Union Organizing

THE NATIONAL LABOR RELATIONS ACT

Union Organizing

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This booklet should not be construed as legal advice or legal opinion on any specific facts or circumstances. You are urged to consult your lawyer concerning your particular situation and any specific legal questions you may have. Employers are specifically encouraged to consult an attorney to determine whether they are subject to other unique state requirements that extend beyond the scope of this booklet.

This booklet is designed to acquaint senior managers and human resources executives with the basic principles under which unions can acquire (and lose) the right to represent your employees under the National Labor Relations Act – the law that establishes the right of most private sector employees to join unions, to bargain collectively with their employers, and to strike. In addition, we will briefly explain some of the techniques used by unions to organize employees, and what management should and should not do to show employees that union representation is not in their best interests.

In a separate booklet in this series, we explain the basic outline of the Act, the collective bargaining process, and conduct prohibited by the Act known as unfair labor practices. Copies of that booklet are available upon request from any Fisher and Phillips office.

HOW UNIONS ACQUIRE THE RIGHT TO REPRESENT EMPLOYEES

There are four methods by which you may become obligated to recognize and bargain with a union as the representative of your employees:

- through an *election* conducted by the National Labor Relations Board;
- by *remedial order* as a consequence of committing unfair labor practices;
- by *voluntary agreement* or by a private election; or
- by *operation of law* under several Board doctrines.

Each will be explained more thoroughly below.

A. The Board's Election Procedures

1. Petition

In order to secure an election, a union submits a *Petition for Election* to the Board's Regional Office (there are 39 such Regional Offices across the country) with geographic jurisdiction over the location involved.

A union cannot just randomly select an employee work force it would like to represent. When it files the petition, the union must demonstrate a "showing of interest" from at least 30% of employees it seeks to organize in a group appropriate for collective bargaining. Normally, this showing of interest takes the form of "authorization cards" signed by the employees.

After processing the petition and determining that it appears to be supported by the requisite showing of interest, the Regional Office notifies the employer of the filing of the petition, provides a copy of the petition, a summary of the Board's procedures, and several copies of a Notice which it "suggests" that the employer post. Posting is not required by law, and there are no adverse consequences if you decline to post it.

2. Hearing

Unless you voluntarily agree to allow the Board to hold an election, the Regional Office next schedules a hearing to determine the scope of the voting unit, and whether that group is "appropriate for collective bargaining." Such hearings are scheduled promptly – sometimes within just a few days of the filing of the petition.

As long as the employees in the petitioned for group share a *community of interest,* the Board will find the unit to be appropriate and will schedule an election. That is, a union may seek to represent employees in a single department, a single craft unit, throughout an entire plant, or even in multiple facilities. If the Board finds that there can

be "meaningful collective bargaining" in the group requested, it will find the unit to be appropriate and direct an election among those employees even if another grouping of employees would also be appropriate, or even more appropriate.

Factors the Board considers in determining whether a unit is appropriate include:

- common supervision;
- similar wages, benefits and working conditions;
- interchange of employees between the group in question and other employees;
- similarity of skills; and
- integration of operations.

The hearing will also determine important issues of voting eligibility for individual employees, including: whether an individual employee is a family member of the owner(s) of the company, a temporary employee, or a supervisor; whether a classification or specific individuals should be categorized as office clerical employees, guards, or professional employees (and thus excluded from voting in a traditional unit); or whether an employee who works in two capacities has a sufficiently close community of interest with employees in the unit to warrant allowing that employee to vote.

3. Witnesses And Subpoenas

Either party may call witnesses at the hearing, and can subpoena individuals to attend. Unions frequently attempt to disrupt a company's operations by issuing subpoenas to all, or a substantial number of its employees. In such cases, you may attempt to have the subpoenas revoked by showing abuse of the Board's processes, that the union has not included the required witness fee, or that the absence of employees will be burdensome and oppressive to your operations.

4. Decision And Direction Of Election

Following the close of the hearing, the employer and the union are allowed one week to submit briefs; the Regional Director will normally issue a *Decision* almost immediately after the receipt of the briefs. If the Regional Director finds that the appropriate unit is different from the one requested by the union, he or she may ask the union whether or not it wishes to proceed. If the unit is broader than the one petitioned for, this may require the union to obtain additional authorization cards in order to reach the 30% showing of interest required.

Although either party can request review of the Regional Director's decision, the order is effective unless and until the headquarters office of the Board in Washington, D.C. grants review and reverses the Regional Director.

Assuming that the union wishes to proceed in the unit found appropriate, the Decision of the Regional Director will also include a *Direction of Election.* Absent unusual circumstances or agreement of the parties, the election is normally held between 25 and 30 days after the Decision is issued. The election is normally held on the employer's premises and at a mutually agreeable neutral site on the premises, such as a cafeteria or break room.

5. Stipulated Or Consent Elections

The Board, the union and the employer are frequently able to avoid the expense of a hearing by formally agreeing on the issues normally resolved through a hearing and selecting a mutually acceptable date for the election. In a *stipulated* election, the parties agree that any post election disputes will be resolved through the Board's normal appeal processes; in a consent election, the parties agree that the decision of the Regional Director will be binding on all the parties, and that there can be no appeal to the full NLRB in Washington.

6. "Excelsior List"

Once the election has been directed or agreed upon, the employer must provide to the National Labor Relations Board an alphabetized list of the full names and addresses (including zip codes) of all employees who are eligible to vote in the election. The NLRB will in turn provide this list to the union in order that the union may, if it wishes, contact your employees at their homes in an effort to persuade them to support the union. This list is commonly referred to as an "Excelsior List" deriving its name from the case in which the Board first held that employers were required to provide this information.

7. Official Election Notices

Shortly after the date of the election is set, the Board provides copies of official election notices. These notices **must** be posted at least three full working days prior to 12:01 a.m. of the date the election is held. Failure to post the notices in a timely fashion gives the union the right to demand a rerun election if it loses.

8. The "24 Hour" Rule

Contrary to what some employers may instinctively believe to be the law, during the pre-election period, you are permitted to actively campaign **against** union representation, and hold employee meetings for that purpose even on company time. Union representatives need not be invited nor allowed access to your property to respond. Such meetings may not be held, however, within 24 hours of the time the voting is scheduled to begin. Managers and supervisors are allowed to discuss the issue with individual employees up to the moment the polls are open. However, no manager or supervisor may talk to more than one employee at a time, during this critical 24 hour period.

9. Voting

During the election, managers and supervisors must stay away from the area in which the voting is taking place in order to avoid intimidating the employees. The only persons present at the polling place during voting hours are the voters themselves, the NLRB agent conducting the election, one or more non-supervisory observers selected by you, and an equal number of observers selected by the union.

The employees vote by secret ballot and indeed, must not sign the ballot or otherwise identify themselves in any way. A ballot with any identifying marks will be considered void. There is a single question printed on the ballot: "Do you wish to be represented for purposes of collective bargaining by the [name of union]?" There are also two squares marked "yes" and "no." After marking the ballot "yes" or "no," the voter places it in the ballot box.

The union's or the employer's observers, or the Board agent, may *challenge* any voter claimed to be ineligible. A voter who is challenged is still entitled to vote, but places his marked ballot inside an envelope with his name written on it. That envelope will not be opened unless a) the outcome of the election could be affected by the ballot and b) the Board later determines (through a hearing or by agreement of the parties) that the voter should be considered eligible.

In order to win the election, the union must have received a majority (50% plus one) of all valid votes cast.

10. Post Election Procedures

Within seven calendar days following the election, the losing party may file with the Regional Office formal *objections* to any misconduct alleged to have affected the outcome of the election and submit evidence in the form of affidavits. If the Board finds the objections have any facial validity – or if the number of challenged ballots was suffi-

cient to affect the outcome of the election – it will schedule a hearing to determine whether the objections have merit, or whether the challenged employees were eligible to vote.

After the hearing, the Regional Director issues a decision on the objections or challenges. At the same time, the Regional Director can either certify the results of the election if the union failed to gain a majority, or, if the union won the election, certify it as the representative of the employees in the unit and order you to bargain with them. Alternatively, the Regional Director may order that the election be set aside because of objectionable conduct by one side or the other, and schedule a new election to be held.

The decision of the Regional Director takes effect immediately, although the losing party may file exceptions to the Decision and Order, and the Board may, if it wishes, grant the exceptions and overrule the Regional Director. Unless and until the Board acts, however, the Regional Director's decision is binding on the parties.

11. The "Blocking Charge" Rule

If, in the course of the campaign between the filing of the petition and holding of the election, either the employer or the union files an unfair labor practice charge against the other, the Board will (unless the party filing the charge requests that the election go forward) suspend the election process until the charge can be investigated and resolved.

Normally, such a charge is filed as a campaign tactic, or simply because the party filing the charge thinks it is losing, and wants some time to regroup. Because this is a common tactic, the Board generally investigates such charges on an expedited basis. Unfair labor practices can be quite serious and are explained and dealt with more fully in a separate booklet in this series.

12. The "At The Employer's Peril" Rule

In many cases, an employer may wish to dispute the Regional Director's certification of the union as the representative of employees. Unfortunately, there is no direct appeal from such a certification. The only way to obtain review of a union's certification, is formally to refuse to bargain, await the unfair labor charge of refusal to bargain, and then litigate the Board's order in a Circuit Court of Appeals. The Court of Appeals may order a new election if you originally lost, or uphold the original election if you won. In such cases, the Board's initial order to bargain, or the certification, is null and void.

If your appeal to the Court is unsuccessful, the original certification or bargaining order is held to have been valid throughout the pendency of the appeal. The result is that any changes in wages, hours or working conditions during the appeal (changes over which you would have had to bargain if the union represented your employees, but over which you did not bargain because you did not believe you had to do so) will be held to be unlawful and the employees entitled to be "made whole."

B. Bargaining Orders As A Remedy For Unfair Labor Practices

The NLRB can order a company to recognize a union as the representative of its employees **even if the union loses the election** or – in cases of "blocking charges" – even if no election has been held. The Board issues such bargaining orders if it finds that

- a majority of employees in the unit have signed authorization cards;
- the employer has committed unfair labor practices; and
- the unfair labor practices were so serious that a fair election cannot now be held.

C. Voluntary Agreement

Employers may voluntarily recognize unions without a formal Board election. In such cases, the union still must demonstrate that a majority of employees desire to be represented by that union. Such a demonstration may be made in a variety of ways, including authorization cards or a petition signed by a majority of employees, a showing of hands, or by a private election. If you initially agree to recognize a union conditioned on a demonstration of majority support, you may not revoke that agreement after the union makes the necessary showing of majority status. Once you agree to recognize a union, you may not withdraw recognition for one year, even if the employees subsequently tell you that they made a mistake.

D. By Operation Of Law

The Board frequently resorts to a number of legal fictions to require employers to recognize unions, even in the absence of unfair labor practices, and with no showing that a majority of the employees desire union representation.

1. Successorship Doctrine

Under the Board's *successorship* doctrine, you will be required to bargain with a union if a) a majority of your employees were employed by a different company and were represented by a union when working for that company, and b) your business is regarded a "continuation" of that previous employer. This usually arises in the case of one business purchasing the assets of another, but it can also arise when one service contractor (e.g. a janitorial or guard service) replaces another service contractor.

In such cases, you will be required to recognize the union as the representative of all employees in the unit, but you will not normally be bound by your predecessor's collective bargaining agreement with the union.

Exceptions arise if you

- voluntarily adopt the contract;
- operate under terms and conditions set forth in the contract; or
- state that you will offer employment to the predecessor's employees without reserving your right to establish different terms of employment.

The Board frequently finds successorship even in cases where a majority of a new employer's employees had not worked for the predecessor employer. If the Board finds that you discriminated against your predecessor's employees by refusing to hire them in order to avoid successorship, the Board will presume that those employees would have been a majority if there had not been unlawful discrimination. Moreover, in such cases the Board may require you to abide by the predecessor's union contract.

2. Joint Employer Doctrine

Joint employment cases arise when employees may be said to work for two employers at the same time. One example of joint employment arises in the case of employees of personnel agencies who work for another employer pursuant to a contract between the agency and the second employer.

Joint employment can also occur when one company performs services for another, and the second employer has enmeshed itself in the labor relations of the first. For example, if a customer tells his contractor how much to pay its employees, or directs the contractor's employees in the performance of their work, the customer and the contractor are joint employers of the contractor's employees.

Joint employment cases arise most frequently when a customer attempts to terminate a contractual relationship, and the union which represents **the contractor's employees** suddenly claims that the customer was a joint

employer, and therefore cannot terminate the relationship without bargaining with the union. In addition, one joint employer is liable for the unfair labor practices committed by the other.

3. The Alter Ego Doctrine

When a unionized employer establishes a new business in the same general field, the Board often finds that the new business is the "disguised continuation" of the unionized operation and will impose on the new business the same bargaining and contractual obligations which bound the original business.

In considering whether one business is the alter ego of another, the Board considers the following factors, no one of which is controlling: a) common management; b) common ownership; c) common business purpose; d) common equipment; e) common customers; and f) common supervision. A finding of alter ego status is more likely if there is evidence that one purpose for creating the second business was to allow the first business to avoid its obligations under the Act, although the Board holds that such evidence is not essential to proving alter ego status. Some courts of appeals disagree with the Board on the necessity of an unlawful purpose.

4. Relocated Or Consolidated Unit Doctrines

When a unionized employer relocates work or consolidates its operations, the Board may require the employer to continue to bargain with the union at the new facility if the employees at the old facility were discriminatorily denied transfer rights, or if they constitute a majority of the employees at the new facility. Indeed, in some cases, the Board has required continuation of bargaining even where the transferred union employees merely constituted a "substantial percentage" (40% to 50%) of all employees in the unit at the new facility.

Cases under this doctrine generally arise when an employer has closed one facility, opens or expands another one to perform substantially the same work for substantially the same customers, and has either unlawfully refused to consider transferring employees from the closed facility to the new location (it is not necessary to agree to such a proposal, but you must consider any such union demand and offer legitimate business reasons for your refusal), or has in fact transferred, by agreement with the union or unilaterally, employees to the new location.

In some cases, where the new facility is clearly just a replacement for the old one, the Board has held that the employer must recognize the union at the new facility even though no, or only a few, employees transferred, simply because of a Board presumption that the newly hired employees will desire union representation to the same extent the employees at the old location did.

5. Accretion Doctrine

If a unionized employer establishes, or purchases, a new operation, the union frequently claims that the new operation is an "accretion" to the existing operation and that the employer must recognize the union as the representative of employees. Factors considered by the Board in determining accretion include: the distance between the two operations, the degree of integration of operations, as well as the similarity of skills and working conditions of the employees.

Historically, the Board has been reluctant to find accretion because it interferes with employee free choice. However, the current membership of the NLRB is sharply pro-union, and it is uncertain whether it will continue to follow this policy.

LOSS OF BARGAINING RIGHTS

Just as unions gain rights to represent employees, they can lose them, as well. The principal means by which unions lose the right to represent employees are through an election conducted by the NLRB, because the company has lawfully withdrawn recognition, or where the employer closes the operation.

As you might imagine, unions enjoy a number of statutory and Board-defined protections against losing representational rights. These protections include the "one year rule," the "contract bar rule," the presumption of continuing majority status, the "taint doctrine," the presumption that strike replacements are "temporary" employees, the "unfair labor practice strike doctrine," and the fact that replaced economic strikers are eligible to vote in any election within one year after the commencement of the strike.

A. Decertification Through NLRB Election

The election procedures described previously cover what is usually referred to as an "RC" election. This is the Board's designation of petitions aimed at **gaining** union representative rights. There are two additional types of elections which are aimed at ousting an established union: "RD" elections and "RM" elections. The Board processes the petitions the same way it processes RC petitions by unions seeking initial recognition, and each must be supported by a showing of interest. RD petitions require a 30% showing of interest. Special rules apply to RM petitions.

An RD petition must be filed by a non-supervisory employee, and supported by a showing of interest of at least 30% of the unit employees. In all cases, if the evidence consists of signatures on a petition, the date of each signature must appear on the face of the petition.

An RM petition is filed by the company. An employer can only file such a petition if it can demonstrate that there is *objective evidence* that a majority of its employees do not desire to be represented by the union. Such petitions are filed rarely, partly because the standard of objective evi-

dence is high, but also because an employer which has such objective evidence need not resort to the Board election process at all, but can simply withdraw recognition.

B. Withdrawal Of Recognition

You are permitted to withdraw recognition if you are presented with evidence that a majority of unit employees do not desire to be represented by the union. This usually takes the form of a petition, circulated by unit employees and signed by a majority of them, which states: "We, the undersigned employees of ____________ do not wish to be represented by the ___________ union." The Board has also approved withdrawal of recognition when the employer proved that a majority of employees had stated at one time or another that they did not want to be represented by the union.

Some courts of appeals, over the Board's objections, have permitted withdrawal based on less unequivocal evidence, such as a dramatic drop in the number of employees authorizing dues deductions. However, reliance on any evidence other than a petition such as that described above will almost certainly subject you to the expense of litigating an unfair labor practice charge before the Board and appellate proceedings following an inevitably adverse decision by the Board.

C. Comparative Advantages Of Elections And Withdrawal Of Recognition

1. Election

If an employer wins an RM or RD election, it has protection against another election for a year (the Board will not normally hold an election within twelve months of another). The union cannot picket for recognition for a year, and the employer does not run the risk that the NLRB will find some basis for finding that the withdrawal of recognition was unlawful, thus making all subsequent operational changes unlawful.

2. Withdrawal Of Recognition

Elections are time consuming and expensive; under the circumstances, the union will probably have the right to come on to the business site and, while there, will campaign among employees; the union might "get to" the employee who filed the petition; the union could "block" the election for a time by filing unfair labor practice charges; and the employer must continue to recognize the union, pending the post election proceedings.

D. Closure Of The Facility

Obviously, if you permanently discontinue operations at a unionized facility, and all employees are terminated as a consequence of the closure, there is no longer a collective bargaining unit for the union to represent. But, you must be able to demonstrate that the facility was closed for legitimate business reasons unrelated to your attitude toward the union, and that it is not in violation of any of your obligations under the Act and any collective bargaining agreement.

That means, you must be prepared to demonstrate that the contract did not forbid the closure, the reasons for the closure (subcontracting, transfer of work to another location, etc.) were legitimate, that you have satisfied any duty you had to bargain with the union over the underlying decision and the effects of that decision, and that either the union did not request transferring the employees to any replacement facility, or that you had legitimate business reasons for refusing such a request.

E. Protections Against Union Loss Of Representational Rights

1. The One Year Rule

Once a union has been certified by the Board, or voluntarily recognized, the union enjoys an **irrebuttable** presumption of continuing majority status for one full year. Even if an overwhelming majority of employees unequivocally state

that they do not want to be further represented by the union, the Board **will not** allow withdrawal of recognition nor the filing of an RD or RM petition during the initial twelve months. Instead, it will require you to continue to recognize and bargain with the union and will refuse to hold another election.

The only exception to this rule occurs when the union has acquired representational rights under the successorship doctrine. In that case, the new employer may lawfully withdraw recognition, or the Board will conduct an election, within the year recognition was granted, assuming that an election or withdrawal of recognition would otherwise be appropriate.

2. The "Contract Bar" Doctrine

If an employer and a union have signed a collective bargaining agreement, the union's majority status may not be challenged or tested during the term of the contract, for up to three years. There is a window period between 60 and 90 days before the expiration of the agreement during which a petition for election may be filed. Contracts for longer than three years do not bar an election after the third year, which explains why there are so few four or five year collective bargaining agreements.

3. The Presumption Of Continuing Majority Status

Even after the expiration of the certification year and any collective bargaining agreement, the Board will presume that employees continue to desire representation by the union. The mere fact that employees have resigned their membership, or complain about the union, or that all employees who originally voted for the union have been terminated and there is an entirely new work force will not rebut this presumption.

4. The "Taint" Doctrine

The Board will not process a decertification election, or permit an employer to withdraw recognition based on objective evidence of a loss of majority support, if the union

can demonstrate that the showing of interest in support of the decertification petition, or the objective evidence on which the employer relied when it withdrew recognition, was sponsored or instigated by the employer himself (through a supervisor, for example) or was the result of unfair labor practices committed by the employer.

5. The Unfair Labor Practice Strike Doctrine

Unions frequently lose their majority status as the result of a strike and the hiring of *permanent replacements* for the strikers. You are entitled to hire permanent replacements for employees who strike in support of bargaining demands ("economic strikers"). Permanent replacements for economic strikers are considered to be part of the bargaining unit and are technically represented by the union. Of course when this happens, the permanent replacements are generally hostile to the striking union because of abuse by the pickets and/or the fact that the union generally demands that the replacements be discharged in order that the strikers can be reinstated.

However, if the strike is caused or prolonged by the employer's unfair labor practices, the strike is considered to be an "unfair labor practice strike" instead of an economic strike. Because unfair labor practice strikers are entitled to immediate reinstatement upon an unconditional offer to return to work, the replacements are by definition "temporary" employees, are therefore ineligible to vote, and you may not consider their sentiments in determining whether the union represents a majority of your employees.

6. Presumption That Striker Replacements Are "Temporary" Employees

The Board has announced that unless the employer has formally designated replacements as permanent replacements for the strikers and has done so **prior** to the withdrawal of recognition, the replacements will be presumed to be temporary employees, and therefore may not be considered in determining whether the union represents a majority of employees.

7. Requirement Of Overt Expression By Striker Replacements

Even with permanent replacements in a clearly economic strike, the Board will not presume that the replacements are opposed to union representation. Accordingly, you may not withdraw recognition simply because striker replacements are a majority of your workforce. An overt expression that they do not desire to be represented is required.

8. Continuing Voting Eligibility Of Replaced Strikers

The Act specifically provides that economic strikers who have been permanently replaced remain eligible to vote in any election held within one year of the commencement of the strike. Accordingly, sentiments of strikers must be considered when determining whether the employees who have stated they do not want to be represented constitute a majority of the unit employees, and their votes will be counted in any decertification election held within twelve months of the start of the strike.

Because of this quirk in the statute, unions often seek to prolong their representative status by filing a petition for election shortly before the one year anniversary of the strike. If the strikers outnumber the replacements (as they often do, since the replacements are usually more efficient than the employees who struck), the union may win the election and thereby prevent withdrawal of recognition or a decertification election for another year.

UNION ORGANIZING STRATEGIES AND TECHNIQUES

Unions utilize essentially two basic strategies – "grass roots" and "top down." The traditional "grass roots" approach is to persuade employees that union representation will inevitably result in better wages, benefits, working conditions and job security, and that collective bargaining does not carry with it any potential risks for employees.

Because employees across the country have become increasingly resistant to the traditional approach after learning of the disadvantages of union representation,

unions have begun to adopt a "top down" strategy. This consists of attempting to discourage **employers** from exercising their legal right to inform their employees about the disadvantages of unionization.

A. Traditional Organizing Techniques

Space limitations do not permit more than a partial listing of the means by which unions recruit members. Some of the more common approaches include:

- The "silent campaign" – no overt union activity at the employer's premises, with all activity occurring at employees' homes;
- "Everybody else has signed" – employees are urged not to be the only holdouts – even if only a few have signed cards at the time;
- "If you help us, you can be a steward" – promising positions of prominence in the union once the union wins the election;
- "You need somebody to speak for you" – exploiting the apparent (or real) failure of management to listen to employees' concerns;
- Exploiting employer policies – utilizing employer supplied lists of employees, or demanding the rights of access to bulletin boards or solicitation which non-union organizations enjoy;
- Exploiting supervisors – persuading low level supervisors who are either disgruntled or misguided to sign up their employees for the union;
- Recruiting a respected employee – the organizer identifies, befriends and enlists as a member of the organizing committee some of the people in every organization who are natural leaders;
- "Sign this card to get more information (or an election) and there is no obligation" – persuading employees to sign cards on any pretext, and then using the cards to demand recognition.

B. "Top Down" Techniques

The basic element of the top down technique is to discourage you from exercising your right to inform employees about what union representation really means. Unions do this either by offering a very attractive initial agreement (a "sweetheart" contract), by asking your customers to refuse to do business with your company (boycotts) so long as it is non-union, or by increasing the costs and burdens of responding to the union's attempt to organize your employees.

These costs can be increased by persuading, or threatening to persuade, local governments to adopt crippling regulations, by funding employee litigation, or by encouraging governmental investigations. A combination of such techniques, along with adverse publicity against a target company, is sometimes called a "corporate campaign."

A technique currently the subject of much legislative and judicial interest is "salting" – union officers and paid organizers apply for employment as a means of infiltrating your work force. Often the infiltrator deliberately sabotages his application, or provokes his discharge, in order to be able to burden you with costs of unfair labor practice proceedings. In all these cases, the intended message to the employer is that the cost of resistance is greater than the efficiencies of remaining non-union. Remedial legislation outlawing this technique has been proposed but it remains legal at this time.

1. Labor Peace Agreements

Another form of top down organizing involves union pressure to force a company to agree in advance that it will either recognize a union majority by card check only (that is, omitting the need for a secret ballot election), or will campaign in a very subdued manner. These so-called "Labor Peace" Agreements come in several variations.

a. Neutrality

In a Neutrality Agreement, the company agrees not to oppose future unionization efforts.

- "Strict" Neutrality Agreements can range from requiring the company to do nothing at all during a union organizing campaign, to affirmatively allowing union organizers access to the property, or giving union spokespeople a forum from which to persuade employees to support the union.
- Other variations of Neutrality Agreements are more limited, allowing the company to express its opinion (if done in temperate terms), to correct any misstatements the union may make, to respond to union "provocations" or to give union representatives equal time, i.e. if the company holds meetings with employees to present it's views, a union spokesman will be present.

b. Card Check

Some labor peace agreements go so far as to require the company to recognize the union on the basis of authorization cards alone. There is no campaign and no secret ballot election. There is currently (2007) legislation in Congress aimed at eliminating secret ballots and making card checks the norm.

c. Why Companies Agree to Labor Peace Agreements

In most situations, labor peace agreements grow out of collective bargaining at a location where the company is at an economic disadvantage. The union may have a credible threat of a strike, or may be seriously affecting the company's business. In order to obtain a better relationship at the target location, the company agrees to some form of labor peace agreements at its other locales.

Many locations in the country (San Francisco, Chicago, New York) are much more pro-union than other parts of the country. There may be politicians at either the local or national level who are able to put pressure on employers to deal favorably with unions.

City councils are often useful tools for unions, and may pass local ordinances requiring employers who do business with the city, or who do business in a certain area of the city to recognize unions or deal favorably with them.

Some employers may actively seek union assistance because of certain business reasons:

- Unions are often able to steer major conventions toward or away from certain hotels based on their labor policies.
- Employers in controversial industries (the gaming industry, or industries accused of polluting, for example) may find certain localities overtly hostile to the opening of a new facility. Unions can often be helpful in overcoming this opposition.
- Unions may offer direct financial assistance to certain companies including in the area of finacing new construction.
- American properties of foreign-owned corporations may sometimes receive pressure from the parent, in order for the parent to maintain good relations with its own union.
- Fear of a corporate campaign.

2. Corporate Campaigns

Corporate campaigns are another example of top down organizing when ground up organizing no longer is effective. Rather than persuading employees to sign authorization cards, unions persuade Boards of Directors and shareholders of major companies to adopt favorable policies towards unions in order to avoid negative publicity, boycotts, etc.

Unions may also put pressure on banks or lending institutions and other third parties who are friendly to it to either cease doing business with a particular target or to persuade the target to adopt union-friendly policies.

DEFENSIVE MEASURES

There is no simple, easy or foolproof measure you can adopt to ensure that your company remains union free. The best you can hope for is to become a "hard target." Unions have limited time and resources and therefore are naturally inclined to invest those resources in efforts most likely to produce returns. If an employer appears to be relatively less susceptible to union organizing than another similarly situated employer, the union is more likely to focus its attention on the vulnerable employer than one which has taken common sense preventive measures. These measures include:

A. Communications, Communications, Communications

Your employees want to know what is expected of them, how their work affects the work of others, and how your company is doing in the marketplace. In addition, smart employers take advantage of their employees' intelligence, initiative, insight and experience, and try to ensure that their decisions and policies affect morale and productivity in a positive way.

Employee meetings, "hotlines" and suggestion boxes, exit interviews, dispute resolution procedures and "two way" evaluation programs are just some of the programs that complement effective supervision. In addition, employee participation programs and "team" systems are excellent communications tools if they are carefully designed to avoid a finding of a violation of Section 8(a)(2) of the Act.

B. Identification And Training Of Supervisors

Supervisors are the principal means by which you communicate with the work force. For that reason, unions fre-

quently attempt to organize rank and file employees by first recruiting supervisors and asking them to solicit members on behalf of the union. If supervisors have not been formally identified as such, and have not been informed of their special status, it is possible that they would do as the union requests.

Another reason for clear identification of supervisory personnel is that you are required to give instructions to supervisors to ensure that unfair labor practices are not committed, yet if you gave those instructions to non-supervisors, the instructions themselves would constitute violations of the law. A prime example is the instruction to report immediately any information which could have legal significance. It is essential that supervisors be given such instructions, but if the same instructions were given to non-supervisory employees, the NLRB would find the instructions to be unlawful "coercive interrogation."

For these reasons, senior management should determine (ideally before any union activity) which employees are, and which are not, supervisors within the meaning of the Act. All managers and supervisors should then be trained to comply with the laws affecting the workplace and in your policies.

C. Review Personnel Policies And Practices

Senior management should periodically review and revise personnel policies and practices to ensure that they are understood by all employees, that they are administered consistently, that they comply with federal and local laws, and that these policies are not subject to abuse or exploitation.

D. Ensure That Wages And Benefits Are Competitive

In an increasingly competitive economy, a non-union employer cannot afford to pay lower wages or benefits, just because it is non-union, any more than a unionized employer can afford to pay higher than market wages and benefits just because its employees are represented by a union. If your costs, and therefore prices, are higher than those of your competitors, you will lose market share.

Similarly, if your wages and benefits are lower than those paid by competitors, your most qualified employees will seek employment elsewhere or a union will attempt to organize them by pointing out the wage and benefit disparities.

E. Exercise "Free Speech" Rights Under Section 8(c)

If you are the target of a union organization campaign, you should exercise to the fullest possible extent your right under Section 8(c) of the Act to present facts, opinions and arguments demonstrating that union representation is not necessarily in the employees' best interest, and could operate to their serious disadvantage. To do this, you may quote newspaper and magazine articles, cite statistics, explain how markets work, explain the law, point to what unions haven't done for, or have done to, employees at other businesses or in your own business.

Remember, however, that your campaign may not suggest or imply that you will take action against employees to punish them because they select the union or reward them because they reject the union. Any suggestion of possible adverse consequences must be carefully phrased in terms of objective, external economic circumstances, or simple operation of law, unrelated to any hostility to unionization on your part.

THE FUTURE OF UNIONS

For more than three decades, the percentage of the nation's work force represented by unions has steadily declined. Indeed, the only areas in which unions have been able to increase their penetration of the work force has been among governmental employees, or among employees of charitable institutions or other employers which are not subject to competitive pressures.

There are many explanations for this continuing decline. One reason, ironically, has been the unions' success in persuading legislators to enact "worker friendly" legislation, which exposes employers to expensive legal

proceedings if any of their employees' individual rights are violated. This has forced prudent employers to review their policies, and the manner in which those policies are carried out. This process of review has prevented many harsh or arbitrary decisions which in the past have caused employee unrest leading to unionization.

Another cause of the union decline is the increasing competitiveness of the global economy. It is no longer the case that in most industries all the competitors have unions with essentially the same labor costs. Employers can no longer agree to contracts which impose inefficient work rules or other costly provisions and simply pass those costs on to the customer because all competitors suffer the same handicap. Employers with costs higher than their competitors sooner or later either go out of business or bring their costs into line through concessionary bargaining.

This effort to reduce costs often leads to deunionization, either through strikes and the hiring of replacement employees who do not desire representation, or simple recognition by employees that unions do not and cannot repeal fundamental laws of economics.

On the other hand, the increasing competitiveness of our economy works both ways. Employees change jobs far more frequently than in the past, and are increasingly willing and able to find other employment in the event unionization leads to the loss of jobs through plant closure or strikes. Although the continuing decline of unions appears to be inevitable on a national scale, individual companies remain vulnerable to organizing campaigns, and unions appear to be increasingly sophisticated in identifying those employers who have not maintained their defenses.

For further information about this topic, contact any office of Fisher & Phillips LLP or visit our website at www.laborlawyers.com.

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