

# The State of the Unions: What HR Leaders Should Know About Dealing with Today's Labor Unions

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Preventive Strategies and  
Positive Solutions for the Workplace

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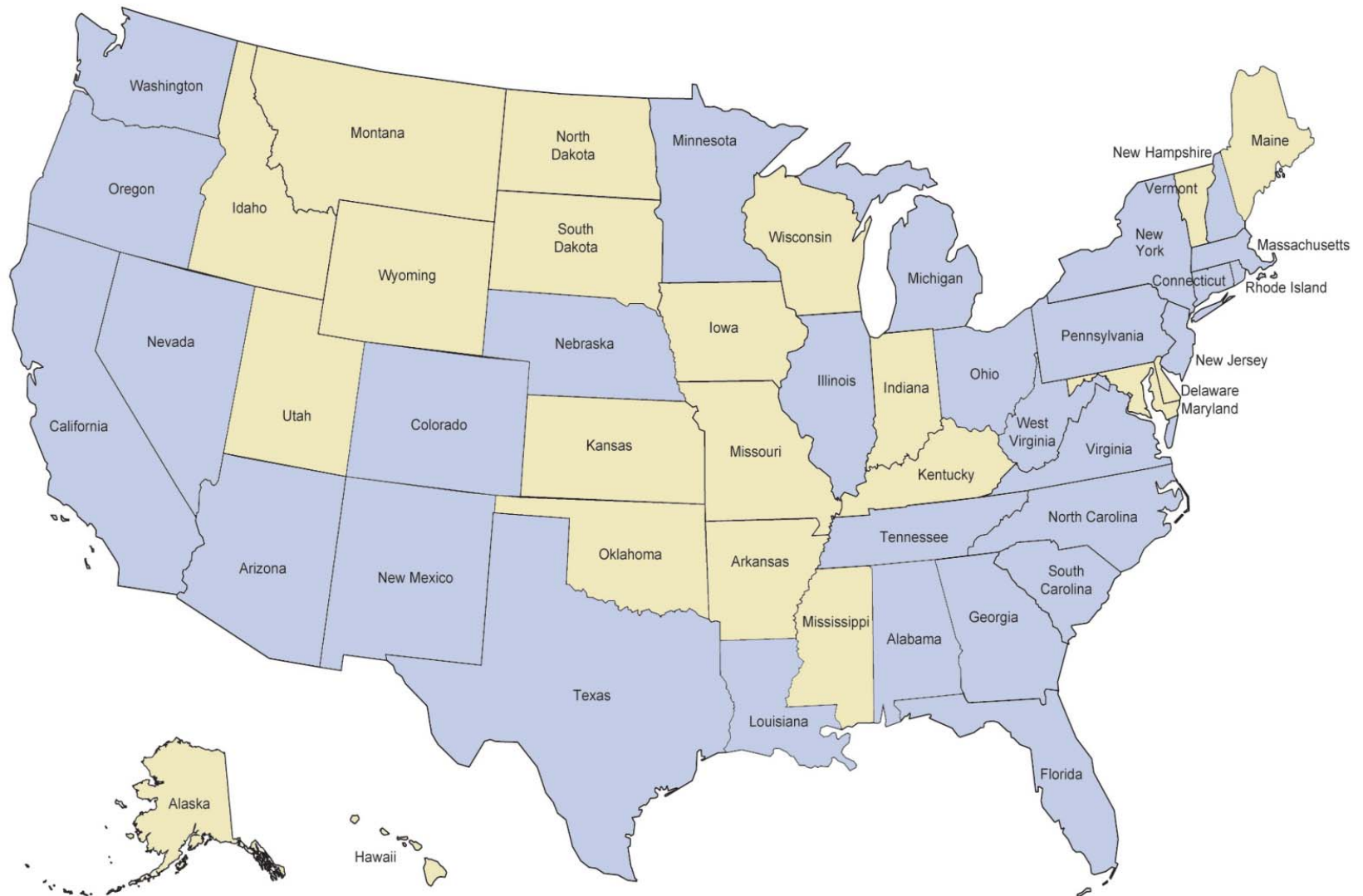
## About Jackson Lewis

All we do is  
**work**<sup>®</sup>

For 50 years, Jackson Lewis has placed a premium on preventive strategies and positive solutions in the practice of workplace law. With more than 600 attorneys practicing in 45 offices nationwide, we represent management exclusively and have the resources to *advise about every employment issue you may encounter.*

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# Nationwide - 45 Offices – Over 60 Attorneys



## Presented by Jackson Lewis Partners



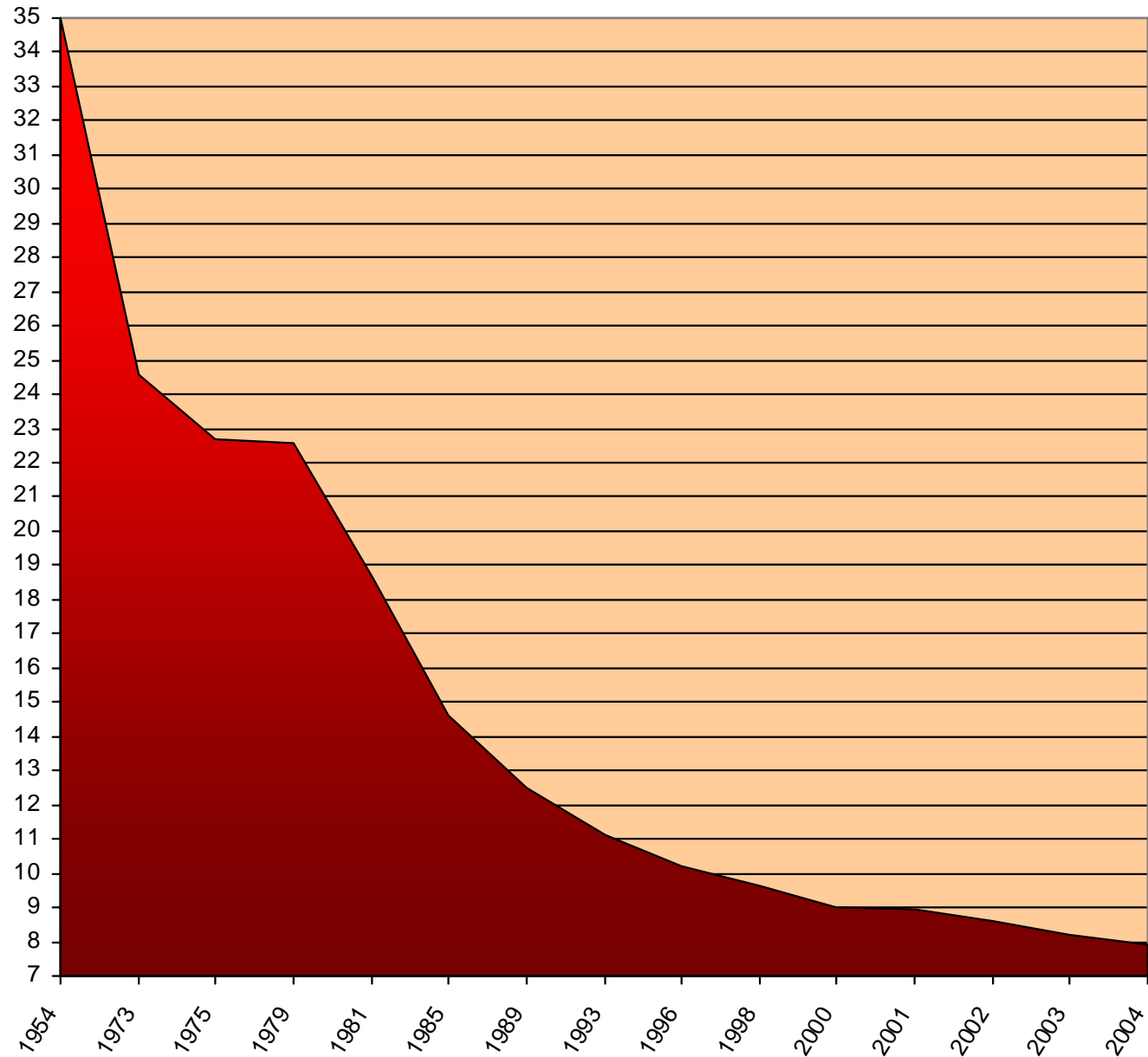
**Martin F. Payson**



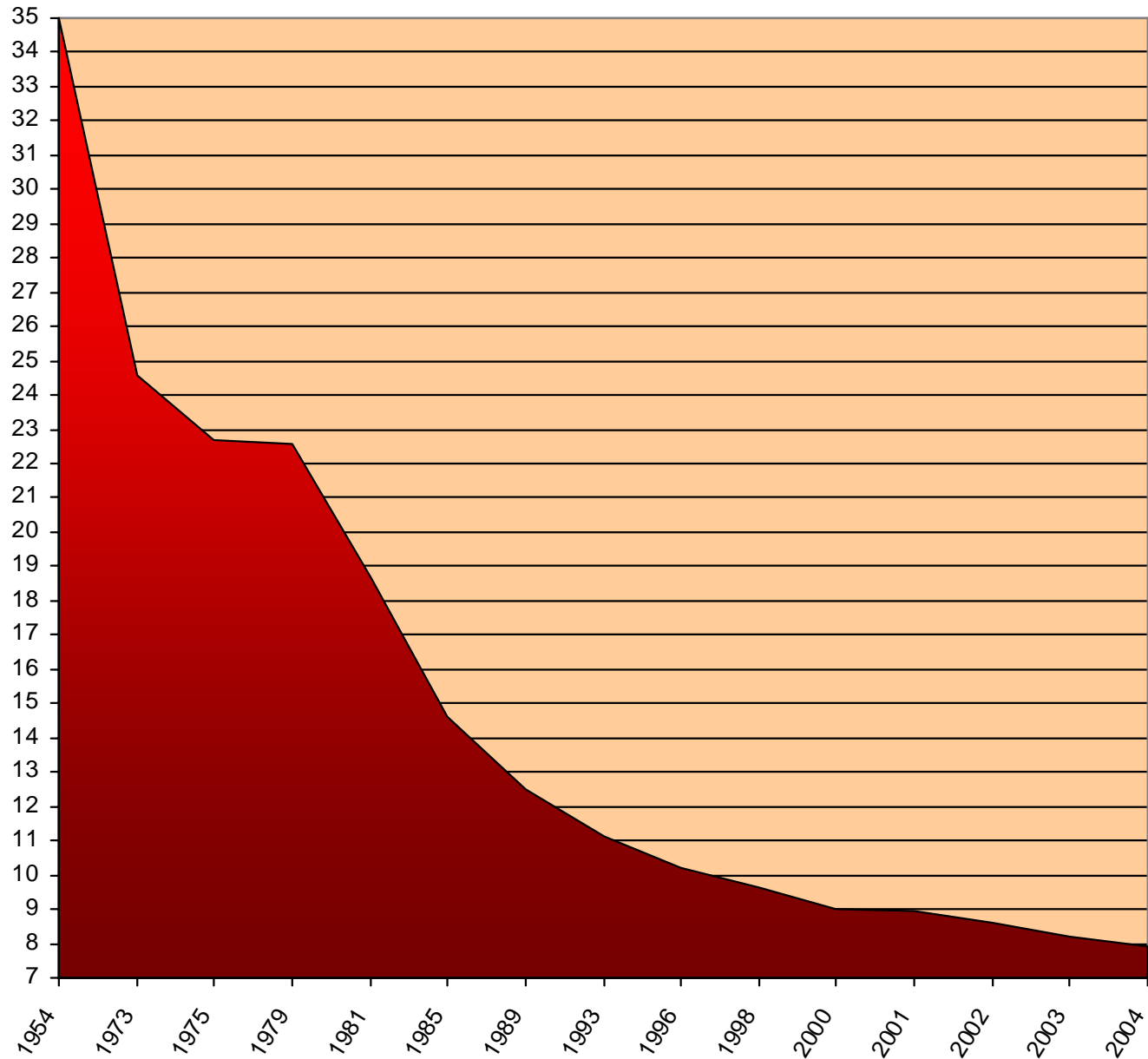
**Michael J Lotito**

**Over 75 years of combined experience  
counseling employers confronted with union  
organizing.**

# This IS the history of union membership in the last 55 years.



# If this was your company's profit picture what would you do?





When you are desperate you will try ANTHING!!!:

Unions are desperate and are trying everything

- Traditional organizing – NLRB Elections
- ‘Corporate campaigns’ and demands for neutrality agreements
- Amending the law – EFCA and labor law reform
- Changing the makeup of the NLRB to reinterpret the law in its favor
- Presidential Executive Orders
- ‘High Road’ Initiatives and Blacklisting

# Labor's Plan for Future

## The Voice of Organized Labor



The only way to rebuild the labor movement is to organize wholesale, not retail, to organize all of a company at one time, not one plant, one shop, one worksite at a time.”

*- Andrew Stern, President SEIU  
JUST RESIGNED*

# NLRB Elections, Neutrality Agreements, Card Check

## Fiscal 2009

- Union win rate of 63.8% of NLRB elections down slightly from year earlier
- But, total number of elections conducted down significantly in the last 10 years
- Unions avoiding the election process in favor of card check.
- Neutrality agreements imposed as a result of corporate campaigns.

# Union Authorization Card

## Authorization for Representation Under the National Labor Relations Act

I, the undersigned employee of

Company: \_\_\_\_\_

Address of Company: \_\_\_\_\_

authorize Local \_\_\_\_\_ affiliated with the International Brotherhood of Teamsters to represent me in negotiations for better wages, hours and working conditions.



(PLEASE PRINT)

Name \_\_\_\_\_ Date \_\_\_\_\_

Home Address \_\_\_\_\_  
(Number and Street) (City, State and Zip Code)



Social Security Number \_\_\_\_\_ Phone \_\_\_\_\_

Job Classification \_\_\_\_\_



Signature \_\_\_\_\_

# Secret Ballot

	<p>UNITED STATES OF AMERICA National Labor Relations Board</p>	
<p><b>OFFICIAL SECRET BALLOT</b> For certain employees of</p>		
<p>Do you wish to be represented for purposes of collective bargaining by -</p>		
<p>LOCAL UNION 528, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO?</p>		
<p>MARK AN "X" IN THE SQUARE OF YOUR CHOICE</p>		
<p>YES</p> <input type="checkbox"/>		<p>NO</p> <input type="checkbox"/>

# National Labor Relations Act (NLRA) Today

## **Unions believe current process is broken**

- Unions solicit about 60% of cards by the time election petition filed, but win only 70%
- Biggest factor: lawful employer education programs
- Secret-ballot election ensures those who were pressured to sign cards can change their mind in private
- Good faith negotiations do not guarantee a union contract—most do not within a year

Organizing

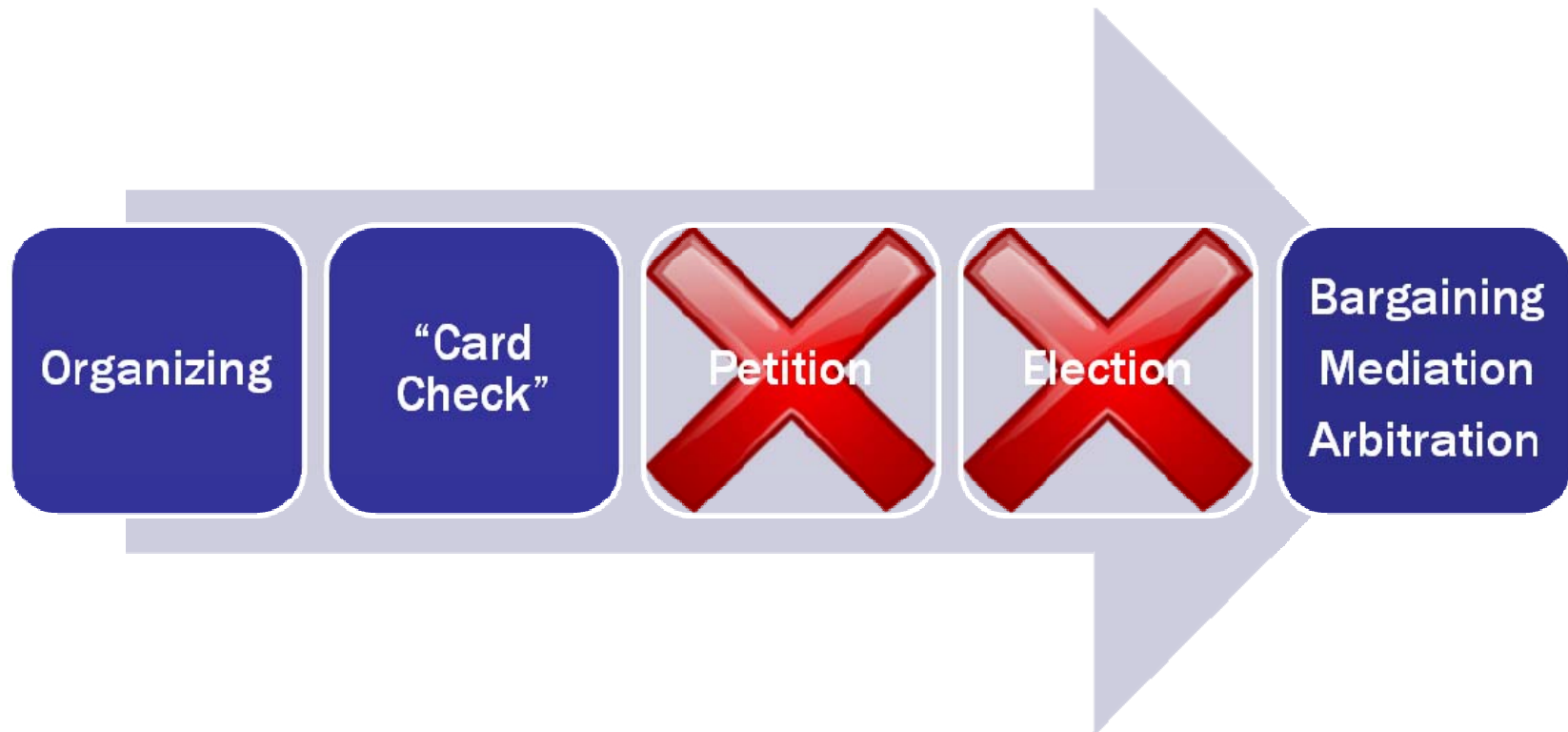
Petition

Election

Post  
Election

# What Unions Want

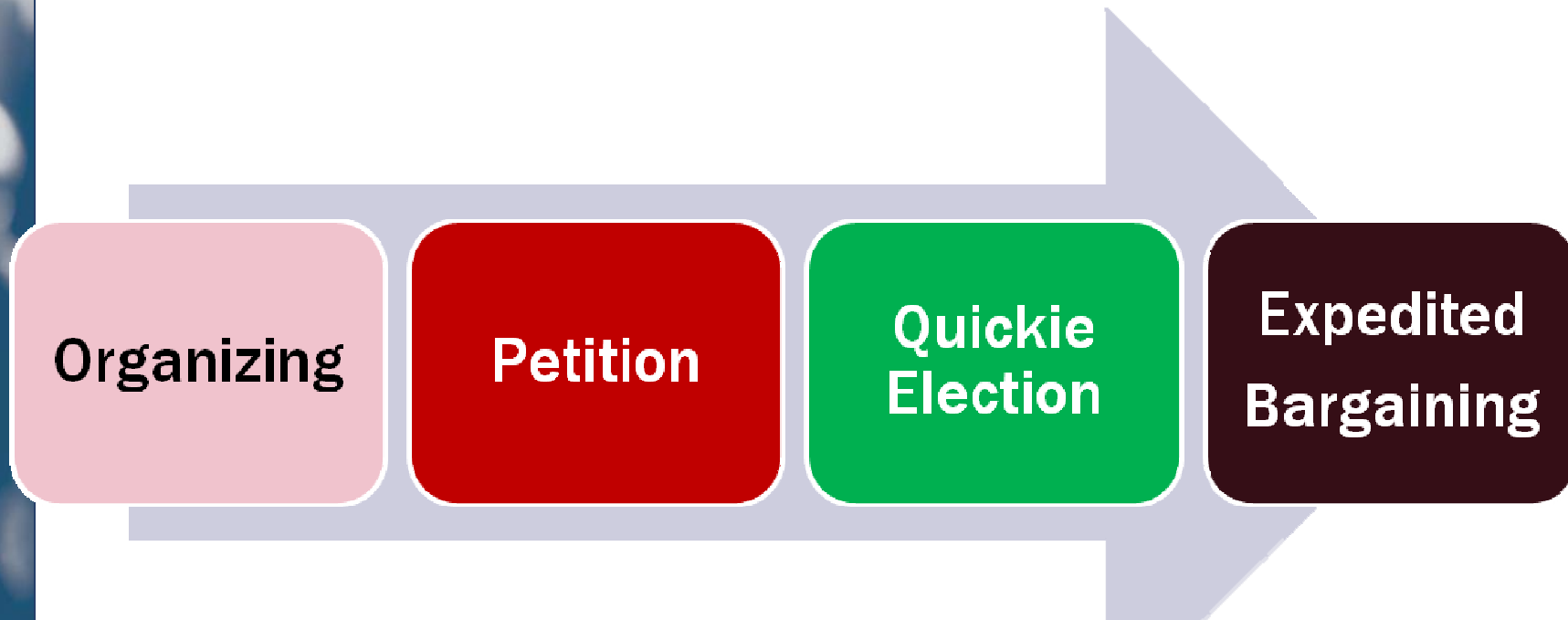
## Employee Free Choice Act (EFCA) with Card Check



## **EFCA - Probable Components of an EFCA compromise – “EFCA-Lite”**

- **No “card check” – politically unacceptable**
- **“Quickie” elections 14-21 days from filing an election petition with the Labor Board**
- **Enhanced remedies including monetary damages and possible extraordinary remedies in bad faith bargaining cases**
- **Binding arbitration as either a right or a remedy**
- **Possible ‘baseball style’ arbitration for first contracts**
- **Equal access to employees at the workplace**

## Possible EFCA Compromise



**Caution: Employers will find it harder to win election in only about 10-21 days with union access and triple penalties.**

# New National Labor Relations Board

## Labor Law Reform without an Act of Congress Current

### Members

CHAIR WILMA LIEBMAN

Term Expires 2011

Clinton/Bush/Obama Appointee

PETER SCHAUMBER

Term Expires August 2010

Bush Appointee-Former Arbitrator

### Recess Appointments

CRAIG BECKER

*Assoc. General Counsel Service Employees International Union*

MARK PEARCE

*Creighton, Pearce, Johnson and Giroux- Union side labor lawyer*

BRIAN HAYES - Nominated did NOT receive a recess appointment

*Republican Staffer Senate HELP Committee*

# Proposed NLRB –a Stacked Deck – 3 of 5



## Wilma Liebman, Current Chair

- She believes Labor Law should be changed to make it easier for unions to organize workers*



## Mark Pearce, Union Attorney

- Represented Union officials charged with corruption but considered moderate



## Craig Becker, SEIU In-House Lawyer

- Believes Employers should be stripped of any role in NLRB elections and NLRB should eliminate or restrict Employer free speech

## New Pro- Labor Majority

### **Wilma Liebman**

- **Current Chairman of NLRB**
- **Dissented in employer favorable decisions of Bush Board, such as:**
  - **Restrictions on use of company e-mail for union communications**
  - **Restriction on union petitions to combine temporary and contract workers with regular employees in union elections**
  - **Restrictions on abusive language do not violate labor law**
- **Former Counsel for the Bricklayers Union and the Teamsters Union**
- **Former Staff attorney with the NLRB**



## New Pro- Labor Majority

### Mark Pearce

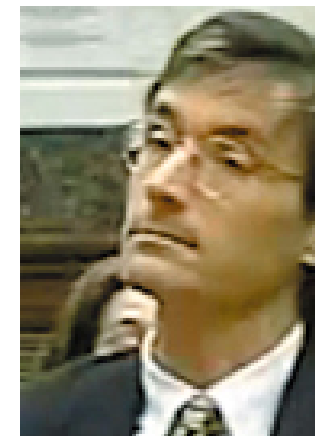


- Labor Side Attorney in Buffalo, NY
- Former NLRB Attorney
- “Pearce’s representation of corrupt union leaders at the expense of workers makes him unsuitable for this position. The NLRB needs members who are committed to protecting workers and not the union thugs who steal from them.”- *Bill Wilson, President Americans for Limited Gov’t*

## New Pro-Labor Majority

### Craig Becker

Current Associate General Counsel  
for the SEIU



- **Has expressed extreme views on labor law:**
  - “Employers should be stripped of any legally cognizable interest in their employees' election of representatives.”
  - Proposed to eliminate the mandate that the NLRB certify a union only after an NLRB supervised election.
  - Proposed the NLRB should restrict or eliminate an Employer’s right to communicate with employees during election campaign.
  - Proposed to eliminate Employer’s right to have observer present during NLRB conducted election

Source: Minnesota Law Review, 1993

- **Engineered changes in State laws to permit unionization of home healthcare workers**

## Status of Craig Becker's Nomination

- ❑ July 9, 2009- Nominated by President Obama
- ❑ October 21, 2009- Senator McCain places a hold on Mr. Becker's nomination and insists on a public hearing
- ❑ January 7, 2010- President Obama re-nominates Mr. Becker to the NLRB
- ❑ February 2, 2010- Public hearing held before HELP committee on Mr. Becker
- ❑ February 10, 2010- Senate democrats fails to invoke cloture on Mr. Becker's nomination (52-33)
- ❑ March 27, 2010- receives a **recess appointment** that does not require Senate confirmation

## Labor Law Reform Without EFCA

**The New Labor Board can re-write Labor Law in two ways:**

➤ *Reversing pro-employer Bush Board decisions and issuing new decisions favoring unions in novel ways*

➤ *Issuing rules that permanently shift the balance in favor of unions*

# Labor Law Reform Through Adjudication

- ❑ NLRB will make it harder to prove first line supervisors are exempt from unionization
- ❑ NLRB will reverse Bush Board decision requiring employer consent before temporary employees can be unionized with its regular employees
- ❑ NLRB to reverse Register Guard removing employer right to prohibit employees from discussing unions via email systems
- ❑ NLRB will likely restrict employer right to issue facially neutral non-harassment rules that could be seen as limiting union free speech

# Labor Law Reform Through Adjudication

- ❑ NLRB will issue New York New York decision giving contractor employees equal rights to solicit/distribute on company property
- ❑ Impose upon companies joint employer liability over a contractor's employees even where they are not directly supervised
- ❑ Revisit IBM Corp. to grant "Weingarten" rights to non-union employees

# Labor Law Reform Through Rulemaking

## New Election Rules to Favor Unions

- Mandatory union rights postings
- Expedited Election Processing
- Mail and E-Balloting

## More Aggressive Remedies in Initial Organizing and First Contract Cases

- Union access to premises
- Equal time rules in campaigns
- Mandated bargaining schedule and monitoring in bad faith bargaining cases

# Rulemaking Benefits Labor Law Reform

- Rulemaking takes time, but rules cannot be reversed like case decisions with the next Republican administration.
- Revising these would require a repetition of the time consuming process.
- While conservative federal judges do not hesitate to reverse the NLRB on appeals in individual cases, they defer to agency rules even if they disagree with them.
- Thus, reform instituted through rules may become close to permanent.

# Labor Law Reform Through Executive Order 13496 Required Posting For Government Contractors

## NOTICE TO EMPLOYEES

### RIGHTS OF EMPLOYEES UNDER THE NATIONAL LABOR RELATIONS ACT

Under federal law, you have the right to:

Organize a union to negotiate with your employer concerning your wages, hours, and other terms and conditions of employment.

Form, join or assist a union.

Bargain collectively through a duly selected union for a contract with your employer setting your wages, benefits, hours, and other working conditions.

Discuss your terms and conditions of employment with your co-workers or a union; join other workers in raising work-related complaints with your employer, government agencies, or members of the public; and seek and receive help from a union subject to certain limitations.

Take action with one or more co-workers to improve your working conditions, including attending rallies on non-work time, and leafleting on non-work time in non-work areas.

Strike and picket, unless your union has agreed to a no-strike clause and subject to certain other limitations. In some circumstances, your employer may permanently replace strikers.

## Labor Law Reform Through Executive Orders

- ❑ **“NONDISPLACEMENT OF QUALIFIED WORKERS UNDER SERVICE CONTRACTS”- E.O. 13495**  
Service Contractors must offer jobs to prior contractor’s employees to help preserve the union and union jobs
  
- ❑ **“ECONOMY IN GOVERNMENT CONTRACTING”- E.O. 13494**  
Contractors cannot use government funds to pay cost incurred for labor consultants, union free training or lawful communications concerning unions
  
- ❑ **PROJECT LABOR AGREEMENTS - E.O. 13502**  
Federal agencies can require every contractor or subcontractor on a large-scale construction project to negotiate or become a party to a Project Labor Agreement (PLA) with one or more labor organizations
  
- ❑ **“Blacklisting” : Federal “High Road” Procurement Policy:**  
preferring contractors who adopt certain labor practices that equal or exceed union contracts.

## Forced Neutrality for Federal Contractors

- ❑ Unallowable costs include costs of the following activities when engaged in for the purpose of discussing union issues:
  - ❑ Preparing and distributing materials
  - ❑ Hiring legal counsel to advise regarding employer communications
  - ❑ Holding meetings on paid time
  - ❑ Planning or conducting activities by managers during working hours, such as union free training

## Federal “Blacklisting” – The “High Road” Initiative

**President Obama’s spending restrictions – aiding organized labor through the federal government’s procurement power**

- **White House Task Force on the Middle Class**
- **- “Contracts should not be awarded to irresponsible sources with unsatisfactory records...including noncompliance with labor .... Laws.**
- **-”We also recognize that substandard wages and benefits can have negative impacts...which in turn can reduce the quality or performance on Federal contracts.”**

adopt a position of neutrality in unionization drives. The current bill would amend the Internal Revenue Code to provide a one percent tax credit to qualifying "Patriot" employers. To be designated a "Patriot" employer, a business must (1) maintain headquarters in the United States, (2) pay 60 percent or more of each employee's health care premiums, (3) observe a policy of neutrality in union drives, and (4) provide a specified living wage and retirement benefit to employees

## Federal - Patriot Employer Act - Neutrality

- **Patriot Employer Act Core Provisions:** On April 20, 2009, Senator Richard Durbin (D-IL) reintroduced The Patriot Employer Act, a legislative initiative designed to encourage businesses to increase wages and benefits and adopt a position of neutrality in unionization drives. The current bill would amend the Internal Revenue Code to provide a one percent tax credit to qualifying "Patriot" employers. To be designated a "Patriot" employer, a business must (1) maintain headquarters in the United States, (2) pay 60 percent or more of each employee's health care premiums, (3) observe a policy of neutrality in union drives, and (4) provide a specified living wage and retirement benefit to employees

## Other Federal and State Labor Law Initiatives

- ❑ **RESPECT ACT** - To revise the labor law to enable unions to organize first line superv
- ❑ **OREGON WORKER FREEDOM ACT** - To prohibit employers from holding employee meetings to discuss unions\*

\* Jackson Lewis is representing Oregon Business and Industry in court challenge to law

# More Labor Law Reform

## RESPECT Act

(“Re-Empowerment of Skilled and Professional Employees and Construction Tradeworkers”)

- The NLRA defines a supervisor as an:
  - *individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.*

# More Labor Law Reform

## RESPECT Act

(“Re-Empowerment of Skilled and Professional Employees and Construction Tradeworkers”)

- The RESPECT Act would remove from the definition of "supervisor" the duties of assigning and responsibly directing other employees.
- The legislation also specifies that supervisors must "hire, transfer, suspend, lay off, recall, promote, discharge, reward, or discipline other employees" for a majority of their work time.

# Next Steps For Employers - 2010

- The economy will recover—plan now to address legitimate employee concerns before the first sign of union activity
- Conduct vulnerability assessment and create an “issue free” workplace before organizing starts
- Review policies and procedures to assure compliance with new laws, regulations, Executive Orders and standards
- Conduct wage hour compliance audit, educate managers and consider safe harbor communications
- Provide workplace due process and meaningful employee involvement programs

## Sources for continually undated information about EFCA and Labor Law Reform

- Updated information about developments at the *New Liebman/Becker Labor Board* and EFCA -Lite and Labor Law Reform can be found at [www.efcablog.com](http://www.efcablog.com)
- A complete discussion of How To Stay Union-Free will be conducted at our public seminars:

**Las Vegas May 18-19**

— Copies of the PowerPoint slides from this webinar, as well as a White Paper, documenting developments at the Labor Board, can be obtained by contacting either of the speakers at their e-mail address below.

**Thank you for participating.  
Any Questions?**

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**Michael Lotito - [lotitom@jacksonlewis.com](mailto:lotitom@jacksonlewis.com)**