

## With Or Without EFCA, Labor Reform Is Coming

### *Reconfigured NLRB Next Significant Employer Challenge*

By Steve Bernstein (Tampa)

The Employee Free Choice Act continues to languish amid partisan squabbles in Washington, which means that its controversial elements such as card check and mandatory interest arbitration are unlikely to see the light of day this year. But as the discourse continues on Capitol Hill, attention is now shifting to the anticipated composition of the National Labor Relations Board (NLRB), which is responsible for administering national labor policy pursuant to the National Labor Relations Act.

Although three of its seats have lain vacant for close to two years now, the NLRB is on the verge of being reconstituted into an agency with the means to impose a sea change in the legal landscape. Indeed, union officials have been looking forward to this moment for some time. So before you breathe a sigh of relief, you may want to consider what lies in waiting, even in the absence of the Employee Free Choice Act. Leaders of the labor movement are already setting their sights on prospects for sweeping reform through agency rulemaking rather than legislative action, and that is where the next round of battles is likely to be fought.

#### **The Volatile Nature Of The Board**

The NLRB is primarily responsible for the oversight of representation elections and adjudication of unfair labor practice charges. Over the past 75 years, it has periodically gone through moderate shifts in agency doctrine, depending upon the ideology of the incumbent administration. It is comprised of five members, appointed by the President to serve five-year terms. Traditionally, two of those members arrive with management backgrounds, while two more are aligned with organized labor. The fifth seat controls the decisive swing vote, and may hale from either side as the President sees fit.

The NLRB is presently comprised of Board Chairperson Wilma Liebman, who often served as a dissenting vote and outspoken critic of decisions previously issued by the Bush-era Board. Before assuming member status, Liebman served as legal counsel to the Teamsters union. She is currently joined by Peter Schaumber, a Republican appointed by President Bush. In recent months, President Obama has moved to fill the remaining vacancies with a complement of nominees who carry a distinctively pro-labor flavor. Among the potential members are SEIU counsel Craig Becker and union-side attorney Mark Pearce. Becker in particular has drawn the ire of employers for his expressed aversion to



so-called captive audience meetings and an insistence upon “equal access” for unions. Once confirmed, the nominees would presumably unite with Chairperson Liebman to form a formidable pro-labor majority bloc.

As soon as that happens, the Board is expected to set its sights on reversing a number of decisions issued under the preceding administration. Many “high-priority” targets for this trio are likely to derive from a string of narrow decisions issued in late 2007, during the closing weeks of former Chairman Battista’s term. Recent decisions allowing employers to prohibit use of company email for campaign

purposes, creating an early window for employees to file decertification petitions, and disqualifying union “salts” from eligibility for reinstatement, are likely to be overturned.

Other concerns surround fundamental employer rights that are now endangered, including the right to counsel non-union employees outside the presence of representatives, excluding temporary workers and front-line supervisors from bargaining units, and even the long-standing entitlement to permanently replace economic strikers.

#### **Rulemaking Versus Case Decisions**

The Board usually brings about policy change through case decisions – decisions which can be appealed in federal court. Although the NLRB has traditionally frowned upon administrative rule-making as a means for advancing shifts in ideological doctrine, many anticipate that an Obama

board will not shy away from using this as means for reform. The Board might choose this route to effectuate changes ranging from abbreviating the 42-day “campaign period” between representation petition and election that has been in place since 1996, to marginalizing the free-speech rights of employers during the campaign period.

Down the road, President Obama will also have an opportunity to choose the successor to NLRB General Counsel Ron Meisburg, whose term expires in August, 2010. This may turn out to be just as significant, as the General Counsel has ultimate authority to decide whether to prosecute unfair labor practice charges, issue complaints, and seek authorization to pursue temporary injunctive relief in the federal courts.

The General Counsel also has discretion to pursue what has long been referred to as the “industrial death penalty,” the Gissel bargaining order. Bargaining orders have rarely been issued in recent years. Unions are expected to begin seeking such orders routinely in an effort to compel employers to recognize them in the presence of violations that threaten to

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# Top Five Reasons You Can't Blame Employees For Joining A Union

By Matt Simpson (Atlanta) and Michael S. Mitchell (New Orleans)

We all know that union membership has been on the decline for decades. But with a new administration in the White House, and Democrat majorities in the House and Senate, employers should expect significant labor law reforms and dramatically different enforcement strategies that will make it easier for labor unions to organize employees. In fact, hopeful labor leaders proclaim that the expected changes could add up to 1.5 million new members per year for the next 15 years.

With the seemingly inevitable surge in union organizing upcoming, many businesses have already begun to point fingers at politicians, unions, and employees. Few stop to remember that the primary reason an employee joins a union is because of the employer's bad practices.

Historically, unions are most successful where employers send the message that they "don't care" about their employees. Allowing employees to work in unsafe conditions, not addressing or resolving employee concerns, showing favoritism, and making employment decisions that are perceived as unfair can leave your company susceptible to an organizing campaign.

With that in mind, let's take a look at why employees join unions, and what you might do to convince them otherwise. There are lots of reasons. Here are five that we see most often.

## Reason Number 5: Ignoring employee complaints

You don't like to be ignored. Neither do your employees. When you overlook employee complaints, and especially claims of discrimination and payroll concerns, or fail to resolve them quickly and efficiently, resentment grows. Give employees orders without explanations, or ask them to perform jobs that they are not suited to do, and they begin to feel more like a number, as opposed to a valuable member of a productive team.

Unions know this. Indeed, one of the key promises made in every union campaign is to provide employees a "stronger voice on the job." To the underappreciated employee, this can be an attractive selling point.

You need an effective complaint-handling system – one that gives you employee feedback on a regular basis. Periodic group meetings and mini-surveys are good places to start. That way, if a union starts promising your employees a "voice" in the workplace, they'll understand that they already have opportunities to be heard, and they'll more likely conclude that they don't need to pay a union representative for that privilege.

And keep this in mind: if you shut down employee complaints, you're not getting the benefit of their ideas and suggestions either.

## Reason Number 4: Lack of respect

It goes without saying that, just as employees do not like being ignored, they also do not like being disrespected. Disciplining employees in front of others, assigning blame before reviewing the facts, and generally playing favorites are all factors that can cause employees to feel disrespected, and turn to a union for help.

To counter this, ensure that your supervisors are well-trained on effectively communicating with employees, especially about sensitive subjects like discipline or job performance. Helping managers become better leaders and advocates for their employees makes the managers better "caretakers" of employees and reduces employee vulnerability to the traditional union sales pitch.

Actually, the Golden Rule about treating others the way you'd like to be treated, is a pretty good business model for your supervisors to follow with their employees.

## Reason Number 3: Lack of concern about safety

Employees expect to work in a safe environment. They expect safety training, appropriate equipment, and clear guidelines and procedures for responding to and reporting workplace accidents. Too often, employers fail to meet these basic expectations. Not only does this leave your organization susceptible to potential OSHA citations, it also opens the door to a union-organizing campaign.

Workplace safety has historically been a focal point for unions. Unions promote themselves as being able to secure more safety training, resulting in fewer workplace accidents. They advertise that they are able to walk employees through the sometimes complicated workers' compensation procedures.

Employers who address safety issues early on are therefore better suited to counter the inevitable union promise to create a "safer" workplace. This begins with management and supervisor safety training. Remember, safety is not simply a book of rules and regulations, but a culture of smart behavior that needs to be encouraged from the top down. Employers who actively promote a safe work environment will not only find that they are well prepared for a union campaign, but also that they have protected themselves from costly OSHA citations, and created a more productive business environment.

## Reason Number 2: Non-competitive pay and benefits

The bottom line in an organizing drive often comes down to wages and benefits. Unions argue consistently that representation leads to higher wages, better health care, and a secure retirement. The "union advantage," employees are told, will put more money in their pockets.

That's not necessarily true, of course, and in fact it's sometimes the reverse. But perception can become reality and if your employees believe that your organization is easily capable of providing more but just chooses not to, they are easy union targets.

Employers who provide fair and competitive wages and benefits are less susceptible to this argument. Employees talk to their friends and neighbors at competing businesses and learn quickly if they are being paid less than others. To the extent that employees feel they are earning less, they will be more likely to believe that the union can get them more.

Participate in wage-benefit surveys where you can and make sure you are competitive in your industry and your location. If your position in the community is not at the top of the scale, be prepared to explain why, including the trade-offs of the other non-monetary advantages of working at your company, which employees may not always focus on. The more honest you are with your employees the more likely they are to believe you when you explain that a union is not the answer to their concerns.

## The Number One Reason You Can't Blame Employees for Joining a Union: Favoritism

As should be obvious by now, the number one reason employees join a union is because they feel their employer is treating them "unfairly." That can mean lots of different things, but nowhere is it more evident than when an employer takes inconsistent disciplinary action. Where employees feel that they have been subjected to discipline which they did not deserve, or did not expect, or that another employee got a break that they did not, union organizing may not be far off.

The solution here is a simple one: establish clear policies and regulations and follow them. Too often, employers satisfy the first step, but fail to meet the second. You also need to train and update managers

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## Real World HR

*With this issue we'll be inaugurating a new column; a series of articles appearing monthly on employee-relations topics that we feel employers will find immediately useful. Some will be nuts-and-bolts practical. Others will be more philosophical, touching on the nature of what we really mean by "human resources" and "employee relations."*

*All, we hope, will provide you with food for thought and live up to our firm's long-standing motto: "Solutions at Work."*

*Our initial article starts at the very beginning of an individual's employment. After the screening, after the testing, after the interviewing, comes that coveted job offer. But then what?*

## In Praise Of . . . Orientation?

By John McLachlan (San Francisco)

Faced with an article on new employee orientation, the reader may have one or more of the following thoughts: "Has this writer read a newspaper in the last year? Isn't he aware that nobody in America is hiring? In fact, we're not even sure if we won't need to have more layoffs just to get through this economic whirlpool. Any article about new employee orientation is grossly premature and impossibly out of touch with reality."

While consideration of a process to optimally introduce new employees to the company may be swimming upstream just a little, consideration of a carefully-crafted orientation program is not at all out of place. For one thing, it's easier to think about this subject when new employees are not flowing through the doors in large numbers. For another, orientation programs which communicate to new employees the values, beliefs, culture and history of the employer are and will be more important than ever as expectations increase, as they must, in the "new economy" in which employers as well as employees are going to have to achieve more with fewer resources.

A thoughtful introduction to the company is essential if you believe there is any correlation between employee commitment and company performance. We strongly believe that there is a very high correlation between employee involvement and company achievement. We also believe that a well-structured orientation program is an effective and very necessary first step in taking your company out of the low-hanging-fruit category for union organizers, in a rapidly changing environment where management will very likely have much less time to oppose union marketing efforts than it had in the past.

### Starting On The Right Foot

It's true that employee orientation does not have any slick, new-age moniker which makes it sound like it's a new idea or somehow smarter and more relevant than it was in the past. It's also true that the concept has been around for a long time and is not particularly helpful to consultant marketing or branding initiatives. But if you think about it, a careful introduction to your company just makes sense.

In almost every case, new employees know very little about the company – they probably know next to nothing about the company's history or its key accomplishments. They have no idea about their co-workers, about their supervisors, about top management, about

their job responsibilities, your expectations, how you measure contribution, or what is really important to the company. Orientation is your chance to tell them what you really, really want them to know and understand about the company. There will never be a better opportunity to shape impressions and expectations than you have at the beginning of employment. In our experience too many employers don't even recognize the opportunities that are slipping through their fingers because they are too busy focusing on the tyranny of the schedule and the everyday grind.

There is one additional and inevitable benefit in addition to all those mentioned above: The fact that you take the time to inform the new employee about the company sends an inescapable message to that new employee. "YOU'RE IMPORTANT." This is never a bad message to send to anyone, whether a new or a long-term employee.

Alternatively, management can opt not to take the time to communicate its pride in the company and its accomplishments, it can save the time and let someone else conduct the orientation. And don't fool yourself, new employees **will** receive an orientation, whether you provide one or not. They will and must form impressions about the company. When you abdicate your responsibility for a careful introduction, you just can't be sure what the orientation will be. If you don't provide it, a disgruntled employee who has no use for the company or its objectives or culture may fill in the void. Or if a disgruntled employee doesn't "assist" in the orientation, you may leave the employees on their own to make uninformed guesses about what is important to know about the company.

So you must decide what kind of orientation your new employees will receive.

### Some Fundamental Concepts

If you accept our claim that new employee orientation programs are truly important, here are some elements a well-designed program should include.

Initially we think orientation should extend over more than one day. Saying this does not imply that orientation needs to be an interminable slog which must be entirely completed before an employee starts to do any productive work. We do believe that orientation activities should be intermixed with all of the other necessary elements of someone starting at ground zero and progressing to reasonable productivity.

Periodic questionnaires or mini-surveys during the first weeks of the orientation should also be considered to provide feedback about each new employee's view of the effectiveness of the orientation. Responses to these questions will also provide the opportunity to reinforce points which may not have been effectively communicated the first time.

Typically, employers have a secretary, payroll clerk or the junior human resources person sit down with the new employee(s) and get all the necessary paperwork signed which includes W-4s, insurance forms, etc., and put the employee to work. If this is your orientation program, it is neither adequate or effective. While the orientation period should last more than one day, and will necessarily involve the completion of all required paperwork, it needs to include much more.

We believe that an effective orientation program should, among other items, include the opportunity for the new employee to be exposed to managers at all levels of the organization, as well as provide an explanation of company expectations, opportunities for advancement, introductions to co-workers and to the operations both in front and behind the employee's work department so the new employee understands how the job interacts with those both up and down stream. A thorough safety briefing is also essential. Obviously it is in the company's interest that all employees work safely and go home at the end of the day in the same condition as they came to work in the morning. Additionally a safety mentality sends the message to the new as well as to old employees that the company really cares about them, which is never a bad impression to leave with an employee.

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undermine the possibility of a fair election – effectively conducting an end run around more conventional Board procedures.

### What Lies Ahead?

The rhetoric coming from organized labor sounds an ominous tone. As SEIU General Counsel Brent Garren has stated, “The labor movement will maximize whatever opportunities we have under the law to represent workers and their interests.” Added Steelworkers Director of Rapid Response Tim Waters, “If there’s a way for workers to petition the board for relief, no stone is going to be left unturned.”

For those employers who are invested in lawfully preserving their union-free status, the window of opportunity is rapidly closing. Don’t get lulled into a false sense of complacency merely because talk of card check, binding arbitration and other EFCA provisions has died down for the time being. Now is the time to train your supervisors and managers to operate in a new playing field, dominated by a reinvented agency with an unprecedented mission – to turn the tide for organized labor.

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and supervisors on employment policies, and make sure that they are being implemented effectively and consistently.

To sum it up: a good pro-employee management style is also a good way to stay union free. Employers that take this approach will: 1) prove to employees that their employer cares about them; 2) improve working conditions before the threat of union organizing arises; 3) detect issues that could be exploited by unions; and 4) provide an established mechanism for implementing pro-employee practices and responding credibly to any imminent organizing threat.

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## Real World HR

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Some employers with unionized workforces don’t bother communicating the company’s strengths because all of the employees are covered by a collective bargaining agreement and the employer is obligated to deal with the union. An excellent introduction to the company is useful in every case because union-represented workers are not automatons. It is not violation of any labor law if they choose to work productively and use their brains as well as their physical skills to accomplish the company’s goals. No provision of the National Labor Relations Act mandates that an employer abdicate its responsibilities to effectively manage, inspire and motivate union-represented employees as well as those who are not represented by a union. There will be no excuse or slack for the employer who does not maximize each and every resource available to her in the new global economy.

We believe so strongly in the importance of an employer’s communicating what makes each company unique, that we do not advise limiting employee-orientation efforts only to new employees. Messages about the company’s history, why it believes in itself, its culture and value systems should be communicated regularly to employees, even those who are no longer new to the company; and this is particularly so if there has been no prior effective orientation program in effect. So, effective employee orientation need not necessarily be restricted to employees who first walk in the door, although it should always be used for each of them from this point forward.

For advice and help in making your orientation program more comprehensive and more effective, contact your regular Fisher & Phillips lawyer.

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