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LITTLER ON UNION ORGANIZING

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ABOUT THE AUTHORS

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COVERAGE

Scope of Discussion. This publication explains union election procedures and the NLRB's role in overseeing elections. It also explores NLRB precedent on objectionable conduct by different parties that may result in election results being overturned. Also included is information concerning actions employers are permitted to take and are prohibited from taking in advance of and in response to union organizing drives.

Although the major recent developments in federal employment and labor law are generally covered, this publication is not all-inclusive and the current status of any decision or principle of law should be verified by counsel. The focus of this publication is federal law. Although some state law distinctions may be included, the coverage is not comprehensive.

To adhere to publication deadlines, developments and decisions subsequent to **April 1, 2018** are generally not covered.

Disclaimer. This publication is not a do-it-yourself guide to resolving employment disputes or handling employment litigation. Nonetheless, employers may find the information useful in understanding the issues raised and their legal context. This publication is not a substitute for experienced legal counsel and does not provide legal advice regarding any particular situation or employer or attempt to address the numerous factual issues that inevitably arise in any employment-related dispute. The materials in this publication are for informational purposes only, not for the purpose of establishing an attorney-client relationship. Use of and access to this publication does not create an attorney-client relationship between Littler Mendelson, P.C. and the user.

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§ 1 OVERVIEW OF UNIONS & THE ELECTION PROCESS

§ 1.1 INTRODUCTION

Organized labor has experienced a steady decline for decades. Despite higher rates of success in some more recent elections, the number of union members has decreased over the past 35 years from 17.7 million workers (20.1% union membership rate) in 1983 to 14.8 million (10.7% membership rate) in 2017.[1]

Further, many unions are increasingly reliant on the public sector for members. Although the number of unionized workers in the private and public sector is about equal, the membership rate in the public sector is more than five times that of the private sector: 7.2 million union workers in the public sector (34.4% membership rate); 7.6 million in the private sector (6.5% membership rate).[2]

In light of the overall decline in numbers, unions have become more strategic in targeting certain regions, growing industries, and certain well-paid workers (*e.g.*, nurses, white collar employees) and have become more creative in their organizing tactics (utilizing social media, etc.).

§ 1.2 BRIEF HISTORY OF UNIONS

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

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

§ 1.2(a) *National Labor Relations Act & National Labor Relations Board*

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

The NLRB's responsibilities can be broken down into two primary areas: (1) conducting union elections; and (2) enforcing the Act's prohibitions against "unfair" conduct by employers and unions (known as

[1] U.S. Dep't of Labor, Bureau of Labor Statistics, *Union Members Summary* (Jan.19, 2018), *available at* http://www.bls.gov/news.release/union2.nr0.htm. The BLS provides updates to its union organizing statistics in mid-January of each year.

[2] U.S. Dep't of Labor, Bureau of Labor Statistics, *Union Members Summary* (Jan. 19, 2018).

"unfair labor practices"). The NLRB fulfills this second function by investigating allegations of unfair labor practices and by holding hearings to determine whether a violation has occurred. After a hearing, the NLRB can order an employer or a union to "cease and desist" from continuing to commit an unfair labor practice, and it can order other remedies to effectuate the Act's purposes such as directing an employer to reinstate and provide back pay to any employee who is a victim of unlawful employer discrimination.

By the late 1940s, the NLRB was conducting more than 20,000 elections each year—compared to an average of 1,300 elections per year from 2010 through 2017 in more recent years (see Table 3 in **§ 1.2(c)**).[3] By the mid-1950s, at the height of the labor movement, roughly 35% of the American workforce was unionized, and it was not unusual for unions to win 75% of the elections that were held in any particular year.

§ 1.2(b) *Shifting Union Alliances*

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

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

During the 1950s, there was increased pressure within both the AFL and the CIO to unite. With changes in leadership of both organizations, the prospects for unification improved. A special subcommittee was appointed in 1952 to eliminate raiding of membership between the member unions of the two organizations. In 1953, a no-raiding pact was approved by 65 AFL affiliates and 29 CIO affiliates, representing a total of ten million workers. Under its terms, the signatory unions agreed not to try to displace another union or raid its membership in any plant where an "established bargaining relationship" existed. This no-raiding agreement led swiftly to plans for unification. A constitution was ratified by a special joint convention in 1955, and the new organization became known as the AFL-CIO.

More recently, in 2005, several of the unions within the AFL-CIO disaffiliated and formed the "Change to Win" Coalition (including the International Brotherhood of Teamsters, Service Employees International Union (SEIU), United Food and Commercial Workers Union (UFCW), UNITE HERE, and United Farm Workers). The split was attributed to basic philosophical differences within the U.S. labor movement. Change to Win grew frustrated with the AFL-CIO's focus on national politics and demanded that more resources be expended on organizing. The split was a blow to the AFL-CIO as its membership was reduced from about 13.6 million to 9.8 million members in 2006, while Change to Win reached over 5.3 million members.[4]

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[3] For more recent statistics, see Table 3: *Representation & Decertification Elections* in **§1.2(c)**.

[4] *See* Form LM-2 Labor Organization Annual Reports, *available at* http://www.dol.gov/olms/regs/compliance/rrlo/lmrda.htm.

Despite several attempts in early 2009 at unification and reconciliation, infighting and divisions among the major players in organized labor continues. In 2009, approximately 150,000 workers split off from UNITE HERE to form Workers United and immediately affiliated with the SEIU (prompting speculation that the SEIU, a member of Change to Win, may have provoked the rift). Subsequently, three unions left Change to Win to join the AFL-CIO: UNITE HERE in 2009; Laborer's International Union of North America in 2010; and UFCW in 2013. This activity shifted membership numbers again: by 2017, AFL-CIO members had increased to 12,502,587 while Change to Win members had decreased to 3,463,611.[5]

This ever-changing landscape will continue to affect labor's ongoing organizing and legislative efforts.

§ 1.2(c) *Decline of Modern Unions: Union Membership & Election Statistics*

Union membership began to decline steadily in the 1970s. That decline continued as private sector representation continued to hit new lows. Despite the organizing efforts by unions, both the total number of union members and the number of elections have generally decreased over time. However, the decrease has plateaued in the past few years.[6]

Despite the decline in union membership, earnings of union members continue to outpace that of nonunion workers. (See Table 1.)

Table 1. Median Weekly Earnings: Union Members v. Nonunion[7]

Year	Member of Union	Nonunion
2017	$1,041	$829
2016	$1,004	$802
2015	$980	$776
2014	$970	$763
2013	$950	$750
2012	$943	$742
2011	$938	$729
2010	$917	$717

Many unions are increasingly reliant on the public sector. Although the number of unionized workers in the private and public sector is about equal, the *percentage* of workers it represents is vastly different: the public sector's union membership rate is about five times that of the private sector. (See Table 2.)

Table 2. Union Membership Private & Public Sector - Number of Members (Percentage of All Workers in Sector)[8]

Year	Public & Private Sector	Private Sector	Public Sector
2017	14.8 million (10.7%)	7.6 million (6.5%)	7.2 million (34.4%)
2016	14.5 million (10.7%)	7.4 million (6.4%)	7.1 million (34.4%)
2015	14.8 million (11.1%)	7.6 million (6.7%)	7.2 million (35.2%)

[5] *See* Form LM-2 Labor Organization Annual Reports.

[6] *See* Table 2: *Union Membership Private & Public Sector* and Table 3: *Representation & Decertification Elections*.

[7] For 2017 statistics, *see* U.S. Dep't of Labor, Bureau of Labor Statistics, *Union Members Summary* (Jan. 19, 2018), *available at* http://www.bls.gov/news.release/union2.nr0.htm ("The comparisons of earnings in this release are on a broad level and do not control for many factors that can be important in explaining earnings differences."). For previous years, *see* U.S. Dep't of Labor, Bureau of Labor Statistics, *Union Members (Annual), available at* http://www.bls.gov/schedule/archives/all_nr.htm.

[8] For 2017 statistics, *see* U.S. Dep't of Labor, Bureau of Labor Statistics, *Union Members Summary* (Jan. 19, 2018). For previous years, *see* U.S. Dep't of Labor, Bureau of Labor Statistics, *Union Members (Annual)*.

2014	14.6 million (11.1%)	7.4 million (6.6%)	7.2 million (35.7%)
2013	14.5 million (11.3%)	7.3 million (6.7%)	7.2 million (35.3%)
2012	14.4 million (11.3%)	7.0 million (6.6%)	7.3 million (35.9%)
2011	14.8 million (11.8%)	7.2 million (6.9%)	7.6 million (37.0%)
2010	14.7 million (11.9%)	7.1 million (6.9%)	7.6 million (36.2%)
1983	17.7 million (20.1%)	--	--

Although the number of NLRB "representation" elections hit a high of 1,490 in 2015, it has declined since then with only 1,193 such elections held in 2017. The number of "decertification" elections has fluctuated over the past several years. Both the number of these elections and the percentage won by unions hit historical lows in 2017. (See Table 3.)

Table 3. Representation & Decertification Elections[9]

Fiscal Year	No. of Representation Elections (RC)	Percentage Won by Union	No. of Decertification Elections (RD)	Percentage Won by Union
2017	1,193	71.0%	172	32.0%
2016	1,299	72.0%	172	39.0%
2015	1,490	69.0%	176	41.0%
2014	1,260	68.0%	180	33.0%
2013	1,238	63.0%	197	38.0%
2012	1,202	65.0%	211	41.0%
2011	1,297	71.4%	240	43.9%
2010	1,577	65.9%	233	38.6%

§ 1.2(d) *Factors Contributing to the General Decline in Union Membership*

The reasons for the general long-term decline in private sector union membership are as varied as they are debated. Unions have been adversely impacted by, among other things: (1) a decline in traditionally organized industries such as manufacturing and steel production; (2) changes in industries such as transportation, utilities, and communication; (3) off-shoring of work historically done in the United States by organized workers; and (4) organized labor's own strategies over the past 30 years.

Other contributing factors fall more within an employer's control—*i.e.*, where an employer may find that its actions decrease employees' requests for third-party representation in employment. These factors and others are discussed below:

- **Competitive Wages & Benefits from Employers.** Employers generally have found that when they provide better working conditions and are more sensitive to the needs of today's employees, successful union organizing declines. Therefore, some employers have sought to provide competitive wages and benefits, 401(k) retirement plans (which may be a popular alternative to traditional pension plans), and offer non-traditional benefits such as subsidized child care or flexible work schedules to increase employee satisfaction and retention.

- **Improved Policies & Procedures.** Many employers have placed an increased emphasis on the creation and consistent enforcement of fair policies and procedures.

  Part of the labor movement's typical campaign strategy has been to try to convince

[9] Fiscal Year is from October 1 to September 30. The NLRB's Election Reports for Cases Closed are available at https://www.nlrb.gov/reports-guidance/reports/election-reports.

employees that the employer will take advantage of its power and mistreat workers. In response, employers developed employee handbooks and other policies and procedures, such as progressive discipline procedures, to provide better assurances of fair treatment. To help reduce the risk of such policies being deemed contractual commitments limiting an employer's right to terminate employees, employers have included disclaimer language advising employees that the handbook might not be followed in all cases and that employees could be terminated at any time and for any reason. (However, this has been a target for union organizers and the labor movement claiming unions provide increased "job security.")

Another typical strategy of the labor movement is to tout traditional labor arbitrations under union contracts as a superior way to resolve disputes. In response, many employers have implemented alternative dispute resolution (ADR) procedures. ADR policies provide a multi-step internal grievance procedure that an employee can use to resolve workplace disputes. If the grievance process fails, most ADR policies provide for mediation or binding arbitration as a method to finally settle the dispute. One typical benefit of the implementation of ADR programs is to help decrease litigation costs associated with employment disputes.

- **Improved Communications & Management Techniques.** Employers are now providing more training for their front-line supervisors and managers. Employer-sponsored training has become widespread. Training efforts have focused on good management practices and strategies such as effective communication to decrease disputes in the workplace. Fewer disputes, better communications, and good management tend to make employers less attractive targets for union organizing.

- **Increased Protection from State & Federal Laws.** Many of the protections and benefits that unions fought hard to obtain in the 1930s through the 1960s are now mandated by various federal and state laws (*e.g.*, child labor laws, workers' compensation laws, benefit protections, notice requirements before layoffs/reductions in force, and occupational safety and health regulations). Federal and state laws also protect workers against discrimination based on their age, race, sex, national origin, disability status, veteran status, sexual orientation, marital status, and other protected categories. These statutory protections require employers to monitor their employment practices more carefully, and these compliance efforts help reduce the instances of unfair or arbitrary employment actions. The combination of government intervention and regulation along with employers' compliance efforts has resulted in unions no longer being able to claim they are the "sole providers" of such protections.

§ 1.2(e) *Labor Movement's New Strategies*

Union Front Organizations (UFOs), known as "worker centers," include, among others: (1) membership organizations affiliated with labor unions (in some cases loosely); (2) employee caucuses, generally sponsored by employers; (3) immigrants' advocacy organizations; (4) immigrant centers; (5) legal advocacy groups; and (6) Internet-and Intranet-based protest groups.[10] Despite the overall decline in unionization, worker centers have been successful in mobilizing workers through research, communication, lobbying, and community organizing.[11] They are also increasingly engaging with

[10] Alan Hyde, *New Institutions for Worker Representation in the United States: Theoretical Issues*, 50 N.Y.L. SCH. L. REV. 385 (2006).

[11] Stefan Marculewicz & Jennifer Thomas, *Labor Organizations by Another Name: The Worker Center Movement and its Evolution into Coverage Under the NLRA and LMRDA*, FEDERALIST SOC'Y (Oct. 2012), *available at* http://www.fed-soc.org/publications/detail/labor-organizations-by-another-name-the-worker-center-movement-and-its-evolution-into-coverage-under-the-nlra-and-lmrda.

employers directly to effectuate changes in the wages, hours, and terms and conditions of employment for their members. Indeed, these workers centers appear to act no differently than traditional labor organizations.[12] As a result, UFOs are using the NLRA to promote the rights of workers, while circumventing the Act's regulatory teeth.[13] For example, worker centers have circumvented the NLRA's restrictions on secondary picketing and protracted picketing and have increasingly used these tools to convey their message.[14]

In 2013, the AFL-CIO demonstrated its reliance on worker centers to invigorate the labor movement by incorporating them into their ranks as nonunion affiliates.[15] At that time, the AFL-CIO estimated there were approximately 230 worker centers in the United States.[16]

An example of the successful use of UFOs is the "Fight for 15" campaign. Starting in 2012, community and civil rights groups, religious leaders, and the labor union SEIU united to organize fast-food workers in New York City.[17] In an unprecedented move, the SEIU took the backseat, while the UFO New York Communities of Change played the central role in the campaign.[18] The success of the campaign gained national attention and spread throughout the country. In April 2015, thousands of fast food workers in over 200 cities walked off of the job to fight for a minimum wage of $15 per hour. Organizers claimed that the event was the largest protest by low-wage workers in U.S. history.[19] Demonstrating the effectiveness of the campaign, in July 2015, a panel convened by New York Governor Andrew Cuomo approved a resolution recommending a phased-in minimum wage increase to $15 for workers in the fast food industry.[20]

The momentum spread and, at the end of March 2016, New York enacted a statewide minimum wage system that will provide varying minimum wage increases by region. In New York City, for example, the minimum wage will increase to $15 per hour by the end of 2018 for all employees. Other jurisdictions will see more modest raises over longer periods of time. At the end of March 2016, the California legislature also enacted a phased-in increase to the state minimum wage that will reach $15 per hour by the year 2022.[21] In 2017, the District of Columbia and several localities followed suit.

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[12] Stefan Marculewicz & Jennifer Thomas, *Labor Organizations by Another Name: The Worker Center Movement and its Evolution into Coverage Under the NLRA and LMRDA*, FEDERALIST SOC'Y (Oct. 2012).

[13] Stefan Marculewicz & Jennifer Thomas, *Labor Organizations by Another Name: The Worker Center Movement and its Evolution into Coverage Under the NLRA and LMRDA*, FEDERALIST SOC'Y (Oct. 2012).

[14] *The Future of Union Organizing: Hearing Before the H. Subcomm. On Health, Emp't, Labor, and Pensions*, 113th Cong. (Sept. 19, 2013) (statement of Stefan Marculewicz).

[15] Richard Berman, *The Labor Movement's New Blood*, WALL ST. J., Sep. 12, 2013.

[16] Richard Berman, *The Labor Movement's New Blood*, WALL ST. J., Sep. 12, 2013.

[17] Steven Greenhouse, *In Drive to Unionize, Fast-Food Workers Walk Off the Job*, N.Y. TIMES, Nov. 28, 2012, *available at* http://www.nytimes.com/2012/11/29/nyregion/drive-to-unionize-fast-food-workers-opens-in-ny.html.

[18] Steven Greenhouse, *In Drive to Unionize, Fast-Food Workers Walk Off the Job*, N.Y. TIMES, Nov. 28, 2012.

[19] Steven Greenhouse & Jana Kasperkevic, *Fight for $15 Swells Into Largest Protest by Low-Wage Workers in US History*, THE GUARDIAN, Apr. 15, 2015, *available at* http://www.theguardian.com/us-news/2015/apr/15/fight-for-15-minimum-wage-protests-new-york-los-angeles-atlanta-boston.

[20] Jana Kasperkevic, *New York State Fast Food Workers Celebrate $15 Minimum Wage Victory*, THE GUARDIAN, July 23, 2015, *available at* http://www.theguardian.com/us-news/2015/jul/22/new-york-fast-food-workers-15-an-hour.

[21] S.B. 3, Cal. State. Legis. (Cal. 2016).

§ 1.3 RECENT BOARD & DEPARTMENT OF LABOR ACTIVITY ON UNION ORGANIZING & ELECTIONS

§ 1.3(a) *Union Representation Election Rule: Effective April 14, 2015, But Under Review by the Board*

The so-called "quickie" election rule issued by the National Labor Relations Board (NLRB or "Board") went into effect on April 14, 2015. The rule provides unions with the accelerated election process they had been seeking for years. The changes upset the election process that had been in place for decades and employers have voiced concern that the election procedures are tilted in favor of unions.

In a representation election, unions typically want to get an election as soon as possible after the representation petition is filed to keep up the momentum gathered during the collection of authorization cards. Simultaneously, the employer typically seeks a later election date so it can adequately inform employees of reasons they may *not* want union representation and to address, to the extent it lawfully can, any perceived problems that led the employees to organize in the first place. The 2015 election rule requires a shorter period of time between the union filing a petition and the NLRB holding an election—potentially making it easier for unions to organize unrepresented employees and more difficult for employers to prepare and provide employees with counterarguments and to address any perceived problems. Besides encouraging earlier election dates, the rule also delays in most instances the resolution of eligibility issues until *after* an election and limits the introduction of evidence at pre-election hearings.

The rule was a triumph for organized labor as it had been on the Board's agenda for five years and had endured a number of political setbacks. For years, the centerpiece of organized labor's political agenda was the Employee Free Choice Act (EFCA). First introduced in 2009, its main goal was to streamline the union certification process by allowing certification if the union collected signatures from the majority of workers. Congressional support for this "card-check" provision faltered, so organized labor switched tactics and began to advocate to shorten the time period for elections ("quickie" elections). With political stalemate in Congress, the Board and the U.S. Department of Labor (DOL) sought to achieve through administrative means some of what the EFCA was intended to accomplish. In 2011, the Board formally proposed the "quickie" election rule.[22] However, a D.C. district court determined that the election rule was invalid since only two Board members participated in adopting it (thus, the Board lacked a quorum).[23] The D.C. Circuit Court of Appeals later suspended an appeal by the Board in light of the court's earlier decision in *Noel Canning v. National Labor Relations Board*, in which it held that former President Obama's January 2012 recess appointments to the NLRB were constitutionally invalid.[24] Surprisingly, the NLRB voluntarily dismissed its appeal in 2013[25] and subsequently reissued the "quickie" election rule as originally proposed back in 2011. Because the Board was now operating at full capacity, it had the votes necessary during former President Obama's administration to make the rule a reality.

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[22] 76 Fed. Reg. 80,138–80,189 (Dec. 22, 2011).

[23] *Chamber of Commerce of the U.S. v. NLRB*, 2012 U.S. Dist. LEXIS 66626 (D.D.C. May 14, 2012). The same court later denied the Board's motion to reconsider this holding. 2012 U.S. Dist. LEXIS 104539 (D.D.C. July 27, 2012). Under *New Process Steel v. NLRB*, the U.S. Supreme Court requires at least three Board members to constitute a quorum. 130 S. Ct. 2635 (2010).

[24] *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013).

[25] Stipulation of Voluntary Dismissal Pursuant to F.R.A.P. 42(b), *Chamber of Commerce of the U.S. v. NLRB*, No. 12-5250 (D.C. Cir. Dec. 9, 2013).

Controversy continues to surround the rule changes. Before the changes took effect, two legal challenges were filed. Both argued that the NLRB failed to provide adequate justification for overruling decades of Board and judicial precedent designed to balance the interests of the employer, employee, and unions during elections. In *Associated Builders & Contractors of Texas, Inc. v. NLRB*, the plaintiffs, various business groups, argued that the rule change should be invalidated because it: (1) exceeded the Board's statutory authority by impermissibly restricting employers' ability to fairly litigate issues of voter eligibility and unit appropriateness in petitioned-for bargaining units; (2) violated the NLRA by compelling the invasion of employee privacy through the disclosure of personal information; (3) violated the NLRA by interfering with protected speech during union election campaigns; and (4) was arbitrary and capricious and an abuse of agency discretion. In June 2015, a Texas federal court dismissed the lawsuit, finding great deference must be accorded to the Board, and the Fifth Circuit Court of Appeals later affirmed that decision.[26] A District of Columbia federal court ruled in the second lawsuit that the U.S. Chamber of Commerce and other business groups failed to prove the rule violated the NLRA.[27]

Despite employer concerns that the rule was a "pro-union" measure because, among other things, it could lead to elections being held within 13 days from the filing of the petition, it appears that the rule has had a limited impact on the union win rate. For fiscal year 2017, 1,391 elections were held, resulting in a total union win percentage of 65%. This is not a significant change from the pre-quickie election rule statistics of 1,453 elections with a 63% union win percentage in fiscal year 2014, despite the median number of days from petition to election dropping from 38 days in fiscal years 2013 and 2014, to 23 days in fiscal year 2016.[28]

Notwithstanding, the Board recently indicated its intent to revisit the election rule. On December 14, 2017, the Board published a Request for Information (RFI) in the Federal Register, seeking public input on the "quickie" election rule.[29] The RFI seeks responses on whether the election rule should be: (1) retained without change; (2) retained with modifications; or (3) rescinded.

§ 1.3(b) *"Persuader" Rule: Enjoined June 27, 2016 & Under Consideration for Rescission*

For several years, the DOL's Office of Labor Management Standards had been considering a final rule to broaden the scope of reportable activities between an employer and a labor-relations consultant by substantially narrowing its interpretation of the "advice exemption" in section 203(c) of the Labor-Management Reporting and Disclosure Act (LMRDA).[30] Under section 203(c), a disclosure is required for agreements or arrangements between employers and labor relations consultants when a consultant agrees, directly or indirectly, "to persuade employees to exercise or not exercise, or persuade employees as to the manner of exercising, the right to organize and bargain collectively through representatives of their own choosing," *i.e.*, "persuader activity." Since 1962, the advice exemption has been interpreted to exclude an employer's engagement of labor counsel to assist with organizing campaigns provided the attorney has no direct contact with employees and the employer is free to reject the counsel's recommendations.

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[26] *Associated Builders & Contractors of Tex., Inc. v. NLRB*, 2015 U.S. Dist. LEXIS 78890 (W.D. Tex. June 1, 2015), *aff'd* 826 F.3d 215 (5th Cir. 2016).

[27] *Chamber of Commerce of the U.S. v. NLRB*, 118 F. Supp. 3d 171 (D.D.C. 2015).

[28] *See* NLRB, Office of the General Counsel, Memorandum GC 1-02, *Report on the Midwinter Meeting of the American Bar Association* (Mar. 2017).

[29] *See* 82 Fed. Reg. 58,783 (Dec. 14, 2017).

[30] 29 U.S.C. § 433.

In March 2016, the DOL issued a final rule limiting what constitutes "advice" and, effectively, undoing the 54-year interpretation of the advice exemption.[31] As a result, advice intertwined with persuader activities triggers reporting obligations under the LMRDA for both the employer and the consultant providing the advice. For example, reporting is required if a consultant provides—with an object to persuade—material or communications to the employer for dissemination or distribution to employees. Reporting would also be required if the consultant revised employer-created materials if an object of the revisions is to enhance persuasion, as opposed to ensuring legality, or selected persuader materials for the employer to disseminate or distribute. In addition, seminar agreements must be reported if the consultant develops or assists the attending employers in developing anti-union tactics and strategies for use by the employer, the employers' supervisors, or other representatives.

The rule's opponents argue, among several other contentions, that it interferes with an employer's right of access to legal counsel for important legal advice and guidance once thought to be outside the scope of LMRDA reporting and disclosure. Specifically, employers will be discouraged from seeking legal assistance during an organizing campaign because attorneys will have to file reports, made available to the public, that detail all of the labor work performed for the employer, regardless of whether it is considered persuader activity or not. As such, the rule will achieve one of the hallmark objectives of the EFCA, namely, greater regulation and restriction of employer activities.

In June 2016, the District Court for the Northern District of Texas issued a nationwide injunction enjoining the DOL's persuader rule. The injunction relieved employers and their advisors from the new reporting obligations under the LMRDA for arrangements, agreements, and payments (including reimbursed expenses) made on or after July 1, 2016. The court held that the rule was "defective to its core" and would cause irreparable harm by reducing employer access to "full, complete, un-conflicted legal advice and representation" and by burdening First Amendment rights.[32] In November 2016, the court permanently blocked the rule.

In June 2017, the DOL's Office of Labor Management Standards proposed to rescind the persuader regulations in full.[33] The agency noted that rescission "could address the concerns that have been raised by reviewing courts" and consider the potential effects of the rule on attorneys and employers seeking legal assistance.

§ 1.4 ELECTION PROCEDURES

§ 1.4(a) *Petition*

To understand union organizing, it is important to know the basics of elections and proceedings before the NLRB. When a union feels it is ready for a representation election, it files an election petition with the NLRB to initiate what is called a "representation case." Since April 14, 2015, a union may file its petition electronically and must also serve a copy of the petition on the employer. In the petition, the union is required to provide details about the election it seeks, *i.e.*, type of election (mail versus manual), date(s), location(s), and time(s).

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[31] 81 Fed. Reg. 15,924 (Mar. 24, 2016).

[32] *National Fed'n of Indep. Bus. v. Perez*, 2016 U.S. Dist. LEXIS 89694, at **109, 124 (N.D. Tex. June 27, 2016). A second court had earlier denied the requested preliminary injunction, but held that the rule conflicts with the advice exception to the LMRDA. *See Labnet Inc. v. U.S. Dep't of Labor*, 2016 U.S. Dist. LEXIS 81884 (D. Minn. June 22, 2016).

[33] 82 Fed. Reg. 26,877 (June 12, 2017).

At the time the union files its petition, it must also submit to the NLRB its "showing of interest." This means that the petition must be supported by a "substantial number" of the employees in question. The NLRB has adopted an administrative rule that requires a showing of support from at least 30% of the employees in the petitioned for bargaining union to satisfy the "showing of interest" requirement.[34] Strategically, most unions will not file an election petition, however, unless there is support from a majority of the employees. Support for a union may be demonstrated by an actual written petition or by authorization cards signed by the employees. An authorization card is a card employees can sign to indicate that they want a union to represent them in collective bargaining with an employer. Most unions, for their own internal purposes, require employees to sign cards rather than a petition.

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

The 2015 changes to election procedures accelerate the election schedule by permitting electronic filing and requiring the union to provide its alleged employee support at the time of petitioning, not within 48 hours, as was previously required. Also, by requiring the union to serve the employer, the employer is placed on notice earlier than if the NLRB served the employer.

§ 1.4(b) *Pre-Election Posting*

Under the rule changes effective April 2015, an employer must post at its location(s) a Notice of Petition for Election to advise employees about such topics as the filing of the petition, their rights under the NLRA, election procedures, and rules governing campaign conduct. The notice must be posted within two business days after the service of the petition and the accompanying notice on the employer by the NLRB. If the employer uses email to communicate with employees, it must distribute this notice electronically. Failure to post and/or distribute the notice within the required two business days is grounds to set aside an election.

Under the previous rules, there was no such mandatory posting. Unwary employers may inadvertently miss the short two-day posting requirement, which may create grounds for the petitioning union to file objections to the election afterwards and seek a rerun election in the event that the union is unsatisfied with the election results. Furthermore, because this Notice is to set forth parameters of campaign conduct, it may lead to more unfair labor practice charges being filed against employers as union supporters may seek to trap unaware supervisors into making questionable statements.

§ 1.4(c) *Pre-Election Hearing*

Since April 2015, pre-election hearings are to be held eight days from the date of the NLRB's service of the Notice of Hearing on the employer, unless the Regional Director determines the case is complex. The Regional Director has discretion to postpone the hearing at a party's request for up to two business days (upon a showing of special circumstances) or for more than two business days (upon a showing of extraordinary circumstances).[35] Prior to the rule change, hearings were generally scheduled within seven to 14 days after the petition was filed.

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[34] NLRB, *Conduct Elections*, *available at* https://www.nlrb.gov/what-we-do/conduct-elections.

[35] NLRB, Form NLRB-4812 (4-15), *Description of Representation Case Procedures in Certification and Decertification Cases*, *available at* https://www.nlrb.gov/.

Issues for the hearing are ordinarily limited to whether there is a question concerning representation (*i.e.*, whether the petition seeks an appropriate unit for the purposes of collective bargaining). The hearing no longer delves into areas of individual employee eligibility to vote or inclusion in a unit, as such eligibility and inclusion issues are delayed to the post-election challenge procedure. Precluding the employer in most instances from litigating the supervisory status of individuals at this time makes it difficult for the employer to know which individuals it may lawfully use as company spokespersons in the campaign.

§ 1.4(c)(i) *Employer Statement of Position*

If the employer chooses to proceed to a pre-election hearing on the appropriateness of the petitioned-for unit, the employer is required to file with the NLRB and serve on the union its Statement of Position within seven days after the NLRB serves a Notice of Hearing on the employer, which generally will accompany the petition. The Statement of Position must set forth whether and why the petitioned-for unit is appropriate and, if deemed inappropriate, identify employee classifications, locations, or other employee groupings to be added or excluded from the unit. An employer's failure to raise issues in the Statement of Position will preclude the employer from raising such issues at the pre-election hearing.

The Statement of Position also must include the employer's position on issues of individual eligibility and election details (date, time, place, and eligibility cut-off). Significantly, the Statement of Position must include information about the employer's employees (discussed in **§ 1.4(c)(ii)**) as the Initial Employee List). The union must reply to the employer's Statement of Position at the hearing.

The 2015 rule on the election procedure changes states that the purpose of the Statement of Position is to force the parties to share information and narrow the issues for a hearing. As a practical matter, this requirement places the onus on employers to proactively identify unit issues and commit to such issues in writing or lose the chance to raise them. Presumably, if the parties enter into a Stipulated Election Agreement before the Statement of Position is due, the employer need not submit a Statement of Position (see **§ 1.4(c)(iv)**).

§ 1.4(c)(ii) *Initial Employee List*

If the employer chooses to proceed to a hearing, along with its Statement of Position, the employer must provide the full names, work location(s), shift(s), and job classification(s) of all employees in the petitioned-for unit and all employees the employer may seek to add to or exclude from the petitioned-for unit. For example, if the union petitions for a single facility and the employer believes a single facility unit is not appropriate and the unit should also include employees working in a second facility, the employer is required to provide the identifying information for employees working in the first and second facilities. Personal contact information for the employees is not required for this Initial Employee List.

Employers may have difficulty assembling the needed information in the short time allowed. Furthermore, the Initial Employee List can assist unions in advancing their larger scale or longer-term organizing goals. For example, a union can file a petition with 30% of employee support in an inappropriately small unit, after which the employer would be required to provide the Initial Employee List for 100% of the employees in the larger unit it deems appropriate. The union then can withdraw its initial petition and use the information provided by the employer to attempt to organize the larger unit.

§ 1.4(c)(iii) *Topics Covered During Pre-Election Hearing*

At the pre-election hearing, the employer's arguments will be limited to issues contained in its Statement of Position, unless the union's position changes. Once the union responds to the issues raised in the employer's Statement of Position, the hearing officer will exercise his or her discretion on seeking offers of proof or proceeding with testimony. The hearing officer will also solicit the positions of the parties

with respect to the type of election (mail versus manual), date(s), time(s), location(s), and eligibility period for the election.

A party's request for special permission to appeal a hearing officer's ruling will not stay the proceedings. The hearing will continue for consecutive days until complete. Oral argument will be used for summation unless the Regional Director permits the filing of post-hearing briefs.

These changes are all aimed at shortening the hearing process, including removing the previous practice of allowing seven days to file post-hearing briefs. The changes also make it more difficult for the employer to present a full argument on the petitioned-for unit and what it believes is an appropriate unit.

§ 1.4(c)(iv) *Stipulated Election Agreement*

At any time before or during the representation hearing, the parties may stipulate to issues that must be resolved in order to schedule an election. In fact, the parties may stipulate to an election and avoid a hearing entirely. An employer may find that a stipulation provides advantages because it will eliminate the time and expense of a hearing.

For employers that choose to enter into a Stipulated Election Agreement instead of proceeding to a hearing, the rule changes provide that post-election disputes are to be heard by the Regional Director, not the NLRB. NLRB review will be discretionary in cases where the parties have not addressed the matter in the election agreement. A party seeking review must identify significant, prejudicial error by the Regional Director or some other compelling reason for the NLRB to grant review. This change places much more discretion in Regional Directors and effectively limits Board review of Regional Directors' decisions.

§ 1.4(d) *Direction of an Election*

Because the pre-election hearing covers the election details, including the type of election and scheduling information, it allows the Regional Director to expedite the holding of the election and issue a Decision and Direction of Election (DDE). The 2015 rule changes eliminated the 25-day waiting period between the issuance of the DDE and the holding of the election. In addition, ballots are no longer automatically impounded while a party's request for review of a DDE is pending before the NLRB. This also permits the Regional Director to schedule an election more quickly.

§ 1.4(e) *Notices of Election*

After the execution of a stipulation or the direction of an election, the Regional Office sends the employer copies of the Notice of Election for posting. The Notice of Election informs employees of the employees' eligibility to vote and the time and place of the election. Failure to post the notices at least three working days before the election can result in overturning the election. The notices must be posted in conspicuous places. Employers also are required to distribute the notices electronically to employees if they customarily communicate with employees in the unit electronically, either by email or by posting on an employer Intranet site or both. If employers customarily communicate with only some of the bargaining unit employees electronically, the employers are required to distribute the notices to that subset of the unit.

§ 1.4(f) *Excelsior List Rule*

Within two business days after the issuance of the DDE or the approval of a Stipulated Election Agreement, the employer is required to electronically file with the NLRB and serve on the union a list of all eligible voters, called the *Excelsior* list (named after an NLRB case *Excelsior Underwear, Inc.*).[36] The

[36] 156 N.L.R.B. 1236 (1966).

information required by the *Excelsior* list rule has been broadened to mandate disclosure of the employee's name, address, *available* personal cell and home telephone numbers and personal e-mail addresses, work location, shift, and job classification. Business phone numbers and e-mail addresses need not be turned over. Voters who will be voting subject to challenge are to be set apart on the list.

These changes make it easier for a union to contact employees for organizing or other reasons, and adversely affect employees' privacy. The 2015 rule changes left intact the requirement that, unless waived by the union, the *Excelsior* list must be in the hands of the union for at least ten days before an election is held. On this point, some unions have waived the ten-day period, based upon their having received the initial employee list days earlier, because they had knowledge of the identity of the employees in the unit prior to filing a petition, or because they wanted to obtain an earlier election date due to their belief that they had a high likelihood of winning an early election.

The repercussions for failure to provide the *Excelsior* list in accordance with the requirements above remain the same notwithstanding the changes in the rule. For example, failure to submit the list on time, in whole or substantial part, may result in overturning the election if the employer wins.[37] Even where the list is submitted on time, an election still may be set aside where the *Excelsior* list is deemed deficient in some way.[38]

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

§ 1.4(g) *Voting & Ballots*

On election day, NLRB agents supervise the voting. Voting is typically conducted by means of secret ballots in voting booths set up at the employer's place of business. Employees vote either for or against union representation. The ballots contain the following question: "Do you wish to be represented by [the union] for purposes of collective bargaining?" A *Yes* vote is a vote for union representation; a *No* vote is a vote against union representation. If more than one union is on the ballot, employees also will have an option to vote for *Neither* or *No Union*. As each voter marks his or her choice on the ballot, the ballot is placed directly into the ballot box provided by the NLRB. The NLRB generally does not allow absentee ballots for employees who will be absent due to vacation or illness. Absentee ballots may be provided if all parties agree.

At its discretion, the NLRB may conduct the balloting by mail rather than using the "manual" balloting process described above. In the past, mail balloting was disfavored and used only in unusual

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

[38] *See, e.g., Shore Health Care Ctr., Inc.* (*Fountainview Care Ctr.*), 323 N.L.R.B. 990 (1997) (election set aside where employer omitted the names of four eligible employees from its *Excelsior* list); *Mod Interiors, Inc.*, 324 N.L.R.B. 164 (1997) (election set aside even though original list containing a significant number of inaccurate addressees was corrected and employer offered to postpone the election); *Laidlaw Waste Sys., Inc.*, 321 N.L.R.B. 760 (1996) (failing to provide the union with employees' full first names was sufficient to set aside the election, and a showing of actual prejudice to the union was not required).

[39] 325 N.L.R.B. 1162 (1998).

circumstances such as where an election involved long distances or widely scattered voters, making it difficult for a number of employees to get to the polling place. The NLRB has rejected the argument that a mail ballot election has less "solemnity and integrity" than a manual ballot election, stating that, with mail ballot elections, employees have ample opportunity to cast their ballots in secrecy and without coercion.[40] Because mail ballots have been shown to help unions, the Obama Board appeared more willing to order mail ballots.[41]

§ 1.4(h) *Language Problems*

Regional offices of the NLRB may use their discretion in determining whether to print foreign language translations on the ballots. In 1998, the Board reaffirmed its policy of paying for interpreter services in representation cases.[42]

§ 1.4(i) *Observers*

Each side is permitted to have an equal number of observers present in the polling place during the election. An observer's primary responsibility is to identify voters and verify the voters against the voter eligibility list (the *Excelsior* list, discussed at **§ 1.4(f)**). The observer is also present to mentally record the events in the voting area and to challenge any person he or she feels is ineligible to vote but who nevertheless attempts to cast a ballot. In large units where the observers are not likely to know personally all of the voters, the Board may require that eligible voters be identified by Social Security number or similar means, rather than merely by self-identification.[43]

The NLRB's Case Handling Manual states that observers must be nonsupervisory employees, although they need not be members of the bargaining unit.[44] In 2000, the Board overturned a longstanding rule that allowed supervisors to be observers for unions; instead the Board adopted a *per se* rule prohibiting all supervisors from serving as observers for either side.[45] More recently, the Board set aside an election in which the employer's observer—a trainer and substitute bus driver—was not a supervisor but could reasonably be viewed by employees as closely identified with management.[46] If a party can only provide observers who are not employees of the employer, the Case Handling Manual provides that the party should be permitted to use such observers, subject to challenge by the other party in post-election objections.[47]

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[40] 323 N.L.R.B. 1057 (1997); *see also Reynolds Wheels Int'l*, 323 N.L.R.B. 1062 (1997) (finding that the NLRB's decision to conduct a mail ballot election was not an abuse of discretion, noting that although the voters were not scattered geographically because of their duties, they were scattered by reason of working staggered shifts).

[41] *See, e.g., Sutter W. Bay Hosps. d/b/a California Pac. Med. Ctr. (St. Luke's Hosp. Campus)*, 357 N.L.R.B. No. 21 (July 29, 2011) (approving a mail ballot election over the employer's objection); *CHS, Inc.*, 357 N.L.R.B. No. 54 (Aug.12, 2011) (Board sustained an employer's challenge to the eligibility of a voter in a mail ballot election although the challenge was made after the opening of the ballots).

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

[43] *See Avondale Indus. v. NLRB*, 180 F.3d 633 (5th Cir. 1999).

[44] NLRB Case Handling Manual, Part II, § 11310.2 (Aug. 2007).

[45] *Family Serv. Agency, S.F.*, 331 N.L.R.B. 850 (2000).

[46] *First Student, Inc.*, 355 N.L.R.B. 410 (2010) (relying, *inter alia*, on observer's administration of employer's commercial driver's license training program and employee's sharing of office with a supervisor).

[47] NLRB Case Handling Manual, Part II, § 11310.2 (Aug. 2007); *Browning-Ferris Indus. of Cal., Inc.*, 327 N.L.R.B. 704 (1999).

§ 1.4(j) *Pre-Election Conference*

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

§ 1.4(k) *Challenges*

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

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

§ 1.4(l) *Ballot Count*

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

§ 1.4(m) *Objections to the Election*

Within seven days after the tally of ballots has been prepared and served (generally the date of the election), the losing party has the right to file objections concerning conduct that might have affected the election results. Objections must pertain either to the conduct of the election or to conduct by one of the parties affecting the results of the election. (The nature and specific bases for objections are described in **§§ 1.6**, **1.7**, and **1.8**.)

The objecting party has the obligation to substantiate its objections by objective proof, generally through affidavits. Failure to do so will result in dismissal of the objections. Previously, employers were given an additional seven days to investigate and file evidence in support of their objections. Effective with the rule change from April 14, 2015, a party must submit its evidence in support of the objections at the same time it files the objections.

After receiving all the evidence, the Regional Office of the NLRB may dismiss the objections, sustain the objections or set a hearing. If the Regional Office sustains an objection, it will order a rerun election. The party that won the first election may appeal that decision to the NLRB in Washington, D.C., and the rerun election will be delayed until the appeal is decided. If the Regional Office dismisses a party's objections, the party that lost the election may appeal to the NLRB. Again, the election results will not be certified until the appeal is decided.

Objections that raise material and substantial factual issues will be set for hearing before an NLRB hearing officer. Previously, post-election hearings were often not scheduled for two to three months.

Based on the rule changes, if a hearing is required, it will be 21 days from the tally of ballots. After the hearing and the filing of briefs, the hearing officer issues a recommended decision. Determinative challenges are usually resolved at the same hearing. A party who loses at a hearing may appeal to the Board in Washington, D.C. Unless an appeal is filed, the hearing officer's recommended decision becomes final.

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

§ 1.4(n) *Test of Certification*

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

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

§ 1.5 ELIGIBILITY TO VOTE IN UNION ELECTION & APPROPRIATE BARGAINING UNIT

§ 1.5(a) *Eligibility to Vote*

§ 1.5(a)(i) *"Employees" v. "Supervisors"*

The NLRA excludes supervisors from the definition of the term *employee*. Supervisors are therefore not covered by the NLRA, not considered part of any bargaining unit, and not permitted to vote in representation elections. Section 2(11) of the Act defines the term *supervisor* as:

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

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

In 2006, the Board provided much-needed guidelines on deciphering the NLRA's definition of supervisor. The lead case was *Oakwood Healthcare, Inc.*[48] The Board's decision followed many years of

[48] 348 N.L.R.B. 686 (2006) (holding that a hospital's charge nurses had supervisory authority to assign employees under the NLRA and, therefore, were supervisors; this meant that charge nurses were not represented by the union).

criticism by the federal courts, which had urged the Board to clarify the differences between a "supervisor" and an "employee." Even the U.S. Supreme Court had previously rejected the Board's supervisory status test and scolded the Board for allowing charge nurses, who directed other members of the health care team, to be part of a union.[49] In its *Oakwood Healthcare* decision, the NLRB sought to provide a more usable standard for differentiating between true supervisors and those who merely have "lead" responsibilities.

In *Oakwood Healthcare*, the Board held that permanent charge nurses exercised supervisory authority in assigning employees within the meaning of section 2(11) of the NLRA, and therefore could not be part of the union.[50] In making its decision, the Board reexamined and clarified its interpretations of the terms "assign," "responsibly to direct," and "independent judgment." The Board defined the word *assign* to mean designating an employee to a certain place or time (*e.g.*, a particular location or shift) or "giving significant overall duties, *i.e.*, tasks, to an employee."[51] The Board explained the statutory term *responsibly to direct* as follows: "If a person on the shop floor has 'men under him,' and if that person decides 'what job shall be undertaken next or who shall do it,' that person is a supervisor, provided that the direction is both 'responsible' … and carried out with independent judgment."[52] The Board held that the element of "responsible" direction involved a finding of accountability, so that it must be shown that the "employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary" and that "there is a prospect of adverse consequences" for the supervisor arising from his or her direction of other employees.[53]

Finally, consistent with the Supreme Court's decision in *NLRB v. Kentucky River Community Care*,[54] the Board adopted an interpretation of the term *independent judgment* that "applies irrespective of the section 2(11) supervisory function implicated, and without regard to whether the judgment is exercised using professional or technical expertise."[55] The Board defined the statutory term *independent judgment* in relation to two concepts. First, to be independent, the judgment exercised must not be effectively controlled by another authority. Thus, where a judgment is dictated or controlled by detailed instructions or regulations, the judgment would not be found to be sufficiently "independent" under the NLRA. The

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The three cases issued on the same day, including *Oakwood Healthcare*, are often referred to as the "Kentucky River" cases because they were in reaction to the U.S. Supreme Court's decision in *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001).

[49] *NLRB v. Kentucky River Cmty. Care*, 532 U.S. 706 (rejecting NLRB's institution of a uniform standard for determining supervisory status that focused on whether the supervisor's direction of other employees mandates the use of independent judgment or whether it is merely routine, which acted to exclude routine professional and technical judgment from the "independent judgment" factor); *see also NLRB v. Healthcare & Retirement Corp. of Am.*, 511 U.S. 571 (1994) (rejecting NLRB interpretation of the phrase "in the interest of the employer" that focused on whether a nurse's supervisory activity was incidental to the treatment of patients).

[50] 348 N.L.R.B. 686.

[51] 348 N.L.R.B. at 689.

[52] 348 N.L.R.B. at 691.

[53] 348 N.L.R.B. at 692. In *Hobson Bearing International, Inc.*, the Board noted that accountability is relevant to determining whether an individual is a supervisor only where one party contends that the individual possesses authority "responsibly to direct" employees, and in the case at hand, the employer had not alleged that the employee responsibly directed employees. 365 N.L.R.B. No. 73 (May 11, 2017).

[54] 532 U.S. 706 (2001).

[55] *Oakwood Healthcare*, 348 N.L.R.B. at 692.

Board further found that the degree of discretion exercised must rise above "routine or clerical" to constitute "independent judgment."[56]

Because *Oakwood Healthcare* essentially expanded the class of workers who qualify as supervisors, thus excluding them from union representation, organized labor in 2007 and 2012 lobbied for the introduction of legislation that would have revised the definition of supervisor to require the individual to have authority over employees for a majority of the individual's worktime and remove the definitions of "assign" and "responsibly direct" from the NLRA's definition.[57]

In the interim, the Board continued to scrutinize closely cases presenting issues of supervisory status. For example, in *Veolia Transportation Services, Inc.*, the Board determined that road supervisors for a company providing public bus transportation services were not supervisors under the NLRA.[58] The panel majority concluded that the road supervisors' role in observing and documenting rule infractions by bus drivers was "merely reportorial" and their responsibilities for reporting on accidents and removing intoxicated drivers did not involve the exercise of independent judgment.

§ 1.5(a)(ii) *Nontraditional "Employee" Groups*

Whether nontraditional "employee" groups are eligible to seek representation and to vote in a representation election as employees is another consideration. These nontraditional groups include such groups as graduate teaching assistants, hospital residents, hospital interns, and disabled workers.

Teaching Assistants, Hospital Residents & Interns

In 1999, the NLRB overruled precedent that had held that "house staff," such as interns and residents, are primarily students and therefore not employees.[59] The Board further decided that a group of interns and residents at a private hospital were employees as well as students and thus covered by the Act.

The Board has also reversed prior precedent on the status of teaching assistants at universities. In *Brown University*, the Bush Board reversed a short-lived, controversial precedent set by the Clinton Board[60] and held that graduate students who engage in teaching as part of their academic development are not "employees" under the NLRA and are therefore not entitled to vote on whether to choose union representation.[61] The Board in *Brown University* reasoned that the relationship between the graduate student and the school is primarily educational, rather than economic, and the task of teaching is an integral part of being a graduate assistant.

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[56] 348 N.L.R.B. at 693-94; *see also Golden Crest Healthcare Ctr.*, 348 N.L.R.B. 686 (2006) (finding that charge nurses at a nursing home lacked the authority to assign or responsibly direct other employees in part because there was no accountability sufficient to show that the nurses' terms and conditions of employment could be affected as a result of their performance in directing other employees; therefore, nurses did not exercise supervisory authority); *Croft Metals, Inc.*, 348 N.L.R.B. 717 (2006) (holding that the lead persons at a manufacturing facility did not exercise supervisory authority).

[57] Re-Empowerment of Skilled and Professional Employees and Construction Trades Workers (RESPECT) Act, S. 2168, 112th Cong. (2012); H.R. 1644, S. 969, 110th Cong. (2007).

[58] 363 N.L.R.B. No. 98 (Jan. 20, 2016).

[59] *Boston Med. Ctr. Corp.*, 330 N.L.R.B. 152 (1999), *aff'd in St. Barnabas Hospital*, 355 N.L.R.B. 233 (2010).

[60] *New York Univ.*, 332 N.L.R.B. 1205 (2000).

[61] 342 N.L.R.B. 483 (2004).

In 2016, the Obama Board again reversed course with its ruling in *Columbia University* that graduate and undergraduate student assistants, including those assistants engaged in research funded by external grants, are employees who have the right to unionize.[62]

Disabled Workers

In *Brevard Achievement Center Inc.*, the Board held that disabled workers in a primarily rehabilitative relationship with their employers are not statutory employees, despite the fact in *Brevard* that the disabled workers worked the same hours, were paid the same wages and benefits, and performed the same tasks under the same supervisor as the nondisabled employees.[63]

§ 1.5(a)(iii) *"Part-Time Employees" v. "Casual Employees"*

Regular part-time employees are eligible to vote; however, so-called "casual employees" are not. The test to determine whether one is a regular part-time employee or a casual employee "takes into consideration such factors as regularity and continuity of employment, tenure of employment, similarity of work duties, and similarity of wages, benefits and other working conditions."[64] The standard frequently used by the Board to determine the regularity of part-time employment is whether the employee worked an average of four or more hours per week in the quarter preceding the eligibility date.[65]

§ 1.5(a)(iv) *Temporary Workers & Joint Employment*

Up until very recently, a union could organize a bargaining unit of temporary employees and the "user" (or client) employer's regular employees, only if both employers consented. However, the Board changed this rule with its 2016 decision in *Miller & Anderson, Inc.*, to allow workers in alternative work arrangements to more easily organize.[66] The case involved a Regional Director's decision to dismiss a union election petition because it sought to represent regular employees solely employed by one company, temporary employees employed by another company, and temporary employees jointly employed by both of the companies. The companies had not consented to multiemployer bargaining.

In *Miller & Anderson, Inc.*, the Board reversed its 2004 decision in *Oakwood Care Center*.[67] In *Oakwood Care Center*, the unit of employees the union wanted to represent were solely employed by the care center or jointly employed by the care center and a staffing agency. The Board concluded that a unit of solely employed regular workers and jointly employed temporary workers created a multiemployer unit. Organized labor urged the Board to overrule *Oakwood Care Center* and return to the test previously established by *M.B. Sturgis & Jeffboat Division*.[68] In *Sturgis*, the Board held that the scope of the bargaining unit is delineated by the work being performed for a particular employer. The Board's test essentially asked: What work is being done and who is the work being done for? In *Miller & Anderson, Inc.*, the Board expanded upon this premise and held that in determining if a combined unit is appropriate, it will apply traditional "community of interest" factors (*e.g.*, common functions and duties, shared skills, functional integration, commonality of wages, hours, and other working conditions, etc.). An employers' consent to inclusion of their employees in a combined bargaining unit is no longer required, although the Board noted that an employer will only be required to bargain over terms and conditions of jointly-

[62] 364 N.L.R.B. No. 90 (Aug. 23, 2016).

[63] 342 N.L.R.B. 982 (2004).

[64] *Muncie Newspaper, Inc.*, 246 N.L.R.B. 1088, 1089 (1979).

[65] *See Macy, R. H., Co., Inc., Davidson-Paxon Co. Div.*, 185 N.L.R.B. 21, 24 (1970).

[66] 364 N.L.R.B. No. 39 (July 11, 2016).

[67] *H.S. Care L.L.C. d/b/a Oakwood Care Ctr.*, 343 N.L.R.B. 659 (2004).

[68] 331 N.L.R.B. 1298 (2000).

employed employees that it possesses the authority to control. The Board reasoned that requiring consent of multiple employers was too limiting on employees' right to organize and decision on whether they wished to be included in a mixed unit, particularly where contingent workers are often spread out among different "user" clients.[69]

The *Miller & Anderson, Inc.* decision represented a repudiation of precedent issued by the Board under the Bush Administration, and was a natural progression of the Board's expansive view of joint employer relationships. The separate question of joint employment remains a threshold issue in determining the appropriate bargaining unit under various employment scenarios and business relationships. Without a joint employment relationship, there can be no determination of a single unit to organize. However, in 2014, the Board began to loosen the joint employer test in *CNN America, Inc. and Team Video Services, L.L.C.* by injecting factors of indirect control into the traditional joint employer standard.[70] Prior to this case, the NLRB found companies joint employers only when they shared direct and immediate control over essential terms and conditions of employment including hiring, firing, discipline, supervision, and direction. In *CNN*, the Board found that the company controlled the hiring, supervision, and direction of the subcontractor's employees by setting terms in its labor agreement for staffing levels, reimbursements, and training costs. The Board also considered additional factors, including that the employees worked in CNN facilities, CNN paid for employee training, and equipment and the employees performed work at the core of CNN's business. Based on these factors, the majority found CNN and Team Video Services joint employers.

The Board further loosened the joint employer standard in 2015 with its decision in *Browning-Ferris Industries of California, Inc. d/b/a Newby Island Recyclery*.[71] In a 3-2 decision, the Board overruled longstanding precedent and considered "indirect control" to be the main factor in determining whether a joint employer relationship exists. The Board majority asserted it was returning to the "traditional" joint employer standard and imposed a two-part test. As a result of this decision, the Board's current standard is that two or more entities are joint employers of a single workforce if they share or codetermine those matters governing the essential terms and conditions of employment. To determine whether a putative joint employer meets this standard, the Board's initial inquiry is whether there is a common-law employment relationship with the employees in question. If this common-law employment relationship exists, the inquiry then turns to whether the putative joint employer possesses sufficient control over employees' essential terms and conditions of employment to permit meaningful collective bargaining. This broader standard further simplifies unions' ability to establish that two entities jointly employ individuals who are supplied by one entity to another.

The reaction to the Board's *Browning-Ferris* decision was immediate. U.S. lawmakers, along party line, introduced legislation to reject the Board's new joint employer standard and clarify that two or more employers must have "actual, direct, and immediate" control over employees to be considered joint employers for NLRA liability.[72] In the wake of the *Browning-Ferris* decision, several states also moved forward with legislation to blunt the decision's impact.[73]

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[69] *Miller & Anderson, Inc.*, 364 N.L.R.B. No. 39, at **37-40.

[70] 361 N.L.R.B. No. 47 (Sept. 15, 2014). This case is on appeal to the D.C. Circuit Court of Appeals (*see NLRB v. CNN America, Inc.*, Nos. 15-1112, 15-1209).

[71] 362 N.L.R.B. No. 186 (Aug. 27, 2015).

[72] *See* Protecting Local Business Opportunity Act, H.R. 3459, S. 2015, 114th Cong. (2015).

[73] *See, e.g.*, H.B. 1218, 119th Gen. Assemb. (Ind. 2016) (amending IND. CODE § 23-2-2.5-0.5 to stipulate that a franchisor is not an employer or co-employer of a franchisee or a franchisee's employees unless the franchisor agrees, in writing, to assume the role of an employer or co-employer); H.B., 5070, 98th Mich. Legis. (Mich. 2016) (specifying under various state employment statutes that "(e)xcept as specifically provided in the franchise

A threshold joint employment finding under the looser standard articulated by *Browning-Ferris* allows the union to expand the unit to include the user company's solely employed regular employees. This arrangement benefits labor organizations by increasing their membership numbers. Employers, however, have been left to reconcile a system of competing interests, within the same bargaining unit, between groups of employees with different employers and different terms and conditions of employment.

In December 2017, the Board issued a 3-2 decision in *Hy-Brand Industrial Contractors, Ltd.* that rejected the *Browning-Ferris* decision and returned to the prior test for joint employment.[74] On February 26, 2018, however, the Board vacated this decision—leaving in place the *Browning-Ferris* test for joint employment for the time being.

§ 1.5(a)(v) *Laid-Off Employees*

The Board's test for determining whether laid-off employees are eligible to vote is whether they have a reasonable expectation of reemployment in the near future and involves consideration of four objective factors: (1) the employer's past practice of layoff and recall; (2) the employer's future plans; (3) the circumstances surrounding the layoff; and (4) what employees were told about the likelihood of recall.[75] In *MJM Studios of New York, Inc.*, the Board found, contrary to the hearing officer, that six laid-off temporary employees had no reasonable expectation of recall because the evidence showed the employer was struggling with a decline in contracts, coupled with diminished revenues that required downsizing in its administrative and managerial staffs.[76]

§ 1.5(a)(vi) *Undocumented Workers*

Both the Board and the federal courts have concluded that the NLRA's definition of *employee* includes undocumented workers. In *Agri Processor Co.*, the Board held that an employer violated section 8(a)(5) of the NLRA by refusing to bargain with a union because most of its unit employees had Social Security numbers that did match those in the Social Security Administration's records.[77] The Board rejected the employer's argument that it had no obligation to bargain with the employees because they were illegal immigrants. Although the Board acknowledged it is peculiar to protect the rights of employees who could be discharged under the Immigration Reform and Control Act (IRCA), it concluded that the employer could not argue that it had no obligation to bargain with the employees because they were illegal immigrants. The D.C. Circuit Court of Appeals affirmed this holding, noting that "nothing in IRCA's text alters the NLRA's definition of 'employee.'"[78]

The Ninth Circuit Court of Appeals has also held that undocumented workers are entitled to vote if they are employed at an establishment at the time of the election.[79] The fact that their status as employees may be subject to challenge under immigration law does not alter their voter eligibility under the NLRA, which does not exclude undocumented workers from its definition of *employee*. The court concluded that

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agreement, as between a franchisee and franchisor, the franchisee is considered the sole employer of workers for whom the franchisee provides a benefit plan or pays wages.").

[74] 365 N.L.R.B. No. 165 (Dec. 14, 2017).

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

[76] 338 N.L.R.B. 980 (2003).

[77] 347 N.L.R.B. 1200 (2006).

[78] *Agri Processor Co. v. N.L.R.B.*, 514 F.3d 1, 5–6 (D.C. Cir. 2008) ("NLRA section 2(3) continues to define 'employee' exactly the same way it did when the *Sure-Tan* court held that 'undocumented aliens' … plainly come within the broad statutory definition of 'employee.' "); *see also Iweala v. Operational Techs. Servs.*, 634 F. Supp. 2d 73 (D.D.C. 2009) (affirming *Agri Processor Co.* finding that there is "no congressional action clearly intending to … exclude foreign nationals [working] without proper work authorizations" from protection under the NLRA).

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

if an employer has not terminated an employee prior to the election in order to comply with the IRCA, the employer cannot challenge the employee's status after the election to invalidate the election.

Although an undocumented worker may be an "employee" under the NLRA, the U.S. Supreme Court determined, in *Hoffman Plastics Compounds, Inc. v. NLRB*, that an undocumented worker who violated the IRCA by providing false documentation is not eligible to receive a back-pay remedy.[80] In its majority opinion in *Mezonos Maven Bakery, Inc*., the Board similarly determined that even if an employer violated the IRCA by knowingly hiring undocumented workers, the undocumented workers are still precluded from obtaining a back-pay remedy.[81] However, the concurring opinion was highly critical of *Hoffman Plastics* and suggested that, in a future case, the Board would consider an alternative remedy within its statutory authority to "prevent an employer that discriminates against undocumented workers because of their protected activity from being unjustly enriched by its unlawful conduct."[82]

§ 1.5(b) *Appropriate Bargaining Unit*

The NLRB conducts elections only in units that it finds to be appropriate. A unit need not be the "most appropriate" unit—it must only be "an appropriate" unit. Over the years, the NLRB has established a number of presumptions for determining the appropriateness of a unit. Although the NLRB has great discretion in this area, there are specific statutory limitations on its actions. For example:

- **Section 9(b)(1):** a unit may not include both professional and nonprofessional employees, unless a majority of both the professional and nonprofessional employees votes for inclusion in such a mixed unit.

- **Section 9(b)(2):** the Board may not preclude the establishment of a craft bargaining unit solely on the basis that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation.

- **Section 9(b)(3):** the Board is prohibited from establishing a unit that includes both plant guards and other employees. The Board is also prohibited from certifying a labor organization that admits non-guards into its membership, or is affiliated directly or indirectly with an organization which admits non-guards to its membership, as the representative of a bargaining unit of guards.

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

- the degree of functional integration within the proposed unit;

- common supervision;

- the nature of employees' skills and functions;

- interchange of employees;

[80] 535 U.S. 137 (2002).

[81] 357 N.L.R.B. 376 (2011).

[82] 357 N.L.R.B. at 384.

- contact among employees;
- common work locations;
- common general working conditions;
- similar benefits; and
- similar hours and shifts.

§ 1.5(b)(i) *Micro-Bargaining Units*

To prevent fragmentation and proliferation of bargaining units in the health care setting, the Board traditionally defined eight standard bargaining units for acute care hospitals. In non-acute hospitals, the Board took a more flexible approach.[83] In evaluating unit composition, the Board would consider the traditional "community of interest" factors (described below), as well as the unique structure and organization of the work performed at the facility.

In 2011, however, the Obama Board in *Specialty Healthcare* held that a unit requested by a union in a non-acute healthcare facility would be deemed appropriate so long as the unit consists of a clearly identifiable group of employees.[84] Although it involved a nursing home, the Board's decision was not limited to the healthcare industry and fundamentally changed the standard for determining appropriate bargaining units applicable to all employers. The burden was now on the employer to demonstrate that a larger group of employees share an "overwhelming community of interest" with those in the petitioned-for unit. The practical significance of the decision was to create an incentive for unions to organize micro-units in order to establish a toehold in a company, and consequently, there was a significant increase in "micro units" consisting of small subsets of employees.

In December 2017, the Trump Board rejected *Specialty Healthcare*'s "overwhelming community of interest" standard and reinstated its prior standard for determining the appropriateness of a petitioned-for bargaining unit.[85] In *PCC Structurals, Inc.*, the majority stated that the "overwhelming community of interest" standard had represented "an unwarranted departure" from the traditional test and explained that *Specialty Healthcare*'s progeny upended decades of industry-specific precedent concerning bargaining unit preferences. The majority found that *Specialty Healthcare*'s deference to the union's petitioned-for unit, and higher burden for employers, substantiality limited the Board's ability to carry out its statutory duty to take an active role in deciding the appropriate bargaining unit "in each case." Moreover, the Board noted that the "overwhelming community of interest" standard improperly ignored the section 7 rights of excluded employees by focusing only on the section 7 rights of the petitioned-for unit, except in rare cases where the employees shared "overwhelming" interests.

In returning to the traditional factors to determine an appropriate bargaining unit, the Board's "community of interest" test involves weighing whether employees:

1. are organized into a separate department;
2. have distinct skills and training;

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[83] *See, e.g., Park Manor Care Center, Inc.*, 305 N.L.R.B. 872 (1991).

[84] 357 N.L.R.B. No. 83 (Aug. 26, 2011), *aff'd, Kindred Nursing Ctrs. E., L.L.C. v. NLRB*, 727 F.3d 552 (6th Cir. 2013).

[85] *PCC Structurals, Inc.*, 365 N.L.R.B. No. 160 (Dec. 15, 2017).

3. have distinct job functions and perform distinct work, including an inquiry into the amount and type of job overlap between classifications;

4. are functionally integrated with the employer's other employees;

5. have frequent contact with other employees;

6. are interchanged with other employees;

7. have distinct terms and conditions of employment; and

8. are separately supervised.[86]

Applying these factors, the Board will determine, on a case-by-case basis, "whether the petitioned-for employees share a community of interest sufficiently distinct from employees excluded from the proposed unit to warrant a separate appropriate unit."[87]

In the *PCC Structurals, Inc.* dissent, Members Pearce and McFerran argued that the Board's role is to determine "whether the selected unit is an appropriate one under the statute not the unit the Board would prefer, or the unit the employer would prefer."[88] The dissent further objected to the majority's refusal to allow briefing on the case and its failure to follow the eight circuit courts that had upheld the *Specialty Healthcare* standard.

§ 1.6 OVERTURNING AN ELECTION BECAUSE OF OBJECTIONABLE CONDUCT BY AN EMPLOYER OR UNION

Generally, employer misconduct prior to the election will be sufficient to set aside the election. Some union misconduct may also cause an election to be set aside. The misconduct normally must occur after the election petition is filed to be objectionable.[89]

For many years, the NLRB held the view that any pre-election unfair labor practice would automatically be objectionable. However, the NLRB has departed from this approach "in cases where it is virtually impossible to conclude that the misconduct could have affected the election results."[90] For example, if an employer's objectionable acts are limited to a small number of employees out of a large voting group and do not involve any discrimination against employees on the basis of their union activity, the chances of overturning the election results are reduced. However, even minor violations have been found to be sufficient to set aside the election where those violations involved a significant percentage of the voting unit. For example, in *Freund Baking Co.*, the Board set aside an election because of the company's handbook provision that prohibited employees from disclosing or using proprietary or confidential information.[91] The Board construed this policy as potentially prohibiting the discussion of wages, hours, and working conditions, despite the rule never being discussed or enforced in such a way.

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[86] 365 N.L.R.B. at *21.

[87] 365 N.L.R.B. at *32.

[88] 365 N.L.R.B. at *58.

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

[90] *Clark Equip. Co.*, 278 N.L.R.B. 498 (1986).

[91] 336 N.L.R.B. 847 (2001).

§ 1.6(a) *Changes in Conditions of Employment & Promises by the Employer*

After an election petition is filed, an employer may not make changes in wages, hours, or working conditions unless it can be shown that these changes would have been made even in the absence of the petition. Basically, employers must act as they would in the absence of a union campaign.[92] For example, in *Evergreen America Corp. v. NLRB*, the Fourth Circuit Court of Appeals upheld the Board's finding that the employer committed an unfair labor practice when it gave employees a $400 per month wage increase just days before an election.[93] For most employees, the increase exceeded the previous three years' increases combined. The NLRB rejected the employer's contention that such increases were needed to remain competitive in the labor market and to reduce costly employee turnover, and compelled the employer to begin bargaining.

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

§ 1.6(b) *General Shoe Doctrine: Laboratory Conditions Test*

In a case called *General Shoe Corporation*, the NLRB determined that an election should take place in "an atmosphere calculated to prevent a free and untrammeled choice by the employees."[94] This is also known as the "laboratory conditions test."

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

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

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[92] *See, e.g.*, *Amera Prods., Inc.*, 323 N.L.R.B. 701 (1997) (setting aside the election results and ordering a second election because the employer announced improved health insurance and vacation benefits on the eve of the election); *Brown City Casting Co.*, 324 N.L.R.B. 848 (1997) (setting aside the election on the ground that the employer failed to provide a legitimate business justification for announcing improved insurance benefits on the eve of the election). *Cf. Adams Super Mkts. Corp.*, 274 N.L.R.B. 1334 (1985) (finding that the employer committed no violation of the NLRA by announcing and implementing an improved medical plan just days before the election, where the improvements had been considered and planned long before the union filed its representation petition and that the election was not held until approximately a year and a half after the union first began organizing employees).

[93] 531 F.3d 321 (4th Cir. 2008).

[94] 77 N.L.R.B. 124, 126 (1948).

- an unusually large deduction of union dues on the day of the election.[95]

§ 1.6(c) *Misrepresentations*

The Board's view of campaign misrepresentations has undergone numerous changes over the years. The Board has said that it will not overturn an election based solely on the basis of campaign misrepresentations.[96] However, the Board normally will overturn an election if there were forged documents that employees did not recognize as propaganda,[97] or if there were altered official documents giving the impression that the Board itself was not neutral.[98]

One tactic employed by some of the more aggressive unions, such as the SEIU, is to gather employee signatures or photographs early in the process of an organization campaign and to subsequently use those signatures or photographs in union campaign materials—sometimes falsely attributing pro-union sentiments to the employee. The Board has been hesitant to reverse elections on the basis of such conduct.[99] However, the Board stated it does not condone this practice, at least where the union makes no prepublication effort to verify that it is correctly reflecting the showcased employees' actual views.[100]

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

§ 1.6(d) *Inflammatory Propaganda*

Campaign propaganda calculated to inflame racial prejudice and deliberately exacerbate racial tension is a basis for setting aside an election. The Board has stated that this rule applies equally to employers and unions. For example, the Board once set aside an election because the union falsely associated the employer with the Ku Klux Klan.[101] However, later decisions have shown a greater leniency in this area.[102]

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[95] *Fred Meyer Stores, Inc.*, 355 N.L.R.B. 541 (2010).

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

[97] *Albertson's Inc.*, 344 N.L.R.B. 1357 (2005) (finding that a union's distribution of a fake letter, forged on employer's company letterhead, claiming that employer's nonunion stores would be converted to low-priced discount stores, unlawfully affected the results of the election).

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

[99] *See BFI Waste Servs.*, 343 N.L.R.B. 254 (2004) (finding that union's attribution of quotes to employees was not grounds for overturning the election because the views of only two employees were arguably misrepresented, and the employees directly involved were told that a quote would be prepared for them, and the accuracy of the employees' quotes could have been verified by the other employees).

[100] 343 N.L.R.B. 254.

[101] *See Zartic, Inc.*, 315 N.L.R.B. 495 (1994).

[102] *See, e.g., Honeyville Grain, Inc. v. NLRB*, 444 F.3d 1269 (10th Cir. 2006) (NLRB properly ruled that employer challenging representation election bore initial burden to prove that religious remarks made by union agent at union meeting, five days before election, by referring to religious beliefs of company's owners were inflammatory or formed core of election campaign); *NLRB v. Flambeau Airmold Corp.*, 178 F.3d 705 (4th Cir. 1999) (widespread, but unattributed, rumor that manager had referred to employees by using a derogatory racial term, spread at the end

§ 1.6(e) *Excelsior List Rule*

The *Excelsior* list rule, discussed at **§ 1.4(f),** requires the employer to file with the Board an eligibility list two business days after approval of a stipulation or issuance of a direction of election. The rule is strictly applied in terms of time; an employer that files the list late hands the union an automatic objection. Submission of an inaccurate or incomplete list may also provide the basis for invalidating an election, depending on the specific factual circumstances of the case.

§ 1.6(f) *Captive Audience Rule*

The *captive audience* rule, also known as the *Peerless Plywood* rule, applies to both employers and unions. The rule prohibits election speeches on company time to groups of employees within 24 hours before the scheduled time of an election. Violation of the rule is grounds for setting aside the election if objections are filed.[103]

The rule does *not* apply to:

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

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

§ 1.6(g) *Interference with the Board's Election Process*

Distribution of a facsimile of an official ballot or any other material that suggests to voters, either directly or indirectly, that the Board endorses a particular party to the election may cause the election to be set aside.[104] Further, actual forgery of NLRB documents will result in the election being set aside.

In the past, the Board overturned an election where a union claimed that an employer had committed unfair labor practices when in fact the employer had settled the charges without admitting liability. However, the Board later reversed its decision, finding such misleading claims as unobjectionable.[105]

§ 1.6(h) *Promises Made by the Union or Employer*

Certain types of conduct that will result in setting aside an election if committed by an employer will not necessarily have the same result if committed by a union. Union promises of benefits fall within this category. The Board believes that because union promises of increased benefits are inherently unreliable, employees will see through them. For instance, a union may falsely promise that it will obtain a sizable wage increase for employees. In *Detroit Auto Auction v. NLRB*, the U.S. Supreme Court let stand the Sixth Circuit Court of Appeals's ruling that a union's pre-election distribution of coupons promising

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of a campaign filled with union appeals for racial solidarity, was an insufficient reason to invalidate an election that resulted in a vote of 96 to 94 in favor of the union); *Case Farms v. NLRB*, 128 F.3d 841 (4th Cir. 1997) (union flyer accusing employer of firing Amish workers because Latinos could be paid less and treated worse was not inflammatory appeal to racial or ethnic hatred).

[103] *Peerless Plywood Co.*, 107 N.L.R.B. 427 (1953).

[104] *See French Redwood, Inc.*, 343 N.L.R.B. 769 (2004).

[105] *See, e.g., Affiliated Midwest Hosp., Inc. d/b/a Riveredge Hosp.*, 266 N.L.R.B. 1198 (1983), *aff'd sub nom.*, 789 F.2d 524 (7th Cir. 1986).

employees $150 per week in the event of a strike constituted legitimate campaign literature rather than impermissible vote-buying by the union.[106]

In contrast, the Board has found that employees are likely to believe employer promises because an employer has the power to deliver on its promises. For that reason, employer promises are objectionable. For instance, an employer's promise to settle a pending class-action lawsuit with its employees was found to be an unlawful promise.[107] However, merely informing employees that employee-initiated pension litigation had been settled, even shortly before a re-run election, was found not to be objectionable conduct because the employer showed it would have announced the settlement of the litigation regardless of the ongoing union campaign.[108]

Solicitation of grievances during an election campaign, in some instances, may be considered an unlawful promise to address and resolve employee needs. In one case, however, the Board found that "stepped-up" solicitation activity during a campaign was not objectionable conduct because the pattern of soliciting and remedying grievances during the critical period was substantially consistent with past practice.[109]

§ 1.6(i) *Interrogations*

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

In contrast, virtually all employer questioning about union activity will cause an election to be set aside.[110] The Board has held, however, that certain forms of limited questioning are not unlawful or objectionable. For instance, a friendly question asked of an open union supporter may be viewed as noncoercive.[111]

§ 1.6(j) *Surveillance*

Photographing employees engaged in section 7 activity, such as when union agents are distributing campaign literature, constitutes objectionable conduct whether engaged in by a union or an employer.[112] Likewise, an employer may not conduct surveillance, or create the impression of surveillance, of union activity. For example, in *Sprain Brook Manor Nursing Home*, an employer monitored a union official distributing pro-union literature during an organizing campaign, monitoring who did or did not accept the literature.[113] The Board found that this monitoring constituted unlawful surveillance.

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[106] 528 U.S. 1074 (2000).

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

[108] *See Onan Corp.*, 338 N.L.R.B. 913 (2003).

[109] *Wal-Mart, Inc.*, 339 N.L.R.B. 1187 (2003).

[110] *See, e.g., Mid-South Drywall Co.*, 339 N.L.R.B. 480 (2003).

[111] *See, e.g., Appalachian Mach. & Rebuild Co.*, 317 N.L.R.B. 1343, 1347 (1995).

[112] *Randell Warehouse of Ariz., Inc.*, 347 N.L.R.B. 591 (2006) (on remand, the Board concluded it could not justify different standards for employers and unions).

[113] 351 N.L.R.B. 1190 (2007); *see also Waste Stream Mgmt.*, 315 N.L.R.B. 1099, 1124 (1994) (explaining that whether the employer "creates an impression of surveillance" turns on "whether the employees would reasonably assume from the employer's actions or statements that their union activities had been placed under surveillance").

§ 1.6(k) *Waiver of Initiation Fees by the Union*

The U.S. Supreme Court has held that a union may not offer to waive initiation fees before the election *only* for employees who sign authorization cards.[114] The Court said that a union may not "paint a false portrait" of the actual extent of its support to other employees by "buying" such support before the election. Nonetheless, the Court held that a union may waive initiation fees so long as the waiver applies to *all* employees, before or after the election.[115]

§ 1.6(l) *Violence & Threats of Violence*

Violence and threats of violence that create a general atmosphere of confusion and fear of reprisal among employees can be a basis for setting aside an election. In several NLRB decisions, union election victories have been set aside based on evidence of verbal threats of violence by union agents. By contrast, an election generally will not be set aside where an employee makes threats while campaigning for the union. For example, in *HCF, Inc. (Shawnee Manor)*, the NLRB found that an employee's threats of violence, even while soliciting authorization cards, could not be construed by any reasonable person as representing "purported union policies."[116] Consequently, the NLRB held that there was no reason to set aside the election.

While virtually all threats from employers are automatically objectionable, the stationing of security guards and guard dogs during a contentious election campaign was found not to constitute conduct sufficient to overturn an election.[117] In *Quest International*, the Board ruled, contrary to the hearing officer, that the union failed to show that the employer's implementation of security measures "had a reasonable tendency to interfere with the employees' free and uncoerced choice in the election."[118]

§ 1.6(m) *Threats of Job Loss or Plant Closure*

An employer may not threaten its employees with the loss of their jobs because employees choose to support a union. Such conduct, during an organizing campaign, can be grounds for overturning the election results. However, during a campaign, an employer may inform employees of the factual possibility that employees may be called out on strike by the union and that the employer may permanently replace those employees. Doing so is not typically treated as a threat to retaliate against union supporters.[119] An employer anticipating a strike may also seek prospective replacements to prepare for the strike.[120] Posting advertisements for workers during an election campaign may not be objectionable, if such postings are a common practice.[121]

Just as employers may not threaten employees with job loss, they may not tell employees that the election of a union to represent them will result in the closure of the business. An employer may offer its informed opinion, but it will be a question of fact whether the statement constitutes a threat. For instance, in *Mid-South Drywall Co.*, the Board found that the statement of a leadman to two employees—"If it were my

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[114] *NLRB v. Savair Mfg. Co.*, 414 U.S. 270 (1973).

[115] *See also Majestic Star Casino v. NLRB*, 373 F.3d 1345 (D.C. Cir. 2004) (holding that a union's waiver of initiation fees is not improper where the waiver is not conditioned on employees' pre-election support for the union).

[116] 321 N.L.R.B. 1320 (1996).

[117] *See Quest Int'l*, 338 N.L.R.B. 856 (2003).

[118] 338 N.L.R.B. 856.

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

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

[121] *See Big Brass Band*, 339 N.L.R.B. 973 (2003).

business, I'd close it"—constituted an unlawful threat.[122] Significantly, however, in 2004, the Board reversed precedent[123] and held in *Crown Bolt* that an employer's threat to close its facility if employees voted for union representation—if made to only one or two employees—will not be presumed to have been disseminated throughout the entire bargaining unit.[124] In those circumstances, the election will not necessarily be invalidated.

§ 1.6(n) *Milchem Rule: Conversations in the Polling Area*

In *Milchem, Inc.*, the Board held that prolonged conversations in the polling area between voters and representatives of either party, during voting hours, would be a basis for setting aside an election.[125] The Board concluded that it does not matter whether the conversations relate to the election. Note that the *Milchem* rule is very narrow. If any one of its elements is not present, the *Milchem* rule cannot be used as a basis for setting aside an election.[126]

§ 1.6(o) *Posting Notice of Election*

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

§ 1.6(p) *Opportunity to Vote*

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

§ 1.6(q) *List Keeping*

Neither party may keep a running list of employees who have voted.[127] This rule applies equally to the observers designated by the parties. This is to avoid intimidating voters who may wonder about the purpose of the list. The Board has ruled that an employer may check off the names of workers voting in a union election where the employer's business normally involves a high degree of security.[128] That case, however, involved the unique security needs of a nuclear power plant, and employees accustomed to

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[122] 339 N.L.R.B. 480 (2003).

[123] *See Springs Indus., Inc.*, 332 N.L.R.B. 40 (2000).

[124] 343 N.L.R.B. 776 (2004).

[125] 170 N.L.R.B. 362 (1968).

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

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

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

being monitored because of those needs. Other employers may not be able to similarly justify such list keeping.

§ 1.7 OVERTURNING AN ELECTION BECAUSE OF OBJECTIONABLE CONDUCT BY A THIRD PARTY

An election may be overturned because of the conduct of a third party (someone other than the employer or the union) if the conduct interferes with the right of employees to exercise their free choice. In one case, the directors of the local chamber of commerce undertook a substantial campaign that included visits to employees at their homes to urge them to vote against the union. The chamber of commerce spread the rumor that, if the union won, the employer would leave the community. Concluding that the atmosphere was one of fear and confusion, even though there was no evidence that the employer was responsible, the Board ordered a rerun election.[129]

In another case, events during the pre-election period included extensive property damage, anonymous telephone threats, and threats of physical violence. The Board set aside the election, finding that the confusion, violence, and threats of violence created by such acts could reasonably be expected to generate anxiety and fear in the minds of the voters.[130]

Sometimes an issue exists as to whether a certain person is the agent of either the employer or a particular union. An individual employee will be considered the agent of a union only when he or she serves as the primary conduit for communication between the union and other employees or is substantially involved in the campaign in the absence of union representatives.[131] In such cases, the union can be held responsible for statements made by the employee. Even if a pro-union employee is not deemed an agent of a union, certain conduct by the individual, such as physically intimidating coworkers who are waiting in line to vote in a representation election, may be sufficient for the Board to set aside an election.[132]

§ 1.8 OVERTURNING AN ELECTION BECAUSE OF BOARD CONDUCT

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

§ 1.8(a) *Board Agent Conduct*

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

- The NLRB agent left the ballot box unattended during a break in the voting.
- The NLRB agent ripped an anti-union button off of an observer in front of other voters.
- The NLRB agent failed to secure challenged ballots properly in a sealed envelope.[133]

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[129] *Mylan-Sparta Co., Inc.*, 70 N.L.R.B. 574 (1946).

[130] *Centennial Village, Inc. d/b/a Tacoma Terrace Convalescent Ctr.*, 270 N.L.R.B. 974 (1984).

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

[132] *See Hollingsworth Mgmt. Serv.*, 342 N.L.R.B. 556 (2004).

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

- The NLRB agent was seen drinking beer with a union representative on the day before the election.

- The NLRB agent made disparaging remarks about the employer's product within earshot of voters.

In one case, the NLRB set aside the election where the NLRB agent included an erroneously incomplete description of the voter eligibility formula in the NLRB's Decision and Direction of Election order. The NLRB found that the employer reasonably relied on that articulation of the formula in preparing its *Excelsior* list, but that, as a result, the *Excelsior* list included two ineligible voters. Accordingly, the NLRB directed a new election, noting it was the NLRB's responsibility to set forth properly the voter eligibility requirements.[134]

§ 1.8(b) *Polling Place*

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

§ 1.8(c) *Opening & Closing of Polls*

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

§ 1.8(d) *Secrecy of Ballot*

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

§ 2 OVERVIEW OF UNION ORGANIZING

§ 2.1 TRADITIONAL UNION ORGANIZING TACTICS & STRATEGIES

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

§ 2.1(a) *Depending on Employees to Identify the Target Employer*

Traditional organizing campaigns usually begin with employees of a particular employer contacting the union. Typically, an employee would choose a union because the employee previously worked at a location represented by that union or had some other connection to that union, for example, a relative who

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

was a member. Union representatives still prefer this type of campaign, since there is already an established core of employees who may be dissatisfied.

§ 2.1(b) *Developing an In-Plant Organizing Committee*

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

§ 2.1(c) *Toehold Approach: Keeping the Employee Group Small*

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

§ 2.1(d) *House Calls: One-on-One Campaigning with Voters*

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

Home visits still play a vital role in those workforces of today in which employees do not work out of one central location.

§ 2.1(e) *Keeping the Campaign Quiet*

In a traditional union organizing campaign, a union also strives to keep the organizing campaign secret from the employer. This is done so that the employer will have little time to respond and, once it finds out, will not know whom to target for response. Authorization cards are collected away from the facility or in quiet groups during break time. No public announcements are made regarding union meetings or about the issues that the union is using as a rallying point for its campaign.

§ 2.1(f) *Focusing on Economic Issues & Job Security*

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

while employers are prohibited from making any promises at all. Unions can also make exaggerated claims about the benefits that would be available to employees. Job security remains a big selling point for unions, especially in today's economic climate.

§ 2.2 OTHER UNION ORGANIZING TACTICS & STRATEGIES

While unions have not completely abandoned the traditional strategies described above, they have increasingly supplemented traditional organizing tactics with new techniques and approaches. Certain unions—most notably the SEIU—have been particularly aggressive in pursuing new organizing strategies.

§ 2.2(a) *Full-Time Union Organizers*

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

§ 2.2(b) *Employer Targeting*

§ 2.2(b)(i) *Targeting Companies, Industries & Geographic Areas*

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

Unions often target all nonunion employers within a particular industry and geographic area, a practice commonly referred to as the "blitz." Sometimes the target industry or area is a core industry or area for the union; at other times, the union is attempting to branch out into new industries or areas

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

§ 2.2(b)(ii) *Top-Down or Wholesale Organizing*

Another popular method of targeting employers is called *top-down* or *wholesale organizing*. Using this technique, unions target employees by identifying employers that are vulnerable to adverse-publicity campaigns, political pressure, or legal pressure. Typically, unions will choose employers that rely heavily on their consumer image or the reputation of their products or services. Unions may join forces whenever feasible to wage these top-down campaigns.

In a top-down or wholesale organizing campaign, the union attacks the larger corporation rather than the individual branches through which the corporation operates. The campaign is often aimed at corporate officers and shareholders rather than simply at the employer or employees. The union's aim is to break

down the targeted company's willingness to resist union organizing, thereby making it easier to organize the workers. The union then may seek to bypass the NLRB altogether by obtaining voluntary recognition from the employer or a pledge not to actively oppose union organizing efforts.

§ 2.2(c) *Creating a Negative Corporate Image*

Unions have found that another effective method of attacking a company is to attack the company's public image. This is commonly referred to as a "corporate campaign." Organized labor will often conduct a concerted nationwide effort to disparage a corporation in the hopes it will weaken the corporation's ability to compete against unionized companies within the same industry. Corporate campaigns focus on harming the sale of the company's products or services. In larger corporations, this often has the effect of driving down stock prices. Unions typically do this by creating *red-herring* issues—meaning, issues that make for good publicity but are not part of the union's real agenda. Typical red-herring issues include:

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

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

§ 2.2(d) *Focusing on Moral & Ethical Issues Instead of Economic Issues*

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

As part of their desire to shift the focus of organizing from economic issues to moral and ethical issues, unions frequently join forces with community-based organizations. Unions also affiliate with minority groups, immigration groups, or with various health and safety organizations.[135] Religious groups frequently declare outright support for organizing drives. Affiliation with an "independent" organization allows a union to claim the moral high ground and use that high ground to preach its other messages.

[135] *See, e.g.*, http://www.aflcio.org/About/Allied-Organizations.

§ 2.2(e) *Use of the Media*

Unions have long known that the media are a great source of free publicity for its organizing efforts. Unions have traditionally employed the media by making provocative accusations against targeted companies, thereby creating a newsworthy story. For example, unions have enlisted the help of television shows such as *Dateline* and *48 Hours* to investigate allegations concerning an employer's products or its treatment of consumers. Classic examples include a *Dateline* segment on a supermarket chain that involved hidden cameras and staged incidents at stores.

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

§ 2.2(f) *Political Efforts*

Unions have always paid great attention to the political arena. In one of its most contentious decisions in recent history, *Citizens United v. Federal Election Commission*, the U.S. Supreme Court found that no distinction existed between a corporation and an individual regarding protected political speech.[136] Overturning decades of court precedent as well as federal campaign finance restrictions, the Court rejected limits on the ability of corporations and unions to fund advertisements for political candidates.[137]

With the lack of restrictions on union funding for political advertisements, unions have created PACs (political action committees) and/or super PACs (which do not have to follow contribution limits or restrictions on taking money) to reach audiences beyond their members. In the 2016 presidential election, almost every large union spent more than it had in previous presidential elections; a Wall Street Journal article in October 2016 noted that union spending had jumped 38% from the 2012 election.[138] A significant portion of that spending was directed to super PACs. Union money predominately went to support Democrats and Hillary Clinton's presidential bid.

§ 2.2(g) *"Cellular" Campaign Approach*

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

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

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[136] 558 U.S. 310 (2010).

[137] Adam Liptak, *Justices, 5-4, Reject Corporate Spending Limits*, N.Y. TIMES, Jan. 21, 2010, at A1, *available at* http://www.nytimes.com/2010/01/22/us/politics/22scotus.html.

[138] Brody Mullins, Rebecca Ballhaus & Michelle Hackman, *Labor Unions Step Up Presidential-Election Spending*,

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

§ 2.2(h) *Open-Campaign Approach*

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

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

§ 2.2(i) *Challenging the Employer to Debate*

Shrewd union organizers will often challenge a company official to a debate. However, this is a no-win situation for most employers. Unlike employers, unions are relatively free to make promises in a debate and they often take advantage of that fact. An employer, without the ability to make such promises, is generally at a disadvantage. On the other hand, if the employer refuses the offer to debate, the union will make much of the refusal.

§ 2.2(j) *Targeting Nontraditional Groups*

The change in the makeup of the U.S. workforce has required unions to adjust their efforts to reach new members. Some unions have targeted certain industries or occupations. Many have increased their focus on diversifying membership by championing the needs of different minorities.

- **Targeting Certain Occupations.** Over the past several years, unions have targeted employees not traditionally subject to union organizing drives (*e.g.*, professional employees such as pharmacists, physicians, private attorneys). Through a series of legislative acts in pro-union states and executive orders issued by pro-union governors, unions such as the SEIU and AFSCME have made efforts to organize home day-care workers. For example, in 2013, home-based child care workers in Rhode Island voted by a 390 to 19 margin to join the SEIU following legislation allowing the providers to unionize and requiring the state to negotiate with them.[139]

  An increasing number of graduate school teaching assistants, interns, and residents have also sought union representation. Unions have also focused organizing drives on bagel workers,

[139] News Staff, *RI Home-based Childcare Workers Vote Overwhelmingly to Unionize*, PROVIDENCE J., Oct. 31, 2013, *available at* http://www.providencejournal.com/article/20131031/video/310319874.

gaming dealers working at casinos, fast food employees, body piercers, exotic dancers, gig economy workers, app-based drivers, youth counselors, and bicycle messengers to increase membership. Unions have also been successful in gaining a foothold in the finance, insurance, and real estate industries. In the high-tech field, unions have had little success thus far, despite high-profile attempts to unionize companies.

- **Targeting Women & Other Minority Groups.** Unions have increasingly focused their efforts on organizing women and other minority groups, and have incorporated the mission into the fabric of their organizations. For example, the AFL-CIO: (1) created a Civil, Human and Women's Rights Department which encourages unions to addresses civil rights/equality issues in the workplace and to bargain for nontraditional items such as family leave, alternative work schedules, and childcare to attract more women and minority members; (2) adopted resolutions focused on increasing membership of women, young workers, and "Building a Diverse and Inclusive Labor Movement Now and for the Future;" and (4) amended its constitution to be more inclusive ("To encourage all workers without regard to race, creed, color, sex, national origin, religion, disability, sexual orientation, gender identity, or gender expression to share equally in the full benefits of union organization.")[140]

  The SEIU has highlighted women and "people of color" in its constitution and bylaws (*e.g.*, "We believe we have a special mission to bring economic and social justice to those most exploited in our community—especially to women and workers of color."[141]), and in its "5 Good Reasons to Unite at Work" campaign materials (*e.g.*, "Union representation places equal opportunity more in reach for people of color and women."[142]).

  The effectiveness of this outreach is not clear. Statistics released by the DOL, Bureau of Labor Statistics verify that the gap in unionization rates between the sexes is closing—attributable, in part, to the high rate of decline for men. With respect to race, the gap is closing between unionization rates of Caucasians compared to African Americans, Asians, and Hispanics, but the overall rates in each group have generally been on the decline (see Table 4).

Table 4. Rate of Union Membership by Gender & Race[143]

Fiscal Year	Men	Women	African American	Asian	Caucasian	Hispanic
2017	11.4%	10.0%	12.6%	8.9%	10.6%	9.3%
2016	11.2%	10.2%	13.0%	9.0%	10.5%	8.8%
2015	11.2%	10.2%	13.6%	9.8%	10.8%	9.4%
2014	11.5%	10.1%	13.2%	10.4%	10.8%	9.2%
2013	11.9%	10.5%	13.6%	9.4%	11.0%	9.4%
2012	12.0%	10.5%	13.4%	9.6%	11.1%	9.8%
2011	12.4%	11.2%	13.5%	10.1%	11.6%	9.7%
2010	12.6%	11.1%	13.4%	10.9%	11.7%	10.0%
1983	24.7%	14.6%				

[140] *See* http://www.aflcio.org/About/Exec-Council/Conventions/2013/Resolutions-and-Amendments.

[141] *See* http://www.seiu.org/cards/what-you-should-know-about-our-constitution-and-leaders/you-can-read-it-yourself/p3.

[142] *See* http://www.seiu.org/cards/5-good-reasons-to-unite-at-work/for-people-of-color-and-women-workers/p3.

[143] The most up-to-date statistics regarding unionized workforce, are available on the Bureau of Labor Statistics website, http://www.bls.gov/cps/lfcharacteristics.htm#laborforce, under the heading "Union Members."

§ 2.2(k) *Utilizing Legal Processes*

§ 2.2(k)(i) *Use of the Board's Unfair Labor Practice Procedure*

Since the inception of the NLRA, unions have been filing unfair labor practice charges against employers with the Board. There is nothing unusual about unions using the NLRB as a weapon. However, unions are now filing multiple unfair labor practice charges in an effort to bypass the election process and force an employer to recognize the union voluntarily or be subject to an NLRB bargaining order. Unions now work to stage situations where pro-union employees ask managers difficult questions or engage them in one-on-one conversations. In these situations, the issue often becomes one person's word against another's, and the NLRB is required to hold a hearing to decide who is telling the truth.

Defending charges of unfair labor practices can be expensive. The union's goal in filing such charges is to break down the targeted company's will to resist the union's campaign. If there are a sufficient number of unfair labor practices, the NLRB may find that maintaining the laboratory conditions required for a fair election is impossible. In such circumstances, the NLRB can issue an order requiring the employer to bargain with the union without benefit of an election.

§ 2.2(k)(ii) *Use of Board Injunctions*

The NLRB may apply for injunctive relief against employers that have allegedly violated the NLRA. This strategy has grown in recent years. The requests for relief usually allege that the employer interfered with an ongoing union organizing campaign or has engaged in unlawful tactics intended to evade union recognition, such as a successor employer refusing to hire a sufficient number of the predecessor employer's employees for purposes of avoiding compelled union recognition. When a party files an unfair labor practice charge with the NLRB, the Board can seek certain provisional remedies while awaiting a final decision. The provisional remedies available to the Board are set forth in NRLA sections 10(j) and 10(l). Section 10(j) *allows* the Board to file for injunctive relief, whereas section 10(l) *requires* the Board to file for injunctive relief under certain circumstances. The Board normally seeks section 10(j) relief against employers and 10(l) relief against unions and union members. In the rare situation where the Board seeks section 10(j) injunctions against unions, it is usually to stop picket-line violence or unlawful strikes.

NLRA section 10(j) provides:

> The Board shall have power, upon issuance of a complaint … charging that any person has engaged in or is engaging in an unfair labor practice, to petition any U.S. district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

The U.S. Supreme Court has not articulated criteria for granting section 10(j) injunctions, and federal appellate courts are divided on the issue. Generally, as a prerequisite to granting a section 10(j) injunction, most federal courts apply a two-prong test. First, the court must find there is "reasonable cause" to believe that the NLRA has been violated. Second, the court must determine that the requested relief is "just and proper."[144]

[144] *Hoffman v. Inn Credible Caterers, Ltd*., 247 F.3d 360 (2d Cir. 2001); *Pye v. Sullivan Bros. Printers*, 38 F.3d 58 (1st Cir. 1994); *Kobell v. United Paperworkers Int'l Union*, 965 F.2d 1401 (6th Cir. 1992).

Strictly speaking, section 10(j) does not contain "reasonable cause" language. Courts have grafted the "reasonable cause" element into section 10(j) analysis by analogizing it to section 10(l), which explicitly contains that phrase. The Seventh and Ninth Circuit Courts of Appeals do not agree with this approach; these courts only require the Board to demonstrate that injunctive relief is "just and proper."[145] If a dispute of fact exists, courts usually defer to the Board's determinations because of its expertise in the field. As a result, injunctive relief pursuant to section 10(j) is granted more readily than might be expected.

Courts are inconsistent in interpreting the "just and proper" standard. The Second Circuit Court of Appeals, for example, requires a showing that an injunction is needed to preserve the *status quo* or prevent irreparable harm.[146] The Third Circuit Court of Appeals requires a showing that "the nature of the alleged unfair labor practices are likely to jeopardize the integrity of the bargaining process and make it impossible or infeasible to restore or preserve the *status quo*."[147] Meanwhile, the First, Seventh, and Ninth Circuit Courts of Appeals apply traditional equitable principles that require the Board to show: (1) a likelihood of success on the merits; (2) the potential for irreparable injury in the absence of relief; (3) the potential injury outweighs any harm preliminary relief would inflict on the defendant; and (4) preliminary relief is in the public interest.[148] The Supreme Court refused an opportunity to create a uniform standard for section 10(j) cases when it denied certiorari in *Beverly Health & Rehabilitation Services v. Kobell*.[149]

A court's role in granting injunctive relief under section 10(j) is narrow and does not extend to determining the merits of an unfair labor practice charge. A district court's conclusion that an injunction would not be just and proper has no bearing on the Board's subsequent unfair labor practice proceeding. Likewise, a grant of injunctive relief is not determinative of any subsequent unfair labor practice hearing. For instance, in *NLRB v. Kentucky May Coal Co.*, the Sixth Circuit Court of Appeals ruled that a section 10(j) proceeding and an unfair labor practice proceeding present different issues to the finders of fact, which means collateral estoppel cannot be asserted.[150]

§ 2.2(k)(iii) *Use of Other Government Agencies*

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

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[145] *Miller v. California Pac. Med. Ctr.*, 19 F.3d 449 (9th Cir. 1994) (*en banc*) (holding "reasonable cause" inquiry inapplicable to 10(j) analysis), *overruled in part on other grounds*, *Small ex. Rel. NLRB v. Operative Plasterers' & Cement Masons' Int'l Ass'n Local 200,* 611 F.3d 483 (9th Cir. 2010); *Lineback v. Spurlino Mat'ls*, 546 F.3d 491 (7th Cir. 2008) (upholding district court's grant of section 10(j) injunction because union's organizing efforts would face irreparable harm without an injunction).

[146] *Hoffman*, 247 F.3d at 360.

[147] *Pascarell v. Vibra Screw, Inc.*, 904 F.2d 874 (3d Cir. 1990).

[148] *Miller*, 19 F.3d at 456; *Pye*, 38 F.3d at 63.

[149] 525 U.S. 1121 (1999).

[150] 89 F.3d 1235 (6th Cir. 1996).

§ 2.2(k)(iv) *Funding Independent Lawsuits on Behalf of Employees*

One of the more recent union techniques most costly to employers is union funding of lawsuits on behalf of employees against a targeted employer. Again, the goal is twofold: first, to break the employer's resolve; second, to show employees the union's power to protect them. The NLRB has held that, so long as a union's lawsuit is directly related to the union's traditional role as protector of wages, benefits, and working conditions, the funding of a lawsuit does not interfere with employees' free choice in an election. In *52nd Street Hotel Associates*, the NLRB found that the union did not engage in any objectionable conduct when, eight days before the election, it provided employees with free legal services to file a lawsuit against their employer under the Fair Labor Standards Act (FLSA).[151]

However, such lawsuits are not always legally permissible. In 1999, the D.C. Circuit Court of Appeals ruled that a union's sponsorship of a lawsuit against an employer, announced the day before a representation election, violated the rule against providing gratuities to voters during the campaign period.[152] The court reasoned that the lawsuit, which sought overtime pay, was "not integral to the conduct of a fair election," unlike charges of unfair labor practices filed by a union.[153] The court also found that the suit constituted a benefit to employees that might influence them to vote for the union, in violation of the NLRA.

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

§ 2.2(l) *Unfair Labor Practice Charges that Block Elections*

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

§ 2.2(m) *Salting*

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

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

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[151] *52nd St. Hotel Assocs.*, 321 N.L.R.B. 624 (1996).

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

[153] 165 F.3d at 934.

Another form of salting is for regular union members, who are not paid as union organizers, to flood a job site with applications that state that the applicants are union members who intend to organize the company's job site if hired. This type of applicant presents the same problems as the full-time paid union organizer.[154]

Unions have rallied around the U.S. Supreme Court's decision in *NLRB v. Town & Country*, seeing it as legalization of salting. In that case, the employer was faced with an influx of applications from both paid and unpaid union organizers. The NLRB found that the employer had committed an unfair labor practice by refusing to interview the applicants because of their union affiliation.[155] On appeal, the Eighth Circuit Court of Appeals denied enforcement of the NLRB's decision. On further appeal, however, the U.S. Supreme Court concluded that the NLRB had lawfully interpreted the term employee to include paid union organizers. Following *Town & Country*, salting gained in popularity as a union organizing tactic. In 2010, the Board recognized that "[s]alting itself is protected, concerted activity, even if it is intended in part to provoke an employer to commit unfair labor practices."[156] However, this decision was later questioned by the Fifth Circuit Court of Appeals based on legal technicalities.[157]

More recently, with its decision in *Toering Electric* in 2007, the Board significantly altered the legal framework in "salting" cases by placing on the NLRB General Counsel the ultimate burden of proving an individual's genuine interest to establish an employment relationship with the employer.[158] As the law currently stands, individuals who do not genuinely seek an employment relationship do not qualify as "employees" protected by the Act.

Further, not all salting cases have been resolved in the unions' favor. In *International Brotherhood of Boilermakers v. NLRB*, the employer had implemented a nonresponsive information policy in conjunction with its application process.[159] This policy warned applicants that any individual who provided information not specifically requested by the employment application would be disqualified from consideration. Accordingly, when several union members wrote "volunteer union organizer" on their applications, the employer disqualified them from consideration. The NLRB held that, in disqualifying these individuals because they had written the words "volunteer union organizer," the employer illegally discriminated against them because of their union activities. The Eleventh Circuit Court of Appeals reversed, finding that the employer's policy was unrelated to any desire to discriminate against an applicant based on union activities. Instead, the court found the policy was implemented to avoid making any hiring decisions on the basis of nonrelevant factors such as race, disability, union affiliation, and the like. Moreover, the court found that the company had applied its policy in a nondiscriminatory manner, disqualifying not only those applicants who provided nonresponsive information relating to their union

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[154] In *Town & Country Elec., Inc.*, 309 N.L.R.B. 1250 (1992), the employer was faced with an influx of applications from both paid and unpaid union organizers. The NLRB found that the employer had committed an unfair labor practice by refusing to interview the applicants because of their union affiliation. On appeal, the Eighth Circuit Court of Appeals denied enforcement of the NLRB's decision. On further appeal, the U.S. Supreme Court concluded that the NLRB had lawfully interpreted the term employee to include paid union organizers. *See NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85 (1995), *on remand*, *Town & Country Elec., Inc. v. NLRB*, 106 F.3d 816 (8th Cir. 1997).

[155] 309 N.L.R.B. 1250 (1992).

[156] *KenMor Elec. Co.*, 355 N.L.R.B. 1024 (2010) (holding that an association of electrical contractors violated the NLRA by maintaining a discriminatory "referral system" designed to preclude hiring of salts).

[157] *Independent Elec. Contractors of Houston, Inc. v. NLRB*, 720 F.3d 543 (5th Cir. 2013).

[158] 351 N.L.R.B. 225 (2007).

[159] 127 F.3d 1300 (11th Cir. 1997).

activities but also those who provided nonresponsive information such as "Passed all pipe tests in December '91" and "See Steve of survey crew."[160]

Since 2009, Republican legislators have attempted to legislatively eliminate protection for "salting," introducing nearly identical bills in 2009, 2011, 2013, 2015, and 2017 that would allow an employer to reject any applicant who seeks employment "in furtherance of other employment or agency status."[161] Despite the confusion in the Board's decisions and the potential for legislative action, salting remains a viable and favored union strategy. Employers have found it helpful to be particularly sensitive to the risks associated with this particular organizing tactic.

§ 2.2(n) *Use of Technology*

Unions have also learned the importance of using technology to access employees. Simply put, the Internet in combination with mobile devices provides easier—and instant—transmission of information, allowing unions to conduct more efficient organizing campaigns.

Unions have conducted "virtual leafleting" campaigns as part of their organizing efforts (*e.g.*, distributing the virtual leaflet using a banner ad on a search engine site that directed individuals to a website explaining the labor dispute at issue). More recently, "online organizing" has become instrumental in the low-wage worker organizing campaigns, such as the "Fight for 15" campaign.

Other examples of technology in union organizing campaigns include:

- **E-mail & Social Media (Twitter, Facebook, Instagram, etc.).** These forms of communication have quickly become a part of union organizing efforts, providing unions with the ability to send campaign messages (and urging their supporters to do the same). Some campaigns have been planned and conducted using little else but social media.

- **Union-Sponsored Websites.** The major unions have websites and generally post information about union organizing efforts (and other information as outlined in the list below). Unions have also created separate websites targeting particular employers as part of a corporate campaign.

- **Union-Sponsored YouTube Channels.** This provides a dynamic platform from which unions can showcase activity at union rallies and various campaigns, highlight their leaders at various speaking engagements, feature their members, promote their political agenda, etc. They often prepare videos with appearances by local union leaders describing the virtues of unions and likely statements an employer will make to counter the union's organizing effort.

- **Union-Prepared Custom Videos.** For large elections, unions prepare custom-designed videos that attack a particular employer. These customized presentations allow pro-union employees to appear on the video and explain why they believe the union would benefit the employees. This type of campaign propaganda can be persuasive.

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[160] *See also Little Rock Elec. Contrs., Inc.*, 327 N.L.R.B. 932 (1999) (employer's rule against moonlighting provided legitimate basis upon which to reject the job applications of two salts who were employed by a union and who did not contend that they intended to quit that employment if their applications were accepted).

[161] *Truth in Employment Act*, H.R. 2808, S. 1227, 111th Cong. § 4 (2009); H.R. 2153, 112th Cong. § 3 (2011); H.R. 1746, 113th Cong. § 3 (2013); H.R. 1746, 114th Cong. § 3 (2015); H.R. 744, 115th Cong. § 3 (2017).

- **Union-Sponsored Discounts on Computers & Internet Services to Union Members.** In related efforts, some unions offer such discounts to make it easier for members to have access to e-mail and the Internet. When members access the Internet using these services, they often receive information on organizing and other developments in the labor union movement.

- **"How to Unionize" Websites.** There are numerous "how to" websites that include information on labor organizing, union election procedures, examples of unfair labor practices, and news about other organizing efforts, etc.

- **Electronic Forms.**

  - **"Unionize Your Workplace" forms:** many unions now provide strictly confidential online forms for anyone interested in receiving information on organizing a union. Such forms ask for the inquiring employee's address, phone number, e-mail address, type of work, and the number of employees of his or her employer, and can be submitted instantly.

  - **Electronic authorization cards:** employees can even download authorization cards from the Internet.

§ 2.3 UNION ORGANIZING WITHOUT A BOARD-CONDUCTED ELECTION

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

- voluntary recognition of the union by the employer;

- a *Gissel* bargaining order; or

- a finding of successor status.

§ 2.3(a) *Voluntary Recognition & Card Check Agreements*

If an employer has a reasonable basis for believing that the union represents a majority of its employees, it may choose to voluntarily recognize the union without an election. Unions are increasingly pressuring employers to enter into *card check agreements*, whereby the employer agrees to forgo a secret-ballot election and recognize the union if the union is able to obtain authorization cards from a majority of employees. At times, these agreements even require employer *neutrality* during the period of time in which the union attempts to collect the requisite number of cards. Card check and neutrality agreements are often made in exchange for the union's promise to refrain from striking, picketing, boycotting, or undertaking other economic pressure against the employer. Unions have more success in organizing employees via neutrality and/or card check agreements rather than recognition elections.

In 2013, the U.S. Supreme Court appeared poised to rule on whether neutrality agreements should be prohibited. Despite hearing oral arguments in *Unite Hear Local 355 v. Mulhall*, however, the Court dismissed the case, indicating simply that *certiorari* had been "improvidently granted."[162] In *Mulhall*, the Eleventh Circuit Court of Appeals revived an employee's claim that a neutrality agreement between his

[162] 134 S. Ct. 594 (2013).

employer and Local 355 was unlawful.[163] In the agreement, the employer offered to provide Local 355 with employee information, allow union access to company property for organizing purposes, remain neutral during the union's organizing effort, and conduct a card check in exchange for the union's promise not to strike, picket, or boycott the company. The union also agreed to give approximately $100,000 in support of a slot machine ballot initiative benefiting the employer. The lower court dismissed the employee's complaint, ruling that section 302 of the Labor-Management Relations Act, the anti-bribery provision, did not outlaw the "thing[s] of value" delivered by the employer or the union as part of the neutrality agreement. A divided Eleventh Circuit disagreed, ruling that a "thing of value" could extend to the intangible promises an employer makes in a neutrality agreement.[164] The Eleventh Circuit ultimately remanded the case and instructed the lower court to consider what motivated the cooperation between the employer and the union because section 302 may be violated if the employer was wrongfully attempting to influence the union in its representation duties.

The Board has grappled with whether employees may seek a decertification election to vote a union out following an employer's recognition of the union based on a card check. In 2011, the Board returned to the previous rule barring an election petition for a reasonable period of time after voluntary recognition of a union designated by a majority of employees. In *Lamons Gasket Co.*,[165] the Board rejected the conclusion in *Dana/Metaldyne*[166] that there is good reason to question whether card signings accurately reflect employees' true choices concerning union representation. In addition, the Board asserted that *Dana/Metaldyne* had compromised the neutrality of the Board and undermined the purposes of the Act by subjecting the choice of the majority of employees to an extraordinary, mandatory notice informing employees of their right to seek a decertification election—a notice that casts doubt on the majority's choice by suggesting that voluntary recognition is inherently suspect. Although the Act is neutral when it comes to employees' basic choice of whether to be represented, the Board stated that the notice scheme established in *Dana/Metaldyne* was not. In a change from pre-*Dana/Metaldyne* law, however, the majority defined a reasonable period of bargaining, during which the recognition bar will apply, to be no less than six months after the parties' first bargaining session and no more than one year. In determining whether a reasonable period has elapsed in a given case, the Board will apply the multifactor test of *Lee Lumber*[167] and impose the burden of proof on the general counsel to show that further bargaining should be required.

A tactic that is becoming increasingly popular to coerce voluntary recognition is the use of the corporate campaign, discussed at **§ 2.2(c).** This is a sophisticated technique that has the advantage of leaving management at a loss in planning a response. The union (usually through an expert consultant) finds pressure points peculiar to the company. These pressure points are then exploited in an attempt to stifle the company's resistance to the organizing campaign. These tactics are popular among the Change to Win Coalition members, which estimate that a vast majority of the employees who joined the union in recent years were organized through card check agreements and voluntary recognition by management.

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[163] 667 F.3d 1211 (11th Cir. 2012).

[164] 667 F.3d at 1215.

[165] 357 N.L.R.B. No. 72 (Aug. 26, 2011).

[166] 351 N.L.R.B. 434 (2007).

[167] Under *Lee Lumber*, 334 N.L.R.B. 399, 402 (2001), the determination of whether a reasonable period of bargaining has elapsed after six months depends on a multifactor analysis which considers: (1) whether the parties are bargaining for an initial contract; (2) the complexity of the issues being negotiated and of the parties' bargaining processes; (3) the amount of time elapsed since bargaining commenced and the number of bargaining sessions; (4) the amount of progress made in negotiations and how near the parties are to concluding an agreement; and (5) whether the parties are at impasse.

By way of cautionary example, in one NLRB case, a nursing home contended it had entered into a neutrality agreement as a *quid pro quo* for the union's waiver of any attempt to organize another group of employees during the term of the agreement.[168] The Board held, however, that the union had not waived its right to represent those employees because the waiver was not "clear, knowing and unmistakable." Therefore, employers have found it beneficial to carefully weigh any decision to enter into such agreements.

§ 2.3(b) *Gissel Bargaining Order*

In *NLRB v. Gissel Packing Co.*, the U.S. Supreme Court held that in certain circumstances, an employer may be required to bargain with a union, even if the union *never wins* an election.[169] Generally, a *Gissel* bargaining order is limited by the NLRB and the courts to cases where: (1) the employer committed numerous and serious unfair labor practices (usually including discharges and threats); and (2) the union had previously collected signed authorization cards from a majority of the employees.

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

The validity of the authorization cards evincing alleged majority status may be a critical issue in a bargaining order case. The Board's rule is that when a card unambiguously designates the union as the employee's collective bargaining representative, it will be deemed valid for purposes of establishing whether the union represents a majority of the employees. However, the employer may attack cards on the following grounds: (1) they were forged; (2) they were obtained through misrepresentations as to their meaning; (3) they were obtained through threats; (4) they were collected by supervisors; (5) the employees could not understand the cards; or (6) the cards are stale. Another potential defense to a bargaining order is a change in circumstances. A court may sometimes deny a bargaining order due to the passage of time since the unfair labor practices or because of turnover in the workforce.

§ 2.3(c) *Successorship*

A successor's business is generally considered a continuation of its predecessor's business.[170] Therefore, under current Board law, when one employer is a successor to an employer that has a bargaining obligation, the successor will be required to continue the bargaining relationship with the union. No election is required to impose the obligation.

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

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

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[168] *Springfield Terrace Ltd.*, 355 N.L.R.B. 937 (2010).

[169] 395 U.S. 575 (1969).

[170] *Planned Bldg. Servs., Inc.*, 347 N.L.R.B. 670 (2006).

Of these four factors, the first is the most important, and the last is the least determinative.[171] In most cases, a purchaser will *not* be a successor if a majority of the employees are new (*i.e.*, they did not work for the seller).[172]

The general rule is that a successor employer can unilaterally set initial terms and conditions of employment. However, this freedom ends either: (1) when the successor has hired a substantial and representative complement of employees; or (2) at an earlier time if the employer makes it "perfectly clear" that it plans to retain all the employees in the purchased unit.[173] A *perfectly clear successor* cannot unilaterally set the initial terms and conditions of employment, but instead must give the union notice and an opportunity to bargain before unilaterally implementing new terms. In addition, a 2011 Board decision held that an employer that satisfies all of the criteria for being a successor and would have an obligation to recognize and bargain with the representative of its predecessor's employees—but for the fact that the predecessor had recognized the representative in an inappropriate unit—nevertheless becomes a successor if the representative "perfects" the unit by disclaiming interest in representing specified employees in the predecessor's unit.[174]

Speculation that the Obama Board would revisit the successorship rules was borne out in August 2010. In a 3-2 party-line decision, the Board signaled its intent to revisit the "successorship doctrine" as interpreted by the Bush board.[175] A year later, the Board, in *UGL-UNICCO Service Co.*, followed through on this intent and reinstated the successor bar doctrine in which an incumbent union is entitled to represent the employees in collective bargaining with their new employer for a reasonable period of time without challenge to its representative status.[176] The Board defined a "reasonable period" of time as six months. Where the successor employer recognizes the union, but exercises its legal right to unilaterally establish initial terms and conditions of employment, however, the period is not as easily determined. It could range from six months to up to one year, measured from the date of the first bargaining meeting between the union and the employer. Because of the return to the successor bar doctrine, employers contemplating the purchase of a unionized business are advised to seek legal counsel.

§ 2.4 DECERTIFICATION PROCESS: TRANSITION TO NONUNION STATUS

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

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

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

[173] *See NLRB v. Burns Int'l Sec. Servs., Inc.*, 406 U.S. 272, 294–95 (1972); *see also Spruce Up Corp.*, 209 N.L.R.B. 194 (1974), *enf'd* 529 F.3d 516 (4th Cir. 1975) (establishing the Board's "perfectly clear" successorship test).

[174] *See Specialty Hosp. of Wash.-Hadley, L.L.C.*, 357 N.L.R.B. No. 77 (Aug. 26, 2011).

[175] 355 N.L.R.B. 748 (2010) (consolidating *UGL-UNICCO Serv. Co.*, No. 1-RC-22447, and *Grocery Haulers Inc.*, No. 3-RC-11944, and requesting *amicus* briefing as to whether the Board should modify or overrule the successor bar doctrine as interpreted by the Bush Board).

[176] 357 N.L.R.B. No. 76 (Aug. 26, 2011).

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

§ 2.4(a) *Contract Bar*

With the exception of a brief "window period" (see **§ 2.4(b)**), a decertification petition cannot be filed during the existence of a collective bargaining agreement. This so-called *contract bar rule* is designed to ensure stability during the life of a collective bargaining agreement. There is one exception to this rule: The contract bar is lifted after three years in the case of a contract that has a life of more than three years. This exception precludes a union from insulating itself indefinitely from potential decertification.

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

As noted in **§ 2.3(a),** the Board in 2011 returned to the traditional contract bar doctrine with respect to unions certified via neutrality or card check agreements.[177]

§ 2.4(b) *Missing the "Window Period"*

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

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

Sometimes, following recognition or certification of a union, an employer bargains with the union but fails to reach a contract. In such circumstances, a decertification election generally cannot be held for at least one year from the date of recognition or certification. Thereafter, if no contract is in effect, a decertification petition can be filed at any time.

§ 2.4(c) *Supervisory Involvement*

Another possible impediment to a decertification petition is evidence that it was instigated, circulated, or supported by an employer or its supervisors. As a general rule, any decertification effort must be free of coercive involvement by management. Traditionally, the Board has enforced this rule strictly and has invalidated decertification efforts where it was proved that management gave financial support to the decertification effort or knowingly condoned the use of working time and company facilities to further the gathering of employee signatures for a decertification petition. However, in several NLRB cases, the Board refused to invalidate employee petitions circulated by low-level supervisors who were members of

[177] *See Lamons Gasket Co.*, 357 N.L.R.B. No. 72 (Aug. 26, 2011).

the bargaining unit.[178] The theory is that a fellow union member generally will not have a coercive effect on employees.

§ 2.4(d) *Unfair Labor Practice Charges*

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

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

§ 2.4(e) *Employer Conduct During a Decertification Drive*

As noted above, the Board rigorously enforces its rule against supervisory instigation or assistance in the decertification effort. This rule has particular application during the period of time prior to the filing of a decertification petition. Once such a petition is filed, an employer generally is free to state its views regarding continued union representation. An employer can urge its employees to vote against the union in a decertification election. In *Lockheed Martin Skunk Works*, the Board held that the employer did not commit objectionable conduct meriting the overturning of a decertification election by allowing decertification supporters to use company e-mail, but not clarifying that union supporters could also use e-mail during the election campaign.[179] The Board found that since the company's policy could reasonably be read to prohibit the decertification supporters' e-mails, and since the union was given authorization to send three mass e-mails but preferred to rely on more traditional means of communication, there was no interference with employee free choice in the election.

While the same general rules apply to employer statements during a decertification campaign and during a union organizing effort, there is one significant difference. The Board has held that it is permissible during a decertification campaign for an employer to inform employees that they will not suffer wage reductions or any loss of benefits if the union is voted out. This important difference, although little known and rarely discussed by the NLRB, can greatly alter the thrust of an employer's decertification campaign.[180]

In many cases, decertification petitions are filed at times when an employer and a union are in the midst of bargaining for a new contract. For some time, the Board allowed an employer to suspend bargaining upon the filing of any decertification petition. That is no longer the rule. The union remains the bargaining representative, and the employer's bargaining obligation continues, while the decertification election proceedings are underway.[181] An employer may have sufficient objective evidence to prove actual loss of majority support if a majority of the bargaining-unit employees sign the decertification petition.[182] However, if the decertification petition filed is supported by less than a majority, the Board

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

[179] 331 N.L.R.B. 852 (2000).

[180] *See, e.g.*, *El Cid*, 222 N.L.R.B. 1315 (1976) (assurances by the employer that it would continue to make comparable payments to a private plan and that the employees would continue to receive comparable health coverage if the union lost the decertification election were not offers or promises of new or increased benefits, as the employer was simply advising the employees that it would maintain the status quo).

[181] *Levitz Furniture Co.*, 333 N.L.R.B. 717 (2001).

[182] 333 N.L.R.B. 717.

requires an employer to continue bargaining with the union. If the parties reach a contract, the employer is bound by that agreement. Then, if employees subsequently vote to decertify, the contract is declared void.[183]

§ 2.4(f) *Alternatives to Decertification*

Historically, the Board has recognized certain alternatives to the filing by employees of a decertification petition with the NLRB. Briefly, the three principal alternatives are: (1) an employer petition for an election; (2) unilateral withdrawal of recognition; and (3) an employer-conducted poll of employees.

With regard to the latter two alternatives, in 2016, then-General Counsel Richard Griffin requested that the Board adopt a rule that, absent an agreement between the parties, an employer may lawfully withdraw recognition based only on the results of an election. The Board has yet to adopt such a rule, however, and it is unlikely that the current General Counsel, Peter Robb, will pursue such a rule.

§ 2.4(f)(i) *Employer Petition for an Election*

In order for a unionized employer to file an election petition with the NLRB, the employer must have received objective evidence demonstrating a good faith doubt that a majority of the employees continues to want to be represented by the union.[184] Such evidence can come in various forms. Most often, however, the requisite objective evidence is a petition signed by a majority of the employees that states that they do not want the union as their representative. Armed with such a petition, the employer can request that the NLRB conduct an election.

Before an election is held, the NLRB will schedule a hearing. This hearing will provide the union with an opportunity to raise legal issues often designed to delay or prevent an election. The same risks apply as in an employee-filed decertification case. Both the union and the employer may campaign in the time between the hearing and the election.

§ 2.4(f)(ii) *Unilateral Withdrawal of Recognition*

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

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

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

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[183] *See, e.g.*, *City Markets, Inc.*, 273 N.L.R.B. 469, 469-70 (1984).

[184] *Levitz Furniture Co.*, 333 N.L.R.B. 717.

In 2008, then-NLRB General Counsel Ronald Meisberg issued updated guidelines to regional office personnel on the burden-shifting framework to be used in unilateral withdrawal of recognition cases, as well as what constitutes "objective evidence" of actual loss of majority support under *Levitz Furniture*.[185] If the NLRB's General Counsel issues a complaint alleging an illegal withdrawal of recognition, the employer bears the initial burden of proving that the incumbent union suffered a valid, untainted numerical loss of its majority status, using a variety of objective means, such as an antiunion petition signed by a majority of the unit employees. The burden then shifts to the NLRB General Counsel to prove that the union actually had majority support at that time or that the employer's evidence is unreliable. The post-*Levitz* cases indicate that "objective evidence" sufficient to demonstrate actual loss must be specific enough to show that a numerical majority of the unit no longer supports the union, such as a petition, a poll or individual statements from a majority of unit employees, as opposed to strictly circumstantial evidence.[186] Additionally, the Fourth Circuit Court of Appeal held that hearsay evidence can be objective evidence.[187]

§ 2.4(f)(iii) *Employee Polls*

An employer must possess a good faith reasonable doubt as to a union's majority status to establish the requisite threshold for conducting an employee poll.[188] In *Allentown Mack Sales & Service, Inc. v. NLRB*, the U.S. Supreme Court found in a 5 to 4 decision that, "although the Board's 'reasonable doubt' test for employer polls is facially rational and consistent with the Act," the Board had failed to apply the test in a reasonable manner in that case.[189] The Court determined that the evidence on the record did not support the Board's factual finding that the employer lacked the requisite doubt where the employer purchased an automobile dealership and retained 32 of the original 45 employees. Prior to the sale, the employees had been represented by the Machinists Union, Local Lodge 724. Before and immediately after the sale, some employees suggested to the new owners that the union had lost their support and the support of the bargaining unit in general. When Local 724 requested recognition, the employer refused, claiming a good faith reasonable doubt as to the union's support, and informed the union that it had arranged for an independent poll by secret ballot. After the union lost in the polling, it filed an unfair labor practice charge with the NLRB. Despite the statements from employees, the Board held the employer violated the NLRA because it conducted the poll without a good faith reasonable doubt about the majority status of the union. The Supreme Court disagreed with the Board and remanded the case to the court of appeals with instructions to deny enforcement of the Board's order.

The federal courts generally require that polling be done with certain safeguards, including: (1) the poll's purpose must be limited to determining the truth of the union's claim of majority status; (2) this purpose must be communicated to the employees; (3) assurances against reprisal must be given; (4) the poll must be conducted by secret ballot; and (5) the employer must not have engaged in unfair labor practices or otherwise have created a coercive atmosphere. The Ninth Circuit Court of Appeals also requires that the union be given notice of the time and place of the poll.

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[185] 333 N.L.R.B. 717 (2001).

[186] Gen. Couns. Mem., NLRB, Guidelines Memo Concerning Withdrawal of Recognition Based on Loss of Majority Support, GC 09-04, at 7 (Nov. 26, 2008), *available at* http://apps.nlrb.gov/link/document.aspx/09031d458019183d.

[187] *NLRB v. B.A. Mullican Lumber & Mfg. Co.*, 535 F.3d 271 (4th Cir. 2008) (a letter to the employer from an employee, who had also filed a decertification petition with NLRB, telling the employer that 114 out of 220 unit employees had signed slips stating that they no longer wanted to be represented by the union was sufficient to meet the employer's burden of proving a valid numerical loss of majority status).

[188] *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359 (1998).

[189] 522 U.S. at 380.

§ 2.4(f)(iv) *Taint of Prior Unfair Labor Practices*

The three alternatives above share a common feature: They will work only at a time when the employees have not been influenced by an unfair labor practice committed by their employer. The NLRB historically has held that any unfair labor practice that has not yet been fully remedied will invalidate an effort to remove the union.[190] However, some employers have successfully argued that certain unfair labor practices that are minor or remote in time are not sufficient to taint an employer's decision to withdraw recognition of a union.[191]

§ 2.4(g) *Deauthorization of Union Security*

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

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

§ 3 PRACTICAL GUIDELINES FOR EMPLOYERS

§ 3.1 LAWFUL MANAGEMENT PRACTICES

§ 3.1(a) *Communication*

The following are avenues of communication that employers are able to utilize lawfully, provided that such procedures or practices are not initiated in response to union organizing.

§ 3.1(a)(i) *Open-Door Complaint Procedure*

Employers are permitted to implement their own channel for employees to voice complaints and ask questions, which may increase employee morale. Under this line of thinking, undiscovered problems such as unfair favoritism by a supervisor may fester unresolved, ruin morale and drive off good employees.

Employers have found that the most effective procedures allow multiple means of access to problem-solvers such as supervisors, trusted higher-level managers, the personnel department, or popular corporate officers. The objective under this potential approach is to air and resolve the problem, thereby reinforcing the perception that management is fair and will fix problems if there is a reasonable way for it to do so. Management that becomes too fussy about the form or channel of the complaint may lose sight of this

[190] *See, e.g., Wyndham Palmas del Mar Resort & Villas*, 334 N.L.R.B. 514 (2001) (unremedied employer unfair labor practices adversely affected employee support of the union).

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

objective. Experience has shown that shortsighted supervisors may try to suppress complaints or retaliate against employees who raise questions. Therefore, although employees may be encouraged to go to their supervisor first, employers have found it more effective to not insist on a rigid chain of command for complaints. As such, employers may choose to consistently assure employees that they are encouraged to bring up problems.

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

§ 3.1(a)(ii) *Top-Down Information*

If employees learn important information about the company at or before the time the information becomes public knowledge, they tend to feel that they are a meaningful part of the company. If employees realize they are a part of the company, rather than "just employees," employees may care more about what happens to the company. Top management, therefore, has generally found it effective to develop the habit of communicating both good news and bad news through levels of supervision. The employers' objective under this approach is to encourage employees to look to their supervisor as a more reliable source of information than the "grapevine."

§ 3.1(a)(iii) *Attitude Surveys*

Attitude surveys are a lawful, formalized system of giving controlled feedback to management about employee opinions. Surveys that are anonymous, regularly conducted and include feedback of results to employees soon after the survey is taken are permissible channels through which employees can transmit such information to management. Although management may use the results for its own information about problem issues, employees may also want to see what they think as a group. Employers that have utilized such surveys have found it most effective to be prepared to address how problems identified in the surveys will be addressed, especially before reporting problematic results.

§ 3.1(a)(iv) *Other Communication Techniques*

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

Many companies also spend time explaining company benefits and policies to all new employees. The advantage of an early, in-depth explanation is that it avoids later confusion or disillusionment. In fact, experience has shown that unless a major communication effort is made, a large percentage of employees often remain ignorant of the benefits they are receiving. The companies that have taken this more proactive approach often encourage employees to use existing company complaint procedures or to take advantage of an open-door policy.

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

§ 3.1(b) *Legal Cautions in Communicating to Employees*

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

§ 3.1(b)(i) *Legality of Quality Circles*

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

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

In circumstances where quality circles do discuss wages, hours, or working conditions, there is still a legal argument that the NLRA is not violated. Because all employees participate in quality circles on an equal basis, and no representatives or spokespersons are elected by the employees, it does not appear that a quality-circle program establishes an employee "labor organization" within the meaning of section 2(5) of the Act.

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

§ 3.1(b)(ii) *Legality of Employee Committees/In-House Unions*

Employers may run afoul of the NLRA when they establish employee committees consisting of representatives designated to speak on behalf of the employees. In an older case, *Electromation, Inc.*, the Board held that setting up action committees to deal with a variety of workplace issues violated section 8(a)(2) of the Act because the committees were labor organizations dominated and supported by management.[192]

Two basic elements are necessary to establish a violation of section 8(a)(2). First, there must be an employee group—typically *elected* by employees or *chosen* by management—that is a "labor organization" and is designed to "deal with" management concerning wages, grievances, work stoppages, hours, and working conditions. The second element necessary is employer domination or assistance. This can be established by showing that the company wrote the committee's charter or bylaws, helped the

[192] 309 N.L.R.B. 990 (1992), *enforced*, 35 F.3d 1148 (7th Cir. 1994).

committee conduct elections, scheduled committee meetings, provided space for committee meetings, or allowed the committee to meet during working time.

The Board's *Electromation* decision proved to be universally unpopular. In 2001, the Board issued its decision in *Crown Cork & Seal*,[193] which cut back somewhat on *Electromation*. In *Crown Cork & Seal*, the employer delegated to workplace committees the authority to operate the plant within certain parameters. In holding that the committees did not violate section 8(a)(2), the Board stated that the workplace committees were not labor organizations "because their purpose is to perform essentially managerial functions, and thus they do not 'deal with' the [employer]."[194] A number of administrative law judges applied *Crown Cork & Seal* and found no violation of section 8(a)(2). However, at least one of the decisions reasoned that, although not violative of section 8(a)(2), the employer's conduct did constitute a failure to bargain, and thus was violative of sections 8(a)(1) and 8(a)(5).

§ 3.1(b)(iii) *Legality of Advisory or Adjudicatory Employee Committees*

An employer may permissibly establish and control employee committees that perform certain advisory or adjudicatory functions. Both the NLRB and the courts have defined certain parameters for the establishment of such committees.

First, the Board has held that the establishment of a group of employees who sit as a "jury" to adjudicate the merits of grievances relating to discharge and discipline is not a violation of the NLRA.[195] The Board's rationale for this decision is that adjudicatory committees do not bargain with management; rather, such committees make decisions without employer input. In addition, the committees do not discuss wages, hours, or working conditions with management. However, a disciplinary committee that reviews discharges and discipline may be unlawful where it also has responsibility for drafting work rules or meeting with management on such rules.

The Board has also indicated its interest in examining whether the employee committee has engaged in a "pattern and practice" of discussing mandatory subjects of bargaining. If the committee generally discusses "permissive" subjects of bargaining, but only sporadically touches on issues concerning wages, hours, or working conditions, the committee might not be violative of the NLRA.

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

§ 3.1(b)(iv) *Legality of Attitude Surveys*

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

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[193] 334 N.L.R.B. 699 (2001).

[194] 334 N.L.R.B. at 701.

[195] *See Mercy-Memorial Hosp.*, 231 N.L.R.B. 1108 (1977).

For instance, in one NLRB case, an attitude survey that was administered after a union organizing campaign had begun was found to violate section 8(a)(1) of the NLRA.[196] There, the memorandum accompanying the survey promised that the employer would review employee responses and try to make improvements in areas in which there had been criticism.

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

§ 3.1(c) *Performance Evaluations*

For purposes of job security and satisfaction, employers generally find it more effective to share regularly with employees what the company thinks of their work. Supervisors may give instant feedback on unusually good or bad performance, but a regular formal system of feedback reinforces the message.

§ 3.1(d) *Merit-Based Pay*

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

Certain merit-pay systems have come under attack. Among other things, employees may argue that an employer is using a merit-pay system to discriminate against certain employees. Accordingly, legal guidance should be sought before implementing such a system.

§ 3.1(e) *Fair Discipline System*

By making employees aware in advance of what standards of performance and conduct are expected, an employer provides a form of "due process" to employees. Employers that have implemented standards of performance and conduct typically also make employees fully aware of progressive levels of discipline that will correspond to a failure to meet those standards. Under such a system, employees may also be given the opportunity to "appeal" any discipline by using the complaint procedure. The goal behind such procedures is to monitor and control supervisor favoritism, as well as unusually harsh supervisors. As such, this system may not only be fair, but also be perceived as more fair by employees. Notably, such a system could, in certain states, compromise at-will employment status.

§ 3.1(f) *Supervision*

Employers have found it beneficial to provide on-going effective training in employment relations to their supervisors to allow them to provide an effective channel through which employees can communicate their workplace concerns and discuss potential solutions.

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

§ 3.2 LAWFUL EMPLOYER CONDUCT APPLICABLE TO ORGANIZING DRIVES

It is lawful for an employer to instruct members of the management team to be sensitive to the early warning signs of union activity and learn the rules for lawfully responding to such activity. The following are some behaviors that have been found to be signs of organizing activity.

§ 3.2(a) *Employer Experiences Recognizing Subtle Signs of Union Activity*

- **Communication Problems.** It is believed that poor communication creates a void that employees fill with their own perceptions or misperceptions. Employee misperceptions can often lead to dissatisfaction and distrust.

- **Employee Group Discussions Immediately Stop When a Supervisor Approaches.** As noted earlier, union organizing generally is kept quiet at the start of a union drive. A considerable increase in the number of employee group conversations and the tendency for discussions to stop suddenly when a supervisor approaches may indicate that a union drive is in progress.

- **Employees Begin Spending More Time on Their Breaks.** Experience has shown that when a union drive is underway, especially in its early stages, there is usually a great deal of discussion, inquiry, curiosity, and debate. Much of this occurs during breaks and meal periods, often delaying employees in returning to work.

- **Changes in Employees' Normal Work Patterns.** Any change in employees' normal work routines, such as taking lunch breaks at different times or places, or interacting with different groups of employees during the day, could be an indicator of union activity. A goal of union organizing is to bring all employees together for a common cause. Consequently, groups of employees who suddenly start associating with one another may be affiliated with the union.

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

- **Employees No Longer Talk to Their Supervisors.** To prevent disclosure of union activity, the union may instruct employees to avoid non-work-related conversations with supervisors. Another reason for a decline in communications may be that employees feel awkward about their union involvement. In addition, management may have been characterized by the union as "villains," thus driving a wedge between management and the employees.

- **Employees Start Asking About Improving Their Wages, Benefits, or Working Conditions.** A union tends to promise employees substantial improvements in wages, benefits, and working conditions. While employees normally will not start demanding changes, they may raise questions about why their pay rates are different from those of a nearby competitor. If those types of questions start coming from several employees simultaneously, it may be a warning sign of union activity.

- **Employee Complaints Increase.** For the union drive to be successful, the union must stir up dissatisfaction among employees about their wages, benefits, working conditions, and

supervision. The union will attempt to make employees feel they have been deprived and exploited. A sudden increase in complaints may signal this activity.

- **A Noticeable Division Among Employees Develops.** Tension and hostility may result between employees who are supportive of the union and those who are not. If there is an unexplained tension between groups of employees, this might be the explanation.

- **The Language of the Facility Changes.** Sudden use by employees of union terms such as "seniority," "grievance," "bumping," and "job bidding" can be indicative of organizing activity. Similarly, changes in the topics of employee discussions, such as a sudden focus on health insurance, pension plans, and job security may also demonstrate union activity.

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

- **What to Do with Union Authorization Cards.** Employers may lawfully instruct managers to *not* look at any signed union authorization cards that are sent or given to them. The NLRB has held in a number of cases that supervisors reviewing authorization card signatures and expressing their belief that the signatures are genuine can constitute union recognition without the necessity of an election.[197] Accordingly, many employers lawfully instruct their supervisors to simply tell the presenter of the cards that he or she should contact the NLRB.

§ 3.2(b) *No-Solicitation/No-Access Policies*

The U.S. Supreme Court ruled that nonemployee union organizers do *not* have a right to access an employer's private property to distribute leaflets or solicit authorization cards.[198] The Court held that an employer may bar nonemployee organizers from its private property when it consistently applies a rule denying access to outside groups and where the union has alternative means of communicating with the targeted employees.

It may be difficult for unions to show they lack reasonable alternative means to communicate with employees. For example, the Board found that the company's refusal to turn over to a union the names and addresses of computer technicians scattered across eight states did not violate the NLRA. The Board concluded that the union failed to demonstrate it had no other reasonable means of communicating with employees because it already had in its possession the name of some employees that could help the union identify and contact the rest of the unit.[199]

Union organizers can stand outside gates or near driveways, contact employees by phone, send letters and e-mail, and otherwise communicate with the targeted group. Employers must be careful, however, to ensure that private property rules are consistently applied to *all* nonemployee solicitors, not just to union

[197] *See Richmond Toyota, Inc.*, 287 N.L.R.B. 130 (1987).

[198] *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992) (returning to test in *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956), that nonemployee organizers ordinarily will not be permitted on private property for the purpose of organizing, unless the union lacks reasonable alternative means to contact the employees).

[199] *Technology Serv. Solutions*, 332 N.L.R.B. 1096 (2000).

organizers.[200] An employer cannot ban union organizers from its property if it allows organizations such as charitable groups to solicit on its grounds.[201] Moreover, employers in states like California with broader free speech rights and/or weaker property rights may need to take extra precautions and consult legal counsel before excluding union organizers in questionable circumstances.[202]

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

- Solicitation of or by employees (which includes pro-union campaigning and solicitation of authorization cards) can be prohibited during *working time*. Although working time is defined by the Board to exclude meal and break periods, it is not necessary to specifically include this definition in a written policy so long as the term *working time* is used.

- Union organizers can be denied access to all private company property where other outside solicitors have traditionally been barred. Such a rule is lawful so long as it is consistently applied and the union has other reasonable means to communicate with employees.

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

One word of caution: Because of the frequent changes in the law, employers should obtain legal guidance before promulgating no-solicitation rules or before relying on a rule to discipline or discharge an employee. For example, in 2011, the Board issued a decision addressing the question of whether an employer-property owner must provide employees of a vendor with the same access and distribution rights as are enjoyed by the property owner's employees (in nonworking areas during nonworking times).[203] The Board held a property owner may lawfully exclude such employees, but only where the owner demonstrates these employees' activity "significantly interferes" with the owner's property use or is justified by some other business reason.[204]

§ 3.2(c) *Employers' Permitted & Prohibited Actions During a Union Organizing Drive*

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

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[200] *See, e.g.*, *Cmty. Med. Ctr.*, 354 N.L.R.B. 232 (2009) (two-member Board holding that the employer violated the LMRA by ejecting union organizers from its parking garage, where the employer had no policy against individuals parking while visiting the on-site coffee shop and ATM, and where the union organizers had previously parked in the garage without incident), *aff'd by panel*, 355 N.L.R.B. No. 128 (2010), *enf'd by NLRB v. Community Med. Ctr. Inc.*, 446 F. App'x 463 (3d Cir. 2011).

[201] *See, e.g.*, *Babcock & Wilcox*, 351 U.S. at 112 ("An employer may validly post his property against nonemployee distribution of union literature" so long as "the employer's notice or order does not discriminate against the union by allowing other distribution.").

[202] *See, e.g.*, *United Bhd. of Carpenters v. NLRB*, 540 F.3d 957 (9th Cir. 2008) (applying more stringent California law, holding that a shopping mall is a public forum for speech and that the mall's content-based and signage restrictions on speech were unlawful).

[203] *New York New York Hotel & Casino*, 356 N.L.R.B. No. 119 (Mar. 25, 2011).

[204] 356 N.L.R.B. No. 119.

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

§ 3.2(c)(i) *Written or Oral Communication to Employees*

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

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

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

- ***P.*** Supervisors must not directly or indirectly *promise* any benefits or reward employees for refusing to sign a union card, staying out of the union, or voting against the union. For example, supervisors may not promise employees a wage increase if they decline to sign up with the union or if they vote against the union. Such an inducement to employees to encourage them to withdraw or repudiate union authorization cards is also unlawful. Supervisors may not solicit grievances about working conditions while expressly or impliedly promising corrections. It is lawful to listen to employees who mention their grievances or suggestions for improving conditions. It is unlawful to promise an improvement. Supervisors should stay within the bounds of management's established grievance procedure and inform employees that they cannot make any promises concerning the grievances raised.

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

§ 3.2(c)(ii) *Avoiding Discrimination Against Employees Engaged in Union Activity*

It is the right of each employee to sign or not sign a union card, favor or not favor a union, and vote for or against the union. Therefore, supervisors may not discharge or otherwise discriminate against any employee because he or she favors, or votes for, a union. While supervisors may not consciously violate this rule, as soon as they become aware of a union organizing campaign, supervisors must be very careful in dealing with all discharges and other disciplinary measures. Supervisors must be sure that they have good cause for any discharge or discipline and that the cause is completely unrelated to any union considerations.

A poor disciplinary decision can have a serious negative impact on an employer. Setting aside the impact that a perceived unfair disciplinary decision may have on the employer's campaign, the NLRB is suspicious of questionable disciplinary decisions during an organizing drive and will often assume that the discharge was based upon improper union considerations.

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

§ 3.2(c)(iii) *Controlling Employee Union Activity*

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

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

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

§ 3.2(c)(iv) *Changes in Wages or Fringe Benefits During a Union Organizing Campaign*

Employers may not make changes in wages or fringe benefits for the purpose of influencing the outcome of the organizational campaign. Granting discretionary benefits during an ongoing organizing campaign may constitute grounds for ordering a rerun election, unless the benefit was objectively too minor to be able to affect the results of the election or unless the employer can provide a legitimate explanation for the timing of the benefit.

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

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

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

§ 3.2(c)(v) *Encouraging Employees to Vote*

NLRB decisions highlight that employers must be careful in their efforts to actively encourage employees to vote in a representation election. For example, election-day raffles may be suspect. In *Atlantic Limousine, Inc.*, the NLRB ruled that the company engaged in objectionable conduct by running a raffle for employees on the day of the election.[205] The Board adopted a *per se* rule prohibiting both unions and employers from conducting election-day raffles if: (1) eligibility to participate in the raffle or win prizes is in any way tied to voting in the election or being at the election site on election day; or (2) the raffle is conducted at any time during a period beginning 24 hours before the scheduled opening of the polls and ending with the closing of the polls.[206]

Merely promising to provide food and beverages at a post-election victory party, however, may not necessarily be considered coercive or destructive of an atmosphere in which free choice can be made.[207]

§ 3.2(d) *Employers' Lawful Campaign Topics & Strategies*

Employers have found that creativity and communication are most effective in responding to union organizing campaigns. While there are a number of restrictions on employer activity during an organizing drive, an active campaign is vital to winning any election. Employers may lawfully select topics for discussion during the campaign that address the actual questions and concerns of the employees, inform them of the union's motivation, and educate them regarding their rights. Unfocused attacks on the union can be counterproductive. The following is a short list of potential campaign issues and topics for discussion that are lawful.

- **The Union Is a Business.** An employer may lawfully explain that the union is a business and is dependent upon its members' dues, initiation fees, and assessments for its existence. An employer may share with its employees that to increase its income, the union must increase its membership. Supervisors may lawfully indicate that the union's interest in new membership is a reason they are interested in the employees.

- **Company Philosophy.** An employer may describe the company's employee relations philosophy and point out that the company is pro-employee, not anti-union. An employer may also lawfully emphasize that the company respects its employees' rights and will honor its employees' choice, but that there are important reasons why a union would not be in the best interests of all concerned.

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[205] 331 N.L.R.B. 1025 (2000).

[206] *See also Comcast Cablevision-Taylor v. NLRB*, 232 F.3d 490 (6th Cir. 2000) (union unduly influenced voters by offering a free trip to Chicago so employees could attend a union meeting on cable industry issues); *River Parish Maint., Inc.*, 325 N.L.R.B. 815 (1998), (employer that required, and paid, employees to attend an off-site campaign meeting and "crab boil" two days before the election unlawfully interfered in the election).

[207] *See Raleigh County Comm'n on Aging, Inc.*, 331 N.L.R.B. 924 (2000).

- **Point Out Benefits.** An employer may lawfully point out all the benefits that the employees now enjoy, such as holidays, paid vacation, sick leave, medical insurance, dental insurance, and other benefits that are not regularly reflected in their paychecks. Employers must avoid, however, promising future benefits. Employers must also be sure not to withhold information about existing benefits, only to reveal it during the campaign, as part of a campaign strategy.[208]

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

- **Declines in Union Membership.** An employer may inform the employees that in recent years union membership has been declining as a result of unions' failure to satisfy the needs of their members. An employer can also lawfully explain that over the past several decades, unions have lost members as the country's workforce has grown.

- **Job Security.** An employer can lawfully point out that the union cannot provide job security and that the only real job security comes from a healthy company.

- **Negotiation Process.** An employer may let the employees know how the negotiation process works. An employer can also advise its employees that should the union win the election, all that it gets is the right to bargain and that all the company is required to do is to bargain in good faith. The employer can also lawfully explain that the company is not required to concede on any particular issue, and there is no requirement that agreement ever be reached.

- **Strikes.** An employer may let the employees know that they might be forced to strike, and if there is a strike, employees can lose wages and benefits. Employers can also tell employees that during a strike, employees will generally not be able to receive unemployment insurance benefits (if true in the particular state). Moreover, it is lawful to explain that the company has the right to replace employees out on an economic strike, with strikers being placed on a preferential recall list. This point must be made with great care. There is a fine line between discussing striker replacement and threatening employees with the loss of their jobs.

  Distribution of handbills during an organizing drive warning of the possibility of "long, bitter negotiations" and "a long and ugly strike" may be lawful but only if the handbill does not contain any threats or coercion, is based on objective facts, and acknowledges the company's obligation to engage in collective bargaining.

- **Compensation.** If compensation is a key issue in a campaign, an employer can lawfully point out that employees are already compensated competitively for similar work in the industry.

- **Election Process.** An employer may explain the card-signing process (if not done earlier), petitions for elections, the NLRB's role, secret ballots, and the importance of voting. Employer experience has shown that it is beneficial for employees to know how the election process works.

[208] *Beverly Enters. v. NLRB*, 139 F.3d 135 (2d Cir. 1998).

- **25th Hour Speech.** Employers are permitted to make a "captive audience" speech up until 24 hours before the election begins. It is common practice for employers to present a 25th hour speech that is often given by a top member of management before the election. The speech must be completed at least 24 hours before the election begins. Employers often use this speech to summarize the company's position on all the campaign issues.

§ 3.3 LAWFUL & UNLAWFUL ACTIVITY DURING A UNION ORGANIZING DRIVE

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

Supervisors and Other Management May:

- Tell employees that the company prefers to remain nonunion and that you would like them to vote "NO" (a "NO" vote is a vote against the union in an NLRB election).
- Emphasize that employees are free to vote either for or against the union, but that you hope they vote against it.
- Assure them that union or no union, you will continue to try to make the company a good place to work.
- Tell employees that the company will not retaliate in any way against union supporters; thus, there is no reason to vote for the union simply to protect the jobs of employees who are openly pro-union.
- Emphasize that you are not asking employees about their union views or activities, but that you need and want their support.
- State that the company prefers to continue to deal directly with its employees, without intervention by an outside union that has no real interest in the success of the business.
- Answer employees' questions about company policies and discuss the campaign issues, providing you do not ***T***hreaten reprisals***, I***nterrogate them about their union views, ***P***romise benefits, or conduct unlawful ***S***urveillance of employees (***TIPS***).
- Listen sympathetically to employee problems and grievances, but explain to employees that the company is legally prevented from making promises of new benefits during the union campaign.
- Tell employees that there will be no automatic pay increases, no automatic improvements in fringe benefits, and no automatic union contract if the union wins an election. Everything will depend on what happens in collective bargaining negotiations.
- Say that the company will recognize the union and bargain in good faith if there is a valid NLRB certification that requires it to do so, but that any improvements in wages and benefits are "negotiable" and not automatic, as the union might suggest.

- Explain to employees that good faith negotiations can lead to higher wages and benefits, the same wages and benefits, or lower wages and benefits than they now receive. No one can predict what will happen in negotiations.

- Tell employees that the company does not have to agree on a contract or on any certain pay or benefits just because some other company has agreed to them.

- Explain to employees all of the benefits they presently enjoy. Where these benefits compare favorably with the terms of a union contract, consider emphasizing that fact.

- Tell employees that there is no reason to think that past progress in wages and working conditions will stop if there is no union. To keep competitive, the company must continue moving ahead, union or no union.

- Inform them that if they become members of the union, they will have to pay monthly dues to the union, as well as possible fees, fines, and assessments.

- Refer to the union's financial reports and tell employees that if they become union members, much of their dues will be going to pay the salaries and expense accounts of union officials.

- Point out provisions in the union's constitution and bylaws that are disadvantageous to employees, such as punishable union offenses, picketing requirements, union trials, and provisions for suspension, expulsion, fines, and assessments by the union.

- Advise employees that if they become union members, they will have to obey all the union rules found in the union constitution and bylaws.

- Explain to employees that they will be required as union members to follow the orders of union officials; they will effectively have another "boss."

- State that under most union contracts, employees are expected to take their grievances up through union stewards or agents and not to management directly. The union can usually veto the grievance somewhere along the line. Without a union, employees can take their problems as far up as they have the fortitude to go, and no union official can turn thumbs down on their right to go to management.

- Remind employees that every person put between company representatives and employees makes it more difficult to communicate.

- Tell employees that if they select a paid agent to represent them (the union), the company will probably have to hire lawyers or other experts to represent the company. This will be an expense to both parties, and the company would rather work out issues with employees directly.

- Point out the indirect costs of unionization that the company wants to avoid: executive time spent in bargaining sessions; working time of employees spent on union business; and cost of hiring lawyers and other labor relations experts. Money spent for such costs obviously cannot go to the employees in higher wages.

- Tell employees that the company would bargain with the union in good faith and do everything humanly possible to avoid strikes; but if the union called an economic strike, the

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

- Remind employees that unions can fine members who cross union picket lines, that the union can sue in court to collect the fines, and that judgments for union fines are enforceable through garnishment and attachment, just like any other court judgment.

- If applicable in your state (legal counsel can determine), inform the employees that strikers are not eligible for unemployment insurance compensation benefits. Remind them that they do not get paid by the company while striking.

- Refute any untruths in the union's propaganda.

- Tell employees about any bad experiences company representatives personally have had with the union, so long as the descriptions are factual and accompanied by assurances that such things would not necessarily occur there.

- Inform employees that during the 12 months following certification of an NLRB election that is won by a union, the employees cannot vote the union out in another NLRB election, and if a contract is signed during this period, it acts as a bar to decertifying the union for up to three more years.

- Enforce lawful no-solicitation, distribution, and access rules without discrimination between pro-union, anti-union, and nonunion activity.

- Request union officials leave the company's property where the company has a lawful no-access rule that is also applied against nonemployee solicitors who are not connected with a union. Escort them off the property. As a last resort, call the police to have them removed if necessary.

- Immediately report any union threats or intimidation of employees. Charges can then be filed with the NLRB if the coercion is substantiated. Consult legal counsel for assistance with this process.

- Administer appropriate disciplinary action for any employee threatening or coercing other employees, whether for or against the union.

- Tell employees that signing a union authorization card does not commit them to vote for the union in an NLRB election.

- Answer questions from anti-union employees about what they can do to oppose the union by telling them of their legal right to actively campaign against the union, provided they observe the same rules imposed on the other employees. The company is prohibited by law from giving financial assistance to anti-union employees, however.

Supervisors and Other Management May Not:

- Fire, reprimand, assign to less desirable jobs, or otherwise prejudice the employment status of a worker because of his or her union views or sympathies (or because he or she complains about working conditions).

- Threaten employees in any way to deter them from union activity.
- Retaliate against employees who file NLRB charges or give testimony to the NLRB.
- Threaten to close down the company or move it to another location if employees vote for the union.
- Cut out employee privileges, suddenly crack down on tardiness or absenteeism, institute tougher work rules, or otherwise attempt to punish employees for union activity.
- Enforce company rules strictly against union supporters, while being lenient toward pro-company employees.
- Connive to make a union supporter quit his or her job by purposely assigning him or her undesirable work, or by deliberately imposing intolerable conditions on his or her employment so that he or she is pressured into quitting.
- Carry out necessary layoffs in such a manner as to deliberately weed out union supporters.
- Question employment applicants as to whether they are or have been union members.
- Question employees about their union views, activities, or sympathies.
- Ask an employee if he or she has signed a union "authorization card," or attended a union meeting, if he or she intends to, whether other employees have, or why anyone has done so.
- Question an employee as to how he or she is going to vote in an NLRB election.
- Question employees about the causes of their dissatisfaction and expressly or impliedly promise to make corrections.
- Promise or grant employees pay increases or new benefits during a union drive for the purpose of making unionization less attractive to them.
- Engage in spying on employees concerning their union activities (for example, standing or parking outside of a union meeting place).
- Give workers the impression that company representatives are engaging in spying on their union activities.
- State flatly that you will never bargain with the union.
- Tell employees that the company will definitely never grant the union's demands and that there will definitely be a strike.
- Prevent employees from talking with each other about the union, handing out, or signing union cards during their nonwork free time, including before and after work, at lunch or during break times.

- Prohibit employees from passing out union literature in nonworking areas on their own nonwork free time.

- Distribute to employees or make available anti-union buttons for employees to wear (although employees are free to make and distribute their own).

- Stress the inevitability of strikes and incessantly dwell on the probability of violence and personal injury, particularly where the information mentioned relates to a different union than the one seeking support from the company's employees.

- Base the company's campaign on an emotional appeal rooted in racial prejudice.

- Visit employees at their homes to systematically solicit their support against the union.

- Sponsor or circulate an anti-union petition among the employees.

- Take a poll of employees to see what their views are concerning unionization. (The NLRB has permitted pre-recognition polls in limited circumstances. Consult legal counsel for further guidance.)

- Interview employees one at a time or in small groups concerning their union views or opinions.

- Hold election campaign meetings with groups of employees on company time during the 24 hours immediately preceding the opening of the NLRB election polls.

- Solicit or assist employees in revoking authorization cards or in resigning from the union.

- Misrepresent NLRB processes or procedures.

- Promise or give employees special favors for influencing other employees against the union.

- Use third parties in the community to threaten employees or coerce them because of their union activities.

