

Morgan Lewis

Keeping up with Labor Changes:
Issues real estate stakeholders
will face with the incoming
Obama Administration

Tracy L. Steele
Philadelphia

A. John Harper II
Houston

Joseph C. Ragaglia
Philadelphia

www.morganlewis.com



Organized Labor and the 2008 Election

- Unions are the strongest single force in the election other than candidates and national parties
 - 74% of union voters voted for the union-endorsed candidate
 - Union voters are 20% of the electorate
- Unions and related PACs spent about \$450 million
- AFL-CIO had 250,000 volunteers working at the end of the campaign
 - 5.5 million phone bank calls
 - 3.9 million home visits
 - Undecided voters contacted as many as 30 times

Organized Labor and the 2008 Election (cont'd.)

- Unions claim that they got Obama and the Democrats elected and now they are expecting payback
- This payback takes several forms, most notably the passage of EFCA and other union-friendly legislation, as well as union-friendly presidential appointees

EFCA: How Did We Get Here?

- Dramatic drop in union density
 - 7.4% of private sector workforce unionized
 - Union efforts fail to reverse drop
- How unions are recognized
 - NLRB elections
 - Voluntary recognition

EFCA: How Did We Get Here? (cont'd)

- Unions consistently win majority of elections, but few elections are held
- Union successes result from:
 - Neutrality agreements
 - Card-check recognition
 - Corporate campaigns
 - Political pressure

Enter Politics

- Obama victory
 - House majority with 257 Democratic votes and 178 Republican votes
 - 58 democratic votes in Senate with 1 unresolved race in MN
- EFCA support was indispensable for candidates receiving financial support from unions in this election cycle

What Is EFCA?

- Three elements

- 1) No more NLRB elections

- Union certification based on showing of majority support through authorization cards

- 2) Increased penalties for employers engaging in unfair labor practices during organizing and first contract negotiations

- Civil fines up to \$20,000/violation
 - Triple back-pay awards
 - Mandatory injunctions

What Is EFCA? (cont'd)

3) Initial contract bargaining obligations

- Mediation after 90 days and binding arbitration after 120 days for first contract negotiations
- Arbitrators write binding contract

Potential Legislation or Regulation

- RESPECT Act
 - Goal to neutralize first-level supervisors
- Ban on state Right to Work laws (repeal of Section 14(b))
- Ban on the use of permanent replacements for striking employees

Barack Obama

- “Each year, more than twenty thousand workers are fired or lose wages simply for trying to organize and join unions. That needs to change. We should have tougher penalties to prevent employers from firing or discriminating against workers involved in organizing efforts.”
- “Employers should have to recognize a union if a majority of employees sign authorization cards choosing the union to represent them.”
- “Federal mediation should be available to help an employer and a new union reach agreement on a contract within a reasonable amount of time.”
 - [Barack Obama, The Audacity of Hope, pp. 181-82.](#)
- Obama AFL-CIO Approval Rating
 - [2007 – 100%](#)
 - [Lifetime – 98%](#)

The Obama Administration

- Secretary of Labor — Nominee Hilda Solis
 - Member of House of Representatives since 2001
 - Co-sponsor of 2007 EFCA
 - Deputy Secretary of Labor
 - Solicitor of Labor
- National Labor Relations Board
 - Board Members (Liebman, Schaumber)
 - General Counsel (Meisberg)
- National Mediation Board
- Federal Mediation and Conciliation Service

SEIU Organizing Efforts

- EFCA is needed so employees can share in the prosperity they helped create
- 1/8/09 “Change That Works”
- 30% of SEIU’s resources — \$50 million
- 35 states will have an Organizing Director

Corporate Campaigns

Target customers and tenants, not employees

Goal is to force employer to agree to not exercise legal rights and to sign neutrality and card-check agreements

Proactive, not reactive, is key to success

JUSTICE FOR JANITORS

SEIU nationwide campaign to organize janitorial workers in class 1 office buildings in major metropolitan areas.

TACTICS:

- Using its leverage in certain organized markets such as New York and Chicago, it engages in demonstrations, picketing and handbilling at and around downtown office buildings claiming that building owners/managers are guilty of supporting poor wages and no benefits for janitors maintaining buildings owned/managed by them in other locales.
- Similar demonstrations, handbilling and picketing are undertaken against the “big 5” janitorial contractors who have union-represented employees in certain markets. Message is a plea for “solidarity” with the non represented “oppressed” janitors in other cities.
- Aim of these tactics is to (1) secure an agreement from the large national building owners and managers to not replace a janitorial contractor because its employees elect to unionize and (2) secure a card check recognition/neutrality agreement from the big 5 janitorial contractors.

JUSTICE FOR JANITORS (cont'd)

- Tactics are successful. Some building owners go so far as to publicly support SEIU efforts to provide a “living wage” for janitors. Big 5 janitorial companies yield to picketing pressure and sign neutrality/card-check pacts.
- SEIU then goes to target city, such as Houston, Texas, and secures support of local government officials and churches, or at least a pledge of neutrality.
- Organizers (and other disrupters) are brought into the target city and organizing efforts via card signings begin accompanied by demonstrations and picketing in support of its efforts to provide “justice for janitors.”

JUSTICE FOR JANITORS (cont'd)

- Card check recognition is secured with the big 5 janitorial companies and negotiations begin. Again picketing, demonstrations, and street blockings occur in support of union's claimed needs for contract terms. These demonstrations include invading individual buildings and locking themselves in the building owner's conference room.
- Agreements are reached that generally mirror those in place in other cities. Pay increases that match the then pending increases in the federal minimum wage and there is a promise to "make available" health insurance for purchase by the individual janitors in the last year of the agreement.
- Building Owners Manager Association (BOMA) concerned about what might happen in negotiations but is dissuaded from going to the bargaining table and risking a joint employer finding, embroiling itself even deeper into the controversy. Increased janitorial costs are passed through to tenants generally.

What Can Employers Do?

- Be prepared
- Maintain positive employee relations
- Train supervisors and managers to identify organizing activity in its early stages
- Conduct a labor-management policy audit program

Issues Specific to Property Owners/Managers

- Construction labor issues
- Property rights

Construction Contract Language – Hold Harmless & Indemnity Clause

- General Contractor must, as a condition of this Agreement, use its best efforts to prevent strikes, picketing, slowdowns, handbilling other forms of labor disputes, or any other protected concerted activity which has the tendency to interfere with work on this project irrespective of the reason for any such dispute or conduct.
- Should there be any manifestation of a labor dispute or other activities as defined above, irrespective of the reason or justification therefore, the General Contractor must take immediate steps to ensure that there is no interruption of the work on the Project, including but not limited to removal of any or all of the involved subcontractor(s), and shall take such steps as are necessary to finish the uncompleted portion of the work to be performed by such subcontractor(s). Additionally, the General Contractor shall indemnify, defend, and hold harmless INSERT YOUR NAME for any and all losses and/or delays that arise from conduct covered by this clause.

Property Rights

- Right to remove external organizers
- Right to enjoy ingress and egress
- State court injunctions
- Reserve gate

Reserve Gate Language

THIS IS THE LANGUAGE FOR A SIGN THAT MUST BE MADE AND POSTED ON THE ENTRANCE ON _____ ROAD:

RESERVE GATE FOR [CONTRACTOR]

THIS ENTRANCE IS RESERVED FOR THE EXCLUSIVE USE OF THE EMPLOYEES AND SUPPLIERS OF [CONTRACTOR]. ALL OTHER EMPLOYEES, SUPPLIERS, CUSTOMERS, OR CONTRACTORS OF *[insert every subcontractor, contractor and _____]* MAY NOT USE THIS ENTRANCE.

Reserve Gate Language (cont'd)

THIS IS THE LANGUAGE FOR A SIGN THAT MUST BE MADE AND POSTED ON THE REMAINING ENTRANCES TO _____:

THIS ENTRANCE IS FOR THE EXCLUSIVE USE OF ALL EMPLOYEES, SUPPLIERS, CUSTOMERS, OR CONTRACTORS OF *[insert every subcontractor, contractor and _____]* EXCEPT FOR THE EMPLOYEES AND SUPPLIERS OF _____, WHO ARE TO USE ONLY THE ENTRANCE ON _____ ROAD.

Contact Information



Tracy Steele
Partner
Philadelphia
tsteele@morganlewis.com
215.963.5355



A John Harper II
Senior Counsel
Houston
aharper@morganlewis.com
713.890.5199



Joseph C. Ragaglia
Partner
Philadelphia
jragaglia@morganlewis.com
215.963.5365