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Keck, Mahin & Cate

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Employee Participation Programs After *Electromation*: They're Worth the Risk!

K. Bruce Stickler*
Patricia L. Mehler**

I. INTRODUCTION

Employee participation programs ("EPPs")¹ have been hailed as "the most positive and important development in U.S. labor-management relations in the last 20 years. . . ."² A myriad of employers, including those in the healthcare industry, apparently agree. More than 80% of the largest employers in the United States—nearly 30,000 employers—have implemented some form of EPP.³

EPPs allow management to utilize a valuable resource, the employees' firsthand knowledge of the employer's strengths and weaknesses. EPPs also empower employees by giving them a role in making decisions about matters that affect their jobs. In a classic example of form over substance, the National Labor Relations Board ("the Board") recently found that an electronics manufacturer's EPPs violated federal labor law and ordered that the employee committees be disbanded.⁴ The Board's decision in

* K. Bruce Stickler is a partner and Director of the Labor and Employment Law Group of Keck, Mahin & Cate in Chicago, Illinois. He received his B.A. and J.D. degrees from Southern Methodist University. Mr. Stickler represents management in employment and labor relations matters, including a number of religious orders, hospitals, and health care institutions. He has served as Labor Counsel to the American Hospital Association and the Illinois Hospital Association. Mr. Stickler has written many articles and lectured extensively throughout the country on labor and employment law issues.

** Patricia L. Mehler is an associate attorney at Keck, Mahin & Cate in Chicago, Illinois. She received her B.S. from University of Illinois at Champaign-Urbana and her J.D., *cum laude*, from Loyola University Chicago School of Law. Miss Mehler concentrates her practice in labor and employment law.

1. Employee participation programs are committees of management and nonsupervisory employee representatives that meet to address workplace issues. They often deal with quality, productivity, efficiency, or safety issues, though their purposes can be unlimited. Numerous types of EPPs may exist; some of the more common EPPs include "quality circles," "total quality management (TQM)," "continuous quality improvement (CQI)," and "work-life quality" task forces.

2. Letter from Congressman Steve Gunderson (R-Wis.) to the Members of the House of Representatives (Mar. 1, 1993) (on file with the Institute for Health Law).

3. *Id.*

4. *Electromation, Inc.*, 309 N.L.R.B. No. 163, 5 Lab. L. Rep. (1992-1993 NLRB Dec.) (CCH) ¶ 17,609, at 32,970 (Dec. 16, 1992), *appeal docketed*, No. 92-4129 (7th Cir. Dec. 28, 1992).

Electromation, Inc. left countless employers wondering about the legality of their own EPPs. This article explores *Electromation* and its aftermath, particularly as applied to the healthcare industry.

II. THE *ELECTROMATION* DECISION

Electromation, Inc., an Indiana corporation, manufactures electrical components.⁵ Due to financial losses, the company modified certain employee benefits. After a number of employees complained about the reduced benefits, Electromation created five EPPs called "Action Committees." The Action Committees were designed to resolve the problems raised by the employees. Representatives of both employment and management sat on each committee.

The National Labor Relations Board found that the company's "Action Committees" violated § 8(a)(2) of the National Labor Relations Act ("the Act"),⁶ which prohibits employer domination, interference, or support of a labor organization.⁷ The Board's analysis of § 8(a)(2) required two distinct determinations, both of which are necessary to find a violation. First, the Board determined that the Action Committees constituted a "labor organization" as defined in § 2(5) of the Act.⁸ Second, the Board found that the employer's involvement with those committees constituted "unlawful domination and support."⁹

An employee committee qualifies as a labor organization if it 1) involves employee participation, 2) "deals with" the employer, and 3) concerns grievances, labor disputes, wages, hours, or other work conditions.¹⁰ Like all EPPs, Electromation's Action Committees involved employee participation, thereby fulfilling the first prong of the statutory definition of a labor organization.

The Board then examined whether the committees existed, at

5. Electromation, Inc., 5 Lab. L. Rep. (CCH) at 32,971.

6. *Id.* at 32,978.

7. National Labor Relations Act § 8(a)(2), 29 U.S.C. § 158(a)(2) (1988). Congress enacted § 8(a)(2) to avoid sham unions, which were created and dominated by the company but gave the employees the impression that their interests were represented. The original proponent of the Act, Senator Wagner, explained: "[O]nly representatives who are not subservient to the employer with whom they deal can act freely in the interest of employees." Electromation, Inc., 5 Lab. L. Rep. (CCH) at 32,974 (citing 1 LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT OF 1935 15-16 (GPO 1949)). For further discussion of the legislative history of § 8(a)(2), see Electromation, Inc., 5 Lab. L. Rep. (CCH) at 32,973-75, 32,981-82.

8. Electromation, Inc., 5 Lab. L. Rep. (CCH) at 32,979.

9. *Id.* at 32,980.

10. National Labor Relations Act § 2(5), 29 U.S.C. § 152(5) (1988).

least in part, to “deal with” the employer. The Board, noting that the employer created these committees to discuss and mutually resolve employee complaints, stated: “This is the essence of ‘dealing with’ [the employer].”¹¹ Thus, the Action Committees satisfied the second prong of the statutory definition of a labor organization.

The third prong of the statutory definition requires that the exchange between the employer and employees concern traditional subjects of collective bargaining—conditions of work, grievances, labor disputes, wages, or hours. The Board found that Electromation’s Action Committees dealt with employee benefits, which can be both conditions of work and wages.¹² Thus, the third prong was also met.

Having found the Action Committees to be a “labor organization” within the meaning of the statute, the Board then examined whether Electromation, as the employer, unlawfully dominated, interfered with, or supported the Action Committees in violation of § 8(a)(2).¹³ The Board delineated several factors indicating employer domination and support. These factors include the employer’s role in suggesting the committee, determining its purposes, writing its bylaws or other governing rules, determining the number of committee members, establishing the complement of representatives from management and the work force, drafting goals, setting restrictions on which employees may participate, selecting the subjects to be discussed, scheduling the meeting times and places, financially supporting the committee, and paying for time spent by the employees while attending meetings.¹⁴

The Board found that Electromation’s influence over the Action Committees was so pervasive as to constitute unlawful domination and support.¹⁵ First, it was Electromation’s decision to create the Action Committees. Electromation also established the entire structure of the committees: it determined the purposes and goals, the topics to be discussed, the number of members on each committee, and the individuals who would serve as management representatives. Electromation also financially supported the committees by allowing them to meet on company time and company property. Given the employer’s conduct, the Board found “no doubt” as to the existence of a § 8(a)(2) violation.¹⁶

11. Electromation, Inc., 5 Lab. L. Rep. (CCH) at 32,979.

12. *Id.* at 32,978-79.

13. *Id.* at 32,979-80.

14. *Id.*

15. *Id.* at 32,980.

16. *Id.* at 32,979.

III. EMPLOYEE COMMITTEES AFTER *ELECTROMATION*

The *Electromation* decision does not prohibit all EPPs. The Board was careful to note that its determination was limited to the facts of the case and that not all employee committees would be considered unlawful.¹⁷ Robert Reich, Secretary of Labor, commented recently that he considered the *Electromation* decision to be a "narrow" one, noting that "[t]he last thing we want it to do is cast a chilling effect" on mutually beneficial employment initiatives.¹⁸

Congress also has indicated its intention to construe *Electromation* narrowly. Three months after the *Electromation* decision, Congressman Gunderson (R-Wis.) introduced the Teamwork for Employees and Management ("TEAM") Act of 1993, which would severely limit the impact of *Electromation*.¹⁹ On March 30, 1993, Senator Kassebaum (R-Kan) introduced a companion bill.²⁰ Additionally, in the One Hundred Third Congress, both the House and the Senate are considering legislation to reform the Occupational Safety and Health Act of 1970 ("OSHA").²¹ Both OSHA reform bills would require that employers with more than ten employees establish a safety and health committee that includes both employer and employee representatives to deal with safety concerns.²²

Until legislation limiting the impact of *Electromation* becomes law, employers must look to the Board for guidance on the legality of their EPPs. Under *Electromation*, employers may avoid having their employee committees declared unlawful by one of three means. First, EPPs that do not "deal with" the employer do not constitute "labor organizations" under § 2(5) of the Act and thus cannot violate § 8(a)(2).²³ Second, EPPs that do not concern em-

17. *Id.* at 32,971.

18. *Employee Involvement is Critical to Success of Companies, Reich Says*, Daily Labor Report (BNA) No. 44, at A-5, A-6 (Mar. 9, 1993).

19. H.R. 1529, 103d Cong., 1st Sess. (1993); *Gunderson Bill Would Amend NLRA To Allow For Participation Programs*, Daily Labor Report (BNA) No. 60, at A-14, A-15 (Mar. 31, 1993).

20. S. 669, 103d Cong., 1st Sess. (1993).

21. S. 575, 103d Cong., 1st Sess. (1993) (introduced by Senators Kennedy (D-Mass.) and Metzenbaum (D-Ohio) on Mar. 11, 1993). Congressman Ford (D-Mich) introduced the House's version of the bill, H.R. 1280, 103d Cong., 1st Sess. (1993), on March 10, 1993.

22. S. 575, 103d Cong., 1st Sess. § 201 (1993) (amending § 28 of the 1970 Act). Section 201 of the House bill also mandates establishment of a safety and health committee in each qualifying company. H.R. 1280, 103d Cong., 1st Sess. § 201 (1993).

23. 29 U.S.C. §§ 152(5), 158(a)(2) (1988).

ployee grievances, labor disputes, wages, hours, or work conditions also do not constitute “labor organizations.”²⁴ Third, an employer may reduce the likelihood of a § 8(a)(2) violation by minimizing its influence on the EPP.

While § 8(a)(2) of the Act prohibits employer domination of a labor organization, there can be no § 8(a)(2) violation if a committee does not constitute a “labor organization” within the meaning of the statute.²⁵ To qualify as a labor organization, a committee must “deal with” the employer. A committee “deals with” the employer if it attempts to mutually resolve issues. The Board explained: “[w]e view ‘dealing with’ as a bilateral mechanism involving proposals from the employee committee. . . , coupled with real or apparent consideration of those proposals by management. A unilateral mechanism, such as a “suggestion box,” or “brainstorming” groups or meetings, or analogous information exchanges, does not constitute ‘dealing with.’”²⁶

In a subsequent decision, the Board further defined the differences between a unilateral and a bilateral mechanism.²⁷ The Board stated that a bilateral mechanism involves a “pattern or practice” of employee proposals followed by management’s response to those proposals, though actual resolution of the proposals through compromise would not be required. Where only “isolated instances” of employee proposals exist, however, “the element of dealing [with] is missing.”²⁸ Additionally, the Board stated that the presence of management representatives on the EPP would not, in itself, constitute “dealing with” management. If the EPP was empowered to act on its own and the management representatives had no vote or only constituted a minority of the committee, the EPP would not be “dealing with” management.²⁹

Thus, one way to minimize the possibility of a § 8(a)(2) violation is to use employee committees as a mechanism for input, without agreeing to respond to that input. The downside of using committees in this manner is that it strips the employees of their active role in decision making. Presumably, the quality of the participation on such a committee would be less enthusiastic than on a committee designed for the mutual benefit of both the employer and

24. 29 U.S.C. § 152(5).

25. *Id.*

26. *Electromation, Inc.*, 5 Lab. L. Rep. (CCH) at 32,976 n.21.

27. *E. I. du Pont de Nemours & Co.*, 311 N.L.R.B. No. 88, 1993 WL 191471 (May 28, 1993).

28. *Id.* at *2.

29. *Id.* at *3.

the employees. Thus, creating an EPP that serves only as a suggestion mechanism may well defeat one of the main purposes in creating the EPP and therefore may not be a viable option.

Another way to avoid a § 8 (a)(2) violation is to create an EPP that does not concern the traditional subjects of collective bargaining. Federal labor law distinguishes between “mandatory” and “permissive” subjects of bargaining. Mandatory subjects are those that an employer *must* negotiate with the employee’s representative (the labor organization).³⁰ Permissive subjects may be the subject of bargaining, but need not be. Mandatory subjects of bargaining include employee grievances, labor disputes, wages, hours, and other conditions of work.³¹ Hence, a committee that purports to resolve issues regarding these mandatory subjects usurps the role of an elected employee representative and thus qualifies as a labor organization.

The scope of the five mandatory subjects of bargaining—grievances, labor disputes, wages, hours, and conditions of work—is fairly broad. Wages, for example, include all forms of compensation—bonuses, shift differentials, overtime pay, merit increases, the method of pay calculation, and pay for employees on the bargaining committee during contract negotiations.³² Employee benefits, which were at issue in *Electromation*, could be considered either wages (e.g., vacation pay) or conditions of work (e.g., attendance programs).³³ To avoid being considered a labor organization, an employee committee must avoid discussing any of these five mandatory subjects of bargaining, including any related issues encompassed within each subject.

On April 15, 1993, the Board’s General Counsel, Jerry M. Hunter, issued a memorandum to the Board’s offices to provide further guidance on *Electromation*.³⁴ The memorandum warned that the Board considers safety issues to be mandatory subjects of

30. Of course, negotiation of mandatory subjects is only required where a properly recognized employee representative exists.

31. National Labor Relations Act § 8(d), 29 U.S.C. § 158(d) (1988) (“wages, hours, and other terms and conditions of employment”); Labor Management Relations (“Taft-Hartley”) Act § 9(a), 29 U.S.C. § 159(a) (1988) (“rates of pay, wages, hours of employment, or other conditions of employment”). See also 1 THE DEVELOPING LABOR LAW (Patrick Hardin, 3d ed. 1992) (hereinafter THE DEVELOPING LABOR LAW).

32. THE DEVELOPING LABOR LAW, *supra* note 31, at 864-66, 876-77, 927.

33. For a discussion of the Board cases establishing mandatory subjects of bargaining, see *id.* at 863-928.

34. NLRB Gen. Couns. Mem. 93-4 (Apr. 15, 1993), reprinted in Daily Labor Report (BNA) No. 78, at G-1 (Apr. 26, 1993).

bargaining.³⁵ Thus, safety committees that meet the statutory definition of a labor organization may violate § 8(a)(2) if employer domination, interference, or support is also indicated.

In *Electromation's* concurring opinions, Board members stated that employee committees designed to address issues of productivity, product quality, and efficiency would be lawful;³⁶ these issues concern aspects of employment that generally remain within the prerogative of management to dictate. Because these managerial issues are not mandatory subjects of bargaining, they can be freely discussed.³⁷

Thus, EPPs designed to deal with issues of productivity, efficiency, or quality will likely be safe from the reach of *Electromation*.³⁸ The challenge will be to keep the committee focused on those topics. Addressing any topic without discussing the closely intertwined mandatory bargaining subjects may be difficult.³⁹ The employer must be prepared to contend with this possibility, reminding the committee that federal labor law prohibits such discussions in EPPs.

In addition to safeguarding productivity, quality, and efficiency committees, the Board also noted that an EPP that performs strictly managerial or adjudicative functions does not constitute a labor organization.⁴⁰ Because such a committee performs functions for management, the Board does not consider the committee to be "dealing with" the employer as an advocate for the employee.⁴¹ Further, such committees do not qualify as labor organizations.

The Board considers an adjudicative committee to be a substitute for management if the committee has the sole authority to decide employee grievances, just as management would.⁴² "Fair treatment" and "grievance" committees would thus be lawful if

35. *Id.* at G-5.

36. *Electromation, Inc.*, 5 Lab. L. Rep. (CCH) at 32,980-85 (Devaney, concurring), 32,985-86 (Oviatt, concurring), 32,987-97 (Raudabaugh, concurring).

37. *Electromation, Inc.*, 5 Lab. L. Rep. (CCH) at 32,977.

38. Thus, health care institutions that have established quality assurance committees to enforce Joint Commission of Accreditation of Healthcare Organizations standards presumably do not violate the Act.

39. The General Counsel Memorandum of *Electromation* warns that a productivity or efficiency EPP may still be considered a labor organization "if it engages in direct dealing over mandatory terms and conditions of employment, or over matters that will have a substantial impact upon mandatory working conditions." Daily Labor Report (BNA) No. 78, at G-5.

40. *Electromation, Inc.*, 5 Lab. L. Rep. (CCH) at 32,977.

41. *Id.*

42. *Id.* See also *Mercy-Memorial Hosp.*, 231 N.L.R.B. No. 182, 1108, 1121 (1977).

they were authorized to make final decisions as to a grievance. For example, a committee that decided employee grievances at the third stage of a four-stage grievance procedure would not constitute a labor organization as long as its decision was final as to the third stage of the procedure. If such a committee only recommended a course of action to management, however, it would be "dealing with" the employer.

The third way in which an employer can reduce the likelihood of a § 8(a)(2) violation is to minimize its domination of the committee. An employer demonstrates employer domination when it determines the structure of the committee, by establishing or controlling its bylaws, rules, purposes, or goals, determining the topics to be discussed, scheduling meetings, or limiting or selecting the number of members and those employees who may participate.⁴³ Additionally, if the employer financially supports the committee or pays its employees for time spent on committee activities, the employer takes the risk that its support will be considered unlawful.⁴⁴

Employers with committees should consider their domination and support of those committees in light of the above factors. Unfortunately, the Board did not provide any guidance on how many of these factors are required to constitute unlawful domination, interference, or support. If an examination reveals more than negligible domination, interference, or support, the employer should consider dissolving the current committees and, if desirable, reformulating new committees according to the above standards. Simply reducing the employer's involvement in existing committees may not be enough. The employer in *Electromation*, when faced with a union election, withdrew its involvement from its committees pending the election results. The Board found that the employer's withdrawal was insufficient. Because management's influence pervaded the committees' entire structure, the Board held that disestablishment was necessary.⁴⁵

As further cases are decided, the line between lawful and unlawful committees will become clearer. Until then, *Electromation* and previous Board decisions indicate the following guidelines.

43. *Electromation, Inc.*, 5 Lab. L. Rep. (CCH) at 32,979-80.

44. *Id.* However, the General Counsel Guideline Memorandum indicates that allowing an EPP to meet on company time and property will not be considered per se unlawful. Daily Labor Report (BNA) No. 78, at G-7.

45. *Id.*

	LAWFUL	UNDECIDED	UNLAWFUL
S T R U C T U R E	<ul style="list-style-type: none"> •unilateral mechanisms: employee input without employer action (brainstorming, suggestion boxes) 		<ul style="list-style-type: none"> •bilateral mechanisms: negotiation or other attempts at mutual resolution of issues
+			
T O P I C S	<ul style="list-style-type: none"> •quality circles, productivity, or efficiency committees •managerial or adjudicative committees 	<ul style="list-style-type: none"> •employee health committees⁴⁶ 	<ul style="list-style-type: none"> •grievances, labor disputes, wages, hours, conditions of work, and related items •safety committees⁴⁷
+			
D O M I N A T I O N	<ul style="list-style-type: none"> •formulation and structure of committee determined by employees; minimal employer influence 	<ul style="list-style-type: none"> •employer financial support without other support •a level of employer involvement less than total domination of structure 	<ul style="list-style-type: none"> •creation, structure, function, and continued existence of committee determined by employer

IV. HEALTHCARE EPPS

There are as many forms of EPPs as there are employers. That fact, coupled with the Board's failure to provide adequate guidance on the extent of employer involvement required for a § 8(a)(2) violation, makes it difficult to devise a formula by which employers

46. In *E. I. du Pont de Nemours & Co.*, 311 N.L.R.B. No. 88, 1993 WL 191471 (May 28, 1993), the Board cast doubt on the lawfulness of employee health committees. Without much analysis, the Board found that the employer's committees that discussed picnic areas and jogging tracks involved employee "benefits," which are prohibited subjects for EPPs. *Id.* at *1.

47. *But see* note 22.

can judge the legality of their EPPs. The following two hypotheticals attempt to illustrate the application of the § 8(a)(2) analysis.

General Hospital, a large, tertiary care, for-profit institution in a large Northeastern city, established an "Employee Advisory Committee" based on employees' suggestions. The committee's purpose is to provide input to management about benefit plans.

The committee's membership consists mostly of employees. General hired a consulting company to assist in establishing and running the committee. Management personnel from Human Resources also sit on the committee. Otherwise, management appears not to have a large role; they are only to be apprised of the committee's progress.

At first glance, General's committee may appear to pass muster under *Electromation*. Both its name ("advisory committee") and its stated purpose of "providing input" suggest that the committee is lawful as a unilateral mechanism for employee suggestions. The initial description of the committee, however, also states that the results of the committee's deliberations will be used to implement changes to certain company policies and health insurance benefit plans, making it appear to be more than a mechanism for input. The topics that the committee addresses also include a mandatory subject of bargaining: benefits. Thus, General's committee is likely to be characterized as a labor organization.

Although management does not appear to play a dominant role in the committee's ongoing activities, the employer's influence pervades the committee's structure. The employer created the committee, devised the rules, determined the employee and management complement, set the agenda and the meeting times, created materials to review for the first meeting, and dictated its purposes. Presumably, the committee would cease to exist if the employer had no further need for it. Even if management's role on an ongoing basis was minimal, its influence in dictating the entire structure of the committee would likely amount to a violation of § 8(a)(2) of the Act.

St. Hospital, a religious-sponsored nonprofit institution located in a rural area, uses a "shared governance" model to make major decisions about managerial and clinical practice issues. The model consists of three councils, each addressing a different subject—clinical practice, quality improvement, and education. Each council has responsibility for final decisions regarding its respective subject matter.

Employees sit on all three councils. St. Hospital created these

councils because it wanted a strong line of communication between hospital staff and hospital management. Management chairs each council. The councils are completely funded by the hospital and council members are paid for time spent on council activities.

Although St. Hospital's committees were created and structured by management, they may well survive scrutiny under the *Electromotion* analysis. The purpose of the councils is to perform functions traditionally within the discretion of management: quality assurance, staff education, and supervision of clinical practice. These management functions are not mandatory subjects of bargaining. Thus, the councils are not likely to fall within the statutory definition of "labor organization." Hence, no § 8(a)(2) violation could occur.

V. THE RISKS AND BENEFITS OF MAINTAINING EPPS

Before creating or dissolving an EPP, the employer should balance the risks against the advantages of such action, including the penalties that could result if the Board found that the EPP violated § 8(a)(2) of the Act. Though *Electromotion* applies to both union and non-union companies, it is likely that only a traditional labor union would file an unfair labor practice charge.⁴⁸ Such a charge might be filed by a union that currently represents some of the employees or by a union wishing to organize employees. If the Board finds the challenged committees to be unlawful, the employer would most likely be ordered to disestablish the committees and cease providing their support.

An employer of a unionized workforce should be aware that an employer-dominated EPP could also violate the employer's duty to bargain with the union's elected representative under § 8(a)(5) of the Act.⁴⁹ If the employer bargained with the EPP over changes concerning mandatory subjects of bargaining, § 8(a)(5) would likely be violated.⁵⁰ If § 8(a)(5) were also violated, the Board would likely issue a bargaining order. Regardless of which of the two statutory sections is violated, monetary penalties are unlikely unless, pursuant to the EPP, the employer unlawfully reduced wages or benefits.

The risk of an *Electromotion* violation and a disestablishment order, however, should not frighten employers into immediately

48. Though an employee could file an unfair labor practice charge, it is not likely the employee would have any reason to do so if a union were not present.

49. 29 U.S.C. § 158(a)(5) (1988).

50. Daily Labor Report (BNA) No. 78, at G-8 to G-9.

dissolving their EPPs. The benefits of EPPs to employers and employees may outweigh the risks associated with maintaining them. The employer has three options. First, it can choose not to use employee committees, thereby foregoing all of the benefits of EPPs. Second, an employer can maintain a potentially unlawful EPP and risk a disestablishment order. Third, the employer can structure its EPPs in one of the ways described so as to minimize the possibility of a violation.

Although an employer may structure its EPPs in any one of the three ways discussed to avoid a violation, there are trade-offs inherent in each of the three methods. If the employer creates a committee that will act only as a unilateral mechanism for gathering input (so as not to qualify as a labor organization), that may defeat a principle purpose in creating the committee: allowing employees to have an active role in meaningful decision making. A better option may be to design the committee so that it does not concern the mandatory subjects of bargaining—grievances, labor disputes, wages, hours, or conditions of work. Keeping the committee from discussing the prohibited topics may be difficult. If the employer can accomplish it, though, the employer will be able to maintain as much control over the committee as it desires, without fear of violating federal labor law.

A third option, minimizing the employer's domination, may be the most difficult for the employer. First, minimizing the domination necessarily involves relinquishing control over the committee's structure and its activities. Second, even if the employer were willing to share control of the committee, the Board in *Electromation* did not provide much guidance about how much control is too much. The employer would thus remain at risk of a violation unless it abandoned virtually all control of the committee.

Employee participation programs can be valuable to both employers and employees. Despite the *Electromation* ruling, EPPs need not be abandoned. Although employers may have concerns about their EPPs, the decision did leave employers with options that allow them to minimize or avoid altogether violations of federal labor law. Employers must weigh the potential risks of a violation against the considerable benefits derived from EPPs when determining their proper course.