The National Gay and Lesbian Task Force (www.thetaskforce.org/issues/transgender)

The Transgender Law Center (www.transgenderlawcenter.org)

The Transgender Law and Policy Institute (www.transgenderlaw.org)

Workplace Gender Transition Guidelines at Ernst & Young (available online at http://www.hrc.org/documents/Sample-Gender-Transition-Guidelines-Earnst-Young.pdf)

III. Neutrality Agreements: What's So Bad About Employers Being Neutral?

Peter D. Nussbaum*

Nothing in the National Labor Relations Act requires an employer to oppose efforts by a union that is seeking to organize its employees; and nothing in the Act prevents an employer from voluntarily recognizing a union that represents a majority of its employees. In recent years, however, the National Labor Relations Board and its General Counsel have taken steps that may discourage neutrality agreements between employers and unions as well as voluntary recognition by employers.

Pursuant to the Act, employees have the right to self-organization and to form and join labor unions.[1] Employers are entitled to express their views as to whether their employees should join a union, as long as the expression of those views does not contain a threat of reprisal or force or a promise of benefit.[2] If an employer's speech crosses that line, it constitutes an unfair labor practice.[3] Of course, employers are free to remain neutral during union organizing drives and, in recent years, unions have increasingly sought to obtain written neutrality agreements from employers.

Neutrality agreements can do more than set limits on what an employer will do and say during an organizing campaign. The agreements frequently contain detailed rules about both employer *and* union activities during such campaigns, and establish a pro-

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[1]29 U.S.C. §157.
[2]29 U.S.C. §158(c).
[3]29 U.S.C. §158(a)(1).

cess for recognition by the employer of the union as the exclusive bargaining representative for all or some of its employees.[4]

Supreme Court and Board precedent make it clear that the Act permits an employer to recognize a union as an exclusive bargaining representative voluntarily upon proof of majority employee support, and without the necessity of a Board-supervised election.[5] Indeed, an employer's ability to recognize a union by non-election procedures derives directly from the language of the Act, which in no way limits the method of selecting a representative. Section 9(a) refers to "[r]epresentatives *designated or selected* for the purposes of collective bargaining by the majority of the employees."[6] So-called "card-check" procedures have long been approved by the Board and courts as an appropriate mechanism for determining majority support prior to granting voluntary recognition.[7] In addition to being grounded in the statutory text, voluntary recognition effectuates the policies of free employee choice, stability of labor relations, and voluntary resolution of labor-management disputes, that are central to the Act.[8]

In recent years, primarily at the urgings of the National Right to Work Legal Foundation, the Board and its General Counsel have taken a number of steps that could undermine efforts by unions and employers to enter into neutrality/voluntary recognition agreements. Although some of those efforts do not challenge such agreements head-on, they nonetheless raise issues that could be decided in a manner that would make such agreements less likely in the future. Although several of these efforts have not been successful, a number of significant cases are currently pending before the Board and will probably be decided in the near future:

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[4]Neutrality agreements often have arbitration provisions for resolving disputes regarding the interpretation and application of the agreement, and provide that an arbitrator will determine whether the union has demonstrated majority status by presenting a sufficient number of signed authorization cards.

[5]*See, e.g., NLRB v. Gissel Packing Co.*, 395 U.S. 575, 596–97 (1969); *United Mine Workers v. Arkansas Flooring Co.*, 351 U.S. 62, 71–72 (1956); *MGM Grand Hotel, Inc.*, 329 NLRB 464, 466 n.7 (1999).

[6]29 U.S.C. §159(a) (emphasis added); *see also* §159(c)(1)(A)(i) (granting employees the right to petition for an election when their "employer declines to *recognize* their representative") (emphasis added); *Arkansas Flooring*, 351 U.S. at 71–72.

[7]*See, e.g., Gissel*, 395 U.S. at 597; *Rockwell Int'l Corp.*, 220 NLRB 1262, 1263 (1975).

[8]*See NLRB v. Broadmoor Lumber Co.*, 578 F.2d 238, 241 (9th Cir. 1979); *MGM Grand*, 329 NLRB at 466; *Verizon Info. Sys.*, 335 NLRB 558, 559 (2001).

Decided Cases

- *Heartland Industrial Partners*, 348 NLRB No. 72 (Nov. 7, 2006) (rejecting claim that provisions to trigger a neutrality agreement violate Section 8(e) of the Act). A petition for review is pending in the D.C. Circuit.
- *Hotel and Employees Union, Local 57 v. Sage Hospitality Resources*, 390 F.3d 206 (3d Cir. 2004), *cert. denied*, 125 S. Ct. 1944 (2005) (rejecting claim that an employer that agreed to a neutrality agreement provided the union with a "thing of value" in violation of Section 302 of the Act, 29 U.S.C. §186).
- *Patterson v. Heartland Industrial Partners*, 428 F. Supp. 2d 714 (N.D. Ohio 2006) (same as *Sage*), appeal pending in the Sixth Circuit.
- *Adcock v. UAW*, 2006 WL 3257004 (W.D.N.C. Nov. 6, 2006) (same as *Sage* and *Heartland*).

Pending Cases

- *Dana (UAW) and Metaldyne (UAW)*, 341 NLRB No. 150 (June 7, 2004) (Board granted review to decide whether to overrule 40 years of precedent that voluntary recognition bars a decertification petition for a reasonable period of time. In granting review, the majority stated that "the use of voluntary recognition has grown in recent years" and that "the secret-ballot election remains the best method for determining whether employees desire union representation."
- *Cequent Towing (Steelworkers)*, 25-RD-1447 (same as *Dana and Metaldyne*).
- *Shaw's Supermarkets (UFCW)*, 343 NLRB No. 105 (Dec. 8, 2004) (Board granted review to decide whether employer that has agreed to an "after-acquired store" provision, by which it has promised to apply the collective bargaining agreement to future stores, thereby waives its right to file a petition with the Board seeking an election when the union demands recognition at a new store.
- *Marriott Hartford Downtown Hotel (UNITE)*, 347 NLRB No. 87 (Aug. 4, 2006) (Board granted review to determine whether union request for a card-check agreement is a demand for recognition that allows employer to file a petition seeking an election).
- *Dana/UAW* (General Counsel alleged that a neutrality agreement that settled some terms and conditions of employment

to be included in future contracts and narrowed areas of disagreement violated Sections 8(a)(2) and 8(b)(1)(A) of the Act pursuant to *Majestic Weaving*, 147 NLRB 859 (1964).

Although issues regarding neutrality/voluntary recognition procedures are being litigated before the Board and in the courts, Congress is considering the Employee Free Choice Act. Under this so-called "card-check bill," if a majority of employees sign valid union authorization cards, the Board will certify the union as their exclusive collective bargaining representative. The bill in the House has 234 co-sponsors, and the House Education and Labor Committee recently approved it.

IV. The Top 10 Employer Mistakes When Investigating Employee Complaints: How To Avoid Putting Your Company at Risk

Jane Kow*

1. ***Not conducting an investigation unless the complainant submits a signed written complaint or demanding that all witnesses provide their statements in writing.*** This remains one of the most common employer mistakes that typically flow from misguided company complaint procedures. However, the employer is obligated to conduct an investigation when it knows or has reason to know that an employee is being subjected to discrimination, harassment, or other unlawful conduct in the workplace, even if the complainant never submits a formal written complaint and no witnesses provide written statements.
2. ***Not starting or concluding an investigation promptly.*** Waiting too long to kick off an investigation or postponing the conclusion of the investigation could lead to a claim that the company ignored the complaint or failed to take the concerns seriously.

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