In *Atlantic Limousine, Inc.*,¹³³ the NLRB ruled that the company engaged in objectionable conduct by running a raffle for employees on the day of the election. The Board adopted a *per se* rule that now prohibits both unions and employers from conducting election-day raffles if: (1) eligibility to participate in the raffle or win prizes is in any way tied to voting in the election or being at the election site on election day; or (2) the raffle is conducted at any time during a period beginning 24 hours before the scheduled opening of the polls and ending with the closing of the polls.¹³⁴

Merely promising to provide food and beverages at a post-election victory party, however, may not necessarily be considered coercive or destructive of an atmosphere in which free choice can be made.¹³⁵

§ 31.3.1(d)

The Employer's Lawful Campaign Topics & Strategies

While there are a number of restrictions on employer activity during an organizing drive, an active campaign is vital to winning any election. Topics chosen for discussion during the campaign must address the needs of the employees, must inform them of the union's motivation, and must educate them regarding their rights. Most importantly, campaign topics must be narrowly tailored to meet the actual questions and concerns of employees. Unfocused attacks on the union can be counterproductive. The following is a short list of potential campaign issues and topics for discussion.

The Union Is a Business

Explain that the union is a business and is dependent upon its members' dues, initiation fees, and assessments for its existence. To increase its income, the union must increase its membership. Supervisors can indicate that the union's interest in new membership is the real reason they are interested in the employees.

¹³³ 331 N.L.R.B. 1025 (2000).

¹³⁴ See also *Comcast Cablevision-Taylor v. NLRB*, 232 F.3d 490 (2000) (union unduly influenced voters by offering a free trip to Chicago so employees could attend a union meeting on cable industry issues); *River Parish Maint., Inc.*, 325 N.L.R.B. 856 (1998), (employer who required, and paid, employees to attend an off-site campaign meeting and "crab boil" two days before the election unlawfully interfered in the election).

¹³⁵ See *Raleigh County Comm'n on Aging, Inc.* 331 N.L.R.B. 734 (2000).

Company Philosophy

Describe the company's employee relations philosophy. Point out that the company is pro-employee, not anti-union. Emphasize that the company respects its employees' rights and will honor its employees' choice, but that there are important reasons why a union would not be in the best interests of all concerned.

Point Out Benefits

Point out all the benefits that the employees now enjoy, such as holidays, paid vacation, sick leave, medical insurance, dental insurance, and other benefits that are not regularly reflected in their paychecks. Be sure, however, to avoid promising future benefits. Also be sure not to withhold information about existing benefits, only to reveal it during the campaign, as part of a campaign strategy.¹³⁶

Union Promises

Tell employees that during the campaign the NLRB permits the union to make promises, but the company is forbidden from doing the same. The reason for this difference lies in the belief that employees will recognize that the union makes promises solely to promote themselves and cannot make them come true without the employer's cooperation. By contrast, it is generally assumed that the company can deliver on its promises.

Declines in Union Membership

Inform the employees that in recent years union membership has been declining as a result of unions' failure to satisfy the needs of their members. Over the past several decades, unions have lost members as the country's workforce has grown.

Job Security

Point out that the union cannot provide job security. The only real job security comes from a healthy company.

Negotiation Process

Let the employees know how the negotiation process works. Should the union win the election, all that it gets is the right to bargain. All the company is required to do is to bargain in good faith. The company is not required to concede on any particular issue, and there is no requirement that agreement ever be reached.

Strikes

Let the employees know that they might be forced to strike. If there is a strike, employees can lose wages and benefits. Also, during a strike, employees will generally not be able to receive unemployment insurance benefits (if true in the particular state). Moreover, it is lawful to explain that the company has the right to replace employees out on an economic strike, with strikers being placed on a preferential recall list. However, this must be done with great care. There is a fine line between discussing striker replacement and threatening employees with the loss of their jobs.

Distribution of handbills during an organizing drive warning of the possibility of "long, bitter negotiations" and "a long and ugly strike" may be lawful but only because the handbill does

¹³⁶ *Beverly Enters., Inc. v. NLRB*, 139 F.3d 135 (2d Cir. 1998).

not contain any threats or coercion, is based on objective facts, and acknowledges the company's obligation to engage in collective bargaining.¹³⁷

Compensation

Determine whether compensation is a key issue. If it is, point out that employees are already compensated competitively for similar work in the industry.

Election Process

Employees need to know how the election process works. Explain the card-signing process (if not done earlier), petitions for elections, the NLRB's role, secret ballots, and the importance of voting.

25th Hour Speech

The 25th hour speech is usually given by a top member of management before the election. The speech must be completed at least 24 hours before the election begins and is used to summarize the company's position on all the campaign issues.

§ 31.4

IV. ESSENTIAL TOOLS FOR DEALING WITH A UNION ORGANIZING DRIVE

Creativity and communication are key in responding to any union organizing campaigns. Employers should be proactive and should tailor their response to the needs and desires of their workforce. Employers should also keep in mind the legal "do's and don'ts" of any organizing drive:

§ 31.4.1

A. DO'S & DON'TS IN A UNION ORGANIZING DRIVE

It is extremely important in any preelection period that the company supervisors and other management personnel know what they can and cannot say on the issues. The following list is provided as a guideline for use by supervisors and management personnel during a union organizing drive.

You Can:

- Tell your employees that the company prefers to remain nonunion and that you would like them to vote "NO" [a "NO" vote is a vote against the union in an NLRB election].
- Tell your workers that they are free to support the union or not, as they see fit, but you hope they vote against it.

¹³⁷ *General Elec.*, 332 N.L.R.B. 919 (2000) (Board noted that the employer's reference to "miles apart" bargaining positions only contrast the existing terms and conditions for unrepresented GE employees with the provisions in the current contract the union had with GE's represented employees, and therefore merely reflected an industrial reality that employees are capable of understanding).

- Emphasize that you are not asking employees about their union views or activities, but that you need and want their support.
- Answer employees' questions about company policies and discuss the campaign issues, providing you don't threaten reprisals, promise benefits or interrogate them about their union views.
- Inform them that if they become members of the union, they will have to pay monthly dues to the union, as well as possible fees, fines and assessments.
- Assure them that union or no union, you will continue to try to make the company a good place to work.
- Tell employees that there is no reason to think that past progress in wages and working conditions will stop if there is no union. To keep competitive, the company must continue moving ahead, union or no union.
- Refer to the union's financial reports (which legal counsel can provide to an employer) and tell employees that if they become union members, much of their dues will be going to pay the salaries and expense accounts of union officials.
- Point out provisions in the union's constitution and bylaws (which legal counsel can also furnish) which are disadvantageous to the employees, such as punishable union offenses, picketing requirements, union trials, and provisions for suspension, expulsion, fines, and assessments by the union.
- Explain to employees that they will be required as union members to follow the orders of union officials; they will effectively have another "boss."
- Advise the employees that if they become union members, they will have to obey all the union rules found in the union constitution and bylaws.
- State that the company prefers to continue to deal directly with its employees, without intervention by an outside union that has no real interest in the success of the business.
- Tell the employees that if they select a paid agent to represent them (the union), the company will probably have to hire lawyers or other experts to represent the company. This will be an expense to both parties, and the company would rather iron out problems with the employees directly.
- Answer questions from anti-union employees about what they can do to oppose the union, by telling them of their legal right to actively campaign against the union, provided they observe the same rules imposed on the other employees. However, the company is legally prohibited by law from giving financial assistance to anti-union employees.
- Say that the company will recognize the union and bargain in good faith if there is a valid NLRB certification which requires it to do so, but that any improvements in wages and benefits are "negotiable" and not automatic, as the union might suggest.
- Explain to employees that good faith negotiations can lead to higher wages and benefits, the same wages and benefits, or lower wages and benefits than they now receive. No one can predict what will happen in negotiations.
- Tell the employees that the company would bargain with the union in good faith and do everything humanly possible to avoid strikes; but if the union called an

economic strike, the company would have the legal right to hire permanent replacements for such strikers, with strikers being placed on a preferential hiring list subject to recall if openings occur.

- Point out the indirect costs of unionization that the company wants to avoid: executive time spent in bargaining sessions; working time of employees spent on union business; cost of hiring lawyers and other labor relations experts. Money spent for such costs obviously cannot go to the employees in higher wages.
- If applicable in your state (legal counsel can determine), inform the employees that strikers are not eligible for unemployment insurance compensation benefits. Remind them that they do not get paid by the company while striking.
- Listen sympathetically to employee problems and grievances, but explain to employees that the company is legally prevented from making promises of new benefits during the union campaign.
- Enforce lawful no-solicitation, distribution, and access rules, without discrimination between prounion, anti-union and nonunion activity.
- Immediately report any union threats or intimidation of employees. Charges can then be filed with the NLRB if the coercion is substantiated. Consult legal counsel for assistance with this process.
- Administer appropriate disciplinary action for any employee threatening or coercing other employees, whether for or against the union.
- Request union officials to leave the company's property where the company has a lawful no-access rule which is also applied against nonemployee solicitors who are not connected with a union. Escort them off the property. Call the police to have them removed if necessary. However, this should be a last resort because the company should avoid confrontations.
- State that under most union contracts, employees are expected to take their grievances up through union stewards or agents and not to management directly. The union can usually veto the grievance somewhere along the line. Without a union, employees can take their problems as far up as they have the fortitude to go, and no union official can turn thumbs down on their right to go to management.
- Remind employees that every person put between company representatives and employees makes it more difficult to communicate.
- Explain to employees all of the benefits they presently enjoy. Where these benefits compare favorably with the term of a union contract, be sure to emphasize that fact.
- Remind employees that unions can fine members who cross union picket lines, that the union can sue in court to collect the fines, and that judgments for union fines are enforceable through garnishment and attachment, just like any other court judgment.
- Tell employees that signing a union authorization card does not commit them to vote for the union in an NLRB election.
- Inform employees that during the 12 months following certification of an NLRB election which is won by a union, the employees cannot vote the union out in

another NLRB election, and if a contract is signed during this period, it acts as a bar to decertifying the union for up to three more years.

- Tell employees about any bad experiences company representatives personally have had with union, so long as the descriptions are factual and accompanied by assurances that such things would necessarily occur there.
- Refute any untruths in the union's propaganda.
- Emphasize that employees are free to vote either for or against the union. The company will not retaliate in any way against union supporters; thus, there is no reason to vote for the union simply to protect the jobs of open union adherents.
- Tell employees that the company respects their right to do as they wish, but personally prefers not to have a union at the company.
- Tell employees that there will be no automatic pay increases, no automatic improvements in fringe benefits, and no automatic union contract if the union wins an election. Everything will depend on what happens in collective bargaining negotiations.
- Tell employees that the company does not have to agree on a contract or on any certain pay or benefits just because some other company has agreed to them.

You Cannot:

- Fire, reprimand, assign to less desirable jobs or otherwise prejudice the employment status of a worker because of his or her union views or sympathies (or because he or she complains about working conditions).
- Threaten employees in any way to deter them from union activity.
- Retaliate against employees who file NLRB charges or give testimony to the NLRB.
- Say you will close down the company or move it to another location if your employees vote for the union.
- Cut out employee privileges, suddenly crack down on tardiness or absenteeism, institute tougher work rules, or otherwise attempt to punish employees for union activity.
- Question employees about their union views, activities or sympathies.
- Question employees about the causes of their dissatisfaction and expressly or impliedly promise to make corrections.
- Ask an employee if he or she has signed a union "authorization card," or attended a union meeting, if he or she intends to, whether other employees have, or why anyone has done so.
- Question an employee as to how he or she is going to vote in an NLRB election.
- Promise or grant employees pay increases or new benefits during a union drive for the purpose of making unionization less attractive to them.
- Engage in spying on employees concerning their union activities (for example, standing or parking outside of a union meeting place).
- Give workers the impression that company representatives are engaging in spying on their union activities.

- Enforce company rules strictly against union supporters, while being lenient toward pro-company employees.
- Connive to make a union supporter quit his job by purposely assigning him undesirable work, or by deliberately imposing intolerable conditions on his employment so that he is pressured into quitting.
- Visit employees at their homes to systematically solicit their support against the union.
- Sponsor or circulate an anti-union petition among the employees.
- Take a poll of employees to see what their views are concerning unionization. (The NLRB has permitted pre-recognition polls in limited circumstances. Consult legal counsel for further guidance.)
- Interview employees one at a time or in small groups concerning their union views or opinions.
- Hold election campaign meetings with groups of employees on company time during the 24 hours immediately preceding the opening of the NLRB election polls.
- Solicit or assist employees in revoking authorization cards or in resigning from the union.
- State flatly that you will never bargain with the union.
- Say that before the company will have a union at the company, it will move, shut down, or go out of business.
- Tell employees that the company will definitely never grant the union's demands and that there will definitely be a strike.
- Prevent employees from talking with each other about the union, handing out or signing union cards during their nonwork free time, including before and after work, at lunch, or during break times.
- Prohibit employees from passing out union literature in nonworking areas on their own nonwork free time.
- Distribute to employees or make available anti-union buttons for employees to wear (although employees are free to make and distribute their own).
- Stress the inevitability of strikes and incessantly dwell on the probability of violence and personal injury, particularly where the information mentioned relates to a different union than the one seeking support from the company's employees.
- Base the company's campaign overwhelmingly on an emotional appeal rooted in racial prejudice.
- Misrepresent NLRB processes or procedures.
- Promise or give employees special favors for influencing other employees against the union.
- Use third parties in the community to threaten employees or coerce them because of their union activities.

- Carry out necessary layoffs in such a manner as to deliberately weed out union supporters.
- Question employment applicants as to whether they are or have been union members.