Strategic Perspectives

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ON THE LABOR FRONT—Organized campaign workers create new labor relations reality for presidential candidates

By Michael J. Soltis, J.D.

Presidential campaigns are "frenetic, dynamic, and tumultuous," says Democratic presidential candidate Bernie Sanders in his "Blueprint for Safety, Inclusion & Equity."[i] Collective bargaining agreements tend to be the opposite: stable, predictable, and staid. Now that five Democratic presidential candidates have recognized a union to represent nonmanagerial campaign staff, the "frenetic, dynamic, and tumultuous" is about to meet "stable, predictable, and staid." Since this is the first time presidential campaign employees are represented by a union, this encounter presents unique labor relations and political issues.

That five Democratic candidates have recognized a union is not a surprise. Labor unions have supported Democratic presidential candidates in almost every election since the New Deal. Since 1976, the AFL-CIO, the largest federation of unions in the United States, has endorsed the Democratic presidential candidate. Despite AFL-CIO President Richard Trumka's recent statement to the Democratic hopefuls that they cannot "count on workers' votes simply because you have a 'D' next to your name," the presidential candidate with a "D" next to his or her name can almost certainly count on union endorsements, financial resources, and other support.[ii]

Democratic presidential candidates waive secret ballot election, voluntarily recognize a union

Given that long history of union support for Democratic candidates, when unions called on the campaigns of candidates Bernie Sanders, Elizabeth Warren, Julian Castro, Cory Booker, and Earl Swalwell, each welcomed its employees' choice to be represented by a union. The National Labor Relations Act (NLRA) regulates the relationship among employers, unions and employees and has a process for employees to vote in a secret ballot election to determine if they want to be represented by a union. Each campaign waived its right to a secret ballot election, relied on employee signature cards to establish that a majority supported the union, and "voluntarily recognized" the union. That voluntary recognition was heralded with campaign press releases and speeches. "I'm thrilled that the Teamsters have earned majority support to serve as our campaign workers' union representatives," said a Booker campaign official.[iii] The Sanders

campaign sent a similar message: "[W]e're honored that his campaign will be the first to have a unionized workforce."[iv]

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Employers applauding their employees' decision to be represented by a union is not the norm in the United States, but a presidential campaign is not a typical employer. A fundamental principle underlying the NLRA is that employers and employees have adverse interests, and when employees are represented by a union, the desire to reach an agreement and avoid the threat to the operation if an agreement is not reached will result in compromises that will be embodied in a labor contract.

In a presidential campaign, the interests of the campaign and its employees seem almost perfectly aligned. All are on a mission to have the candidate be elected as the next president. Campaign workers typically work very long hours for very little or no pay or benefits with the goal of putting their candidate in the White House.

Yet, a union exists to represent employees, not to have a particular candidate elected. The Campaign Workers Guild (CWG), a union representing campaign workers, leaves no doubt about its mission. "We are done with candidates disrespecting the workers who put them in office," the CWG says on its website.[v] "We, as campaign staff, believe that campaigns cannot fully fight for workers' rights while they're exploiting their own campaign staff," it adds. The CWG represents employees in the Julian Castro 2020 campaign.

After recognition, negotiating a labor contract is next

With union recognition behind them, the presidential campaigns now face a new labor relations reality. The platitudes supporting their staff's unionization effort soon give way to dealing with a union's very detailed bargaining demands for iron-clad contractual commitments with a grievance and arbitration procedure enforcement mechanism. The NLRA requires an employer and union to bargain "in good faith," a vague and pliable term that imposes multiple more specific obligations.

Negotiating a first contract can be an arduous and time-consuming task. Often, after a year of negotiating a first contract, the employer and union have not yet reached an agreement. The Sanders campaign is the only campaign reported to have already negotiated a labor contract. The campaign recognized Local 400 of the United Food and Commercial Workers in March and negotiated a labor contract in May, just two months later.

The Warren campaign recognized Local 2320 of the International Brotherhood of Electrical Workers in early June and, as of mid-July, the campaign reported that negotiations were "going well."[vi] The Castro campaign recognized the CWG in May and has not yet announced that it has reached an agreement. The Booker campaign recognized Local 238 of the International Brotherhood of Teamsters earlier this month and is likely in the early stages of negotiations. The Swalwell campaign had also recognized Local 238 of the Teamsters but ended its campaign in July.

Unfair labor practice charges filed against Sanders, Warren campaigns and union representing Sanders' employees

Since late July, unfair labor practice charges have been filed at the NLRB against the Sanders and Warren campaigns and Local 400, UFCW, the union representing certain Sanders campaign workers.

The Sanders campaign. The Sanders campaign has been accused of violating its labor contract and its obligation to bargain in good faith under the NLRA. The platitudes have yielded to the reality of labor relations.

A primary focus of the dispute deals with one of the Sanders campaign's most important positions—that every employee ought to earn at least $15 per hour. His campaign staff protested that they were working more than 60 hours weekly and not earning $15 per hour. Sanders responded by reducing their hours which, in effect, increased the hourly rate to $15 but reduced their overall income. I suspect the employees had a different outcome in mind—to be paid $15 per hour without having their hours cut.

Newton's Third Law of Physics states that for every action, there is an equal and opposite reaction. That law often applies in labor relations. On July 22, 2019, a slew of unfair labor practice charges was filed with the National Labor Relations Board against the Sanders campaign. The allegations are of three types—making unilateral changes to working conditions, terminating six employees for reasons prohibited by the NLRA, and unlawfully interrogating employees about their union activities.

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The obligation to bargain in good faith under the NLRA prohibits an employer from making unilateral changes in wages, hours and working conditions. The charge alleges that the campaign violated the NLRA by making five unilateral changes: changing employee "blackout days," (days on which an employee cannot be called in to work); telling employees they were employed at-will despite the limitations on termination in the labor contract; providing housing to some

employees but not others; promising employees a five day workweek; and not providing employees a "union enrollment form'," which is a union membership card. Having a union membership card signed by an employee is required before a union could collect dues from that employee.

The charge also alleges the campaign terminated the employment of six employees for reasons prohibited by the NLRA. The NLRA makes it unlawful for an employer to terminate an employee because of the employee's support for a union (two of the terminations alleged in the charge) or having engaged in protected concerted activity, which is generally a protest of working conditions by or on behalf of more than one employee (four of the terminations alleged in the charge).

The final allegation in the charge is that the campaign interfered, restrained, and coerced employees in violation of the NLRA by interrogating them about their union activities. The charge does not provide any details about those alleged interrogations.

On July 25, an unidentified individual filed an unfair labor practice charge against Local 400 of the UFCW, the union that represents Sanders campaign employees. The charge identifies the Sanders campaign as the employer and alleges that the union violated the NLRA "by refusing to process the Charging Party's grievance for arbitrary or discriminatory reasons or in bad faith." It is unclear whether this charge relates to the charges filed against the Sanders campaign.

The Warren campaign. The charge against the Warren campaign was filed on August 13. It alleges that the campaign violated its employees' rights under the NLRA "by maintaining work rules that prohibit employees from discussing wages, hours, or other terms or conditions of employment." The work rule at issue is the campaign's Confidential Information Agreement. That three-page agreement imposes numerous restrictions on employees, including that they may not speak to the press, may not video, tape record or photograph Senator Warren or any employee, volunteer, or agent of the campaign, and may not divulge "confidential information," a term defined broadly in the Agreement.

> *"Whether work rules violate the NLRA has been the subject of much litigation in the past decade."*

Whether work rules violate the NLRA has been the subject of much litigation in the past decade. In December 2017, in *The Boeing Co.* decision, the NLRB reversed its prior approach for analyzing work rules and held that in determining whether a work rule violates employees' NLRA rights, the NLRB will evaluate "the nature and extent of the potential impact on NLRA rights, and … [the employer's] legitimate justifications associated with the rule."[vii] Since *Boeing*, the General Counsel of the NLRB has issued more than a dozen "advice memos" to provide guidance concerning the application of the *Boeing* standard to various work rules, including confidentiality agreements.[viii]

Depending on the outcome of the NLRB investigations, some or all of the charges will be either dismissed, settled, or scheduled for a trial before an NLRB administrative law judge.

Reported provisions of Sanders campaign's labor contract

Beyond the charges, the Sanders campaign must continue to comply with its labor contract and the other campaigns must negotiate labor contracts as well. In response to my email request for a copy of its labor contract, the Sanders campaign emailed me a form invitation to attend a webinar about participating in #MyBernieStory, the campaign's new organizing program. Since the campaign said it was "honored" and "very proud" to be the first presidential campaign to negotiate a labor contract, it seemed the campaign would be touting—and sharing—the fruits of its negotiating effort. Nonetheless, other bits of reporting note that the contract addresses at least the following issues:

- **Overtime.** The Fair Labor Standards Act (FLSA) requires an employer to pay nonexempt employees time and one half for hours worked in excess of forty in a workweek. In a lawsuit brought by campaign workers against the DNC for failure to pay overtime during the 2016 presidential election, a Pennsylvania federal district court last year held that the campaign workers in that case were not engaged in interstate commerce and were not entitled to the protections of the FLSA.[ix] Without reviewing the labor contract, one cannot determine whether the Sanders campaign has agreed to comply with the FLSA.
- **Pay parity.** The Equal Pay Act of 1963, according to the EEOC, "prohibits sex-based wage discrimination between men and women in the same establishment who perform jobs that require substantially equal skill, effort and responsibility under similar working conditions."[x] Here also, without reviewing the contract, one cannot determine whether the campaign has agreed to comply with the Equal Pay Act or has agreed to something more than the EPA requires.
- **Breaks.** Breaks during the workday.
- **Vacation.** 20 paid vacation days per year.
- **Blackout days.** 4 days per month, known as blackout days, during which an employee cannot be called to work.
- **Severance.** Severance payment of at least 30 days' pay. Here also, I suspect the contract details when and under what conditions an employee is entitled to severance.
- **Binding arbitration.** Binding arbitration of disputes that arise under the contract. It is likely that the union waived the employees' right to strike during the term of the agreement. A "no strike" commitment is typically the quid pro quo for the binding arbitration provision.
- **Duration.** The labor contract expires March 31, 2021. This term assures the Sanders campaign of labor peace through the major events of the campaign: the July 2020

Democratic National Convention; the November 2020 election and the January 2021 inauguration. A duration clause typically does not prohibit an operation from closing earlier should Sanders either not get the nomination or win the presidential election.

Whether the Democratic nominee will be a candidate whose staff is represented by a union is impossible to predict. Given the precedent that five candidates have set, it is quite likely that if the candidate's employees are not represented by a union, labor will be knocking at the campaign's door insisting that the nominee's staff be organized.

We would then have another first in labor relations and politics: a Democratic presidential candidate operating within the stable, predictable, staid world of a labor contract in a "frenetic, dynamic, and tumultuous" battle against the Republican candidate. Stay tuned.

About the author: Michael J. Soltis is an attorney, author, arbitrator, speaker and adjunct law professor of employment and labor law. He represented employers in employment and labor law matters for more than 35 years with a national labor and employment law firm.

About the series: *Employment Law Daily's* new monthly article series, "On the Labor Front," offers practical insights and commentary on contemporary topics in labor law and collective bargaining. Authored by highly-regarded labor and employment law attorney, Michael J. Soltis, "On the Labor Front" will explore the implications of new labor developments to both employers and unions, and share observations and perspectives on the application of the law that come from Soltis' more than 30 years of practice, including negotiations of more than 100 CBAs and dozens of arbitrations in a variety of industries.

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[i] https://berniesanders.com/wp-content/uploads/2019/05/Campaign-Equity-Blueprint.pdf

[ii] https://www.huffpost.com/entry/labor-puts-presidential-candidates-on-notice-lets-be-honest-about-the-democratic-partys-record_n_5d43215de4b0ca604e2ed07f?fzn&guccounter=1

[iii] https://thehill.com/homenews/campaign/456451-booker-presidential-campaign-staffers-unionize

[iv] https://laborunionreport.com/2019/03/17/bernie-sanders-campaign-staff-just-unionized-with-the-ufcw/

[v] www.campaginworkersguld.org

[vi] https://www.desmoinesregister.com/story/news/elections/presidential/caucus/2019/07/19/iowa-caucus-2020-elizabeth-warren-campaign-bernie-sanders-union-workers/1778581001/

[vii] https://www.nlrb.gov/news-outreach/news-story/nlrb-establishes-new-standard-governing-workplace-policies-and-upholds-no

[viii] https://www.nlrb.gov/news-publications/nlrb-memoranda/advice-memos/advice-memoranda-dealing-handbook-rules-post-boeing

[ix] *Katz v. DNC Services Corp.*, Civil Action No. 16-5800 (E.D. Pa. Feb. 1, 2018).

[x] https://www.eeoc.gov/laws/statutes/epa.cfm