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IN THE TRENCHES

WHAT EVERY FRANCHISE LAWYER NEEDS TO KNOW ABOUT LABOR UNIONS AND UNION ORGANIZING ACTIVITIES

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IN THE TRENCHES – WHAT EVERY FRANCHISE LAWYER NEEDS TO KNOW ABOUT LABOR UNIONS AND UNION ORGANIZING ACTIVITIES

I. INTRODUCTION

As the labor landscape continues to change, often on a weekly basis, it is imperative for all employers (franchisors and franchisees) to understand and prepare for union organizing activity as well as other types of concerted activity engaged in by a workforce, which is rapidly becoming more sophisticated regarding rights under Federal labor law. For example, the “ambush” or “quickie” election regulations represent only one of the significant steps taken by the National Labor Relations Board ("NLRB" or "Board"). Indeed, the five-member Board along with the NLRB’s General Counsel, continues to issue decisions and regulations which make union organizing easier and make it more difficult for employers to respond. From off-duty access rules, to rules allowing use of the employer’s electronic communication systems for campaigning, to “electronic signatures” on union authorization cards, the NLRB’s rules and rulings make it even more critical for employers to engage in advance preparation.

Unions are positioning themselves to exploit these new rules and the new organizing environment that has been created. Some unions are even testing untraditional concepts and tactics in an effort to find new, more successful ways to connect with employees and to demonstrate their relevance. Today, that often involves the building of new partnerships for labor, especially where a union’s involvement is not always obvious. From teaming up with political, religious, and social action leaders, to new global partnerships with unions worldwide, the methods of attack are changing. There has been a significant increase in the number of alternative—"alt labor"—organizations, introduction of new concepts of labor-management relations and labor’s skilled use of social media and other technological advances in order to better connect with targeted employees. While these new tactics are prevalent, one cannot forget about the old standards as evidenced by a number of old school, highly aggressive corporate campaigns and the use of corporate campaign tactics in slightly different contexts. There has also been a recent surge of strikes, job actions and coordinated walk-outs.

This paper and coordinating session is intended to provide franchise attorneys an overview of the current status of federal labor law, what to tactics to expect from the labor movement, and how to help them better prepare their clients for potential union organizing. The need to understand and to plan for these potential attack points is increasingly critical due to the reality of 14 to 21 day ambush elections and the ever changing landscape of the law.

II. STATE OF THE UNIONS

In order to prepare for union organizing activity, one must first understand the current state of the unions. Union membership remains in general decline, but that will only serve to motivate the labor movement to take maximum advantage of the new organizing environment.
A. Membership

In 2015, the union membership rate—the percent of wage and salary workers who were members of unions—was 11.1 percent, which was unchanged from 2014, according to the U.S. Bureau of Labor Statistics as highlighted below.¹

In the private sector, industries with high unionization rates included utilities (21.4 percent), transportation and warehousing (18.9 percent), educational services (13.7 percent), telecommunications (13.3 percent), and construction (13.2 percent). Low unionization rates occurred in agriculture and related industries (1.2 percent), finance (1.3 percent), food services and drinking places (1.5 percent), and professional and technical services (1.7 percent).²

The union membership rate in 2015 continued to be slightly higher for men (11.5 percent) than for women (10.6 percent). The gap between their rates has narrowed considerably since 1983 (the earliest year for which comparable data is available), when rates for men and women were (24.7 percent) and (14.6 percent), respectively. Among major race and ethnic groups, Black workers continued to have a higher union membership rate in 2015 (13.6 percent) than workers who were White (10.8 percent), Asian (9.8 percent), or Hispanic (9.4 percent).³

By age, union membership rates continued to be highest among workers ages 45 to 64. In 2015, 13.6 percent of workers ages 45 to 54 and 14.3 percent of those ages 55 to 64 were union members. The union membership rate was 12.2 percent for full-time workers, more than twice the rate for part-time workers, 5.9 percent.⁴

B. Unions and Millennials

The Millennials grew up in an era of technology and are the largest workforce group. Their technology background has created an environment where they expect, and often can get, instant answers. They were brought up with personal cell phones, texting, Facebook and a variety of other social media outlets. When they are at work, they expect immediate feedback from their supervisors. Notably, they prefer to work in teams rather than alone.

As described above, union membership is at an all-time low, but more significantly so among millennials. Only about 4 percent of workers aged 16 to 24 and 9 percent of workers aged 25 to 34 belong to a union.⁵ In 1980, those figures were 15 percent and 28 percent, respectively.⁶ That combined with a number of other factors such as the increase in right to work states where making mandatory union membership a condition of employment unlawful, the shrinking economy and the change in industry has forced unions to rethink their organizing strategies. There are some who say the Millennials are the key to the rebirth of the labor

² Id.
³ Id.
⁴ Id.
⁵ Id.
⁶ Id.
movement. For example, in a recent online article, educational consultant Gina Belli states “there are promising indications that millennials understand the importance of unionizing and that they are finding new ways to organize within an economy that’s less and less rooted in manufacturing, which is the traditional settling of labor unions.”7 She points to recent organizing efforts in non-traditional industries such as evidence of younger workers “finding ways to organize within an increasingly service-based economy.”8 Those efforts include the editorial staff at Gawker Media, and the question of whether college athletes, teaching assistants or adjunct professors are subject to the National Labor Relations Act.

According to the Pew Research Center,9 unions are viewed more positively now than they were just five years ago, reporting that 45 percent now say unions have a positive impact on the country, up from 32 percent in 2010. Additionally, the study went on to say that more than half of Millennials (57 percent) view unions positively.

C. Virtual Labor Organizing

Given the number of Millennials in the workforce and more importantly in industry sectors underrepresented by unions, it makes perfect sense unions would not only target this population segment, but do so using the social media communication avenues with which this generation is most comfortable. In answering the question “why unions should embrace social media,” Alex White, Founding Director of Creative Unions, a non-profit dedicated to strengthening the trade union movement’s communications strategy and design, states it best:

The new social media is a very powerful thing. It allows unions to have intimate, personal conversations with hundreds, if not thousands of members, potential members and supporters. No longer are unions reliant on the old forms of media (newspapers, television, radio), or on face-to-face conversations between organisers [sic] and workers. Social media allows for unmediated communication and dialogue across vast distances, and at any time of the day or night. Unions can now campaign globally, raise awareness of issues locally or build support from non-traditional regions or geographic areas. Unions can utilize [sic] very powerful and flexible social networking tools, but like any organizing [sic] and campaign tool, they must be used properly. Tools such as Facebook and Twitter should not be just an afterthought. A union cannot just set up a Twitter account, make one or two “tweets”, and then expect hundreds of its members to start “following”. Like any endeavor [sic], the effective use of social networking requires practice, and trial-and-error. Consumers of social media (union members, potential members and supporters) can interact with corporate and commercial users that have a high standard of

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8 Id.

professionalism. If a union is going to start using social media, it must be prepared to invest time and (human) resources to do so properly.10

Virtual communications allows workers to interact and organize surreptitiously and quickly, often times long before an employer has any knowledge union activity is taking place. And now, unions are transitioning from websites to mobile applications allowing workers to come together quickly and with the critical mass to catch employers off guard.

D. **Minimum Wage Movement**

What started as a way to challenge the closing of underperforming schools in low-income areas of Brooklyn, turned into what some would say is a successful movement to increase the minimum wages across the country. About four years ago, an advocacy group, New York Communities for Change (“NYCC”), began sending out volunteers to collect signatures to protest the closing of the targeted schools. At the same time, other groups were advocating for affordable housing. What the two groups concluded was that their constituents’ issues stemmed from working jobs that paid minimum wage or just a little over the minimum wage, including many who worked in fast-food. NYCC then reached out to the local chapter of the Service Employees International Union (“SEIU”) to coordinate its efforts.11

On November 29, 2012, approximately 200 New York City fast food workers walked off the job in protest of wages and working conditions in the industry and “Fight for $15” was born. Led by the SEIU, strikes, demonstrations and walkouts were organized throughout the country in nearly 300 cities. The Center for Union Facts reports the SEIU has spent as much as $80 million on the Fight for $15 campaign since it started.12 But as all labor watchers understood from the beginning, SEIU’s involvement in the minimum wage movement had a secondary, and possibly more important goal of increasing membership and the collection of dues. Frankly, SEIU’s and other union’s involvement in this and other social issues has helped revitalize the public’s view of labor organizations over the last few years.

III. **THE NATIONAL LABOR RELATIONS ACT**

A. **The Basics**

The National Labor Relations Act (“NLRA” or “the Act”)13 was enacted in 1935. The purpose of the Act was to regulate labor-management relations with the additional goal of labor stability in the private sector. The Labor Management Relations Act14, passed in 1947,

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and the Labor-Management Reporting and Disclosure Act of 1959\textsuperscript{15} amended the Act to further clarify the rights of employees, employers and unions.

Often employers believe that the NLRA is not relevant to their workplaces if the workforce is not represented by a union. The NLRA applies to all employees employed by businesses engaged in interstate commerce. The term “employer” is broadly defined to include any person acting either directly or indirectly as an agent of the employer.\textsuperscript{16} The definition of “employee” is also broad and is not limited to employees of a particular employer and includes an individual whose work has ceased as a consequence of or in connection with a current labor dispute or unfair labor practice.\textsuperscript{17}

The NLRB is the government agency with primary responsibility for administering and enforcing the NLRA.\textsuperscript{18} The Board is made up of five members appointed by the President with the consent of the Senate to five-year terms.\textsuperscript{19} With the consent of the Senate, the President also appoints a general counsel to the Board for a four-year term.\textsuperscript{20} As one would expect, because the appointments are political in nature, the approach, personality and activism of the Board changes.

Through its regional offices, the NLRB handles basically two types of cases: Representation cases, known as “R-Cases,” and Unfair Labor Practice (“ULP”) cases, known as “C-Cases.” Most representation cases fall into one of two categories: petitions filed by unions seeking to represent employees (“RC Petition”), and petitions filed by employees seeking to displace an incumbent union (“RD Petition”). ULP cases deal with alleged violations of the NLRA either by the employer, brought by employees or unions under Section 8(a), or alleged violations by the union, brought by employees or employers under Section 8(b).

Probably the most familiar, and most relevant section of the Act is Section 7, which guarantees to employees:

\...the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activity for the purpose of collective bargaining or other mutual aid and protections, and shall have the right to refrain from any or all of such activities...\textsuperscript{21}

Notably, these rights are available to all non-supervisory employees, whether they are represented by a union or not.

\textsuperscript{16} 29 U.S.C. § 152(2).  
\textsuperscript{17} 29 U.S.C. § 152(3).  
\textsuperscript{18} 29 U.S.C. § 153.  
\textsuperscript{19} 29 U.S.C. § 153(a).  
\textsuperscript{20} 29 U.S.C. § 153(d).  
B. Protected Concerted Activity

Aside from establishing the right to engage in union activity and collective bargaining, Section 7 of the Act extends to employees the right "to engage in other concerted activities for . . . mutual aid or protection . . . ."22 This right of protected concerted activity exists regardless of whether a union is involved. Under Section 8(a)(1) of the NLRA, it is an unfair labor practice for an employer to interfere with or coerce employees in the exercise of their Section 7 rights.23 Thus, there are numerous cases of employer liability for unfair labor practices being imposed without any indication of union involvement.24

The most obvious example is the right of employees to withhold their labor in protest over employment conditions, i.e., to strike. When faced with a so-called quickie or wildcat strike in the absence of union involvement, many employers mistakenly believe that they can discharge or discipline the employees for refusing to work. After all, they are employed at-will, and refusing to work is deemed to be insubordination. But where two or more workers announce that they will not work until their complaint is addressed -- e.g., pay is too low, work floor is too cold, or company is generally unfair to its workers -- an employer must proceed with caution and, in essence, treat the employees as strikers.25 They should not be disciplined, suspended, discharged, or recorded as resignations for having abandoned their jobs (unless subsequent evidence strongly establishes a resignation).26 Although the employer cannot discharge or discipline strikers, it is not without options to respond to a quickie strike, for example, as with union strikers, these strikers can be ordered to leave the property and can be permanently replaced as economic strikers.

Aside from strikes, non-union employees can engage in a variety of less dramatic conduct which would rise to the level of protected concerted activity. In essence, any complaint of a concerted nature concerning wages, benefits or working conditions could achieve protected status. An obvious example would be an employee circulating a petition of protest concerning poor working conditions.27 While a personal complaint is not protected, an employee who complains to management about a work issue and appears to be speaking on behalf of others will be afforded protection.28 A complaining employee could be subject to discipline if she or he

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24 See e.g. William Beaumont Hospital, 363 NLRB No. 162 (2016).
26 See Odyssey Capital Group, L.P., 337 NLRB 1110 (2002) (three non-union employees who refused to work for fear of exposure to airborne asbestos participated in protected concerted activity, and were terminated in violation of the NLRA); Tamara Foods, Incorporated, 258 N.L.R.B. 1307 (1981) (11 nonunion employees who clocked out to protest the presence of ammonia fumes in their work environment engaged in protected concerted activity and were entitled to reinstatement and back pay).
28 NLRB v. Caval Tool Division, Chromalloy Gas Turbine Corporation, 262 F.3d 184 (2d Cir. 2001) (NLRB properly found that nonunion employee’s complaints during group meeting called by employer to announce change in its break policy constituted protected, concerted activity, where statements had objective of initiating or inducing group action).
violated the company’s rule prohibiting work time solicitation, or otherwise could be discharged if performance standards are not met. But just as with retaliation claims under employment laws, a concerted activity complaint must be treated as protected under the law and any adverse employment decision will be found to be unlawful if similarly situated non-complaining employees have not been disciplined.

1. Work Stoppages and Protests

Generally, absent evidence of a pattern or plan of intermittent work stoppages, a work stoppage where employees simply walk off the job and then return a short time later is treated as protected conduct under the NLRA. Thus, an employer may not discipline, discriminate or retaliate against the individuals involved in such a job action. However, during such a work stoppage, employers may temporarily replace the employees who are withholding their services so that the business is able to operate.  

Also, employers may be able to condition the strikers’ return to work on assurances from the union that they will not engage in a similar work stoppage in the future provided the following circumstances exist:

- First, such restriction may only be imposed if the employees’ work stoppage is over economic issues, and not in protest of alleged unfair labor practices.  
- Second, such restrictions may only be imposed if the employer can show a legitimate and substantial business justification for the restriction.  

Each return to work situation should be resolved on a case-by-case basis, paying particular attention to administrative and operational difficulties as well as to how other interruptions in operations have been resolved in the past, e.g., what has been done if an employee temporarily absented himself/herself from a shift for a personal reason, but later returned. If returning the employees to work on the same shift they recently abandoned would be significantly disruptive to operations, then the employer may instruct the employees to report to work at a later time during the shift after the necessary readjustments have been made, or, if necessary, at the commencement of their next scheduled shift. It is essential that employers be able to support any such decision with a substantial business justification.


30 See Caterpillar, Inc., 322 NLRB No. 116 (1996) (it is unlawful for an employer to insist that unfair labor practice strikers, who have made an unconditional offer to return to work, provide assurances that they will not engage in similar disruptions in the future before being allowed to return to work).

31 See e.g., Bali Blinds, 292 NLRB 243 (1989) (in absence of assurances by union that there would be no future “sporadic” or “quickie” economic strikes, partial lockout by employer lawful where: (1) no unlawful motivation; (2) only a comparatively slight adverse effect on employee rights; and (3) significant economic justification, i.e., “a reasonable fear of recurring strikes that would disrupt its production and delivery schedules to the extent that Respondent would face serious loss of customers”); General Portland, Inc., 283 NLRB 826 (1987)(employer entitled to engage in partial lockout and condition return of striking employees on agreement to provide advance notice of future economic strike action in order to allow employer to make an orderly transition of operations and avoid serious damage to plant and equipment from work stoppage); cf. Caterpillar, Inc., supra, (1996) (holding that the proposition in Bali Blinds and General Portland that an employer may place restrictions on the reinstatement of striking employees provided it can show “a legitimate and substantial business justification for the restrictions” relates only to economic strikers and is inapplicable to unfair labor practice strikers).
A refusal to work will be considered unprotected when the evidence demonstrates that the stoppage is part of a plan or pattern of intermittent action. Thus, a single concerted refusal to work is generally treated as protected strike activity and will generally only lose its protection if other refusals to work follow. Also, to the extent that the subsequent work stoppages are attributed to different work related complaints, the Board is reluctant to find that the work stoppages are part of a pattern or plan and unprotected.

However, in Embossing Printers, Inc., the Board adopted an administrative law judge’s conclusion that employees were engaged in unprotected work stoppages, where over the course of a week, employees walked off the job on three separate occasions to meet with union officials to discuss the current contract negotiations. The judge stated the employees “did not have a right under the Act to come and go as they pleased. They were entitled to strike. But they were not entitled to walk out and return and to engage in this activity repeatedly. The employees established a pattern of intermittent partial strikes. For this the employer had the right under the Act to discipline them if it chooses.”

During an unprotected work stoppage, an employer may resort to discipline up to and including discharge. Given the current composition of the Board, it is advisable that any employer have clear evidence of a pattern or plan of “quickie” work stoppages before concluding that the work stoppages are unprotected and imposing any disciplinary action. Finally, even where employees engage in conduct that may be otherwise unprotected, an employer may not treat or discipline them in a disparate or discriminatory manner.

2. Expanded Definition of “Protected Concerted Activity” And Relation to Employee Policies

The NLRA, Section 7, gives employees the right to act together to try and improve their terms and conditions of employment, including such things as pay, benefits, work environment, with or without a union. This is known as protected concerted activity. Generally, for the activity to be protected two or more employees must act together, but under certain circumstances, the actions of one employee alone may be considered concerted and be protected if that employee involves co-workers before acting, or the action is made on behalf of other workers. Employers may not retaliate or discriminate against employees who engage in protected concerted activities. Over the last years, the Board has continued to expand its interpretation of the forms of employee conduct and behavior that qualifies for protection under the Act as protected concerted activity.

3. Use of Company Email

On December 11, 2014, the NLRB reversed its prior position and held that employee use of e-mail for activities directed to terms and conditions of employment must presumptively

33 Id. at 723.
34 Chesapeake Plywood, 294 NLRB 201, 203 (1989).
be permitted by employers who have given employees access to their e-mail systems. The Board’s decision in *Purple Communications, Inc.*, means that employees have the legal right to use company e-mail for non-business related reasons, including union organizing, and requires most employers to revise their electronic communications policies. The shift in the Board’s opinion reflects the change in its political makeup, with its three Democrats reversing prior precedent and its two Republicans dissenting.

The *Purple Communications* decision is troublesome for employers, because it is essential for most employers to provide employees with access to e-mail systems for business purposes. Previously, in *Register Guard*, the Board held that an employer may completely prohibit employees from using its e-mail system for non-business purposes, provided it did not apply the ban discriminatorily. In *Purple Communications*, however, the Board decided this analysis was "clearly incorrect," focusing too much on employer property rights and too little on the importance of e-mail to workplace communication. The majority opinion found e-mail to be akin to the "new water cooler," a "natural gathering place" for employees. Because an employer may not ban discussions on its property during non-working time, an employer may likewise not ban conversations occurring through e-mail.

The Board characterized its decision as "carefully limited" in two ways, neither of which provide much comfort to employers. First, the decision only applies to employees who have already been granted access to company e-mail systems. Employers are not required to grant employees access to company e-mail systems; although most already do. Second, in undefined and "rare" "special circumstances," an employer may justify a *total* ban on non-work use of e-mail to maintain production or discipline.

An employer is permitted to apply limited, uniform and consistently enforced controls over the e-mail system, such as prohibiting mass e-mails and large attachments or audio/video segments. Further, "[a]n employer’s monitoring of electronic communications on its e-mail system will similarly be lawful so long as the employer does nothing out of the ordinary, such as increasing monitoring during an organizational campaign, or focusing monitoring on union activists." Additionally, an employer may continue to notify employees that it monitors e-mail for management reasons, and that there is no expectation of privacy in employee use of the e-mail system.

4. **Use of Cell Phones, Recording Devices, and Cameras in Workplace**

Many employers have implemented rules prohibiting the audio and video recording of work-related interactions and events. With the advent of small recording devices and smart phones with video capability, such rules would seem to make sense in today’s modern “technological” era, particularly if an employer’s work processes and procedures are considered highly proprietary in nature. Two recent Board decisions have created doubt as to their general

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36 *Purple Communications*, 361 NLRB No. 126 (2014).
37 *Register Guard*, 351 NLRB 1110 (2007).
38 *Purple Communications*, 361 NLRB No. 126 at 5.
39 *Id.* at 16.
40 *Id.*
validity. And as with most rules the Board examines in this arena, the words and the context used, always matter.

In *Whole Foods Market Group, Inc.*, the Board addressed the legality of the following work rules:

In order to encourage open communication, free exchange of ideas, spontaneous and honest dialogue and an atmosphere of trust, Whole Foods Market has adopted the following policy concerning the audio and/or video recording of company meetings:

It is a violation of Whole Foods Market policy to record conversations, phone calls, images or company meetings with any recording device (including but not limited to a cellular telephone, PDA, digital recording device, digital camera, etc.) unless prior approval is received from your Store/Facility Team Leader, Regional President, Global Vice President or a member of the Executive Team, or unless all parties to the conversation give their consent. Violation of this policy will result in corrective action, up to and including discharge.

Please note that while many Whole Foods Market locations may have security or surveillance cameras operating in areas where company meetings or conversations are taking place, their purposes are to protect our customers and Team Members and to discourage theft and robbery.

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It is a violation of Whole Foods Market policy to record conversations with a tape recorder or other recording device (including cell phone or any electronic device) unless prior approval is received from your store or facility leadership. The purpose of this policy is to eliminate a chilling effect on the expression of views that may exist when one person is concerned that his or her conversation with another is being secretly recorded. This concern can inhibit spontaneous and honest dialogue especially when sensitive or confidential matters are being discussed.

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In a 2-1 decision, the NLRB found both rules unlawful. The Board majority concluded generally that photography and audio or video recording in the workplace, as well as the posting of photographs and recordings on social media, are protected by Section 7 of the NLRA if employees are acting in concert for their mutual aid and protection, and no overriding employer interest is present. The Board continued with examples stating that “such protected conduct

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42 *Id.*
may include, for example, recording images of protected picketing, documenting unsafe workplace equipment or hazardous working conditions, documenting and publicizing discussions about terms and conditions of employment, documenting inconsistent application of employer rules, or recording evidence to preserve it for later use in administrative or judicial forums in employment-related actions.\textsuperscript{43}

The Board majority noted that the employer had taken the position that its rules applied regardless of the activity that the employee was engaged in, whether protected concerted activity or not. The Board concluded that this was too broad and unqualified and as a result concluded that employees would reasonably read the rules as prohibiting recording activity that would be protected by Section 7.

Illustrating how specific facts matter can determine the outcome in these cases, the Board distinguished a previous Board decision finding no violation of the statute in the maintenance of an anti-recording rule in a medical setting. In \textit{Flagstaff Medical Center},\textsuperscript{44} the Board found that an employer policy prohibiting the use of cameras for recording images in a hospital did not violate the Act. The Board in \textit{Whole Foods} distinguished the rational of that decision finding that patient privacy interests weighed heavily in favor of such a rule in \textit{Flagstaff Medical Center}, but that no such rights were implicated in the context of the rule before them in \textit{Whole Foods}.

The NLRB found similar rules unlawful in \textit{Caesars Entertainment d/b/a Rio All-Suites Hotel and Casino}.\textsuperscript{45} There, the employer, a hotel, maintained two rules addressing the use of cameras and audiovisual and other recording equipment. Those rules stated as follows:

\begin{quote}
Personal pagers, beepers and cell phones worn by employees must not be visible or audible to guests and should not impact job performance. The use of personal cellular/digital phones is prohibited while on duty, but is allowed during break time in designated break areas. Camera phones may not be used to take photos on property without permission from a Director or above.
\end{quote}

\begin{quote}
Cameras, any type of audio visual recording equipment and/or recording devices may not be used unless specifically authorized for business purposes. (e.g. events).
\end{quote}

The Board found that these rules were unlawfully overbroad. Although one would think a hotel would have a substantial and legitimate interest in seeking to prohibit various forms of recording, the Board found that the employer had not tied its rules to any particularized interest, such as the privacy of its patrons.\textsuperscript{46} The Board concluded that “employees would not reasonably

\textsuperscript{43} Id. at 3.

\textsuperscript{44} Flagstaff Medical, 357 NLRB No. 65 (2011).

\textsuperscript{45} Caesars Entertainment, 362 No. 190 (2015).

\textsuperscript{46} Id.
interpret these rules as related to the protection of patron privacy.” Without such a limiting principle, the Board said, the employees were “left to draw the reasonable conclusion that these two prohibitions would prohibit their use of audio-visual devices in furtherance of their protected concerted activities.”

The lesson learned from these two cases, which is similar to many other decisions from the NLRB in this area, is that not targeting the legitimate employer interest in the policy is often fatal to the rule since the Board (at least this current NLRB) is apt to find the rule unlawfully overbroad.

5. **Policies and Practices Requiring Confidentiality**

The NLRB and its cadre of administrative law judges continue to issue decisions dealing with and finding unlawful employer confidentiality rules. Most often such rules address issues relating to employee compensation (including tips) and benefits.

For example, in *Alternative Entertainment*, the following rule was deemed unlawfully overbroad: “Unauthorized disclosure of business secrets or confidential business or customer information, including any compensation or employee salary information.”

Similarly, the following rules were deemed unlawful: (1) “Remember. NEVER discuss tips with other employees or guest. Employees who do so are subject to discipline up to and including termination.” (2) “The unauthorized dispersal of sensitive Company operating materials or information to any unauthorized person or party [might result in discipline up to, and including immediate termination]. This includes, but is not limited to, recipes, policies, procedures, financial information, manuals, or any other information in part or in whole as contained in any Company records.”

And in *Columbia Memorial Hospital*, the following rule, which appeared to be legitimately geared toward a medical patient’s confidentiality and privacy concerns, was nonetheless found to be illegal under NLRA Section 7:

> Information relating to patients/residents or which is proprietary to Columbia Memorial Hospital in any way shall be maintained in a strictly confidential manner. The Administrative policy on confidentiality shall be adhered to by all Columbia Memorial Hospital staff members, physicians, volunteers, students, consultants and board members. I have read and fully understand the information Systems-Access and Confidentiality policy. Any information whether patient information, employee information or corporate information, which is accessed or disclosed in any

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47 Id. at 4.


50 *Columbia Memorial*, 362 NLRB No. 154 (2015).
way other than in the course of conducting hospital business, is grounds for immediate termination.\textsuperscript{51}

While it seems that the rule was targeted to maintaining patient confidentiality, it also included the provision relating to “employee information or corporate information.” Hence, it was deemed broad enough to prohibit the disclosure or discussion of such things as wages and working conditions.

The Board also found the confidentiality rule in \textit{Caesars Entertainment, d/b/a Rio All-Suites Hotel and Casino} was unlawfully overbroad. That rule stated in part: “All employees are prohibited from disclosing to anyone outside the Company, indirectly or directly, any information about the Company which has not been shared by the Company with the general public.” The Board said that the rule was “extraordinarily broad in scope” and that without more, this “sweeping provision clearly implicates terms and conditions of employment that the Board has found to be protected.”\textsuperscript{52}

6. \textbf{Employee Conduct}

The Board in \textit{Remington Lodging & Hospitality, LLC d/b/a The Sheraton Anchorage},\textsuperscript{53} reaffirmed its earlier decision in the same case\textsuperscript{54} that the employer’s rules against conflicts of interest and decency were unlawful.\textsuperscript{55}

The rules at issue were relatively broad in scope. The conflict of interest rule simply stated “I understand that conflict of interest with the hotel is not permitted.” In the Board majority’s view this rule would reasonably be read by employees as encompassing activities protected by the statute. The Board also noted that particularly when viewed in the context of the employer’s other unlawfully overbroad rules, employees would reasonably fear that the rule “prohibits any conduct the employer may consider to be detrimental to its image or reputation or to present a conflict with its interests such as informational picketing, strikes, or other economic pressure.” Moreover, to the extent the rule was found to be ambiguous. The Board said that the ambiguity must be construed against the employer as the drafter of the rule.

One of the other overbroad rules the Board also found unlawful in that case included a rule on “common decency.” That rule stated “I understand that I may be discharged without any prior warning if I commit any of the following acts…. Behavior which violates common decency or morality or publicly embarrasses the Hotel or Company.”\textsuperscript{56}

The administrative law judge, whose finding was upheld by the Board, determined that this rule was unlawful for various reasons. The ALJ stated in this regard that:

\textsuperscript{51} Id. at 14.

\textsuperscript{52} \textit{Caesars Entertainment}, 362 No. 190 at 6.


\textsuperscript{54} \textit{Remington Lodging}, 359 NLRB No. 95 (2013).

\textsuperscript{55} The Board’s original decision had been invalidated pursuant to the Supreme Court’s decision in \textit{NLRB v. Noel Canning}, 134 S. Ct. 2550 (2014).

\textsuperscript{56} \textit{Remington Lodging}, 359 NLRB No. 95 at 3.
employees who have the right under the Act to engage in union activity or other protected activity, which may certainly lead to criticism of the [employer], or whose activities may potentially conflict with the [employer], should not have to fear running afoul of the rules of conduct and being subject to discipline. Even employee conduct disparaging management officials or the employer’s business may be protected activity if the remarks or conduct relate to employee interests or working conditions and are not egregious in nature.57

With respect to the portion of the rule dealing with common decency or immoral behavior, the ALJ went on to condemn that part of the policy stating:

there are no specific examples in the rules to define these terms. Therefore, employees might reasonably be uncertain as to what constitutes prohibited speech. They might think that using the term “scab” in the course of union activity, which is certainly “uncivil,” “insulting,” and “contemptuous,” would result in discipline, even though such language is clearly protected under the Act. The employees should not have to decipher such language at their own peril. Clearly, the language in these rules is overly broad and ambiguous, and would serve to chill the Section 7 rights of the ....employees.58

Member Miscimarra dissented from that latter determination, stating that “employees generally understand what types of misconduct violate ‘common decency’ and ‘morality’ and a reader does not need examples to understand that the NLRA protected conduct would not fall within this type of prohibition.”

The Board continues to be on the lookout for rules on insubordination and does not hesitate to invalidate them if found to be overbroad. Hooter of Ontario Mills, Inc. provides another good example. In that case the employer maintained the following rule: “Insubordination to a manager or lack of respect and cooperation with fellow employees or guests [might result in discipline up to, and including immediate termination].”59 Finding the rule unlawful, the ALJ said that the rule “does not go on to define what “insubordination,” “lack of respect,” or “cooperation” means and thus are subjective. These broad terms, in the ALJ’s opinion, could have a chilling effect on employee rights, since they contained no language limiting the reach of the rule to the employer’s legitimate concerns.60

In the same decision, the ALJ addressed a rule that would be seemingly non-controversial, but was deemed unlawful nonetheless. The rule stated: “Disrespect to our guest including discussing tips, profanity or negative comments or actions [might result in discipline up

57 Id. at 56.
58 Id.
59 Hooters, 363 NLRB No. 2 at 21.
60 Id.
to and including immediate termination]." In the ALJ’s view, the rule was unlawfully overbroad and unqualified since the prohibitions against profanity or negative comments or actions provided no examples or clarifications.

7. **Disclaimers**

An issue that comes up often in handbook rules cases is whether disclaimers can otherwise save an overbroad rule. A “disclaimer” is a statement that purports to except or “save” certain types of conduct from the scope of the policy. Unfortunately, the Board has taken a dim view of them, at least insofar as they are broad in nature and do not specify the specific conduct that is exempted. Similarly, the NLRB General Counsel believes that a savings clause will not protect an unlawful rule or policy.

The Board’s approach to disclaimers is perhaps best exemplified by its analysis of them in *SolarCity*, wherein it said:

> In examining the Agreements here, we must be guided by the clear policies of the Act. We also recognize – as the Board has done before – that “rank-and-file employees do not generally carry lawbooks to work or apply legal analysis to company rules as do lawyers, and cannot be expected to have the expertise to examine company rules from a legal standpoint.” With this principle in mind, the Board routinely has found insufficient language in workplace rules purporting to except, or “save” employees’ legal rights from restrictions on their conduct. This is so even where such exceptions referred to the “NLRA” or “the National Labor Relations Act.” The rationale underlying these decisions is that absent language more clearly informing employees about the precise nature of the rights supposedly preserved, the rule remains vague and likely to leave employees unwilling to risk violating the rule by exercising Section 7 rights.

It then cited a number of cases finding that a generalized reference to the National Labor Relations Act was deemed insufficient to save an otherwise overbroad rule.

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61 *Id.*

62 *Id.*

63 *SolarCity*, 363 NLRB No. 83 (2015).

64 *Id.* at 5.

65 *Jury’s Boston Hotel*, 356 NLRB No. 114 (2011)(multiple handbook disclaimers preserving “rights under the National Labor Relations Act” and your “NLRA rights” found insufficient to validate employer’s rules); *Allied Mechanical*, 349 NLRB 1077 (2007)(waiver of legal rights concerning wage claims which excluded those claims “permitted by federal or state law including but not limited to the National Labor Relations Act” did not insulate the waiver provision from 8(a)(1) finding); *McDonnell Douglas Corp.*, 240 NLRB 794 (1979)(exclusion of distributions protected by Section 7 of the National Labor Relations Act was insufficient to validate employer’s overbroad no-distribution rule); *Chrysler Corp.*, 227 NLRB 1256 (1977)(an exception for activities protected by the National Labor Relations Act did not, on its face, provide a reasonable employee with enough information to validate employer’s overbroad no-solicitation and no-distribution rules).
Therefore, in the Board’s view, broad disclaimers are simply insufficient to provide protection against a finding that a rule is otherwise unlawfully overbroad. As the Board seems to be indicating, any “disclaimer” must be specific and do more than simply recite the “NLRA” or the “National Labor Relations Act.” A valid disclaimer essentially has to drill down to identify what the protected right might be.

Given the Board’s view of employer handbook rules in general and the use of disclaimers, what is an employer to do? The easiest answer is to say that a periodic and thorough review of handbooks and policies is necessary in order to keep up with the Board’s constant flow of cases in this arena. But is amending an unlawful policy by simply inserting it into a handbook enough to get past a potential unfair labor practice violation? Or is something more needed? There may not be an easy answer to that question, since context and timing may play a significant role in deciding the right course of action. At the end of the day, employees who are in possession of handbooks that contain unlawful rules must receive notice that whatever rules are being changed, have in fact been amended. Whether that is through the distribution of an entirely new handbook or just the new rule that has been changed will probably depend on whether it is feasible to have all new handbooks prepared.

The bigger question though is whether the distribution of the new rules (whether through an all new handbook or otherwise) must be accompanied by a sufficient legal disclaimer about the previous rule’s invalidity to pass muster under Board law.\(^66\) Whether such an explanation must be given to the employees may depend, in turn, on whether the changes are being made in the context of an organizing drive or other employer unfair labor practice claims. Evaluation of options in those instances must be made on a case-by-case basis.

A few thoughts about strategy:

- The more general the rule is written, the more likely it will be found to be unlawfully overbroad.
- When drafting a rule, focus on the employer’s legitimate interests and make that statement clear. If, for example, it is necessary to prohibit picture taking inside a plant because there are proprietary processes that could otherwise be disclosed, make that the focal point in the rule prohibiting the use of cameras within the facility and make it clear that it is that conduct that the employer is seeking to ban.
- Provide the lawful examples of what is prohibited. Providing such clarification or explanation goes a long way to showing that employees could not reasonably understand a rule to encompass NLRA rights.
- Use disclaimers – at the very least start with a general disclaimer regarding NLRA rights (understanding that may not be enough) and then use a specific disclaimer if it is possible and reasonable to adequately capture the type of lawful activity exempted from the rule.

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\(^66\) See e.g. Passavant Memorial, 237 NLRB 138 (1978); Atlas Logistics, 357 NLRB 1 (2011).
IV. The Election Process

A. Union Authorization Cards

In order for a union to ask the NLRB for a representation election, the union must prove there is a “showing of interest” from the group of employees it wants to represent. Historically the “showing of interest, which demonstrates that at least 30 percent of the employees involved support the union has taken the form of employee-signed “authorization cards,” pocket-sized cards stating that employees wish to be represented by a union for purposes of collective bargaining.

While unions can still make use of the physical cards or petitions, the NLRB has now made union organizing by email and social media a reality. The NLRB’s General Counsel issued Memorandum 15-08 on September 1, 2015, states that, “[e]ffective immediately, parties may submit electronic signatures in support of a showing of interest.”67 On October 26, 2015, the General Counsel issued Revised Memorandum 15-08 providing more detail and examples of how the new process will work.68 Employers should expect unions to take advantage of this groundbreaking development by using email and social media to expedite and expand the organizing process.

This move to electronic signatures is an outgrowth of the NLRB’s new “ambush” election rules, which took effect in April 2015. Under those rules, the speed of the organizing process has increased significantly and, for the first time, electronic filing and service of petitions is permitted by the NLRB. As part of that rulemaking process, the Board directed the General Counsel to issue guidance on whether electronic signatures should be accepted to support a showing of interest, and Memorandum 15-08 was issued in response to that directive.

Multiple forms of “electronic signature” will be accepted by the NLRB, including “email exchanges or internet/intranet sign-up methods.” Options include a website that employees could access to complete an online “authorization form” or a form email message. An authorization supported by electronic signature must include the signer’s name, email address or social media account, telephone number, the actual “authorization” language to which the employee assents, the date of the submission, and the name of the employer. The submitting union also must provide a declaration identifying the technology used and explaining the identification controls within the system. Rather than signing an authorization card with a pen, employees will be offered the opportunity to affirm their desire for union representation by simply clicking a box.

In accepting “electronic signatures,” it is not clear whether, how, or what actions the NLRB will take to verify authenticity. The NLRB has long presumed conventional signatures to be valid absent significant evidence to the contrary, and the acceptance of cards has been at the NLRB’s discretion with extremely limited opportunity for legal challenge. Under the procedures detailed in the Revised Memorandum, electronic signatures verified by an independent third party through public key infrastructure (PKI) technology will be accepted without further action. If the union gathering the electronic signatures does not use a PKI-based system, it will be required to send a “confirmation transmission” to each electronic signer.

67 GC Memo 15-08 (Sept. 1, 2015).
confirming the information to which the signer assented, and inviting the signer to respond if anything is incorrect. The submitting union will be obligated to provide any responses to the confirmation transmission to the NLRB along with the electronically signed authorizations. Sample forms for these submissions are provided as attachments to the Revised Memorandum.

In the General Counsel’s view, “the contact information (email address, phone number or other social media account) is easy to obtain electronically from the signer and will enable the NLRB to promptly investigate forgery or fraud, where appropriate.”69 While the process of verifying the authenticity of the showing of interest always has been murky from the viewpoint of employers, the potential for fraud and abuse of electronic processes is significant.70

It remains to be seen to what extent unions will capitalize on this development, but the opportunity is tremendous. Many unions have existing websites, social media pages, Twitter accounts, etc., that provide a ready-made platform for soliciting employees by offering a hyperlink to the “electronic authorization form” for employees to complete. Likewise, a hyperlink easily could be included in a mass email to employees—a prospect that was enhanced greatly by the NLRB’s recent decision in Purple Communications71 (see below). In that case, the NLRB held that employees who have been granted access to company email systems must be permitted to use those systems for union organizing activity when on non-working time. If a union provides the hyperlink to one sympathetic employee, that employee could extend the invitation to all employees in a matter of seconds. In addition to electronic solicitations, more traditional means still may be used to direct employees to a union’s “e-authorization” website, such as handbills and mailers. One union has already placed an advertisement in a local newspaper, inviting employees of a particular employer to visit a union website for the purpose of signing an electronic authorization card.

The General Counsel’s decision to allow unions to organize electronically creates an alternative to traditional authorization card signing drives that is exponentially faster, very low in cost, and more “under the radar” than ever before. A union can now effectively solicit all of an employer’s employees before the employer has any opportunity to respond, or perhaps even without the employer becoming aware that it has happened. A proactive approach to positive employee relations, including advising employees in advance of the ramifications of signing an authorization card and properly training supervisors, is now more important than ever.

B. Voluntary Recognition

If a union obtains authorization cards or a petition supporting the union signed by more than 50 percent of the employees the union wants to represent, it can ask (demand) the employer to voluntarily recognize the union as the employees’ representative without the necessity of an election. Employers are not required to recognize the union on the basis of cards and usually decline to do so.

69 GC Memo 15-08, 6 (Sept. 1, 2015).
70 Id.
71 Purple Communications, 361 NLRB No. 126 (2014).
C. **New Election Rules**

Once the union or an individual has evidence of a sufficient showing of interest or voluntary recognition has been declined, a petition for election (secret ballot) will be filed with the appropriate regional office of the NLRB. On December 12, 2014, the NLRB implemented the long-anticipated “quickie” or “ambush” union representation election rules changing the petition process in a variety of ways. The effective date for the rules was April 14, 2015. The rules were enacted by a 3-2 vote. Approved by Board Chairman Mark Gaston Pearce and Members Kent Y. Hirozawa and Nancy Schiffer – Board Members Philip A. Miscimarra and Harry I. Johnson, III, dissented. The rule includes detailed explanations regarding the rule’s impact on current procedures and the views of the majority and dissenting members. As Chairman Pearce said:

> I am heartened that the Board has chosen to enact amendments that will modernize the representation case process and fulfill the promise of the National Labor Relations Act. Simplifying and streamlining the process will result in improvements for all parties. With these changes, the Board strives to ensure that its representation process remains a model of fairness and efficiency for all.

The Board believed the rules will enable it to more effectively administer the Act by using modern technology, making its procedures more transparent and uniform across Regions, and eliminating unnecessary litigation and delay. With these amendments, the Board claimed it will be better able to fulfill its duty to protect employees’ rights by fairly, efficiently and expeditiously resolving questions of representation.

The most notable changes to the NLRB’s election procedures are outlined below.

1. **Petition Features**

The new election rules have altered several aspects of a union’s petition for election and the petition process. The new rules allow (but do not require) petitions to be filed electronically – a departure from the requirement of in-person filing or filing by facsimile. The new rules require that the petition be served “on all other interested parties” including the employer. According to the NLRB, this requirement will ensure the earliest possible notice of the petition to all interested parties, and, once served by the Region, start the clock for the accelerated elections process.

The required contents for a petition are also modified slightly. The new rules require the petitioner to designate the individual who will serve as the petitioner’s representative (e.g., for service of papers) and require the petitioner to state the following in the petition:

- Type of election requested (e.g., manual, mail, or mixed manual/mail);
- Proposed date(s) of election;

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• Proposed time(s) of election; and
• Proposed location(s) of election.

Requiring more details results in a considerable advantage for petitioning unions because the union will essentially have a rebuttable presumption that all their requested specifics of the election are proper. These election specifics can be manipulated by the union to provide them with a considerable advantage (i.e., proposing voter times in a manner that make it more difficult for employer supporters to reach the polls, etc.).

The new rules require the petitioner to file its showing of interest (signed authorization cards/petitions) with the election petition, which replaces the previous 48-hour requirement.

2. **Posting Requirements**

Employers now must post a “Notice of Petition for Election” following service of a union’s petition for election. The posting provides employees with notice that the petition has been filed, the name of petitioner, the type of petition, the proposed unit, the basic election procedures, a summary of basic rights of employees, and the NLRB’s website address. The posting is mandatory. The notice must be posted in conspicuous places, and employers who “customarily communicate” with employees using electronic forms of communication are required to distribute this notice electronically. The notice must be posted within two (2) business days after service of the Notice of Hearing. A failure to timely post can be a basis for objections to an election. The posting must be maintained until the petition is dismissed, withdrawn, or the Notice of Petition is replaced by the required Notice of Election posting.

3. **Voter List**

The new rules expanded the voter information that must be provided by the employer in the Voter Eligibility List, formerly known as the “Excelsior list,” and make the list due sooner – two (2) business days, not seven (7), after the Regional Director’s approval of an election agreement or issuance of a Decision and Direction of Election. Employers must furnish the list to the NLRB Regional Director, as well as serve the list directly on the union and file a Certificate of Service with the Regional Director. Previously, the employer was simply required to send the voter list to the Region. The Region would then send the list to the union. The list must be served on the union and filed with the Region in an electronic format (unless the employer certifies it does not have the capacity to do so).

Under the previous rules, the employer was only required to provide the names and addresses of eligible voters. The new rules drastically expand this requirement to include each eligible voter’s:

- Full name
- Home address
- Personal (not work) email address (if available)
- Home and personal cellular telephone numbers (if available)
- Work locations
- Shifts
- Job classifications
If the employer does not maintain personal email and/or home/mobile phone numbers, the employer is not required to ask employees for them, but if the employer has personal email and home/mobile phone numbers for some, but not all, employees, the employer must provide the information that it does possess or to which it has access. The production of work email or work phone number is not required. All of the same information for individuals, voting subject to challenge, must also be provided. The above information is the “minimum” to be produced, leaving open the possibility that future Boards may require more or different forms of contact information (based on peculiar circumstances) by adjudication or rule making (examples could include social media contact information – Facebook, Instagram, Tumblr, etc.).

4. Rules And Guidelines Governing Hearings

The details of how and when an election will be conducted can evolve in two ways. If the parties can agree as to the appropriate voting unit (group of employees eligible to vote), the date, time and location of the election, as well as other procedural issues, a stipulated election agreement can be reached. If an agreement cannot be reached, the Regional Director has authority to make those determinations.

The pre-election Representation Case Hearing had been the accepted method for resolving the numerous issues that arise in the petition and election process (e.g., eligible voters, supervisory issues, multi-facility issues, etc.). Under the new rules, most disputes over voter eligibility and bargaining unit inclusion/exclusion are not resolved until after the election. The NLRB’s “Representation Case Fact Sheet” states:

Generally, only issues necessary to determine whether an election should be conducted will be litigated in a pre-election hearing. A regional director may defer litigation of eligibility and inclusion issues affecting a small percentage of the appropriate voting unit to the post-election stage if those issues do not have to be resolved in order to determine if an election should be held. In many cases, those issues will not need to be litigated because they have no impact on the results of the election.

Leaving important issues unresolved, such as supervisory status and whether certain employees are part of the voting unit, undermines the ability of employees to make an informed decision and hinders all employers’ ability to present an effective campaign.

A hearing on unit and voter eligibility will typically be set to open eight days after service of the Notice of Hearing unless the case presents unusually complex issues. The Regional Director serves notice of the hearing as “soon as is practicable,” but the rules do not provide a specific time requirement. If the Notice of Hearing is served on the same day that the union’s petition is filed, the hearing will open on the 8th day following service by the Region. The

73 Employees vote subject to “challenge” when either the union or employer objects to the voting eligibility of a particular individual(s). Often, the parties will agree to allow employees to vote subject to challenge instead of litigating the eligibility prior to the election. If the challenged ballots are determinative of the election outcome, the issue is litigated after the election. If the challenged ballots are not determinative of the election outcome, those ballots are not opened or counted.

Regional Director retains the unilateral discretion to postpone the hearing beyond the 8th day without motion if the Regional Director identifies complex issues. The Regional Director may postpone the opening of the hearing for two days based on a moving party’s showing of “special circumstances,” but examples of what may constitute special circumstances are not provided. The Regional Director may only postpone for longer than two days based on “extraordinary circumstances,” for which the Regional Director has complete discretion. Again, the rules fail to specifically provide examples of what may constitute extraordinary circumstances.

5. Statements of Position

Employers must file a Position Statement with the Regional Director and serve it on all parties by noon on the business day before the hearing is set to open. The Regional Director may require the Position Statement to be filed earlier than the day before if the hearing is set to start more than eight days after service of the Notice of Hearing. According to the Board, the purpose of the Statement of Position is to facilitate an election agreement and narrow the scope of any hearing issues.

If the employer takes the position that the unit proposed by the union is not an appropriate unit, the employer will be required to set forth in the Position Statement:

- The basis for that contention (state the precise objections to the appropriateness of the proposed unit); and
- A list of prospective voters, their job classifications, shifts and work locations.

If the employer does not take a position on the appropriateness of the union’s requested unit, the petitioner is allowed to present evidence on that point (without opposition from the employer), but the employer is not permitted to offer evidence or cross-examine witnesses. Additionally, the employer must identify any individuals in classifications in the petitioned-for unit whose eligibility to vote the employer intends to contest and outline all other issues the employer intends to raise at the hearing.

A significant advantage for unions is the requirement that the employer include a list containing the full names, work locations, shifts, and job classifications of all employees in the union’s proposed unit and all employees that the employer contends must be included/excluded in any appropriate unit. Failure to provide this information limits the employer’s ability to litigate certain issues and any inaccuracies in the information may be a basis to file objections to an election. Another important component of the Position Statement is the Board’s requirement that the employer take a position on the election details including: (1) the type of election (manual, mail, or mixed); (2) the date(s) the election should be held; (3) the election time(s); and (4) the location(s) where the election should be held. While the union has the first opportunity in the petition to state its preference on these issues, the Position Statement is the vehicle by which the employer may rebut those preferences.

Perhaps most importantly from an employer’s perspective is that any issue not raised in the Position Statement will be forever waived, except the Board’s statutory jurisdiction.

6. Compressed Timelines

The rules imposed by the Board are technical in nature and may appear on their face to address legitimate goals. Many believe, however, the rules amount to a “solution in search of a
problem" and represent a concerted effort to give labor unions an advantage in their organizing efforts to reverse decades of steady declines in membership. The rules tilt the playing field dramatically in favor of unions by creating an environment in which many union elections will occur in just 10 to 21 days after the union requests a vote and essentially eliminates most employer rights during the representation case process. This new paradigm makes it easier for unions to successfully organize employees in various industries.

D. Conduct During Campaign Period

After learning of union organizing activity, but especially after a petition for election has been filed, the employer may be limited in what it can do operationally. Understanding these limitations and obligations can help protect the company against allegation of unlawful conduct and union charges of unfair labor practices. Violations of the law during this critical time, can result in unfair labor practice charges and election objections that can prolong the process or even overturn the election results.

Once a petition is filed until the time the election results are certified, the law requires the employer to maintain what are called “laboratory conditions.” This means terms and conditions of employment must remain in the “status quo.” Generally while under laboratory conditions, the employer cannot make changes to such things as wages, benefits, policies, and procedures, but whether a change can lawfully be made during this period of time depends on many factors. If there are any policy/operational changes already scheduled to take effect during this timeframe or if there is a need to make a change, it would be appropriate to have legal counsel review to determine the appropriateness of such modifications.

Even when there is union organizing activity or a union petition, the employer’s priority continues to be the operations of the business the serving of clients and customers. While responding to an organizing campaign will be distracting, the business must continue to operate. In doing so, the following should be considered:

- Do not treat employees differently based on how one thinks they might vote or whether the employee is believed to support the union.
- If necessary, an employer is permitted to promote, layoff, discipline, reward and discharge employees as long as it is done without regard to the employee’s union or anti-union position or activities.
- Employees may be distracted during a campaign, which may lead to carelessness or safety issues, therefore an added focus on safety may be warranted.
- Continue to enforce work rules impartially and in accordance with past practice.
- Do not create new or modify existing rules or policies in response to union activity without first obtaining guidance from human resources or legal professionals.

E. Campaigning and Property Rights

1. Distribution/Solicitation by Employees

Employees have the right to distribute union (or anti-union) literature in nonworking areas during nonworking time and have the right to solicit in working areas during

75 Nonworking areas include break rooms, cafeterias, parking lots, locker rooms or the like.
nonworking time. Counterintuitively, the Board deems acts involving the “distribution” of union cards or a union petition as solicitation, not distribution – even though it involves a physical document.

The Board recognizes an exception for retail stores and restaurants, allowing those employers to limit solicitation to nonworking time and nonselling areas.

In Target Corporation, the Board found the employer’s policy that prohibited solicitation for “commercial purposes” unlawfully overbroad. In so doing, the Board noted that the employer had failed to define the phrase “commercial purposes” or provide any illustrative examples, noting that the employer had told employees that a union was a “business” that “sells membership.” As such, the “ambiguous” rule could reasonably be interpreted to prohibit union solicitation and distribution, and violated Section 8(a)(1) of the Act. This example underscores how a facially lawful rule can be successfully challenged when the Board applies its “reasonable interpretation” standard. The inclusion of some illustrative examples that did not implicate Section 7 rights – lottery tickets, personal sales items, or solicitations for another retail establishment – could have potentially prevented the adverse finding.

In the absence of a policy limiting solicitation and distribution, the employer must prove a solicitation was an actual interference with or disruption of work if it wants to discipline an employee for solicitation on working time. All employers should implement lawful solicitation and distribution policies sooner as opposed to later, assuming there is no known union activity at the time of implementation.

2. Non-Employee Access to Property

As a general proposition, employers can ban unions and non-employees from soliciting or distributing literature inside their facilities or on their property as long as they apply their rules in a non-discriminatory manner. In Lechmere, Inc. v. NLRB, the U.S. Supreme Court held that a property owner cannot be compelled to allow non-employee organizers onto its private

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76 Nonworking time is defined as paid or unpaid periods when the employee is not expected to be working. https://www.nlrb.gov/rights-we-protect/whats-law/employees/i-am-not-represented-union/your-rights-during-union-organizing.

77 Target Corporation, 359 NLRB No. 103 (2013).

78 Section 8(a)(1) of the Act makes it unlawful for employers to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights.


81 Lechmere deals with private commercial property and does not affect the general rule that union proponents may solicit and distribute on public property (e.g. on a public sidewalk near the street, not adjacent to the store entrance). Although the distinction between public property and private commercial property is not always readily apparent, non-employee union proponent solicitation-distribution generally can be limited and restricted to public property. Before the Lechmere decision, several unions argued that they had the right to distribute union materials on private company property based on the First Amendment. The Supreme Court rejected that argument. In Central Hardware Co. v. NLRB, 407 U.S. 539, 547 (1972), the Supreme Court held that a non-employee could not have a First Amendment claim upheld unless the employer’s property had “to some degree the functional attributes of public property devoted to public use.” Central Hardware Co. v. NLRB, 407 U.S. 547 (1972). In Lloyd Corp. v. Tanner, 407 U.S. 551 (1972), the Supreme Court found that a union had no First Amendment right to use privately owned property for distributing.
property, subject to two exceptions: (1) if “the inaccessibility of employees makes ineffective the reasonable attempts by non-employees to communicate with [employees] through the usual channels” (the “inaccessibility exception”); and (2) if the property owner’s decision to allow other groups of non-employees on its property discriminates against the union (the “discrimination exception”).

*Lechmere* does not deal with the broader question of whether an employer may deny access to union organizers while, at the same time, allowing political candidates, charities or other non-employee groups to solicit employees on company property. However, NLRB case law has held that an employer may not discriminate in this fashion.  

Several federal courts of appeal have declined to find discriminatory access unless the union is being treated less favorably in communicating “on the same subject.” The NLRB has not adopted this position and continues to enforce the NLRA in a more restrictive manner.

3. **Exceptions for Certain Forms of Access**

In its analysis of whether an employer has discriminated against union access, the NLRB treats certain types of solicitation and distribution as distinct from union access. Specifically, employers may permit the following without losing their ability to prohibit union solicitation on Company property:

- A small number of “isolated beneficent acts” (*i.e.*, charitable events). The Board looks at the “quantum of incidents” in determining whether the employer discriminated against the union.  

- Solicitations and distributions that are an integral part of the employer’s business, including:
  - Events designed to promote product sales or boost foot traffic, including joint business relationships with outside vendors where the company receives a share of receipts or an up-front payment;
  - hand bills and other related activity where the employer had placed a general no-solicitation ban. In fact, the handbillers in *Lechmere* were in the parking lot of a privately owned retail shopping plaza.

82 See Susquehanna United Super, Inc., 308 NLRB 201 (1992) (attempt to ban union picketing from shopping center parking lot islands unlawful where sales and solicitation previously permitted by Shriners, the Salvation Army, little league baseball teams and the Boy Scouts); Davis Supermarkets, 306 NLRB 86 (1992) (employer barring union advocates from parking lot was held discriminatory where the employer allowed other groups to sell and solicit both before and during the time the union attempted to picket); Big Y Foods, Inc., 315 N. L. R. B. 1083, 1086 (1994) (employer violated §8(a)(1) by prohibiting a union from distributing leaflets while allowing charities to collect food, distribute literature, sell candy and solicit donations).

83 See Salmon Run Shopping Ctr. LLC v. NLRB, 534 F.3d 108 (2d Cir. 2008) (no discrimination in denying union access while allowing Muscular Dystrophy solicitations and distribution of higher educational promotional materials on Higher Ed Night); Sandusky Mall Co. v. NLRB, 242 F.3d 682 (6th Cir. 2001) (no discrimination in barring union handbilling while allowing charitable or civic organizations to distribute information or solicit because the activities were not similar to union handbilling); Guardian Indus. v. NLRB, 49 F.3d 317 (7th Cir. 1995) (distinguishing between for-sale notices and meeting notices for all organizations did not discriminate against employees’ right to self-organize).

Solicitations by entities that offer fringe benefits to employees, including insurance companies and potentially companies that offer discounts to employees solely because of their business relationship with the employer.86

By comparison, allowing solicitation and distribution by vendors offering services unrelated to employee fringe benefits and comparable to what is offered to the general public (i.e., no benefit specific to being an employee) while barring similar access by a union can constitute discrimination.87 The Board has found discrimination in such instances even when the vendor is required to remit a percentage of proceeds to an employee committee.88

In discussing the benefits exception, the Board has distinguished employee benefits for which the employer pays “in whole or in part” from products and services which are approved or recommended – but not “subsidized” – by the employer.89 In Lucile Salter, the Board held a hospital employer who prohibited union solicitation lawfully permitted solicitation by nonemployee representatives of self-funded tax sheltered annuity and health insurance plans offered by the employer to its employees.90 On the other hand, the Board found the hospital unlawfully allowed other third-party solicitation, including by a credit union and an outside insurance company, where “these products are not a part of the employees’ regular benefit package.”91

The mere fact that a vendor offers a discount to employees of Ashley Furniture is probably not enough to make the argument that whatever product or service the vendor offers is “subsidized” by Ashley. However, we may be able to make that argument if there is some evidence that Ashley Furniture has a partnership with the vendor in question whereby Ashley Furniture pays fees to the vendor (for example, a banking relationship), and if no discount would be available to employees absent that relationship.92


As discussed more fully above, effective April 14, 2015, new rules regarding how representation elections are conducted were implemented. Because of the shortened time frame between petition and election, this new dynamic is often referred to as “ambush” or


86 Cmty. Med. Ctr., 2009 WL 1569250, at *10 (adopter, without comment, ALJ’s determination that employees would not have received the discounts and benefits but for the business relationships between employer and third-party company); Lucile Salter Packard Children’s Hosp. at Sanford, 318 NLRB 433 (1995) (solicitations for tax shelter annuity plans and health insurance plans offered by employer).

87 See Lucile Salter Packard Children’s Hosp. at Sanford, 318 NLRB 433, 435-36 (finding solicitations by credit unions, child and family services and insurance company that were not part of employer’s regular benefits program did not fall under business-related exemption).

88 See id.

89 Lucile Salter, 97 F.3d 583 (D.C. 1996).


91 Id.

92 See Community Medical Center, 254 NLRB 232 (2009).
“quickie” elections. The information provided below may be helpful in emphasizing the impact these new rules have had on the organizational paradigm.

Number of election petitions filed: 2175
Average time to election (all ballot types): 25 days
Number of elections held: 1344
Number of employees affected by petitions: 136,467
Average unit size: 63
Win rate: Company - 30%; Union - 70%

- 1468 stipulated agreements (68% of all petitions)
- 125 Decision & Direction of Election (6% of all petitions)
- 22 consent agreements (1% of all petitions)

1603 Ambush petitions in Non-RTW states (74% of all petitions) versus 533 Ambush petitions in RTW states (24% of all petitions).

Average Time to Election
- For manual ballots: 25 days (petition date to date election held)
- For mail ballots: 26 days (petition date to mail date)
- Combined mail and manual: 25 days (petition to either date election held or mail date)

Outcomes
- Petitions withdrawn: 57
- Petitions dismissed: 28
- Petitions in process: 216 (as of April 14, 2016)
- Petitions to election: 1344 certified outcomes
  - Management Wins: 409 (30%)
  - Labor Wins: 935 (70%)

Type of Election
- Mail ballots: 148
- Manual ballots: 1165
- Combined mail and manual: 10
- Unknown: 21

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93 Union and employer, with approval of the NLRB Regional Director, enter into an agreement regarding the election details, including date, time, eligible voters, etc.
94 Where the union and employer cannot agree on the details of an election, following a hearing and the presentation of evidence, the NLRB Regional Director issue an order that sets forth those details.
95 The details of the election are determined by the NLRB Regional Director by agreement of the parties, without an evidentiary hearing.
Top five industries by petition count:
- Healthcare and life sciences
- Transportation
- Construction, engineering and landscape
- Manufacturing
- Security

Top five states for petitions filed:
- New York
- California
- Illinois
- Pennsylvania
- New Jersey

V. Micro Bargaining Units: The Rules Have Changed And So Should Your Strategy

A bargaining unit is a group of two or more employees who share a community of interest and may be reasonably grouped together for the purposes of a union organizing campaign and if the union wins, for collective bargaining. The determination of what is an appropriate unit for these purposes is, under the Act, in the discretion of the NLRB. Section 9(b) of the Act states that the Board shall decide in each representation case whether, “in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purpose of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.”

The NLRB’s long-standing approach to bargaining unit analysis as described above was fundamentally changed by its decision in Specialty Healthcare. Specialty Healthcare gave rise to the concept of what are now known as “micro-bargaining units.” The case involved a nursing home and the union’s effort to have an election involving only Certified Nursing Assistants (“CNAs”) excluding other similarly skilled employees working in the same facility, such as nonprofessional service employees like food and nutrition workers and environmental service employees – employees who under traditional principles would have normally been included in the unit. Rejecting the employer’s effort to add these additional employees based on their shared community of interest, the Board articulated a new analytical standard for evaluating the appropriateness of bargaining units when an employer claims that additional employees or classifications must be added for the bargaining unit to be appropriate.

A. “Readily Identifiable As A Group

Specifically, in determining whether a petitioned-for bargaining unit is appropriate, the Board will first ask whether the employees included in the unit by the union are “readily identifiable as a group.” Under Specialty Healthcare, if the Board concludes the employees are

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96 Information compiled from NLRB.gov.


98 Specialty Healthcare, 357 NLRB No. 83 (2011).
readily identifiable based on these factors, they will next consider whether those employees share a community of interest. If the Board finds that the employees are readily identifiable as a group and that they share a community of interest, the Board will find that unit to be "an appropriate unit." Once a unit is found to be appropriate “the Board proceeds no further.”

B. Smallest Appropriate Unit

The Board majority then addressed the question: “what showing is required to demonstrate that a proposed unit consisting of employees readily identifiable as a group who share a community of interest — is nevertheless not an appropriate unit because the smallest appropriate unit contains additional employees.” The Board first addressed what is not sufficient.

In that regard, the Board said a unit is not inappropriate simply because the employees included in the unit share a community of interest with the employees who will be excluded. “The Board has held that the appropriateness of an overall unit does not establish that a smaller unit is inappropriate.” Likewise, “because a proposed unit need only be an appropriate unit, and need not be the only or the most appropriate unit, it follows inescapably that demonstrating that another unit containing the employees in the proposed unit plus others is appropriate, or even more appropriate, is not sufficient to demonstrate that the proposed unit is not appropriate.” A unit is also not inappropriate simply because it is small. “The fact that a proposed unit is small is not alone a relevant consideration, much less a sufficient ground for finding a unit in which employees share a community of interest nevertheless inappropriate.” “A union is not required to request representation in the most comprehensive or largest unit of employees of an employer unless an appropriate unit compatible with that requested unit does not exist.”

C. “Overwhelming Community of Interest

In order to successfully expand a unit containing employees readily identifiable as a group who share a community of interest, the employer must show that the “included” and “excluded” employees share an “overwhelming community of interest.” The Board characterized this as a “heightened showing” and said two groups have an "overwhelming community of interest" when the factors “overlap almost completely.” Citing the Court of Appeals decision in Blue Man Vegas, LLC v. NLRB, the Board said “that the proponent of the larger unit must demonstrate that employees in the more encompassing unit share an

99 Specialty Healthcare, 357 NLRB No. 83, at 8.
100 Specialty Healthcare, 357 NLRB No. 83, at 10.
101 Id.
102 Id.
103 Id.
104 Id.
105 Blue Man, 529 F.3d 417 (D.C. Cir. 2008).
overwhelming community of interest such that there is no legitimate basis upon which to exclude certain employees from it.”

D. Fractured Units

Finally, the Board majority in *Specialty Healthcare* noted that a union cannot successfully petition for a “fractured” unit. A unit would be fractured if employees inside and outside the requested unit “share an overwhelming community of interest.” Stated another way, a bargaining unit would be fractured if it contains “an arbitrary segment” of what would be an appropriate unit or “a combination of employees that are too narrow in scope or that have no rational basis.” Looking at the facts in *Specialty Healthcare*, for example, a unit containing some CNAs, but not all CNAs, or CNAs working only the night shift, or on the first floor, would constitute a fractured unit. As another example based on the facts from *Wheeling Gaming*, a request for a unit including some poker dealers but not all poker dealers or poker dealers and blackjack dealers, but not all game dealers employed by the employer, would likewise constitute a fractured unit. The Board has implied that in those instances, there would be no “rational basis” for those unit configurations which would make them fractured.

Then Board Member Brian Hayes noted in his dissent that under the new standard Board agents “will have little option but to find almost any petitioned-for union appropriate,” and that would encourage unions to organize in smaller units.

Insightful guidance on this fractured unit analysis can be found in *Odwalla, Inc.* That case involved a stipulated election agreement in which the parties agreed to a unit including: Route Service Representatives (sales and delivery drivers for juice drinks), warehouse associates, “swing reps” (who functioned both as relief drivers and warehouse workers) and cooler technicians (who repair juice coolers). In dispute were merchandisers who

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106 Id.


108 Id.

109 Wheeling Island Gaming, Inc., 355 NLRB No. 127 (2010), involved an election petition in which the union sought to represent only poker dealers at a West Virginia casino. In response, the employer argued that the smallest appropriate unit should also include craps, roulette, and blackjack dealers, with which the Board majority (Board Members Liebman and Schaumber, a Democrat and a Republican) agreed. The dissent by then Board Member Becker, however, is what is more insightful. Specifically, Member Becker noted that the petitioned-for unit contains all employees who do the same job at the same location. Member Becker observed that these employees perform the same duties (all having identical duties), work in the same location (physically separated from the other dealers), under common separate supervision, have a unique compensation system (direct tips instead of pooled tips), with unique training and certification. Because these employees are all in the same job and because they necessarily share a community of interest – indeed “virtually identical terms and conditions of employment” – they are an appropriate unit. Member Becker said, “From the perspective of employees, this is one of the most logical and appropriate units within which to organize for the purpose of engaging in collective bargaining.” 355 NLRB No. 127, slip op. at 1. The fact that poker dealers share a community of interest with the other dealers was irrelevant to Mr. Becker. “There is nothing in the statute which requires that the unit for bargaining be the only appropriate unit, or the ultimate unit, or the most appropriate unit; the Act only requires that the unit be ‘appropriate’” Id. at 2. “One clearly rational and appropriate unit is all employees doing the same job and working in the same facility.” Id. While Member Becker’s position was not sufficiently persuasive to the majority in Wheeling Gaming, he was apparently more persuasive in Specialty Healthcare, in which the majority adopted Member Becker’s Wheeling Gaming dissent, albeit in slightly different terms.

110 Odwalla, 357 NLRB No. 132 (2011).
did not work at the same location and who voted subject to challenge (the union wanted to exclude them and the employer wanted them included). They voted by challenge and became the determinative votes.

At the regional level, a hearing officer concluded that the merchandisers lacked a sufficient community of interest with the other employees and excluded them from the stipulated unit. The Board (Pearce, Becker and Hayes) disagreed. They held instead “that the merchandisers share an overwhelming community of interest with the employees the parties agreed should be in the unit, and therefore a unit excluding the merchandisers is not an appropriate unit.”111 In analyzing this issue, the Board assumed, without expressly discussing that the stipulated unit (including route service representatives, warehouse associates, swing reps and cooler technicians) included employees who were readily identifiable as a group and that they shared a community of interest. In their analysis, however, the Board focused on whether the merchandisers shared an overwhelming community of interest with all the employees already included in the unit agreed to by the union and the employer.

In finding that the merchandisers shared an overwhelming community of interest, the Board focused on this analysis: the agreed-upon bargaining unit is not configured by job classification, department or function. Rather, that unit aggregates various classifications, departments and functions. The agreed-upon unit also did not include employees all supervised by the same supervisor. The employees included in the unit reported to various supervisors (not just one) and some employees included in the unit (the route service representatives) had more supervisors in common with the excluded merchandisers than with some of the other included employees. Finally, the unit was not drawn along lines of compensation. There were multiple forms of compensation among some of the included employees and the excluded merchandisers. Likewise, the excluded merchandisers had similar compensation to the warehouse workers and the cooler technicians, both of which were included in the unit. The Board also noted that the factors which distinguished the route service technicians from the merchandisers, also distinguished the route service technicians from the other employees in the agreed upon unit.

Based on these facts, the Board concluded that the unit, excluding the merchandisers, was fractured and lacked a logical basis. The following reasoning is a bit complicated but critical to applying the fractured unit analysis. While none of the categories of employees included in the unit had an overwhelming community of interest with each other – all the employees in the stipulated unit shared a community of interest which the merchandisers shared equally. That is, the community of interest factors that did exist “overlapped almost completely.” As a result, the merchandisers shared an overwhelming community of interest with the other employees in the unit. Thus, exclusion of the merchandisers would be arbitrary and lack a rational basis. This reasoning will be applicable when a union petitions for employees in more than one job classification, but not all arguably related job classifications.

Indeed, despite the Odwalla guidance, Specialty Healthcare provided unions with the opportunity to divide and conquer an employer’s workplace by organizing in “micro-units.” For some, this approach was paramount to offering up employees on a silver platter by undermining the Act’s purported purpose of forwarding industrial peace through collective bargaining. Notwithstanding that the ruling came in the context of healthcare, the Board clearly intended the new standard to apply to a variety of industries and workplace settings as

111 Id.
evidenced by Specialty Healthcare’s progeny.112 Soon after the Specialty Healthcare ruling, a series of cases issued from the Board with predictable results.

E. Application of Specialty Healthcare Analysis

Relying on the new standard announced in Specialty Healthcare, the Board in Nestle Dreyer’s Ice Cream Co.,113 upheld a regional director’s determination that a unit of only maintenance employees was an appropriate unit. Notably, the same union had tried and failed three times before to organize a larger unit, which included production and maintenance employees. In Nestle, maintenance employees were found to be readily identifiable as a separate group because they were in a separate department, had different job classifications, used different skills, and performed functions different than production employees. Further, the Board found there was a sufficient community of interest among the maintenance employees themselves because they shared similar wages, similar hours, common supervision (reporting to maintenance supervisors), and common skills and functions. In determining a maintenance only unit was appropriate, the Board held the employer had not met the overwhelming community of interest standard and that the union did not seek to represent only a fraction and arbitrary portion of the maintenance employees. 114 On April 26, 2016, the Fourth Circuit Court of Appeals, which arguably rejected the “overwhelming community of interest” standard in making bargaining unit determinations in NLRB v. Lundy Packaging,115 upheld the Board’s decision.

Similarly, in Huntington Ingalls, Inc.,116 a unit comprised of only a small subset of technical workers in a shipyard’s Radiological Control department was found to be an appropriate unit. As Member Hayes had predicted in his Specialty Healthcare dissent, and as noted in his dissent here, the Board in essence allowed the union to cherry pick a group of employees to the exclusion of “thousands of other technical employees working at the same facility. In spite of departmental homogeneity, this fragmented technical employee unit is clearly inappropriate, particularly in light of the high degree of functional integration of their duties with those of other technical employees in this defense contractor employer’s workforce.”117

112 The decision was upheld by the U.S. Court of Appeals for the Sixth Circuit on August 15, 2013, Kindred Nursing Centers East LLC v. NLRB, 727 F.3d (2013).

113 Nestle Dreyers, Case No. 31-RC-66625 (2011).

114 Following the U.S. Supreme Court’s decision in NLRB v. Noel Canning, this case was re-decided by the Board with a new panel and reached the same result. The U.S. Chamber of Commerce asked the Fourth Circuit to grant Nestle Dreyer’s petition and deny the NLRB’s cross-petition. In its coalition the U.S. Chamber of Commerce argued that the Specialty Healthcare rule was inconsistent with Section 9(B) of the Act and with the contemporaneous legislative record of the Act. Furthermore, the Board ignored Section 9(b)’s command to assure employees the fullest freedom in exercising all of the rights guaranteed by the Act because the rule violated Section 9(C)(5) of the Act as well, the Chamber’s brief argued. The U.S. Chamber filed this brief jointly with the Coalition for a Democratic Workplace, International Foodservice Distributors Association, National Association of Wholesaler-Distributors, National Council of Chain Restaurants, National Federation of Independent Business, National Retail Federation, and Society for Human Resource Management.

115 NLRB v. Lundy, 68 F.3d 1577 (4th Cir. 1995).

116 Huntington Ingalls, 358 NLRB No. 100 (2012).

117 This case is also on appeal to the U.S. Court of Appeals for the Fourth Circuit.

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The Board reached different conclusions in the retail industry as to whether unions could organize small groups of employees in a workplace. The principles articulated in those decisions are applicable to employers in all industries, but provide a roadmap for unions seeking to gain representation rights over workers in single departments or within single job classifications.

In *Macy’s*,\(^{118}\) the United Food and Commercial Workers International Union unsuccessfully attempted in 2011 to organize all full-time and regular part-time employees at the company’s Saugus, Massachusetts store. In 2012, believing it would be more successful if a vote was conducted in a different bargaining unit, the union filed a petition seeking to represent a much smaller group of employees at the same store including both the employees working on the first floor in cosmetics and women’s fragrances and those employed on the second floor selling men’s fragrances. This group constituted about 41 of 150 total Macy’s employees at the Saugus store.

The employer contended that the appropriate bargaining unit needed to include all 150 employees in the 11 departments of the store or, alternatively, all selling employees at the store. It was undisputed that all store employees shared almost identical terms and conditions of employment; they were issued the same handbook, had the same fringe benefits, worked under a single dispute resolution procedure, were evaluated according to the same performance evaluation process, used the same time clock system and the same break room. Despite that strong evidence of common interest among all store employees, the employees in the petitioned-for micro-unit were separately supervised and there were apparently few documented instances of interchange of employees between the 11 departments.

The Board agreed with the union and concluded that a bargaining unit of only employees in the first floor cosmetics and fragrance department and those on the second floor selling men’s fragrances was appropriate for collective bargaining. Applying its landmark decision in *Specialty Healthcare*, the Board found that Macy’s did not meet its affirmative burden of proof to demonstrate that all store employees shared an overwhelming community of interest with the much smaller group of employees the union sought to represent. It focused on the fact that employees did not work in multiple departments and did not share common front-line supervision. The Board rejected the employer’s arguments that the bargaining unit should be composed of all store employees because the retail industry historically has been organized in wall-to-wall units and because the union represented significantly larger and more comprehensive bargaining units at other company stores.\(^{119}\)

The Board reached the opposite conclusion in *The Neiman Marcus Group, Inc. d/b/a Bergdorf Goodman*,\(^{120}\) which was thought to perhaps set the outer limits of the Board’s willingness to allow unions to organize “micro-units” of employees. In *Bergdorf*, the union sought to organize employees working in the second floor “Salon Shoe Department” of the company’s multi-floor, Manhattan store as well as the “contemporary footwear” employees working on the fifth floor who themselves were a subset of the larger “Contemporary Sportswear Department.”

\(^{118}\) *Macy’s*, 361 NLRB No. 4 (2014).

\(^{119}\) The Fifth Circuit Court of Appeals upheld the Board’s determination on June 2, 2016. *Macy’s v. NLRB*, 2016 BL 175991, 5th Cir., No. 15-60022, June 2, 2016).

\(^{120}\) *Neiman Marcus*, 361 NLRB No. 11 (2014).
All employees at the store enjoyed identical working conditions; they were issued the same handbook, were offered the same health care plan, had the same holidays and vacations, and worked the same number of hours. Employees selling shoes on the second and fifth floors had separate direct supervisors who reported to different floor managers. Employees were not interchanged between the Salon Shoe and Contemporary Footwear departments. The Board ruled that the two groups of employees did not share a community of interest and, therefore, did not constitute an appropriate bargaining unit, observing that the unit the union sought to represent did not follow "any administrative or operational lines drawn by the employer," had little contact, were separately supervised and otherwise did not share sufficient interests in working conditions to be grouped together for collective bargaining.

The Macy’s and Bergdorf decisions applied the Board’s 2011 Specialty Healthcare decision, which permitted unions to organize small groups of employees such as single departments or single job classifications of workers within an employer’s overall operation. Naturally, Specialty Healthcare makes it far easier for unions to collect authorization cards and get to elections due to their ability to organize the smallest possible unit. In Macy’s, for instance, the union only needed to secure authorization cards from 30 percent of the 41 employees in the unit (13 cards) rather than 45 cards from among the 150 total employees at the store.

Earlier this year, in a 2-1 decision, in Volkswagen Group of America, Inc., the Board found that a “micro unit” of maintenance workers at Volkswagen’s Chattanooga, Tennessee plant was an appropriate unit for an election held in December 2015. Applying the Specialty Healthcare standard, Board Members Kent Kirozawa and Lauren McFerran held the petitioned-for unit made up of only maintenance workers was appropriate, notwithstanding the fact they worked side-by-side with production workers in the plant, were stationed among the production departments and were not separately supervised as a standalone, unified maintenance department. "The employer failed to meet its burden of demonstrating that the additional employees it seeks to include share an 'overwhelming community of interest' with the petitioned-for unit," the NLRB said in its order. "The employees in the petitioned-for unit are readily identifiable as a group."

F. Petitioner’s Preference

The danger of unions’ use of micro-units is not limited to the ease with which they may be organized. Consider for example (i) the time, expense, and disruption caused by multiple union organizing campaigns; (ii) the possibility of negotiating multiple labor contracts; (iii) classifications within a single operation; (iv) competitive bargaining among the various micro-units; and (v) the danger of unstable bargaining relationships.

As these cases demonstrate, under the Specialty Healthcare analysis it is extremely difficult for employers to defeat a micro-unit by simply arguing that the appropriate bargaining unit should also include other groups of workers, even when those employees work in the same establishment under almost identical terms and conditions of employment. Although a careful reading of Bergdorf and Macy’s provides employers some guidance on this dynamic,

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121 Volkswagen, 10-RC-162530 (April 13, 2016).
122 Id. at note 1.
123 Id.
Secuprint, Inc.’s apparent disregard of Odwalla seems to demonstrate Board Member Hayes’ prophetic dissent: the Board is likely to approve whatever unit a union asserts.

VI. PREPARING FOR THE NEW ORGANIZING REALITY

A. Review Handbooks and Policies for NLRA Compliance

It is critical to maintain handbooks, supervisor policy manuals, and company policies and practices that are legal. This is especially true for no access rules, no solicitation/distribution rules, posted property signs, etc., which can affect an employer’s ability to manage its workforce during periods of union activity. The NLRB has scrutinized employer handbooks in recent years, as discussed above, and has opined that mere maintenance of an unlawful policy during an organizing campaign can be a basis for overturning an election and forcing a re-run, even if the policy was not enforced.

B. Prepare Draft Position Statement Template

The new required Position Statement is a significant undertaking that will require extensive employer resources. The unit issues that must be briefed in the event an employer challenges a union’s proposed unit are both legally complex and extensive. Therefore, time is of the essence and any preliminary work that can be done on the Position Statement will allow a petitioned employer to have a more complete legal position in the event of a petition. Although employers may be unable to anticipate exactly what type of unit a petitioning union would seek, there are numerous basic steps that employers can and should consider that will allow a company to quickly address unit and other issues. Developing a model Position Statement that addresses basic legal principles on various potential unit issues will allow an employer to quickly assess and apply those principles based on the facts presented at the time of the petition.

C. Identify Potential Supervisors Under NLRA Section 2(11)

Section 2(3) of the Act states that an employee “shall include any employee…but shall not include any individual…employed as a supervisor.” An employee’s title, job description or method of compensation does not determine whether an employee is a supervisor. The term supervisor is defined to include any individual with the authority to perform one of 12 specified functions, if the exercise of such authority requires the use of independent judgment and is not routine or clerical. Section 2(11) of the Act states:

The term “supervisor” means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively 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.


It is, therefore, imperative that employers know who qualifies as a “supervisor” so they can know who is protected under Section 7 of the NLRA; in other words, who can organize and who cannot. Additionally, a “supervisor” is a legal agent of the company and thus must confirm with all legal requirements and refrain from engaging in activity that could be determined to be an unfair labor practice (violation of the law). Finally, supervisors may be assigned tasks when opposing a union organizing effort, while employees may not.

The NLRB recently narrowed the definition of “supervisor” under Section 2(11) of the NLRA. In *G4S Government Solutions, Inc.*, the Board concluded that nuclear power plant security lieutenants were not supervisors under the NLRA. Under well-established NLRB precedent, an individual is a supervisor under the NLRA if he or she exercises or effectively recommends one or more of the indicia set forth in Section 2(11) of the NLRA. In *G4S*, the NLRB rejected the employer’s evidence of supervisory status, which focused on the criteria of responsible direction, assignment, and discipline.

In *G4S*’s chain of command, there were 330 lower-level protective force personnel reporting to 46 lieutenants, who in turn report to 5 captains, 1 chief, and 4 majors. *G4S*’s lieutenants commanded teams of security officers in responding to and repelling attacks on the nuclear power plant. Lieutenants regularly led teams under their command in training exercises to prepare for any armed attacks on the plant and commanded the truck convoy when nuclear material was transported within the site. During nights, weekends, holidays, and any other times when nonessential personnel were away from the site, lieutenants were the highest ranking officers at the site.

With regard to discipline, the NLRB found that the lieutenants did not discipline employees because there was no evidence that the employer relied on lower-level discipline to impose a higher level of progressive discipline, nor did the employer consistently apply a progressive discipline policy. Similarly, the NLRB found that the lieutenants did not effectively recommend discipline, because the labor relations department reviewed all discipline before it was issued.

The NLRB rejected a lieutenant’s testimony that he used his personal discretion to not evacuate a building as evidence of responsible direction because the lieutenant made this decision only after talking to a chief (a statutory supervisor). The NLRB also found that it was unclear whether the decision not to evacuate was “more than one obvious choice.”

The NLRB further found that the lieutenants did not assign employees, as there was no evidence that the lieutenants’ approving or readjusting of post-rotation schedules involved more than routine assignment. In a similar vein, the NLRB found that although lieutenants temporarily reassigned employees outside of their normal assignments, there was no evidence that the lieutenants considered anything other than an employee’s skill and knowledge in their determinations. The NLRB then concluded that the procedures for permanent reassignment of employees and granting overtime were set forth in the collective bargaining agreement and thus did not require independent discretion.

In a well-reasoned dissent, Board Member Philip A. Miscimarra pointed out what employers everywhere are realizing: “[T]he Board has tended to evaluate each Section 2(11) factor in isolation, and then construe each factor so narrowly as to compel a conclusion that

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126 363 NLRB No. 113 (2016).
nobody is a supervisor.” Member Miscimarra further noted that if the lieutenants are not supervisors, the only persons who would be responsible for the roughly 330 individuals during a terrorist attack on a nuclear power plant would be four majors, one chief, and five captains. The dissent then chastised the majority's failure to recognize that only one indicium of supervisory authority is required for an individual to meet the definition of a supervisor under the NLRA. Member Miscimarra noted that he found the command authority exercised by lieutenants in tactical situations and during training exercises demonstrated responsible direction qualifying them as supervisors under the NLRA.

In light of unions' efforts to expand bargaining units, the NLRB has taken a closer look at the definition of “supervisor” under the NLRA and has continued to find that individuals are not supervisors even where they appear to meet the historical statutory criteria. The decision in G4S is just another cautionary tale demonstrating that employers will be expected to provide an abundance of evidence in support of any supervisory claims and may be required to establish that the individuals in question actually exercise (not just possess the authority to exercise) two or more indicia of supervisory status. The NLRB has continued to restrict the number of individuals that will fall within the definition of a “supervisor” under the NLRA, paving the way for greater union organizing. Employers should ensure that the employees it considers supervisors in fact exercise independent authority in supervising and directing employees to ensure that the NLRB will find that these individuals have supervisory status and prohibit the supervisors from being included in a bargaining unit.

D. Train Management and Leadership Team

Once employers have identified employees likely to be classified as Section 2(11) supervisors, it is important to train those supervisors and other managers to ensure that they are equipped with the basic knowledge required if faced with an organizing effort. Supervisors and managers must be knowledgeable of the legal boundaries and prepared to immediately engage employees on unionization issues if confronted with a campaign. With the new election rules, time constraints will be vital in this respect. The labor movement has long sought to marginalize management's role as “educator” during employee organizing attempts. To prepare for the new organizing environment, employers will be forced to accelerate the development and execution of their response plan.

Section 8(c) of the Act (the “free speech” provision) provides that “[t]he expressing of any views, argument, or opinion [with respect to unionization], or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act [subchapter], if such expression contains no threat of reprisal or force or promise of benefit.” 29 U.S.C. § 158(c). Section 8(a) of the Act identifies the various activities which may constitute unfair labor practices committed by employers. Specifically, it is unlawful for an employer: to interfere with, restrain or coerce employees in the exercise of rights guaranteed under Section 7 of the NLRA (29 U.S.C. § 158(a)(1)); to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it (id. at § 158(a)(2)); to discriminate against an employee in the terms of employment to encourage or discourage membership in any labor organization (id. at § 158(a)(3)); to discharge or otherwise discriminate against an employee for filing charges under the Act or engaging in NLRB proceedings (id. at § 158(a)(4)); and to refuse to bargain in good faith with the employees' collective bargaining representative. Id. at § 158(a)(5).

127 Id. at 6.
Once a petition is filed, an employer may actively campaign against the union and unionization. Management representatives may vigorously present the company's position but they may not: (1) threaten employees with reprisals for support of the union; (2) interrogate or question employees about their union support (e.g., how they plan to vote); (3) engage in surveillance of union activities (e.g., spying on union meetings); or, (4) expressly or impliedly promise an increase in wages or benefits if the union loses.

Even with an understanding of the law, it is still often difficult knowing what a member of management can or cannot say to employees facing an organizing battle. Generally speaking, an employer may make any statement of Fact or expression of Opinion or relate Experiences as long as the statement does not violate the four restrictions noted. For a statement to be defensible as free speech, it must simply be the employer's prediction of what could happen if the union were to get voted in, not a threat that the employer has the ability to carry out.

Below is a list which may help clarify what supervisors (management) can say and do, followed by a list of what they cannot say and do. These DOS and DON'TS will serve as guidelines in day-to-day dealings with employees.

WHAT YOU CAN SAY AND DO:

Facts
Opinions
Experiences

For example, you can:

1. Tell employees that the Company is opposed to the union and that the Company would prefer to continue to deal with employees directly, rather than through some outside organization such as a union.

2. Inform employees concerning the wages and benefits they now enjoy without having to pay dues to an outside organization. (Avoid making promises or threats.)

3. Inform employees about the history, background, and character of the union and its officials or representatives. (Do not misrepresent the facts--stick with the truth!)

4. Tell employees about any experience you or other persons have had with unions in the past. (Do not speak of termination, layoffs, plant shutdowns, or other such adverse actions unless you make it clear that these things took place for economic or other legitimate "business" reasons.)

5. Answer any false or misleading statements made to employees by a union organizer or representative.

6. Tell the employees that you feel both the employees and the Company can make more progress by working together without the disruptive influence of a union.

7. Explain that belonging to a union costs money in the form of union dues, initiation fees, fines, and other assessments.
8. Explain that being represented by a union does not automatically result in any wage increase or other improvement in benefits or working conditions.

9. Make it known to the employees that the union has the right to promote a strike. Tell employees that if they get pulled out on strike, they will not receive wages from the Company, nor can they generally draw unemployment compensation.

10. Also, make it clear that the Company has the right to hire other persons to permanently replace employees who engage in an "economic" strike. (Do not tell employees that they can be discharged or otherwise penalized for engaging in a strike.)

11. Enforce Company rules against violators as you have in the past, including the uniform enforcement of valid no-solicitation/distribution rules.

12. Tell employees that they can be put under the union without a vote if the union can get enough cards signed.

WHAT YOU CANNOT SAY AND DO

There are basically five things you may not do or say to employees concerning unions. You may not (1) make threats; (2) ask questions; (3) make promises; or (4) spy. You also cannot (5) discriminate against employees because of their union activities or sentiments.

Threaten
Interrogate
Promise
Spy

For example, you cannot:

1. Promise employees a wage increase, more overtime, better treatment, a promotion, or any other improvement in benefits or working conditions to induce them to refrain from engaging in union activities (such as signing a union card, attending a union meeting, joining a union, etc.).

2. Tell employees that if they engage in union activities, they could lose their job, be discharged or demoted, have their pay cut, or otherwise be penalized by the Company.

3. Tell employees that if the union comes in, the Company might have a layoff or close down.

4. Tell employees that if they engage in union activity, it could keep them from getting a job elsewhere (blacklisting).

5. Ask employees questions about union activities, such as (1) how they or other employees feel about the union, (2) whether they or other employees have signed union cards, (3) how many employees would vote in favor of a union in an election, or (4) whether they or other employees have attended union meetings or engaged in other
union activities. (There is nothing wrong with employees volunteering information to you about union activity. You are free to listen--just don't ask questions.)

6. Attend a union meeting, drive by a union meeting place to see which employees are attending a union meeting, or otherwise give the impression of spying on union activity.

7. Make statements to employees indicating that you have spied, or could spy, on union activities, or that you know what union activities employees have engaged in.

8. Ask an employee to spy on any union activity for you.

9. Discharge, lay off, transfer, cut hours, or otherwise change conditions of employment of employees because of their union activities or sentiments. (This does not mean that you must give employees special treatment because of their union activities. You are prevented only from discriminating against them. You are free to continue to enforce Company rules, policies, and practices concerning employees, as usual.)

Employers also should consider training management on:

- The company’s position on unions
- Basic employee relations
- Campaign legal Dos and Don’ts
- Concerted activity – how to recognize and how to address
- How to engage employees on the issue of unionization

E. Prepare Basic Campaign Materials

With “quickie elections,” there may be little time after detecting union activity to collect the details of what would typically be presented during the employer’s educational campaign. Employers should develop, in advance, the basic information they would present during a campaign.

F. Conduct Unit Analysis

Consider taking steps to “craft” the best possible voting unit in advance by ensuring there is a strong “community of interest” between the job titles the employer seeks to have included in the “target” appropriate unit in the event of a union petition for an election in a smaller unit – i.e., common supervision, similar wage/benefit ranges, workplace interactions and interchange, transfers between positions in the unit, etc.

Based on Specialty Healthcare, employers must “strengthen the ties” between those employees the company desires to be placed in an appropriate voting unit to ensure they have an “overwhelming” community of interest in wages, hours, working conditions, interchange of functions, work-related contacts, the right to bid on each other’s jobs, common supervision, etc.

G. Vulnerability Audits

Periodically, employers should gauge each facility’s vulnerability to a union organizing campaign. Many methods may be used to perform this audit – an attitude survey filled out by
employees anonymously, suggestion boxes, employee issue forms, corporate interviews with the management team at each facility, regular communications meetings, in-person labor audits conducted by the company’s labor attorneys, or online assessment tools.

Outlined below is an overview of the critical areas of a positive employee relations program, which could be individually tailored for each business. The various sections contain descriptions of areas of emphasis and statement of the overall objectives of the plan. This is followed by examples of specific action items that should be included in the plans to accomplish the desired objectives. The template is not a complete or an exclusive design for every business. Rather, it is a guide to be used in developing a specific and detailed program tailored for individual needs. The general objective of these programs is to promote good employee relations and efficient and open communications between all employees throughout the corporation.

H. Have a Written Plan of Action

Most companies have written business plans, marketing plans, etc. Companies should also have a written employee relations plan that includes policies, programs and events designed to demonstrate a pro-employee philosophy. The philosophy is based on a belief that employees are important. The basics of the pro-employee philosophy are simple: (1) demonstrate to employees that the employer cares about them as individuals; and (2) resolve issues employees have through corrective action or communication. The pro-employee philosophy is based on individual dignity, mutual trust and respect.

It is easy for a company to proclaim that it is pro-employee and cares about its employees. However, it is necessary for a company to demonstrate this commitment to its employees. The purpose of this structured approach to employee relations is to ensure that the company’s good intentions come to fruition. The pro-employee philosophy will be integrated throughout the organization. This structured program will serve as a tool to ensure that actions are taken which are consistent with the goal of maintaining a positive workforce and work atmosphere.

I. Employee Issues are Important

Virtually all union campaigns begin with an employee “issue.” As a result, it is critical that management recognize employee issues and develop a plan for responding to employee issues. For management and supervision to demonstrate that they truly care about employees, they must also care about employee issues. If the employer (supervisor or manager) is unavailable or unwilling to listen, the employee sometimes turns to a government agency, a lawyer, a union, or other outsiders. The company’s goal should be to create an issue-free environment through open communication and sincere efforts to resolve employee concerns.

One aspect of the pro-employee philosophy is treating an issue raised by one employee individually as importantly as an issue raised by a dozen employees collectively. Ignoring an issue raised by one or two employees and subsequently resolving it when it is raised by a dozen employees reinforces concerted behavior. If that occurs, management is teaching employees that the way to get results is to band together. That is the fundamental principle upon which a labor union is based. Treating an individual complaint with the same attention and urgency, as if it were raised by a large number of employees, will reinforce individual behavior and foster individual communication with management. Individual communication and one-on-one relationships are central to the pro-employee philosophy.
Systems are necessary to ensure that employees’ problems are being addressed, as well as to provide a means of accountability. Once issues concerning employees are identified, action can be taken to either resolve or defuse the issues. Some issues will be easy to resolve and others will be impossible to resolve. Issues that cannot be resolved must be defused. This is accomplished by educating the employees on what the company has done to resolve the problem and by explaining exactly why the issue cannot be completely resolved at this time. While the employees may not be happy with the ultimate decision, the fact that the company is willing to communicate openly about the issue will minimize employee frustrations.

Many companies use employee involvement programs to address workplace issues. There are many methods of employee involvement – employee focus groups on developing company-sponsored events (picnics, etc.), safety committees, and formal employee committees. There are literally hundreds of ways in which the company can involve employees in decision-making processes. Unfortunately, some forms of employee committees have been ruled “employer dominated labor organizations” and found unlawful by the National Labor Relations Board. Generally speaking, when employee committees are used purely as “brainstorming sessions,” they are legal. An example of “brainstorming” is gathering a group of employees from various areas of a facility to discuss a particular policy, without forming a committee, and discussing the subject with no commitment on how or whether their input would be acted upon. By contrast, a “grievance committee” which meets with management to present employee issues and deals with management to resolve those issues is considered unlawful. The issues presented in the “brainstorming sessions” and by the “grievance committee” may be the same. The difference is subtle, but it is fairly easy to structure the communications with employees to reach the issues without violating the law.

J. Improve The Workforce

Although many companies focus on hiring only during start-up or substantial workforce build-up, hiring is a continuing process. In making hiring decisions, care must be taken to avoid hiring employees who have an established history of workplace problems. Applicants with a history of poor attendance, marginal performance, disciplinary warnings or difficulties getting along with supervisors should be avoided. The facility should seek stable employees who have established a good work history.

K. Conduct Regular Review of Wages and Benefits

Generally speaking, wages and benefits are not the primary factors causing unionization. According to an AFL-CIO survey, where wages or benefits are the primary union issue, the union win rate is only 33 percent. However, if wages/benefits are not competitive in the industry and the geographic area, this issue is more critical in organizing drives.

While employees would always like to receive more pay, the fact is that most employees have a general idea of what their work is worth in the marketplace. It is important that employers learn what level is appropriate and pay it. Because most employees judge what they should earn by what their neighbors earn, wage and benefits surveys of similar employers in the recruitment area will answer these questions. Wage and benefit surveys enable the company to establish that it is providing a competitive benefits package. The wage data developed is useful for demonstrating to employees that they are paid appropriately.
To ensure continued competitiveness, a wage/benefit survey should be performed annually. Some employer associations, chambers of commerce and area development associations conduct these surveys. These are attractive because they are readily available. Local management should satisfy itself that the surveys are accurate and provide data relevant to the jobs at their particular facility.

L. Maintain Appropriate Working Conditions

The physical workplace is often a good indication of a company’s attitude toward employees. If restrooms are unsanitary or the break room uncomfortable, the employees will often feel that the company does not care about them. At the very least, the following items should be checked on a regular basis: (1) restroom supplies; (2) restroom cleanliness; (3) cleanliness of break areas; (4) break room vending equipment; (5) heat; (6) cold; (7) parking; and (8) first aid facilities.

Such status symbols as separate dining facilities, separate parking, and separate entrances create a perception among employees that management thinks it is better than they are. For that reason, status symbols should be discouraged and supervisors and managers should be encouraged to work within the same general working conditions as the hourly employees. This means that managers and supervisors should regularly eat lunch and take breaks with employees.

Safety and health can be a major organizing issue for any workforce. Issues including cumulative trauma disorder, sick building syndrome, CRT syndrome, and other occupational injuries and illnesses concern an office workforce. The company should show employees that it cares about them by developing and publicizing an effective safety program.

Many companies have “wellness” programs for their employees and dependents. These programs are considered beneficial and cost effective by many management teams. The actual costs of wellness programs vary from very expensive (building employee workout facilities, annual physicals, etc.) to very inexpensive (providing wellness information, encouraging smoking cessation, etc.). Regardless of the cost involved, properly communicated, the implementation of a wellness program will tell employees that your company is concerned about their health.

M. Improve Communications At All Levels

The purpose of a communications program is both to dispense information and to receive it. In receiving information, the company will learn of various issues and problems. For that reason, the communications program plays a key role in the identification of issues.

Roundtables in which employees participate, suggestion programs, one-on-one communication meetings, and other similar means of communication that involve listening to employees are all effective in identifying issues. The goal is to implement a combination of communication techniques that will best enable the company to learn of new and existing issues. This could include a myriad of methods:

Supervisor’s Preview of Facility-Wide Meetings: Facility-wide meetings are an excellent opportunity for the location manager to address all of the employees on matters of general concern. It is useful for the facility manager to meet with the supervisors in advance of the meeting and review the substance of that meeting with them. This way, the supervisors are not
taken by surprise by announcement in the meeting and they will be better prepared to answer questions. Also, it serves as an excellent “dry run” for the manager to practice delivering the message.

Safety Meetings: While weekly safety meetings are often appropriate in a manufacturing environment, monthly or quarterly meetings may be appropriate for workplace settings.

“Lunch with the Boss”: One informal, inexpensive, and effective means of communication available is the small group lunch meeting between hourly employees and the Facility Manager. The lunch can be a sandwich buffet, some other light food, or even a “brown bag” lunch with soft drinks provided by the company. These meetings have the benefit of giving the facility manager first-hand and unfiltered information from employees. Additionally, it gives employees an opportunity to meet management, to see that he or she is human and, in many ways, just like them.

Benefits Update: Meetings should be held periodically to inform employees about benefits issues, especially if any changes are being considered.

Letters to the Employees: One of the major benefits of letters to the employees’ homes is that it also involves the spouse, and family. Although it is more expensive to mail the letter to the home than it is to hand it out at the facility, mailing it to the home ensures that the message will at least get into the home. It is important to use the letter to the home as a means of addressing topics which are of interest to spouses, such as benefits, the state of the business, competition, etc. This could include a “hidden paycheck” letter which shows the employees “true compensation” for a particular year by adding the costs of all company-paid benefits, such as insurance, workers’ compensation, unemployment insurance, holidays, etc.

One-On-One Meetings: One-on-one conversations between a person in a level of management above supervision and employees are very effective means of communications. It gives a manager and an hourly employee the opportunity to meet in private and discuss the job, problems, suggestions, etc.

Human Resources “Check-Ups”: A representative of the human resources department should meet with employees individually at least once a year where feasible. The purpose is to update personnel records so that names, addresses, telephone numbers and contacts are current for emergency and administrative purposes. Additionally, this meeting provides an excellent opportunity for someone in human resources to have two-way communications about the employee’s job. It demonstrates an interest in the employee and builds the relationship between the employee and the Human Resources Department.

Roundtables: Roundtables are small group meetings (10-15 employees) between a member of management and hourly employees. The purpose of these meetings is to provide information to the group and receive information from employees. The manager conducting the meeting usually makes a 5-15 minute presentation on a subject of current interest and then opens the meeting for discussions, questions, and concerns. An optimal length of time for such meetings is approximately 30 minutes to one hour.

Suggestions Programs: Many companies presently utilize a “direct line” program that allows employees to submit suggestions, complaints, or questions to top management by way of voice mail or in writing.
Exit Interviews: To the extent practicable, exit interviews should be conducted with all employees whose employment ends. Exit interviews are an excellent source of information regarding the employee’s job, how the company is viewed, and how supervisors are doing in handling people, enforcing rules, etc.

Employee Publications: “In-house” newsletters can be used to recognize achievements by employees. They also provide a forum in which the company can respond to concerns of general interest that have been raised in a roundtable or through the suggestion system.

The best approach does not rely on any single method for communications. Rather, each employer should use the method that is most appropriate under the circumstances at a given time and integrate each of the suggested techniques over a cycle of time. Every supervisor should be encouraged to speak to each employee at the beginning of the workday, to be available to discuss family problems, to make hospital visits to recovering employees, to attend funerals of employees or their close relatives, to speak with employees in a courteous manner, to ensure the appearance of fairness in all decisions. While most of these things are common sense, in today's high pressure, high performance work environment, supervisors and managers may not appreciate their importance.

N. Community Involvement

The way the general public views the company will have a great impact on how employees view the company. For that reason, management should be concerned about community interests and the company’s reputation as a corporate citizen.

While employees may live in a number of different communities, some of these communities are, in fact, several communities in one. Each community within a community has its own set of leaders. Before a company can increase its visibility in the communities where its employees live, it must identify those communities. One good way is to conduct an analysis of employee zip codes. This will quickly reveal the communities where your employees are concentrated.

The company should consider implementing programs that enable it to develop its image and meet the leaders of all communities that serve its employees. Through a community image campaign, the company will develop contacts within all communities of relevant areas. Once these contacts are established, the company will be able to seek assistance from external organizations, as well as give assistance.

O. Address “Rogue” Supervisors And Managers

There are basically three options to address “rogue” supervisors and managers. These include:

- Change behavior;
- Isolate from employees; or
- Terminate.

Employers are faced with extremely tight timeframes in the context of union organizing and must now navigate through substantially more red tape that will create numerous legal trip wires. There is no room or time for error when employers are targeted by union organizing. Because the dynamics of the organizing game have been so drastically changed to advantage
unions, employers must adapt to this new reality. Employers must prepare ahead of time and carefully execute a plan to confront this challenge.

VII. THE FRANCHISOR’S DILEMMA

On August 27, 2015, the NLRB overturned decades of precedent and issued its decision in Browning-Ferris Industries of California, Inc. d/b/a BFI Newby Island Recyclery. The decision established a new standard for determining when two entities are a single “joint employer” over a group of workers. The new standard means a franchisor may be a joint employer not only if it exercises control over the franchisee’s workforce, but even where it only has indirect or even potential control. Since the announcement of the new standard, franchisor companies have faced a difficult dilemma. On the one hand, franchisors need to protect their brand — on the other hand, even potential control over a franchisee’s business could result in a finding of joint employer status.

In the organizing context, a joint employer finding may mean more than just potential liability for violations of the NLRA resulting from the actions of a franchisee. It may also broaden the union’s ability to organize, strike, picket or boycott and access private property. For example, as discussed more fully above, employers generally have the right to ban non-employees from soliciting or distributing literature inside their facilities or on their property as long as the rules are applied without discrimination. In the event a franchisor and franchisees are found to be a “joint employer,” the NLRB may allow franchisee employees to access franchisor property for the purposes of organizing and vice versa. Similarly, employees from one franchisee could be permitted access to the private property of another franchisee boot-strapped together as a joint employer through the franchisor.

So what is a franchisor to do when its franchisees come looking for assistance and guidance in relation to union organizing or other protected concerted activity?

- Require franchisees to comply with all relevant labor laws, but do not dictate how compliance is to be achieved. While franchisor companies should encourage franchisee businesses to educate themselves and their management teams regarding the NLRA, a franchisor should not make training and educational programs a mandatory term of the franchise relationship.

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129 This case and the new standard are discussed more fully in another session.

130 The NLRB now permits a single bargaining unit to include employees who are solely employed by an employer along with other employees who are jointly employed by that employer and another employer, all without the consent of either employer. Miller & Anderson, Inc., 364 NLRB No. 39 (2016).

131 If an employer is not deemed a secondary (neutral) employer, but instead a “joint employer” with the targeted business, a union could lawfully target the secondary/neutral employer with strikes, boycotts and picketing. See e.g., Carpenters Local 1506 (Eliason & Knuth of Arizona, Inc.), 355 NLRB No. 159 (2010).

132 See e.g., Tri-County Medical Center, 222 NLRB 1089 (1976)(off-duty employees allowed access to exterior, non-working areas of employer’s property for labor activities); and Alcoa, Inc., 363 NLRB No. 39 (2015)(where entities found to be “single employer,” employees from one employer allowed access to other employer’s property).
• Be sensitive to “corporate messages” regarding unions and unionization that could be misinterpreted by franchisee businesses (or the NLRB) as a directive. Many employers, including franchisor companies, adopt and publically articulate a philosophy regarding unionization. If such a position is communicated, whether formally or informally, insure it is clear the message is made on behalf of the franchisor company and not as an expectation of franchisees.

• It is very likely the first place a franchisee will turn when hit with card signing, minimum wage demonstrations or even the service of a petition is the franchisor company. Be careful not to inadvertently direct a particular course of action or the franchisee’s response to such activity. While emphasizing the need for franchisees to act in compliance with the NLRA or pointing them to resources (franchisee or trade associations, outside consultants, independent counsel), a franchisor company that requires franchisees to “fight the union at all costs,” for example, may support a finding of joint employer status. Even comments from the franchisor company meant to be suggestions or friendly guidance may be interpreted as requirements.

• There will be times, however, when by design or by impact, union activity directed at a franchisee business will necessarily implicate the franchisor company even before or without an allegation of joint employer status. In a corporate campaign, for example, unions target a business’ reputation, brand, product, or relationships on which the company depends to sell its product or services. The purpose is to undermine the public’s confidence in the brand with the ultimate goal of forcing the company to accept unionization in exchange for relief. In the context of a franchisor-franchisee relationship this may come as attacks on quality, safety and treatment of employees. In dealing with this type of situation, the franchisor company should work to address the issues through standardization of products/services and customer experience as opposed to codetermining matters related to the terms and conditions of franchisee employees.

Defining the relationship between franchisor and franchisee in terms of labor relations should not be left until union activity occurs. Evaluate what current operational practices could be changed to reduce the risk of a joint employer finding. Also consider: Are the changes warranted and practical? Will such changes affect the bottom line? Do the changes make business sense? Are they sustainable? And probably most importantly, what level of risk are the parties willing to accept?

VIII. CONCLUSION

As outlined above, the Board’s new election rules drastically alter the representation case procedure. Employers are now faced with extremely tight timeframes and must now navigate through substantially more red tape that will create numerous legal trip wires. These new rules leave no room for error when employers are targeted by union organizing. Because the rules of the game have been so drastically changed to advantage unions, employers must adapt to this new reality. Employers must prepare ahead of time and carefully execute a plan to confront this challenge.
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Paul Ades is Hilton’s Senior Vice President for Labor Relations and Americas Legal Operations. Paul leads Hilton’s global labor relations function, including establishing labor relations policy and strategy, negotiating collective agreements, and advising Hilton and its owned and managed properties on all labor relations legal matters. Paul also oversees the operations function for Hilton’s Legal Department, providing legal support to over 400 owned and managed properties in North and South America. Prior to joining Hilton, Paul was General Counsel for Labor & Employment at MGM Resorts International and Associate General Counsel for Caesars Entertainment in Las Vegas, Nevada, a trial attorney for the National Labor Relations Board’s Enforcement Division, and an Associate at the Washington D.C. law firm Steptoe & Johnson. He received a Juris Doctorate from the University of California, Berkeley and a Bachelor of Arts degree in Political Science from Williams College. Paul lives in Reston, Virginia with his wife and nine-year old daughter.

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