



FREEMAN MATHIS & GARY, LLP

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Union Vulnerability: Assess & Respond To Your Company's Risk

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Organized Labor In 2009

- Union membership was down slightly, from 12.4% in 2008 to 12.3%
- Private sector union rates remain slightly lower than 8%
- Union win rate increased in 2009 to 73% from 66% in 2008

Why would an increase in labor unions be such a big deal?

Once designated as exclusive bargaining, union never required to stand for re-election.

After workers who originally voted for union have died/retired, union assumed to have support of majority of workers

Why would an increase in labor unions be such a big deal?

Unions have unique legal status:

- If A is bargaining with B over the sale of his house, and if A were given the privileges of a modern labor union, he would be able (1) to conspire with all other owners of houses not to make any alternative offer to B, using violence or the threat of violence if necessary to prevent them, (2) to deprive B himself of access to any alternative offers, (3) to surround the house of B and cut off all deliveries, including food (except by parcel post), (4) to stop all movement from B's house, so that if he were for instance a doctor he could not sell his services and make a living, and (5) to institute a boycott of B's business. All of these privileges, if he were capable of carrying them out, would no doubt strengthen A's position. But they would not be regarded by anyone as part of "bargaining" – unless A were a labor union.

Why would an increase in labor unions be such a big deal?

- 2002 study calculated that labor unions have cost American economy \$50 trillion over past 50 years
- Unionized labor earned 15% higher wages than nonunion counterparts
- Wages in general suffered dramatically because economy is 30 to 40 percent smaller than it would have been without unionism

How likely is an increase in number and influence of labor unions?

3/2/09 NYT In Obama, Labor Finds the Support It Expected

- Since Inauguration Day, A.F.L.-C.I.O. president John J. Sweeney had visited the White House at least once a week.
- Sweeney: "I look upon Obama as the most pro-union president since John Kennedy, and I have even compared him to Franklin Delano Roosevelt."
- Unions looking to Obama to help reverse decades-long slide in power and membership

How likely is an increase in number and influence of labor unions?

3/2/09 NYT In Obama, Labor Finds the Support It Expected

- Labor pinning biggest hopes on passage of Employee Free Choice Act
- Obama: "I don't buy the argument that providing workers with collective-bargaining rights somehow weakens the economy or worsens the business environment."

How likely is an increase in number and influence of labor unions?

5/14/09 WSJ: *Andy Stern's Go-To Guy*

- Under current law, ERs required to provide union reps with list of EEs and their addresses. Union organizers can visit EEs at home, but companies cannot. Organizers can also make promises to EEs (such as obtaining raises), which ERs cannot.
- Both sides get seat at the table during NLRB hearings about the scope of an election or complaints about how it was conducted.

How likely is an increase in number and influence of labor unions?

5/14/09 WSJ: *Andy Stern's Go-To Guy*

- Becker has other ideas. In 1993 article, said traditional notions of democracy should not apply in union elections: that employers should be barred from attending NLRB hearings about elections, and from challenging election results even when there is evidence of union misconduct.

How likely is an increase in number and influence of labor unions?

9/12/09 NYT: *U.S. Adds Tariffs on Chinese Tires*

- President Obama announced 35% tariff on automobile and light-truck tires imported from China.
- Decision hailed as major victory for United Steelworkers (union that represents American tire workers)
- Tire Industry Association opposed tariffs, arguing that they will not preserve American jobs but will instead cause manufacturers to relocate plants to other countries where they can produce tires cheaply

How likely is an increase in number and influence of labor unions?

2/3/2010 Why You Should Know About Craig Becker (and Why You Need to be Worried)

- As Service Employees International Union's (SEIU) Associate General Counsel, Becker wrote that ERs should be barred from NLRB proceedings:
- "On these latter issues employers should have no right to be heard in either a representation case or an unfair labor practice case, even though Board rulings might indirectly affect their duty to bargain."
- In other words, business owners should have "no legally cognizable interest" in one of the most significant decisions impacting the potential future success of their company.

How likely is an increase in number and influence of labor unions?

2/3/2010 Why You Should Know About Craig Becker (and Why You Need to be Worried)

- Becker takes things one step further -- would deny employers the ability to alert authorities to illegal union activity during an election campaign saying:
- "Similarly, employers should have no right to raise questions concerning voter eligibility or campaign conduct. ... On the questions of unit determination, voter eligibility, and campaign conduct, only the employee constituency and their potential union representatives should be heard."

How likely is an increase in number and influence of labor unions?

2/3/2010 Why You Should Know About Craig Becker (and Why You Need to be Worried)

- Becker also views workers' ability to democratically choose union representation as problematic:
- "Just as U.S. Citizens cannot opt against having a congressman, workers should not be able to choose against having a union as their monopoly-bargaining agent."
- Believes a worker's choice should be between which unions workers should be forced to join; he does not believe a worker should have the choice not to join to a union. Has described secret ballot elections as "profoundly undemocratic"

How likely is an increase in number and influence of labor unions?

United Transp. Union v. Illinois Central R.R. Co., N.D. Ill., No. 08 CV 4001, 3/16/10

- Federal judge ordered Illinois Central Railroad Co. to reinstate conductor who spent 16 months in federal prison for embezzling union funds. During a two-year term as secretary-treasurer of the local union, conductor embezzled \$63,000 from treasury funds. Pled guilty to charges of embezzlement and obstruction of justice.

How likely is an increase in number and influence of labor unions?

Executive Order 13502: allows federal agencies to require that contractors on large-scale public construction projects agree to union representation for workers.

- Doesn't mandate that federal agencies require contractors to bargain with unions on all jobs, but clears the path for government agencies to make such agreements a requirement for contractors on jobs costing \$25 million or more.
- Building trade groups: could drive up the costs of public construction by nearly 20%

How likely is an increase in number and influence of labor unions?

4/29/2010 Town hall in Iowa:

- “I am a pro-union guy,” President Obama to a union member woman who asked how he would “continue to support” union members

How likely is an increase in number and influence of labor unions?

8/4/10 - Obama exhorts unions to step up election efforts for Democrats –

- Speaking to AFL-CIO's executive council: Obama "said it was good to be with "good friends"
- Obama praised labor throughout the speech and noted that the AFL-CIO helped push many of his policy priorities through Congress.
- Obama vowed to keep fighting for the Employee Free Choice Act (EFCA): "we'll keep on pushing." Also said EFCA is not the only means available for promoting unions.

How likely is an increase in number and influence of labor unions?

8/4/10 - Obama exhorts unions to step up election efforts for Democrats –

- Spoke of appointment of labor-friendly officials to the National Mediation Board and the National Labor Relations Board
- Trumka said he and the White House are working on a way to move forward on EFCA but would not disclose details. “We are working on a way to pass it, and they are active participants in that,” Trumka said.

How likely is an increase in number and influence of labor unions?

8/5/2010 – *Obama rallies unions, rips GOP* –

- Obama took credit for passing health care and Wall Street reform over a solid wall of GOP opposition.
- Pledged to keep pushing for passage of EFCA

How likely is an increase in number and influence of labor unions?

9/6/10 Obama Administration Calls Unions a Human Right in U.N. Report and Refers to 'Card Check' Legislation –

- In first Universal Periodic Review (UPR) report of U.S. Human Rights Issues, Obama administration declared unionization a human right and indirectly equated it to freedom of speech, freedom of religion and other normal human rights.
- Making it very easy for unions to organize workers is now a stated U.S. Human Rights goal.

How likely is an increase in number and influence of labor unions?

9/14/2010 WSJ *Back Door Card Check* –

- Becker a recess appointment in March after Senate *Democrats* refused to confirm him to the NLRB
- As a top lawyer for the Service Employees International Union, Mr. Becker had suggested that the NLRB has the legal authority to impose card check—which eliminates secret ballots in union elections—without the approval of Congress.

How likely is an increase in number and influence of labor unions?

9/14/2010 WSJ *Back Door Card Check* –

- At end of August, in a 3-2 decision, NLRB decided to revisit *Dana Corp.*
- When workplace is organized after secret ballot, workers are barred from voting to "decertify" union until after first negotiated contract expires.
- In *Dana*, NLRB recognized that card check (which allows a workplace to be organized if 50% of workers at the site sign a union card) was inferior substitute to secret ballots
- Held that when company recognized a union via card check, workers had right to force an immediate secret vote on whether they really wanted to join that union

How likely is an increase in number and influence of labor unions?

9/14/2010 WSJ *Back Door Card Check* –

Dana reversal raises more questions about Becker's ethical standards:

- has refused to recuse himself from cases involving SEIU, his former employer
- he had filed a brief for AFL-CIO in original *Dana* case
- had argued that there is no essential difference between card check and secret ballots
- called *Dana*-style protections "bad labor-relations policy"

How likely is an increase in number and influence of labor unions?

9/14/10 – NYT - *Inquiry Focuses on White House Role in Preserving Union Pensions at Delphi* –

- Special inspector for taxpayer bailout funds looking into whether Obama administration pressed General Motors in bankruptcy to backstop pensions of union retirees of a former division, Delphi.
- Both unionized and white-collar workers earned pensions while at Delphi
- When federal government took over failing pension plans, only Delphi's white-collar retirees suffered benefit cuts.

How likely is an increase in number and influence of labor unions?

9/14/10 – NYT - *Inquiry Focuses on White House Role in Preserving Union Pensions at Delphi –*

- Special inspector general for Treasury Department's bailout programs said he intended to find out "whether political considerations played a role in favoring hourly over salaried retirees."
- Barofsky announced decision to conduct audit in a letter to Representative Christopher Lee, Republican of New York, who has many Delphi retirees in his district.

How likely is an increase in number and influence of labor unions?

9/14/10 – NYT - *Inquiry Focuses on White House Role in Preserving Union Pensions at Delphi* –

- Lee said that lawmakers from both parties had been trying to find out why white-collar workers were left with lesser pensions, but had been stymied because Obama administration had not provided suitable witnesses for Congressional hearings

How likely is an increase in number and influence of labor unions?

09/16/2010 *Obama admits to favoring Big Labor*

- “What we’ve done instead [of getting EFCA passed in the Senate] is try to do as much as we can administratively to make sure that it’s easier for unions to operate and that they’re not being placed at an unfair disadvantage,” Obama said.
- In recent report to the United Nations’ Human Rights Committee, the Obama administration claimed that organizing a union in America is difficult and that this difficulty constitutes a human rights offense.

How likely is an increase in number and influence of labor unions?

9/19/10 Washington Examiner: *Then there's Obama's favorite special interest, unions –*

- "Labor union PACs have spent more this year than every PAC in these industries, combined: oil and gas, mining, Wall Street, commercial banks, defense contractors, HMOs, telecom, and lobbyists . . ."
- According to the Center for Responsive Politics, 12 of the top 20 biggest political contributors are labor unions.
- Labor unions represent just 7.5 percent of the private work force and 40 percent of public employees.

How likely is an increase in number and influence of labor unions?

9/19/10 Washington Examiner: *Then there's Obama's favorite special interest, unions –*

- Democrats have attempted to pass legislative fix to Citizens United decision known as the DISCLOSE Act. Bill would impose stricter campaign finance laws in place of those thrown out by Supreme Court in Citizens United.
- Amendment was inserted into bill that would have exempted unions from many of those new requirements.
- Unions would be free to make nearly unrestricted, undisclosed political spending, while corporations would have their hands tied.

How likely is an increase in number and influence of labor unions?

9/28/10 Election Panel Dismisses Complaint Against SEIU, Clears Way for Union to Amass War Chest –

- Federal Election Commission's general counsel found that Service Employees International Union violated election law when it required local affiliates to contribute to its political action fund
- FEC's full board voted to overrule its staff attorney and dismissed the original complaint, which was filed by National Right to Work Foundation (NRWF)

How likely is an increase in number and influence of labor unions?

9/28/10 Election Panel Dismisses Complaint Against SEIU, Clears Way for Union to Amass War Chest –

- NRWF didn't receive full explanation of FEC's decision until after 111 days had passed, ensuring that right to appeal lapsed
- FEC spokeswoman Julia Queen said no one at the FEC "will speak in reference to this case"

How likely is an increase in number and influence of labor unions?

9/28/10 Election Panel Dismisses Complaint Against SEIU, Clears Way for Union to Amass War Chest –

- NRWF filed complaint in October 2008 challenging amendment to union's constitution that required each local to contribute \$6 per member to international's political action committee.
- Locals that didn't comply would be charged difference between what they owed and what they raised, plus a 50 percent penalty.

How Do We Stop This?

- Preventative Strategy & Operational Communications
- Legal Strategy & Compliance
- Media Campaigns

Establish Preventative Strategies & Policies

- Union-free statement
- Non-solicitation/non-posting policy
- Supervisor training
 - Basic principles of effective supervision
 - Recognizing signs of union organizing

Consider Your Business Model

- Company locations
 - How many
 - Location(s)
- Company's industry
 - Skill set/sophistication of workers
 - Likely to be targeted by unions?

Warning Signs of Union Efforts

- Employees who usually talk to supervisors and management no longer do so;
- Employees who are speaking in a group immediately stop when a supervisor approaches;
- Employees start questioning supervisor authority with respect to job assignments;
- Employees start spending more time than normal in break rooms, cafeterias, or restrooms, often delaying their return to work;
- Employees who usually do not associate with each other start doing so;

Warning Signs of Union Efforts

- An unusual number of employees visiting departments where they are not assigned;
- Employees make lists of names of other employees from records such as timecards.
- “Group” complaints start to appear, or employees approach management in groups;
- The “language” of the employees changes – they start using union terms like seniority, grievance, bumping, job security, job posting, etc.,

Evaluate Union Threat Levels

Each Company location should be assessed by:

- Interviewing supervisors;
- Recognizing and dealing with local legal issues;
- Obtaining information on any union with activity near the site;
- Reviewing the Company's policies and procedures for legal compliance; and
- Training supervisors and on-site management on lawful union avoidance tactics.

Develop Personalized Action Plans By Site

Classify each site as low, moderate or high-risk

- **Low risk:** Some evidence of union activity at the site but little evidence of employee interest:
 - Supervisor training on employee relations and legal methods of dispelling union propaganda;
 - Educational campaign for employees in form of posters and handouts which highlight negative effects of unions; and
 - Researching relevant union to determine typical methods, relative strength, and probable contract terms

Implement the Personalized Action Plan: Moderate Risk

- Conduct comprehensive supervisor training on:
 - Employee relations
 - Legal methods of dispelling union propaganda
- Review terms and conditions of employment and address any legitimate concerns;
- Implement an aggressive educational campaign;
- Retain a consulting company to formulate video presentations regarding the negative effects of unions

Implement the Personalized Action Plan: High Risk

- Coordinate multi-level organizational communications strategies;
- Ensure legality of all anti-union efforts;
- Identify the possible bargaining units
 - Develop strategy to maximize likelihood of unit that will vote against unionization

DISADVANTAGES OF UNION REPRESENTATION

FROM THE VIEWPOINT OF THE COMPANY

Service and Satisfaction May be Affected: A union is a third party which has *no legal obligation to provide service*. Because its objectives will differ from the Company's, union may:

- Demand work rules which detract from quality or quantity of service to customers;
- Demand special privileges;
- Call a strike/picket

Lack of Managerial Flexibility: Takes away Company's flexibility to adjust to meet changing needs

DISADVANTAGES OF UNION REPRESENTATION

Management Time Wasted: Unionization means great deal of time may be spent dealing with petty union gripes and grievances. With union, consultation with steward becomes standard procedure before changing duties, assignments, or schedules

Higher Operating Costs: Due to delays, time wasting, work rule restrictions, grievances, arbitrations, etc., the cost of operating the facility will go up. This reduces amount of money available for investing in new equipment, new programs, and compensation

DISADVANTAGES OF UNION REPRESENTATION

FROM THE SUPERVISOR'S VIEWPOINT

Restrictions on The Supervisor's Freedom and Authority: Union shop stewards constantly looking over shoulder -- second-guessing decisions. Union can effectively override many supervisory decisions by threatening arbitration

Difficulties In Dealing With Employees: Unions often generate feelings of distrust toward supervisors, may create uncooperative attitude among employees by telling them that they are "untouchable"

Over-Emphasis On Seniority: Many union contracts require that employment decisions be based solely on seniority rather than skill and ability

DISADVANTAGES OF UNION REPRESENTATION

FROM THE EMPLOYEE'S VIEWPOINT

High Cost of Union Membership: Union representation has hefty price tag. Employees will encounter many financial obligations with membership in the union:

- a. Union dues;
- b. Initiation fees;
- c. Special assessments;
- d. Union fines.

Union Vulnerability: Assess & Respond To Your Company's Risk

An ounce of prevention . . .

Not "if," but "when" . . .

Lessons from the auto industry . . .