

A young girl with blonde hair, wearing a blue sweater, is smiling and holding a pair of blue-handled scissors. Her right hand is raised in the air. The background is blurred, showing other children in a classroom setting. The entire image is framed by a white border.

ATLANTIC LEGAL'S GUIDE TO

LEVELING THE PLAYING FIELD

**WHAT CALIFORNIA
CHARTER SCHOOL LEADERS
NEED TO KNOW ABOUT
UNION ORGANIZING**

Second Edition

Jackson Lewis LLP

Atlantic Legal Foundation

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What California Charter School Leaders
Need To Know About Union Organizing

SECOND EDITION

Jackson Lewis LLP

Atlantic Legal Foundation
2039 Palmer Avenue
Larchmont, NY 10583

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LEVELING THE PLAYING FIELD

What California Charter School Leaders
Need To Know About Union Organizing

Second Edition

Preface

For nearly 20 years, California's charter movement has energized public education with a robust infusion of innovative, high quality schools that are helping to close the achievement gap across the state. Now more than 800 strong, California's charter schools represent a diversity of instructional programs and operational design as unique as the communities they serve.

As the movement has evolved from a handful of schools focused on improving programmatic flexibility and increasing innovation, to a broad-based movement focused on high quality outcomes, increasing attention has been focused on examining the diversity of operational structures that exist, and how to best support the critical role of teachers. Are schools that integrate teachers into their governance structures better poised to deliver good instructional outcomes? What structures and supports produce the best professional learning environments for children and adults? What supports do teachers value most to enhance their professional practice? Good research to answer some of those questions is underway, and yet much more remains to be inves-

tigated, to guide the future replication of the strongest models, based on the best outcomes.

One element of school operations and structures that has been hotly debated recently is the question of the role of collective bargaining within the charter structure. The operational flexibility that chartering affords has typically driven charter leaders to seek to remain unencumbered by the bargaining agreements of the home districts. Yet, true to the diversity of perspectives and approaches that chartering nurtures, there are models in California that integrate collective bargaining into their design.

Whatever choices charter communities make to best serve their students, we believe that those choices must be made with the benefit of full information, transparent communication, and clarity about the roles and responsibilities of charter directors, teachers, boards, and all others engaged in each charter's community. It is our hope that this guide will answer important questions about the unionization process, what charter leaders must do to foster positive labor relations, and where and how to seek help to improve operational quality.

Jed Wallace

President & CEO

California Charter Schools Association

Foreword

The Atlantic Legal Foundation, a public interest law firm now in its 30th year of operation, has been proud to represent charter school advocates contending that charters should be given freedom to develop innovative programs leading to academic success. We welcome this opportunity to serve the charter community.

Efforts to organize charter school teachers and other employees, altogether lawful, are likely to have a significant impact on the flexibility the school needs to meet its charter responsibilities, and charter administrators need to know how to react when the union seeks to represent employees.

This thorough guide—an important component of Atlantic Legal’s Charter School Advocacy Program—offers advice that is not always available from corporate or not-for-profit attorneys who often are not skilled in labor law matters. Labor law is highly technical. Charter boards and administrators are well advised to seek counsel from firms that practice regularly in this area.

In preparing this guide Atlantic Legal has enlisted the services of Jackson Lewis LLP, a prominent national law firm whose practice is limited to representing employers in a wide variety of labor and employment law matters. This guide is one in a series, the first of which was prepared by New York Jackson Lewis partners Thomas V. Walsh, Esq. and Roger S. Kaplan, Esq. We are grateful to Lawrence H. Stone, Esq. and his California colleagues who prepared this California edition. Messrs. Walsh and Kaplan continue to serve as series editors. The guidance of the Jackson Lewis firm in this complex area is greatly appreciated.

Careful consideration of this discussion of union organizing efforts and how they can be anticipated and addressed will ensure that charter leaders comply with the law while making their views about dealing with a union known to staff members.

William H. Slattery
President
Atlantic Legal Foundation

I

The Landscape

When California enacted the Charter Schools Act of 1992, it became the second state in the nation to adopt legislation introducing charter schools as an alternative to the traditional public school. Indeed, in doing so, the legislature stated that it intended charter schools to “improve pupil learning” and “encourage the use of different and innovative teaching methods.” (Cal. Educ. Code § 47601(a), (c)). Many of those dissatisfied with the often lackluster performance of conventional public schools turned to the Charter Schools Act with the expectation that flexibility and innovation would improve student achievement in exchange for rigorous accountability.

Many leaders of the charter school movement have been staunch critics of the status quo perpetuated, in part, by rigid collective bargaining agreements that can stifle the creativity and flexibility needed to test new educational delivery systems. Many observers conclude that the need for charter schools has grown in proportion to the defects in the current public education system in California—a system in which virtually every conventional school administration is restrained by the limits of its union contract.

Leading charter school advocates were encouraged by the fact that the Charter Schools Act, at least in theory, allows schools to operate “independent” of many regulations stemming from the Education Code governing school districts and in many cases from union contracts. However, in practice, the law neither prevents a union from organizing charter school employees nor exempts charter schools from collective negotiations should a union successfully organize a charter school.

The California Teachers Association (“CTA”) has its sights set on organizing charter school employees. The CTA initially opposed the Charter Schools Act in its current form because it did not require charter sign-off by the leadership of local bargaining units. Instead the law enacted by the legislature left the details of collective bargaining up to charter petitioners and local sponsors and, ultimately the charter school employees themselves.

Today, the CTA is aiming to add to its numbers in charter schools, especially with the recent addition of education-support staff as eligible union members. Every non-union charter school administration in the state must assume that the CTA has approached its faculty or at least expect that the CTA will target them in the near future.

Charter school leaders must consider the overtures of organized labor with care. A visit to the websites of both the CTA and the American Federation of Teachers (“AFT”) (the other major labor organization involved in organizing school employees) reveals the current union attitude which can be summarized as follows: “charter schools are acceptable—as long as they are the same as other public schools.” Many

observers are of the view that labor’s “support” for charter schools and its efforts to organize them is not a sign of acceptance and that unions oppose meaningful school reform. They contend that teachers unions are committed primarily to the preservation of the status quo and the interests of their members. Charter school teachers and other employees should be aware of the mission of the teachers’ unions and know their rights under California law when they are asked to join a union. By the same token, charter school administrators need to know the consequences of unionization and the impact collective bargaining can have on their school’s operation.

What is a “Union?”

Most labor unions are organizations made up of several layers. At the top is the “home office,” usually called the “International.” In the case of the National Education Association (“NEA”), the main office is in Washington, D.C. The California Teachers Association is the California state affiliate of the NEA. Below the regional level are the “branch offices,” commonly called “locals.”

Generally, when the CTA organizes a school system, the teachers in that system form their own local.

At the bottom are the members. Every member belongs to his or her local, state federation, and international. Thus, every CTA member helps fund the union statewide and the NEA nationally. This is no small matter, since all the funding for the union comes from dues and other fees paid by members. Members pay their locals. The locals keep some money then send the rest to the state federation and to the international.

It takes a lot of money to fund a union. The CTA employs over 500 staff throughout dozens of offices in California.

Not all unions are affiliated with national organizations and some have entered into collective bargaining agreements that are less rigorous than those sought to be negotiated by the CTA.

Employee Choice

Under California law, charter school employees have the right to join a union, support a union, and take affirmative steps to make a union the legally recognized bargaining agent for school employees. However, the law guarantees employees the right to refrain from supporting a union unless an exclusive representative—a union—already has been recognized or certified. Education Employment Relations Act, Cal. Govt. Code § 3543 (a).

At its core, collective bargaining is economic muscle flexing which can be contrary to collegial deliberation and consensus building between employer and employee

which are the hallmarks of successful charter schools. The process may have limitations that charter school employees should know about before making any decision. As this guide will explain, a union can organize a school quickly and before any administrator even knows what is happening.

Simply by signing an authorization card (formally referred to in the law as an “expression of interest”), charter school staff members can authorize a union to represent them for collective bargaining. Although the law grants employees freedom of choice in this regard, the law also grants certain advantages to unions. As we describe below, the law creates an environment in which employees unknowingly may obligate themselves and their charter school to an adversarial bargaining relationship. One way to avoid this unintended consequence is to acquire a basic knowledge of the law and an awareness of the limits and potential risks of unionization.

Why Many Charter School Leaders Do *Not* Want to Have a Union

While a charter school leader may have an opinion as to whether a union is desirable, the choice of union representation belongs to the employees. Having said that, there are many reasons why a school administration may see a union as an obstacle to achieving its school’s mission.

Charter leaders may see unions as obstacles to progressive change, based on their experiences in the traditional public school system. For

example, seniority rules can limit selecting the teacher best suited to teach a particular class.

Administrators may well be concerned that a union would interfere with the harmonious operation of the enterprise. For example:

- An “us-versus-them” atmosphere can develop;
- Union demands often reduce flexibility;
- Unions can restrict direct communications with employees;
- Union relationships require much time, energy, and extra costs;
- An over-emphasis on seniority may hurt a merit-based system;
- Risk of labor strife may increase and with it, a loss of community.

Of course, employees encountering over-bearing and insensitive administrators or unreasonable demands on their professional performance may be willing to be represented by a union. But there is no reason to reach that point. Chapters III and VI of this guide offer some fundamental management advice in fostering a workplace environment in which employees likely would consider a union unnecessary.

III

Why Employees Might Want to Support a Union

Unions represent only a small minority of employees in the workforce, and many of those employees do not support their unions wholeheartedly. Surveys show that while many Americans favor the notion of unions, relatively few favor having one where *they* work. Indeed, most unionized employees are “union” because they *have to be*. They have gone to work for an enterprise whose employees already were subject to a collective bargaining agreement. They never had a choice.

When one is asked why employees would support unionization, there is a temptation to say “money,” or “benefits” or, in education, “tenure.” If unions could guarantee more money, job security or better benefits, we all might be unionized. The fact is these issues generally matter little because they are dictated, for the most part, by the market and an employer’s ability to pay. The market factors do not change for the better merely because a union is on the scene.

Experience shows that employees seek outside representation when they feel mistreated or hurt by their employer. If they believe their employer has no interest in them, will not listen to them, or has treated them unfairly or abusively, they will look to unions for help. The word commonly used

in organizing campaigns is “respect.” (They may also seek out government agencies or private attorneys willing to make unlawful discrimination claims on their behalf.)

Who is the employer? In a technical sense, it is the employing organization—here, the charter school or possibly the school district in which the charter is located if the school has not elected to be the exclusive public school employer. See Cal. Educ. Code § 47611.5. In a real sense, however, it is every supervisor or administrator. While the top-level management such as the board of trustees or directors of any enterprise should be committed to the welfare of its employees, principals and department heads have more interaction with employees. To an employee, his or her immediate supervisor is management. No matter how progressive an employer tries to be, it will be viewed negatively by employees if its first line supervisors are seen as uncaring or unfair.

Charter leaders cannot afford to underestimate the extent to which supervisors can affect employees' morale and their view of the school. Employees spend more of their waking hours with their colleagues than they do with anyone else. Employees take their supervisors' directions, comments, praise, and criticism very seriously. Even a principal's or department head's off-hand remark may weigh upon an employee for days.

Naturally, employees recall vividly their exchanges with administrators. Employees want the support and approval of those above them. They gauge their relationships with supervision (and thus with the school itself) by the feedback they get, both spoken and unspoken, and by their observations of

how other employees relate with the administration.

Even a perfectly pleasant individual can create a problem accidentally if taken for granted or pushed too far. Minor incidents in sufficient number can become a major headache. When an employee's personal catalogue of slights and hurts reaches a critical point (which will differ for every person), that employee will sour on the enterprise. Employees who reach this point have low morale, exhibit poor performance, and often harbor resentment. Worse, their unhappiness spreads to other employees, demoralizing the organization.

Small indignities eventually can poison the working atmosphere. If a supervisor:

- Is too busy to deal with employees;
- Is rude, abrupt, or discourteous;
- Fails to address employee issues;
- Appears to "play favorites";
- Enforces standards that seem inconsistent;
- Does not want to hear employee suggestions; or
- Is insensitive to employee concerns;

then employees may decide that the school really has no interest in their concerns. In such cases, employees may look outward for help. They may seek out a union.

The good news is that the workplace need not be this way. Development of a negative atmosphere can be avoided or at least corrected promptly. Even better, the same management skills which make for highly productive and successful workplaces also can create positive employee relationships. When such relationships exist, unions cease being attractive.

III

Skilled Administration Fosters Positive Labor Relations

Avoiding unionization has two key elements: (1) creating a workplace environment in which employees feel engaged and valued and (2) educating employees in a lawful manner to the realities of unionization. The second element will be described in Chapter IV. The first element is summarized here.

Eleven Point Program to Enhance Team Morale and Performance

Any School which follows these eleven points will enjoy improved morale and performance. It will recognize and deal with employee issues before they become conflicts. Schools employing this program will better serve their students. Schools operating in this environment will experience less conflict.

1. Develop and Maintain Clear and Lawful Workplace Policies

The first step in successful school management is to ensure that the employees have a clear understanding of the employer's policies and rules. That means the employer must have policies which are not only functional, but also lawful and clearly expressed. They should cover

every aspect of work, and address fully the relationship between the school and its employees. These policies should be collected into one master file or manual, and updated as laws or your school's needs change.

The charter school will have a well-worded mission statement, prepared as part of the charter petition. It will give your employees a sense of common purpose. Do not underestimate the value of your school's mission as a means of motivating employees. Together, you have embarked on an exploration of education, always looking to enhance your students' educational experiences.

There are resources which can assist you in preparing employment policies. However, off-the-shelf policies will not fully satisfy your school's needs. "Generic" policies should be reviewed and modified to meet your circumstances.

2. Create and Distribute an Employee Handbook

Once you have prepared sound policies for your school, you must communicate them to your employees. An employee handbook is an ideal vehicle. A well-prepared handbook allows all employees to fully understand the policies that apply to them. It also offers the school an opportunity to publicize its mission and provides employees with a resource to understand the school's benefits for them and expectations of them.

As with employment policies, there are resources that can provide suggestions for employee hand-

books. Your school must put its own stamp on any handbook; most important, the handbook must be kept current. Because these handbooks are important and will raise expectations by employees that the policies will be followed, if at all possible they should be reviewed by legal counsel.

Employees should sign an acknowledgement that they have received and have reviewed a copy of the handbook.

What's in a Handbook?

Here are some topics that typically are found in an employee handbook:

Our Mission	Continuing Education
Our Philosophy	Workers' Compensation
Anti-Harassment Policies	Leaves (and Procedures)
About Your Job	Bereavement Leave
Your Supervisor	Jury Duty
Employee Classifications	Military Leave
Problem Solving	Solicitation & Distribution
Attendance & Time Records	Access & Trespass
Work Hours	Confidentiality
Your Paycheck	Monitoring of Electronic
Your Personnel Record	Communications
Performance Evaluations	Standards & Discipline
Salary Increases	Substance Abuse Policy
Benefits	Personal Appearance
Retirement Plan	Inclement Weather Closings
Vacation (Eligibility & Usage)	Safety
Paid Holidays	Bulletin Boards
Sick Pay	Smoking
Disability (Short & Long Term)	

3. Educate Employees About Your Mission

If you are a charter school administrator, you are committed to the great experiment of charter school

education. If you are a founder of a charter school, the enterprise is the product of your vision. Your school could not have been created without your enthusiasm and hard work. Chances are many of your employees share that enthusiasm and you should encourage them to spread the message. You are doing important work—make sure they know it! Share your vision with every person who works for you. Encourage teamwork.

- Don't be afraid to tell employees you cannot succeed without them.
- Explain that you exist to be different.
- Explain your finances. Employees should understand funding issues and the problems you may face.
- Take pride in the flexibility you have. You can change when you need to, while traditional schools are bound by union contracts under which it may take years to solve problems.
- Make employees part of the process. Grow employees' enthusiasm by soliciting their ideas.
- Meet with employees regularly to discuss the "state of the school."

Sample Pro-Employee Mission Statement

Our school strives to maintain an environment that provides excellent working conditions and non-confrontational working relationships. Every employee is essential to the success of our mission. Each employee deserves to be treated as an individual.

We believe in meeting our challenges together through individual consideration and direct collegial relationships. In our view, these principles provide the best environment for staff development and the education of our students. We seek to create a climate that enhances the teamwork necessary for us to attain our mutual goals.

We accept enthusiastically our responsibility to provide our employees with good working conditions, competitive wages and benefits, fair treatment, and the personal and professional respect they deserve. We do so because of our continuing interest in our employees, our students, and the community we serve.

We firmly believe that collegiality and teamwork will enable us to succeed in our mission of providing the best possible educational opportunities to our students.

4. Supervisors Are Not Born—They Are Trained

American workplace culture too often perpetuates the belief that because an individual has ambition or drive, or because an employee has a good performance history, that employee will be a good supervisor or manager. This is not necessarily true. The qualities that make someone successful as a worker are not always the ones needed for success in management.

All individuals in a supervisory capacity should receive training on fundamental principles, such as:

- The school's employment policies;
- Effective supervision and delegation of duties; and
- Constructive (not confrontational) correction.

All levels of school administration could benefit

from instruction on these subjects.

5. State Performance Expectations Clearly: Accountability and Corrective Action Are Essential

All employees in the school must understand fully the performance expectations held by administration. This is essential to their doing a good job and to any evaluation of their work. Where an employee fails to meet goals because he or she did not fully understand them, management has only itself to blame. Do not assume that the staff will “know what to do.”

Having stated your expectations, all employees must be held accountable for their performance. This is not intended to be harsh. It is intended to be fair; fair to all employees (so they are treated equally), fair to the students (so they are not shortchanged), and fair to the school (so that it is better able to succeed).

Holding employees accountable is more difficult than it may appear. Many educators are reluctant to discipline or correct subordinates for fear that the collegial atmosphere of the school will be disrupted. This is not wise. Avoiding critical discussion prolongs the problem and makes the correction later more difficult. Constructive criticism can correct a problem before it becomes deeply rooted.

Likewise, a laid-back, “let live” approach, which “lets the small things pass” is not conducive to a good working environment, and is likely to prove troublesome as time passes. Looking the

other way creates an environment in which standards slip. Moreover, it creates an expectation that infractions are permitted. When corrective action finally is taken, there may well be resentment (“Why is it a problem when I do that, but not someone else?”). Experience proves that the best way to maintain a fair workplace is to hold all employees to the same standards all the time.

6. Provide Meaningful Performance Evaluations

Develop a program of formal performance evaluations which provide a true measure of strengths and weaknesses. Employees should have at least one meeting with the appropriate supervisor every year in which their written evaluation will be discussed. Avoid last-minute fill-in-the-blank or circle-the-number formats for evaluations. Use the interview as an opportunity to help the employee grow professionally. Where improvement is desired, be sure the school is providing the tools to the best of its ability. However, do not neglect to mention the individual’s successful qualities and accomplishments as well.

In addition to these formal evaluations, employees deserve ongoing feedback and support. An employee should never learn at her annual evaluation that she has not been meeting expectations for many months. If performance is substandard, interim correction should be provided.

There is no such thing as too much constructive communication.

7. Meet Frequently with All Employees

It should be clear from these recommendations that *communication* with the staff is the key to a successful school. Part of the school's program of communication should be regular meetings—preferably weekly—which all employees attend. Management can use these meetings to discuss its goals, as well as the school's performance, and any other issues. It can also use this time to provide in-service training on various subjects.

8. Listen to Your Employees

Too often, management engages in one-sided communication. Use meetings with employees as an opportunity to listen. Be sure to reserve time at every meeting for employees to discuss issues important to them. Build an inviting environment in which employees are encouraged to bring up their concerns. It is far better to hear the issues early than to allow them to fester unresolved.

Move beyond an “open-door” policy. Your door may be open, but you are not always there, and when you are, you're probably on the phone. Understand that employees may be reluctant to bother you.

Actively solicit employee input on problems or challenges facing the school. There is nothing which makes any employee feel more like part of the team than being asked for help in facing a common issue. An annual employee satisfaction survey can be effective. But note: a written survey is no substitute for two-way communication.

9. Document, Investigate, and Resolve

Now that you've listened, be sure to act on the employee's request or suggestion. You must close the loop. If management does not respond to employees promptly, it would have been better off not having listened to them in the first place. When you have received an employee question, concern or suggestion, *write it down immediately*. Give the employee a time frame for responding. Follow up, get back to the employee with a reasoned response.

A grunting "No" translates into "I'm the boss, you're the horse." However, telling an employee that you have discussed his or her idea with the trustees is empowering to that employee. It makes the staff member understand that his or her opinion is valued. It sends the message that the administration is not arbitrary, and is willing to consider change.

Also, be open to the likelihood that your employees have good ideas that you may want to implement. This will reflect well upon you, and the school, as well as the employee. After all, you're a leader in a charter school—you are able to do things differently.

10. Consider a Problem-Solving Procedure

Despite your state-of-the-art policies, your employee handbook, and your constant communication with employees, there will be a time when you will have a conflict with an employee. Consider de-

veloping a process by which an employee may have a management decision reviewed. Many employers find such a procedure helpful in resolving disputes without formal agency complaint and litigation.

There are many procedures available, from “peer review” to “alternative dispute resolution.” Not all of these procedures will be right for your school. However, where an employer has a meaningful outlet to assure employees they are receiving fair treatment, the chances for serious conflict are reduced.

11. Competitive Wages and Benefits

Lastly, be sure that your school is reasonably competitive with market rates for wages and benefits even beyond the requirements of the charter school legislation. Although there may be certain benefit plans under school district union contracts in which charter school employees cannot participate, your employees should be provided with an appropriate compensation package.

Use Your Charter School Association as a Resource

Operating a charter school can sometimes seem like a lonely task. There are powerful groups out there who feel threatened by charters. Perhaps you have a less than cordial relationship with the school district. Perhaps there are funding delays. You are not alone. There are many other charter schools in California, and many around the country, that are experiencing the same challenges.

The California Charter Schools Association offers a wealth of resources to assist you with many of the items discussed in this guide.

IV

How a Union Organizes Employees

The process of unionization is referred to as “union organizing,” because it “organizes” the employees for the purposes of collective action into appropriate bargaining units represented by a union.

How Do Unions Go About Organizing?

The Education Employment Relations Act (EERA) was enacted in California in 1976 and establishes employees’ rights to support or refrain from supporting unionization. To organize employees under the law, a union must gain written expressions of support from employees. Typically, “union authorization cards” are the means used for such expression. Employees state that they designate a specific labor union to be their representative for collective bargaining purposes and sign their names to the cards. Obtaining these signed cards is essential to the union’s efforts. The union’s success in obtaining formal recognition as the employees’ bargaining representative depends on the number of signed employee cards it can obtain relative to the total number of employees in the bargaining unit.

Significance of Authorization Cards

- An authorization card is a binding legal document.
- It is similar to a power of attorney.
- For some charter schools a signed card can result in unionization without an election.

Union authorization cards often are solicited by unions and signed by employees before an employer is aware of what is taking place. The law does not require that a union announce its intention to organize the employees of any particular employer. In fact, unions are most successful when they secure employee signatures without management's knowledge.

Let us pause here to talk about some assumptions upon which labor laws are based. It may help explain the law's curious procedures.

American labor laws, both state and federal, are based on a workplace model that is now almost 100 years old. That workplace was subject to virtually no safety laws or anti-discrimination laws, and offered employees few meaningful outlets for their frustrations. Unions back then were of questionable legality. In the public sector, employees were expected to have undivided loyalty to the governmental unit that employed them. Unions were unthinkable. Private employers often responded ruthlessly to efforts to unionize their workers, retaliating against employee "troublemakers" without legal limitation. Conflict—sometimes violent—was inherent in this employment relationship. The nation's labor laws were written while this model was still widely applicable. Employment relations have changed greatly, but the labor laws—even the more recent

ones dealing with public employment—have not kept pace.

The laws were written not only to establish the employees' right to engage in concerted activities but also expressly to forbid employers from punishing employees for exercising their right. The laws, however, go even further. They forbid employers and their agents from questioning employees as to their union activities, or those of their co-workers. Merely asking an employee if he supports a union may be deemed coercive and intimidating. We will discuss these restrictions on employers in more detail below.

Given the historical context of the law, it is understandable that a union need not announce its intention to seek employee signatures.

Unions often are well-structured, well-funded, and skilled in recruiting new members. The AFL-CIO, as well as many of its member unions, has long taught organizers that the most successful tool of organizing is *stealth*. Unions are most successful when they can obtain a large number of employee signatures *without attracting the employer's attention*. They will appeal to employees so as to make unionization appear highly attractive, at little or no cost to the employees, without providing any negative information, in an effort to get signatures swiftly.

Why this secrecy? Unions know full well that when the employer is aware of union organizing, the employer may begin educating employees *lawfully* as to the less attractive realities of unionization.

In short, the unions want to obtain employee signatures before the employer can provide employees with “the other side of the story.”

Honest Information Is Not “Union Busting”

Unions do not want employers to discuss their views of unionization with employees. Unions do not want employers to provide employees with information about the costs of a union, the risks of collective bargaining, the rules imposed by unions on their members, and other subjects.

Charter school employers must understand that the law does not prevent them from educating their employees about union representation, provided that state funds or state facilities are not used.

Unions often rail against employers who oppose their interests by branding them “union busters.” Unions hope this label will scare the employer into silence, thereby giving the unions an advantage in securing signatures. Silence, however, does not help the school or its staff. By providing your employees with honest factual information, you serve your charter school and your employees.

The law gives employees the right to decide. Employees need employers to provide them with information the unions will not give them, but this must be done lawfully.

Experience shows that unions frequently attempt to secure signatures from many employees at the same time by using several organizers and even by visiting employees at their homes. Unions refer to this approach as a “blitz”. They seek to gain as many signed cards as they can in the shortest possible time, before the employer can respond.

How Unions Convince Employees to Sign

Some employees are more than willing to support a union. They may feel this way because of their political beliefs, because their employer is treating them badly, or because they do not understand the shortcomings of union representation.

In a perfect world, unions would provide employees with a balanced view of unionization. They would offer employees copies of the labor organization's financial reports, by-laws, and collective bargaining agreements, so employees could learn about the organization in detail. Unions would inform employees that they cannot guarantee any results, that it is possible employees could end up with less in wages and benefits than they had before bargaining, and that unions have other objectives for which they might be willing to trade these terms of employment.

However, union officials are not required, and certainly cannot be expected, to offer employees a complete explanation of the consequences of signing a representation card. Moreover, unions also rely on pro-union employees to convince their co-workers to sign with the union.

Signs of Organizing Activity

There are many examples of employee conduct that may signal union organizing:

- new employee cliques form;
- new employee “leaders” emerge;
- heated discussions erupt among employees;

- the employee “rumor mill” becomes very active—and unusually negative in tone;
- employees start meeting after work;
- employees stop speaking freely to administration;
- adversarial challenges are made towards administration; and
- new vocabulary: “grievances,” “tenure,” “seniority,” etc. emerge.

Charter school administrators should educate staff *before* any “tell-tale signs” emerge—remember, acting early is important because under certain circumstances, signed cards may take the place of an election.

Procedures used by PERB

Generally, unions in California have two avenues to secure lawful establishment as the collective bargaining representative of public employees: voluntary recognition by the employer or certification through the procedures of the Public Employment Relations Board (PERB), the California administrative agency empowered with the authority to oversee public employee matters.

The process always begins with employee signatures. Typically, if the union secures signatures from a majority of the employees in an “appropriate bargaining unit,” it may request voluntary representation by the public employer. (See box on page 29 for discussion of an appropriate bargaining unit). The employer is permitted to recognize the union but only if a majority of employees authorize the union.

If the employer has declined voluntary recognition, the union may file a petition with the PERB requesting a “certifi-

cation” of unit representation through an election where employees decide whether or not they want union representation. When the union files its petition, it also must file a “showing of interest” indicating that at least 30 percent of the unit employees have provided supporting signatures. This showing of interest can be in the form of union cards or a petition sheet which must be signed and dated by the employee.

The PERB will conduct a preliminary investigation to determine if the petition is supported by a sufficient showing of interest and raises a question of representation in the appropriate bargaining unit. If the PERB determines that the petition raises a question of representation, it will schedule an investigatory hearing to determine whether an election should be held to allow the employees to vote on whether or not they want to be represented by the union, as well as whether the group of employees the union seeks to represent constitutes an “appropriate unit.”

What’s an “Appropriate Unit?”

Under the law, to obtain bargaining rights a union needs signatures from a certain percentage of employees in an “appropriate unit” for bargaining. In essence, an appropriate unit is that group of employees who share workplace interests to the extent that it would be practical to negotiate one collective bargaining agreement to cover all of them. This is referred to as the “community of interests” test. There need only be a community and not an identity of interests among employees in an appropriate unit. Furthermore, it need not be the most appropriate unit; “an appropriate unit” will suffice. An

appropriate unit need not be limited to one charter campus. The unit is ultimately determined by the PERB, which will examine each workplace on a case-by-case basis.

While no one factor is determinative, the PERB, in making its determination, examines the similarity of skills and functions, similarity of pay and working conditions, common supervision, work contact and the similarity of training and experience among employees.

With regard to classroom teachers, for instance, the law states that a unit is not considered appropriate unless it “at least includes all of the classroom teachers employed by the public school employer.” As a result, the unit would also include school adjustment counselors, guidance counselors, speech and hearing teachers, remedial reading teachers, homebound teachers, and educational testers. The law, however, excludes from this unit managerial, supervisory, and confidential employees.

If the PERB determines that an election will be held, it will order that an election be conducted by secret ballot. During this election, employees will fill out ballots on which they vote for or against union representation. If a majority (50% plus one) of the employees who vote in the election vote in favor of being represented by the union, the union will become the exclusive bargaining representative of *all* the employees in the unit deemed appropriate by the PERB, including those who voted against representation.

Changes in Union Organizing Procedures

In 2004, California Senate Bill 253 (Stats. 2003, Chap. 190) was enacted changing the union certification process.

The law allows a union, under certain circumstances, to be selected as the employees' exclusive bargaining representative without a vote. While an employer normally could require the PERB to conduct a secret ballot vote in the process described above, Senate Bill 253 *requires* an employer to recognize the union without a formal election if the union can demonstrate:

- Proof of majority support;
- Clarity as to the bargaining unit to be represented; and
- That no other union has come forward to intervene with the support of 30% of the affected employees.

This means that employees are demonstrating support for the union when they sign a dues deduction authorization, membership list, membership card, petition or any other document which demonstrates the employees' desire to be represented by the union for purposes of collective bargaining. Taken at face value, if a union can secure authorization cards from a majority of employees in an appropriate unit the charter school is required to "voluntarily" recognize the union as the exclusive bargaining representative of the employees. There will be no election and the union will represent the employees.

Under Senate Bill 253, a union therefore is best served by obtaining signatures quickly and quietly from a majority of the employees in an appropriate bargaining unit. If it does, it generally will avoid the risk of losing an election. In essence, the law permits a labor union to become the legally recognized bargaining representative of the charter school's em-

ployees simply by getting signatures from a majority of the employees in an appropriate bargaining unit, without facing any discussion of the disadvantages, costs, risks, or requirements of union membership.

The process, whether completed through the more traditional PERB election procedures or under SB 253, always begins with employee signatures. To obtain employee signatures, unions must first gain access to employees. Sometimes union organizers attempt to gain such access at the employer's facility. In California, public employers, including charter schools, can deny union organizers access to their facilities, but only if they do so in a non-discriminatory way. In other words, to the extent that access is granted to any non-employees (with the exception of students, and parents on school business), it cannot be denied to non-employee union representatives. The flip side to this is that union organizers do not have to be given any *more* access than other non-employees. While there are cases where charter school administrators cannot deny access to union organizers, if a union seeks such access, it loses the advantage of surprise, and the administration then has the opportunity to educate its staff.



Use of State Funds

In 2000, the Governor signed into law Assembly Bill 1889 (Cal. Govt. Code §§ 16645.1 to 16649), declaring:

“It is the policy of the state not to interfere with an employee’s choice about whether to join or be represented by a labor union. For this reason, the state should not subsidize efforts by an employer to assist, promote, or deter union organizing. *It is the intent of the Legislature...to prohibit an employer from using state funds and facilities for the purpose of influencing employees to support or oppose unionization....*” (2000 Cal. Stats. Ch. 872 § 1) (Emphasis added).

Passage of AB 1889 was viewed as a significant victory for organized labor and it was challenged by the Chamber of Commerce of the United States, and others. In the course of an extended court battle the case found its way to the Supreme Court of the United States. A divided Court held in *Chamber of Commerce v. Brown*, 128 S. Ct. 2408 (2008), that AB 1889, as applied to a *private* employer, was “a targeted negative restriction on employers speech about unionization” and was preempted by federal law which calls for “unembellished” and “wide-open” debate in labor disputes.

The Court's decision did not specifically address the application of AB 1889 to public employers and, at this writing, no court has addressed how AB 1889 impacts a charter school, including whether a charter school is properly considered a "public employer" under the law.

AB 1889 provides that "A public employer receiving state funds shall not use any of those funds to assist, promote or deter union organizing" and that "any public official who knowingly" does so will be liable to the state for the amount of such funds (Cal. Gov't. Code § 16645.6). It is important to note that AB 1889 (even assuming that a charter school is a "public employer") does not prohibit a public employer entirely from educating employees about the undesirable aspects of unionization for employees themselves and its impact on a charter school's mission. As Justice Breyer pointed out in *Brown*, AB 1889 "permits all employers who receive state funds to 'assist, promote or deter union organizing.' It simply says to those employers, do not do so on our dime." (dissenting opinion) The employer is required to segregate private funds received and to keep records scrupulously to ensure that commingled public money is not used to promote or deter unionization.

A public employer's failure to comply with AB 1889 can have serious consequences. The Supreme Court's majority opinion in *Brown* spells them out:

"The statute also imposes deterrent litigation risks. Significantly, AB 1889 authorizes not only the California Attorney General but also any pri-

vate taxpayer—including, of course, a union in a dispute with an employer—to bring a civil action against suspected violators for injunctive relief, damages, civil penalties, and other appropriate equitable relief... Violators are liable to the State for three times the amount of state funds deemed spent on union organizing. Prevailing plaintiffs, and certain prevailing taxpayer interveners, are entitled to recover attorney's fees and costs... which may well dwarf the treble damages award."

Obviously, charter school trustees and administrators (and charter management organizations, which depending on the circumstances may not be deemed private employers) must take AB 1889 seriously if they seek to discuss with employees the pros and cons of unionization or to respond to a union organizing campaign. And because even an accusation that AB 1889 has been disregarded can require a costly defense, experienced legal counsel should be consulted, preferably before any union organizing activity is detected or suspected, and before any response is initiated.

VI

What the Charter School Employer Can Do

As noted, the Education Employment Relations Act gives employees the absolute right to act independently in choosing whether to support a union seeking recognition. Naturally, the union will emphasize that collective bargaining is permitted for charter school employees and extol its benefits. Some charter employers in California and elsewhere have elected to cooperate with unions organizing efforts, evidently convinced that an amicable collective bargaining process will not derail the innovative educational experience the charter wishes to offer. However, few independent charter schools have willingly signed onto the voluminous agreements the CTA's local affiliates have entered into with traditional district schools. These are the unions that are out to organize charters and to negotiate burdensome agreements (from the employers' standpoint) and charter employers must be alert to the challenge.

A representative of the charter school administration, armed with a clear understanding of “the rules of the road”— what can be said and what cannot and must be avoided — can be a powerful voice in promoting an informed workforce with regard to the pros and cons of unionization.

However, as a precautionary measure, the charter school should ensure that state funds are not used to deter (or promote) unionization as compliance with AB 1889 would require. We strongly recommend that you get advice from an attorney before undertaking a communication program. At least three issues must be addressed in light of your specific fact situation: the precise role of the spokesperson (i.e. principal, trustee, parent, consultant, lawyer) the manner in which the spokesperson is compensated and the exact source of funding (i.e. private foundation, local civic group, parent) and the means the spokesperson will use to communicate lawfully with employees.

In communicating with your employees about unions, the appropriate spokesperson can focus on several key concepts.

- National unions have strongly opposed charter school legislation.
- CTA has begun a campaign to organize charter schools, while continuing to challenge their existence.
- Employees have the right to decide for themselves whether they want union representation.
- Elections are rare — signing a card may well be the only chance to “vote” — so employees need to get the facts first before signing anything.

Seventy years of experience under federal labor law have produced several core principles of lawful employer communication. While these are not specifically made part of EERA, the PERB frequently looks to federal labor law for guidance, and these principles are equally pertinent to the public employment arena. Your communications should be limited to these subjects: *Facts, Opinions and Examples*.

Facts: There Is No Defense Like the Truth

An appropriate spokesperson may inform employees of any facts regarding unions, collective bargaining, EERA rights, and the procedures of the PERB. Lawful communications may include facts which are uncomplimentary to unions, such as the costs of unionization, examples of union corruption, or failures of collective bargaining. Because a fact is unpleasant does not render it unlawful. Unions may not always wish to talk about unpleasant facts, but the employer can.

There is an enormous amount of information available regarding unions. You will want to familiarize yourself with current information relevant to your community. Although this guide is not intended as a script for charter school employers, and you should obtain legal counsel in the event you are faced with union organizing, employees are likely to find the following facts of particular interest.

Facts about employee rights, and the limitations on their rights, under the law:

- Employees have the right to decide for themselves, free from coercion, whether they want—or don't want—to be represented by a union;
- The law does not guarantee them the right to a secret ballot election;
- The law does not require “full disclosure” by union organizers of all the facts needed to have a balanced view;
- Signing a card now could deprive them of an opportunity to make a choice later;
- Decertifying (getting rid of) a union is possible, but difficult.

Institutional facts about the international unions and locals, such as:

- If and when a union contract goes into effect, all employees in the bargaining unit are covered, whether or not they signed a card or voted for the union (no “opting out”);
- The size and scope both of the international union and the local union, as well as their payrolls, expenditures, and political contributions;
- The initiation fee charged by the local;
- The monthly (or possibly weekly) dues charged by the local;
- The possibility of extra assessments members are required to pay;
- The rules which members must follow, which are found in both the international’s constitution and in the local’s by-laws. All unions must have such documents;
- Union rules generally include the right to discipline members for violations (typically through fines).

Newsworthy information about relevant local unions, including:

- Collective bargaining agreement information;
- The union’s views about and opposition to charter schools and the charter school movement;
- Other political views and position statements made by the union which may be contrary to the goals and principles of the charter school movement and contrary to the employees’ personal beliefs.

The truth about collective bargaining:

- The union, not the teachers and other employees, de-

cides what to propose in negotiations;

- The union bargains with the school;
- The school may make its own proposals at the bargaining table;
- The parties must negotiate in good faith, but there is no time limit on how long it may take to reach agreement, and no requirement that an agreement actually be reached;
- Negotiations may result in employees receiving higher pay and benefits than they have now, the same as they have now, or less than they have now;
- The union may have made many promises (for instance, tenure), but it cannot guarantee any of them will come true.

Is There a “Downside” to Unionization?

“Yes.” To make an informed judgment about unions – and about whether they want to become members—employees must have information about the potential negative impacts of a union.

It is not the purpose of this guide to provide an exhaustive list, but some of the most important concerns include:

Negative Impact on the Educational Mission

Unions—by definition—are institutionally motivated to maximize the number of employees, control and minimize work load and to eliminate accountability. Many teachers chafe under union-imposed limitations on performance.

Additionally, collective bargaining agreements can stifle the innovation and flexibility in curriculum and school governance that attract students, and teachers, to charter schools in the first place.

Risks of Negotiations

There is no guarantee a union will obtain higher pay or better benefits. In fact, the union cannot guarantee negotiations will not result in a reduction of wages or benefits.

Union Control of Members

Unions require members to obey their rules—under pain of trial and potential fines. A union will expect all its members to act and speak with one voice; dissent and individuality are discouraged. This also can extend to political activities beyond the workplace. In recent years, unions have increasingly pressured members to contribute and campaign for the union's preferred political and social agenda.

Financial

Unions require members to fund the union through:

- Initiation fees;
- Dues;
- Assessments.

Unions often pressure members to contribute to their political action funds.

Opinions: A Highly Persuasive Tool

The law allows employers, complying with AB 1889, to express their opinions regarding unionization. For charter school operators, these might include the following:

- That it does not make sense to have an organization that opposes charter schools representing charter school teachers;
- That union contracts have hurt the traditional schools' ability to meet student needs;

- That the teachers' unions will seek to impose work rules that will reduce flexibility.

Opinions are powerful. It is for this reason that the line drawn by the PERB between lawful opinions and unlawful threats can be fuzzy. Threats, and the distinctions between threats and opinions, are discussed in more detail in chapter VI. For now, suffice it to say that expressing opinions about unions must be done carefully.

Examples: The Power of the Press

Facts are driven home by real-world examples. The law permits an appropriate spokesperson to share with employees any relevant newspaper articles, position papers, or other media pieces on subjects such as:

- Union leaders' statements in opposition to charter school approvals and legislative initiatives;
- Articles about restrictive union contract rules preventing meaningful change in the public schools.

* * *

Adding a union and collective bargaining to a charter school's operation is a big step—one that should not be taken without a careful evaluation of how unionization will impact the school's mission and its employees. The charter school employer should squarely face the issue and do all it can under the law to make sure that employees act on a full understanding of the consequences.

VIII

Unfair Practices

In addition to AB 1889, the charter school must also pay attention to the “unfair practices” set forth in the Education Employment Relations law. It provides a general outline of employee rights and obligations as well as activities employers must avoid. Here is the statute itself, along with some explanatory comments:

Cal. Govt. Code § 3543.5 Unfair Practices: Interference with employees’ rights prohibited

It is unlawful for a public school employer to do any of the following:

(a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, refrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

Under section (a), it is an unfair practice to intentionally interfere with employees in their right to “form, join and participate in the activities” of unions. This interference can take the form of adverse actions or threats of adverse actions against employees for their union activity. In one

recent case, a letter drafted by teachers and sent to parents criticizing a charter's management was deemed a protected union activity. Ironically, interference also can take the form of providing benefits to employees or promising benefits in the face of union activity. This section also forbids discrimination against employees based on union sentiments or activity, either for or against.

(b) Deny to employee organizations rights guaranteed to them by this chapter.

Under section (b), the employer must recognize the rights of unions including the "right to represent their members," the "right of access at reasonable times to areas in which employees work," which includes having access to institutional bulletin boards and mailboxes subject to reasonable regulation as well as the "right to use institutional facilities at reasonable times" for meetings concerning unions' rights. Unions also have the right to have a reasonable number of representatives "receive reasonable periods of released time without loss of compensation when meeting and negotiating and for the processing of grievances" as well as the "right to have membership dues deducted." Denial of any of these rights is an unfair practice.

(c) Refuse or fail to meet and negotiate in good faith with an exclusive representative. Knowingly providing an exclusive representative with inaccurate information, whether or not in response to a request for information, regarding the financial resources of the public school employer constitutes a refusal or failure to meet and negotiate in good faith.

If a union is certified, the employer must negotiate in good faith with the union. The duty to negotiate in good faith does not require reaching agreement on any topic. The duty requires an employer to approach negotiations with an open mind, discuss topics raised by the union, and support its rationale for the positions it takes.

(d) Dominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another.

Section (d) prohibits an employer from establishing an “in-house union” which it controls. It also prohibits employers from financially supporting a union, which can undermine a union’s ability to fairly represent its members. Finally, it prohibits employers from expressing preferences for one union over another.

(e) Refuse to participate in good faith in the impasse procedure set forth in Article 9.

If the employer and the union reach impasse in negotiations over matters that are subject to bargaining, either the employer or the union can declare an impasse and proceed through mediation and further steps to try and move the negotiations along.

The unfair practice prohibitions might seem intimidating, but what do they mean?

Unfair practices can be the bases for charges which a complainant—usually an employee or union—may file with PERB which determines whether or not the charges have merit. The remedy for a violation is for the employer to restore

the situation that existed before the improper practice was committed. If an employee has lost pay due to the violation, the employee receives back pay; if an employee has been terminated, he receives an offer of reinstatement. The employer also must promise to act lawfully in the future. Charges are filed against the employer, not the individual supervisor or manager. There is no “fine” for a violation and unfair practices are not “crimes.”

What You Should Avoid: The Unlawful and The Counter-Productive

The law prohibits you from engaging in the following conduct: *threats, retaliation, interrogation, bribes and promises of bribes, and surveillance.*

Having described which acts are unlawful, we can add the good news: they are easy to avoid.

Threats: No Way to Treat an Employee

The law does not allow employers to make threats to employees in connection with their support for, or activities for, the union. Some examples are obvious:

- If I find out you signed a card, you'll be sorry.
- If you bring in a union, you can forget about that extra prep time.
- If we get a union here, I'll have to find some new teachers.
- If we get a union here, I'll stop seeking your input on curriculum issues.

The ban also includes indirect threats, such as, “We'll never agree to a contract. Never!” Look at it this way: if a

union is recognized, you would be required to bargain in good faith. To say in advance “never!” tells employees that unionization is futile, because you have no intention of honoring your obligation of negotiating in good faith. That would be unlawful. So even if you feel that a union contract would harm your ability to operate, to say to employees you never will agree to a contract is unlawfully threatening.

Avoid threats.

Retaliation: Vengeance Is No Virtue

Retaliation is likewise prohibited. This includes all forms of discrimination against employees based on their union activity or sentiments. Employees have the right to make their own decisions. All promotion, assignment, discipline, and compensation decisions are to be made without regard to the employee’s union likes or dislikes (if any). A pro-union teacher should not be given preferential treatment. Indeed, to do so also would violate the law. The safe path is to conduct business as usual. Any decisions regarding an employee must be made on the merits, without consideration of union activity, one way or the other.

Interrogation: Don’t Ask

Employees have the right to make their decisions on unionization without being coerced. While employers may share facts, opinions, and examples about unions in a lawful manner, they should avoid asking employees questions about their possible union support or activity. Examples of improper questions include:

- Has the union been asking employees to sign cards?
- Why would you want a union here?
- Have you signed a card?
- You wouldn't sign a card, would you?
- Did Jane go to the union meeting?
- What is the union promising?
- Do you support our union-free principles?
- What is bothering you so much that you would seek union representation?

The reason supervisors and administrators may not make these inquiries is that the law generally views such questions as “inherently coercive.” Don't ask them.

Bribes: You Cannot Buy Your Way Out

Unions are permitted to make promises to employees, even if they cannot guarantee to deliver. However, employers are forbidden from making promises to employees, or from improving wages, benefits, or working conditions, in response to union organizing activity and to discourage employees from supporting the union.

There are two main reasons for this difference in treatment. The law promotes collective bargaining. If an employer could “buy its way out” of an obligation to bargain, unions might never prevail. Also, an employer's promise may give it an unfair advantage. After all, a union's promises are merely “campaign rhetoric” because the union can't deliver unless the employer agrees to concede those items in collective bargaining. The employer's promises, however,

stand on a different legal footing, because it can fulfill them without any third party's agreement.

Surveillance: No Big Brother

The law also prohibits the employer from “surveilling” or spying on union activities. A classic example of surveillance is where an administrator stations himself outside a union meeting to see who is attending. The simple rule is *don't spy*.

Administrators and supervisors may not attend union meetings. Any attempt to monitor attendance is a violation. (It also may be unlawful to give employees the impression that the employer is spying on them, such as by saying, “I understand you went to the union meeting yesterday.”)

Of course, this rule does not apply to discussions between employees on school premises which happen to be overheard by school officials. If a school administrator happens to walk in on a union discussion in the staff room where he or she usually goes, it is not spying.

Do Unions Have to Follow Any Rules?

Absolutely. The law specifies a list of “unfair acts of employee organization,” as well, although it is a little shorter than the employer's list. Under the law, unions cannot:

- Cause or attempt to cause an employer to violate the Education Employment Relations Act ;
- Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise interfere with, restrain, or coerce employees because

of their exercise of rights under the Act;

- Refuse or fail to meet and negotiate in good faith with an employer of any of the employees of which it is the exclusive representative;
- Refusing to participate in good faith in the impasse procedure set forth in the Act.

VIII

Collective Bargaining

If a union successfully organizes a group of employees, the process of collective bargaining will begin.

What does this mean? Charter school employees must focus upon what lies at the essence of choosing union representation. Charter school employees need to understand that if they choose union representation what they really are choosing is a process—the process of collective bargaining. The struggles at the bargaining table, many times, are in stark contrast to the collegial discourse teachers believed they were signing on for when they chose to teach in a charter school.

The California Education Employment Law does not define collective bargaining comprehensively except for stating that “meeting and negotiating” means “meeting, conferring, negotiating and discussing . . . in a good faith effort to reach agreement on matters within the scope of representation.” As with other concepts in the EERA, California courts have looked to federal labor law for guidance when deciding issues about good faith bargaining. The National Labor Relations Act defines bargaining in Section 8(d) as follows:

“[T]o bargain collectively is the performance of the mutual obligations of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, *but such agreement does not compel either party to agree to a proposal or require the making of a concession.*”

We emphasize the final words of the definition to highlight an important point. While the law requires the parties to sit down and negotiate, the law does not require either side to concede on any issue. The dynamics of collective bargaining generally lead to a long, drawn-out process where virtually everything that affects an employee's work life must be hashed and rehashed, discussed and discussed again.

A charter school faces two major challenges when sitting down at the bargaining table with a union like the CTA. The first hurdle is history. Once a union wins representation rights at a charter school, the first item on the agenda will be to establish “protections” similar to those found in traditional public school contracts. Issues such as the number of “prep” periods a teacher should receive, what constitutes a prep period (is honors math and regular math one prep or two?), and how much compensation is due for “extra” prep periods become subject to the economic tug of war at the bargaining table. The process many times transforms highly motivated professionals into piece-

workers seeking compensation on a task basis. Despite all good intentions, the institutional inertia of unions lures negotiators into following the patterns of contract in other school districts.

The second hurdle is time and resources. By nature, collective bargaining consumes a lot of time and resources—intellectual, monetary and emotional. While time and money is spent at the bargaining table, other critical needs are left wanting. Unions address this issue by charging that employers unnecessarily complicate the process by not agreeing to their demands. Faced with this challenge, charter school employers have two choices: agree with the union's demands even though they may run counter to the educational mission of the school, or stick to their principles, hold firm, and allow the process to drag on.

What Actually Happens During Bargaining?

Collective bargaining involves meetings between the union and the administration. The union may, or may not, have some employees present at the table. However, they will have an experienced negotiator. Experience is important. Collective bargaining is not like an ordinary negotiation over an individual or commercial contract. While administration officials surely will be involved in bargaining, it is highly recommended that they obtain the assistance of experienced counsel at the negotiating table. Successful bargaining requires preparation and yes, strategy.

There is no time limit on negotiations. The parties trade proposals back and forth agreeing to some, rejecting others, asking questions, suggesting changes.... All these are elements of bargaining.

The realities of bargaining can be devastating. A charter school seeking to break the mold of traditional education and instead pursue innovation, responsiveness, and the flexibility to address the needs of a student population hungering for a better way, may find itself handcuffed by the cumbersome process of collective bargaining.

EERA's definition of mandatory subjects of bargaining makes this clear. While the Act requires bargaining over "wages, hours of employment, and other terms and conditions of employment," the Act broadly defines "terms and conditions of employment" to include leave, transfer and re-assignment policies, class size, and procedures to be used for the evaluation of employees—subjects traditionally thought to be within the sole discretion of employers. Other issues, such as the "definition of educational objectives, the determination of the content of courses and curriculum, and the selection of textbooks," while not mandatory subjects, are included under the law as subjects over which a union has the right to consult with an employer. Only areas not specifically provided for in the Act are subject matters reserved for the sole discretion of the employer. As a result, schools need to contend with the union's aggressive approach to push the limits of the scope of bargaining.

Furthermore, collective bargaining always raises the specter of a strike. The California Supreme Court has held that strikes are permissible, unless public health or safety is threatened. And while to date California unions have rarely struck schools to achieve bargaining demands, the mere possibility of

a strike is another important reason to have a clear and effective strategy when dealing or negotiating with unions.

There are times when public sector negotiations become deadlocked. Contract dispute resolution in school cases is handled as follows: A party may seek to declare impasse in negotiations. If PERB finds impasse, that is, if negotiations are deadlocked, it will appoint a mediator to help the parties reach agreement. The mediator, however, cannot impose any terms on either party.

If mediation fails, PERB will assign a fact-finder. The fact-finder inquires into the causes and circumstances of the impasse, along with the positions of the parties. The fact-finder is empowered to make public recommendations for resolving the impasse—but he, too, cannot impose a settlement. Either party is free to accept or reject the fact-finder's report and recommendations. The purpose of the public recommendations is to put pressure on the parties to reach agreement. If fact-finding fails to resolve the impasse, PERB may order additional mediation. *In no event will there be any imposition of contract terms on the parties by any outside agency.*

What does this mean to the charter school employer? Just this: the school must bargain in good faith—which means it must make an honest and earnest effort to reach agreement. Failure to bargain in good faith may result in a PERB unfair practice charge. However, the good faith refusal of an employer to agree to terms is not unlawful. Although there are various vehicles to help reach agreement, the law has no way to compel a charter school or a union to agree to terms it does not want.

Put plainly, a charter school may or may not be as susceptible to the political pressures which often impact a public employer. Although a school's ability to withstand these pressures will vary from case to case, charter schools—which are not subject to governmental election campaigns—may be better suited to maintain their values and principles at the bargaining table and weather strikes and uncertainty. Otherwise, their mission may be compromised.

Union Decertification Petitions

Union representation may not satisfy employee expectations. This may happen for any one of a number of reasons. Perhaps the promises of better wages or benefits made by organizers when authorization cards were solicited have not been fulfilled; maybe heavy-handed administrators have been replaced with ones more attuned to needs of the staff; or, staff turn-over may have resulted in a workforce that would never have opted for union intervention in the first place. So, what can be done if employees want to be free of a union?

Employee Petitions

The Education Employment Relations Act and PERB regulations afford employees the right to decertify their union through an election conducted by PERB. The process is similar to the process used to certify a union through an election. The “reverse” process may be initiated by a decertification petition filed by a group of employees within the bargaining unit, or even another labor organization seeking to replace the current one. The petition cannot be filed by the school, an administrator or other supervisor and communication with employees on this subject must follow the rules

applicable in an initial organizing campaign. Counsel should be consulted.

The petition must be supported by proof that at least thirty percent of the employees in the established unit no longer wish to be represented by the union or wish to be represented by another union. The proof of support must generally include each employee's printed name, signature, job title and date of signature.

PERB has very explicit rules concerning when a valid decertification petition can be filed. The rules are technical and strict compliance with them is required. A union is irrefutably presumed to have majority support for the twelve month period immediately following a certification or valid election. Therefore, employees cannot ask PERB to conduct a decertification election until twelve months have passed after the union is certified by "card-check" or wins an election.

The EERA provides that decertification petitions are to be filed less than 120 days, but more than 90 days, prior to the expiration date of a negotiated agreement between the union and the employer. This period of 29 days is called the "window period." For example, if an agreement is set to expire on August 31 the open period is between May 4 and June 1. Once a contract expires, a decertification petition can be filed any time prior to a new agreement being negotiated and signed.

When the petition is filed, the employer must post a notice of the decertification petition no later than 15 days after receiving a copy of the petition. The notice must include a copy of the decertification petition. The employer must then serve a copy

of the notice on PERB. Within 20 days of the filing of the decertification petition, the employer must file with PERB a description of the established unit, including an alphabetical list of employees and their job titles. PERB then reviews the proof of support to determine whether it is sufficient. Once sufficiency is established, PERB will generally schedule an election.

In the event the incumbent union decides to withdraw as bargaining unit representative, it may file a disclaimer of interest within 20 days after the decertification petition is filed.

How the School May Respond

An employer should not initiate, instigate, solicit, encourage, or assist in the filing of the petition. Therefore, a school should not plant the idea of decertification in its employees' minds through unsolicited advice. If school administrators incite a movement to oust the union, the resulting decertification petition may be tainted and dismissed and the school's actions ruled unlawful.

Unfortunately, California law covering public sector employers and employees is not as well developed as its federal counterpart. A school wanting to withdraw recognition, therefore, should carefully review all the evidence and legal requirements with legal counsel. Certain actions may be appropriate but also may precipitate charges and a PERB proceeding if the employer does not exercise caution.

Note: This guide is intended to provide charter school administrators with a general understanding about California's labor relations law applicable to charter schools. It offers a broad description of the law and the rights and responsibilities of employees, charter schools and unions under the law—a subject that in large measure has escaped notice until now. It is not intended to be an exhaustive explanation of the law. It is not a substitute for professional legal advice. If your school faces any of the issues raised in this guide, you are urged to seek specific legal advice from an attorney who is knowledgeable in this specialized area of the law.

The California Charter Schools Association

The California Charter Schools Association (“the Association”) is the membership and professional organization serving charter public schools in California. The Association’s mission is to lead the charter public schools movement in California in order to increase the number of students attending high quality charter schools. When the Association was created in 2003, there were approximately 440 charter schools in the state serving about 150,000 students; in 2009-10, more than 800 charter public schools serve an estimated 300,000 students. Overall, the Association has identified four strategic priorities to help achieve its mission.

1. Growing new charter schools
2. Strengthening existing charter schools
3. Ensuring accountability
4. Sustaining the California Charter Schools Association

The California Charter Schools Association is also a trusted source of data and information on California’s charter schools for parents, authorizers, legislators, policy analysts, funders, the press and other interested groups. For more information on the Association, please visit www.myschool.org

Lawrence H. Stone

Lawrence H. Stone is the managing partner of the Los Angeles office of Jackson Lewis LLP. He received his Bachelor of Arts degree from Brandeis University, *cum laude*, in 1980 and earned a Master's degree from Brown University in labor history in 1981. He received his Juris Doctor from Benjamin Cardozo School of Law in 1985. He is a member of the bars of the states of New York and California. Mr. Stone became the managing partner of the Los Angeles office in 1997.

Mr. Stone frequently speaks and trains on the perils of managing employees in California. These topics include union organizing, managing under a union contract, sexual harassment in the workplace, leaves of absence and workplace accommodations, discipline and termination issues and avoiding workplace litigation.

He regularly practices before the National Labor Relations Board, state and federal agencies and state and federal courts. In addition, he has extensive experience in all facets of union-management relations from organizing to collective bargaining and has successfully handled numerous arbitrations on subjects ranging from disciplinary issues, just cause for termination and contract interpretation issues. Mr. Stone has handled matters before other administrative tribunals and has also litigated wrongful termination and discrimination lawsuits before state and federal courts and administrative agencies.

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Thomas V. Walsh is a partner in the White Plains, New York, office of Jackson Lewis LLP. He received a B.A., *summa cum laude*, from Long Island University and his Juris Doctor from St. John's University. He is the author of "Recent Developments in the Weingarten Doctrine, The Board Shifts to the Right," for the St. John's University Journal of Legal Commentary. Mr. Walsh is a member of the New York State Bar Association and of the American Bar Association, and participates in the labor and employment law sections of both organizations.

Mr. Walsh has represented employers in all aspects of labor and employment law and litigation before numerous state and federal courts, regulatory agencies, as well as in numerous arbitrations. Mr. Walsh has extensive experience in representing employers faced with union organizing drives and in proceedings before the National Labor Relations Board. He has litigated matters on behalf of employers before several appellate courts, and has appeared on behalf of national industry groups before the U.S. Supreme Court. Mr. Walsh is admitted to the courts of New York, the United States Courts of Appeals for the Second, Fourth, Sixth, Eighth, and District of Columbia Circuits, as well as the U.S. Supreme Court.

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Roger S. Kaplan is a partner in the Long Island office of Jackson Lewis LLP. Mr. Kaplan received his B.S. degree from Cornell University, School of Industrial and Labor Relations, and holds an LL.B degree from New York University School of Law. He is a member of the bar of the State of New York, and has appeared before many federal and state courts, including the U.S. Supreme Court, as well as administrative agencies.

Mr. Kaplan frequently counsels clients with respect to National Labor Relations Board proceedings, including representation grievances and arbitrations, substance abuse testing issues, Americans with Disabilities Act and workers compensation issues, discrimination complaints and related issues, and OSHA investigations.

Mr. Kaplan has addressed business and professional organizations on National Labor Relations Act issues, OSHA liability, workers compensation, workplace violence and substance abuse, and has written articles on labor and employment law. He co-authored "Responding to Union Organizing Campaigns", a LEXIS NEXIS Matthew Bender Business Law Monograph (rev.1998), and participated in rewriting Jackson Lewis's *Winning NLRB Elections*, (CCH 4th ed. 1997). Mr. Kaplan also edited and contributed to "The Accountant's Role & Employment Relations," published by the American Society of Certified Public Accountants (CPE-DW). He is a past contributor to the American Bar Association's Committee on Labor Law publication, *The Developing Labor Law*. He is currently editing Matthew Bender's OSHA Treatise.

Jackson Lewis LLP

Jackson Lewis LLP is a labor relations and employment law firm consisting of approximately 551 attorneys representing management exclusively. The firm's offices are located in major commercial centers across the country. Jackson Lewis attorneys have handled labor relations matters, administrative hearings and litigation in virtually every jurisdiction in the United States.

Jackson Lewis has been, in many respects, a pioneer. It is probably the first firm actively to practice preventive labor and employment law. From its beginnings over 50 years ago, Jackson Lewis has advocated the education of management as the key to avoiding legal problems. For example, it was the first labor law firm, and possibly the first firm of any kind, to conduct annual client symposiums and publish monthly client bulletins. The firm has authored *Avoiding Unionization Through Preventive Employee Relations Programs*, published by CCH Incorporated, among other titles. This preventive approach continues to be the foundation of the firm's practice.

The firm's expertise in assisting clients in remaining union-free is recognized nationally. It has counseled employers in thousands of union organizing and election situations. But perhaps its proudest accomplishment is the number of clients who have relied upon the firm's expertise in developing issue-free environments, thereby making the intervention of a union unnecessary. The firm's practical "hands on" approach consists of training supervisors, developing policies and procedures including employee handbooks and supervisory manuals, and conducting employee relations audits.

This aggressively proactive, preventive approach is particularly warranted in an age when the growth of employee rights and the surge in employment-related litigation have seriously eroded employment-at-will.

For clients with unionized workforces, Jackson Lewis provides the full range of labor law services: negotiation of collective bargaining agreements, representation at all stages of the grievance and arbitration process, representation in deauthorization/decertification proceedings, and handling administrative and court litigation relating to these activities.

The firm also has been particularly active in litigating novel and challenging wrongful discharge and EEO cases. It is proud of its record of victories for management in cases at the trial stage, but is equally conscious that efficient pretrial resolution of such matters is frequently of paramount interest. The firm believes its reputation as aggressive litigators has enabled it to secure very favorable extra-judicial settlements of many matters, at minimum expense and exposure to clients. Indeed, it frequently provides counsel and conducts training seminars on implementing preventive employment practices and “avoiding the courthouse”.

Additional information about Jackson Lewis LLP may be found on the firm’s website, www.jacksonlewis.com, or by contacting an attorney at the firm’s offices.

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The experts agree that a healthy relationship between a charter school's leadership and staff is an essential component in fulfilling the charter school's mission.

In this clearly written guide for California charter school educators, Jackson Lewis LLP—a national employment law firm—reviews sensible management practices, explains how a union organizes employees for collective bargaining and spells out what the employer can lawfully do and what it cannot do in response. In addition, the authors describe how the collective bargaining process works in the public education arena.

Atlantic Legal's guide is an indispensable resource for trustees and administrators of charter schools.

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