Worker Centers & Traditional Labor Law: *How to Stay on The Good Side of the Law!*

The Issue: Labor Law as Friend and Foe

While worker centers engaged in wage justice campaigns are usually familiar with laws governing the individual employment relationship (such as wage/hour, discrimination, and workers' compensation laws) they may know little about the National Labor Relations Act (NLRA or "the Act") and other laws governing labor relations. Worker centers should be interested in the NLRA for two reasons: (1) it can be a source of rights for collective activity in the workplace, and (2) employers can try to use it to stop certain forms of worker center organizing. This strategy guide explores the potential consequences labor law may pose for worker centers, so that centers may properly evaluate the legal risks of their campaign activities and adjust them where necessary.[1]

Under the NLRA, if an organization qualifies as a "labor organization," the law places several restrictions on its activity, for example, the organization cannot engage in secondary boycotts or certain kinds of picketing. In addition, the Labor Management Relations and Disclosure Act (LMRDA) imposes a series of burdensome annual financial disclosure requirements as well as certain rules on how labor organizations conduct their internal affairs, which are enforced by the Department of Labor (DOL). These restrictions and more are summarized in the table below:

NLRA Restrictions	**LMRDA Restrictions**
Cannot picket an employer for a period over thirty days with a "recognitional" or "organizational" goal unless the organization files a petition for representation.[2]	Must file detailed annual financial reports with Department of Labor as well as constitution and bylaws.[3]
Cannot picket or otherwise pressure a third-party group about working conditions that are not under its legal control (e.g. picketing a building owner for the working conditions of its subcontractor).[4]	Must guarantee certain rights of members, including the ability to run for office and participate in internal affairs, to obtain certain information about the labor organization, and to receive due process before any kind of discipline by the labor organization.[5]
Cannot favor members in certain kinds of hiring halls.[6]	Officers have fiduciary duty to members over organization's money and property.[7]
Organization owes a duty to fairly represent any workers in bargaining unit (members or not) if the organization becomes the exclusive bargaining representative.[8]	Bonding insurance requirements for organization employees.[9]
Cannot receive funds or loans from employers.[10]	Must hold elections on a regular schedule.[11]

[1] Labor law's protective side is based in Section 7 of the Act, which gives employees the right to engage in concerted activity for mutual aid or protection. 29 U.S.C. § 157. The extent of Section 7 rights, and how they may benefit worker centers, is beyond the scope of guide, but there are numerous resources on NLRA protections for non-union workers. *See, e.g.*, Charles J. Morris, *NLRB Protection in the Nonunion Workplace: A Glimpse at a General Theory of Section 7 Conduct*, 137 U. PA. L. REV. 1673 (1989); William R. Corbett, *Waiting for the Labor Law of the Twenty-First Century: Everything Old Is New Again*, 23 BERKELEY J. EMP. & LAB. L. 259 (2002). For a more in-depth treatment of how traditional labor law's protections and restrictions may bear on worker center activity, see Eli Naduris-Weissman, *The Worker Center Movement and Traditional Labor Law: A Contextual Analysis*, 30 BERKELEY J. EMP. & LAB. L. 232 (2009).

[2] NLRA 8(b)(7)(C); 29 U.S.C. § 158(b)(7)(C). A recognitional goal could include winning recognition as a union or a contract that will control working conditions. Picketing over specific work issues, such as unpaid wages, a new employer policy, or the discharge of a worker, is not recognitional. Whether picketing will be considered recognitional depends on the circumstances, with a key factor being the text of picket signs, chants, leaflets, and speeches made on the picket line.

[3] 29 U.S.C. § 431.

[4] NLRA 8(b)(b); 29 U.S.C. § 158(b)(4).

[5] 29 U.S.C. §§ 411(a)(1), 431, 481(e).

[6] NLRA 8(b)(2); 29 U.S.C. § 158(b)(2).

[7] 29 U.S.C. § 501(a).

[8] This is commonly known as the "duty of fair representation."

[9] 29 U.S.C. § 502.

The Potential Threat to Worker Centers

The threat that a worker center may be classified as a "labor organization"—and subject to these restrictions—is not an idle one. In 2006, three restaurants filed unfair labor practice charges against the Restaurant Opportunities Center-New York (known as "ROC-NY"), after ROC engaged in weekly demonstrations near the entrances to the restaurants and picketed, gave out handbills, and used noisemakers for a year in its campaign to recover unpaid wages and rectify discrimination in the workplace. The restaurants claimed that this picketing constituted a demand for recognition without seeking an election, in violation of the NLRA. Fortunately, the General Counsel of the National Labor Relations Board (NLRB or "the Board") decided not to file a formal charge, and an advice memo held that ROC-NY was not a labor organization.[12] A separate petition by the employer to have the DOL regulate ROC-NY under the LMRDA also failed.[13] However, after an appeal and a motion seeking reconsideration filed with the NLRB, the General Counsel admitted that the employers had raised "legitimate questions that might in a future case warrant placing this matter before the Board for decision."[14] Because the law on this issue is still unclear, worker centers could be classified as "labor organizations" if their activities and relations with employers become closer to those of traditional unions.

While this guide highlights the potential risks of aggressive organizing activities directed at employers, it should be noted that in some cases such activities represent creative and potentially effective tools that centers may not wish to abandon. Yet, as the restrictions above illustrate, being classified as a "labor organization" could severely hamper worker center activity, and in some cases lead to significant liability. For example, an employer may sue a "labor organization" in federal court for damages for any business losses attributable to a secondary boycott.[15]

It should be emphasized that the threat of this happening is unclear and thus far the risk is small. Whether a particular worker center will face the labor organization question will depend on the legal sophistication of employers and how the NLRB and DOL will receive these arguments in the future. As a result, it is important that worker centers monitor developments in this area. Once aware of the risks, worker centers can properly evaluate and—where necessary—calibrate the tactics they use in campaigns against employers.

The Meaning of "Labor Organization"

Section 2(5) of the NLRA defines labor organization as "any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."[16] The LMRDA

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[10] Labor Management Relations Act Section 302(a); 29 U.S.C. § 186(c).
[11] 29 U.S.C. § 401.
[12] *See* Memorandum from Barry J. Kearney, Assoc. Gen. Counsel, NLRB, to Celeste Mattina, Reg'l Dir., Region 2, NLRB, regarding Rest. Opportunities Ctr. of N.Y., Cases 2-CP-1067, 2-CP-20643, 2-CP-1071, 2-CB-20705, 2-CP-1073, & 2-CB-20787, 1-4 (Nov. 30, 2006) [hereinafter *ROC-NY Advice Memo*], *available at* http://www.nlrb.gov/shared_files/Advice%20Memos/2006/2-CP-1067.pdf.
[13] *See id*. at 4 n.8.
[14] Letter from Ronald Meisburg, General Counsel, NLRB, to Peter M. Panken, Esq., Epstein, & Pecker & Green, PC (Mar. 19, 2007) (by Office of Appeals) (on file with author).
[15] Labor Management Relations Act § 303, 29 U.S.C. § 187.
[16] 29 U.S.C. § 152(5).

definition differs slightly, and also requires that the labor organization be certified, recognized, or "acting" as the representative of employees.[17]

Traditionally, the NLRB and the courts have interpreted "labor organization" broadly, so as to capture within its meaning many forms of in-house unions formed by the employer that the NLRA prohibits (i.e. "company unions").[18] In the case of worker centers, the key question is whether they exist, in whole or in part "for the purpose . . . of dealing with employers."

Arguments Against Labor Organization Status for Worker Centers

If your center runs into an employer who tries to use the NLRA to restrict your activities, there are several strong arguments you can make to the NLRB to convince them not to find "labor organization" status for worker centers that do not seek to engage in collective bargaining. First, modern NLRB case law has held that "dealing with" only occurs if there is a "bilateral mechanism" involving proposals from the labor organization that are considered by management,[19] where this mechanism "entails a pattern or practice" over time, rather than "isolated instances in which the group makes ad hoc proposals to management."[20] Second, the legislative history and purposes of the NLRA indicate that the broad definition of labor organization was intended to address the specific problem of company unions that were rampant in the 1930s when the Act was passed. The Board has been mindful of the policies of the Act when applying the "labor organization" definition in different settings, and should do so when being asked to apply prohibitions intended for labor unions to nonprofit worker centers.[21] Third, protest activity by political groups is entitled to some degree of First Amendment protection from government regulation. Specifically, politically-motivated boycotts[22] and litigation activities[23] have received broad protection from the courts, suggesting that the NLRB should be wary of regulating worker centers for engaging in such activities.

The NLRB's Advice Memo regarding ROC-NY demonstrates that these arguments can prevail in specific instances. In ROC's case, throughout the long campaign and litigation, the organization sought, and eventually reached, a settlement with the employers over a range of terms. The proposed settlement even contained an arbitration provision designed to resolve disputes arising during the life of the agreement. While in some ways the negotiations over this settlement looks like "dealing," the advice memo emphasized that ROC's attempts to negotiate settlement

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[17] 29 U.S.C. § 402(j). *See ROC-NY Advice Memo*.

[18] *See* NLRB v. Cabot Carbon Co., 360 U.S. 203 (1959) (holding that employee committees established by the employer qualified as labor organizations despite absence of bargaining, where the committees had discussed and submitted to management various proposals relating to terms and conditions of employment).

[19] Electromation, Inc., 309 N.L.R.B. 990, 995 (1992).

[20] E.I. Du Pont De Nemours & Co., 311 N.L.R.B. 893, 894 (1993).

[21] For example, in *Center for United Labor Action*, the Board concluded that a labor support group engaging in a classic secondary boycott (picketing a department store for selling the clothes of a manufacturer with which a national union had a labor dispute), was not a labor organization—and thus could not be liable under the NLRA—but was supporting a "social cause" and was not seeking to become the employees' representative. 219 N.L.R.B. 873 (1975).

[22] *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) (holding that nonviolent picketing by civil rights protesters in effort to publicize a boycott of white merchants who opposed racial integration was protected by the First Amendment and thus could not be the basis of tort liability).

[23] *See* BE&K Construction Co. v. NLRB, 536 U.S. 516 (2002) (holding that NLRB's treatment of retaliatory employer lawsuits against a union as an unfair labor practices was overbroad, because the First Amendment protects the right to "petition the Government for a redress of grievances," which includes the right to file lawsuits that are unsuccessful so long as they are not objectively baseless); NAACP v. Button, 371 U.S. 415, 429(1962) (striking down state law that limited solicitation for civil rights lawsuits, because litigation is not only "a technique of resolving private differences" but also "a form of political expression" protected by the First Amendment).

agreements were "discrete, non-recurring transactions" that, "[a]lthough stretching over a period of time . . . were limited to a single context or a single issue," and thus did not constitute "dealing." Rather, the agreement was aimed at resolving ROC-NY's attempts to enforce employment laws and did not "impl[y] an ongoing or recurring pattern of dealing over employment terms and conditions," in part because, "settlement of lawsuits is not generally something that can be accomplished in a single meeting."[24] As this example illustrates, the reasons a worker center engages the employer, and the extent of that engagement, will be critical factors in determining whether it has crossed the threshold into "labor organization" status.

Guidance: How to Avoid Being Classified as a Labor Organization

While every worker center must evaluate its own activities with respect to the "labor organization" question and weigh any changes to its tactics in the context of its overall goals and strategies, the following pointers may help worker centers ward off the potential threat of employers seeking to hamstring their organizing efforts. **NOTE**: **This is generic information regarding a legal issue but does not in any form constitute legal advice. Please consult an attorney if you have specific questions in this area.**

Making Demands on the Employer	When making demands on the employer on behalf of workers, centers and their members should avoid establishing formal negotiations. The safest course is to tie demands to specific legal claims—such as wage violations or discrimination claims—and pursue such claims in the appropriate administrative or judicial forum. The organization can then use additional pressure tactics in its efforts to resolve the dispute, such as protest or settlement negotiations, on parallel tracks, and make additional, related demands. As the ROC-NY case demonstrates, when organizing activities are pursued in this manner they may be viewed by the NLRB as connected to the legal claim rather than independent efforts to establish terms and conditions with the employer.
Code of Conduct Campaigns	There is a risk that in pursuing a code of conduct campaign, a worker center will engage in extensive back-and-forth negotiations with an employer that a court of the NLRB might classify as "dealing." Several guidelines can help to avoid this result. First, as is typical, a code of conduct campaign should involve multiple employers rather than a single target. Second, to the extent possible, the worker center should independently establish the terms of the code, based on the market and other considerations (such as model employer standards, comparable codes, etc.). This way, the center will be seeking to convince employers to sign on to pre-established terms rather than negotiating with employers over the code's terms. Third, the campaign to seek employer assent to codes of conduct should be primarily conducted in the public sphere as a call for good corporate citizenship, rather than in direct negotiations with employers. All of these steps help to ensure that codes of conduct campaigns do not became a proxy for bilateral negotiations.
Precautions to Take While Organizing	Even if a worker center has engaged with the employer in a way that may qualify the center as a labor organization, it can nevertheless avoid violating the NLRA by taking precautionary measures and refraining from certain organizing activities. For example, if campaigning against

[24] *ROC-NY Advice Memo*, *supra*, at 3.

	a secondary target (i.e. a supplier, retailer, or owner that is not the direct employer), the worker center could engage in peaceful and truthful protests that do not violate NLRA Section 8(b)(4). As many unions do, worker centers could add provisos to their fliers or pickets specifying that they do not seek to stop deliveries or to cause employees of the secondary target to stop work. Centers could go further by specifying that they do not seek to deal with the employer or represent workers in collective bargaining.[25] Similarly, worker centers could avoid NLRA Section 8(b)(7)'s restrictions on picketing by making clear that the object of their campaign is not to gain union recognition, but perhaps concerns a lawsuit or the treatment of a specific worker. Just as importantly, worker centers should avoid using language that could create an impression that they are a labor organization. For example, it should not refer to itself as a "union," nor use trade union lingo, such as calling a settlement agreement with an employer over a legal claim a "contract."
Operating Hiring Halls	If the center operates an exclusive hiring hall and has specific referral relationships with individual employers that persist over time and jobs, it is possible that the center will be "dealing with" the employer in setting terms of the arrangement. If this is the case, the worker center might consider making hiring hall arrangements less formal, or "spinning off" the hiring hall as a separate entity apart from the worker center's economic and political organizing directed at employers, to eliminate the employer's ability to target these efforts based on the organization's hiring hall activities.
Working with Labor Unions	As worker centers begin to collaborate with unions on specific campaigns, the risk of "labor organization" classification may increase. To avoid this outcome, worker centers and unions should develop clearly separate roles and goals for each organization in any campaign. If collective bargaining is a goal of the campaign, it should be the labor union and not the worker center that pursues it. Because the restrictions on labor organizations in NLRA section 8(b) also apply to "agents" of labor organizations, worker centers should avoid acting merely as union proxies—by developing their own actions and pursuing an independent decision-making process. Overall, worker centers should avoid being seen as dealing with employers, either directly or through involvement in a campaign that does. Worker center coalitions with non-union groups, such as religious and other non-profit organizations, do not raise the same risks.

[25] For example, the leaflets used by ROC when it targeted two New York restaurants included the following text on the backside:

> The Restaurant Opportunities Center of New York (ROC-NY) is a non-profit organization that seeks improved working conditions for restaurant workers citywide. ROC-NY assists restaurant workers seeking legal redress against employers who violate their employment rights. ROC-NY seeks to provide customers and the public with *information* about the litigation in this restaurant through these handbills, *not to picket or interfere with deliveries. ROC-NY is not a labor organization and does not seek to represent the workers or be recognized as a collective bargaining agent of the workers at this restaurant.*

SMJ Group, Inc. v. 417 Lafayette Restaurant LLC, 439 F. Supp. 2d 281, 286 (S.D.N.Y. 2006). (emphases added).