

UNION ACTIVITY ALERT

The recently formed "Change to Win" labor federation has announced the launch of a massive organizing campaign targeting major industries in more than 35 cities, including Puerto Rico. The "Make Work Pay" campaign aims to strengthen joint efforts between the seven "Change to Win" member unions (which includes the Teamsters and the UNITE HERE) in order to organize millions of workers.

This union drive is a nationwide unprecedented organizing campaign, which includes Puerto Rico. Of particular concern is the fact that several unions are trying to avoid following the standard procedure of filing a petition for elections before the NLRB. Their goal now is to obtain recognition through a "card-check" and/or neutrality agreements, instead of an NLRB-governed secret ballot election.

According to the organization's press release, their efforts will focus on workers in industries whose jobs cannot be shipped overseas, such as hotels, hospitals, food, transportation, retail, seaports, and distribution, among others.

These unions are using new organizing campaign strategies focusing on the "core industries" of the member unions. For example, it was reported that UNITE HERE will target non-union workers at a large U.S. hotel chain, including a massive leafleting effort at the company's hotels and community rallies in many cities.

On July 30, 2006, the UNITE HERE, Local 610 (also known as the "Gastronomical Union") held an open rally targeted to increase its diminished membership.

In order to avoid this push, employer groups have alerted members to become more proactive, and address these efforts from the outset.

Communication with the employees is very important at any stage, but particularly now. All employers, and particularly those in the targeted industries, need to make supervisors aware of the danger and consequences of this union drive. Supervisors and managers need to know what to do, what to expect, and how to react to different situations.

In light of this perceived revival of union activity in various business sectors, we recommend a pro-active approach in dealing with this potential risk. First step: supervisor and management training with respect to techniques and strategies to maintain a union free status. Other actions should include a labor and employment audit to determine how susceptible your organization is to a union campaign and how to address or avoid issues that frequently provide fertile grounds for such activities.

ELECTION RESULTS

From June 2004 to June 2006, there were 104 private-sector union representation elections and 6 union decertification elections in Puerto Rico. The following table illustrates the principal industries affected.

Table 1. Principal industries affected 6/2004 – 6/2006.

Industry	Election	% Won
Health	26	65%
Other	26	73%
Construction	19	37%
Manufacturing	11	55%
Waste	7	71%
Hotel	5	20%
Sales (Wholesale &	5	80%
Transportation, Maintenance	4	100

*Does not include St. Luke's Memorial Hospital's 4/28/2005.

The union success rate in many of the industries where elections were actually held should be a matter of concern. It may reflect that unions are only completing the election process when they have a high expectation of success. These withdrawals are not reflected in the statistics. On the other hand, the high success rate may reflect increased effectiveness of the union campaigns or management's decreased effectiveness.

O'Neill & Borges' lawyers assisted management in four of the five elections in the hotel industry, the business sector with the *lowest* union success rate.

An analysis of the representation elections from June 2004 to June 2006, by size of unit, disclosed that at least 67 of the 104 elections (65% of the total elections) took place in operations with 50 employees or less. Union percentage of wins was high in all units, except for those with 51 to 100 employees.

Table 2. Representation elections: 6/2004 – 6/2006.

Size of Unit (No. of Employees)	No. of Elections	% Union Won
25 or less	38	68%
26 - 50	29	76%
51 - 100	21	29%
101 - 200	11	64%
201 - 300	0	0%
Over 300	4	50%

*Does not include St. Luke's Memorial Hospital's 4/28/2005 election since ballots are impounded.

In terms of the unions more active in the representation elections during the period comprised between June 2004 and June 2006, the Unión de Tronquistas de Puerto Rico (Teamsters), Unión de Carpinteros de Puerto Rico (Brotherhood of Carpenters) and Unión General de Trabajadores (UGT) stood out as the most active. These unions participated in 71 of the 104 elections (68% of the total). The following table identifies the more active unions in Puerto Rico and their level of success at the polls.

Table 3. More Active unions in Puerto Rico: 6/2004 – 6/2006

	Number of Elections	% of wins
Unión de Tronquistas de Puerto Rico	21	76%
Unión de Carpinteros de Puerto Rico	13	38%
Unión General de Trabajadores	11	55%
Unidad Laboral de Enfermeras y Empleados de la Salud*	10	90%
United Steelworkers of America	9	33%
Sindicato Puertorriqueño de Trabajadores	7	43%

*Does not include St. Luke's Memorial Hospital's 4/28/2005 election since ballots are impounded.

RECENT NLRB RULES FOR THE NON-UNION EMPLOYER

Employers who do not have union employees in their workforce often do not realize they need to consider the application of the National Labor Relations Act ("NLRA" or "the Act") on their employment policies and decisions. However, despite the absence of a union, an employer may find itself before the National Labor Relations Board (the "NLRB" or "Board"), exposed to an unfair labor practice charge.

The obligations under the NLRA are not limited to employers who have to deal day to day with unions. When examining the rights and protections of nonunion employers under the NLRA, the employer must understand that Section 7 of the Act provides protection to both union and non-union employees.

An employee's right to engage in concerted activity for mutual aid and protection in the workplace goes beyond their right to simply engage in union related activity. Section 7 of the Act guarantees employees the right to engage in concerted activities for the purpose of mutual aid or protection and Section 8(a)(1) of the Act enforces this guarantee by making it unlawful for an employer to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights.

Recent decisions from the NLRB are highlighting the relevance of the NLRA

provisions for all employers, pointing the need for carefully drafting company policies and employment agreements, and revising the current ones. Non-union employee arbitration agreements, confidentiality policies, e-mail policies, no-solicitation and distribution policies, and use of insignias, among others, are some of the issues that are currently being scrutinized by the Board. What follows are recent examples of this trend.

Arbitration Agreements

Over the past years, employers have begun to extend to Puerto Rico their stateside alternative dispute resolution programs, including mandatory arbitration agreements requiring non-union employees to arbitrate any employment claims against the employer. In addition, some employers have used compulsory arbitration provisions when drafting settlement agreements. The NLRB has recently addressed an aspect of these agreements.

Specifically, the NLRB found one employer's agreement to be unlawful. In *U-Haul Co.*, 347 NLRB 34 (2006), a panel of three members of the NLRB held that an employer's mandatory arbitration policy, which never referred to the NLRA or indicated a specific limitation for an employee's right to file a charge with the NLRB, was unlawful because it interfered with the employee's Section 7 rights. The Board concluded that employees couldn't validly waive their right to *file a charge* with the Board.

The Board reasoned that the policy did not *explicitly* inform employees they still had the right to file charges with the Board. The Board ruled that the mere inclusion in the policy of the phrase "any other legal or equitable claims and causes of action recognized by local, state or federal law or regulations" would reasonably tend to inhibit employees from filing unfair labor practice charges against the employer with the Board.

Consequently, the NLRB ordered the employer to: (1) rescind its arbitration policy at all

facilities where it was in effect; (2) post remedial notices at the facilities where the policy was in effect; (3) remove from its files all unlawful waivers by employees; and (4) notify in writing its present and former employees who executed such waivers that the waivers would not be used in any manner.

Accordingly, an employer maintaining such mandatory arbitration policies for all employment related claims, should consider whether the text of the policy complies with the *U-Haul Co.*, ruling, and if not, whether a clarification of the policy is necessary.

Confidentiality Agreements

Employers frequently include in their employees handbooks, policies and employment contracts, provisions prohibiting the disclosure of confidential information. The NLRB has also recently addressed certain aspects of general confidentiality provisions.

In *Longs Drug Stores California, Inc.* 347 NLRB 45 (2006), the NLRB held the NLRA prohibited confidentiality provisions in employee handbooks, that may be understood as barring employees from discussing their wages and other terms and conditions of employment with other employees and third parties, including union representatives.

A three-member panel of the Board found unlawful the employer's handbook, which contained a general confidentiality provision together with the employer's specific statement that it considered employee wage rates to be confidential information. The Board held such broad language interfered with, restrained, or coerced employees in the exercise of the rights guaranteed by Section 7 of the NLRA.

E-mail Policies

E-mails policies limiting employee use and access are another area in which the NLRB is currently passing judgment. In particular, these policies are being challenged in two main fronts:

protected concerted activities, or disparate treatment in its application.

For instance, in *Timekeeping Systems, Inc.*, 323 NLRB 244 (1997), the NLRB found that the employer unlawfully discharged a non-union employee who engaged in protected action when he sent an e-mail message to fellow employees in response to employer's new vacation plan. The NLRB found the employee's resort to the e-mail was an effort to incite others to help him preserve existing vacation policy, which he believed served best his interest and the interest of his peers. In this case, the NLRB ordered the employer to reinstate the employee and make him whole for any lost of earnings and benefits.

The NLRB has also consistently held that employer e-mail policies may not be enforced in a discriminatory manner. Thus, if an employer allows some personal e-mail use, it must also allow employees to use e-mail for union and other concerted, protected activity. For example, in *Seton Co.*, 332 NLRB 979 (2000), the Board held the employer violated the Act by discriminatorily enforcing a no-solicitation/no-distribution rule against employees' pro-union activities while knowingly allowing employees to solicit and distribute antiunion materials

More recently, in *Richmond Times-Dispatch* 346 NLRB 11 (2005), the NLRB reiterated its previous holdings and found an employer had acted unlawfully by selectively and disparately informing a union that it was prohibited from utilizing its e-mail and computer systems to send union bulletins and other union-related business. To support its finding, the Board emphasized the variety of e-mail usage permitted by the employer, which included a wide range of e-mail messages unrelated to the employer's business. As a result, the Board concluded that the NLRA precludes a disparate or discriminatory enforcement of the employer's e-mail/computer use policy against e-mails with union messages.

Note: Because of the general nature of this Labor Newsletter, nothing herein should be considered as legal advice or a legal opinion. Should you have any questions or need advice, please contact a lawyer of our Labor Department.

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* Present composition of the Labor Department.