

# The Future of Labor Unions in the Private Sector: Micro Unions, Worker Centers & Right-to-Work Laws

Analysis of trends, laws & cases impacting private sector union organizing

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**THIS IS AN OPEN DISCUSSION**  
**FEEL FREE TO ASK QUESTIONS AT ANY TIME**

# Legal Disclaimer

AKA Covering My A \* \*

- All of the content presented here is general information only & shouldn't be construed as me giving you legal advice.
- Just because I'm giving this presentation to you, doesn't make me your attorney (that's a separate fee 😊).
- This presentation is purely for educational purposes & shouldn't be relied upon as your sole source of information concerning a specific issue or set of circumstances, though I'm happy to examine or discuss them with you.

# Presentation Format

- Although this is a PowerPoint formatted presentation & I'm lecturing, **PLEASE** don't hesitate to ask questions at any time. It's okay, I'm flexible.
- I tend to talk quickly. So, if you want me to repeat something just ask.

# Additional Materials

(In Case You Have Nothing to Do)

- Kindred Nursing Centers East (AKA Specialty Healthcare) v. NLRB, Case #12-1027, U.S. Court of Appeals, 6<sup>th</sup> Circuit, 8/15/13
- Neiman Marcus Group, Bergdorf Goodman & Local 1102, Case #02-RC-076954, Regional Director Decision, 5/4/12
- The Emerging Role of Worker Centers in Union Organizing, A Strategic Assessment, by Jarol B. Manheim for the U.S. Chamber of Commerce, November 2013
- Is Fight for \$15 Making Unions Cool Again?, Daily Kos, 9/11/13

## Why Is This Topic Important? Slide 1/2

- Organizing has increased by low-wage workers. However, this organizing isn't being done exclusively by or for the benefit of labor unions. There are varied types of organizations & entities involved.
- This is being done to increase wages, benefits & working conditions in the private sector. It's also being done to rein in what allegedly (& sometimes in fact) are employer abuses.
- Relative to this discussion, income disparity is neither bad nor good, but it's a crucial issue for businesses to understand, because any business can become a target of these activities or organizations.

# Why Is This Topic Important? slide 2/2

- Since none of these organizations pay private sector workers for their jobs, the \$ comes from you, the employer.
- This organizing comes in the form of Occupy Wall Street & related Occupy movements, the Fight for Fifteen (\$15/hour), worker centers, nonprofit & labor organizations, & entities that are not usually thought of as National Labor Relations Act (NLRA) unions.

# Statistics to Consider

According to the federal Bureau of Labor Statistics (U.S. DOL):

- In 2012, the percentage of workers who were members of a union was 11.3 %, down from 11.8 % in 2011.
  - 14.4 million union workers total in 2012; but, 17.7 million total union members in 1983, the 1<sup>st</sup> year that such data was kept.
- In 2012, 7.3 million public sector employees belonged to a union; only 7.0 million union workers in the private sector. The union membership rate for public-sector workers was 36%, but for private-sector workers it was 6.6%.
- In 2012, among full-time workers, union members had median weekly earnings of \$943, while those who were not union members had median weekly earnings of \$742.

# What the Statistics Mean

- Private sector unions are in trouble.
- More specifically, because of the decline in private sector unionization, increased globalization of our economy, & diminishing support among elected officials & politicians, labor unions are losing relevancy.
- Many union pensions & revenues are in deep trouble. 2008 really crushed them. Retirees have to be paid.
- Consequently, unions & their supporters (e.g., private foundations, community organizing groups & religious organizations) are increasingly using non-traditional methods to attract “members” while avoiding the traditional NLRA routes.



# What are These Non-Traditional Routes?

- The more popular ones include micro unions or units, worker centers & “occupy” something or other.
- Since micro unions is the only method here that relates directly to an actual statute (the NLRA) & is enforceable by the government, we’ll start with them.
  - Keep in mind, that right-to-work laws directly relate to opting out of a union. Consequently, right-to-work laws result in more informal or non-statutorily proscribed organizing. We’ll be looking at RTW laws more in the context of these informal methods.

# Micro Unions

- According to the NLRB, they've always been permitted. I'm not so sure. It's only been around the past 5 years that the NLRB has explained just what these small, carve-out, unions really are.
- Recently as 2011, in the 1<sup>st</sup> Specialty Healthcare decision (357 NLRB No. 83; 8/26/11).
- Specialty Healthcare was appealed up to the U.S. Court of Appeals for the 6<sup>th</sup> Circuit. They issued their decision on 8/15/13.

# Specialty Healthcare Slide 1/2

- The employer, a nursing home appealed the Board's decision that a unit of 53 certified nursing assistants was an appropriate collective bargaining unit (union). Employer wanted around 33 other employees in it.
- The court sided with the NLRB.
- The nursing home is in Alabama (remember, southern states are known for being anti union (no Civil War pun intended)).
- There was no prior union history at the home.

# Specialty Healthcare Slide 2/2

- The employer wanted to include more employees/job titles in the proposed bargaining unit, to dilute the union & increase chances of a no union vote.
- The Board & court said the smaller unit was OK, i.e., the NLRB is right.
- The standard for defining an appropriate bargaining unit or union is “the overwhelming community of interest with the included employees.”

# Community of Interest

- Section 9 of the NLRA gives the Board broad discretion in defining a collective bargaining unit.
- There is no absolute rule as to how to determine what is an appropriate unit because it's a matter of context, & it was Congress' intent in passing the Act that the NLRB would handle this.
- Section 9, requires the NLRB to select “an” or “a” appropriate unit, not “the” most appropriate unit.
- Here, the NLRB uses & more or less codifies the “community of interest” test as being the standard.

# Community of Interest Test

- Here's why the NLRB claims that the standard for micro unions has ALWAYS been the same, because it relies on the "community of interest" test which has been around in some form for decades.
- It's that groups of employees in the same unit must "share a community of interests sufficient to justify their mutual inclusion in a single bargaining unit." (Specialty & its predecessors)
- There are 5 key factors to consider:
  1. Similarity in skills, interests, duties & working conditions.
  2. How well the varied jobs, depts., divisions are integrated (e.g., contact & communication among employees & groups).
  3. Organization & management structure.
  4. Bargaining/negotiating history between the parties.
  5. The extent of union organization at the workplace.

# Self-Organization/Workplace Democracy

- 1 fundamental aspect of micro unions is the ability of employees to organize themselves & to vote for a union balanced with . . .
- The employers need to simplify the negotiation & 3<sup>rd</sup> party representation process
- So long as the NLRB doesn't act in an "arbitrary," "unreasonable" or abusive manner, then it's OK.
- Let's look at what this means in a workplace environment that's arguably more diverse than a nursing home, a department store (albeit a very upscale dept. store on Manhattan's 5<sup>th</sup> Ave.).

# Neiman Marcus Group AKA Bergdorf Goodman vs. Local 1102 & the NLRB

- Decided 5/4/2012, 02-RC-076954 (administrative law judge hearing).
- Union trying to organize 1 of U.S.' most upscale dept. stores. Focus on full & part time women's shoes employees.
- Employer, just like in Specialty, wants a very broadly defined unit so as to either increase chances of defeat, or as it argued to make it logistically easier to manage.
- ALJ goes through a comprehensive analysis of store operations, including job titles, duties, pay scales, benefits, etc.



# Neiman's Continued

- Unlike some Board decisions, this isn't an arbitrary or illogical decision. It's just a tough decision for employers to deal with.
- Specialty Healthcare is the current standard for micro unions & community of interest.
- Here, the ALJ also clarifies the COI standard. Consider "whether the employees are organized into a separate department; have distinct skills & training; have distinct job functions & perform distinct work, including inquiry into the amount & type of job overlap between classification; are functionally integrated with the . . . other employees; have frequent contact with other employees; interchange with other employees; have distinct terms & conditions of employment; & are separately supervised."
- This isn't rocket science, but imagine being an employer & having to go through all of this litigation & maneuvering just to keep a union out, or to make having a union monetarily possible.

# So What? Slide 1/2

- The NLRB is trying to help unions & increase private sector unionization. They're not neutral.
- Employers have to pay close attention to any employee complaints or HR issues that arise. This is where these organizing campaigns start. But this isn't the usual "we need a union" rhetoric.
- Other recent cases besides Specialty & Neiman Marcus: DTG Operations (31 car rental agents out of 109 employees), & First Aviation Services (airline employees). In each of these cases, small groups of employees, a fraction of the workforce, are permitted to have their own union. The difference with Specialty & Neimans is that it appears that they aren't your typical "blue collar" types of businesses more commonly associated with the NLRB; these are services jobs.

# So What?

Slide 2/2

- One of the NLRB's board members, Brian Hayes, who is on record as being against the Board's rationale puts it well:

“As long as a union does not make the mistake of petitioning for a unit that consists of only a part of a group of employees in a particular classification, department, or function, i.e., a so-called fractured unit, it will be impossible for a party [employer] to prove that an overwhelming community of interests exists with excluded employees.”
- Even if an employer can defeat a micro union campaign, the organizing campaign lays the foundation for other avenues like worker centers & community organizations.

# Worker Centers Defined Slide 1/3

- Although the NLRB is overtly pro-union, unions continue to decline. Also, Congress has largely been anti-union & the Executive Branch has been very quiet. However, there's a great deal of \$ available for worker issue advocacy & non-traditional organizing, thus, worker centers are born.
- Worker center is the name given to businesses set up as a gathering place for workers of a certain ethnicity, socioeconomic status, gender or other classes. Generally, they're thought to relate mostly to middle class & lower income brackets. Also, research about workers is a big factor
  - Quantitatively speaking, worker centers appear to be most prevalent among the Latino & black communities, which are also diverse communities among themselves.
- They tend to represent service workers (e.g., food, agriculture/farming, carwash, distribution, delivery, etc.)
- WCs seem to have developed during the 1980s & have grown & become stronger over time. In 1992, there were around 5 worker centers; in 2007 around 160. Now, hundreds?

# Worker Centers Defined Slide 2/3

- However, they're not solely focused on organizing unions, they're focused on research & representing employees relative to specific socio-economic issues like wages, hours & conditions of employment.
- They're also open to everyone. They're very egalitarian, so there's no barriers to involvement.
  - This is in stark contrast to union history, which is known to be racist, sexist & classist. They're trying to make up for labor's past sins.
- Worker centers are largely funded by labor unions, religious organizations, private foundations (e.g., Ford, Ben & Jerry's, etc.).
- Funding tends to be via a combination of sources.

# Worker Centers Defined slide 3/3

- These are largely urban neighborhood community gathering places, in storefronts, community centers, places of worship & union halls.
- On a day-to-day level, they're largely conducting informational campaigns, holding employment related classes & fairs, & working with partners in their neighborhoods.
  - Their partners include employers/businesses.
- They're not very mystical or secretive, but they're a 1<sup>st</sup> step to unionization or some other form of 3<sup>rd</sup> party representation. Consequently, all of the factors entailed with 3<sup>rd</sup> party representation are present, including higher operating expenses. This is the scary aspect of worker centers—how much \$ they cost business.
- In an excellent paper, The Emerging Role of Worker Centers in Union Organizing, by Jarol Manheim, for the U.S. Chamber of Commerce (November 2013), Manheim describes their primary function as the “outsourcing of the customary functions of labor unions.” Private & public sectors businesses outsource, why not labor unions?

# How Worker Centers Work

- Partnership for Working Families, started 2006, now has 16 locations in urban areas from coast-to-coast.
- It was founded by the Los Angeles Alliance for a New Economy (LAANE, founded 1993). Founded by union officials, attorneys, etc.
- Does corporate campaigns concerning economic disparity involving Walmart, port authorities & similar large worker operations.
- LAANE receives \$ from many foundations, including Ford, Hewlitt, Rockefeller & Cummings. Funding ranges from thousands to millions of \$.
- The \$ goes to the WCs to actually carry out research, education, protests & advocacy on issues. It's a vertical & complicated organizational & funding model.
- They're less focused on getting a union into the workplace & more focused on representing workers regarding specific issues.
- In 2011, the National Taxi Workers Alliance joined the AFL-CIO as a union. This was the 1<sup>st</sup> known worker center to join a union as a labor union.

# A Closer Look - Ford Foundation

- Big & influential activist foundation. Very well known & highly regarded. They're the "good guys" right?
- Between 2009 & 12, it gave the Labor/Community Strategy Center, based in L.A., \$600k; the National Employment Law Project (employee attorneys) \$10,860,000, Miami Workers Center \$600k, etc., etc. Also, in 2010 it gave the SEIU \$200k for research & programs re new workforce strategies. This isn't an exclusive list.
- Funding from the private sector is key.



# The Federal Gov't. Funds WCs Too

- In 2013, the U.S. DOL gave \$181k to CASA de Maryland, \$141k to Casa Latina, \$122k to the Farmworker Association of Florida & \$185k to the National Day Labor Organizing Network.
- Between 2005 & 08, the Dept of HHS gave ROC-NY (Restaurant Opportunity Center) \$940k for its Health & Safety Project.
- Is gov't. funding of WCs part of our system of checks & balances?

# Fight for \$15 Slide 1/2

- Loosely organized, but well funded. Trying to get \$15/hour for fast food, retail & other service workers.
- IL Congresswoman Jan Schakowsky (D): “When you win this fight for \$15 an hour & a union, America wins too.”
- Lorraine Chavez, Organizer, Workers Organizing Committee of Chicago: “I think what’s very amazing about this campaign & what a lot of people have not really talked about is that it’s making the union movement cool again.”
- Although unions are heavily involved, & unionization is the ultimate goal, so far, it’s an issue oriented movement.
- The “Fight” is big into protesting, which includes walking off of the job, & related concerted activities, which are protected by the NLRA.

# Fight for \$15 Slide 2/2

- Critics claim that the union focus is problematic because they often don't have workers best interests at hand; e.g., union corruption, politics & pillaging other unions.
- On a day-to-day level, not much different than worker centers & other movements.
- Leadership development is a key factor too. These are tomorrow's issue & union leaders.
- They've had small successes with companies like Whole Foods & Dunkin Donuts concerning work conditions, but little success with \$15/hour.

# Case Study SeaTac Proposition 1

- Seattle Tacoma International Airport, Fight for \$15 via voter referendum. Airport & hospitality workers.
- It passed, but small businesses are exempt.
- Affects about 6,500 workers.
- Passed by a margin of about 77 votes; 6003 total votes. Vote not certified yet. Effective 1/1/14.
- According to media reports, the PR campaign for the resolution got about \$2 million from out-of-state sources (SEIU was a big one).
- Will this spread to other states & localities? Yes, in 1 form or another. Already being debated in Seattle, King County.

# Occupy Wall Street & Other Occupies

- This is the “anarchic” branch of the FFF & WCs. Allegedly, there’s little structure to these groups, but they’ve had offices in major cities, & show up at the same demonstrations as the aforementioned groups.
- They’re even more loosely organized than the FFF.
- They’re focused on income disparity, executive pay, & the manipulation of financial markets & securities.
- Their recent notoriety, resulting from the 2008 recession, places them at the forefront of public protests & issue advocacy. But it appears to be declining in relevancy.
- Look for them to be absorbed by the FFF & worker centers, which are more coordinated & better funded.

# Right-To-Work Laws

- States are permitted to enact RTW laws. Essentially, these laws permit employees to opt out of any union that's voted in. However, those employees may still be required to pay a “fair share” for incidental benefits received via the union.
  - The opposite of a RTW state is a “closed shop” state, that means if a union is voted in, the employee has to join as a condition of employment.
- Currently 24 states have such laws (NV, UT, ID, AZ, WY, ND, SD, NE, KS, OK, TX, IA, AR, LA, MI, IN, MS, TN, AL, VA, NC, SC, GA & FL)
- Recent states to pass such laws include Indiana & Michigan. Look for more states to follow. This is a union killer.
- In theory & in practice, RTW minimizes union power, in the traditional sense of representing employees, but doesn't affect the worker centers, FFF or Occupy movements.
- Obviously, RTW does have an impact on micro unions.

# Independent Contractor Associations & Unions

- In 6/12, the Western Washington Taxi Cab Operators Association merged with the Teamsters Local 117. The drivers are ICs & owners. In 10/13, Washington D.C.'s cab drivers, most of whom are either cab owners or independently contracted drivers, merged their Wash. D.C. Taxi Operators Association with the Teamsters 922. They don't collectively bargain, but they get support & other benefits from the Teamsters.
- Here's an interesting twist on union organizing: Unions look to organize jobs that aren't outsourceable or exportable (e.g., cab drivers). Consider that the ACA/PACA may cause many doctors to become in-house employees & not be management or supervisor. Doctors jobs aren't exportable or outsourcesable. Doctors thus become targets for organizing.
- In 11/13, the University of California (UC) recognized the Union of American Physicians & Dentists (UAPD) as the bargaining representative for doctors working in the student health centers on all ten UC campuses.
- Aren't ICs & owners exempt from unions by law? Yes, but just merging with a union, without voting for formal representation or bargaining, skirts traditional labor law & allows for collective action over certain issues, such as working conditions & benefits.

# Trends – What to Watch Out For

- All of these organizations are “chomping at the bit” for a “taste” of your business & \$. Regardless of your size or revenues, they want your employees & \$.
- Even if the FFF is won, that may not have a direct impact on union membership, so look for increased organizing efforts, especially when it comes to micro unions.
- In other words, issue advocacy doesn’t necessarily equate to increased union membership & funded pensions.
- The NLRB is pro-union, but consider that there are fewer unions & unionized employees. Also, consider that the NLRB has been set back regarding the EFCA, posters & its lack of a quorum. The NLRB needs to justify its existence, therefore, look for the NLRB to do more on behalf of micro unions; i.e., looser definitions of a unit & more board decisions in their favor.
- Micro unions & worker centers are the present & future for unions. These are where the members & \$ for pensions come from (besides their \$ investments in real estate, gambling & securities).
- More states going RTW due to economic pressure.