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InfoPAK[SM]

The New Face of Union Organizing: Corporate Campaigns, Neutrality/Card Check Agreements, and New NLRB Initiatives

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In recent years, organized labor has employed aggressive campaign strategies and innovative techniques designed to catch unwary employers off guard. The National Labor Relations Board also has launched new initiatives that impact all employers. The information provided in this InfoPAK℠ can assist in-house counsel seeking to improve a company's ability to avoid or survive a corporate campaign, make necessary changes to comply with the National Labor Relations Act, and enhance an organization's overall human resource posture.

The information in this InfoPAK should not be construed as legal advice or legal opinion on specific facts, and should not be considered representative of the views of Jackson Lewis LLP or of ACC or any of its lawyers, unless so stated. This InfoPAK is not intended as a definitive statement on the subject, but rather to serve as a resource providing practical information for the reader.

This material was compiled by **Jackson Lewis LLP** at the direction of the Association of Corporate Counsel. For more information on Jackson Lewis LLP, visit www.jacksonlewis.com or see the "About the Author" section of this document.

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- Shannon Bagato, and
- Susan Tahernia

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I. Introduction

Ask in-house counsel to name the most pressing legal issues facing their clients, and likely few, if any, would include the threat of National Labor Relations Act charges or unionization. This seems logical given recent statistics showing the rate of union membership in the United States has steadily declined over the past 30 years. Nevertheless, complacency about the threat of National Labor Relations Board ("NLRB") charges or initial/increased unionization can be viewed as unwise.

The simple fact is that the NLRB has changed its approach, and unions have become increasingly aggressive about organizing. Rather than relying on direct appeals to workers, unions are utilizing their political and economic clout to pressure employers into foregoing their legal right to communicate their views on unionization and to waive their employees' right to participate in the secret ballot election process provided by the National Labor Relations Act ("NLRA"). A lack of awareness of these changes may leave in-house counsel unprepared to recognize and respond to the new union strategies for exposing an organization's vulnerability. At the same time, the NLRB has modified its approach to employer policies and practices even without a union on the scene by emphasizing "protected concerted activity," and has also moved forward through decisions and rulemaking with initiatives that are likely to help union organizing.

II. The Sleeper Behind the Statistics

A. Union Elections

In recent years, and particularly since the birth in 2005 of the Change to Win Federation, which splintered from the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") because of the AFL-CIO's perceived failure to support aggressive organizing efforts, organized labor has been pushing the envelope with aggressive campaign strategies and innovative techniques designed to catch unwary employers off guard. Thanks in part to these tactics, unions won just over 66% of resolved elections in 2011.

These statistics do not, however, reflect the true extent of current union activity. Alternative methods of boosting membership, such as "voluntarily" negotiated neutrality agreements, union recognition through signed authorization cards ("card check"), and other approaches, are being used by unions to circumvent the traditional secret ballot election process. In fact, the AFL-CIO reported that 70% of all new private sector union members in 2005–approximately 150,000 employees–were organized through card check procedures, while just 25 years ago, only 5% of union members were gained through card check. Of course, it is not surprising that card check procedures are more effective for unions than secret ballot elections supervised by the NLRB. Typically, unions will obtain authorization cards from employees before an employer even knows its employees are considering unionizing. As a result, employees sign cards without the benefit of hearing both sides of the issues.

The net effect of this strategy is that unions routinely already have authorization cards from well over half of the employees they are seeking to organize when they ask an employer to extend recognition based on the signed cards.

B. Union Activity is High Despite Low Union Membership Statistics

According to the most recent statistics from the Bureau of Labor Statistics (2012), union membership in the United States (including public employees) was 11.3%, down from 12.3% in 2009 (when this InfoPAK was last updated). In the private sector, unions currently represent just 6.6% of the work force. These statistics reflect a steady 30-year decline in membership–in 1983 unions represented just over 20% of the American work force.

Given these statistics, many employers perceive the threat of unionization to be minimal or nonexistent. However, changes in organizing strategies and tactics have been gaining ground steadily as the percentage of private sector employees who belong to unions has continued to decline. Aggressive unions, such as the Service Employees International Union and UNITE HERE, have taken the fight directly to corporate management, bypassing the established route of a traditional union campaign and NLRB-supervised election in which the employees, not corporate directors and executives, must be convinced they need union representation. Clearly, there is a consensus that the traditional approach has failed, and in its place, some unions have recognized the power of what has been called "reputational warfare waged through broadsides, half-truths, innuendo, and a staccato rhythm of castigation, litigation, legislation and regulation. It is fought in the press and on television, on the internet, in the halls of government, in the marketplace, on the trading floor, and in the boardroom."[1]

Consequently, employers–especially those who have maintained non-union status or are only partially unionized–may be at greater risk of facing aggressive union tactics than in the past. Raising management awareness of the potential for such nontraditional organizing is an important step in equipping them to resist unexpected union activity. However, the most effective insulation is continuing the practice of positive employee relations in order to create and maintain an issue-free workplace..

III. The Corporate Campaign: Not Your Grandparent's Fight for Better Wages

Alternative organizing processes often are implemented through so called "corporate campaigns" which have proven extremely effective against employers in certain industries and geographic areas. Corporate campaigns are a form of economic and public relations pressure by unions to soften an employer's position in collective bargaining negotiations or weaken opposition to organizing. In the latter case, unions often use a corporate campaign to persuade an employer to sign a neutrality agreement promising not to oppose unionization, granting the union special

access to employees, and/or recognizing the union if it can establish that it has union authorization cards signed by a majority of employees in a sought-after bargaining unit. While they were relatively rare in the 1980s and '90s, corporate campaigns are becoming standard practice in hard-fought organizing or contract campaigns.

A. The First Step: Finding the Employer's Pressure Points

For a corporate campaign to work effectively, unions profile and research employers for vulnerabilities and weaknesses, create opportunities to communicate their message through aggressive strategies and tactics, and pressure nonunion employers targeted for organizing, as well as unionized employers facing contract negotiations related to an existing collective bargaining agreement.

Since the Industrial Union Department of the AFL-CIO published its book, "Developing New Tactics: Winning with Coordinated Corporate Campaigns,"[2] labor unions and employers alike have studied its pages for the keys to waging and defending against "top down" organizing strategies. For management, the book provides useful inside information on the thinking, tactics, and objectives of this type of organizing. Generally waged as a multipronged attack on a company through its shareholders, customers and creditors, other unions, government regulatory agencies, community and civic organizations, and the press, a corporate campaign's objective is to find and make use of any actual or perceived vulnerabilities the employer has. Those pressure points often are used as leverage to negotiate neutrality agreements or recognize card check procedures.

B. Typical Corporate Campaign Objectives and Tactics

1. Economic Pressure

a. Boycotts

Boycotts are most effective against consumer products corporations whose goods carry an easily identifiable brand name. Producers of commodities and industrial products are less susceptible to consumer boycotts, since any effect is less directly traceable to the boycott. Although total product boycotts are difficult to achieve, a noticeable impact accompanied by significant press coverage may harm the carefully cultivated reputation of a product or corporation.

b. Product Disparagement

Corporate campaigners also create pressure by publicly questioning the wholesomeness or quality of the product or service sold by the employer. For example, the Farmworkers Union has linked carcinogenic pesticide use with grapes and lettuce, raising concerns among consumers and tarnishing the reputation of targeted employers. In the health care industry, unions have publicized damaging information about the quality of patient care, including survey results and malpractice claims, creating the perception among consumers that they are at risk.

2. Public Pressure

A major component of a successful corporate campaign is gaining public attention by casting the employer in a negative light. Often, this is accomplished through attracting media attention, particularly through appeals to the community at a grassroots level. There are a number of approaches that have been used successfully, including the following.

a. Unfairness to Organized Labor

Organized labor may attempt to brand the targeted employer as antiunion by publicizing and criticizing alleged unfair labor practices, resistance to union organizing, or strident bargaining demands.

b. Disrespect for Consumers

Another tactic portrays the employer as avaricious, greedy, exploitative, and engaging in business practices inconsistent with the general welfare of the public and consumers. To cultivate this viewpoint, for example, unions have publicized a government contractor's allegedly abusive pricing ($9,000 for a 12-cent wrench), a nursing home's record of alleged patient abuse and neglect, and an employer's purported production or distribution of unsafe or unwholesome products.

c. Exploitation of "Vulnerable" Groups

Characterizing corporate actions as exploiting disadvantaged and vulnerable constituencies may appeal to social consciousness and influence the decisions of the buying and investing public. Groups that unions have effectively identified as corporate "victims" include the elderly, the disabled, migrant farm workers, minorities, women, and child laborers.

d. Aligning Union Position with Social Causes

Unions often attempt to merge their demands with the "public interest" and with social cause movements to expand the reach and appeal of a corporate campaign. The more altruistic the union appears, the more public support it may attract. To serve their own organizing objectives, unions have championed environmental concerns, social and economic equality, equal access to justice, worker and consumer health and safety, and patient abuse and neglect. Some unions have linked up with the "Occupy Wall Street" movement to protest corporate greed or other social causes to publicize a labor dispute.

e. Xenophobia

Some unions have attempted to play on the fear of foreign influence in United States' affairs, in the hope of galvanizing public opinion against a target employer. This tactic may be used where there is a strong perception of foreign control, unfair advantages for international businesses employing American workers, the export of "American jobs" overseas, or unpopular differences between the employer's foreign and domestic labor policies.

3. Legal Pressure

In the course of a corporate campaign, unions may employ myriad legal processes besides those available through the NLRB. Campaigners may find employers vulnerable to inspections, audits, fines, and lawsuits by governmental regulators. To determine the employer's vulnerability, a union may conduct a systematic examination of their wage, hour, and safety practices, hiring and promotion practices, use of independent contractors, etc., and attempt to identify areas of non-compliance with various other state and federal laws and regulations. If vulnerable in any of these areas, employers may expect pressure from these and other sources:

- Occupational Safety and Health Administration;
- Employment litigation via Equal Employment Opportunity agencies, discrimination claims and class actions, and/or wage and hour claims and collective actions;
- Trade regulation authorities;
- Securities and Exchange Commission;
- Department of the Treasury;
- Department of Justice, Antitrust Division;
- Shareholder derivative suits; and
- Community safety and health authorities, such as environmental protection agencies, zoning and planning commissions, building departments, health departments, and state and local regulatory and licensing agencies.

4. Political Pressure

When waging a corporate campaign, unions often will use their political influence to highlight their disputes with an employer. Politicians are highly susceptible to union pressure, given the ability of unions to mobilize member support or opposition, deliver votes, staff phone banks, and make or withhold campaign contributions. In return for such political support, politicians often are willing to support union causes that attract media attention. In addition to securing the support of elected or appointed officials, political pressure as a corporate campaign tactic gives unions a common cause with a panoply of special interest groups, community alliances, and citizen organizations, adding leverage to the union's ability to press its organizing demands.

a. Coalitions

Building coalitions gives an instigating union access to other organizations' personnel, resources, and members, who can be enlisted to leaflet, canvass, operate phone banks, and attend demonstrations to publicize the purported wrongdoing of the corporate target. Corporate campaigners often forge alliances with other local and national labor organizations, religious groups, and special interests, such as environmentalists, women's groups, civil rights and civic organizations, and senior citizens.

b. Federal Government Officials and Processes

If the campaign target is a large employer, government contractor, or foreign-based corporation, officials and processes of the federal government may become unwitting partners in a corporate campaign. A union and its allies may call for congressional hearings or the introduction of legislative initiatives, or appeal to cabinet members and elected officials to investigate and take action in the public interest.

c. State Governments

Because of their close proximity to the electorate, elected state officials may be even more susceptible than federal officials to constituent and grassroots action in the form of legislative initiatives, hearings, task forces, and the like. Additionally, state governments often control purse strings vital to industrial expansion. Tax abatements, industrial development bonds, and land acquisition may be stalled or withdrawn when elected officials are put under the spotlight of a corporate campaign.

d. Foreign Governments

By directing unwanted attention to a foreign company in the domestic or international arena, a corporate campaign can instigate intercession by an employer's home government, parent corporation, or international business organizations. For example, corporate campaigners have contacted or demonstrated at the embassies of foreign governments, sent letters to foreign government leaders, used influence at the State Department, and commenced investigations by the Organization for Economic and Cooperative Development ("OECD").

5. Corporate Pressure

Perhaps the most fertile field for a corporate campaign is the organization itself, including its officers, directors, financial sources, investors, shareholders, and governance mechanisms. By directing public attention to the often publicly discrete corporate power structure, a union's goal is to embarrass, coerce, or cajole high-level corporate officials into changing the corporation's response to unionization. The tactics used to do so are often tailored to the employer's perceived or actual weaknesses.

a. Executives, Officers, and "Inside" Directors

Especially vulnerable to the public, press, and regulators because of their real or perceived responsibility for corporate behavior, these individuals usually avoid publicity outside of the corporate world. A union will often seize upon this as a particularly important pressure point and use tactics such as directly contacting corporate officials through the mail, confronting them at shareholder meetings, picketing at their homes, accusing them of indifference or hostility to workers and working conditions, and initiating lawsuits against them alleging breach of fiduciary duties.

b. Outside Directors

Outside directors are particularly susceptible to corporate campaign tactics because they typically have no attachment to the corporation other than their honorary or symbolic position. These individuals often are executives or directors of other corporations, and campaigners may follow these connections to find a weak link susceptible to the union's appeal.

c. Creditors

Financial institutions that lend capital to corporations also commonly manage union pension funds. This gives unions leverage with corporate lenders. A union can use this leverage to prevent or delay the extension of credit, putting significant pressure on the targeted employer. At the same time, a strike or other campaign tactic may force an employer into difficult financial circumstances, making access to needed capital more urgent and more expensive to obtain.

d. Investors

A union's creative use of adverse publicity can place significant pressure on a public company's stock price. A drumbeat of negative stories about working conditions and labor strife may lead to downward pressure on share price if investors believe a company will be unable to meet earnings predictions because of workplace unrest. Similarly, if a union effectively thwarts a business's plans for development by raising zoning or environmental concerns, the economic outlook for the business may be dimmed, resulting in a loss of investor confidence. Even for private companies, such unfavorable publicity may inhibit their ability to obtain a needed loan or otherwise raise capital for expansion.

e. Shareholder Initiatives

Through their pension funds, union members may control large blocks of stock in the target employer or its vendors, suppliers, and other business partners. Campaigners may exploit this control and publicly assert pressure at annual shareholder meetings by threatening or attempting shareholder resolutions, voting to replace directors and officers, limiting executive compensation, opposing or favoring various strategies to respond to corporate take-over possibilities, making speeches, and demanding answers to campaign-related questions. A union and its supporters also may threaten to unload blocks of company stock or orchestrate takeover attempts, and in some cases may do so without even making a threat.

f. Pressure on Corporate Customers

Another strategy being used with increasing frequency when the target employer otherwise resists a union's pressure is to take the fight to the target's corporate customers, seeking to coerce the customer into pressuring the target company to reach an accommodation with the union. This strategy has been particularly effective when the target company's customer is a larger, more visible entity that has no interest in being ensnared in its contractors' or vendors' labor disputes, particularly if the disputes are generating adverse publicity. Unless the target company plays a unique or indispensable role in the operations of its customer, it may be compelled to reach an accommodation with the union to avoid losing its customer's business.

A highly publicized example of this strategy has arisen in campaigns against janitorial services contractors. Typically, a union will engage in picketing or pamphleteering directed toward the owner of a high profile office building who contracts with the target janitorial service. This public spectacle is designed to pressure the building owners to "encourage" the janitorial contractor to accede to the union's demands.

The corporate customer has a number of possible responses in such situations. It can simply fold under the union's pressure and induce the target to agree to the union's demands. Conversely, it can simply ignore the union's entreaties if it is willing to deal with increasingly aggressive adverse publicity. The corporate customer may also engage in its own publicity campaign to rebut the union's allegations.

Finally, depending on the union's specific conduct, the target company and its customer may consider taking legal action, potentially filing a claim for defamation or a lawsuit alleging violations of the Racketeer Influenced and Corrupt Organizations Act (RICO). While some of these actions have been successful, such as a 2006 case involving a jury verdict ordering UNITE HERE to pay $17.3 million for defaming a group of Northern California doctors and hospitals that used linens cleaned by a commercial laundry service embroiled in a labor dispute with the union, not all courts have been receptive to such claims. Employers may also consider initiating legal action with the NLRB alleging that the union has engaged in unlawful secondary boycott or other activity. As with all litigation, an employer should assess the viability of any legal action before threatening or commencing a proceeding.

g. Pressure on Corporate Parent of U.S. Subsidiary

As multinational corporations continue to expand, labor unions have identified a new way to organize U.S. workers: put pressure on the European parent to abide by its home country's laws, which may be more favorable to organized labor, when doing business in the U.S. International corporate campaign tactics are similar to the strategies used within the U.S., except that unions can put the spotlight on not only the U.S. subsidiary, but also the parent company, potentially compromising a company's global operations. In addition, transnational union alliances have additional legal recourse through not only national law, but also by filing complaints with the International Labor Organization's ("ILO") Committee on Freedom of Association (the ILO is the international organization responsible for overseeing international labor standards), as well as under the OECD's Guidelines for Multinationals.

C. Case in Point: A Nearly Decade-Long Campaign to Organize Service Workers at Yale-New Haven Hospital

The outline of an actual corporate campaign may be the most effective teaching tool to emphasize the scope, depth, and tenacity of some unions' tactics. The highlights of the Service Employees International Union's ("SEIU") campaign against Yale-New Haven Hospital are instructive:

- Through 2008, the campaign was in its ninth year in efforts by District 1199 (SEIU) to organize 1,800 service workers.
- District 1199 already represented 150 of the hospital's dietary workers.

- Yale University is a legally separate entity but the public perceives that it is linked to the Hospital.
- 4,300 Yale University employees were represented by the Hotel Employees and Restaurant Employees union ("HERE").
- The union had political clout and access to the state and local media.
- The union's points of attack included: pricing, billing, and debt collection practices; charity care and service to poor communities; diversity and demographic issues, assets and investments; executive compensation; tax exemption status; patient outcomes and safety issues; treatment of employees; and alleged unfair labor practices.
- Under union pressure, the state Attorney General launched repeated investigations into the hospital's charity care practices.
- The union made allies and used proxies, including local politicians and clergy, National Association for the Advancement of Colored People (NAACP) and Hispanic rights groups, Rev. Jesse Jackson, the Association of Community Organizations for Reform Now (ACORN), Community Organized for Responsible Development (CORD), "Residents for a Healthy Open Debate," and the Center for a New Economy.
- The union's "permanent campaign" had numerous public elements, including demonstrations, picket lines, concerts, other public events, TV commercials in heavy rotation, website information, newspaper ads, postcards, fliers, petitions, communication with Board members and picketing at their private residences, influencing elected officials, on site solicitation, and strikes by unionized groups.
- The Hospital showed no signs of ever agreeing to the Union's proposed neutrality agreement – until the Hospital announced its plans to consolidate cancer services in a new, 14-story, $430 million facility. In response, the mayor predicted that the cancer center was "dead in the water unless there is an agreement on holding a union election for Yale-New Haven Hospital employees."[3]
- A deal with the union cleared the way for construction of the cancer center, as reported by the Associated Press in March 2006:

> "Yale-New Haven Hospital struck a deal with city and union leaders Wednesday that clears the way for a 14-story cancer center that administrators hope will give Connecticut one of the nation's premier centers for cancer research and treatment.
>
> The proposal had been in doubt because of a long-standing dispute between the hospital and the Service Employees International Union, which wants to unionize about 1,800 hospital workers.
>
> Once the city signs off on the construction deal this spring, the hospital will allow union leaders to hold an organization vote by secret ballot. Both sides agreed to choose an arbitrator to oversee the union drive."[4]

- The agreement included, among other things, that the union would not introduce any major new issue during the final 72 hours before the vote or directly mail literature

unless they were given home addresses; and that the hospital would not disparage the union; coerce, intimidate, or "threaten" employees with a loss of benefits, wages, or less favorable working conditions; initiate one-on-one conversations with employees; or hold mandatory meetings about the union.

- The hospital also agreed to meet to discuss its position on the composition of the voting unit; provide a list of names, home addresses, and other employee information; provide a room on the grounds for union organizers to use three days per week for two and a half continuous hours; and to provide access to other interior and exterior areas.
- The agreement called for a secret ballot election process but subjected disputes to arbitration and waived any right to an NLRB hearing.
- In 2007, an arbitrator ruled that the hospital had violated the election-principles agreement and ordered it to pay an aggregate $2.23 million to eligible voting employees. This decision came after the NLRB thwarted an initial representation vote that was to take place in December 2006, finding that the hospital had engaged in unfair labor practices in connection with the election. The arbitrator also ordered the hospital to compensate the union $2.3 million for organizing expenses, which the hospital challenged.
- On August 15, 2008, the parties reached a settlement in which the hospital agreed to pay the union $2 million for its organizing costs.

IV. The Meaning of "Neutrality" in Nontraditional Union Campaigning

A. Playing by the NLRB's Rules

The National Labor Relations Act ("NLRA") is the primary federal law governing the rights and responsibilities of employees and employers in the context of concerted and protected activities relating to the terms and conditions of employment, including hiring, wages, benefits, discipline and termination, among others. Under the NLRA, an employer is only required to recognize a labor organization as an employee representative after the organization prevails in a secret ballot election supervised by the NLRB. Under current law, prior to an election being held, an employer generally has four to six weeks to communicate to employees about unionization. During that time, the employer has a legally-protected right to communicate the disadvantages of union representation and therefore may lawfully urge employees to vote against union representation.

B. Unions Need Another Way to "Win"

Unions have seized on neutrality agreements, authorization card recognition, and variations of these methods in the context of a corporate campaign or collective bargaining to rearrange the playing field. These tactics have yielded positive results for unions.

C. Neutrality Takes Many Shapes

An employer's pledge to remain neutral during a union campaign can take many forms. Some employers simply agree to recognize a union if it proves that a majority of employees has signed union authorization cards. Other employers pledge to remain neutral during the course of an election campaign. More comprehensive agreements require the employer to provide the union with the names and home addresses of unrepresented employees and grant union organizers access to employees during their work hours. In some cases, the employer may even agree in advance to abide by a model contract for unionization, if the union can prove it represents a majority.

D. The Legal View of Neutrality and Voluntary Recognition

The current, labor-friendly NLRB has facilitated the permanency of an employer's voluntary recognition of a union in its *Lamons Gasket Co.*, 357 N.L.R.B. No. 72 (2011) decision. Reversing course from a prior ruling that allowed for immediate decertification of a union recognized through a voluntary card check agreement, the Board ruled in *Lamons* that an employer's voluntary recognition of a union bars an election petition for a reasonable period. A reasonable period, according to the Board's new clarification, is no less than six months after the parties begin bargaining and no more than one year after bargaining starts. After the six-month minimum has expired, a reasonable period will be determined based on five criteria:

1) Whether the parties are bargaining for a first contract;
2) The complexity of the issues that are subject to negotiations and the parties' bargaining processes;
3) The amount of time that has elapsed since bargaining began and the number of bargaining sessions;
4) The amount of progress made in negotiations and how close the parties are to reaching agreement on a contract; and
5) Whether the parties are at an impasse.

The rule established in *Lamons* is likely to result in greater protection for union status and another obstacle to employees who may want to challenge union representation, reducing free choice for employees and flexibility for employers.

Though its significance remains to be seen, employers should take note of a recent decision from the U.S. Court of Appeals for the Eleventh Circuit holding that an employee may bring suit under the federal Labor Management Relations Act ("LMRA") to enjoin enforcement of a neutrality agreement between his employer and a labor union. In *Mulhall v. UNITE HERE Local 355*, 2012 U.S. App. LEXIS 944 (11th Cir. Jan. 18, 2012), the Court explained that labor organizing assistance can be a thing of value that, if demanded or given in payment in certain circumstances, could be a violation of the LMRA. In this ruling, the Eleventh Circuit broke ranks with several other federal courts that have ruled neutrality agreements are not "things of value."[5] The Union has petitioned the U.S. Supreme Court for *certiorari* on whether organizing assistance can be a "thing of value."

E. Economics of Gaining Employer Neutrality

An aggressive and extended union campaign to exact a neutrality agreement or card check agreement from an employer can be very expensive for unions. However, if successful, it achieves a number of important union goals. First, a neutrality agreement makes it easier and less expensive for a union to organize unrepresented employees. Second, if the employer remains neutral, a union will likely be able to obtain authorization cards from a higher proportion of the employer's workforce, increasing its leverage at the bargaining table. Lastly, a union will have demonstrated its strength and resolve to the employer and the business community. At the bargaining table, the threat of a renewed corporate campaign will loom over the negotiations and demonstrate the union's power to other employers, who may then be more willing to reach an agreement, rather than engage in a protracted and damaging confrontation.

In the 1990's, the SEIU aptly demonstrated the strategic benefits of neutrality agreements, successfully using extensive and damaging corporate campaigns against several large health care systems, leading them to reach neutrality agreements. Under the agreements, the health systems were forced to remain neutral while the union organized employees into new bargaining units, using its increased bargaining power to secure additional employee benefits, and setting the terms of the collective bargaining agreements.

VI. The Effects of a Pro-Labor National Labor Relations Board

A. Composition

After undergoing significant personnel changes during the past four years, the NLRB is now dramatically more "labor friendly" and has taken a more activist approach to handling labor disputes. In general, the NLRB has five Members who are appointed by the President for five-year terms, with Senate consent, the term of one Member expiring each year. The political party of the President typically enjoys a 3-2 NLRB majority when the NLRB has its full complement of five Members, although the Board often operates with less than five Members. Currently composed of three Members—all Democrats—President Obama's appointments will likely continue to ensure a Democrat majority.

While the remainder of this section will detail the current Board's pro-employee agenda, it should be noted that, at the time of publication of this InfoPAK, there is an open question regarding the legitimacy of two of the three Member's appointments by President Obama. Specifically, the U.S. Court of Appeals for the District of Columbia Circuit ruled on January 25, 2013, that National Labor Relations Board Members Sharon Block, Richard Griffin, and former Member Terence F. Flynn were not properly named to the Board as interim appointees by President Barack Obama at the beginning of 2012. *Noel Canning v. NLRB et al.,* Nos. 12-1115 and 12-1153 (D.C. Cir. Jan. 25, 2013).[6] Though significant because the law requires at least three Members for the Board to act, the D.C. Circuit's decision in *Noel Canning*—which ostensibly leaves the Board with only one properly appointed

Member—may not be the end of the story; this ruling may be revisited by the entire D.C. Circuit *en banc* and/or the U.S. Supreme Court. In the meantime, the decision casts into doubt the validity of many recent Board decisions and other actions detailed below in which the appointees participated.

As discussed below, the NLRB has taken action both through adjudication (i.e., new decisions overturning or expanding existing case law) and administrative agency rulemaking that broaden the NLRA's impact and make it easier for unions to organize workers. In addition, Acting General Counsel Lafe Solomon has been instrumental in advancing the NLRB's labor-friendly agenda.[7] None of the Board's recent initiatives should be viewed in isolation. Recent decisions that expand the scope of employees' protected concerted activity rights, the Notice of Employee Rights posting requirement (if upheld), the expedited election rule (if upheld or reissued by the NLRB), and bargaining unit composition changes will all work together to increase pressure on employers in 2013 and beyond.

B. Notice Posting and Election Rules

The fate of two labor-friendly rules passed by the NLRB and scheduled to take effect in April 2012 are currently unsettled as a result of successful legal challenges by representatives of the employer community.

The NLRB issued its final rule on the "Notification of Employee Rights under the National Labor Relations Act" on August 25, 2011. The rule, which was last scheduled to take effect on April 30, 2012, would require that all employers covered by the NLRA conspicuously post a notice informing employees of their right to organize and engage in other protected activities and provide contact information for the NLRB. Failure to post the notice, according to the rule, would constitute an independent unfair labor practice and could be considered evidence of unlawful motive in certain proceedings before the NLRB. A failure to post also could toll the statute of limitations to file unfair labor practice charges for acts allegedly committed during the period in which an employer failed to post the notice.

On April 17, 2012, an emergency injunction was granted by the U.S. Court of Appeals for the District of Columbia Circuit in *Nat'l Ass'n of Mfrs. v. N.L.R.B.*, No. 12-5068, (D.C. Cir. April 17, 2012), which has prevented the NLRB from implementing the rule. In granting the emergency injunction, the D. C. Circuit rejected the NLRB's argument that the rule should take effect during the pendency of an appeal from a March 2, 2012 District of Columbia District Court decision holding that the NLRB had the authority to promulgate the posting rule. The D. C. Circuit injunction was granted after a South Carolina federal district court judge held that the Notice Posting rule was beyond the scope of the Board's authority in *Chamber of Commerce v. N.L.R.B.*, No. 11-cv-2516 (D.S.C. Apr. 13, 2012). The South Carolina decision is currently on appeal before the U.S. Court of Appeals for the Fourth Circuit. At the time of publication of this InfoPAK, both appeals are pending and the NLRB has indicated it will not implement the rule pending court decision.

Please note, however, that a similar Notice Posting requirement is in effect for federal contractors pursuant to a Presidential Executive Order (E.O. 13496, which was signed by President Barack Obama on January 30, 2009). The Executive Order is not based on the Board's statutory authority. Therefore, employers who have chosen to participate in covered federal contracts

remain obligated to post the Department of Labor-generated notice of rights pursuant to the terms of the Executive Order.

In another controversial series of events, the District of Columbia District Court, in *Chamber of Commerce v. N.L.R.B.*, No. 11-2262 (D. D.C. May 14, 2012), ruled that the NLRB's "expedited election" rule—originally scheduled to take effect on April 30, 2012—is invalid because only two Board Members, instead of the three needed to make up a Board quorum, participated in the final vote to pass it. The rule, which the Board rushed to finalize at the end of 2011, would eliminate certain pre-election rights of employees and employers, thus (among other things) shortening the time before a representation election takes place.

The district court determined that when the election rule actually was adopted on December 16, 2011, only two members participated, voting electronically through the agency's Judicial Case Management System to adopt the rule. The district court judge found that former Member Brian Hayes did not respond to the Board's electronic invitation, and therefore could not be counted toward the three-member quorum. However, as the judge explained, this decision does not "necessarily spell the end of the final rule for all time." Even though he did not reach the "other procedural and substantive challenges to the rule," he continued, "it may well be that, had a quorum participated in its promulgation, the final rule would have been found perfectly lawful."

In response to the NLRB's motion to alter or amend the judgment, the federal district court in Washington, D.C. again found the rule could not stand as it was promulgated without the required quorum. The Board has appealed the federal court's decision to the U.S. Court of Appeals for the D.C. Circuit. The Board could also decide to reissue the rule in its current or an expanded form if there is a three-Member quorum present on the Board, which depends on the resolution of the ongoing challenges to President Obama's recess appointments discussed above. In all likelihood, a new vote on the rule will not end the controversy. Renewed legal challenges almost certainly will follow any re-issuance.

In essence, the controversial rule in its current form (76 Fed. Reg. 80138) would amend existing Board procedures by:

- Giving the NLRB hearing officer authority to limit the pre-election hearing to matters relevant to "question[s] concerning representation." In its commentary accompanying the final rule, the Board explained that while the "regional director must determine that a proper petition has been filed in an appropriate unit in order to find that a question of representation exists, the regional director need not decide all individual eligibility and inclusion questions… and the hearing officer need not permit introduction of evidence relevant only to disputes concerning the eligibility and inclusion of individuals." The Board also commented on whether evidence sought to be introduced would be relevant to voter eligibility/inclusion as opposed to unit appropriateness. As a consequence of this change, employers may not know which employees are eligible to vote until after the election takes place. This issue is particularly problematic with respect to determining supervisory status; supervisors are considered agents of employers and also are ineligible to vote in Board-held elections. However, if their status is not determined based on a pre-election hearing, their status will remain in doubt during the pre-election campaign period (so there would be concerns since the employer is

responsible for a supervisor's conduct and statements) and subsequent balloting (because there would be no definitive determination of whether the individual is or is not eligible to vote in the election).

- Authorizing a hearing officer to decide whether to permit briefing after the pre-election hearing, including the subjects to be addressed and the time for filing.
- Consolidating the appeals process for Board review of pre-election issues and issues concerning the conduct of the election into a single post-election procedure. By eliminating the possibility of appealing issues pre-election, the time between the filing of an NLRB election petition and an election will be reduced significantly.
- Ending the practice of permitting time for appeals to the NLRB from Regional Directors' decisions before scheduling elections.
- Allowing requests for special permission to appeal to the Board only in extraordinary circumstances.
- Giving the Board discretion to hear and decide any appeals from the election process, whether they concern pre- or post-election issues.

Guidance issued by NLRB Acting General Counsel Lafe Solomon in April 2012 (Memorandum GC 12-04) details how the NLRB regional offices would implement the new representation case procedures.

As of the time this publication went to press, the "expedited election rule" was not in effect yet because of the initial decision and pending appeal discussed above.

C. Board Decisions

1. Specialty Healthcare

Part of the NLRB's statutory mission is to determine the group of employees who will vote in a union representation election—the group that, if the union wins, would be the "bargaining unit" for purposes of contract negotiation. A union and an employer may have differing opinions as to what constitutes an appropriate bargaining unit. For many decades, the NLRB has determined the issue by analyzing and comparing the "community of interests" among various employee groups to make its determination. In *Park Manor Care Center*, 305 N.L.R.B. 872 (1991), the Board characterized this well-used standard as the "pragmatic community of interests" test. The Board took into consideration Congressional expressions of concern (echoed in earlier Board rulings) that unit determinations avoid a proliferation of bargaining units in long-term care facilities. Before and after that decision, the Board found broad service and maintenance bargaining units composed of various employee classifications to be appropriate bargaining units in long-term care facilities.

In *Specialty Healthcare and Rehab. Center of Mobile*, 357 N.L.R.B. No. 174 (2011), the Board for the first time found that a unit requested by the union comprised solely of certified nursing assistants was appropriate, rejecting the employer's request to add other non-professional employees to the unit.

In so doing, the Board, on its own initiative, overruled the community of interest test and announced a new standard for determining an appropriate bargaining unit. Now, if the union seeks a unit of employees that is "readily identifiable as a group" (e.g., a unit of a single job classification) and those employees "share a community of interest" (which is highly likely), the Board will approve that unit, *unless* the employer can show that employees in a larger unit share an undefined "overwhelming community of interest" with the employees in the unit requested by the union.

Although this decision was in the health care context, it is likely to be extended to other industries.

The *Specialty Healthcare* decision is currently being appealed to the U.S. Court of Appeals for the Sixth Circuit. If the Sixth Circuit upholds the Board's decision, increased organizing activity is widely anticipated.

2. Protected Concerted Activity, Including Social Media and Arbitration Agreements

a. Employer policies and practices

The NLRB's "protected concerted activity" initiative is creating a significant alternative for employees not represented by a union to contest employer policies and practices. Section 7 of the NLRA protects the rights of both union and non-union employees to engage in "concerted activities" for their mutual aid and protection, which includes discussions among employees concerning their terms and conditions of employment. Under recent Board decisions, unlawful conduct can arise not only from written workplace policies, but also from seemingly reasonable statements made by supervisors and human resource representatives that may be construed as interfering with an employee's rights.

In one of its recent decisions, for example, the Board ruled that an Arizona hospital violated the NLRA when its human resources consultant asked employees interviewed in connection with an internal investigation not to discuss the matter with their co-workers while the investigation was ongoing. *Banner Health System d/b/a Banner Estrella Med. Ctr.*, 358 N.L.R.B. 93 (July 30, 2012). The Board's ruling clarifies that an employer's *mere suggestion* (as opposed to a mandate) to employees that they not speak to others regarding an internal investigation could interfere with, restrain or coerce employees in the exercise of their Section 7 statutory rights, and thereby violate the NLRA.

The Board has also ruled that, if not carefully worded, broad, generic policies prohibiting "harassment" of co-workers may be "reasonably interpreted" as improperly prohibiting employees from partaking in protected concerted activity in violation of the NLRA. In addition, some employers have policies prohibiting employees from speaking to the media without prior authorization by management. The NLRB has held that some of these policies are unlawful because they "chill" employees' statutory right to publicize their grievances.

Employers should also note that the NLRB recently has begun to review "at-will" employment acknowledgements, which require employees to certify or acknowledge their employment is on an "at-will" basis. Such policies convey that an offer or accepted offer of employment is not intended to create a contract of employment and employment is on an "at-will" basis. In one recent case, for example, a Board administrative law judge ("ALJ") found that an acknowledgment that read, "I

agree that the at-will employment relationship cannot be amended, modified, or altered in any way" was "essentially a waiver in which an employee agrees that his/her at will status cannot change, thereby relinquishing his/her right to advocate concertedly, whether represented by a union or not, to change his/her at will status." For that reason, the ALJ said, the policy could reasonably chill protected concerted activity and, thus, violated Section 8(a)(1) of the NLRA.

Recent "memoranda" opinions from the NLRB General Counsel's Office Division of Advice, however, indicate that "at-will" clauses may be lawful if worded so that they could not be interpreted as inhibiting employees' efforts to unionize or otherwise engage in protected concerted activity. Specifically, the Division deemed the follow policies to be lawful:

- The relationship between you and the Company is referred to as "employment at will." This means that your employment can be terminated at any time for any reason, with or without cause, with or without notice, by you or the Company. No representative of the Company has authority to enter into any agreement contrary to the foregoing "employment at will" relationship. Nothing contained in this handbook creates an express or implied contract of employment.
- Employment with the Company is employment at-will. Employment at-will may be terminated with or without cause and with or without notice at any time by the employee or the Company. Nothing in this Handbook or in any document or statement shall limit the right to terminate employment at-will. No manager, supervisor, or employee of the Company has any authority to enter into an agreement for employment for any specified period of time or to make an agreement for employment other than at-will. Only the president of the Company has the authority to make any such agreement and then only in writing.

The Division of Advice reasoned that the first provision did not violate the NLRA because it did not require employees to refrain from seeking to change their at-will status or to agree that the employment relationship cannot be changed in any way. Similarly, the second provision explicitly stated that the at-will relationship could be changed, and, thus, employees would not reasonably assume that their NLRA rights were prohibited. The Division distinguished these policies from language in which an employee agrees that his/her at-will status cannot change.

The Board has sought to educate the public about its protected concerted activity initiative, including through a new webpage launched in June 2012 focused entirely on protected concerted activity. It provides examples of recent cases in which employers have been found to have improperly disciplined employees in response to such activities, along with the remedies that the Board obtained for the employees in the cases. In announcing the launch of the new webpage, Chairman Pearce stated: "We think the right to engage in protected concerted activity is one of the best kept secrets of the National Labor Relations Act …. Our hope is that other workers will see themselves in the cases we've selected and understand that they do have strength in numbers." As a result of the Board's public outreach initiative, employers can expect to see an increase in the number of unfair labor charges filed by both unionized and non-union employees alleging interference with their Section 7 rights.

b. A Note on Social Media

Because employee communication through social media often involves Section 7 activity, the NLRB is taking a hard look at company social media policies. In fact, the NLRB Acting General Counsel Lafe Solomon has issued three reports on cases involving employee social media use. In these reports, the Acting General Counsel found certain policy language regarding employee social media use to be problematic because of unlawful restrictions on the exercise of protected concerted activity. These include, for example, policies prohibiting posts discussing the employer's non-public information, confidential information, and legal matters (e.g., when used without further clarification of the meaning of these terms). The Acting General Counsel's third report noted that a social media policy's "savings clause," stating the policy would "be administered in compliance with applicable laws and regulations (including Section 7 of the National Labor Relations Act)," was insufficient to cure ambiguities in an otherwise overbroad policy.

The NLRB, in its first decision on social media policies, similarly held that a policy prohibiting employees from making statements on social media that could damage the company or other employees' reputations was overly broad and violated the NLRA. Further, in an apparent expansion of the National Labor Relations Board's traditional view of protected concerted activity, the Board affirmed an administrative law judge's finding that an employer violated the NLRA by firing five employees for posting Facebook comments in response to a co-worker's criticism of their job performance. *Hispanics United of Buffalo Inc.*, 359 NLRB No. 37 (Dec. 14, 2012).

It is also speculated that the current NLRB will overturn a prior decision allowing facially neutral employer work rules that inadvertently limit workplace organizing activity, such as restricting the use of company e-mail for personal business and restricting bulletin board or e-mail solicitations for outside organizations while permitting personal solicitations. *Guard Publ'g Co.*, 351 N.L.R.B. 1110 (2007), *enforced in part, review granted in part,* 571 F.3d 53 (D.C. Cir. 2009).

c. Arbitration Agreements with Class or Collective Action Waivers

Although the decision is now on appeal before the U.S. Court of Appeals for the Fifth Circuit, the Board has found class action waivers to be problematic under certain circumstances. In *D.R. Horton*, 357 N.L.R.B. No. 184 (Jan. 3, 2012), the Board held that "employers may not compel employees to waive their NLRA right collectively to pursue litigation of employment claims in *all* forums, arbitral and judicial." The NLRA, the Board said, confers on employees the right to pursue discrimination, wage and hour and other workplace-related claims in a joint, class or collective fashion as "protected concerted activity."

By no means, the Board asserted, does the decision ban all arbitration agreements with new and existing employees. "Employers remain free to insist that *arbitral* proceedings be conducted on an individual basis," the NLRB affirmed. "So long as the employer leaves open a judicial forum for class and collective claims," it continued, "employees' NLRA rights are preserved without requiring the availability of class-wide arbitration."

The Board also recognized that a union representing employees in collective bargaining could waive individual unit employees' rights to pursue statutory claims in court, as the U.S. Supreme Court held in *14 Penn Plaza, LLC v. Pyett*, 556 U.S. 247 (2009), maintaining that collective bargaining itself is a form of statutorily protected activity. But these waivers, it said, were different from the unilaterally imposed employment policies before it in *D.R. Horton*.

Since the NLRB issued its decision in *D.R. Horton*, several federal courts have rejected the Board's reasoning, and the U.S. Court of Appeals for the Fifth Circuit has agreed to review the case.

Like *D.R. Horton*, many of the Board's recent rules and decisions are being challenged in court while questions remain regarding the NLRB's authority to act. Nonetheless, in-house counsel should be familiar with all of these developments which reflect the current state of the law unless overturned.

VII. Legal and Preventive Strategies: Preserving Management Rights Through Positive Employee Relations Solutions

Although unions are using creative and aggressive tactics more frequently and with greater success against both partially unionized and union-free employers, in-house counsel can play a leadership role in positioning an organization with "best practices" that minimize the likelihood of such efforts occurring or being successful. Companies that are cognizant of changing legal trends and commit to a program of positive employee relations that takes these trends into account are less likely to have significant litigation, agency charges, or union issues.

The first step is educating and preparing senior management and boards of directors about new approaches by the NLRB (such as protected concerted activity, the Notice Posting rule, likelihood of accelerated election rules, etc.) and the labor movement (such as corporate campaigns, neutrality/card check requests directed at high level officials, etc.). It is important that there be an understanding that any organization could be vulnerable unless positive, preventive measures are taken to keep up with new trends and changes in the law. One could liken it to conducting the due diligence necessary to insure that the company is not vulnerable on any other legal matter. One key question at this level involves the corporate commitment to maintaining the current labor philosophy and approach. If so, for example, it is important that top management understand how a corporate campaign might impact its business and make an affirmative decision that it does or does not want to preempt or withstand a corporate campaign. In-house counsel can serve as the adviser to top management in this regard. Once top management has committed to the concept of creating the best employee relations environment possible and seeking to withstand such a campaign if one is ever waged, in-house counsel then also can coordinate preparation of or updating the organization's preventive program accordingly.

An employer's first, best, and most efficient defense is maintaining an issue-free work environment in which unions have little or nothing to offer employees. Even without an

immediate threat of unionization, employers should conduct a thorough analysis of their vulnerabilities and weaknesses in employee relations. Periodic examination of policies, practices, supervisor's actions and accountability, and prompt resolution of any shortcomings will limit an employer's exposure to corporate campaigns and create an environment in which employees are less likely to perceive a need for representation. In the wake of current and potential liberalizing changes to the law, this strategy should be reinforced through regular communication with employees about the disadvantages of unionization and the significance of signing union cards. Employees also are less likely to file "protected concerted activity" charges since company policies and practices will have been updated appropriately.

A. Assess Vulnerability

The company can begin to assess its vulnerability by reviewing its compliance with statutory obligations, such as the NLRA (e.g., review of handbook policies in light of the Board's protected concerted activity initiative, determining possible modifications to jobs that might be appropriate in light of the *Specialty Healthcare* decision, etc.), wage and hour laws and regulations (e.g., to make it less likely that employees – with or without union support – will commence a wage-hour collective action), health and safety standards (including OSHA and state right to know laws), and all other applicable laws. Unions often will use noncompliance – whether major or minor – to support its case during a corporate campaign that the employer is not a "good citizen" and that employees need protection.

The Company also should review typical corporate campaign pressures (such as through members of the Board of Directors, shareholders, customers, politicians, funding sources, government agencies, the media, employees, etc.), determining which ones might be effective against the company, and develop a lawful long and short-term approach.

B. Establish Coalitions

To counter a corporate campaign, the company should consider establishing its own coalitions and strategic alliances demonstrating its good corporate citizenship to any special interest groups that may be involved in union issues, such as environmental, religious, women's, disability, or minority organizations. Whenever possible, the company should also consider transacting within the local business community to establish relationships which may later become valuable support for the company's position in opposing the union.

C. Develop Government Relations

The company also should develop and nurture its contacts and relationships with elected and executive local, county, state, and federal government officials while also ensuring that these relationships remain appropriate and businesslike.

D. Nurture Corporate Involvement

It is vital to have an informed, educated management committed to maintaining positive employee relations and, if it becomes necessary, to defend against an organizing campaign. Support should come from every level of company management but particularly top management in conjunction with in-house counsel, senior labor relations, and human resources officials. The most effective way to coordinate corporate involvement is establishing a task force to prepare and deploy strategies developed by in-house counsel and the company to deal with major corporate events, including in this case one or more elements of a union corporate campaign.

It is also important that the task force have central control over the public relations aspect of a campaign. A public relations counter campaign should always emphasize a positive tone, build the company's reputation, and praise the company's employees rather than attacking a union. If it becomes necessary to respond to a union's public attacks, the company should phrase its response in positive tones, stick to the issue raised, and avoid disparaging the union or its officials.

E. Conduct Education and Training

Managers and supervisors should be trained on rights and responsibilities under the NLRA, as it might arise in a union organizing, collective bargaining, and protected concerted activity context. In this way, they will understand how to respond lawfully and responsibly to union organization efforts and how to recognize the early warning signs so that they handle any corporate campaign lawfully and effectively. This would include understanding the legal and practical parameters of how to handle questions and claims from employees, customers, the community, and the press with composure and poise since the organization typically is responsible for their statements/actions and, at least to employees, managers and supervisors are often the "public face" of the company.

As a typical part of a corporate campaign strategy, a union will sometimes try to exert pressure upon corporate boards of directors by picketing the directors' homes, and often pressure businesses that board members own or other organizations with which they are associated. Board members should be alerted about this possibility, educated about lawful responses and the stakes involved, and asked for their commitment to "weathering the storm."

F. Develop an Action Plan

In-house counsel should coordinate with management to develop an action plan reporting on the likelihood of a union campaign, including assessing potential issues, identifying any special interest groups that may seek to involve themselves, and planning the company's response. The action plan should establish a timetable and designate specific individuals to carry out the plan's various components and anticipate and respond to a union's tactics.

G. Explore Potential Legal Action

Though not readily available, there may be certain situations when a company has a legal remedy against tactics employed by a union in a corporate campaign. Several employers have invoked the

RICO Act as a comprehensive counterattack against unions, their consultants, and occasionally their supporters and affiliates. Defamation and invasion of privacy claims also have been used effectively against unions. It is important to assess the legal claim and ramifications carefully to insure that any action commenced is lawful and appropriate.

H. Take Advantage of the Public Outcry Against Corporate Campaign Tactics

Recently, there has been a public outcry from the business community against the smear tactics employed by some unions in corporate campaigns. Business leaders have criticized unions' misuse of federal regulatory agencies, such as OSHA and the Environmental Protection Agency, and filing of frivolous claims. Consequently, the U.S. Chamber of Commerce and the National Association of Manufacturers have undertaken an effort to curb the use of legislative proposals and regulatory action as corporate campaign tactics.

I. Recommit to an Issue-free Workplace

Practicing preventive labor relations requires anticipating employee-related problems before they are manifested by employee complaints, deteriorating morale, union organizing activity, agency proceedings, litigation, or possibly the start of a complete corporate campaign. The company should periodically conduct a legal/HR preventive labor relations assessment to identify potential issues. The audit should have the following major components:

- A review of the company's policies, practices, and procedures to insure compliance with applicable labor and employment laws, paying particular attention to key personnel policies and practices regarding equal employment opportunity, discrimination/harassment, wage-hour matters (e.g., overtime, off the clock work, etc.), social media and e-communications, leave, promotions, transfers, employee selection techniques, etc., and the company's sensitivity to "family" and "diversity" issues;
- An assessment of fairness and consistency in the administration of personnel policies, as well as employees' perceptions of such policies;
- An evaluation of the effectiveness of all internal (e.g., employee) and external (e.g., public relations) communications programs and the company's dedication to continuous improvement;
- An assessment of the government relations program to insure appropriate compliance;
- An evaluation of the effectiveness of all employee complaint, problem resolution and other ADR procedures, as well as the company's dedication to continuous improvement;
- An identification and resolution of health and safety issues that may be of concern to employees;
- An identification of all supervisory and managerial personnel;
- A schedule and summary of training for supervisors and managers on their rights and responsibilities under relevant labor and employment laws, including open discussion

of techniques and strategies that can be used to continuously maintain an effective preventive labor relations posture;

- An evaluation of the development of employee orientation programs, particularly those segments dealing with the employer's philosophy of employee relations and policies concerning third-party intervention;
- An evaluation of the effectiveness and legality of employee handbooks and/or manuals;
- An evaluation of the development of guides for management on maintaining non-union status;
- An analysis of potential bargaining units and development of plans for any necessary remedial action;
- An evaluation of the development of a system for monitoring, reporting, and maintaining accountability in preventing and resolving workplace conflict; and
- Proposals and action plans for any of these programs or systems that do not exist yet.

J. Communicate Company Position on Unionization to Employees

Employees educated on the disadvantages of union representation are much less likely to sign cards or support a union campaign. This is critical if the employer is compelled to agree to a card check procedure or the proposed "quickie election" rules are implemented. Accordingly, employers should consider conveying their union-free philosophy to employees regularly and unambiguously. Strategies for doing so include placing a policy statement in the employee handbook (though the company cannot specifically require employees to agree with the policy) and in regular communications, such as at annual "state of the business" meetings.

Maintaining a consistent and comprehensive communication strategy requires:

- Crafting the company's position and supporting messages to be consistent with its mission and values, such as compassionate concern for employees, customers, and public; financial stewardship; community service; promoting dignity, respect and fair treatment in the employment relationship; and openness and full disclosure;
- Incorporating a consistent message in all communications with employees;
- If appropriate, recognizing the validity and accomplishments of the labor movement generally while conveying its inapplicability to the company specifically;
- Communicating the message completely to all supervisors, applicants and employees;
- Maintaining positive press and public relations and considering proactive public discussion to frame the issue positively;
- Revisiting and strengthening community and political ties; and
- Enlisting and encouraging active employee support.

K. If Neutrality Is Unavoidable

In a situation where entering into a neutrality agreement may be unavoidable, the employer should consider the following negotiation strategies:

- Limiting the duration of the neutrality agreement;
- Limiting the scope of the neutrality agreement and potential organization (for example, agreeing that the union will not organize other facilities or branches of the company);
- Conditioning the neutrality agreement on the union's agreement to favorable contract terms to the extent feasible under current NLRB law;
- Negotiating for an NLRB-conducted election (or at least a private secret ballot election) instead of card check recognition;
- Negotiating for a super-majority requirement if card check is necessary;
- Negotiating specific rights to communicate with employees (for instance, requesting to be allowed to provide simply "full and accurate" information about the impact to the company of unionizing without stating a position) in lieu of remaining fully silent;
- Including a right to respond to employees' questions or union communications;
- Prohibiting intimidation or other improper union conduct;
- Limiting the time, place, and manner of union access to the company's premises for engaging in organizing activity;
- Carefully reviewing and negotiating provisions regarding the private resolution of any dispute (for example, using a specific arbitrator);
- Avoiding liquidated damages or attorneys' fees provisions for any claimed breach of neutrality;
- Requiring that the union refrain from picketing, hand billing or inciting a strike;
- Limiting the actual organizing activity to a reasonable period of time (e.g., 90 days) and requiring advance written notice of intent to organize;
- Establishing a time period following an unsuccessful organizing effort during which the union waives its right to attempt organizing again;
- If agreeing to disclose names, addresses, and telephone numbers to the union, providing a mechanism for employees to opt out of having their personal information (or at least their home telephone number) given to the union;
- Requiring both parties to promote the message that choosing whether or not to unionize is the employees' decision and that both parties will respect the employees' choice;
- Including a provision that the union and its agents will not impede or interfere with the normal operations of the company;
- Including a provision that the union waives its right to file lawsuits and will not encourage or assist employees in filing lawsuits against the company; and
- Including clear provisions for resolving bargaining unit issues, challenging voter issues, and alleging violations of the neutrality provisions. This provision should also include

limits on the remedies available in the event of a violation by the employer (e.g., the union cannot seek a direct bargaining order). Similarly, the agreement should specify potential remedies if the union violates the agreement.

VIII. The Bottom Line: Organizations Are at Risk Without a Commitment to Minimizing Vulnerability and Maximizing Positive Employee Relations

Organized labor has recommitted itself to reversing the decline in union membership through nontraditional strategies and tactics unfamiliar to many employers. As unions use more sophisticated methods of accessing employees and campaigns become more aggressive in finding and exploiting vulnerable employers, ignoring the issue or assuming that only certain industries or geographic areas are at risk could be viewed as ill-informed.

Each corporate campaign is a unique, tailored operation demanding that management's response is targeted to the campaign's particular objectives and audiences. Accomplishing this goal depends on the company, its philosophy of employee relations, and the objectives and tactics of its adversary.

All companies should consider minimizing vulnerability to corporate campaigns as part of their overall risk management strategy. Additionally, the company should consider creating a corporate campaign task force, which meets on a regular basis, monitors changes in the internal or external environment, and recommends preventive or corrective measures. These steps will improve the company's ability to avoid or survive a corporate campaign, and will enhance their overall human resource posture.

Ironically, corporate campaigns often alienate the very employees a union seeks to organize. Many employees have a strong allegiance to their employer, particularly those with strong community roots. While such employees may gripe occasionally among themselves about working conditions, an outside group attacking their employer will often offend them. Thus, when the employer runs an effective counter campaign to capitalize on this sentiment, an aggressive union may be unable to force a neutrality agreement and may fail to garner enough employee support to prevail in an NLRB supervised election.

IX. About the Authors

Founded in 1958, Jackson Lewis, dedicated to representing management exclusively in workplace law, is one of the fastest growing workplace law firms in the U.S., with 750 attorneys practicing in 52 locations nationwide. We have a wide-range of specialized practice areas, including: Affirmative Action and OFCCP Planning and Counseling; Disability, Leave and Health Management; Employee Benefits Counseling and Litigation; Immigration; Labor, including Preventive Practices; General Employment Litigation, including Class Actions, Complex Litigation and e-Discovery; Non-Competes and Protection Against Unfair Competition; Wage and Hour Compliance; Workplace Safety and Health; and Corporate Diversity Counseling. In addition, Jackson Lewis provides advice nationally in other workplace law areas, including: Reductions in Force, WARN Act; Corporate Governance and Internal Investigations; Drug Testing and Substance Abuse Management; International Employment Issues; Management Education; Alternative Dispute Resolution; Public Sector Representation; Government Relations; Collegiate and Professional Sports; and Privacy, Social Media and Information Management.

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X. Additional Resources

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XI. Endnotes

[1] Jarol B. Manheim, Corporate Campaigns: Labor's Tactic of The 'Death of A Thousand Cuts,' LAB. WATCH, Jan. 2002, at page 2.

[2] INDUSTRIAL UNION DEP'T, AFL-CIO, DEVELOPING NEW TACTICS: WINNING WITH COORDINATED CORPORATE CAMPAIGNS (1985).

[3] New Haven Register, Feb. 26, 2005

[4] Yale-New Haven Hospital Reaches Cancer Center Deal, Conn. Post (Bridgeport, Conn.), Mar. 23, 2006.

[5] See, e.g., Adcock v. Freightliner, LLC, 550 F.3d 369 (4th Cir. 2008); Hotel Eps. & Restaurant Eps. Union, Local 57 v. Sage Hospitality, 390 F.3d 206, 218-19 (3d Cir. 2004); Patterson v. Heartland Industries Partners, 428 F. Supp. 2d 714 (D.C.N.D. Ohio 2006).

[6] The three-judge panel said President Obama did not have the power to make the three recess appointments to the Board because the Senate was officially still in session at the time and therefore they were not made during "the recess" that takes place between sessions, as required by the Constitution.

[7] The General Counsel's position, by design, is independent from the Board. He is responsible for the investigation and prosecution of unfair labor practice cases. Essentially, the General Counsel acts as a "gatekeeper," deciding which cases to prosecute and theories to emphasize.