cross...border
GLOBAL WORKPLACE LAW PERSPECTIVES

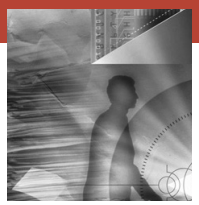
The Corporate Campaign Goes Global

It is no surprise that if you decide to employ workers in another country, you must abide by that country's labor and employment laws. To what extent, however, must multinational employers adhere to the *parent* company's national laws when doing business abroad? Certainly, the reputational harm levied on corporations perceived as exploiting local workers when they operate in countries with lax employment standards is a fate any company would want to avoid. But what happens when a multinational corporation doing business in a country with robust labor and employment laws – like the U.S. – is criticized for deviating from the national law in its home country? This is precisely what organized labor has been doing to unionize U.S. subsidiaries of European companies.

As multinational corporations continue to expand, labor unions have identified a new way to organize U.S. workers: put pressure upon the European parent to abide by its home country's laws, which may be more favorable to organized labor, when doing business in the U.S. As part of this global approach to union organizing, labor unions have borrowed strategies from the "corporate campaigns" – sometimes referred to as *"death of a thousand cuts"* – initiated by U.S. labor unions to secure employer neutrality and other demands. International corporate campaigns, like their local counterparts, can be so disruptive to an employer's operations that the target company is left with no choice but to accede to the union's demands.

Labor Relations in the U.S. and Origins of the Corporate Campaign

Union membership in the U.S. is currently at a 70-year low. In 2010, the union membership rate was just under 12 percent, whereas in 1983,



unions represented over 20 percent of the American workforce. In the private sector, unions currently represent under seven percent of the workforce.

One way labor unions have responded to this downward trend is through aggressive "corporate campaigns" against companies they set out to organize. The key objective in a corporate campaign against a target company is typically to secure employer *"neutrality"*– an agreement by the employer not to utilize its full rights to communicate with employees freely under the National Labor Relations Act (NLRA) with respect to unionization – and/or *"card check"* union recognition, as opposed to the secret ballot election process.

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What are the implications of neutrality and card check recognition processes?

Depending on the specific provisions, neutrality agreements may, among other things, require the employer to provide the union employees' names, addresses, and home phone numbers, grant union access to the employer's premises, and prohibit statements about the union that could be considered derogatory.

Whereas neutrality agreements may result in employees accepting unionization without having the opportunity to hear the employer's side of the story, card check recognition means employees lose their right to participate in the secret ballot election process provided for by the NLRA. There are a number of reasons that unions prefer card check procedures to secret ballot elections supervised by the NLRB. Among other things, unions typically obtain authorization cards from employees before an employer even knows its employees are considering unionization.

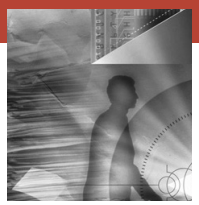
So what exactly is a "corporate campaign"?

The corporate campaign, with roots that go back to activist movements of the 1960s, has been described as "reputational warfare waged through broadsides, half truths, innuendo, and a staccato rhythm of castigation, litigation, legislation and regulation. It is fought in the press and on television, on the internet, in the halls of government, in the marketplace, on the trading floor, and in the boardroom." *

Some common elements of corporate campaigns include the following:

- Publicity and online activity in which the union criticizes the company's treatment of employees, publicizes examples of harassment, and criticizes the company's role as a "corporate citizen."
- Legal proceedings before the National Labor Relations Board (NLRB), Occupational Safety and Health Commission, Equal Employment Opportunity Commission, Securities and Exchange Commission, trade regulation authorities, as well as employment discrimination and class action lawsuits in state and federal courts and shareholder derivative suits.
- Alliances with religious leaders, consumer groups, and government agencies with the common goal of targeting the company.

* Jarol B. Manheim, *Corporate Campaigns: Labor's Tactic of The "Death of A Thousand Cuts,"* LABOR WATCH, Jan. 2002.



- Pressure on shareholders, corporate boards, investors, customers, creditors, and service providers/suppliers.
- Traditional labor union methods, including demonstrations, pickets, and boycotts.

In many instances, the company targeted by a corporate campaign is left with no choice but to accede to the union's demands in order to continue running its business. The employer, therefore, may be stripped of its legal right under the NLRA to communicate with employees regarding its reasons for opposing the union, and employees may ultimately agree to unionization without the opportunity to hear the pros and cons or to participate in the secret ballot election process provided for by the NLRA.

At the heart of these initiatives is a common theme: the unions are calling attention to key differences between U.S. and E.U. member country law, the latter being more favorable to workers in certain ways.

The International Corporate Campaign

International corporate campaign tactics are similar to the strategies used within the U.S., with the major difference being that unions have even more leverage when they can subject a company to global pressure. In other words, unions can put the spotlight on not only the U.S. subsidiary, but also the parent company, potentially compromising a company's global operations.

At the same time, transnational union alliances have additional legal recourse through not only national law, but also by filing complaints with the International Labor Organization's Committee on Freedom of Association (the ILO is the international organization responsible for overseeing international labor standards), as well as under the Organization for Economic Cooperation and Development's (OECD) Guidelines for Multinationals. Other common strategies employed in the context of international corporate campaigns include publicity, online activity, international boycotts, pressure on corporate boards, and alliances with non-governmental organizations (NGOs) and other third parties.

At the heart of these initiatives is a common theme: the unions are calling attention to key differences between U.S. and E.U. member state labor law, the latter being more favorable to workers in certain ways. Among other things, unions are critical of U.S. employers voicing their criticism of labor unions during working hours and via one-on-one conversations with management, as well as of the permanent replacement of striking workers. In some instances, unions are demanding that the company follow the more worker-friendly laws applicable in the European states here in the U.S. as a means to securing unionization.

What are some key differences between U.S. and E.U. member state laws?

In general, the European employer-union relationship is approached as more of a partnership than it is in the U.S. Critics of U.S. labor law also make much of the fact that the U.S. has not ratified the ILO Conventions addressing freedom of association, including Convention No. 87 of 1948 (Freedom of Association and Protection of the Right to Organize Convention) and Convention No. 98 (Right to Organize and Collective Bargaining Convention, 1949). Both Conventions have been ratified by E.U. member states and incorporated into their national laws, although some of the (non-binding) ILO

recommendations are more far-reaching than the national courts' interpretations of freedom of association.

Some specific differences between U.S. and E.U. member state law include the following:

- *Union Authorization by Employees.* While Section 7 of the NLRA gives workers the right to self-organize, bargain collectively, and engage in other concerted activities, *labor unions gain the right to represent employees only if "designated or selected" by employees.* Traditionally, this comes about after (1) having at least a third of the employees express an interest in the union by signing an "authorization" card and (2) obtaining a "yes" vote by a majority of the employees voting in a secret ballot election supervised by the NLRB. Under Article 2 of ILO Convention No. 87, however, employees have the "right to establish and … to join organizations of their own choosing without previous authorization." Accordingly, European member state laws allow union organization without previous authorization.

- *Exclusivity of Union Representation.* Once an American labor union is "designated or selected" by employees, however, the prize is substantial: the union becomes *the exclusive bargaining representative* of all the employees in the bargaining unit. This is not necessarily the case in European countries.

- *Who is Covered?* In the U.S., supervisors and managers are expressly excluded from coverage under the NLRA; this includes the right to form and be represented by a labor union. European law definitions of covered employees are often broader.

- *Permanent Replacement of Striking Workers.* The U.S. allows permanent replacement of striking workers over wages and working conditions, while the ILO Committee on Freedom of Association and European member state laws has found this practice incompatible with freedom of association.

Unfortunately, there is no "one size fits all" solution to either national or global threats posed by a union organizing campaign.

A number of companies have already experienced international corporate campaign pressure, including campaigns involving lawsuits, strikes, and/or union coalitions across various countries. In addition to requests for neutrality from the U.S. entity, global union federations sometimes seek employer agreement to voluntary codes of conduct or International Framework Agreements (IFA). Among other concerns with IFAs, once the company signs on to such an agreement, it can be criticized the moment the U.S. entity engages in activities that are otherwise legal under the NLRA, such as expressing views about union representation.

Unfortunately, there is no *"one size fits all"* solution to either national or global threats posed by a union organizing campaign. Instead, your company's strategy should be carefully tailored to its own culture, labor relations history, and business interests. It is important to ensure senior leadership fully understands not only what a corporate campaign is but also the key differences between social contracts in Europe and the U.S. and the consequences of agreeing to a neutrality agreement or an IFA. The foreign parent company may also seek additional information to assess the relevance of a corporate campaign for its U.S. operations.

Regardless of whether your company is faced with a corporate campaign, suspects it may confront organizing pressure in the future, or simply wants to solidify its reputation as an employer of choice, the best advice is to ensure full compliance with the law and treat employees with dignity and respect.