

Federal Labor Laws

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XII. Employer Interference with a Labor Organization

A. General Considerations

1. There are several sections of the law which are designed to assure that companies and unions deal with each other from a base of independence.
 - a. Section 8(a)(2) outlaws employer domination of a labor organization, prohibits employer interference in the internal affairs of unions and prohibits employer contributions of financial or other support to a labor organization.¹
 - b. Section 302² adds criminal sanctions against unlawful bribes, kickbacks and extortion. Under this section it is unlawful for an employer to pay, and a union representative to receive, payments of money for improper purposes.
 - c. Section 8(b)(1)(B) makes it an unfair labor practice for a union to restrain or coerce an employer in the selection of its representatives for purposes of collective bargaining.
2. There are differing degrees of violations of § 8(a)(2), depending on level of involvement of the employer in the internal affairs of the union.
 - a. The most serious violations of § 8(a)(2) involve employer domination of a labor organization. Domination would indicate the existence of a "company union" in the historically significant manner. Modern allegations of company unionism are relatively rare, but not absent.
 - b. Degrees of employer involvement which fall short of domination constitute interference or unlawful assistance. A union may be independent of the company's control, but still susceptible to unwarranted involvement of the company in the internal affairs of the union. For example, company designation of stewards under a "sweetheart" agreement would indicate interference.

¹ 29 U.S.C. § 158(a)(2). Application of § 8(a)(2) depend in part on whether the group supported by the company is a "labor organization" as defined by § 2(5). For example, company sponsored athletic teams or a company operated credit union would not be subject to a § 8 violation.

² 29 U.S.C. § 302.

- c. In organizing drives, allegations of employer support for a labor organization are fairly common. While an employer may express its opinion about workers' choice between competing unions, the employer may not extend privileges to one union that are not extended to others. Improper recognition of a minority union or one of competing unions would also constitute unlawful support or assistance.
- d. If the form of employer assistance to a union is financial support, the employer and the union risk violation of § 302 as well as §§ 8(a)(2) and 8(b)(1)(A).

B. Employer Domination of a Labor Organization

- 1. Employer domination of a labor organization is found in cases in which the employer has interfered in all aspects of the creation and administration of a labor organization. While rare today, pure company unions were quite common in the 1930's when the Wagner Act was passed.³
- 2. Today, a new issue involving employer domination of a "labor organization" may be raised in cases involving employer created worker participation groups. The tension arises concerning the difference between cooperation, which is allowed and domination, which is not.⁴ If a work team or other participatory group functions in a manner which brings it under the definition of a "labor organization" in § 2(5), it may create issues under § 8(a)(2).⁵
 - a. A labor organization is "any organization of any kind, or any agency or representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."⁶

³ *Newport News Shipbuilding & Dry Dock Co. v. NLRB*, 308 U.S. 241 (1939). The Board has refused to distinguish between a "good" and a "bad" company union. The employees in *Newport News* testified that the company did not influence the labor organization and in another early case, *Brown Paper Mill Co.*, 108 F.2d 782 (5th Cir. 1940), there was broad support for the company union and no evidence of domination. Regardless, the Board has historically maintained the distance between the employer and the labor organization.

⁴ See, *The Commission on the Future of Worker-Management Relations Final Report* for a discussion on the issues surrounding worker participation groups, particularly Section II "Employee Involvement" and the Executive Summary.

⁵ Factors relevant to a finding of domination are found in *Spiegel Trucking Co.*, 225 NLRB 178 (1976).

⁶ 29 USCA § 152(5).

- b. Potential domination issues arise in participation programs in which the plan is created for purposes of union avoidance. However, negotiated participation programs may raise other § 8(a)(2) and § 8(b)(1)(A) issues.
2. The standard remedy in § 8(a)(2) cases that amount to domination is "disestablishment."⁷ A disestablished union, whether affiliated with another union or not, ceases to exist for purposes of worker representation, and any contracts negotiated by the dominated union are void.
- a. A successor organization to a dominated union must establish that it is a legitimate and separate entity.⁸
 - b. Contracts negotiated by dominated unions do not serve as election bars for purposes of NLRB representation cases.

C. Employer Interference with or Support of a Labor Organization

1. In an organizing campaign, an employer is free to express its opinion about labor organizations, but other forms of support for one of competing unions may constitute unlawful assistance. For example, the following activities would violate § 8(a)(2):
- a. Providing different levels of access to company property during an organizing campaign.⁹
 - b. Recognizing one union after another has filed a petition for recognition.¹⁰ However, if an incumbent union is engaged in negotiating a contract renewal and a timely representation petition is filed, the employer is still obligated to negotiate with the incumbent union. If that union loses bargaining rights as a result of the representation procedures following the petition, the renegotiated contract is void.¹¹

⁷ *Pennsylvania Greyhound Lines*, 1 NLRB 1 (1935), *enforced*, 303 U.S. 261 (1938).

⁸ *Continental Oil Co.*, 121 F.2d 20 (10th Cir. 1941).

⁹ *E.g.*, *Kosher Plaza Supermarket*, 313 NLRB 74 (1993); *Davis Supermarkets*, 306 NLRB 426 (1992).

¹⁰ *Bruckner Nursing Home*, 262 NLRB 955 (1982). *See also*, *Innovative Communications Corp.*, 333 NLRB 665 (2001); *McClaren Health Care Corp.*, 333 NLRB 256 (2001); *Katz's Deli*, 316 NLRB 318 (1995)

¹¹ *RCA del Caribe*, 262 NLRB 963 (1982).

- c. Bargaining with one union while another has the right to serve as the exclusive representative of the same workers.¹²
 - d. Recognizing a union which cannot establish majority support of the workers,¹³ except in the construction industry where pre-hire contracts are specifically authorized by § 8(f).
 - e. Recognizing a union prematurely. For example, extending recognition to the union in a new facility before the current workforce is representative and before the employer has commenced normal business operations.¹⁴
 - f. Using supervisors or other employer agents to solicit or distribute authorization cards for a favored union.¹⁵
2. Good faith is not a defense to unlawful recognition of a union that does not have support of the majority of the workers in a bargaining unit.¹⁶
 3. Unlawful assistance cases can also arise in established bargaining relationships. Some examples of violations occurring within the framework of established bargaining relationships are:
 - a. Deducting dues from an employee's paycheck if the employee has not signed a dues checkoff authorization.¹⁷
 - b. Requiring, as a condition of employment, that workers wear a union logo, paid for by the employer, as part of the employer-provided uniform.¹⁸

¹² *AT Systems West, Inc.*, 341 NLRB 57 (2004).

¹³ *Bernard-Altmann Tex. Corp. (ILGWU) v. NLRB*, 366 US 731 (1961). See also, *A To Z Maintenance Corp.*, 309 NLRB 672 (1992).

¹⁴ *Elmhurst Care Center*, 345 NLRB 1176 (2005).

¹⁵ *Meyer Transport of New York, Inc.*, 338 NLRB 958 (2003); *Baby Watson Cheesecake, Inc.*, 320 NLRB 779 (1996); *Kosher Plaza Supermarket*, 313 NLRB 74 (1993). Compare, *Stevenson Equipment Co.*, 174 NLRB 865 (1969)(violation) with, *Arkay Packaging Corp.*, 221 NLRB 99 (1975)(no violation).

¹⁶ *Auciello Iron Works, Inc.*, 317 NLRB 364 (1995).

¹⁷ E.g., *The Kroger Co.*, 334 NLRB 847 (2001); *Laidlaw Transit, Inc.*, 315 NLRB 509 (1994).

¹⁸ *BellSouth Telecommunications, Inc.*, 346 NLRB 637 (2006). This case has an interesting history. The Board first ruled that this was a permissible means of communicating with the public that the workers are represented by the union. *BellSouth Communications, Inc.*, 335 NLRB 1066 (2001). On appeal, the court rejected this argument, relying on the argument that such a uniform and logo requirement would force non-members to convey the impression that the non-member

- c. Providing overly broad preferential seniority protections to union stewards or committee persons.¹⁹
 - d. Continuing to recognize an incumbent union after that union has lost a representation election.²⁰ This is a difficult problem. Normally, results of a representation election are not final until certified by the Board. As a result, a union that loses an election may still be able to function as the representative of affected workers until certification of the results. However, in the cited *Wayne County* case, the incumbent was eliminated from the NLRB ballot prior to a runoff. A competing union and “no representation” were the choices that would be on the final election ballot. Under these circumstances, the Board held that since there was no way for the incumbent to win the representation election, it was unlawful for the employer to continue to recognize that union pending the final outcome of the election. This is different from a situation under which the final outcome is uncertain because of challenges and objections.²¹
 - e. Extending recognition to a union on the basis of an accretion, if it is determined that the expansion of the employer’s business does not qualify as a proper accretion to an existing bargaining unit.²²
 - f. These cases will also often raise issues of union unfair labor practices under § 8(b)(1)(A) or § 8(b)(2).
- 4.. Contributing financial assistance to a labor organization is specifically prohibited by § 8(a)(2).
- a. Section 8(a)(2) allows agreements under which workers handle grievances or other contractual matters on company time.²³ That section states:

Provided, that subject to rules and regulations made and published by the Board ... an employer shall not be prohibited from permitting employees to confer with him during work hours without loss of time or pay;

supports the union. The court vacated the first order and remanded the case to the Board, which subsequently issued its 2006 decision. *Gary Lee v. NLRB*, 393 F.3d 491 (4th Cir. 2005).

¹⁹ *Joy Technologies, Inc.*, 306 NLRB 1 (1992). For a more extensive discussion on the use of preferential seniority, see, *Federal Labor Laws, Outline XIII*.

²⁰ *Wayne County Neighborhood Legal Services*, 333 NLRB 146 (2001).

²¹ *Trico Products Corp.*, 238 NLRB 1306 (1978).

²² *Safety Carrier, Inc.*, 306 NLRB 960 (1992).

²³ *BASF Wyandotte Corp.*, 119 NLRB 1035, 1038 (1985).

- b. Normal courtesies, such as a management representative buying lunch after a bargaining session, are permissible under § 8(a)(2).
 - c. Conduct that is objectionable under § 8(a)(2) includes any payment in cash, trips, cars, etc. which would tend to constitute a substantial benefit to the union representative.²⁴ The union officer, dealing with the employer, is expected to be free to deal at arm's length, and extraordinary payments undermine the ability of the representative to do so.
3. Specific forms of unlawful payments are outlawed and subjected to criminal sanctions under § 302 of Taft-Hartley. It is unlawful for an employer to pay, and for a union or its representatives to accept, any money except for:
- a. Regular payment of wages to an employee who performs services for the employer, permitted under § 302(c)(1).
 - b. Payment of judgments under court or arbitrator's awards, or settlements of disputes short of judgment, under § 302(c)(2).
 - c. Sale or purchase of property at fair market value, under § 302(c)(3).
 - d. Remittance of dues collected under a valid checkoff agreement, under § 302(c)(4).
 - e. Payments into certain trust funds for pensions, benefit administration, etc., under § 302(c)(5).
4. Section 302 prohibits union domination of pension or benefit trust funds, if employers make contributions to those funds. Known as Taft-Hartley trust funds, negotiated pension or benefit fund in which employer contributions are paid may have no more than one half of the trustees designated by the union involved.
5. Remedies for violations of § 8(a)(2) and § 8(b)(1)(A) resulting from improper assistance reflect the basic goal of assuring neutral unions. In addition to a cease and desist order, the following remedies may apply:
- a. Voiding the authorization cards of a union which has received illegal assistance,
 - b. Requiring that an employer provide a legitimate union with access to the company's property.
 - c. Voiding the sweetheart contract of a minority union.

²⁴ *Homemaker Shops, Inc.*, 261 NLRB 441 (1982).

- d. Repayment of funds improperly paid.²⁵
- 6. Section 302(d) carries a potential penalty of one year in prison and a \$10,000 fine.

D. Quality Circles, QWL Programs, Work Teams or other Participatory Structures as Labor Organizations

- 1. The creation of worker participation groups may raise issues of unlawful domination or assistance to a labor organization if the participation group functions as a labor organization, as defined in § 2(5) of the Act.
- 2. In unorganized shops, the issue of domination of a participation group/employee organization may arise. If an employer uses the work team concept or other form of participatory group to circumvent legitimate unionization, it may be possible to have the participation group disestablished.
 - a. In an important 1992 decision, the NLRB ruled that employee participation committees are labor organizations under the definition of § 2(5) if they deal with the employer over grievances, wages, hours and other terms and conditions of employment. As a result, if a non-union employer creates and deals with such committees over mandatory subjects, the employer may be in violation of § 8(a)(2).²⁶
 - b. In the *Electromation* decision, the Board left open the possibility for employer creation of employee participation committees if the committees served only as a means of communications to the employer over issues beyond the scope of bargaining.
 - c. This issue was addressed in part in a subsequent decision involving employer dominated committees in a union-represented workplace. As with the *Electromation* situation, if the committees deal with the employer over negotiable matters, they are unlawful. However, if the committees function only as a means of communications (e.g., planning safety conferences), they may be lawful. There is a very fine line between communicating and dealing with management.²⁷
- 3. In organized shops, the legal status of participation groups raises additional questions. If such a plan is negotiated under terms that

²⁵ E.g., *Baine Services System, Inc.*, 248 NLRB 563 (1980).

²⁶ *Electromation, Inc.*, 309 NLRB 990 (1992).

²⁷ *E.I. Du Pont de Nemours*, 311 NLRB 893 (1993).

makes the plan function, in part, as an extension of the union for legitimate employee organization functions, then a number of issues concerning the propriety of company payments to union facilitators would be raised. Negotiated participation groups may also raise questions of employer interference, if the company is involved in the selection of worker representatives for the program administration.

4. In determining whether an employee involvement process crosses the line and becomes an employer dominated organization, the Board uses a two-prong inquiry. First, the Board looks at whether the employee group satisfies the definitional elements of a “labor organization” under § 2(5) of the NLRA. If it does, the Board then determines whether the employer has dominated, interfered with, or supported the organization in violation of § 8(a)(2).²⁸ The concept of an organization that “deals with” the employer over “grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work” is broader than the question of whether that organization bargains with the employer.
5. Some examples demonstrate the difficulty of applying the two-pronged test to determine whether an employee involvement program is permissible.
 - a. One company with two chicken processing facilities in Oklahoma and Missouri maintained a series of committees, clearly employer dominated, designed to obtain employee participation on issues relating to plant safety, production problems, and plant efficiency issues. In both plants, the safety committees operated as “labor organizations” in that employees actively monitored and reported on safety problems, the employer took recommendations from the participating employees, and reported back to the committees concerning corrective actions that would or would not be implemented. Because management representatives offered counter-solutions to the problems raised, this level of engagement was sufficient to meet the “dealing with” element of the definition of a labor organization. However, some of production and efficiency committees were permissible. While participating employees gave information and suggestions to management about perceived problems, there was little engagement beyond basic information sharing.²⁹
 - b. In another case, a management dominated “continuous improvement committee” constituted an unlawfully dominated “labor organization.” The process began with a series of “round table” discussions in which employees were

²⁸ *Polaroid Corp.*, 329 NLRB 424 (1999).

²⁹ *Simmons Industries, Inc.*, 321 NLRB 228 (1996).

given the opportunity to raise issues concerning production problems. At this point, the discussions were probably permissible information gathering processes. However, when the committee process became more formalized and dealt specifically with issues such as attendance problems, random drug testing, employee training, and related working conditions, a violation occurred when the company began to implement changes discussed by committee members and representatives of management. Assurances that management attempted to restrict discussions to manufacturing concerns and that management would make all decisions were not sufficient to avoid a § 8(a)(2) violation.³⁰

- c. Internal grievance mechanisms in non-union work places raise problems. If an employer creates an employee grievance committee that merely takes evidence and reports its conclusions to management, there is probably not a violation of § 8(a)(2). However, if there is bilateral dealings between management and a grievance committee concerning how an employee complaint should be resolved, the necessary element of “dealing with” a labor organization may be satisfied.³¹

E. Union Interference with the Selection of Employer Representatives

1. On a more limited basis, § 8(b)(1)(B) prohibits union restraint or coercion of the employer in its selection of representatives for purposes of collective bargaining.³²
2. The basic rule under § 8(b)(1)(B) is that both sides have the right to select their own representatives. Just as it is unlawful for the employer to interfere with the union in its selection of representatives, the union must accept the company's selection.

³⁰ *Miller Industries Towing Equipment, Inc.*, 342 NLRB 1074 (2004).

³¹ *Compare, Syracuse University*, 350 NLRB No. 63 (2007)(no violations), with *Keeler Brass Co.*, 317 NLRB 1110 (1995)(violation).

³² *E.g., Automobile Workers Local 259*, 225 NLRB 421 (1976), but also note, if the representative chosen makes bargaining futile or impossible, the other party may be relieved of their duty to bargain. *See, Fitzimmons Manufacturing Co.*, 251 NLRB 375 (1980).