NLRB and DOL Step on the Gas: Implications for Employers

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August 4, 2011
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Chill access to counsel and free speech by employers relating to union organizing, bargaining or strikes

Except when outside counsel exclusively counsels employer on lawful speech/action (pure legal advice), outside counsel arrangements to supply information on unions/employees, or to draft, plan, train, or coordinate employer persuasion of employees (relating to union organizing, bargaining or strikes), must be publicly reported to DOL by law firm/employer

Report fees, scope and nature of agreement

Changes 50 years of practice at DOL under LMRDA
PART C – Persuader Agreements/Arrangements with Labor Relations Consultants. Check the box(es) below and complete Part C if you made any agreement or arrangement with a labor relations consultant or other independent contractor or organization pursuant to which such person or organization undertook activities where an object thereof, directly or indirectly, was to:

- Persuade employees to exercise or not to exercise, or as to the manner of exercising, the right to organize and bargain collectively through representatives of their own choosing.
- Furnish you with information concerning activities of employees or of a labor organization in connection with a labor dispute in which you were involved.

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<th>12. Name of person with whom (or through) a separate agreement was made</th>
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<td>Street</td>
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If the address of the consultant or other organization differs from that of the individual with whom the separate agreement was made, click here: [Continuation button]

| 13.a. Date of the agreement or arrangement. (mm/dd/yyyy) | 13.b. Terms and conditions. (Explain in detail; see instructions. Written agreements must be attached.) |

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14. Information regarding activities performed or to be performed by the labor relations consultant pursuant to agreement or arrangement.
14. Information regarding activities performed or to be performed by the labor relations consultant pursuant to agreement or arrangement.

14.a. Nature of activities performed or to be performed by the labor relations consultant pursuant to agreement or arrangement:

**PERSUADER ACTIVITIES:** Select each activity performed or to be performed, if the object thereof was, directly or indirectly, to persuade employees concerning their rights to organize or bargain collectively through representatives of their own choosing, or their right to engage in any protected concerted activity in the workplace:

- Drafting, revising, or providing written materials for presentation, dissemination, or distribution to employees
- Drafting, revising, or providing a speech for presentation to employees
- Drafting, revising, or providing audiovisual or multi-media presentations for presentation, dissemination, or distribution to employees
- Drafting, revising, or providing website content for employees
- Planning or conducting individual or group employee meetings

**INFORMATION SUPPLYING ACTIVITIES:** Select each activity whereby the labor relations consultant supplies you with information concerning the activities of employees or a labor organization in connection with a labor dispute in which you are involved:

- Supplying information obtained from:
  - Research or investigation concerning employees or labor organizations
  - Supervisors or employer representatives
  - Employees, employee representatives, or union meetings
  - Surveillance of employees or union representatives (video, audio, Internet, or in person)

- Other

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<th>14.d. Name of person(s) who performed activities</th>
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Type of Person:  
- Employee of Consultant  
- Independent Contractor  
- Separate Organization

Organization

Position in Organization

Street

City

State

ZIP Code

Telephone

Email Address

If the address of the organization differs from the business address of the person who performed the activities, or if more than one person performed the activities, click here:

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What’s Most Important at the NLRB Today?

- Unions won 335 more elections in 2010 than in 2009—a win rate of 67.6%
- Congress recently funded NLRB and DOL for another fiscal year and both are now stepping up their pro-labor initiatives
- The new NLRB complaint against Boeing and NLRB’s new proposed election rules are highly politicized and clearly were held off until Congress refunded the NLRB
What’s Most Important at the NLRB Today?

- *NLRB v. Boeing* (may a company with a history of strikes at its unionized facility take that history into account and tell the world its motivation when it decides to locate additional work—at no loss of work to the current work force—at a non union facility in a Right to Work state?)

- Litigation up to the U.S. Court of Appeals or U.S. Supreme Court Likely
Plan to Ease Way for Unions
Labor Board Proposes Speeding Up Organizing Votes; Employers, GOP Cry Foul

By Melanie Trottman
And Kris Maher

The National Labor Relations Board Tuesday proposed the most sweeping changes to the federal rules governing union organizing elections since 1947, giving a boost to unions that have long called for the agency to give employers less time to fight representation votes.

The NLRB’s proposals would likely compress the time between a formal call for a vote by workers on whether to join a union, and the election itself. It is the latest in a series of actions by the board and other agencies controlled by the Obama administration appointees that respond to labor leaders’ calls for more union-friendly federal labor policies.

The rules governing organizing are the focus of a power struggle between unions and employers after decades of declining union membership. Only 6.9% of private sector workers belonged to unions in 2010, and just 11.9% of all U.S. workers, according to the Labor Department. In 1983, unions represented 20.1% of all workers.

“This is another not-so-cleverly disguised effort to restrict the ability of employers to express their views during an election campaign,” said Randy Johnson, the U.S. Chamber of Commerce’s senior vice president of labor, immigration and employee benefits.

Some companies say cutting the lead time before an election would make it harder for them to build a case for opposing a union, because union campaigns often begin months earlier without an employer’s knowledge.

Unions failed during the years when Democrats had control of Congress to win passage of a remake of organizing rules. Please turn to page A4
Rulemaking on Representation Elections:

- Public Hearing on July 18-19
- Comments due on August 22 and reply comments due by September 6.
- Balloting could occur 10 to 20 days after a petition is filed.
What’s Most Important at the NLRB Today?

How:
- Electronic filing and service
- Pre-election hearing held in 7 days
- Statements of Position on scope of voting unit and eligibility of voters due at hearing—issues not timely raised are waived
- Hearing closed immediately if only issues involve inclusion of individuals who make up less than 20% of the proposed voting unit
- No post hearing briefs; rapid Regional Director decision and direction of election
- Employer provides “Excelsior List” of voters within 2 days of direction
- Union may waive right to have Excelsior List for 10 days prior to vote
- No right of pre-election appeal to Board; rather, challenged ballots will be impounded at time of election, etc.
- Election occurs within 10 to 20 days of filing of petition
What’s Most Important at the NLRB Today?

- Dissenting Member Hayes wrote: “Make no mistake, the principal purpose for this radical manipulation of our election process is to minimize, or rather, to effectively eviscerate an employer’s legitimate opportunity to express its views about collective bargaining.”
Why Is Member Hayes Correct?

Balance in the NLRA Today:

- Unions may call and visit employees at their homes; employers may not
- Employers may hold paid “captive audience” meetings on employer property
- Unions may not trespass on employer property
Why Is Member Hayes Correct?

The Employers’ Campaign Today:
- Median of 37-38 days after petition
- Up to 42 days in a Stipulated Election
- Up to 60 days or more when unit and eligibility contested (no more than 56 days in 90% of elections)
- 4 or 5 weeks of “captive” meetings
- Postings and/or emails—Did you know—spread progressively throughout campaign for maximum impact
- Letters to home—also spread throughout campaign
- One on one communications—throughout a 5-week campaign
Why Is Member Hayes Correct?

Employer’s Campaign Today—Week 1 Messages on How Companies Succeed and Make Improvements for Employees:

- The union election process
- What to expect from the Company
- What to expect from the Union
- Union promises vs. reality
- The national and local economy today (customize)
- The company’s mission, vision, values, critical success factors (customize)
- How the company can only improve wages, benefits, job security and job satisfaction by satisfying customers and shareholders
Employer’s Campaign Today—Week 1 Messages on How Companies Succeed and Make Improvements for Employees:

- What the Company’s success has meant for employees—current wages and benefits (customize)
- Why unions do not provide jobs, job security or wage/benefit improvements—only the company and the employees as a team do
- Why third parties may undermine our “family spirit” (customize)
- Facts re unions in the Company’s industry—companies out of business with this union (customize)
- Facts re unions in bad economies (customize)
- Vote “No.”
Employer’s Campaign Today—Week 2 Messages—The Truth About Unions:

- Overwhelming majority of American employees today are non-union
- Union may become a wedge between employees and good relations with management
- Why union may not allow good relations with management
- Why union may erode employee work ethic and personal freedom
- Why union is expensive for the company to deal with and may make it less competitive
- How union may interfere with customer relations
Why Is Member Hayes Correct?

Employer’s Campaign Today—Week 2 Messages—The Truth About Unions:

- Why this union may be expensive and restrictive to employees—the Union Constitution and practices (customize)
- Initiation fees (customize)
- Dues (customize)
- Fines and penalties (customize)
- Special assessments (customize)
Why Is Member Hayes Correct?

Employer’s Campaign Today—Week 2 Messages—The Truth About Unions:

- Union authority over members (customize)
- Strike rules (customize)
- Salaries paid to this union’s officers (customize)
- Unfair labor practice charges against this union (customize)
- What a union can and cannot do
- Employment laws protect employees today
- Vote “No”
Why Is Member Hayes Correct?

Employer’s Campaign Today—Week 3 Messages-How Collective Bargaining Works:

- What is good faith bargaining?
- Why current wages and benefits may go up, down, or remain the same
- Why it is legal for the company to engage in “hard” bargaining and to say “No”
- Why all of this takes time
- Why the union’s campaign promises may not come true
Why Is Member Hayes Correct?

Employer’s Campaign Today—Week 3 Messages-
How Collective Bargaining Works:

- How bargaining could lead to a strike
- History of union’s bargaining results and strikes in this industry (customize)
- Why the company must remain competitive with non-union and foreign competitors (customize)
- Vote “No”
Why Is Member Hayes Correct?

Employer Campaign Today—Week 4 Messages—The Facts About Strikes:

- How this union calls a strike (customize)
- Loss of wages, benefits and unemployment compensation (customize)
- Union fines of crossovers (customize)
- This union’s rights in a strike (customize)
- Possible secondary picketing
- Possible loss of customers (customize)
Why Is Member Hayes Correct?

Employer Campaign Today—Week 4 Messages—The Facts About Strikes:

- Possible violence
- History of violence by this union (customize)
- The Company’s rights in a strike—prosecution of lawbreakers
- Length of strikes by this union—and results (customize)
- Vote “No”
Why Is Member Hayes Correct?

Employer Campaign Today—Week 5 Messages—Reprise on How Company Succeeds to Improve Wages, Benefits, Job Security and Job Satisfaction:

- Dinner, lunch, breakfast or cook out with employees and spouses
- High level, positive sounding summary and wrap up from CEO, Pres. or General Manager
- Importance of voting
- Vote “No”
Why Is Member Hayes Correct?

In sum, today messages are reinforced over 4 or 5 weeks in various mediums:

- Paid “captive” meetings
- Progressive postings and/or emails
- Progressive letters to the home
- Relaxed one on one communications
- Time for employees to question and absorb messages
- Builds good will
Why Is Member Hayes Correct?

What Might Happen in 10 days—a possible scenario for an employer caught by surprise:

- Find notice of petition in email or office—time?
- Focus on what it means—time?
- Think about hiring a law firm to help—time?
- Seek advice on which law firm to help—time?
- Interview more than one law firm—time?
- Learn that new DOL persuader rules require company and law firm reporting to DOL re nature and cost of representation—time?
Why Is Member Hayes Correct?

What Might Happen in 10 days—a possible scenario for employer:

- Ponder whether Company wants to assume the obligation of public reporting of its activity—time?
- If it still wants a law firm, ponders which one to retain—time?
- Ponders engagement letter and legal fees estimated by law firm—time?
- Ponders retaining a non-lawyer persuader instead—time?
- Perhaps interviews and retains a non-lawyer persuader—time?
Why Is Member Hayes Correct?

What Might Happen in 10 days—a possible scenario for employer:

- Probably retains a law firm, and perhaps a persuader as well—time?
- Raises with law firm the merits of contesting authenticity of signatures on union authorization cards—time?
- Perhaps insists on contesting union authorization cards and spends time on this
- Ponders with law firm whether eligibility of proposed voters should be contested—time?
- Ponders with law firm whether there is appropriate community of interest among proposed voting unit—time?
Why Is Member Hayes Correct?

What Might Happen in 10 days—a possible scenario for employer:

- If proposed unit is contestable, collaborates with a lawyer engaged full time in drafting a Statement of Position for filing within 7 days of petition—employer time?
- Sits through legal training on campaign rules
- Ponders and debates with lawyer and/or persuader the right messages for a 10 to 20 day campaign—time?
- Collaborates in drafting PowerPoint messages, letters to home, postings, emails—time?
Why Is Member Hayes Correct?

What Might Happen in 10 days—a possible scenario for employer:

- Deliberates with lawyer and/or persuader and changes content of messages drafted—time?
- Deliberates with lawyer on whether and how to communicate with “lead persons,” “team leaders” or other possible “supervisors” who may be included among voting unit under NLRB’s truncated unit hearing process—time?
- If voting unit is not stipulated, attends NLRB hearing as witness—one day at least
Why Is Member Hayes Correct?

What Might Happen in 10 days—a possible scenario for employer:

- Concentrates upon running the business, day to day operations, phone calls, emails, meetings with customers and investors, etc.
- Tries to stay calm, cool and collected
- Whoops, election day arrives! Where did the time go? Campaign not yet begun—the same impact as if card check were the process
On the other hand:

- If employer rushes actions, messages and meetings without full deliberation and planning with an attorney—flagrant legal violations may occur, and a Gissel bargaining order (based on U.S Sup Ct. precedent) may result, even if union loses
What’s Most Important at the NLRB Today?

- Specialty Healthcare Case, 356 NLRB No. 56 (will the NLRB say that narrowly-defined union organizing units are permitted among any group of employees who do the same job—such as poker dealers only or city drivers only?)
What’s Most Important at the NLRB Today?

- Roundy’s Inc. Case, 356 NLRB No. 27 (will the union be allowed access to an employer’s property if the Salvation Army, Boy Scouts and Girl Scouts, etc. have access? When is there discrimination against the union? And what’s this mean for email communications about the union?)
What’s Most Important at the NLRB Today?

- New Star General Contractors Case, 356 NLRB No. 88 (the union may display large “banners” at your customer’s location about a “labor dispute” with you—is this legalized secondary picketing of your customers by another name?)
What’s Most Important at the NLRB Today?

- Master Direct TV Case, 356 NLRB No. 110 (threats of violence by pro-union employees during union representation election campaign were found to be no basis to overturn the union’s narrow—14 to 12—win)
What’s Most Important at the NLRB Today?

What else?

- Imposition of default language on employers in settlement agreements
- Increased use of section 10 (j)
- Posting of NRLB rights by all employers
- Expanded view of solicitation of grievances by employers (in the Mandalay Bay case)
- Expanded allowance of union insignias on company uniforms (in the Stabilius, Inc. case)
- And electronic voting?
Recommendations For Senior Management On Maintaining Non-Union Status

- Do you want to risk that nothing will change?
- When will the other shoe drop and what should you be doing now?
- “An ounce of prevention is worth a pound of cure”
Recommendations For Senior Management On Maintaining Non-Union Status

Question:

- What is the cornerstone of non-union status?

Answer:

- Business success that is shared with every employee incrementally over time, and simple fairness and respect.

To Elaborate:

- Every employee wants to know - what’s in it for me and my family?
- Employees must feel they have a stake in the company’s success and understand their roles.
- Must trust their roles will be recognized and rewarded.
- Simple fairness and respect - from senior management to local supervisors - is also critical.

We offer 15 recommendations to support these objectives.
1. Create An Employee-Oriented Vision For Company Success:
   • Communicate Consistently
     a) The reasons that nonunion status is the best way for the company to become the most successful company at satisfying customers and growing profits
     b) How the companies that are most successful in satisfying customers and growing profits are able, over time, to have the best jobs, wages, benefits, job security and job satisfaction, and
     c) How this employer is delivering on this vision of success for the company and for each individual employee, year after year
Recommendations For Senior Management On Maintaining Non-Union Status

2. Focus Relentlessly On The Vision By Communicating To Employees The Importance Of The Employees’ Stake In Customer Service, Profitable Revenue Growth, Cost Control And Yield

- Do not underestimate the importance of employees’ appreciation of their stake in a successful business and what must be done to achieve success
3. Hold Semiannual Senior Management Meetings With All Employees At Every Location Concerning Progress Towards This Vision And About Business Success:

- Report to employees and answer questions about the specific business progress of the company, business problems that must be addressed for success, improvements for employees – tie discussion to company vision and focus areas
- If needed, from time to time, address positives of nonunion status, the disadvantages of unionization, and the meaning of signing a union authorization card
- During one meeting a year, show detail on incremental wage and benefit improvements year after year due to success
Recommendations For Senior Management On Maintaining Non-Union Status

4. Prepare Materials And Train Dedicated Management Communicators Now For Times Of Union Organizing Activity
   - Prepare now legally defensible Pre-petition PowerPoints and speaking materials for pre-petition communications with employees
   - Train now on legal rules and how to use communications materials
   - Have trained, dedicated communicators ready to travel to imperiled facility on short notice and “live there” to communicate in a pre-petition campaign the reasons union is not in best interest of company or employees--address meaning of signing union authorization card (if petition for representation not yet filed), positive progress of company toward employee-oriented vision and business objectives, and disadvantages of unionization
   - Prepare now legally defensible Election Campaign PowerPoints and communication materials for a 10 to 20 day campaign (types of materials discussed previously) and train now on how to use these materials

Consult With Counsel on All of These Tasks
5. **Train All Supervisors Now Concerning Union Organizing And Best Supervisory Practices To Prevent Employee Interest In Unions**

- Why employees join unions
- Company’s position on unions- why company doesn’t want a union
- Election process and union organizing tactics
- Management actions prohibited by labor laws
- TIPS and more -- no-solicitation, no-distribution, and no-trespassing rules
- How to communicate about unions
- Signs of union organizing and card signing
- Importance of fairness and completely consistent enforcement of company policies and rules
- Positive Employee Relations Practices—Four Steps to Building “Family Spirit”: Building employee identification with company; Recognition of employees, Communications with employees, and Careful management of local working conditions

**Consult With Counsel Concerning This Training**
6. Establish A Formal Process For Performance Reviews Of Supervisors And For Retraining

- Human beings do not improve without feedback
- Formalize the process
- Harmful if not constructed carefully and treated seriously
- To support the process, mandate retraining of supervisors (one by one or in groups)
Recommendations For Senior Management On Maintaining Non-Union Status

7. Perform Annual Union Vulnerability Assessments
   • Select and train ombudspersons among current managers (no new hires necessary) to interview all employees individually at each location at least once a year
   • Ombudsperson must file written reports and recommend action items to senior management concerning: local employee morale and relations with management; and safety, equipment and facility conditions;
   • COO/Senior Management must approve actions recommended and hold field management accountable during monthly one-hour conference call with top field management;
   • Avoid turning process into illegal witch hunt and violating NLRA
   • Mini-assessment with field management only can be made part of supervisor training discussed previously—such training and mini-assessment can be completed in 4 or 5 hours at local facility

Consult With Counsel Before Establishing An Assessment Process
8. Require HR And/OR Legal Review And Advice On Every Final Warning/Suspension/Discharge Decision

- Builds employee morale and prevents interest in union organizing
- Standard list of questions for the local manager to answer each time
- When local manager does homework in advance, counseling goes smoothly and quickly
- Pays Enormous dividends

Counsel Can Help Even A Small Company To Devise A Simple Review Process
9. Establish Peer Review Boards For Approval Of Suspension/Discharge/Seniority Date Decisions
   • Not a union grievance process – will not cause employers to start to “think union.”
   • Will cause them to think company is taking every step to manage employees’ livelihoods fairly and will build trust that a union is not necessary.
   • Pays enormous dividends in the fairness and trust department.

Very Simple, Effective Processes Can Be Designed For You By Counsel
10. Establish Open Doors To Management At All Levels For Suggestions And For Rapid Resolution Of Complaints

- Most non-union companies claim to have an “open door” policy, but not all take all of these steps:
  - Open the doors at all levels, including your own
  - If you are too small for peer review boards, publish your open door policy and ensure it works
  - Ok to suggest discussions with immediate supervisor first, but do not mandate that this must occur in every case
  - Ok to skip levels or to bring it to the top
  - Ensure a response within a pre-established number of days
  - Make sure the process works as advertised
11. Forma, Written Communication Mediums

- Our previous recommendations all require good communication processes and skills
- Research on communication shows repetition of communication is helpful to the process – saying the same thing in more than one medium helps everyone to get the point and know you mean what you say
- Letters, emails, magazines, newsletters, newspapers all help management to reinforce key messages
- Use also for employee recognition and teambuilding: stories about employees, pictures of families and outings, employee milestones (birthdays, years of service, children’s graduation, photos, etc.)
- Help build “family spirit”
12. **Annual Benchmarking Of Wages And Benefits**

- Accurate information essential
- Don’t violate the antitrust laws
- Find legal ways through appropriate surveys and human resource organizations
Recommendations For Senior Management On Maintaining Non-Union Status

13. Employees Handbooks And/Or Written Policies At A Minimum, Cover The Following:

- Spell out a preference for union-free operations
- Procedures to ensure diversity in the workplace
- Fair and progressive discipline
- Management of absenteeism
- Probationary periods of employment
- Promotions/transfers
- Seniority (if desired)
- Solicitation/Distribution on company property

These Books Do Not Undermine Company “Flexibility” But Collective Bargaining Agreements Often Do

Consult Counsel In Preparation
14. Orientation Meetings For All New Employees

- For hourly employees
- For new management
- Discuss reasons a union is not in the long term interests of the company or employees
- No exceptions to orientation process
15. Mandate Periodic Meetings Between Facility Managers And Their Employees To Communicate Specific Messages From Senior Management And To Take Questions And Comments To Send Back To Senior Management

- Needed by senior management to communicate without traveling on site, using email or letters, or a formal communication medium.
- May want the facility manager to read a key message from senior management and take questions
- May want to communicate key messages in short pre work communication sessions
- Essential for facility manager to report key questions and comments to senior management - may prompt follow up communication or action.
THANK YOU

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