The Next Phase of EFCA: Union Organizer Access to the Business

Claims That Unions Are Disadvantaged in Organizing Under the Current Labor Laws Are Disputed by Technology and Union's Ability to Visit Employees' Homes, Make Promises Unions' Most Persuasive Organizers—Pro-union Employees—Already Have Access to the Workplace

As it becomes clear that there is insufficient support to pass the card check provisions in the Employee Free Choice Act, one alternative likely to be pursued by organized labor is increased access by union organizers to employers' places of business in order to organize employees at the worksite.

The premise that unions lack access to employees ignores the tremendous advances that have been made in communications technology since the labor laws were originally enacted in the 1930s. If anything, the widespread availability and use of personal e-mail accounts as well as Internet sites, such as Facebook, LinkedIn, union home pages, blogs, union-funded NGO websites, and mass emails have made employees more accessible than ever to union contact. In addition to these new tools, unions have numerous other advantages under current law. For example, union organizers have the right to make home visits. Further, organizers have extremely broad rights to make promises to employees to win their support. Neither of these options is available to employers.

Moreover, even though union organizers themselves may not have direct access to the workplace, the union's most effective organizers—the pro-union co-workers—have a constant presence and can, and typically do, make appeals and distribute union materials to their coworkers urging them to support the union. Meanwhile, any proposal to provide unions a right to access an employer's premises to engage in organizing would pose a serious threat to the ability of employers to maintain order and normal productive operations.

Proposals to Increase Union Access Would Be Highly Disruptive to Employer Operations Though it has complained about a lack of equal access to employers' places of business, organized labor has not yet made any specific proposals in this area. However, the so-called Committee for a Level Playing Field, comprised of three companies that have proposed a "third way" on labor reform, has suggested:

> A level playing field for unions and management to *access employees* during *non-working hours* during the *campaign period*, e.g., permitting each to *make presentations* to employees at a *neutral location* concerning *the issue of whether to form a union*.

Several HR Policy member companies have asked the Association for its analysis of the potential impact of this proposed change in the law.

In the absence of specific legislative language, it is difficult to assess the meaning of this proposal and its impact on employer operations. However, even in its imprecise form, it touches upon the various issues that would be in play if the law were to change in this area and raises a number of questions and concerns regarding the potential impact on employer operations:

- **"Access employees/neutral location"**— It is not clear what is meant by a "neutral" location since unions already have the same access as employers to truly neutral sites that are not owned or

controlled by the employer (community centers, bars, etc.). Assuming the Committee means a change in the law, these broad phrases could include numerous potential points of "access" by union organizers to employees, including:

- The ability to engage employees in publicly accessible areas of an employer's facility (*e.g.*, parking lot, public areas within a retail store, sidewalk area in front of a retail store, etc.);
- Obtaining the business e-mail addresses of all employees with the ability to send them e-mails notwithstanding any employer restrictions on non-work-related use of the e-mail system; and
- The ability to post communications on the employer's intranet and other communications devices owned by the employer.

All of these potential areas of access raise legitimate issues as to limitations the employer could impose:

- Could the employer restrict union contact with customers?
- In the case of health care facilities, could the employer restrict union contact with patients?
- Would the right of access override the employer's legitimate security restrictions? For example, operators of nuclear power facilities are required by federal law to impose strict security restrictions on all facilities, even including the employee parking lot. Would the union's access rights override these restrictions?
- Could the employer be required to provide union access to areas requiring specialized training or clearances (*e.g.,* "clean rooms" in electronic facilities; smelting areas in foundries; flight lines in aerospace facilities), and, if so, would the employer be required to admit union organizers even if they did not meet those requirements? Or, would employers be obliged to provide training that would allow for access, even if such training required significant cost?
- How could the employer protect itself against liability for any harm that may come to the organizers themselves, particularly in hazardous areas such as parking lots?
- If the union had a right to access the employer's e-mail system, intranet or other communications systems, could the employer impose reasonable restrictions on the content of the union's message to avoid libel, slander, sexual harassment, racial harassment, and the like? This is especially important where the union is seeking to gain the support of the employees by presenting highly critical misinformation about the employer, as is frequently the case.
- Could the employer impose limits on the number of union organizers with the right of access?
- If more than one union is competing to be the employees' representative, would the employer have to provide equal access rights to all of the unions desiring to organize the workforce?
- Would management have any rights to make presentations at union-sponsored meetings?

  - Would the unions' access to the employer's property create a legal obligation by the employer to provide access to other outside groups to avoid claims of discrimination on some other grounds?

- **"Non-working hours"** – Although this tracks the current rules (discussed below), this could also become a source of confusion if the law were read to expand union access to employers' e-mail systems. It is very difficult for employers to determine whether e-mails are read during working hours or non-workings hours unless they are constantly monitoring their employees' e-mail activity, which most employers have no desire to do.

- **"During the campaign period"** – In the absence of legislative language this could be broadly construed to mean many possibilities. In its strictest sense, it would only include that period between the filing of the petition by the union and the election itself, which is typically a 40-day period. However, it could also be interpreted to include any period in which the union is actively organizing the employees or if there is any other indication of interest by the employees in forming a union. With this broad construction the "campaign period" could last several months or could even become a permanent condition.

- "**Make presentations**" – The breadth of this key phrase raises a number of questions.
  - Does "presentations" include:
    - formal speeches to the entire unit?
    - one-on-one contacts with individuals or groups of employees?
    - mass or individual e-mails?
  - appearance on the company's closed-circuit television network, if there is one?
  - Would the employer have to require the employees to attend the union presentation and pay them for the time in attendance?
  - Would the ground rules of the presentations also be equal? Since employers, but not unions, are prohibited from making promises under current law, shouldn't the same restriction apply to unions? Those promises often create inflated expectations that the union cannot deliver at the bargaining table, thus preventing the employer and the union from reaching agreement on the first contract if the union is elected.

- **"The issue of whether to form a union"** – Union organizers may attach a broad definition to this phrase. For example, many union organizing drives, particularly in the health care industry, have involved issues that are not directly related to union membership. Thus, unions seeking to organize nurses often make the quality of patient care under existing conditions a campaign issue. Does this mean the hospital may be required to allow the union to make presentations on its premises—potentially in the presence of patients and their families—accusing the hospital of posing a serious threat to the health and safety of its patients?

In the absence of legislative language, it is difficult to analyze the impact of this proposal on employers and their ability to maintain normal business operations. However, any proposal to rewrite the rules governing union access will have to address these issues. Meanwhile, proponents of broader union access to the workplace overlook the rather significant advantages the law already provides unions in union organizing.

Union Advantages Over Employers Include Ability to Make Promises, Home Visits Under current law, union organizers enjoy a number of advantages that are not available to employers. As was described in testimony on the Employee Free Choice Act by former NLRB Member Charles Cohen, which pointedly contrasted NLRB elections with political elections:[1]

- "The union, unlike the employer, can make campaign promises to the employees to induce them to vote for the union."

- "The union controls whether and when an election petition will be filed. Imagine if the challenger in a political election controlled the timing of the election."

- "The union largely controls the definition of the bargaining unit in which the election will occur, because the union need only demonstrate that the petitioned-for unit is an appropriate bargaining unit. Imagine if the challenger in a political election had almost irreversible discretion to gerrymander the voting district to its maximum advantage."

- "The union usually has obtained signed authorization cards from a majority of employees at the time the petition is filed. Thus, the union already knows the voters and has conducted a straw poll before the employer is even aware that an election will be held. Imagine if the challenger in a political election could campaign and poll the electorate without the incumbent's knowledge, wait until the polls show that the challenger has majority support, and then give the incumbent less than 60 days' notice of the election."

- "Even though the union already knows the voters well by the time the election petition is filed, the employer must give the union a list of all of the voters' names and home addresses after the petition is filed. The union, but not the employer, is permitted to visit the employees at home to campaign for their vote." Meanwhile, unlike the employer, the union has no obligation to take reasonable steps to ensure employee privacy and security of personal data and, indeed, often shares personal info about targeted employees with coworkers and organizers.

In addition to all these advantages, a union still may gain access to the employer's workplace if other avenues are unavailable, as described below.

Non-Employee Union Organizers Have Access Where Other Alternatives Are Unavailable Like all owners of private property, employers normally may exclude non-employees who are not invited to be on the premises. This includes non-employee union organizers, barring special circumstances discussed below. Because such organizers often seek access to an employer's property to seek to persuade employees to form a union ("solicitation," in legal parlance) or to pass out written information to them ("distribution"), a considerable body of case law has developed in this area under the National Labor Relations Act (NLRA). In approaching these cases, the National Labor Relations Board (NLRB) seeks to balance the property rights of employers with the right of employees to organize a union. Thus, employers are only required to permit non-employee union organizers on their property[2] if the union organizers have no other reasonable means of communicating with the employees.[3] In addition, the employer may not discriminate by refusing union organizers the opportunity to solicit or distribute information if it affords that opportunity to other

groups.[4] Meanwhile, union organizers are generally free to solicit employees and distribute union materials on public property near the employer's facilities. More importantly, employees themselves have a right to engage in solicitation and distribution activities in non-work areas of the workplace.
Unions Already Have Broad Access Through Employee Organizers If a union is to be successful in organizing a workplace, it is critical that it have a significant number of employees willing to persuade their co-workers to form a union. As previously mentioned, employees have a right to campaign in the workplace. To ensure that such activity does not disrupt an employer's ability to run a business, an employer may impose some limitations on this activity.[5] Within these reasonable limitations, employee union organizers who work "regularly and exclusively" on an employer's property have the right to engage in union organizational activities on the employer's property.[6] Consequently, employee union organizers often engage in organizing activities at a business's entrances, exits, breakrooms, dining areas, rest facilities, parking lots, and any other non-work areas.[7]

Further, an employee union organizer may even have access rights extending beyond his or her primary employer's workplace. Thus, in *New York New York Hotel and Casino*,[8] employee union organizers of several restaurants and eateries within the casino were allowed to stand right outside the main entrance to the hotel and casino handing out literature to customers entering and leaving.[9] Thus, unions already have substantial access to employer property, and in some cases even to a third-party's property, through employee union organizers.

A "Solution" That Creates More Problems The notion that unions need to have "equal access" incorrectly implies a current inequality and ignores the substantial access and organizing advantages unions already have. In a world where getting a message to an audience is logistically easier than it has ever been, the last thing that is needed is an artificial boost to union organizers that could have a highly disruptive effect on both productivity and security in the workplace.

---

[1] Testimony of Charles I. Cohen before House Education and Labor Subcommittee on Health, Employment, Labor and Pensions at 12-13 (Feb. 8, 2007), available at http://edlabor.house.gov/testimony/020807ChuckCohentestimony.pdf.

[2] *Salmon Run Shopping Center*, 348 NLRB 658 (2006).

[3] *Id*. citing *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992).

[4] *Id*. citing *NLRB v. Babcock & Wilcox, Co*., 351 U.S. 105 (1956).

[5] The employer may prohibit solicitation during employees' worktime and may limit employee distribution of union literature to non-work areas during non-working hours. *Marshall Field & Co.*, 98 NLRB 88 (1952).

[6] *New York New York Hotel*, 334 NLRB 762 (2001); *Gayfers Department Store*, 324 NLRB 1246 (1997).

[7] Indeed, the NLRB has determined that the exterior of the facilities are generally not work areas even though employees may perform work in those areas such as valet services, assisting customers in and out of the building, providing security, gardening, or retrieving shopping carts, and, therefore, employee union organizers may engage in organizing activity. *Meijer, Inc*., 344 NLRB 916 (2005); *New York New York Hotel*, 334 NLRB 762 (2001); *Sante Fe Hotel*, 331 NLRB 723 (2000).

[8] 334 NLRB 762 (2001).

[9] *Id*. at 762.