At the close of 2007, many areas of workplace law are being reexamined through judicial, legislative, and regulatory lenses. In the past year, the 110th Congress has dealt with a number of workplace initiatives, including passing an increase in the federal minimum wage, proposing to negate a series of pro-employer decisions under the Americans with Disabilities Act, and intensifying the debate on employer sanctions for hiring undocumented workers. At the National Labor Relations Board, a spate of recent decisions has revisited a number of significant issues, including:

- how soon employees can decertify a union after an employer recognizes it voluntarily,
- when an employer is justified in prosecuting a lawsuit against a union which employed arguably illegal means to organize employees, and
- who is an “employee” entitled to protection against discrimination for engaging in union activity under the NLRA.

More than being pro-employer or pro-union, many of these decisions can be viewed as giving individuals who are legitimately interested in employment a greater voice and choice in the terms and conditions under which they work.

This trend towards acknowledging and addressing employees’ legitimate workplace needs – apart from third-party representatives and outside advocates – can be seen in many facets of employment law. “Savvy employers take the long view and understand the opportunity this presents for listening to employees and engaging them with policies and programs that bridge the gap between what reasonably is required and expected from both sides in the employment relationship,” says Philip Rosen, head of the Jackson Lewis labor law practice. “Taking advantage of the opportunity simply makes good sense for achieving business objectives and bottom line results.”

continued
Among the 391 rulings of the Labor Board in FY 2007 were several on important issues of employee rights in the face of increasingly aggressive union organizing strategies.

**Employee Rights and Responsibilities**

In fiscal year 2007, the National Labor Relations Board issued 391 decisions, 287 of which involved charges of unfair labor practices by employers and unions. Among them were several long-awaited rulings on important issues of employee rights in the face of increasingly aggressive union organizing strategies.

Of particular note is Dana Corp., which was combined with a similar case, Metaldyne Corp., both of which involved employee decertification efforts following the employer voluntarily recognizing the union. The Board’s 3-2 ruling, issued on September 29, 2007, strikes a compromise that provides “greater protection for employees’ statutory right of free choice.”

The ruling changed 40 years of existing Board doctrine by creating a window of opportunity for employees to file petitions for union decertification or for rival union representation. Under the new rule, once employees receive notice that their employer voluntarily has agreed to recognize a union, they have 45 days to challenge that recognition before a no-challenge period begins. If employees do not receive such notice, they may challenge the voluntary recognition and any resulting union contract immediately without interference.

In issuing the new rule, the Board repeatedly acknowledged the importance of “striking the proper balance” between two important but often competing interests under the National Labor Relations Act: “protecting employee freedom of choice on the one hand, and promoting stability of bargaining relationships on the other.”

In deciding to give employees who did not have a secret ballot vote a 45-day period to decide whether to be represented by a union, the Board acted to “achieve a ‘finer balance’ of interests that better protects employees’ free choice.”

For more details on Dana Corp., 351 NLRB No. 28, see www.jacksonlewis.com/legalupdates.

In two other 3-2 rulings, the Board considered the scope of individuals’ NLRA rights. The first relates to who is an “employee” entitled to the law’s protection against discrimination.

The other concerns what the law requires to determine the appropriate amount of back pay in an unlawful discharge case. In both decisions, the Board examined the actions of the individuals in relation to their interest in employment, and put the burden on the Board’s General Counsel, who prosecutes cases on its behalf, to prove, respectively, “an individual’s genuine interest in seeking to go to work” and “that the discriminatee took reasonable steps to seek [those] jobs.”

In Toering Electric Co., 351 NLRB No. 18, the Board ruled that an applicant for employment must be genuinely interested in establishing an employment relationship in order to be an “employee” protected against hiring discrimination because of union affiliation or activity. The Board further held that the General Counsel bears the ultimate burden of proving an individual’s genuine interest in seeking to work for the employer.

Formerly, the Board presumed that any individual who submitted an employment application – even a union “salt” – was entitled to the NLRA’s protection against discrimination in hiring. In Toering Electric, the Board rejected that presumption. Only applicants who meet the definition of statutory employees are entitled to protection against hiring discrimination. Such status requires the existence of “at least a rudimentary economic relationship, actual or anticipated, between employee and employer.”

According to the Board, “submitting applications with no intention of seeking work but rather to generate meritless unfair labor practice charges is not protected activity. Indeed, such conduct manifests a fundamental conflict of interests ab initio between the employer’s interest in doing business and the applicant’s interest in disrupting or eliminating this business.”

Focusing on individual action and its consequences in another case, the Board has modified its approach to determine the appropriate amount of back pay to make whole an individual who has been discharged in violation of the NLRA. [St. George Warehouse, 351 NLRB No. 42.] First, the NLRB’s General Counsel must prove the amount of pay the individual would have been entitled to receive but for the discharge. That amount is then reduced by the individual’s earnings, if any, from the time of the discharge to the date the employer offered reinstatement.
The Supreme Court will review legality of California’s enforced employer neutrality law

The United States Supreme Court has agreed to review a decision of the U. S. Court of Appeals for the Ninth Circuit that California Assembly Bill 1889 (AB 1889), barring the use of state monies to advocate on the issue of unionization, is not preempted by the National Labor Relations Act. Chamber of Commerce v. Brown, No. 06-939 (cert. granted Nov. 20, 2007). Presented as a “neutral” spending measure, AB 1889 was enacted by the California state legislature to prohibit employers from using state funds received through contracts, grants, and other sources to “assist, promote, or deter union organizing.” Contrary to the Ninth Circuit, the United States government, in a “friend of the court” brief, has taken the position that AB 1889 is preempted under existing labor doctrine.

Jackson Lewis is one of several firms representing the alliance of employer associations formed to challenge AB 1889. Partners Bradley Kampas and Scott Oborne lead the Jackson Lewis litigation team. As to the importance of this issue in California and several other states (including New York) where similar legislation has been enacted or proposed, Mr. Kampas explained that “employers simply cannot sit idly by while their federal right to communicate during union organizing campaigns is silenced by partisan state legislation.”

Jackson Lewis will continue to report on the developments at www.jacksonlewis.com.

The result may be reduced further by showing, among other things, that the individual did not make reasonable efforts to find interim employment.

Reversing 50 years of precedent, the Board has shifted to its General Counsel the burden of showing the employee’s legitimate efforts to find interim employment after an unlawful discharge. Prior to this decision, an employer had to show not only the availability of comparable jobs in the area, but the employee’s lack of reasonable efforts to obtain interim employment in order to contest the amount of back pay upon reinstatement. Now, though retaining the ultimate burden of proof on back pay, the employer no longer has to mount a difficult affirmative defense with evidence largely in the control of the discharged employee and General Counsel.

In a case of two wrongs, the Board has reaffirmed that the NLRA prohibits it from granting a make-whole remedy to unionized employees disciplined or discharged for misconduct on the job, even if the infractions are discovered through means unilaterally and unlawfully implemented by the employer.

In Anheuser-Busch, Inc., 351 NLRB No. 40, the Board found that the NLRA and compelling policy considerations barred employees who have been disciplined or discharged for cause from invoking the law’s remedies. This was so even though the employer used video surveillance cameras installed without the employees’ bargaining representative’s agreement. Although the Board found the installation of the cameras to be unlawful, it determined the employees were discharged for cause and not entitled to reinstatement and back pay. Here again, the Board focused on the wrongful actions of the individuals who had violated company rules, and determined that they should not receive a windfall from their misconduct on the job.

In another 3-2 decision, the Board ruled that individuals hired as permanent strike replacements are not automatically ousted when the strikers unconditionally offer to return to work, even though the replacements are “at will” employees and can be terminated at any time with or without cause.

In Jones Plastic & Engineering, 351 NLRB No. 11, the Board concluded that at-will employment status does not interfere with an employer’s ability to retain permanent replacements hired to continue business operations during a strike, despite some contrary Board rulings. The employer’s disclaimers that employment was “at will” and for “no definite period” and could be terminated for “any reason” and “at any time, with or without cause” did not detract from permanent replacement status. Both the strikers – who had no union contract to the contrary – and the replacements had been hired as “at will” employees.

The Board has issued a new standard for determining when employer legal action challenging union campaign tactics is lawful.

Pushback against union campaign tactics

After a 20-year legal battle that included a 2002 decision by the U.S. Supreme Court, the National Labor Relations Board has issued a new standard for
This ruling may provide employers with additional strength to resist and counter union corporate campaign tactics.

Determining when employer legal action challenging union campaign tactics is lawful. Vindicating the employer, the Board has held that “the filing and maintenance of a reasonably based lawsuit does not violate the [NLRA], regardless of whether the lawsuit is ongoing or completed, and regardless of the motive for initiating the lawsuit.” This ruling may provide employers with additional strength to resist and counter union corporate campaign tactics through “reasonably based” legal recourse, even if ultimately unsuccessful. BE&K Construction Co., 351 NLRB No. 29.

In formulating the new standard, the Board took into account another Supreme Court decision that found an ongoing “reasonably based” lawsuit cannot be enjoined as an unfair labor practice. Bill Johnson’s Restaurants, Inc. v. NLRB, 461 U.S. 731 (1983). In BE&K Construction, the Board reasoned that the same protection must apply to a completed lawsuit that was reasonably based. According to the Board, reaching a different result for a completed, reasonably based lawsuit would have a “chilling effect” on the employer’s constitutional right to petition the government for redress through the courts. Using its newly-developed standard, the Board found the BE&K lawsuit was reasonably based and the unfair labor practice complaint was dismissed.

This favorable ruling gives employers a powerful tool in a corporate campaign, which has little to do with the employees for whose affiliation the union is vying. Labor leaders report they are gaining more union members through card checks and neutrality agreements than through the Board processes of representation petitions and secret ballot elections. This type of campaigning often has the objective of persuading the employer to agree to neutrality or card check recognition, thereby circumventing the NLRA’s secret ballot election process where employees have the opportunity directly to participate by voting on whether to have a union. “With the increasing sophistication and prevalence of corporate campaign-style organizing, BE&K Construction helps put employers in a better position to engage a more aggressive, toe-to-toe strategy by going on the offensive,” observes Jackson Lewis attorney Philip Rosen.

Details of the decision are available at www.jacksonlewis.com/legalupdates.

POINT/COUNTERPOINT: DOES ORGANIZED LABOR’S AGENDA GIVE VOICE TO EMPLOYEE CHOICE?

ORGANIZED LABOR Outraged by the recent decisions, the AFL-CIO has launched a campaign to put pressure on the Board, which AFL-CIO President John Sweeney claims is “pulling the rug out from under our nation’s middle class through such decisions which amount to a sea change in our nation’s labor laws.” Referring to the Dana Corp. decision, Mr. Sweeney said the ruling “would effectively permit a minority of employees to negate the majority’s decision to have a union, even where the employer has agreed to recognize the union through majority sign-up or ‘card check’ process, and is already engaged in bargaining with the union for a contract. The decision means that as few as 30 percent of the employees will be able to cause any such recognition to be set aside and force an NLRB election to try to get rid of the union.”

Calling the NLRB process for recognizing union representatives “severely broken,” Mr. Sweeney observes that “the majority of workers in this country who successfully form a union now do so through a voluntary recognition process. In allowing a small group of workers to undermine both the majority of workers’ and the employer’s wishes, the labor board is effectively making a mockery of the law’s allowance for voluntary recognition. Workers who attempt to join or form unions through the NLRB election process are routinely subjected to harassment, intimidation and even fired, which is why momentum continues to build for the Employee Free Choice Act.” Statement by AFL-CIO President John Sweeney on Latest NLRB Decision to Undermine Workers, October 3, 2007, at www.aflcio.org.

MANAGEMENT Countering Mr. Sweeney’s criticism of the NLRB processes and recent decisions, U.S. Chamber of Commerce President and CEO Thomas J. Donohue said in a speech to a business group in October, “[S]ome unions are pursuing a political and policy agenda that would turn back the clock to the 1950s, damaging U.S. competitiveness and hurting American workers.” Mr. Donohue noted the Chamber’s longstanding
The National Labor Relations Act generally provides that an employer is not obligated to recognize a labor organization as its employees’ representative unless the labor organization prevails in a secret ballot election. This law protects the rights of employees and employers by ensuring that both management and labor have an opportunity to make their case with the employees, after which the employees are able to express their choice in private by a secret ballot vote free from coercion and intimidation.

The secret ballot election process long has been recognized as the preferred method for determining representation questions, however, unions contend the process is unfairly tipped in the employer’s favor. Another method for selecting union representation is allowed by the NLRA under certain conditions when a union and an employer have agreed to “card check” recognition. For years, unions have lobbied to amend the NLRA to force employers to recognize a union solely on the basis of the “card check” process without a secret ballot vote by the affected employees.

After many unsuccessful attempts to get such a proposal into play, the Employee Free Choice Act was introduced first in 2003, then again in 2005. By 2007, organized labor and its supporters had attracted enough votes to pass the legislation in the House but had failed to garner enough votes in the Senate to bring the floor debate to a close and submit it for a full vote.

Despite its unsuccessful run, management and labor observers expect EFCA will be reintroduced sometime after the 2008 election, when support is likely to be stronger if Congress has a more significant Democratic majority, and, particularly, if the presidency is won by a Democrat. Citing the recent NLRB decisions as “drastic changes in labor law” by a partisan and politicized agency “making a mockery of the law’s allowance for voluntary recognition,” the AFL-CIO said this is why “momentum continues to build for the Employee Free Choice Act.”

### How EFCA Would Affect Employee Choice

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Support for the right of workers to voluntarily join unions under fair and democratic rules. “But we will not sit by while some union leaders pressure Congress to pass a broad array of new workplace regulations,” Mr. Donohue said. “We will continue to lead the fight against their transparent campaign to do away with secret ballots in organizing elections.”

**THE “TRANSPARENT CAMPAIGN”** Mr. Donahue refers to is the Employee Free Choice Act, which was defeated narrowly by the Senate in June 2007 on a procedural vote after the measure passed in the House of Representatives by 241-185. Vigorously opposed by employers and their representatives, EFCA would amend the NLRA to:

1. **require employers to recognize unions based on card checks;**
2. **impose mandatory mediation and arbitration in first contract negotiations; and**
3. **substantially increase penalties imposed on employers for labor law violations during organizing campaigns and first contract efforts.**

**ORGANIZED LABOR** If actions speak louder than words, then the AFL-CIO’s November 15 march on the NLRB brought the debate to a shout. So vehement is the AFL-CIO’s opposition to the recent Board decisions that it organized a protest at the NLRB’s Washington, D.C. headquarters to Stop the Assault on Workers: The Anti-Worker NLRB Should Be Closed for Renovations. Reportedly, hundreds of workers representing a variety of jobs and trades marched from the AFL-CIO’s headquarters in Northwest Washington to the NLRB’s office to express their disagreement with the recent Board rulings and to show support for the Employee Free Choice Act.

**MANAGEMENT** Many employers believe that if EFCA legislation is passed, it would significantly tilt the playing field in favor of unions. For years, unions have lobbied to amend the NLRA to force employers to recognize a union solely on the basis of the “card check” process without a secret ballot vote by the affected employees.
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Field of labor relations to the detriment of all, except organized labor. Most importantly, such legislation would deprive employees of the chance to make a considered, uncoerced choice on union representation by eliminating an employer’s right to require an NLRB-conducted secret ballot election. “Under the EFCA,” veteran Jackson Lewis attorney Michael Lotito points out, “employers, quite unfairly, are not given a chance to provide important information to their employees before union representation decisions are made.” As the U.S. Court of Appeals for the Seventh Circuit observed in a recent decision, “Workers sometimes sign union authorization cards not because they intend to vote for the union in the election but to avoid offending the person who asks them to sign, often a fellow worker, or simply to get the person off their back.”

ORGANIZED LABOR A September 2006 statement by Change to Win, an affiliation of seven unions formed in 2005 that includes the SEIU, UNITE HERE, and the Teamsters, referenced a survey it conducted where “86% of workers believe the right to join a union without fear, retribution or intimidation from their employer is a fundamental American right. But only about half of workers feel they can join with other workers to create a union without fear of retribution.” According to CTW, EFCA legislation would “make the right to join a union a reality.” In explaining the EFCA, CTW says its central purpose “is to allow workers to exercise this right by signing a union card the same way they can sign a card and join a church, join a political party or register to vote.” Change to Win Press Release, Sept. 6, 2006, at www.changetowin.org.

MANAGEMENT Citing the inherent and long-recognized problems with the card check process (including, “back room” process, no secret-ballot vote, no opportunity to present opposing viewpoints), the U.S. Chamber of Commerce argues, “Union members recognize that secret ballot elections are the fairest way to choose whether or not to form a union. In a poll by Zogby International, union members overwhelmingly (84% to 11%) indicated that employees should have the right to specifically vote whether or not to join a union.”

POSITIVE EMPLOYEE RELATIONS: AN OLD IDEA FOR A NEW EMPLOYMENT ETHIC

If advocates on both sides are correct, the Employee Free Choice Act will emerge in 2009 with renewed support and the real possibility of becoming law. Moreover, a change in leadership in Washington, D.C., will mean another change in the direction of the Labor Board, since Chairman Robert Battista’s appointment and the recess appointments of Members Dennis Walsh and Peter Kirsanow expire in December 2007. Meanwhile, a variety of legislative initiatives on the national, state, and local levels are constructing a network of often overlapping and sometimes contradictory workplace laws and regulations which require constant vigilance by employers and their legal counsel.

That the workplace environment is evolving in the direction of greater rights and increasing obligations on both sides is not new. Attorneys in corporate legal departments across the U.S. still consider labor and employment issues the top litiga-
GROWTH AND LONGEVIDY ARE REASONS TO CELEBRATE JACKSON LEWIS IN 2008

Jackson Lewis LLP is pleased to announce the recent openings of new offices in New Orleans, LA and Phoenix, AZ. The firm now has 32 locations nationwide, with 11 new offices since mid-2006, including offices in Birmingham, AL, Denver, CO, Orange County, CA, and Philadelphia, PA.

- In New Orleans, René Thorne, formerly with Proskauer Rose, has joined the firm as Partner and Resident Manager. Her primary focus is complex ERISA class and collective actions. She has extensive experience defending employment law class and collective actions. René is joined by Jason Stein, a senior associate, also formerly with Proskauer. Office details: 650 Poydras Street, Suite 1900, New Orleans, LA 70130; tel: (504) 208-1755.

- In Phoenix, Amy Gittler, a prominent labor and employment attorney in the region, has joined the firm as Partner and head of the new office. Amy has over 30 years’ experience advising, counseling, and defending corporations and business owners on all aspects of workplace law. Accompanying Amy is associate Jeffrey Toppel. Office details: 2375 East Camelback Road, Suite 500, Phoenix, AZ 85016; tel: (602) 714-7044.

- In other Jackson Lewis offices around the country, several outstanding workplace law attorneys have joined the firm in the last quarter of 2007. Among them are Partners Jane McFetridge and Nadine Abrahams in Chicago, both from Fisher & Phillips. Jane will become the Managing Partner of the office when Peter Bulmer returns to full-time client representation. In the Washington, D.C. Region office, Francis W. Connolly has joined as Partner following his tenure with DLA Piper LLP. In San Francisco, the firm welcomed the return of Partner Mark Askanas, former general counsel of Ross Stores, Inc. And in the firm’s Richmond, VA office, an employment law team was reunited when Joseph D. McCluskey joined his former colleague and current Jackson Lewis partner, David Nagle.

As the firm marks its 50th anniversary in 2008, such dynamic growth is linked to the vision of founding partners Louis Jackson and Robert Lewis, chairman emeritus William Krupman, and firm-wide managing partner Patrick Vaccaro. Their shared philosophy of preventive strategies and positive solutions for the workplace is the guiding force for the firm’s nearly 450 attorneys.

As the field of workplace law has grown, so has the scope of Jackson Lewis capabilities. In addition to its cornerstone practices of Employment Litigation, Labor Relations, and Employee Benefits law, the firm has expanded into areas such as Affirmative Action, Alternative Dispute Resolution, Corporate Governance, Drug Testing, Immigration, International Employment Issues, Trade Secrets, Wage and Hour, and Workplace Safety. Over the last half-century, we have become one of the largest and most prominent workplace law firms in the country.

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Is Your Company Ready to Respond to Today’s Union Organizing?

Nationwide organizing efforts are being waged now by the most powerful union forces in years. The AFL-CIO and Change to Win Federations, pledging $750 million for campaign war chests, are enjoying victories in almost 2/3 of union elections. The Employee Free Choice Act, mandating union recognition based on authorization cards alone, is sure to reappear in what may be a more favorable political climate. Does your organization know what to do, and what not to?

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