

A Brief Introduction to Union and Employee Activities Under the NLRA and Proposed Changes Under the Employee Free Choice Act

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INTRODUCTION

The National Labor Relations Act (the “Act” or the “NLRA”) guarantees the right of workers to organize and to bargain collectively with their employers, or to refrain from such activity. To enable employees to exercise these rights and to prevent labor disputes, the Act places certain limits on the activities of both employers and labor organizations.

Administration of the Act resides primarily with the National Labor Relations Board (the “Board” or the “NLRB”), which has two principle functions. One is to prevent and remedy unfair labor practices committed by employers or labor organizations. The other is to certify, or decline to certify, unions to represent the employees of an appropriate bargaining unit of an employer. The Board can act only when formally requested to do so. Individuals, unions, or employers may initiate cases by filing charges of unfair labor practices or petitions for employee representation elections in the field office serving the area where the case arises.¹

The text that follows is an introduction to pre-certification union and employee activities under the Act, which is intended for new practitioners.² In addition, this paper describes changes to the Act that have been proposed in the Employee Free Choice Act, which is currently pending in Congress. Whether changes need to be made to the Act, and what forms they should take, are hotly debated questions, and this paper aims to illuminate the contours of the debate.

The substantive and procedural provisions of the Act are, to say the least, complex. New attorneys, even those who have studied labor law in law school, and attorneys unfamiliar with the Act are well-advised to consult with those more experienced on almost any issue involving the Act.³ Region 11 also provides an “Officer of the Day” to assist with inquiries.

¹ The headquarters of the Board, and of its General Counsel, is in Washington, D.C. The Board also has regional offices around the country. Region 11, which has jurisdiction over North Carolina, South Carolina, and parts of Virginia and West Virginia, is located at 4035 University Parkway, Suite 200, Winston-Salem, North Carolina 27106-3325, (336) 631-5201.

² The first portion of this paper is largely an update of “Union and Employee Activity,” first prepared by Henry N. Patterson, Jr. and Jonathan R. Harkavy in 1979, and subsequently revised by Michael G. Okun. Another useful reference for new practitioners is the “Basic Guide to the National Labor Relations Act,” prepared in the Board’s Office of the General Counsel, which offers a more complete overview of the entire Act. It is available at: www.nlr.gov/nlr/shared_files/brochures/basicguide.pdf.

³ Two references frequently relied upon by practitioners are Higgins, *The Developing Labor Law*, BNA (5th ed. 2006), and Fischer, Garren, and Truesdale, *How to Take a Case Before the NLRB*, BNA (8th ed. 2008), both prepared by the Labor and Employment Law Section of the American Bar Association.

I. THE GENERAL CONTEXT

The Act declares a national policy to be the elimination of the causes of obstruction to commerce:

by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

29 U.S.C. § 151.

The Act establishes the machinery to assure employees the following rights set forth in Section 7:

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

29 U.S.C. § 157.⁴

The Act applies generally to private employers whose activities have a substantial impact on interstate commerce.⁵ The Act's protection does not extend to certain categories of employers, particularly to management and supervisory employees. In fact, the Act gives employers within the jurisdiction of the Board the right to discharge these employees for engaging in union activity notwithstanding provisions in state law to the contrary. Beasley v. Food Fair, Inc., 416 U.S. 653 (1974).⁶

The Railway Labor Act, 45 U.S.C. § 161 et seq., prohibits employer interference in union organization by railway and airline employees and sets up machinery for the resolution of

⁴ Protected concerted activity under Section 7 is usually associated with union activity. The Section, however, protects "concerted" activity, not just union activity. Thus, concerted employee activity that is not union-oriented may sometimes be protected.

⁵ The jurisdiction of the National Labor Relations Board includes, as an example, retail establishments with a gross business volume of at least \$500,000 per year.

⁶ An employer may not discipline or discharge a supervisory employee, however, for refusing to engage in conduct in violation of the Act, for filing an unfair labor practice charge, or for testifying adversely to the employer in an NLRB proceeding.

disputes in these industries. Federal employees are protected in their participation and representation by labor organization under Title VII of the Civil Service Reform Act of 1978, 5 U.S.C. § 7101 et. seq. State government employees are guaranteed the right to organize and participate in union activities by the First and Fourteenth Amendments.

The North Carolina Right to Work Law, N.C. Gen. Stat. § 95-78, et. seq., guarantees organizational rights to employees of private employers in North Carolina which are not subject to the jurisdiction of the National Labor Relations Board. This statute provides for criminal penalties and creates a damage action in favor of employees who have been deprived of employment because of their membership or non-membership in unions. An employee is entitled to recover damages where the moving cause for his discharge is participation in discussion concerning organization and prospective membership in a union. Willard v. Huffman, 247 N.C. 523, 101 S.E.2d 373 (1958).

II. OBJECTIVES OF ORGANIZATION-RECOGNITION

The Act requires an employer to recognize and collectively bargain in good faith with a labor organization having majority support in a group (“bargaining unit”) of employees appropriate for collective bargaining.⁷ The objective of organization by a union, therefore, is recognition by the employer for purposes of collective bargaining.

Such recognition normally is achieved by a union in one of three ways. Usually recognition is achieved as a result of certification by the Board after a Board-conducted secret ballot election in a plant, store or other appropriate employee unit. An employer may also voluntarily recognize a union when it is satisfied the union represents a majority of employees in the unit. Bargaining rights may also be accorded a union under a bargaining order issued by the Board when it determines that the employer has precluded the holding of a fair election by its serious unfair labor practices.

The union authorization card is the usual means by which a union demonstrates its majority status. The union card contains authorization from an employee to represent him or her with respect to the terms and conditions of employment with a particular employer. The Board requires that a union show support among at least thirty percent of the employees in a unit before it will direct an election.

A union will normally request recognition from an employer when it has obtained authorization cards from a majority of employees in a unit. The union’s recognition request may offer to have an impartial third person — a clergyperson, for example — examine the cards to determine whether the union represents a majority of employees. An employer has the right to refuse a union’s demand for recognition on the basis of a card majority absent commission of independent unfair labor practices. But an employer which agrees to a card check by an impartial

⁷ The Board determines what employee groups — multi-plant, single-plant, departmental, craft and so forth — are appropriate for collective bargaining in the absence of agreement by the employer and union. For purposes of the Act, a labor organization includes any group in which employees participate and which has as one of its purposes dealing with employers concerning conditions of work.

third party or who independently attempts to determine if the union represents a majority by conducting, for example, a poll of employees, will be required to bargain if the results confirm the union's majority status.

III. METHODS OF ORGANIZATION

A. Access, Solicitation and Distribution.

Organization, of course, is carried on through the medium of communication between the union and employees. A campaign usually begins with employees contacting a union to request assistance in organizing or employees responding to leafletting or personal contact from a union organizer. The ensuing campaign is an effort by the union and employee adherents to communicate the advantages of organization to other employees, solicit their signatures on union authorization cards, and seek their support when the Board-conducted election is scheduled. The employer, unsympathetic employees, and often community elements are contemporaneously attempting to communicate their positions.

The Board and courts have developed a set of principles governing access to the employer's property, solicitation, and distribution of union literature which are of primary importance in the campaign.

B. Nonemployee organizers.

Nonemployee union organizers are free to communicate with employees and distribute literature away from the employer's premises. They may do this by calling on employees at their homes or meeting with them at a union hall or other convenient locations. They may solicit and distribute union materials on public property and road right-of-ways adjacent to the employer's premises subject to valid traffic ordinances.

The employer may, however, prohibit distribution of union materials by nonemployees on its premises if two conditions exist. The union must be able to reach employees through other available channels and the employer's prohibition must be enforced equally with respect to solicitation and distribution by other groups and other types of literature.

C. Employees.

Employees engaged in organization for the union have much broader rights than nonemployees to solicit and distribute literature. The employer's enforcement of a rule prohibiting solicitation on company property by employees other than during their working time is considered an unreasonable impediment to self-organization and invalid in the absence of special circumstances required to maintain production and discipline.

A distinction is drawn between oral solicitation and distribution of literature. Thus, the Board requires that the right of employees to solicit on plant premises be subject only to the restriction that solicitation be carried on during nonworking time. Distribution of literature can

be further restricted by the employer to nonworking areas of the plant. Rules which unambiguously embody the foregoing principles are ordinarily presumed by the Board and the courts to be valid. An employer rule which is drafted to conform to the presumption of validity may nevertheless be invalid when adopted with a discriminatory motive or enforced in a discriminatory manner. A rule also will be invalid if its ambiguity may influence employees to curtail their rights to solicit and distribute literature.

Employees are also protected in wearing buttons, T-shirts, and other visual indicia of union support, except when an employer restriction is necessary because of “special conditions” required for maintenance of production or discipline.

The union’s campaign may, of course, also rely on the mail for access to employees during the campaign in addition to leafletting, house calls and phone contacts. Employers are, in fact, required to provide a list of the names and addresses of all employees in the unit to the Board for use by the union within seven days after a Board election is ordered.

D. Organizational Committees.

Generally employee union adherents in the course of an organizing campaign will meet with professional organizers to exchange information and discuss issues that have developed. The loose association of employees meeting for this purpose may be referred to as the “committee” or “in-plant organizing committee.” Occasionally the names of committee members are sent to the employer. Committees vary in size from several employees to several hundred. Their function is to build support for the union. Members may solicit authorization cards from employees. The status of employee committee members may become important in litigation, as, for example, when an employer relies on misconduct of a committee member as the basis for objections in an effort to set aside the results of a Board-conducted election or to contend that the union has committed an unfair labor practice. Generally, the Board holds that members of an organizing committee or employees participating prominently otherwise in the union’s organizing campaign are not agents of the union.

E. Concerted Activity.

Protected concerted activity of employees may play a critical role in union organization. Sometimes spontaneous work stoppages by employees protesting employer action or working conditions will precede the presence of the professional organizer and serve as the genesis of the campaign. Other forms of concerted protest in the course of the campaign may relate to issues important to the employees. Employee action may be protected or unprotected from employer reprisal depending on the circumstances of the protest.

An employer that discharges or otherwise disciplines an employee for engaging in protected concerted activity commits an unfair labor practice under sections 7 and 8 of the Act. The employer will be required to make an employee whole for the violation by reinstatement, back pay and expunging any record of discipline for concerted activity. Protected concerted activities could include, as examples, circulation of petitions, a walkout by employees because of

unfavorable working conditions,⁸ or filing a complaint with respect to working conditions with a state or federal agency.

IV. EMPLOYER UNFAIR LABOR PRACTICES

The union's campaign, demand for recognition, or a petition for a Board-conducted election normally, although not without exception, will meet with strong and active employer opposition. The employer enjoys the right to communicate its views in non-coercive terms. Section 8(c) of the Act confirms that the employer's expression of views, arguments or opinions shall not be evidence of an unfair labor practice, if such expression contains no threat of reprisal or promise of benefit.

Section 8(a) of the Act prohibits certain employer conduct, including conduct that can occur in the course of an organizing campaign, as unfair labor practices. Section 8(a)(1) prohibits employer conduct which "interferes with, restrains or coerces employees in the exercise of" their Section 7 rights. Section 8(a)(3) prohibits discharge or discrimination in employment conditions to discourage union activity. Section 8(a)(4) prohibits discharge or discrimination because an employee has filed charges or given testimony under the Act.

A. Section 8(a)(1) Violations.

The question of when employer speech, particularly in the area of pre-election predictions, becomes coercive is frequently litigated. The authoritative statement of the law is contained in the United States Supreme Court's opinion in NLRB V. Gissel Packing Co., 395 U.S. 575, 618-19 (1969):

An employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a 'threat of reprisal or force or promise of benefit.' He may even make a prediction as to the precise effects he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization. See Textile Workers v. Doughton Mfg. Co., 380 U.S. 263, 274, n. 20, 85 S.Ct. 994, 13 L.Ed 2d 827 (1965). If there is any implication that any employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation

⁸ An employer may fill jobs of employees engaged in a strike with economic objectives with permanent replacements. But the employer must reinstate economic strikers who wish to return to work when they have not been permanently replaced. Permanently replaced strikers are entitled to reinstatement without loss of seniority when positions become available. Employees who are striking because of an employer's unfair labor practices are entitled to immediate reinstatement upon an offer to return to work notwithstanding the employment of permanent replacements.

based on misrepresentation and coercion, and as such without the protection of the First Amendment. We therefore agree with the court below that “[c]onveyance of the employer’s belief, even though sincere, that unionization will or may result in the closing of the plant is not a statement of fact unless, which is most improbable, the eventuality of closing is capable of proof.” 397 F.2d 157, 160. As stated elsewhere, an employer is free only to tell “what he reasonably believes will be the likely economic consequences of unionization that are outside his control,” and not “threats of economic reprisal to be taken solely on his own volition.” NLRB v. River Togs, Inc., 382 F.2d 198, 202 (C.A.2d Cir. 1967).

Other examples of employer conduct that have been found by the Board to violate Section 8(a)(1) of the Act include:

the promulgation, maintenance, or enforcement of an unlawful rule restricting solicitation and literature distribution;

the solicitation, encouragement and assistance to employees in revoking their union authorization cards;

the surveillance or creation of the impression of surveillance of employee union activity;

the interrogation of employees concerning their union activity;

threats to discharge or penalize union adherents;

the abolition of rest periods, restriction of employees to work area and speeding up work to discourage union activity;

threats of bodily harm to a union organizer;

the solicitation and remedying of grievances after the beginning of the union preelection campaign in the absence of a consistent past policy and practice;

the cancellation of scheduled wage increases or withholding other benefits during a preelection union campaign which would have been given employees absent the campaign;

the granting of wage increases or other additional employee benefits during a preelection union campaign unless the employer establishes that the timing of the action was governed by factors other than the pendency of the campaign; and

threats to close or move a plant, take away benefits, or otherwise penalize employees if the union campaign is successful.

B. Section 8(a)(3) and (4) Violations.

Examples of employer conduct found by the Board to violate Sections 8(a)(3) and (4) of the Act include the following:

the discharge, transfer, refusal to transfer, denial of training, promotion, and job assignments, assignment of more onerous work, or withholding benefits from union adherents;

the refusal to hire an applicant or recall an employee from layoff because of the employee's or a relative's union activity;

the discipline of employees for engaging in peaceful work stoppages with economic objectives;

the discharge of employees who have given statements to NLRB investigators;
and

the discharge of an employee who the employer believes has filed a charge with the NLRB.

C. Redress of Employer Violations.

Employer unfair labor practices may have the effect of chilling union activity and support among employees and may negatively impact the environment necessary for an uncoerced expression of employee opinion in Board-conducted elections. Individuals or unions (and employers) are entitled to file unfair labor practice charges for violations of the Act. The authority of the Board to investigate charges of unfair labor practices and issue and prosecute complaints on meritorious charges is mandated by Section 10 of the Act. No complaint may be issued, however, on an unfair labor practice occurring more than six months prior to the filing of a charge.

The Board has some discretion to shape remedies to meet the employer's unfair labor practices. It may order an employer to cease and desist or require an employer to reinstate or make whole injured employees. Charges based on extensive unfair labor practices preventing the conduct of a fair election may entitle the union to an order requiring the employer to recognize it.⁹ The Board may seek temporary injunctive relief in federal court in appropriate cases pending completion of Board proceedings.

The role of unfair labor practice charges in a campaign has been described as follows:

The main thrust of a union in organizing a nonunion shop is to win recognition

⁹ The Board has also ordered company-wide remedies involving union access to plants, posting of notices and other communicative devices (as well as payment of Board and union expenses) in cases involving recidivist violators.

and bargaining, not to win a victory in charges before the NLRB. Sometimes, however, successful charges can stop unlawful conduct that, unchecked, would virtually kill any chance of success in the drive. Moreover, the legal consequences of certain unfair employer conduct can, in some instances, provide useful vehicles for successful unionization.

S. I. Schlossberg & 3. A. Scott, Organizing and the Law 68 (3rd ed. 1983).

The unfair labor practice charge is, therefore, a primary means to redress employer violations of the Act and remedy employer coercive tactics which interfere with a fair employee vote. The successful charge may also build confidence and support among employees by demonstrating the advantages of joining in a common effort to improve conditions in the shop.

V. UNION UNFAIR LABOR PRACTICES

Section 8(b) of the Act prohibits certain union conduct, including conduct that can occur in the course of an organizing campaign, as unfair labor practices. Section 8(b)(1)(A) prohibits union conduct “restraining or coercing employees” in their rights to engage in or refrain from engaging in union or other protected concerted activities. Section 8(b)(2) prohibits a union from causing an employer to discharge or otherwise discriminate against an employee for engaging in or refraining from engaging in protected activity. Section 8(b)(7) prohibits picketing for recognition by a union where, for example, there is another union lawfully recognized by the employer or where there has been a Board-conducted election at the worksite during the last year.

Examples of conduct prohibited under Section 8(b)(1)(A) include:

the threat by a union president to employees organizing an independent union;

the threat by a union to file a lawsuit against an employee or to cause the employee loss of work in reprisal for the employee filing an unfair labor practice charge against the union;

violence and threats of violence against employer supervisors or attorneys in the presence of employees or when employees are aware of such conduct;

the threat of physical harm if employees do not remain away from work during a strike; and

mass picketing or congregating which forcibly blocks entrance of nonstrikers into a plant area.

Upon finding an unfair labor practice violation, the Board may order the union to cease and desist and to make whole employees injured by the proscribed conduct.

VI. RECOGNITION THROUGH ELECTION

A. Petition for Election.

A union seeking to represent employees may file with the Board a petition, on a standard Board form, for a Board-conducted election. The petition must be accompanied by evidence of support of thirty percent of the employees in the bargaining unit, which is usually in the form of union authorization cards.¹⁰

After determining administratively if a union has sufficient support to sustain an election petition, the Board conducts a hearing prior to the election to resolve questions about the conduct of the election and voter eligibility. These questions may concern the composition of the appropriate unit for collective bargaining and the timeliness of the petition.¹¹ For instance, in recent years, there have been significant debates over the proper structuring of bargaining units in health care institutions and universities. A second union may also intervene and have its name included on the ballot with a showing of employee support.

The Board, or the Regional Director, will direct an election based on the evidence at the representation hearing. The parties may agree to stipulate to an election in lieu of a formal hearing and decision by the Board directing an election. Under the Board's blocking charge rule, the Board will not conduct an election where there are unfair labor practice charges pending against the employer unless the union requests the Board to proceed with the election.

The issues at the representation hearing may bear importantly on the success of the union's organizational efforts. The employer and union may attempt to include or exclude individual employees or groups of employees from the unit on the basis of evidence about their duties. These decisions may add to or subtract from the employees eligible to vote which will be reflected ultimately in the union's support during the campaign and at the polls on election day.

Often the supervisory status of particular "working forepersons" as supervisors is litigated at the time of the representation hearing. This is particularly important because employees found to be supervisors lose the protection afforded by Section 8(a)(3) of the Act and are effectively barred from participation in the union campaign. On the other hand, an employee found to be a supervisor is an agent of the employer for whose conduct the employer must take responsibility. A decision on supervisory status at a representation hearing normally will not be relitigated in a subsequent prosecution by the Board of an unfair labor practice complaint.

A supervisor is defined in Section 2(11) of the Act to include employees who have authority:

¹⁰ An employer may also petition for an election when it is faced with a union demand for recognition.

¹¹ Section 9(c) of the Act, for example, limits representation elections (except rerun elections) to one per year in a particular employee unit. A petition filed more than sixty days prior to the expiration of the year will be untimely.

to hire, transfer, suspend, lay off, 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.

B. The Election.

The Board's regional office will make arrangements for an election after it has been ordered or agreed to by the parties. The vote is by secret ballot and generally takes place on the employer's premises during working hours.

The employer and union are permitted to have non-supervisory employee observers who assist the Board agent conducting the election. The union normally will select observers who have broad knowledge of employees voting to enable the individual to challenge ballots of employees who may not be entitled to vote. And, as in any other election, this individual will be the last person associated with the union whom voters will see prior to casting their ballots.

Election observers are permitted to challenge ballots of employees whom they consider ineligible because, for example, the challenged voter is a supervisor or is not employed in the bargaining unit. The challenged ballots are placed in envelopes by the voters and retained unopened by the Board until there is a resolution of the challenge by agreement or in a postelection investigation or hearing. Generally employees on temporary leave of absence or layoff may vote, as may employees on strike at the time of the vote who have not taken permanent employment elsewhere.

The ballots usually are counted by the Board agent immediately following the election and a tally prepared. A union must receive a majority of the valid votes cast in the election to be certified by the Board as bargaining representative of employees in the unit. The union loses the election if there is a tie vote. Provision is made for run-off elections where more than one union is on the ballot and neither receives majority support.

C. After the Election — The Union Wins.

The Board's Regional Director will certify the election results unless objections based on impropriety in conducting the election or objectionable conduct affecting the results of the election are filed within five days by the union or employer.

Employer objections may be based, for example, on union unfair labor practices in violation of Section 8(b)(1)(A) of the Act, misconduct of election observers, or the use in union literature of a Board document altered so as to indicate endorsement by the Board of the union. A new election will be ordered if the employer establishes that the union has engaged in objectionable conduct which has affected the "laboratory conditions" necessary for a free election. Objections are ruled on by the Board after an administrative investigation and, in some circumstances, a hearing if the objections raised material factual issues.

An employer may challenge a certification by refusing to bargain with the union if its objections have been overruled. The refusal to bargain will be the basis of an unfair labor practice complaint against the employer for violation of Section 8(a)(5) of the Act. The United States Court of Appeals of the appropriate circuit will review the Board's ruling on objections, using the substantial evidence standard of judicial review, when the employer petitions for review of the Board's decision in the unfair labor practice proceeding.

The union will be certified by the Board as bargaining representative of the employees if the employer does not file objections to the election or if the employer's objections are considered and overruled. The union will then request the employer to meet to negotiate for an initial contract for the benefit of the employees in the bargaining unit. Typically, an employee negotiating committee is formed, discussions take place on first contract proposals, and preparations are made to begin negotiation with the employer.

D. After the Election - The Union Loses and Files Objections.

If the union loses the Board-conducted election, it has the option to file objections to obtain another election if the employer or others have engaged in conduct the Board considers objectionable. Evidence of objectionable conduct can be coextensive with evidence supporting issuance of an unfair practice complaint against the employer for violation of Section 8(a) of the Act. The objections and unfair labor practice proceedings will ordinarily be consolidated for hearing by an administrative law judge in these circumstances.

In deciding whether to file objections to an election, however, the union must weigh its advantages against waiting for ten months to file a new petition for election.¹² Very often proceedings to resolve objections, particularly where they are based on employer unfair labor practices, will take more than ten months and consume resources which can be used elsewhere. There is another consideration, however. The union going into a second election when the first election has been set aside because of employer misconduct is at a tactical advantage. Sometimes an employer will agree to a second election in settlement of objections and unfair labor practice proceedings.

In General Shoe Corp., 77 NLRB 124, 127 (1948), the Board discussed its responsibility for the proper conduct of elections under the Act. The Board's function is:

to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees. . . [When] the standard drops too low, because of our fault or that of others, the requisite laboratory conditions are not present and the experiment must be conducted over again.

¹² Normally the Board limits its consideration of objections to improper conduct occurring on or after the day the petition for an election was filed.

The party objecting to an election has the burden of showing misconduct and that the misconduct affected the fairness of the election. The ultimate test is whether it reasonably appears from the objective circumstances that employees have been prevented from exercising their free choice. In determining whether there has been sufficient interference with laboratory conditions to set aside an election, less weight is accorded to the conduct of persons who are not agents of the parties than to conduct attributable to the parties.

The Board has several established rules about what conduct will result automatically in a new election upon filing of proper objections. The failure of an employer to supply the Board with a list of names and addresses of employees in the bargaining unit which will be turned over to the union as required in Excelsior Underwear, Inc., 156 NLRB 1236 (1966), will merit a new election. A new election will be ordered where a speech is given to employees assembled on company time within twenty-four hours prior to the time of the scheduled election, or a conversation between employer or union officials and employees waiting to vote in the polling area. Actions by the Board agent conducting the election which preclude employees from voting, indicate partiality, or otherwise disturb the laboratory conditions also may cause an election to be set aside.

Employer unfair labor practices committed after filing an election petition will usually constitute the basis for having an election set aside. These include, as examples, enforcement of unlawful rules restricting union solicitation, surveillance, interrogation of employees, discriminatory discharge of employees, or threats, promises of benefits, and withholding or granting benefits in order to influence the outcome of the election.

VII. COMMUNITY INTERFERENCE

In some election campaigns, conduct by members of the community in which the campaign is occurring creates or helps to create a general atmosphere of fear and confusion which adversely affects the "laboratory conditions" necessary for holding a fair election. The Board may set aside an election in such cases even where the employer or the union might not have been able to prevent the objectionable conduct by members of the community. Where the objections are based upon community conduct, the legal relationship of principal and agent between the company or the union and the community actors need not be proved since it suffices that interference with laboratory conditions takes place – whether by means of the employer or the union, their agents or persons in the community who simply agree with the employer's or the union's side of the campaign. Of course, if the employer or union actively condones, confirms, acquiesces in, ratifies or inadequately disavows objectionable community campaigning, the need for setting aside an election because of community conduct becomes more compelling.

VIII. RECOGNITION WITHOUT AN ELECTION

A union may be entitled to certification as bargaining representative of employees without demonstrating its majority in a Board-conducted election where the employer has precluded a fair election by the commission of unfair labor practices. Certification may be

accorded a union by the Board on this basis when there has been no election or when an election lost by a union is set aside on the basis of timely objections. The United States Supreme Court, in 1969, approved the approach which had been developed by the National Labor Relations Board in this area. The following summary of controlling principles is based on the Court's opinion in NLRB v. Gissel Packing Co., 395 U.S. 575 (1969).

When confronted with a recognition demand based on authorization cards from a majority of employees, an employer may, unless it has knowledge independently of the cards (for example, by a personal poll) that a union enjoys majority support, decline the union's request for recognition and insist on an election. The employer may itself file a petition for an election in these circumstances or require the union to do so.

If, however, the employer commits independent unfair labor practices disruptive of election conditions, the Board may withhold an election or set it aside, and instead issue a bargaining order as a remedy for this violation.

The possibility exists that the Board may impose a bargaining order without regard to a union's majority status in exceptional cases marked by outrageous and pervasive unfair labor practices of such nature that their coercive effects cannot be erased by traditional remedies so a fair election can be conducted. Since 1984, however, the Board has ceased issuing bargaining orders where the union lacks proof of majority support. See Gourmet Foods, 270 NLRB 578 (1984).

The Board does, however, have the authority to issue a bargaining order, in the words of the Court, "in less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes." The Board's authority to issue such an order on a lesser showing of employer misconduct is appropriate where there is also a showing that at one point the union had a majority; in such a case, of course, effectuating ascertainable employee free choice becomes as important a goal as deterring employer misbehavior. In fashioning a remedy in the exercise of its discretion, then, the Board can properly take into consideration the extensiveness of an employer's unfair labor practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future. If the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such an order should issue.

A bargaining order will not issue under this latter theory if the union obtained the cards necessary to demonstrate its majority through material misrepresentations or coercion. However, employees will be bound by the clear language on cards by which a signer designates the union as his or her representative unless the language is deliberately and clearly canceled by a solicitor with words calculated to direct the signer to disregard and forget the language above his or her signature. There is nothing inconsistent in handing an employee a card that authorizes the union to represent him and telling the employee that the card will probably be used first to get an election.

It is unnecessary for a union to demand recognition in order for the Board to impose a bargaining order as a remedy when the evidence shows the union enjoyed the majority support of employees and the employer has committed extensive unfair labor practices tending to undermine the union's strength and impeding the election process.

IX. POSSIBLE LABOR LAW REFORM: THE EMPLOYEE FREE CHOICE ACT

Over the last few years, labor unions and their allies have sought fundamental reforms to the NLRA. The Employee Free Choice Act ("EFCA") was first introduced in Congress in 2003 and passed the House in 2007, though it was defeated in the Senate. Now that President Obama has taken office, and Democrats have a larger majority in the Senate, a vigorous effort to pass EFCA is underway, which has brought the most attention to labor law in years.

EFCA was introduced in identical form in both houses of Congress on March 10, 2009, as Senate Bill 560 and House Bill 1409. In the Senate, the chief sponsor is Senator Kennedy, and he is joined by 39 co-sponsors. In the House, the chief sponsor is George Miller of California, and he is joined by 224 co-sponsors. The current text of the bill is included as a supplement. Whether and in what form EFCA will pass continues to be a subject of frequent debate, and the debate has become even more complicated due to Senator Arlen Specter's recent switch in party affiliation from Republican to Democrat. Provided below is: (i) an overview of EFCA's provisions, as it is currently drafted; (ii) union and employer views regarding each provision; and (iii) a recap of recent political developments that may affect EFCA's passage by Congress.

Two important caveats are in order. First, people in the labor field, including the two authors of this paper, have very divergent opinions concerning the current state of the law and the changes proposed by EFCA. Accordingly, the Employer Positions below are only endorsed by Thomas Farr, and the Union Positions below are only endorsed by Narendra Ghosh. Second, the political process is evolving rapidly, and there are indications that changes to and progress of the bill could occur soon. Thus, the description of the bill and possible changes to it, current as of the drafting of this paper, may be quickly overtaken by events.

X. EFCA PROVISIONS

A. Streamlining Union Certification

Section 2 of EFCA provides employees with the option of using an alternative certification method to elections, which is called "majority sign-up" or "card check." Under this method, a majority of employees demonstrate their support for union representation by signing an authorization card as opposed to voting in an election. This method is presently allowed by the NLRA, provided the employer consents to its use, and has in fact been used in recent years to

form unions at many large corporations. Under EFCA, however, employees would have the choice of which method to use, and employers could not require an election.

Under EFCA, an appropriate bargaining unit of employees would become certified if, upon investigation of a petition, the Board finds that a simple majority of employees have signed authorization cards designating the union to represent them. No election would need to be conducted, and the union would be certified as the representative of employees, giving rise to the employer's obligation to bargain.

Details of how this procedure would operate in practice are not specified in the statute, but are instead left for the Board to determine. The bill directs the Board to develop model authorization card language, which means that the current language being used by unions may or may not suffice. The bill also directs the Board to develop procedures to establish the validity of signed authorization cards. Under current Board procedures, signed authorization cards are valid for at least one year. It is unclear whether EFCA would apply retroactively to allow unionization of a bargaining unit based on a card signed before EFCA became law.

1. Union Position

The current NLRA election process, while perhaps fair in theory, is too slanted in practice towards employers for several reasons, including the following. Under the existing system, an employer can require an election regardless of the support that a union can demonstrate. Once an election has been set by the Board, employers have a practical ability to delay the date of an election by raising legal issues and appeals. During this time, employers have an extreme advantage in being able to campaign against unionization in the workplace, while the union cannot. Employees are subject to posters, emails, and employer-only meetings, often one-on-one, where only the employer's position is presented. Such meetings occur repeatedly, and attendance is required by the employer. Moreover, employees are often subjected to threats or bribes, and union supporters and activists are often subject to spying and retaliation by employers, including termination. Studies indicate that retaliatory discharges occur in 25% of organizing campaigns. Although such practices are prohibited under the Act, sanctions are minor and only imposed after much time, expense, and litigation. Therefore, unlawful acts during an election are routine. See also Subsection C. Because of these practices, coercion and the fear of retaliation destroy support for unionization, and cannot be overcome by the union's campaign outside the workplace.

EFCA's certification procedures would streamline the process for choosing to form a union, allow workers to decide whether to unionize on their own schedule and on their own time, and eliminate the coercion inherent with NLRB elections. The majority sign-up process has been used in other jurisdictions, such as Canada, and been shown to reduce employer coercion of workers without increasing coercion by unions.

2. Employer Position

On the other hand, employers believe that the current NLRA election process is both fair in theory and practice. However, while unions are winning a high percentage of elections that

are actually held, they have been less successful in gaining sufficient support to obtain elections. Thus, unions are attempting to change the rules of the game through EFCA. The aim of EFCA, from employers' point of view, is to make organizing easier, ensure that unions get a first contract and intimidate management from resisting.

Under EFCA, the currently preferred method for determining the level of employee support for unionization – a secret ballot election conducted by the NLRB – will be supplemented by a second mandatory method of unionization (i.e., the “card check”). EFCA will therefore make it easier for unions to organize since it is easier to get an employee to sign an authorization card than it is to get that employee to vote for union representation in a secret ballot election.

B. Facilitating Initial Collective Bargaining Agreements

Section 3 of EFCA provides both parties access to mediation and binding arbitration services to assist in their bargaining efforts, and to guarantee the creation of a first contract. The mediation and arbitration procedures will be overseen by the Federal Mediation and Conciliation Service (FMCS). Either party to the negotiations can request mediation after 90 days of bargaining. If mediation is not successful in producing a mutually agreeable contract after 30 days, the dispute is referred to “an arbitration board” for binding arbitration. The arbitration board’s decision, determining the terms of the collective bargaining agreement, would then be binding for two years, unless the contract is amended by the parties. This process will ensure that employees who choose a union actually achieve a contract.

There are several open questions regarding this procedure: (1) Can the arbitration panel impose a no-strike obligation on the employees, or do the employees retain the right to strike even under the terms determined by the arbitration panel? (2) Does the employer have an ongoing duty to bargain during the 2-year term of the contract implemented by the arbitration panel? (3) Can the arbitration panel impose a union-security proposal obligating employees, in non-right-to-work states, to pay the union for the cost of representation? (4) Can the arbitration panel make mandatory arbitration a provision of the first contract so that future contracts will also be determined by government-appointed arbitrators?

1. Union Position

Even if a union is certified to represent employees, there is no guarantee that employees will obtain benefit of a collective bargaining agreement, which is, of course, the goal of workers seeking union representation. The certification of a union only obligates the union and the employer to meet at reasonable times and to bargain in good faith, but does not impose any requirement to reach an agreement. This system is problematic for two major reasons. First, only 38% of new unions are able to negotiate a first contract within one year, and only 56% ever negotiate a first contract. Thus, the current system of negotiation has a failure rate of 44%.

Second, employers unfairly and unlawfully use the delay and possible futility of the negotiating process allowed by the law to their advantage. Under the Act, if no contract is concluded within one year, the Board will allow an employer to seek to withdraw recognition of

the union. Thus, employers have an incentive to continue to oppose unionization and delay negotiations, so that the failure of collective bargaining wears down workers' resolve, creates a feeling of futility, and marginalizes union supporters. Moreover, the employer's anti-union campaign that started before the election can continue while negotiations drag on. This results in frustration and opposition that can then be used to undermine support for and even eliminate the union. The usual remedy for an employer's unlawful refusal to bargain in good faith is simply to order bargaining to begin again, often years later, which effectively rewards efforts to delay.

Section 3 of EFCA is not intended to substitute for collective bargaining. Rather, its purpose is to reverse the current incentives for failing to reach agreement and, instead, incentivize bargaining. Jurisdictions that have first contract arbitration provisions in their labor laws, such as several Canadian provinces, show that the process successfully leads to resolution of the vast majority of disputes without resort to an arbitration award.

2. Employer Position

Employers understandably believe that Section 3 of EFCA fundamentally and incorrectly changes the NLRA's scope. Under current law, there is no obligation for the employer to reach an agreement with the union if the union's proposals are unacceptable. This would no longer be the case under EFCA. Moreover, EFCA will radically change the timeline for the collective bargaining process. Indeed, in theory, within only 100 days after certification, the parties could no longer be engaged in the give and take of negotiations discussing with each other the merits of their respective positions. Rather, the parties could at this point be required to make their case to an outsider – a mediator – who will try to facilitate a voluntary agreement. Employers believe that the likelihood of this mediation process being successful is greatly reduced by the fact that EFCA allows either party to have their negotiations referred to an “arbitration panel” if after 30 days of mediation there is no voluntary agreement. Because EFCA provides no criteria on which the arbitration panel is to base its decision, as a practical matter, the arbitration panel will be free to impose contract language for any terms not agreed upon by the parties before the negotiations were elevated.

Employers also believe that any statute that allows government-appointed arbitrators to set the terms of a contract between private parties raises very serious constitutional questions, including: (i) whether EFCA violates the constitutional right of both the employer and the union to make their own contract decisions as guided by their respective interests; and (ii) whether EFCA violates due process of law by allowing government appointees to dictate the salaries that private business owners must pay.

C. Strengthening Enforcement

Section 4(a) of EFCA provides for timely injunctive relief against egregious illegal employer conduct. Currently, the NLRA mandates such injunctive relief only for violations of the law that have been committed by unions, but not for those committed by employers. The provision requires mandatory injunctions for significant illegal conduct by an employer when its employees are seeking union representation, including during first contract negotiations. The provision also mandates that any unfair labor practice charge filed during a time when employees

are seeking union representation would be given a priority by the Board for investigation and litigation.

Section 4(b) of EFCA increases the penalties for violations of the NLRA. It provides for triple back pay awards to workers who have been illegally fired during organizing and first contract efforts. Illegal threats, coercion and other intimidation that is committed “willfully or repeatedly” would be subject to fines of up to \$20,000 per infraction. In assessing such civil penalties, the Board is to take into account the gravity of the violation and its impact on the charging party, workers, and the public interest.

1. Union Position

The Board’s enforcement mechanisms are pathetically weak and far too time-consuming to ensure compliance with the Act. First, remedies for violations are limited to requirements to post an NLRB notice, back pay awards, and cease-and-desist orders not enforceable though a Board order. There is no provision for compensatory or punitive damages. Except for posting an NLRB Notice and promising not to violate the law again, there is no other penalty for employers who threaten, spy on, intimidate, interrogate, or coerce their workers. Employees who are illegally discharged are entitled to back pay and reinstatement, but most workers do not return, and the average back pay award is between \$3,000 and \$4,000. There is no remedy to the other workers whose organizing effort has been devastated by the employer’s gross misconduct.

Second, delay is endemic in the current enforcement process. Once a charge of illegal conduct is filed, the Board conducts an investigation and, if it determines reasonable cause exists that a violation has been committed, it issues a complaint. That complaint is litigated before an Administrative Law Judge and is appealable to the Board. Review of the Board’s decision can then be sought from a U.S. Court of Appeals. The labor law violator cannot be compelled to do anything until a court order issues. Altogether, the entire process takes several years. As a result of the long delays and weak resulting remedies, if any, employers have a free hand to intimidate and retaliate against employees when opposing a union. Section 4 of EFCA addresses both problems by increasing penalties to meaningful levels and ensuring the prompt handling and remedy of serious charges.

2. Employer Position

Employers believe that Section 4 of EFCA creates unnecessary and unprecedented remedies that will give unions more incentive to bring and pursue unfair labor practice allegations and will likely result in more frivolous claims designed to create pressure on the employer. Moreover, the increased penalties contained in Section 4(b) will further deter supervisors from openly discussing unions with employees; thereby reducing the likelihood that employees will be able to make a fully informed decision. Furthermore, the increased penalties do not apply to unions, despite the fact that they are the only ones witnessing employees voting by signing a union card.

Employers also believe that Section 4 of EFCA raises serious constitutional questions, including: (i) whether Section 4 violates equal protection insofar that only employers but not

unions may be fined for equivalent misconduct; and (ii) whether Section 4 vitiates the right to a jury trial under the Seventh Amendment if a government bureaucrat can award the equivalent of capped punitive damages.

XI. EFCA'S PROGRESS AND POSSIBLE COMPROMISES

In June 2007, after the House had passed its EFCA bill, the Senate voted 51 to 48 in favor of EFCA. Because 60 votes were needed to invoke cloture, the bill did not pass during the 110th Congress. All Democrats voted for the bill, except Senator Johnson who was not present, and all Republicans voted against the bill, except for Senator Specter, who joined the Democrats in support of EFCA.

When Democrats picked up 8 Senate seats and the Presidency in the 2008 elections, assuming Al Franken is declared the winner in Minnesota, supporters of EFCA counted the 60 votes they needed in the Senate. On March 24, 2009, however, Senator Specter announced that he opposed EFCA and would not vote for cloture. In making this announcement, Specter proposed several reforms he would support in place of EFCA, including: (1) a much quicker timetable for holding elections, specifically within 3 weeks after the union requests one; (2) increased penalties for violations, very similar to those in EFCA § 4(b); (3) a prohibition on an employer holding employees in a “captive audience” speech on unionization unless the union has equal time under identical circumstances; (4) provision of mediation services during first contract negotiations, and (5) procedures to speed up the Board review process.

On April 28, 2009, Senator Specter announced that he was changing his party affiliation from Republican to Democratic. With regard to EFCA, Specter stated that his earlier March 24, 2009 position “will not change.” Whether this is true remains to be seen, particularly since Specter may need organized labor’s support to secure the 2010 Democratic nomination for his Senate seat and President Obama supports the bill.

Unions still believe that the bill can pass in its present form, but efforts to obtain the votes of Senator Specter and other moderates in the Senate may lead to compromises on various EFCA provisions. For instance, Senator Feinstein has proposed a certification procedure whereby workers could sign authorization cards and mail them directly to the Board. Regarding first contract arbitration, a “last, best offer” concept has been proposed, whereby the arbitration board would have to choose between the final offers by the employer and the union instead of crafting its own contract. No doubt, further changes to EFCA may be considered.

CONCLUSION

This paper, as noted, is a necessarily truncated introduction to pre-certification union and employee activity intended for new practitioners not familiar with the Act. Again, such attorneys, when confronted with issues in this area or the many others covered by the Act, are strongly advised to consult with those more familiar with the Act and the Board’s procedures.