

THE BLUE EAGLE HAS LANDED

The Paradigm Shift from Majority Rule
to Members-Only Representation



U.S. CHAMBER OF COMMERCE
Workforce Freedom Initiative

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INTRODUCTION: WORKER CENTERS AND THE PROMOTION OF MEMBERS-ONLY UNIONS

For nearly a century, the labor relations system of the United States has been premised upon the principles of industrial democracy and majority rule.¹ Under this system, created by the National Labor Relations Act (NLRA), if a majority of employees in an appropriate unit wishes to be represented by a labor organization, then — assuming the proper steps are followed to objectively establish that majority status — the labor organization becomes the *exclusive* representative of all employees in the unit and an employer must bargain with that labor organization.² The U.S. system differs from that which exists in other parts of the world, most notably in Europe, where employers are regularly required to bargain with unions solely on behalf of their members under a system known as minority, or members-only, unionism. Congress considered such a system during its debates over passage of the NLRA (also known as the Wagner Act) and the Taft-Hartley Act, and it was expressly rejected.³

Organized labor has seen union density rates fall from roughly 35% of the workforce in the 1950s to 11.3% today.⁴ It is not necessary to discuss in this paper the reasons for this decline; of greater interest is labor's response to what it considers a significant problem. Its efforts have ranged from promoting the failed “card check” legislation⁵ to seeking policy changes through the regulatory agencies and utilizing new organizing tactics such as corporate campaigns.

One of the most recent efforts embraced by traditional labor unions to reverse their decline has been to promote and embrace so-called worker centers.⁶ The worker center model of representation differs significantly from that envisioned under U.S. labor laws. Specifically, worker centers seek to negotiate with employers on behalf of employees whom they may not actually represent. In fact, many of the recent protests promoted by worker centers are

1 Ruth Weyand, *Majority Rule in Collective Bargaining*, 45 Colum. L. Rev. 556, 565 (1945).

2 29 U.S.C. §159.

3 S. REP. NO. 74-573, at 13 (1935), reprinted in 2 NLRB, LEGIS. HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 2300, 2313 (1985); see also, H.R. REP. NO. 74-972, at 18 (1935), reprinted in 2 LEG. HIST. NLRA, at 2956, 2974. Further, a provision rejected by Congress stated: “[T]hat any minority group of employees in an appropriate unit shall have the right to bargain collectively through representatives of their own choosing when no representatives have been designated or selected by a majority in such unit. Kenneth Casebeer, *Drafting Wagner’s Act: Leon Keyserling and the Precommittee Drafts of the Labor Disputes Act and the National Labor Relations Act*, 11 INDUS. REL. L.J. 73, 124 (1989). This explicit rejection of the minority unionism model demonstrates that such a theory is not supported by the Act. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442–443 (1987). (“Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language.”)

4 Bureau of Labor Statistics, *Economic News Release*, <http://www.bls.gov/news.release/union2.nr0.htm>. (Last visited Mar. 31, 2014). See also, Sean P. Redmond, “Union Membership Static” WORKFORCE FREEDOM INITIATIVE, (Jan. 24, 2014), <http://www.workforcefreedom.com/blog/union-membership-static>. (Last visited Mar. 31, 2014).

5 Employee Free Choice Act of 2009, H.R. 1049, S. 560, 111th Cong. (2009).

6 AFL-CIO, *Worker Center Partnerships*, <http://www.aflcio.org/About/Worker-Center-Partnerships> (last visited Mar. 5, 2014).

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conducted with the support of, at most, a handful of employees.⁷ There is no evidence that a majority of workers wants these groups to advocate or negotiate for them.

Worker centers originated in the American South in the 1970s and 1980s.⁸ As mentioned above, however, traditional labor unions have begun to support and finance worker centers, and have actively engaged with them.⁹ The AFL-CIO has even attempted to establish its own worker center through its “Working America” initiative, which claims to have 3 million members.¹⁰ What has been missing, though, is a strategy for organized labor to turn its investment in worker centers into actual union members with an accompanying revenue stream. The solution may lie in a significant paradigm shift in labor law toward a members-only union model.

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⁷ For example, during Black Friday job actions promoted by the worker center OUR Walmart in 2012 and 2013, very few employees of Walmart actually participated. See Connor Simpson, *So How Did Those Walmart Protests Go?*, THE WIRE, <http://www.thewire.com/national/2012/11/so-how-did-those-wal-mart-protests-go/59270/> (last visited Nov. 23, 2012); *Closing Bell*, CNBC, http://archive.org/details/CNBC_20121123_170000_Closing_Bell (last visited Nov. 23, 2012). In 2013, Walmart calculated the number of associates who participated in the strikes to be around 20. See *Dispelling Union Myths*, OURWALMARTFACTCHECK.COM, <http://www.ourwalmartfactcheck.com/2013/12/the-2013-black-friday-protests-were-organized-by-union-front-groups-like-our-walmart-not-walmart-associates/> (last visited Dec. 5, 2013). The United Food and Commercial Workers Union (UFCW) has also paid to hire temporary employees to protest at Walmart in Nevada. See *Working Stiffed*, THE DAILY SHOW (airdate Sept. 20, 2010), <http://www.thedailyshow.com/watch/mon-september-20-2010/working-stiffed> (Last visited 3/19/14). Indeed, in anticipation of the 2012 Black Friday protests, the Organization United for Respect at Walmart offered to pay Walmart associates through \$50 gift cards if they participated in the protests. Ben James, *NLRB Approves Union's Gifts to Striking Wal-Mart Workers*, LAW360, <http://www.law360.com/articles/491311/nrb-approves-union-s-gifts-to-striking-wal-mart-workers> (last visited Nov. 25, 2013). Other outlets have offered similar evidence of minimal employee participation in the recent protests at fast food restaurants. Julie Jargon and Kris Maher, *Fast-Food Chains Face Challenges on Wages*, WALL STREET JOURNAL, <http://online.wsj.com/news/articles/SB10001424127887324324404579043292976709778> (last visited Aug. 29, 2013); John Bacon, *Fast-Food Workers Strike, Protest for Higher Pay*, USA TODAY, <http://www.usatoday.com/story/money/business/2013/12/05/fast-food-strike-wages/3877023/#> (last visited Dec. 5, 2013).

⁸ For a comprehensive study on the origins of worker centers, see Janice Fine, *Worker Centers: Organizing Communities at the Edge of the Dream*, 50 N.Y.L. SCH. L. REV. 417, 430 (2006).

⁹ For example, Restaurant Opportunities Center was originally incubated by the HERE labor union. See *Immigrant Restaurant Workers Hope to Rock New York*, DOLLARS AND SENSE (Feb. 2004), www.dollarsandsense.org/archives/2004/0104labotz.html (last visited Mar. 5, 2014). The OUR Walmart is a “subsidiary” of the United Food and Commercial Workers Union. See United Food & Commercial Workers Union, LM-2 (2001), WORKFORCE FREEDOM INITIATIVE, <http://www.workforcefreedom.com/sites/default/files/UFCW%202011.pdf> (last visited Mar. 5, 2014). Retail Action Project is a campaign of the Retail, Wholesale and Department Store Union (RWDSU). See *Retail Action Project and Allied Launch Campaign to Stop Abusive Retail Scheduling Practices* (Oct. 10, 2012), <http://rwdsu.info/en/archives/10/rwdsu-retail-action-project-and-allies-launch-campaign-stop-abusive-retail-scheduling> (Last visited 3/19/14). The Service Employees International Union has provided significant funding to the worker center New York Communities for Change, which is responsible for the fast-food wage increase campaigns. See Kris Maher, *Worker Centers Offer a Backdoor Approach to Union Organizing*, WALL STREET JOURNAL (July 24, 2013), <http://online.wsj.com/article/SB10001424127887324144304578622050818960988.html> (last visited 3/19/14). See also Stefan J. Marculewicz and Jennifer Thomas, *Labor Organizations by Another Name: The Worker Center Movement and Its Evolution into Coverage under the NLRA and LMRDA*, 13 ENGAGE (Journal of the Federalist Society Practice Groups) 64 (October 2012).

¹⁰ See *Worker Center Partnerships*, AFL-CIO, <http://www.aflcio.org/About/Worker-Center-Partnerships> (last visited Mar. 5, 2014). It is doubtful that the organization has 3 million active members.



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At the same time worker centers have become an increasingly important part of the union strategy for renewal, the institutions charged with administering the nation's labor laws have started to subtly accommodate or even promote members-only representation. The principal actors include the National Labor Relations Board (NLRB, or "Board") and the United States Department of Labor (DOL). These agencies have taken positions and issued decisions that, when viewed as a whole, have advanced a members-only model of representation. For example, the NLRB has issued several decisions that empower small groups of workers and enhance their ability to influence employers. A number of key prosecutorial decisions also appear to favor members-only representation. Similarly,

the DOL has taken measures to empower worker centers by funding them with grants and according them a special role as advocates for workers.

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This shift toward a members-only model could represent the leading edge of a significant change in labor law — with far-reaching effects. Not only would a

members-only system empower and embolden groups that have not been selected by a majority of employees to speak on its behalf, but it would also enable traditional labor unions to organize and begin collecting dues from small pockets of workers recruited through worker centers.

Such a system would be fundamentally at odds with the principles of workplace democracy as we have known them for decades. It would also undermine the intent of the NLRA, which was to strike a balance between the right to freedom of association and collective bargaining, and the free flow of commerce. Unless Congress changes the law to offer an alternative structure, the agencies responsible for administering that law should stay true to that mandate.

This article will address this subject in three sections. The first will cover the legal theories behind the viability of members-only representation. The second will address how that theory is inconsistent with the basic principles of U.S. labor laws. The third will survey how organized labor, the NLRB, and the DOL have begun to effectuate the paradigm shift toward members-only representation.

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LEGAL THEORIES BEHIND MAJORITY AND MEMBERS-ONLY REPRESENTATION MODELS

The Existing Exclusive/Majority Representation Model

In order to become the representative of most private-sector employees in the United States, a labor organization must demonstrate that it enjoys the support of a majority of employees in an appropriate bargaining unit.¹¹ Support is usually established through a traditional secret ballot election, for which a union petitions upon a showing of support from at least 30% of employees in the bargaining unit.¹² The NLRB determines the size and scope of the bargaining unit and sets the election.¹³ Historically, certain parameters, based on the industry or nature of the work performed by the relevant employees, have defined what is considered an appropriate bargaining unit.¹⁴

Representation elections are decided by a majority of votes cast. If a union receives a majority, then that union becomes the employees' exclusive bargaining representative;¹⁵ if the union does not receive support from a majority, then it cannot act as the bargaining representative. In fact, it is illegal for an employer to bargain with a labor union that does not represent a majority of employees.¹⁶ Similarly, a labor union cannot select a small group of employees that may want a union and represent only that group; it must have majority support from the entire bargaining unit, or it may not represent the employees at all.¹⁷

The majority representation model was endorsed by Congress in 1935 with the passage of the NLRA. As Sen. Wagner explained in presenting the bill, "collective bargaining means majority rule."¹⁸ Indeed, during the debate of the bill, Congress explicitly rejected other forms of representation, including plurality and minority representation in favor of majority rule.¹⁹

11. *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969) (a union must demonstrate that it has majority support before it can be designated as a Section 9(a) bargaining representative); see also *Conduct Elections*, NATIONAL LABOR RELATIONS BOARD, <http://www.nlr.gov/what-we-do/conduct-elections> (last visited Mar. 5, 2014).

12. *Id.*

13. *Id.* Frequently, this is accomplished by agreement among the parties.

14. "The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof" 29 U.S.C. § 159(b).

15. *Conduct Elections*, National Labor Relations Board, <http://www.nlr.gov/what-we-do/conduct-elections> (last visited Mar. 5, 2014); *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969) (bargaining based upon majority status from authorization cards). See also *Don Mendenhall, Inc.*, 194 NLRB 1109 (1972).

16. 29 U.S.C. § 158(a)(2).

17. *Conduct Elections*, National Labor Relations Board, <http://www.nlr.gov/what-we-do/conduct-elections> (last visited Mar. 5, 2014); *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969) (bargaining based upon majority status from authorization cards). See also *Don Mendenhall, Inc.*, 194 NLRB 1109 (1972).

18. 79 CONG. REC. 7571 (1935); S. REP. NO. 573, 74th Cong., 1st Sess. 13 (1935), reprinted in 2 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 2313 (1949).

19. See *Emporium Capwell Co. v. W. Addition Cmty. Org.*, 420 U.S. 50, 62 (1975).



The majority representation phrasing of Sections 7 and 8(1) of the Wagner Act was carried over almost verbatim from the Norris-LaGuardia Act via section 7(a) of the National Industrial Recovery Act, which had a developed case law under the (old) National Labor Relations Board.²⁰ Under the Wagner Act, unions were the guarantors of “industrial democracy,” a workplace-based system of majority representation.²¹ The connections between industrial democracy and political democracy are clear in the NLRA, and they are regularly referenced by the NLRB and courts in the context of union representation and elections.²² As Sen. Wagner stated: “Democracy in industry must be based upon the same principles as democracy in government. Majority rule, with all its imperfections, is the best protection of workers’ rights, just as it is the surest guaranty of political liberty that mankind has yet discovered.”²³

Congress stressed the majority rule requirement in another way as well: it made the commitment that union representation under the law was *not* to encompass small, fractured bargaining units and *not* to be based on the extent of a union’s organizing.

The major problem connected with the majority rule is not the rule itself, but its application. The important question is to what unit the majority rule applies. Ordinarily, of course, there is no serious problem. Section 9(b) of the Wagner bill provides that the Board shall decide the unit appropriate for the purpose of collective bargaining. This, as indicated by the act, may be a craft, plant or employer unit. The necessity for the Board deciding the unit and the difficulties sometimes involved can readily be made clear where the employer runs two factories producing similar products: Shall a unit be each factory or shall they be combined into one? Where there are several crafts in the plant, shall each be separately represented? To lodge the power of determining this question with the employer would invite unlimited abuse and gerrymandering the units would defeat the aims of the statute. *If the employees themselves could make the decision without proper consideration of the elements which could constitute the appropriate units they could in any given instance defeat the practical significance of the majority rule; and, by breaking off into small groups, could make it impossible for the employer to run his plant.*²⁴

20 *Houde Engineering*, 1 NLRB 35 (1934) was consistently referred to in support of the principle of majority rule. H.R. REP No. 969, 74th Cong., 1st Sess. 18 (1935), reprinted in 2 Leg. Hist. NLRA, supra note 3, at 2928; H.R. REP No. 972, reprinted in 2 Leg. Hist. NLRA, supra note 3, at 2974; H.R. REP No. 1147, 74th Cong., 1st Sess. 20-21 (1955), reprinted in 2 Leg. Hist. NLRA, supra note 3, at 3070-71.

21 Jennifer Gordon, Transnational Labor Citizenship, 80 S. Cal. L. Rev. 503, 521 (March 2007).

22 See, e.g., *Mobil Oil Corp. v. NLRB*, 482 F.2d 842, 846, fn. 10 (7th Cir. 1973) (“[Section 7] language restrains employers from attempting by interference or coercion to impair the exercise by employees of rights which are admitted everywhere to be the basis of industrial no less than political democracy. A worker in the field of industry, like a citizen in the field of government, ought to be free to form or join organizations, to designate representatives, and to engage in concerted activities.”) citing S. Rep. No. 1184, 73rd Cong., 2d Sess. 4; see also *United Dairy Farmers Coop. Ass’n*, 242 NLRB 1026, 1040 (1979) (Pennello, M., concurring in part dissenting in part) (“Senator Wagner said that ‘democracy in industry must be based upon the same principles as democracy in government. Majority rule, with all its imperfections, is the best protection of workers’ rights, just as it is the surest guaranty of political liberty that mankind has yet discovered.’”) citing 79 Cong. Rec. 7571, reprinted in 2 Leg. Hist. NLRA, supra note 3.

23 79 Cong. Rec. 7571 (1935).

24 Hearing on S. 1958 Before the Comm. on Fin., Educ. and Labor, Indian Affairs, and Mfrs, 74th Cong. 1458 (1935) (statement of Francis I. Biddle, Chairman of the precursor to the National Labor Relations Board) (emphasis added).

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Notwithstanding this express congressional directive, the NLRB initially proceeded to rely on the extent of a labor union's organizing as a basis to determine the appropriateness of a bargaining unit,²⁵ and in 1947, the Board fully endorsed the concept.²⁶ At the time, Member James J. Reynolds Jr. wrote a passionate dissent in which he stated that "[e]ven more important, no minority group — either pro-union or anti-union — may be permitted to manipulate the boundaries of the appropriate unit for the sole purpose of constructing another wherein it comprises a majority. Obviously indulgence in such tactics — commonly referred to in political science as 'gerrymandering' — makes a mockery of the principle of majority rule."²⁷

Reacting in part to the NLRB's decisions to permit bargaining units that were based on little more than the extent of a union's support,²⁸ Congress amended the NLRA in 1947. Under the Taft-Hartley amendments, Congress expressly prohibited the Board from relying on the extent of union organizing as the controlling factor for determining the appropriateness of a bargaining unit.²⁹ For many years after passage of the Taft-Hartley amendments, the Board honored this congressional directive.³⁰

“Under the Taft-Hartley amendments, Congress expressly prohibited the Board from relying on the extent of union organizing as the controlling factor for determining the appropriateness of a bargaining unit.”

25 See *Botany Worsted Mills*, 27 NLRB 687 (1940) (approving a unit of trappers and sorters, which comprised one department in an employer's plant).

26 *Garden State Hosiery Co.*, 74 NLRB No. 52, 326 (1947).

27 *Id.* at 326.

28 There were many issues with the original law. See, e.g., S. REP #106, Supplemental Views, reprinted in 1 NLRB LEGIS. HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT OF 1947, at 295.

29 “In determining whether a unit is appropriate for the purposes specified in subsection (b) of this section the extent to which the employees have organized shall not be controlling.” 29 U.S.C. §159(c)(5). The House Report on the proposed 1947 amendments confirmed that Section 9(c)(5) was specifically targeted to eliminate the practice of the Board to use the extent of organizing as a factor to determine an appropriate unit. Further, the House Report on the proposed 1947 amendments confirmed that Section 9(c)(5) was specifically targeted to eliminate the practice of the Board to use the extent of organizing as a factor to determine an appropriate unit. Section 9[(c)(5)] strikes at a practice of the Board by which it has set up as units appropriate for bargaining whatever group or groups the petitioning union has organized at the time. Sometimes, but not always, the Board pretends to find reasons other than the extent to which the employees have organized as ground for holding such units to be appropriate (*Matter of New England Spun Silk Co.*, 11 NLRB 852 (1939); *Matter of Botany Worsted Mills*, 27 NLRB 687 [1940]). While the Board may take into consideration the extent to which employees have organized, this evidence should have little weight, and, as section 9[(c)(5)] provides, is not controlling.

1 Leg. Hist. NLRA, *supra* note 27, at 328 (H.R. Rep. No. 245, April 11, 1947) (emphasis added). Senator Taft confirmed Section 9 (c)(5) existed to prevent the same thing.

This [Section 9(c)(5)] amendment was contained in the House bill. It overrules the ‘extent of organization’ theory sometimes used by the Board in determining appropriate units. Opponents of the bill have stated that it prevents the establishment of small operational units and effectively prevents organization of public utilities insurance companies and other businesses whose operations are widespread. It is sufficient to answer to say that the Board evolved numerous tests to determine appropriate units, such as community of interest of employees involved, extent of common supervision, interchange of employees, geographical consideration, etc., any one of which may justify the finding of a small unit. *The extent-of-organization theory has been used where all valid tests fail to give the union what it desires and represents a surrender by the Board of its duty to determine appropriate units* 2 LEG. HIST. NLRA, *supra* note 3, at 1625 (Congressional Record, Senate, June 12, 1947) (emphasis added). This prohibition was also recognized by the courts. See *NLRB v. Metro. Life Ins. Co.*, 380 U.S. 438, 441 (1965) (“[I]n passing [Section 9(c)(5)] Congress intended to overrule Board decisions where the unit determined could only be supported on the basis of the extent of organization”).

30 “Although the extent of organization may be a factor evaluated, under section 9 (c)(5) it cannot be given controlling weight.” See 28 NLRB Ann. Rep. 51 (1963).



The Additional Safeguards of Sections 8(a)(2) and 8(b)(1)(A)

Congress also incorporated in the NLRA additional safeguards to preserve the principle of majority rule and industrial democracy. They included Section 8(a)(2), which applies to employers,³¹ and Section 8(b)(1)(A), which applies to unions.³²

Section 8(a)(2) prohibits employers from recognizing or bargaining with a union that lacks majority support at the time of recognition.³³ Historically, the prohibition has been so strong that even in those situations where the parties have a good-faith belief that the union had majority support, if that turned out not to be the case, the recognition and bargaining would still be considered unlawful.³⁴ As early as 1937, the courts recognized that implicit in the employer's duty to recognize the majority's representative of his or her employees as

the exclusive bargaining representative is the correlative duty to deal with no agent other than that chosen by the majority.³⁵

“Thus, if a union and an employer come to an agreement that involves a union representing a collection of employees who work for the employer, but that union does not have majority support from the employees who constitute an appropriate bargaining unit, then both the union and the employer violate the Act.”

The NLRA also prohibits unions that do not have majority support from accepting recognition from employers. Section 8(b)(1)(A) prohibits unions from interfering with employees' Section 7 rights in a fashion comparable to Section 8(a)(1) for employers.³⁶

Courts have interpreted the language of Section 8(b)(1)(A) to be the union corollary to Section 8(a)(2).³⁷ Thus, if a union and an employer come to an agreement that involves a union representing a collection of employees who work for the employer, but that union does not have majority support from the employees who constitute an appropriate bargaining unit, then both the union and the employer violate the Act.³⁸

31 29 U.S.C. § 158(a)(2).

32 29 U.S.C. § 158(b)(1)(A).

33 *Siro Security Service, Inc.*, 247 NLRB 1266, 1271–72 (1980).

34 See, *International Ladies' Garment Workers (Bernhard Altmann Texas Corp.) v. NLRB*, 366 U.S. 731, 737–39 (1961).

35 *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 44–45 (1937).

36 29 U.S.C. § 158(b)(1)(A). For expressions of intent that the two provisions establish comparable standards for employer and union conduct to those established for employer conduct by § 8(1). See, e.g., S. REP. NO. 105, 80TH CONG., 1ST SESS. 50 (1947) (the views of Senators Taft, Ball, Donnell and Jenner); 93 Cong. Rec. 4016 (statement of Senator Ball upon introducing § 8(b)(1)(A) as an amendment); *id.*, at 4432–4433 (Senator Ball's further statements during debate); *id.*, at 4025, 4436 (Senator Taft in debate); *id.*, at 4435 (remarks of Senator Smith).

37 See *Ladies Garment Workers*, 366 U.S. at 738 (employer and union violated Sec. 8(a)(2) and Sec. 8(b)(1)(A), respectively, by according and accepting recognition of the union's representative status in the absence of majority employee support).

38 *PCMC/Pacific Crane Maintenance Co.*, 2013 NLRB LEXIS 457, *32 (June 24, 2013) (employer violated Section 8(a)(2) by extending recognition to a union that did not have majority support and union violated Section 8(b)(1)(A) of the Act by accepting the unlawfully extended recognition).

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The Limitations on Recognitional Picketing to Ensure Majority Representation under Section 8(b)(7)

In addition to the restrictions in Section 8(b)(1)(A), Congress also limited how long a labor organization seeking recognition rights from an employer could harass or otherwise bring economic pressure against an employer — for example, in the form of picketing — without taking steps to demonstrate that it, *in fact*, represented a majority of the employees in an appropriate unit.³⁹ Specifically, Section 8(b)(7) of the NLRA makes it an unfair labor practice for a labor union to engage in picketing for recognition for a period of more than 30 days without filing a petition for a representation election with the NLRB.⁴⁰ Section 8(b)(7)'s prohibition includes traditional picketing conduct, where persons carrying picket signs march at entrances to a targeted employer's premises.⁴¹ However, the strength of Section 8(b)(7)'s ban on picketing can be seen by its expansive application to other activities, including posting signs and then waiting nearby to answer questions and speak to employees.⁴² The Board has long held that the prohibition on recognitional pickets can be extended to *threats* of recognitional picketing made by an organization that would not qualify as the representative of the unit employees.⁴³ Violations of 8(b)(7) are considered priority actions by the NLRB, and the Board is obligated by statute to seek an immediate injunction to stop such picketing.⁴⁴

Limits on recognitional picketing were enacted, in large part, because certain types of recognitional and organizational picketing were being used to blackmail and extort employers in cases where the picketing labor organization did not represent a majority of employees.⁴⁵ Indeed, congressional debate on Section 8(b)(7) “centered on conflict between the need to correct abuses of picketing and the resistance to curtailment of labor’s traditional weapon for self-advancement.”⁴⁶ Labor unions that did not have sufficient support to proceed with an election recognized that continuous, disruptive economic pressure could strong-arm employers into recognizing the union even though the union did not have true majority support, and Congress acted to prohibit such tactics.

Ultimately, Congress created Section 8(b)(7) to ensure that when unions lacked majority support, they could not engage in unlimited picketing and harassment of a targeted employer.⁴⁷

39 29 U.S.C. §158(b)(7).

40 Section 8(b)(7) makes it unlawful for a labor union “to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective-bargaining representative, unless such labor organization is currently certified as the representative of such employees: ... (C) where such picketing has been conducted without a petition under section 9(c) [section 159(c) of this title] being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing.” 29 U.S.C. §158(b)(7).

41 *Id.*; see also *Lumber & Sawmill Workers Local 2797*, 156 NLRB 388, 394 (1965) (“[t]he important feature of picketing appears to be the posting by a labor organization or by strikers of individuals at the approach to a place of business to accomplish a purpose which advances the cause of the union, such as keeping employees away from work or keeping customers away from business.”).

42 *Teamster Local 182 (Woodward Motors)*, 135 NLRB 851 (1962) (where workers placed signs in snowbanks and waited in nearby cars); *Furniture Workers of America*, 146 NLRB 474 (1964).

43 *Service Employees Local 73*, 224 NLRB 434 (1976).

44 29 U.S.C. §160(l).

45 *The Developing Labor Law: The Board, the Courts, and the National Labor Relations Act, 1777* (John E. Higgins, Jr., ed., 6th ed., 2012).

46 *Id.* at 1778.

47 *Id.* at 1778.



In other words, Section 8(b)(7) allows only a certain amount of picketing before it requires the union to prove, through a secret ballot election, that it represents a majority of workers.

Minority Representation Models

While the majority representation structure predominates under U.S. law, other nations have taken different approaches. For the most part, members-only systems arise in the context of European labor laws. Several examples illustrate how the European model works in practice.

Minority Unionism in France: Historically, France had five main trade unions. Each had members in all sectors of the French economy and could negotiate at a national level without showing a representative level of support in any one workplace or industry.⁴⁸ However, in 2008, a change in the law forced unions to demonstrate that they had an “appropriate” level of support at the company, industry, and national levels in order to secure representative status.⁴⁹

According to the European Trade Union Institute (ETUI), French unions must meet certain threshold levels of “representativeness” in order to maintain their negotiating rights. The ETUI explains the new law further:

For the first time, these included the requirement to have at least a set level of support from employees in workplace elections—either as indicated by the votes for the members of the works council or, in smaller companies for the employee delegates. Additionally, in companies with 10 [employees] or fewer, where these structures do not exist, workers are able to vote for the unions they favour in regional elections every four years, and there are separate elections for the small number of employees in agriculture.

The new law requires a union to win at least 10% of the votes at company level to be considered representative at company level, 8% of the votes at industry level to be considered representative at industry level and 8% of the votes at national level, to be considered representative at national level. However, the votes to be used as the basis of these calculations are the votes in the first round of the elections, when only unions can nominate candidates. Only if less than half those eligible fail to vote for the union nominated candidates is there a second round in which non-union candidates can also stand.⁵⁰

48 These five unions are: General Confederation of Labor (“Confédération Générale du Travail,” or CGT), French Democratic Confederation of Labor (“Confédération Française Démocratique du Travail,” or CFDT), French Confederation of Management-General Confederation of Executives (“Confédération Française de l’Encadrement-Confédération Générale des Cadres,” or CFE-CGC), General Confederation of Labor-Workers’ Force (“Confédération Générale du Travail-Force Ouvrière,” or FO), French Confederation of Christian Workers (“Confédération Française des Travailleurs Chrétiens,” or CFTC). Trade Unions, France, Worker-participation.eu, <http://www.worker-participation.eu/National-Industrial-Relations/Countries/France/Trade-Unions> (last visited 3/5/14).

49 *Id.*; see also Benoit Robin, New Rules for Union Representatives and Working Time, European Industrial Relations Online (Oct. 10, 2008), <http://www.eurofound.europa.eu/eiro/2008/08/articles/fr0808039i.htm> (Last visited 3/19/14).

50 Trade Unions in France, Worker-participation.eu, <http://www.worker-participation.eu/National-Industrial-Relations/Countries/France/Trade-Unions> (last visited Mar. 5, 2014); see also Benoit Robin, New Rules for Union Representatives and Working Time, European Industrial Relations Online (Oct. 10, 2008), <http://www.eurofound.europa.eu/eiro/2008/08/articles/fr0808039i.htm> (Last visited 3/19/14).

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The change solidified France's minority unionism system. In order to represent any French worker, in any industry, a union need only show it has the support of 8% of the voters.⁵¹ In fact, "[t]rade unions present in a company are normally able to set up trade union sections, irrespective of the number of union members or employees, and because of the structure of French trade unionism there will often be several trade union sections in the same company."⁵²

Minority Unionism in Germany: Another example of minority unionism is found in Germany. The German Constitution guarantees the freedom of association for both employees *and* employers, known as the "Freedom of Coalitions."⁵³ One purpose of the Freedom of Coalitions is to protect employees from discrimination or retaliation for their decision whether to join a union. Another purpose is to provide the space for employees and employers to make agreements for the benefit of both parties. In Germany, trade unions represent their members, and a collective bargaining agreement between an employer (or an employer association) and a union is applicable only to the union's members.⁵⁴ On the other hand, German law allows for works councils (which can be formed with union assistance) to represent all employees in a particular workplace.⁵⁵ Thus, Germany's collective bargaining law enshrines members-only/minority unionism while also providing for overlapping majority representation through a works council.

Minority Unionism in Sweden: Sweden offers yet another example of the European-style minority unionism model. Provisions of the 1974 Instrument of Government⁵⁶ establish the freedom of association and freedom of industrial action. The freedom of association is laid down in Chapter 2, Article 1, Paragraph 5 of the Constitution⁵⁷ and guarantees every citizen in his or her relation to public institutions the right of freedom of association — that is, the freedom to associate with others for public or private purposes.⁵⁸ Further, this article encompasses the right of employers to form and belong to employers' associations and of employees to form and belong to trade unions. Chapter 2, Article 17 of the Constitution stipulates that "[a] trade union or an employer or employers' association shall be entitled to take industrial action unless otherwise provided in an act of law or under an agreement."⁵⁹ Although

51 *Id.*; see also Trade Unions, France, Worker-participation.eu, <http://www.worker-participation.eu/National-Industrial-Relations/Countries/France/Trade-Unions> (last visited Jan. 3, 2014).

52 Workplace Representation in France, Worker-participation.eu, <http://www.worker-participation.eu/National-Industrial-Relations/Countries/France/Workplace-Representation> (last visited Mar. 5, 2014).

53 Art. 9(3) of German Basic Law ("The right to form associations to safeguard and improve working and economic conditions shall be guaranteed to every individual and to every occupation or profession. Agreements that restrict or seek to impair this right shall be null and void; measures directed to this end shall be unlawful."). See Deutscher Bundestag, Basic Law for the Federal Republic of Germany (Oct. 2010), <https://www.btg-bestellservice.de/pdf/80201000.pdf> (Last visited 3/19/14).

54 German Employment Law, Mayr Kanzlei für Arbeitsrecht in Berlin, <http://www.mayr-arbeitsrecht.de/service-kostenlos/hilfen-muster/hilfen-englisch/agg0/> (last visited Mar. 5, 2014) (discussing German employment law, including impact of the Tarifvertragsgesetz).

55 German Employment Law, Mayr Kanzlei für Arbeitsrecht in Berlin, <http://www.mayr-arbeitsrecht.de/service-kostenlos/hilfen-muster/hilfen-englisch/agg0/> (last visited Mar. 5, 2014) (discussing German employment law, including impact of the Betriebsverfassungsgesetz).

56 The Instrument of Government, ch. 2, art. 1, par. 5 (Sweden). The Swedish Constitution is available in English at the website of the Swedish Parliament. The Constitution, riksdagen.se, <http://www.riksdagen.se/en/Documents-and-laws/Laws/The-Constitution/> (last visited Mar. 5, 2014).

57 The Instrument of Government, ch. 2, art. 1, par. 5 (Sweden).

58 *Id.*

59 *Id.* at ch. 2, art. 17.



the provision stipulates that industrial actions are lawful, it is of limited significance, as the actual scope of industrial actions depends not on constitutional law but on statutory law or even rules in collective bargaining agreements.⁶⁰ Further, any employee may become a member of a trade union and may be represented by a trade union, but trade unions are allowed to represent *only* the employees who are members of their trade union. In fact, a union has no right to consult with an employer if none of its members are employed by that employer.

Recent Attempts at Members-Only Unionism in the United States

Worker Centers—Labor Organizations by Another Name

Recently, some within the world of organized labor have expressed renewed interest in establishing a members-only union model in the United States. One way organized labor has applied this model is through worker centers. While they may operate in a different manner than the traditional labor organization, worker centers still seek to represent workers with respect to their dealings with employers on certain aspects of their wages, hours, and

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terms and conditions of employment — despite the fact that these worker centers do not first demonstrate that they enjoy majority support.

Worker centers typically depict themselves as nonprofit, grassroots organizations funded by membership fees and by donations from

foundations and the public at large, sometimes including taxpayers. Notwithstanding their appearance as being “grassroots” organizations, many of these groups are or have been financed and promoted by established labor unions. Two such examples are the Organization United for Respect at Walmart (OUR Walmart), which is claimed as a “subsidiary” of the United Food and Commercial Workers Union (UFCW),⁶¹ and the Restaurant Opportunities Center (ROC), which was incubated by the UNITE-HERE labor union for years before its eventual separation.

Worker centers take a variety of forms and have varying levels of union affiliation. Occasionally, a workers’ organization recognizes that it is, in fact, a labor union and formalizes that status; one such example is when the National Taxi Workers’ Alliance, previously formed as a worker center, joined the AFL-CIO in 2011.⁶² There are also worker centers that function

60 Fahlbeck, Reinhold, Juristförlaget i Lund, LABOR AND EMPLOYMENT LAW IN SWEDEN (1997) at 27.

61 See United Food & Commercial Workers Union, LM-2 (2013), (noting “The UFCW has a subsidiary organization maintained in Washington DC named the Organization United For Respect at Walmart whose purpose as stated in the by-laws will be the betterment of the conditions of the current and former associates at Wal-Mart Stores, Inc., within the meaning of Section 501(c) (5) of the Internal Revenue Code, and to make Wal-Mart a better corporate citizen. The financial transactions are included in the 12/31/13 filing of this LM2.”).

62 Mission & History, New York Taxi Workers Alliance, <https://nytwa.org/about/mission-history/> (last visited Mar. 5, 2014).

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as union surrogates; OUR Walmart serving as the primary example. Other worker centers are hybrids of one type or another, maintaining more or less close ties to an existing union while also keeping a significant degree of independence.

An example is the Centro de Trabajadores Unidos en Lucha (CTUL), a membership organization that negotiates on behalf of workers in the janitorial sector. Although it operates independently, it has close ties to the Service Employees International Union (SEIU).⁶³

Today, many worker centers serve as agents and operatives of mainstream unions, operating outside the limitations imposed by the federal laws that govern labor organizations. Their numbers continue to grow along with their significance in the context of worker organizing.

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The Blue Eagle at Work

A major proponent of the members-only representation model in the United States is Southern Methodist University professor emeritus Charles Morris, who compiled and published a detailed theory on this subject in his 2005 book, *The Blue Eagle at Work*.⁶⁴ There, Morris promoted the position that, although the NLRA provides for exclusive representation in the event a labor organization can demonstrate it represents a majority of workers, the statute also provides for members-only representation.⁶⁵ He attributes the majority representation structure that is the norm today to “latter-day conventional wisdom [that] would have us believe that employers are only required to recognize and bargain with majority unions.”⁶⁶ Specifically, he writes:

the text [of the NLRA] positively conveys the meaning that where no exclusive representative has been designated by a majority of the employees in an appropriate unit, Sections 8(a)(1) and/or 8(a)(5) guarantee the right of nonmajority employees to engage in collective bargaining with their employer through the union of their own choosing.⁶⁷

63 Josh Eidelson, *Workers Cleaning Target Stores Threaten to Strike*, The Nation (Feb. 22, 2013), <http://www.thenation.com/blog/173051/workers-cleaning-target-stores-threaten-strike> (Last visited 3/19/14), (“CTUL and SEIU have been collaborating in recent months and hope to eventually win formal union recognition and collective bargaining for CTUL members (the workers would become members of SEIU, while remaining members of CTUL, one of the country’s hundreds of alternative labor groups).”).

64 Charles J. Morris, *The Blue Eagle at Work: Reclaiming Democratic Rights in the American Workplace* (Ithaca: ILR Press, 2005). Morris’s theories have been formally endorsed by a number of prominent labor law scholars. See Letter from Labor Law Professors Endorsing Members-Only Non-Majority Collective Bargaining Under the NLRA to the National Labor Relations Board (August 13, 2007). A copy of this letter is on file with the authors.

65 *Id.* at pp. 91–109.

66 *Id.* at p. 91.

67 *Id.* at p. 92.



Morris contends the plain language of Section 7(a) of the NLRA is all-inclusive and “makes no reference to excluding any workers covered by the Act.”⁶⁸ He goes on to argue that Section 7 makes it clear that every worker is entitled to union representation and that no distinction is made between minority and majority representation.⁶⁹ Accordingly, under Morris’s theory, the NLRA requires employers to recognize and bargain with unions that represent only their members, even if those individuals make up a minority of the workforce.⁷⁰ The labor union would then gradually increase its membership internally until it reached a majority.⁷¹ Only when the

“Accordingly, under Morris’s theory, the NLRA requires employers to recognize and bargain with unions that represent only their members, even if those individuals make up a minority of the workforce.

union’s membership exceeded the 50% threshold could it claim exclusive representation rights.⁷² Morris’s theory describes members-only unions as a “stepping-stone” approach to unionization.⁷³

Morris also describes a process for obtaining legal acceptance of the members-only union model.

Among the various methods he describes,⁷⁴ two are particularly relevant. One is for the NLRB to implement the model through administrative rulemaking;⁷⁵ the other is to do so through NLRB case law and the prosecutorial discretion of its General Counsel.⁷⁶ With respect to the latter, Morris acknowledged that “obtaining an NLRB decision on the central question will be difficult—or at least delayed—if the General Counsel is not supportive of the legal objective.”⁷⁷

Organized Labor’s Earlier Efforts to Promote Members-Only Unions

Unfair Labor Practices: *Dick’s Sporting Goods*

Professor Morris’s theory was put into practice in 2005, when a group of employees supported by the United Steelworkers, calling themselves the Dick’s Employee Council (“Council”) sought to bargain with their employer, Dick’s Sporting Goods. They sought to bargain over the termination of one of their members and certain other terms and conditions of employment.⁷⁸ Dick’s refused,⁷⁹ and the Council filed an unfair labor practice charge alleging a violation of Sections 8(a)(1) and (5) of the NLRA.⁸⁰

68 *Id.* at p. 98.

69 *Id.* at p. 99.

70 *Id.* at pp. 99–100.

71 *Id.* at p. 186.

72 *Id.* at p. 186.

73 *Id.* at p. 186.

74 In addition to the two listed in the main text, Morris also suggests the theory could be implemented through direct judicial intervention and through a piggyback motion to amend a Section 8(a)(3) Complaint. *Id.* at pp. 176, 181–182.

75 *Id.* at p. 182.

76 *Id.* at p. 175.

77 *Id.* at p. 175.

78 NLRB Advice Memorandum, 6-CA-034821, p. 2 (June 22, 2006).

79 *Id.* at p. 2.

80 *Id.* at p. 1.

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The Council presented “two interrelated” theories in support of its argument that minority unions were permitted and authorized under the NLRA by addressing both the plain language and the legislative history of the Act.⁸¹

With respect to the theory that the plain language of the NLRA called for minority or members-only recognition, the Council argued that Section 7 of the Act broadly protects the rights of all employees, organized and unorganized, to engage in collective bargaining, “as evidenced by the words ‘shall’ and ‘right’ contained in that provision.”⁸² As such, an employer’s refusal to

recognize and bargain with a minority union on a members-only basis would amount to unlawful interference and violate Section 8(a)(1) of the NLRA.⁸³ While Section 9(a) contains limitations of bargaining rights otherwise guaranteed by Section 7, the Council claimed the limitations applied only after a union attained exclusive majority status.⁸⁴ Thus, according to their argument, Section 7 rights apply to all employees—individually, in small, members-only unions, and in majority representative unions.

“Professor Morris’s theory was put into practice in 2005, when a group of employees supported by the United Steelworkers, calling themselves the Dick’s Employee Council (“Council”) sought to bargain with their employer, Dick’s Sporting Goods.

The Council also presented the theory that Section 8(a)(5) of the Act cannot be interpreted to require that employers bargain only with majority unions. Section 8(a)(5) provides that it shall be an unfair labor practice for an employer “to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).”⁸⁵ Congress’s placement of the comma between the phrases “representatives of his employees” and “subject to the provisions of section 9(a)” was allegedly “evidence that the drafters of the Act intended that Section 9(a) restrict only the process of bargaining, not the bargaining representatives.”⁸⁶

The Council also presented Morris’s theory — that the NLRA’s legislative history offered support for members-only union recognition and bargaining.⁸⁷ First, it posited that members-only bargaining was common and even mandated under the National Industrial Recovery Act (NIRA), the precursor to the National Labor Relations Act.⁸⁸ Likewise, the Council claimed various versions of Section 8(a)(5), including those rejected by Congress, supported its position.⁸⁹

81 *Id.* at p. 3, citing Morris, *supra* note 64.

82 Advice Memorandum, *supra* note 78, at p. 3, quoting 29 U.S.C. §157.

83 Advice Memorandum, *supra* note 78, at pp. 3–4.

84 *Id.* at p. 4, citing Morris, *supra* note 64, at p. 104.

85 29 U.S.C. §158(a)(5) (emphasis added).

86 Advice Memorandum, *supra* note 78, at p. 4.

87 *Id.* at p. 5.

88 *Id.* at p. 5, citing Morris, *supra* note 64, at pp. 26–31, 38.

89 Advice Memorandum, *supra* note 78, at p. 5, citing Morris, *supra* note 64, at pp. 62–63, 105–106.



As Morris predicted, then NLRB General Counsel Ron Meisberg⁹⁰ rejected the *Blue Eagle* theory and refused to prosecute the claims as an unfair labor practice.⁹¹ In reaching his

“... then NLRB General Counsel Ron Meisberg rejected the *Blue Eagle* theory and refused to prosecute the claims as an unfair labor practice. In reaching his decision, the General Counsel concluded that the statutory language, legislative history of the Act, and well-established Board and Supreme Court doctrine warranted rejection of the Council’s theory.

decision, the General Counsel concluded that the statutory language, legislative history of the Act, and well-established Board and Supreme Court doctrine warranted rejection of the Council’s theory.⁹²

More specifically, citing the legislation’s history, the General Counsel noted that “by enacting Section 9(a) of the

Act, which sets forth the majority rule, Congress *explicitly rejected* other forms of representation, including plural and proportional representation, which were permitted under Section 7(a) of the NIRA.”⁹³ He also cited a proviso to Section 9(a) that Congress had considered and *rejected* that would have very explicitly protected the status of members-only unions, and he concluded that Congress’s rejection of the proviso was direct evidence that Congress had rejected the principle of minority representation under the NLRA.⁹⁴

The General Counsel also cited commentary by scholars and contemporaneous labor officials on the NLRA’s elimination of members-only unions, as well as statements by the NLRA’s sponsors, who, according to commentators, “took the view that as a practical matter there could be no bargaining unless all of the employees within any appropriate unit bargained as one.”⁹⁵ Included among these comments is one from Sen. Wagner, after whom the law was named, explaining that collective bargaining could not work if the system included a number of members-only unions:

The reasons for majority rule are very simple. Obviously, an employer has to deal with his workers either as individuals, or as a variety of minority groups, or as a consolidated unit . . . The second alternative, which consists in dealing with various minority groups, gives the unscrupulous employer the opportunity to play one group against another constantly. It foments in the ranks of the workers discord, suspicion and rivalry at all times. In addition, since it is virtually impossible to make more than one agreement covering one set of workers in a single plant, the pretense of

90 Ron Meisberg (R) served as General Counsel of the NLRB from January 4, 2006 until June 18, 2010. He served a recess appointment by President George W. Bush until confirmed by the Senate on Aug. 3, 2006, for a 4 year term that began on Aug. 14, 2006, when President Bush signed his commission. See NLRB, *General Counsels since 1935*, <http://www.nlrb.gov/who-we-are/general-counsel/general-counsels-1935> (last visited Mar. 5, 2013).

91 Advice Memorandum, *supra* note 78, at p. 1.

92 *Id.* at p. 18.

93 *Id.* at pp. 6–7 (emphasis added), citing Ruth Weyand, *Majority Rule in Collective Bargaining*, 45 COLUM. L. REV. 556, 565 & n.35 (1945); James A. Gross, *The Making of the National Labor Relations Act*, p. 101 (1974).

94 Advice Memorandum, *supra* note 78, at p. 7. This proviso stated: “[T]hat any minority group of employees in an appropriate unit shall have the right to bargain collectively through representatives of their own choosing when no representatives have been designated or selected by a majority in such unit . . . (citing Kenneth Casebeer, *Drafting Wagner’s Act: Leon Keyserling and the Precommittee Drafts of the Labor Disputes Act and the National Labor Relations Act*, 11 INDUS. REL. L.J. 73, 124 (1989)).

95 Advice Memorandum, *supra* note 78, at pp. 8–9, citing Ruth Weyand, *Majority Rule in Collective Bargaining*, 45 COLUM. L. REV. 556-567.

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negotiating with minorities means that there is to be no real collective bargaining at all. ***Majority rule is thus the only rule that makes collective bargaining a reality.***⁹⁶

Beyond this, the Senate and House reports issued during the NLRA's drafting highlighted the same concerns about members-only unions.⁹⁷ In the Senate, the report stated:

Since it is [almost] universally recognized that it is practically impossible to apply two or more sets of agreements to one unit of workers at the same time, or to apply the terms of one agreement to only a portion of the workers in a single unit, the making of agreements is impracticable in the absence of the majority rule. And by long experience, majority has been discovered best for employers as well as employees. Workers have found it impossible to approach their employers in a friendly spirit if they remain divided among themselves. Employers likewise, where majority rule has been given a trial of reasonable duration, have found it more conducive to harmonious labor relations to negotiate with representatives chosen by the majority than with numerous warring factions.⁹⁸

In the House, the report said much the same:

There cannot be two or more basic agreements applicable to workers in a given unit; this is virtually conceded on all sides. If the employer should fail to give equally advantageous terms to nonmembers of the labor organization negotiating the agreement, there would immediately result a marked increase in the membership of that labor organization. On the other hand, if better terms were given to nonmembers, this would give rise to bitterness and strife, and a wholly unworkable arrangement whereby men performing comparable duties were paid according to different scales of wages and hours. Clearly then, there must be one basic scale, and it must apply to all.⁹⁹

Even beyond the plain language and historical support for majority rule there were core impracticalities of a workforce operating with a collection of members-only unions, or even just one such union. A critical factor is that it would create internal tension among the various unions and other employees. This discord would ultimately undermine a principle and chief goal of the NLRA, which was to achieve a balance of the rights of self-organization with industrial peace and stability.¹⁰⁰

96 Advice Memorandum, *supra* note 78, at pp. 8–9 (emphasis added) (citations omitted).

97 *Id.* at pp. 8–9, citing S. REP. NO. 74-573, at 13, reprinted in 2 LEG. HIST. NLRA, *supra* note 3, at 2300, 2313; H.R. REP. NO. 74-972, at 18, reprinted in 2 LEG. HIST. NLRA, *supra* note 3, at 2956, 2974.

98 Advice Memorandum, *supra* note 78, at p. 9, citing S. REP. NO. 74-573, at 13 (1935), reprinted in, 2 LEG. HIST. NLRA, *supra* note 3, at 2300, 2313.

99 Advice Memorandum, *supra* note 78, at p. 9, citing H.R. REP. NO. 74-972 at 18 (1935), reprinted in, 2 LEG. HIST. NLRA, *supra* note 3, at 2956, 2974.

100 29 U.S.C. §151. *Auciello Iron Works v. NLRB*, 517 U.S. 781, 785 (1996) (“The object of the National Labor Relations Act is industrial peace and stability, fostered by collective-bargaining agreements providing for the orderly resolution of labor disputes”); *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 38 (1987) (“The overriding policy of the NLRA is ‘industrial peace.’ The presumptions of majority support further this policy by ‘promot[ing] stability in collective-bargaining relationships, without impairing the free choice of employees.’”) (citing *Brooks v. NLRB*, 348 U.S. 96, 103 (1954); *Terrell Machine Co.*, 173 NLRB 1480 (1969)). The General Counsel specifically wrote that “it is firmly established under Board and Supreme Court cases that the duty to bargain under the Act is based on the principle of majority representation, to the exclusion of compulsory minority union representation.” Advice Memorandum, *supra* note 78, at p. 11.



Apart from the basic reasons for rejecting Morris’s theory, the General Counsel also disputed the contention that Section 8(a)(5) was not limited by Section 9(a). He wrote that “the Board has never construed Section 8(a)(5) as operating independently from Section 9(a). The Board will therefore not find a Section 8(a)(5) violation for refusing to bargain, and will not issue a bargaining order, where a members-only union is not the majority representative.”¹⁰¹ In those cases where there is no evidence of majority representation, the Board has consistently held that an employer has not violated Section 8(a)(5) of the Act.¹⁰² To be sure, “the Board has steadfastly held that the language of Section 8(a)(5), ‘by reference to Section 9(a), requires as a predicate for any finding of a violation that the employee representative has been designated or selected as the exclusive representative of the employees.’”¹⁰³

Similarly, General Counsel Meisberg rejected the separate argument proffered by the Council, that Section 8(a)(1) of the Act provided an independent basis to permit members-only unions. He explained that the Board had repeatedly held a union’s majority status was a prerequisite to issuance of a Section 8(a)(1) bargaining order.¹⁰⁴ He went on to write that “the Board has consistently declined to find Section 8(a)(1) violations when employers refuse to recognize and bargain with unrepresented employees over grievances.”¹⁰⁵

The General Counsel also referenced the U.S. Supreme Court’s affirmation of majority rule under U.S. law when the Court stated that “national labor policy has been built on the premise that by pooling their economic strength and acting through a labor organization freely *chosen by the majority*, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions.”¹⁰⁶ According to General Counsel Meisberg, “these statements by the Supreme Court recognize a congressional determination that majority rule was the only means by which to redress inequality of bargaining power between management and labor and foster an effective collective bargaining system for the peaceful and fruitful resolution of labor disputes.”¹⁰⁷ Thus, it “is firmly established under Board and Supreme Court cases that the duty to

101 *Id.* at pp. 11–12; see also, *Don Mendenhall, Inc.*, 194 NLRB 1109, 1110 (1972).

102 Advice Memorandum, *supra* note 78, at p. 13; see also, *Goski Trucking Corporation*, 325 NLRB 1032 (1998).

103 Advice Memorandum, *supra* note 78, at p. 13, citing *Don Mendenhall, Inc.*, 194 NLRB at 1110.

104 Advice Memorandum, *supra* note 78, at pp. 13–14.

105 *Id.* at p. 15, citing *Charleston Nursing Center*, 257 NLRB 554, 555 (1981) (employer did not violate Section 8(a)(1) by refusing to meet with unrepresented group of employees about pay raise); *Pennypower Shopping News*, 244 NLRB 536, 537 n.4, 538 (1979); *Swearingen Aviation Corp.*, 227 NLRB 228, 236 (1976). The General Counsel cites a long list of supporting cases, including: *Makin Hats*, 332 NLRB 19, 20 (2000) (Board refused to find Section 8(a)(5) violation for employer’s withdrawal of recognition from union because employer had at all times applied contract on a members-only basis); *Arthur Sarnow Cando Co.*, 306 NLRB 213, 217 (1992) (Board adopted ALJ’s conclusion that bargaining order and bargaining relationship not enforceable under Section 8(a)(5) because members-only group was not appropriate bargaining unit within the meaning of Section 9(a)).

106 Advice Memorandum, *supra* note 78, at p. 10, citing *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967) (emphasis added).

107 Advice Memorandum, *supra* note 78, at p. 10, citing *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967); *Emporium Capwell Co. v. Western Addition Cmty. Org.*, 420 U.S. 50, 62 (1975) (“Central to the policy of fostering collective bargaining, where the employees elect that course, is the principle of majority rule.”); *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967) (“The majority-rule concept is today unquestionably at the center of our federal labor policy.”).

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bargain under the Act is based on the principle of majority representation, to the exclusion of minority union recognition.”¹⁰⁸

Having concluded that his position on majority representation was grounded in well-established law and legislative history, the General Counsel dismissed the charge.

NLRB Rulemaking Request

Having failed to convince the then-NLRB General Counsel of the *Blue Eagle* theory in *Dick’s Sporting Goods*, organized labor attempted another path suggested by Morris: NLRB rulemaking.¹⁰⁹ Section 6 of the NLRA provides the NLRB with authority to implement rules and regulations.¹¹⁰ The substantive rules, once properly implemented by the agency, are enforceable.¹¹¹ Under the Board’s Rules and Regulations, “[a]ny interested person may petition the Board, in writing, for the issuance, amendment, or repeal of a rule or regulation.”¹¹²

“Having failed to convince the then NLRB General Counsel of the *Blue Eagle* theory in *Dick’s Sporting Goods*, organized labor attempted another path suggested by Morris: NLRB Rulemaking.

Despite this authority, the NLRB has engaged in limited rulemaking. Most recently, the NLRB proposed two rules; one would have required employers to post a notice informing employees of their rights under the NLRA,¹¹³ and the second would have shortened the schedule of representation elections.¹¹⁴ Both proposed rules were blocked by federal courts, although a proposed rule on expedited elections has been reissued.¹¹⁵ Prior to 2011, the NLRB had utilized rulemaking to promulgate rules that addressed its jurisdiction over symphony orchestras,¹¹⁶ private colleges and universities,¹¹⁷ and the horse racing industry,¹¹⁸ and with respect to bargaining units in the healthcare industry.¹¹⁹

¹⁰⁸ Advice Memorandum, *supra* note 78, at p. 11.

¹⁰⁹ Petition of the United Steelworkers, In the Matter of Rulemaking Regarding Members-Only Minority-Union Collective Bargaining, August 14, 2007. In addition to the Steelworkers, the AFL-CIO, United Autoworkers (UAW), Communication Workers of America, International Association of Machinists and Aerospace Workers, California Nurses Association, and United Electrical, Radio and Machine Workers of America joined in on this effort. On Jan. 4, 2008, the Change to Win union federation filed its own petition in favor of the rulemaking effort. See Petition of Change to Win, National Labor Relations Board, In the Matter of Rulemaking Regarding Members-Only Minority-Union Collective Bargaining, Jan. 4, 2008.

¹¹⁰ 29 USC §156; see also, 29 C.F.R. §102.123, *et seq.*

¹¹¹ 5 U.S.C. §500, *et seq.*

¹¹² 29 C.F.R. §102.124.

¹¹³ Notification of Employee Rights Under the National Labor Relations Act, 76 F.R. 54006 (Aug. 30, 2011); see also, 76 F.R. 63188 (October 12, 2011) (delaying implementation of posting rule until Jan. 31, 2012); 76 F.R. 82133 (further delaying implementation of posting rule until April 30, 2012); *National Association of Manufacturers v. NLRB*, Case #12-5068 (D.C. Cir. April 17, 2012) citing *Chamber of Commerce v. NLRB*, Case No. 11-02516 (D.S.C. April 13, 2012) (finding Board lacked authority to issue rule). The Board indefinitely delayed the implementation of this Rule on May 2, 2012. 77 F.R. 25868 (May 2, 2012).

¹¹⁴ 76 F.R. 36812 (June 22, 2011). The rule on this topic was proposed again on 79 F.R. 7318 (Feb. 6, 2014).

¹¹⁵ *National Association of Manufacturers v. NLRB*, 2012 U.S. App. LEXIS 10768 (D.C. Cir. April 17, 2012) (finding Board lacked authority to issue rule relating to posting of employee rights); *Chamber of Commerce of the United States v. NLRB*, 879 F. Supp. 2d 18 (D.D.C. 2012) (striking down Board’s “quickie election” rule).

¹¹⁶ 38 F.R. 7289 (March 19, 1973).

¹¹⁷ 35 F.R. 11270 (July 14, 1970).

¹¹⁸ 38 F.R. 9537 (July 18, 1972).

¹¹⁹ 29 C.F.R. § 103.30, 54 F.R. 16336 (1989).



In their request, the United Steelworkers petitioned “the Board to exercise its substantive rulemaking function” and proposed the following rule regarding a specific interpretation of the Act and its requirements:

Pursuant to Sections 7, 8(a)(1), and 8(a)(5) of the Act, in workplaces where employees are not currently represented by a certified or recognized Section 9(a) majority/exclusive collective-bargaining representative in an appropriate bargaining unit, the employer, *upon request*, has a duty to bargain collectively with a labor organization that represents less than an employee-majority with regard to the employees who are its members, but not for any other employees.¹²⁰

Of particular interest in this language was the reference to “upon request.” In other words, no election would be needed to establish an employer’s obligation to bargain with a members-only union.

In the “Statement of Grounds for This Petition,” the unions noted that rulemaking was not their “original chosen course of action,” but the General Counsel’s dismissal of the charge filed in *Dick’s Sporting Goods* had necessitated it.¹²¹ Citing the alleged “chilling effect” of the *Dick’s Sporting Goods* Advice Memorandum, the petitioning unions asked to have the opinion “countered with a correct statement of the law.”¹²²

“In the “Statement of Grounds for This Petition,” the unions noted that rulemaking was not their “original chosen course of action,” but the General Counsel’s dismissal of the charge filed in *Dick’s Sporting Goods* had necessitated it. Citing the alleged “chilling effect” of the *Dick’s Sporting Goods* Advice Memorandum, the petitioning unions asked to have the opinion “countered with a correct statement of the law.”

In the substance of their request, the petitioning unions reiterated the same arguments presented in the *Dick’s Sporting Goods* case, with some additional points. For example, the petitioning unions argued that during the early years of the NLRA, unions “discovered

that NLRB representation procedures usually provided an easier, faster, and less expensive means to achieve representation and exclusivity collective bargaining.”¹²³ Thus, as time passed, “institutional memory faded and the slower members-only route to bargaining was effectively forgotten.”¹²⁴ What had been a commonplace means of organizing in the 1940s simply disappeared from public consciousness until Morris published *The Blue Eagle at Work* in 2005.¹²⁵ At least, this was how the petitioners presented their case.

¹²⁰ USW Members-Only Minority-Union Rulemaking Petition, *supra* note 109, p. 5 (emphasis added).

¹²¹ *Id.* at p. 6.

¹²² *Id.* at p. 8.

¹²³ *Id.* at pp. 12–13.

¹²⁴ *Id.* at p. 13.

¹²⁵ *Id.* at p. 13 (“[I]t was not until publication of Professor Charles Morris’ *The Blue Eagle at Work* that a number of unions, including the Petitioners herein, became aware of the concept.”).

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The Request for Rulemaking sharply criticized the *Dick's Sporting Goods* Advice Memorandum.¹²⁶ The criticism challenged the General Counsel's reading and analysis of applicable statutory language and legislative history.¹²⁷ The unions argued that the General Counsel failed to identify any provision of the NLRA that mandated that only majority unions have the right to collective bargaining; did not properly read or analyze the plain language of Section 7 of the Act; did not dispute that Section 9(a) was conditional; and "provided no textual or history support for" his assertion that Section 8(a)(5) is premised on Section 9(a).¹²⁸

By Order dated August 26, 2011, the NLRB¹²⁹ denied the petitions.¹³⁰ However, the Board did so "without passing on the merits of the arguments set out therein," and instead stated that acting on the petition would not have been "the most effective allocation of the Board's limited resources."¹³¹ The Board recognized that the petitions called for a "significant reinterpretation of the National Labor Relations Act," but did not reject the legal arguments outright.¹³² Instead, it indicated that the matter would require substantial resources in order to study the issues raised.¹³³ Only Member Hayes, the lone Republican on the panel, took a position on the substance of the issue when he questioned the Board's authority to promulgate the proposed rule.¹³⁴

MOVEMENT TOWARD A MEMBERS-ONLY MODEL

Although the NLRB declined to issue a rule on the subject, in the past few years, U.S. labor policy seems to have shifted subtly toward members-only representation. Not only have there been a number of significant decisions issued by the NLRB that serve to empower groups that have never been selected by a majority of the workforce, but actions of the General Counsel's office, with respect to its prosecutorial decisions, also reflect this objective. In addition to the NLRB's seeming shift toward members-only unions, the DOL has promoted and funded worker centers as well as granted them new rights.

In the following sections we will explore the actions of these agencies.¹³⁵ When viewed as a whole, it becomes clear that — notwithstanding the unambiguous intent of Congress — implementation of Morris's members-only union model appears to be gaining ground.

¹²⁶ *Id.* at p. 38.

¹²⁷ *Id.* at pp. 38–67.

¹²⁸ *Id.* at p. 40.

¹²⁹ The NLRB panel that ruled on the Petition consisted of then Chairman Wilma Liebman (D), and Members Craig Becker (D), Mark Gaston Pierce (D), and Brian Hayes (R).

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ We recognize that, depending on the outcome of the *Noel Canning* decision, a number of the NLRB decisions referenced in this article may no longer be of force and effect.



The NLRB's Promotion of Members-Only Unionism

As Morris predicted in *Blue Eagle*, the NLRB is where the bulk of the work has been done in terms of advancing the members-only representation model. While the NLRB has not expressly permitted members-only representation, it has favored worker centers and other organizations that act as employee representatives even when these entities lack majority support. At the same time, the agency has been reluctant to classify worker centers as labor organizations under the NLRA, thereby permitting them to operate beyond the constraints of the law.

The NLRB's *Specialty Healthcare* Decision

Perhaps the single most significant decision by the NLRB in the area of promoting members-only unions is a case called *Specialty Healthcare*.¹³⁶ In it, the Board overruled a 20-year old precedent¹³⁷ and determined that a unit of certified nursing assistants (CNAs) comprised a

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stand-alone bargaining unit.¹³⁸ In so doing, the NLRB — by giving unions the ability to gerrymander a voting unit to fit the extent of their support — changed the standard for determining what constitutes an appropriate bargaining unit.

In *Specialty Healthcare*, the Board created a presumption that a petitioned-for bargaining unit is appropriate if it consists of a “clearly identifiable group” of employees — a somewhat elastic concept that can include very small and fractured groups of workers.¹³⁹ In order for an employer to seek a larger bargaining unit, it must demonstrate that employees in a larger unit share an “overwhelming” community of interest with those in the petitioned-for unit.¹⁴⁰ This heightened burden makes it “virtually impossible” to include additional employees in a unit if the petitioner does not want them.¹⁴¹

The Board’s decision in *Specialty Healthcare* has been controversial. Dissenting member Hayes noted that the new test encourages unions to organize the smallest units possible, resulting in a fragmentation of the workforce.¹⁴² He also noted that the case was “perhaps the most glaring example in cases decided recently by [his] colleagues . . . for the purely ideological purpose of reversing the decades-old decline in union density in the private American workforce.”¹⁴³

Member Hayes’s dissent appears to have rung true. Following *Specialty Healthcare*, the Board has allowed unions to seek representation in a variety of oddly configured bargaining

¹³⁶ 357 NLRB No. 83 (2011).

¹³⁷ See *Park Manor Care Center*, 305 NLRB 872 (1991).

¹³⁸ See *Specialty Healthcare*, 357 NLRB No. 83 (2011).

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 2.

¹⁴¹ *Id.* at 87 (Member Hayes’ Dissent).

¹⁴² *Id.* at 70–87.

¹⁴³ *Id.* at 70.

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units. They include employees in shoe departments on different floors of a multi-floor department store;¹⁴⁴ a unit of 18 bakers working at 6 restaurants, where the employer in fact employed 45 bakers at 17 restaurants in the area;¹⁴⁵ a unit of 31 of the 78 hourly employees in random job classifications at 2 rental car agencies at Denver International Airport;¹⁴⁶ employees in a cosmetics department in a retail store;¹⁴⁷ and a unit of canine welfare technicians and instructors that excluded all other dog-handling classifications.¹⁴⁸

Based on the few post-*Specialty Healthcare* decisions issued thus far, it appears that the Board is willing to approve bargaining units built around the petitioner's wishes. These smaller units are a clear shift away from the NLRB's majority representation model and toward one focused on members-only representation.

NLRB Limitations on Arbitration Agreements: The *D.R. Horton* Decision

In addition to altering the legal standard for bargaining unit determinations, the Board has taken measures to eliminate mandatory pre-employment arbitration agreements that are designed to limit class or collective actions against employers. In recent years, and in the face of an unprecedented number of class and collective actions, many employers have turned to private arbitration agreements as a means to resolve employment disputes. The case at the center of this issue is *D.R. Horton*,¹⁴⁹ wherein the Board held that an employee's right to pursue a class or collective action in the court amounted to concerted activity protected under Section 8(a)(1) of the NLRA.¹⁵⁰ The Board reasoned that any limitation on that "right" amounted to an actionable unfair labor practice.¹⁵¹

“Through its position on *D.R. Horton*, the NLRB has attempted to solidify the ability of groups such as worker centers to exercise influence and bargaining rights with employers on behalf of workers who have not chosen them. The class and collective action lawsuit has proved a popular tool among worker centers to obtain changes, with respect to terms and conditions of employment, in a workplace.”

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144 Decision and Direction of Election, *The Niemen Marcus Group, Inc., d/b/a Bergdorf Goodman*, Case No. 02-RC-076954 (filed May 4, 2012).

145 Ursula Zerilli, *One Year Later, Panera Bread Union Continues to Fight to Reach Bargaining Table*, MLive.com (March 23, 2013), http://www.mlive.com/business/west-michigan/index.ssf/2013/03/panera_bread_union_continues_f.html; see also, NLRB's *Specialty Healthcare Decision Expands Non-Majority Unions*, WORKFORCE FREEDOM INITIATIVE, <http://www.workforcefreedom.com/issues/nlrbs-specialty-healthcare-decision-expands-non-majority-unions> (last visited Nov. 25, 2013).

146 Decision and Direction of Election, *DTG Operations, Inc.*, Case No. 27-RC-8629 (filed Jan. 18, 2012).

147 Decision and Direction of Election, *First Aviation Serv's*, Case No. 22-RC-061300 (filed Sep. 13, 2011); see also, Sean P. Redmond, "Micro" Unions Proliferating? The First Fallout from "Specialty Healthcare" WORKFORCE FREEDOM INITIATIVE, (Nov. 14, 2011), <http://www.workforcefreedom.com/blog/micro-unions-proliferating-first-fallout-specialty-healthcare>. (Last visited 3/19/14).

148 *Guide Dogs for the Blind, Inc.* 2013 NLRB Lexis 490 (2013).

149 357 NLRB No. 184 (2012). Numerous other Board cases have followed suit in deeming such agreements unlawful. See, e.g., *American Express, Ralphs Grocery Co.*, Case No. 21-CA-073942 (July 31, 2013); Decision, *Leslie's Poolmart, Inc.*, Case No. 21-CA-102332 (Jan. 17, 2014).

150 *D.R. Horton*, 357 NLRB No. 184 (2012).

151 *Id.*



them. The class and collective action lawsuit has proved a popular tool among worker centers to obtain changes, with respect to terms and conditions of employment, in a workplace.¹⁵²

One relevant example occurred in a case pursued by the worker center ROC of New York on behalf of a number of restaurant employees.¹⁵³ Not only did the case settle for a substantial sum, but the settlement agreement also contained terms that appear strikingly similar to those found in a typical collective bargaining agreement.¹⁵⁴ For example, the settlement included provisions covering “paid vacations, promotion, the firing of an abusive waiter, and a posting in the restaurant guaranteeing workers the right to organize and the involvement of ROC-NY in the case of any future discrimination.”¹⁵⁵ Accounts of another such “settlement” secured by ROC-NY reveal that the agreement included a promotion policy, wage increases, and a requirement that “the restaurant give ROC-NY’s lawyers three days’ notice when it wishes to fire an employee so that ROC-NY can assess whether the motive is prohibited retaliation.”¹⁵⁶

Numerous federal courts have rejected the Board’s position on arbitration agreements,¹⁵⁷

- 152 On a YouTube video featuring Restaurant Opportunities Center director Saru Jaramayan, she describes litigation in the following manner: “[W]e don’t just ask for resolution of litigation, we actually ask for everything you might ask for in an ideal workplace.” See *Saru Jaramayan of ROC United Explains Their Workers’ Rights Strategies*, YOUTUBE, <http://www.youtube.com/watch?v=hUWM5LS7Sgk> (last visited March 5, 2014). See also, Marculewicz and Thomas, *supra* note 9 (discussing efforts by worker centers, such as Restaurant Opportunities Center and the Retail Action Project, in representing workers in class or collective action lawsuits).
- 153 Robert J. Grossman, *Leading from Behind*, HR MAGAZINE (Dec. 2013), at p. 40; see also, Steven Greenhouse, *Judge Approves Deal to Settle Suit Over Wage Violations*, NEW YORK TIMES (July 19, 2008), http://www.nytimes.com/2008/06/19/nyregion/19wage.html?_r=0. (Last visited 3/19/14).
- 154 *Cleared plate: Dispute between Andiamo Dearborn and Employees Finds Resolution*, METRO TIMES (March 9, 2011), <http://metrotimes.com/news/cleared-plate-1.1116126> (last visited Feb. 27, 2014) (noting that “In reaching this agreement, ROC-MI and Andiamo of Dearborn were able to embrace a resolution that continues and strengthens the restaurant’s long-standing and demonstrated commitment to protecting its employees’ rights. ROC-MI applauds Andiamo of Dearborn for putting aside good-faith differences to reach a resolution that will include innovative anti-discrimination measures, complaint-resolution procedures, training, hiring, break, uniform and equipment policies, along with translation of employee materials for non-English speakers.”).
- 155 *Id.*; see also, Michael C. Duff, *Days Without Immigrants: Analysis and Implications of the Treatment of Immigration Rallies Under the National Labor Relations Act*, 85 DENV. U. L. REV. 93, 135 (2007).
- 156 The settlement agreements are not public documents, and therefore we are forced to rely upon third-party accounts of their contents. To that end, Eli Naduris-Weissman described the settlement agreement between ROC-NY and one restaurant as containing such terms. Eli Naduris-Weissman, *The Worker Center Movement and Traditional Labor Law*, 30 BERKELEY J. EMP & LAB. L. 232, 238 (2009).
- 157 *Sutherland v. Ernst & Young, LLP*, No. 12-304-cv (2d Cir. March 20, 2013); *Richards v. Ernst & Young, LLP*, No. 11-17530, fn. 3 (9th Cir. Aug. 21, 2013) (citing *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1055 (8th Cir. 2013) (“[G]iven the absence of any ‘contrary congressional command’ from the FLSA that a right to engage in class actions overrides the mandate of the FAA in favor of arbitration, we reject Owen’s invitation to follow the NLRB’s rationale in *D.R. Horton* . . .” (quoting *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012)); *Delock v. Securitas Sec. Servs. USA, Inc.*, 883 F. Supp. 2d 784, 789 (E.D. Ark. 2012) (“The Court declines to endorse, however, the Board’s application of the Federal Arbitration Act or its reading of the precedent applying that Act. The NLRA, as interpreted in *Horton*, conflicts with the FAA, as interpreted by the Supreme Court.”); *Morvant v. P.F. Chang’s China Bistro, Inc.*, 870 F. Supp. 2d 831, 845 (N.D. Cal. 2012) (noting that the Supreme Court had “held that courts are required to enforce agreements to arbitrate according to their terms, unless the FAA’s mandate has been overridden by a contrary congressional command,” but concluding that “Congress did not expressly provide that it was overriding any provision in the FAA when it enacted the NLRA or the Norris-LaGuardia Act” (internal quotation marks omitted)); *Jasso v. Money Mart Express, Inc.*, 879 F. Supp. 2d 1038, 1049 (N.D. Cal. 2012) (“Because Congress did not expressly provide that it was overriding any provision in the FAA, the Court cannot read such a provision into the NLRA and is constrained by [*AT&T Mobility LLC v. Concepcion*], 131 S. Ct. 1740 (2011), to enforce the instant agreement according to its terms.”); *LaVoice v. UBS Fin. Servs., Inc.*, 2012 WL 124590, at *6 (S.D.N.Y. Jan. 13, 2012) (holding that “this Court must read *AT & T Mobility* as standing against any argument that an absolute right to collective action is consistent with the FAA’s ‘overarching purpose’ of ‘ensur[ing] the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings’” and that, “[t]o the extent that *LaVoice* relies on . . . the recent decision of the [NLRB] in *D.R. Horton, Inc.* . . . as authority to support a conflicting reading of *AT&T Mobility*, this Court declines to follow th[at] decision[]” (quoting *AT&T Mobility*, 131 S. Ct. at 1748)). But see *Brown v. Citicorp Credit Servs.*, 2013 WL 645942, at *3 (D. Idaho Feb. 21, 2013) (deferring to NLRB’s decision in *D.R. Horton* under *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), as “rational and consistent” with the NLRA, but failing to consider countervailing policies or deference with respect to the FAA); *Herrington v. Waterstone Mortg. Corp.*, 2012 WL 1242318, at *6 (W.D. Wis. March 16, 2012) (finding “the Board’s interpretation of the NLRA in *D.R. Horton*[] is reasonably defensible” and, therefore, “applying it . . . to invalidate the collective action waiver in the arbitration agreement” (internal quotation marks omitted)).

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including the Fifth Circuit Court of Appeals, which rejected *D.R. Horton* itself.¹⁵⁸ Even the Supreme Court has expressed concern about the theory.¹⁵⁹ Yet, the NLRB, in what would appear to be an unprecedented and stubborn reaction to the courts, persists in prosecuting companies for maintaining class and collective action waivers in arbitration agreements.¹⁶⁰

Such stubbornness, in the face of almost universal rejection and criticism,¹⁶¹ may appear odd when viewed in isolation; however, within the larger context of the use of class and collective actions by worker centers, one could easily argue that the effort is part of a general shift toward enabling members-only representation. By prohibiting employee class and collective action waivers, the NLRB has created a vehicle through which groups such as worker centers can effectively establish collective bargaining relationships with employers without ever having to demonstrate that they represent a majority of the workers of those employers.

Protected Concerted Activity and Limits on Employer Control over Its Workplace

Further evidence of the NLRB's goal of enhancing the stature of worker centers and other groups, irrespective of whether they represent a majority of the workforce, can be found in the Board's recent efforts to expand the doctrine of protected concerted activity. Although the doctrine has existed for as long as the statute has been the law of the land, recent decisions and enforcement activity by the Board and the General Counsel have given it renewed energy. In many instances, Board enforcement has exceeded historical limits, affording outside organizations greater abilities to impose their will on employers regardless of their representational status. Unorganized factions of employees, worker centers, and community groups now have significant and expanding levels of access to employees and employee information.

¹⁵⁸ *D.R. Horton, Inc. v. NLRB*, Case No. 12-60031, slip op. (5th Cir. Dec. 3, 2013).

¹⁵⁹ See *Am. Express v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013).

¹⁶⁰ All NLRB Regions have recently been instructed to submit any case "involving mandatory arbitration agreements with a class action prohibition that [is] not resolved by *D.R. Horton* or subsequent Advice Memoranda" to the Division of Advice. NLRB Office of the General Counsel, Memorandum GC 14-01 (Feb. 25, 2014).

Even after the Supreme Court's restatement of its commitment to enforcing arbitration agreements, one NLRB Administrative Law Judge concluded that *D.R. Horton* was not overruled, or changed, by *American Express*. The judge wrote,

"I find that the Supreme Court does not expressly overrule the finding in *D.R. Horton*. The case at issue is distinguishable because the arbitration agreement precludes employees from exercising their substantive rights protected by Section 7 of the [National Labor Relations] Act. The NLRA protects employees' ability to join together to pursue workplace grievances, including through litigation. By initiating arbitration on a classwide basis and filing a class action lawsuit in district court, both Bauer and the charging party in *D.R. Horton* were engaging in conduct that the Board has noted is 'not peripheral but central to the Act's purposes.'" The Board went on to find that there was no conflict between the NLRA and the FAA "[s]o long as the employer leaves open a judicial forum for class and collective claims, employees' NLRA rights are preserved without requiring the availability of class-wide arbitration." The agreement in this matter does not provide for such an option.

Cellular Sales of Missouri, LLC, Case No. 14-CA-094714, slip op. 7-8 (Aug. 19, 2013) (internal citations omitted).

Additionally, another recent Board ALJ decision also upheld *D.R. Horton* and harmonized it with *American Express*. *Ralphs Grocery Co.*, Case No. 21-CA-073942 (July 31, 2013).

¹⁶¹ See, e.g., Glenn Spencer, *California Court Takes NLRB to the Woodshed on "D.R. Horton" Decision*, WORKFORCE FREEDOM INITIATIVE (July 20, 2012), <http://www.workforcefreedom.com/blog/california-court-takes-nlr-woodshed-dr-horton-decision/>; see also, Donald W. Schroeder, *NLRB's Plan: Expand Labor's Influence*, 26 No. 19 WESTLAW JOURNAL EMPLOYMENT 1, (Apr. 17, 2012).



ACCESS TO EMPLOYER PROPERTY

For years, unions have sought greater access to employers' property. The most significant case with regard to such "union access" is *Roundy's Inc.*, which is pending at the Board. The case has clear implications for permitting outside groups that do not represent a majority of workers in a place of employment to gain access to that place of employment.¹⁶² The NLRB has expressed its intent to use *Roundy's* to resolve the issue of "what legal standard the Board should apply in determining whether an employer has violated the Act by denying nonemployee union agents access to its premises while permitting other individuals, groups, and organizations to use its premises for various activities."¹⁶³ While *Roundy's* has yet to be

“The case has clear implications for permitting outside groups that do not represent a majority of workers in a place of employment to gain access to that place of employment.”

decided, other decisions that have been issued by the Board have concluded that unions and other groups allegedly advocating on behalf of employees should have a greater degree of access to an employer's premises than has been allowed in the past. For example, in the case *New York New York, LLC d/b/a New York New York Hotel & Casino*,¹⁶⁴ the Board

held that a hotel violated the statutory rights of a contractor's employees under the NLRA even though they were not employees of the hotel but merely worked at a contractor located inside the property.¹⁶⁵ Under *New York New York*, the contractor's employees were given the right to handbill in and around the hotel because they were regularly employed on the premises.¹⁶⁶ The doctrine promoted by the *New York New York* decision can be reasonably expected to expand as any case involving similar issues is now required to be referred to the Board's Division of Advice for "consistent interpretation of the Act."¹⁶⁷ In *Marriott International*, the Board enhanced the right of off-duty employees to have access to their workplace at times when they are not scheduled to work.¹⁶⁸ And in *Saint John's Health Center*, the Board found that a hospital's no-access rule violated the Act.¹⁶⁹ These expanded rights empower groups like worker centers by allowing their supporters greater access than has been permitted historically. For example, worker centers frequently seek to confront managers *inside* workplaces, and the Board's enhancement of access rights may further that goal.¹⁷⁰

162 356 NLRB No. 27 (2010). See also <http://www.nlr.gov/case/30-CA-017185> (Last visited 3/19/14).

163 *Id.* Notice and Invitation to File Briefs at p. 2.

164 356 NLRB No. 119 (2011).

165 *Id.*

166 *Id.* See also, *Simon DeBartolo Group a/w M. S. Management Associates, Inc.*, 357 NLRB No. 157 (2011).

167 General Counsel Memorandum, *supra* note 159, p. 1, 4 (noting "[c]ases involving the rights of contractor employees, who work on another employer's property, to have access to the premise to communicate with co-workers or the public, where the issues are not resolved by" the Board's *New York New York* decision).

168 *Marriott International, Inc. d/b/a J.W. Marriott Los Angeles at L.A. Live*, 359 NLRB No. 8 (2012); see also, *Sodexo America LLC*, 358 NLRB No. 79 (2012).

169 357 NLRB No. 170 (2011).

170 For example, the worker center OUR Walmart has engaged in demonstrations inside Walmart stores and has confronted store managers regarding demands. See *Louisiana Walmart Workers Go Out On Strike*, YOUTUBE, <http://www.youtube.com/watch?v=RmghZFKKZAw> (last visited March 5, 2014); *OURWalmart Visits Store #1 in Arkansas*, YOUTUBE, http://www.youtube.com/watch?v=uYA3xC_jx2I (last visited March 5, 2014).

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CONFIDENTIALITY AGREEMENTS AND REQUIREMENTS

The Board has issued a string of decisions and Advice Memoranda on employer confidentiality policies that highlight its recent push for a broad definition of protected, concerted activity for all employees.¹⁷¹ Though it is necessary to balance the employer's right to implement rules of conduct in order to maintain discipline with the right of employees to engage in Section 7 activity, the Board has taken protection of Section 7 rights to an extreme. Any hint that a worker might somehow construe an employer policy as chilling the exercise of concerted activity has rendered that policy unlawful.

In the case of confidentiality policies, the Board has, for example, struck down policies that seek to manage workers' interactions with the media and other outside entities.¹⁷² It has also found unlawful policies that seek to protect the reputations of individual workers. Indeed in *Costco Wholesale Club*, the Board invalidated Costco's policy, which stated:

Employees should be aware that statements posted electronically (such as to online message boards or discussion groups) that damage the company, defame any individual or damage any person's reputation or violate the policies outlined in the Costco Employee Agreement, may be subject to discipline, up to and including termination of employment.¹⁷³

In *Costco*, the Board even invalidated policies that were established to protect employee privacy. For example, Costco was required to cease and desist from maintaining a policy forbidding employees from disclosing "names, addresses, phone numbers and email addresses of employees ... to any third parties" or requiring that "[a]ll Costco employees shall refrain from discussing private matters of other employees. This includes topics such as, but not limited to, sick calls, leaves of absence, FMLA call outs, ADA accommodations, [or] workers' comp. injuries."¹⁷⁴

The Board stated that the company rules were too broad and would be reasonably construed as prohibiting Section 7 activity.¹⁷⁵ In essence, the Board held that an employee's Section 7 right "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection" allows an employee to make derogatory attacks on employer representatives; to engage in negative conversations about employees and managers; to make false or misleading work-related statements

¹⁷¹ See e.g., *Quicken Loans*, 359 NLRB No. 141 (June 21, 2013); NLRB Advice Memorandum, No. 30-CA-089350 (Jan. 29, 2013).

¹⁷² *DirectTV U.S. DirectTV Holdings, LLC*, 359 NLRB No. 54 (2013).

¹⁷³ *Costco Wholesale Club*, 356 NLRB No. 106 (2012).

¹⁷⁴ *Id.* At 3-4.

¹⁷⁵ *Id.* at pp. 1-2.



about a company, a facility, or other employees; and to divulge private information about the medical condition of other employees.¹⁷⁶

“As is clear, the Board has limited an employer’s ability to require that employees keep information about their workplace confidential. In so doing, the Board is enhancing the ability of third parties, including worker centers, to gain information about individuals and their place of employment.

As is clear, the Board has limited an employer’s ability to require that employees keep information about their workplace confidential. In so doing, the Board is enhancing the ability of third parties, including worker centers, to gain information about individuals and their place of employment.

Worker centers that have enhanced access to information about a workplace are better able to promote their case among a small nucleus of supporters irrespective of whether they ever established themselves as the employees’ exclusive representative. In fact, a recent memorandum from the Board’s General Counsel indicates confidentiality policies are a high priority for the Board.¹⁷⁷

NLRB Prosecutorial Discretion

As predicted by Morris, the authority vested in the NLRB General Counsel’s office has proved to be an effective tool to promote the notion of members-only unions. Perhaps the most notable example involves the dispute between OUR Walmart, which is sponsored by the UFCW,¹⁷⁸ and the world’s largest retailer.

In November 2012, OUR Walmart, which had pursued a series of demonstrations, flash mobs, “work stoppages,” and other protest-related activities against Wal-Mart during the course of the year, announced a work stoppage and related protests against Wal-Mart on the day after

176 *Id.* at 2, citing *Southern Maryland Hospital*, 293 NLRB 1209, 1222 (1989); *Claremont Resort & Spa*, 344 NLRB 832 (2005); *Beverly Health & Rehabilitation Services*, 332 NLRB 347, 348 (2000). In fact, the Board’s holding in *Costco* that Section 7 protects one employee’s disclosure of personal information about another employee attempts to legitimize what, in some jurisdictions, is a tortious invasion of privacy. *Beaumont v. Brown*, 401 Mich. 80, 257 N.W.2d 522, 531 (Mich. 1977) (“An invasion of plaintiff’s right to privacy is important if it exposes private facts to a public whose knowledge of those facts would be embarrassing to the plaintiff. Such a public might be the general public, if the person were a public figure, or a particular public such as fellow employees, club members, church members, family, or neighbors, if the person were not a public figure.”) (emphasis added), overruled on other grounds by *Bradley v. Bd. of Educ. of the Saranac Cmty. Schs.*, 455 Mich. 285, 565 N.W.2d 650 (Mich. 1997); *McSurely v. McClellan*, 243 U.S. App. D.C. 270, 753 F.2d 88, 112 (D.C. Cir. 1985) (applying Kentucky law) (“However, the publication requirement also may be satisfied by proof of disclosure to a very limited number of people when a special relationship exists between the plaintiff and the ‘public’ to whom the information has been disclosed.”); *Miller v. Motorola, Inc.*, 202 Ill. App. 3d 976, 560 N.E.2d 900, 903, 148 Ill. Dec. 303 (Ill. App. Ct. 1990) (stating the “public disclosure requirement may be satisfied by proof that the plaintiff has a special relationship with the ‘public’ to whom the information is disclosed,” and concluding that proof that plaintiff’s medical condition was disclosed to her fellow employees satisfied the requirement); *Chisholm v. Foothill Capital Corp.*, 3 F. Supp. 2d 925, 940 (N.D. Ill. 1998) (concluding disclosure of plaintiff’s affair to two potential clients of plaintiff’s employer could satisfy the publicity requirement).

177 General Counsel Memorandum, *supra* note 160.

178 See *United Food & Commercial Workers Union, LM-2* (2013), (noting “The UFCW has a subsidiary organization maintained in Washington DC named the OUR Walmart whose purpose as stated in the by-laws will be the betterment of the conditions of the current and former associates at Wal-Mart Stores, Inc., within the meaning of Section 501(c)(5) of the Internal Revenue Code, and to make Wal-Mart a better corporate citizen. The financial transactions are included in the 12/31/13 filing of this LM2.”).

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Thanksgiving 2012. In anticipation of the disruption on what is typically the busiest shopping day of the year, Wal-Mart filed an unfair labor practice charge against OUR Walmart and the UFCW.¹⁷⁹

Since the passage of the Taft-Hartley Amendments, it has been unlawful for a labor union that does not represent a majority of the workers in an appropriate unit to engage in recognitional picketing (that is, picketing intended to force an employer to recognize the union) for longer than 30 days without filing a petition for an election.¹⁸⁰ Congress established this mechanism as a means to limit the disruption such picketing could have on the free flow of commerce while at the same time encouraging labor unions to seek bargaining rights through the channels established by Congress under the NLRA.¹⁸¹ In addition, because picketing can be so disruptive, Congress included infractions of this sort in the category of unfair labor practices that were to receive priority treatment by the NLRB.¹⁸² Congress also authorized immediate injunctive relief to stop such disruptive picketing in the event an expedited investigation found it to have occurred.¹⁸³ These provisions informed the filing of Wal-Mart's unfair labor practice charge against OUR Walmart and the UFCW in November 2012.

“However, Solomon did not secure the agreement until early 2013, long after the 2012 Black Friday activities were over. The timing of a prosecution can be as important as the prosecution itself, and in the case of the activities of OUR Walmart on Black Friday 2012, that timing permitted otherwise unlawful activities to occur.”

Acting General Counsel Lafe Solomon, who occupied the NLRB General Counsel's office at the time, eventually concluded that OUR Walmart's actions were inconsistent with the provisions of the statute that limited recognitional picketing.¹⁸⁴ As such, he secured an agreement with the UFCW and OUR Walmart that included a requirement that the groups cease picketing and post a notice on their websites stating that the labor organizations were not seeking to represent the associates at Wal-Mart.¹⁸⁵ However, Solomon did not secure the agreement until early 2013, long after the 2012 Black Friday activities were over. The timing of a prosecution

179 See e.g., *Walmart's Black Thursday Hits Paducah*, TODAY'S WORKPLACE, (Nov. 21, 2012), <http://www.todaysworkplace.org/2012/11/21/walmarts-black-thursday-hits-paducah/> (Last visited 3/19/14) (noting that “OUR Walmart—Organization United for Respect at Walmart—a national association of current and former Walmart employees, several thousand strong, ... will be walking picket lines and striking at dozens of Walmart stores across the country on Turkey Day and Black Friday.”).

180 29 U.S.C. § 158(b)(7).

181 See e.g., *Int'l Hod Carriers Bldg. and Common Laborers Union of Am.*, 135 NLRB 1153, 1155-1158 (1962) (discussing the congressional purposes behind Section 8(b)(7), including the limitation of recognitional and organizational picketing in favor of the Act's election procedures).

182 Investigations are to be completed within 72 hours of the filing of the charge. NLRB Casehandling Manual (Part One) Unfair Labor Practice Proceedings Sec. 10200.1 (2013).

183 *Id.*

184 Steven Greenhouse, *Labor Union to Ease Walmart Picketing*, NEW YORK TIMES (Jan. 31, 2013), http://www.nytimes.com/2013/02/01/business/labor-union-agrees-to-stop-picketing-walmart.html?_r=0. (Last visited 3/19/14).

185 *Id.*; see also, *Protests for Better Jobs at Walmart Sweep Stores Nationwide*, OURWALMART, <http://forrespect.org/2013/11/29/protests-for-better-jobs-at-walmart-sweep-stores-nationwide/> (last visited March 5, 2014) (“LEGAL DISCLAIMER: UFCW and OUR Walmart have the purpose of helping Wal-Mart employees as individuals or groups in their dealings with Wal-Mart over labor rights and standards and their efforts to have Wal-Mart publically commit to adhering to labor rights and standards. UFCW and OUR Walmart have no intent to have Walmart recognize or bargain with UFCW or OUR Walmart as the representative of Walmart employees.”).



can be as important as the prosecution itself, and in the case of the activities of OUR Walmart on Black Friday 2012, that timing permitted otherwise unlawful activities to occur.

In anticipation of Black Friday 2013, OUR Walmart promised another round of protests. Given the previous determination by the NLRB's acting General Counsel — and after numerous protests and other related activities by OUR Walmart members and supporters at various Wal-Mart stores during the year — Wal-Mart representatives made a statement expressing the belief that the ongoing work stoppages amounted to unprotected activity. The company notified those associates who might be contemplating such work stoppages that it would enforce its attendance policies in the event those workers engaged in unprotected activities. Once again, the General Counsel exercised prosecutorial discretion that benefitted OUR Wal-Mart.

Although participants in a primary strike are generally protected, certain limitations to that protection exist. Employees engaged in what is known as an *intermittent strike* can lose protections normally available to striking employees.¹⁸⁶ An intermittent strike is a series of concerted refusals to work, followed by resumptions of work.¹⁸⁷ It is well established that such conduct is not protected by Section 7, regardless of the employer's ability to defend against the conduct and however lawful the economic objective of the work stoppages may be.¹⁸⁸ The Board considers several factors to determine whether a pattern and practice of strike activity rises to the level of an unprotected intermittent strike. They include: (1) whether there have been more than two separate strikes, or threats of separate strikes; (2) whether the strikes are responses to distinct employer actions or problems with working conditions or, instead, are part of a strategy to engage in repeated strike activity to cripple the employer and minimize the sacrifice made by striking employees; (3) whether the union has stated an intent to pursue a plan or strategy to use intermittent strikes, or whether there is other clear factual evidence of an orchestrated strategy to engage in such activity; and (4) whether the strikes are of short duration and proximate time.¹⁸⁹

¹⁸⁶ See e.g., *NLRB v. Blades Mfg. Corp.*, 344 F.2d 998 (8th Cir. 1965); *NLRB v. Montgomery Ward & Co.*, 157 F.2d 286 (8th Cir. 1946). See also, Discriminating against employees because of their union activities or sympathies (Section 8(a)(3)), NLRB, <http://www.nlr.gov/rights-we-protect/whats-law/employers/discriminating-against-employees-because-their-union> (last visited March 5, 2014) (An employer may “[l]ock out [it’s] employees defensively - e.g., in response to an unprotected intermittent or partial strike - provided that [it is] not motivated by a purpose to interfere with and defeat union activity.”).

¹⁸⁷ *International Union, UAW v. Wisconsin Employment Rel. Bd.*, 336 U.S. 245, 249, 257 (1949); *Pacific Tel. & Tel. Co.*, 107 NLRB 1547, 1547 (1954) (holding the union’s “announced strategy ... of ‘hit and run’ work stoppages deliberately calculated, in [the union’s] own words, to ‘harass the company into a state of confusion,’” was “beyond the pale of proper strike activities” and unprotected).

¹⁸⁸ *Id.*; *International Union, UAW*, 336 U.S. at 249, 257.

¹⁸⁹ See e.g., *Honolulu Rapid Transit Co.*, 110 NLRB 1806, 1809-10 (1954) (holding that a series of four strikes (totaling eight days) within a month, to be unprotected intermittent strike activity, and reasoning that “[t]he decision of the employees in this case, implemented in their part-time weekend strike, can only be described as an abrogation of the right to determine their schedules and hours of work ... an employer is not required ... to alter and adjust his operating schedules and hours to the changing whim which may suit the employees’ or a union’s purpose ... and thereby in effect establish and impose upon the employer their own chosen conditions of employment.” In *Swope Ridge*, 350 NLRB No. 64 at 65 (2007), the Board held that a series of two strikes, totaling two days, over a period of only three weeks, was unprotected intermittent strike activity. Significant to the Board’s holding in *Swope Ridge* (which departs from the normal rule that more than two strikes are required) was the fact that (i) an additional strike notice was issued a month before the first strike, but was then withdrawn (i.e., there were three strike notices within about two months); and (ii) the union did not inform the employer that the strikes would only last for one day until two or three days prior to the start of each of the two strikes.

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For intermittent strike activity to be unprotected, repeated, short-term strikes must occur within a limited period of time. While “there is no magic number,” Board authority generally requires more than two strikes in near proximity to one another.¹⁹⁰

Additionally, sit-down strikes or other forms of occupation of an employer’s premises are also unprotected (*NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939)). Historically, employees engaging in sit-down strikes have been denied protections of the Act and have been subject to discharge by their employers.

The limitations of intermittent work stoppages have been a focus of criticism among pro-labor academics. Notably, former NLRB member Craig Becker wrote a comprehensive analysis of how he believed that the current law of the NLRA can be read to authorize short, repeated strikes aimed at discrete grievances.¹⁹¹ He wrote:

[t]his argument — that the NLRA can and should be read to protect repeated grievance strikes — would breathe new life into the right to strike. It differs from other reform agendas, for it neither depends on the enactment of much-needed statutory amendments nor advocates the abandonment of strikes as futile. Rather, ... existing law contains precedents for protecting repeated grievance strikes, and that reliance on those precedents would not only provide a powerful counterweight to the striker replacement doctrine, but would also give labor a form of economic weapon better suited to teaching employers the value of collective bargaining agreements.¹⁹²

Clearly, the intermittent strike is viewed as a powerful tool to put pressure on employers. If deemed permissible by the NLRB, then it could be effectively deployed against an employer

¹⁹⁰ *National Steel and Shipbuilding*, 324 NLRB 499, 502 (1997) (three one-day strikes in a period of two months were unprotected by Section 7); *NLRB v. Blades Mfg. Co.*, 344 F.2d 998, 1005 (8th Cir. 1965) (holding three one-day strikes over a three week period were unprotected by Section 7); *Care Center of Kansas City (Swope Ridge)*, 350 NLRB 64 (2007) (two one-day strikes over a three week period, and a one withdrawn Section 8(g) notice for third strike in same period, were unprotected); *Dallas Glass*, 2013 WL 703258 (NLRB Div. of Judges) (at least nine one-day strikes over a five-month period unprotected); *Embossing Printers, Inc.*, 268 NLRB 710 (1984) (three one-day strikes over two week period unprotected); *International Union v. Wisconsin Employment Relations Board*, 336 U.S. 245, 254 (1949) (26 one-day strikes over a five-month period unprotected); *Land Mark Elec.*, 1996 WL 323648 (NLRB G.C. Op., May 17, 1996) (three strikes within four hours unprotected); *Pacific Tel. & Tel. Co.*, 107 NLRB 1547 (1954) (nine one-day strikes over a nine-day period with a new location each day unprotected). *Cf. Hospital Episcopal San Lucas*, 319 NLRB 54, 60 (1995) (two strikes, totaling two days, in three months does not constitute an intermittent strike); *Farley Candy Co.*, 300 NLRB 849, 849 (1990) (two half-day strikes over a one-week period protected by Section 7 where five employees struck once and second, two-employee strike was in response to discrete employer action); *Crenlo Div.*, 215 NLRB 872, 879 (1974) (two strikes, totaling two days, not unprotected); *NLRB v. Robertson Industries*, 560 F.2d 396, 398 (9th Cir. 1976) (two one-day strikes over a three-month period protected where second one-day strike was a protest against “working conditions,” not a plan to engage in intermittent strike); *Roseville Dodge, Inc. v. NLRB*, 882 F.2d 1355 (8th Cir. 1989) (two half-day strikes by unrepresented employees in one week period protected where first strike was a three-hour in-plant work stoppage by unrepresented employees and the subsequent three-hour strike two days’ later was to plan strategy); *United States Service Indus.*, 315 NLRB 285, 285 (1994) (one-day strike and a five-week strike over a three-month period was protected where the employers only evidence of an intermittent work stoppage was that some employees struck twice); *WestPac Elec., Inc.*, 321 NLRB 1322, 1360 (1996) (three strikes over a 16-day period, consisting of one one-day strike, one four-day strike, and one seven-day strike, were protected where there was no evidence that the strikes were in furtherance of a single plan to “harass the company into a state of confusion.”).

¹⁹¹ Craig Becker, “Better Than a Strike”: *Protecting New Forms of Collective Work Stoppages under the National Labor Relations Act*, 61 U. CHI. L. REV. 351 (Spring 1994).

¹⁹² *Id.* at p. 355.



by a labor organization irrespective of whether that labor organization has been selected by or enjoys support of a majority of employees.

Twenty years after Craig Becker wrote his article, the NLRB appears to have embarked on a path that will redefine the scope of protections for employees engaged in intermittent work stoppages. More significant, however, is the fact that this is taking place within the context of the worker center movement and on behalf of groups that have not demonstrated that they represent anyone other than their members.

The NLRB General Counsel's efforts on this front were triggered by Wal-Mart's statements about potential Black Friday protests in 2013.¹⁹³ In a complaint against Wal-Mart, filed with great fanfare on January 14, 2014, General Counsel Richard Griffin brought the issue of intermittent strikes to the forefront.¹⁹⁴ In its answer to the NLRB's complaint,¹⁹⁵ Wal-Mart spelled out where many employers fear the General Counsel's charges are intended to lead:

The United Food and Commercial Workers International Union owns and operates its subsidiary "OUR Walmart" — the putative Charging Party here. The UFCW does not represent any Walmart employee ("associate") in the United States and disavows any interest in doing so. See forrespect.org (bottom of home page). However, the UFCW uses OUR Walmart as the face and voice of its multi-year, nationwide, "raise-the-bar" campaign against Wal-Mart (essentially an area-standards campaign with a nationwide scope). To draw media attention to its "Making change at Wal-Mart" campaign, the UFCW began in October 2012 to orchestrate a series of one-shift, hit-and-run work stoppages to promote its generic "more money, better benefits, more hours, and no retaliation" messaging. Since then, the UFCW has orchestrated approximately 25 of these multi-facility intermittent work stoppage events over 16 months at approximately a hundred different stores across the country, and the UFCW threatens to continue doing so.

In each of its made-for-media intermittent work stoppage events — labeled as "National Day of Action" or something similar — the UFCW tries to recruit one or two associates from as many stores as possible to serve as the media "visual" for some kind of disruptive and confrontational demonstration at or in the targeted stores. The UFCW tells potential recruits that they can come and go from work as they please with no extended loss of pay and no impact on their employment, simply by invoking the "strike" word. If it gets an associate to cooperate, the UFCW then recruits a group of non-employee "community allies" to trespass into the targeted Walmart store, calls in the local media (or films itself if the local media does not come), and — with video

193 NLRB Office of the General Counsel Authorizes Complaints against Walmart, Also Finds No Merit to Other Charges, *National Labor Relations Board* (Nov. 18, 2003), <http://www.nlr.gov/news-outreach/news-story/nlr-office-general-counsel-authorizes-complaints-against-walmart-also> (Last visited 3/19/14).

194 *Wal-Mart Stores, Inc.*, Case No. 16-CA-096240, available at <http://www.nlr.gov/case/16-CA-096240> (last visited Mar. 5, 2014).

195 *Id.*

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cameras rolling — confronts a store manager on the sales floor, delivers the UFCW’s canned area-standards message (always packaged with a generic no-retaliation demand), and then escorts the recruited associate “visual(s)” out of the store for a one-shift “strike” or some other short-duration, UFCW-orchestrated media event. The UFCW never notifies Walmart who it will call out “on strike” for these staged events or from which stores or which departments the recruited associates will come, creating (intended) disruption to customer-service staffing and planning at all the targeted stores each time the UFCW stages one of its media events.

In this Complaint, the UFCW — in conjunction with the General Counsel — asserts that the National Labor Relations Act gives unions the right to direct individual employees to come and go from their scheduled shifts at their whim, whenever a union wants to generate a media “buzz” for its campaign messaging. Through this Complaint, the UFCW — in conjunction with the General Counsel — effectively asserts that the Act creates federally-mandated “intermittent strike leave” that trumps employer attendance policies in the American workplace. Walmart does not believe Congress created intermittent strike leave to serve as a prop for union campaign messaging at the expense of customer service, operational efficiency, and the co-workers who have to cover for employees who intermittently come and go from their scheduled shifts at a union’s bidding.¹⁹⁶

While Wal-Mart is the target in this instance, one can see how a change in policy authorizing intermittent strikes would affect almost every employer in the United States. The basic acts of setting a schedule and running a workplace would become nearly impossible if employees were permitted to simply walk out at any time, for a duration of their own choosing, without consequence. Such a situation would be completely contrary to the purpose of the NLRA, which is intended to promote harmonious labor relations and ensure the free flow of commerce.

“... one can see how a change in policy authorizing intermittent strikes would affect nearly every employer in the United States. The basic acts of setting a schedule and running a workplace would become almost impossible if employees were permitted to simply walk out at any time, for a duration of their own choosing, without consequence.”

OUR Walmart offers another example of how the office of the General Counsel has used its prosecutorial discretion to empower members-only representation. On November 15, 2013, the General Counsel refused to prosecute an unfair labor practice filed by Wal-Mart against OUR Walmart and the UFCW for offering \$50 gift cards to any Wal-Mart associate who participated in the 2013 Black Friday strikes.¹⁹⁷ The company alleged that offering the gift cards was tantamount to purchasing the support of Wal-Mart associates for OUR Walmart, which the Board has found to be

¹⁹⁶ The National Labor Relations Board website has not made the Answer to the Complaint public, although the website notes that a copy is available through the Board’s FOIA Branch. *Wal-Mart Stores, Inc.*, Case No. 16-CA-096240, <http://www.nlrb.gov/case/16-CA-096240> (last visited March 5, 2014). A copy of the Answer is on file with the authors.

¹⁹⁷ Advice Memorandum, Case No. 16-CB-099612, (Nov. 15, 2013).



unlawful in other contexts.¹⁹⁸ For example, payment of money to employees prior to a Board representation election violates the Act,¹⁹⁹ and even amounts as small as \$5 have previously been deemed improper.²⁰⁰ Notwithstanding the clear directive of established law on this point, the NLRB General Counsel declared the practice lawful and dismissed the charge.²⁰¹

The pattern that has developed over the course of the past several years in both NLRB decision making and the exercise of prosecutorial discretion suggests that the agency seeks to empower organizations that do not enjoy majority support. This pattern is inconsistent with the doctrine

established by Congress, which is to promote industrial democracy and majority rule.

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Finally, the Board’s General Counsel recently identified the topic of *Weingarten* rights in a non-union environment as a key policy priority for his office.²⁰² As background, in 1975 the Supreme Court ruled in *NLRB v. J. Weingarten, Inc.* that employers must grant a unionized employee’s

request to have a union representative attend an investigatory interview that the employee reasonably believes could lead to discipline.²⁰³ Extending these rights to *non-union* workplaces has been controversial, to say the least. Indicating a potential policy shift, the General Counsel has mandated that these non-union *Weingarten* cases be submitted to the Board’s Division of Advice to “enhance [the Board’s] ability to provide a clear and consistent interpretation of the Act.”²⁰⁴

The General Counsel’s anticipated policy change here is not the first time the NLRB has sought to extend *Weingarten* rights to non-union settings. In 1988, the Board declined to extend *Weingarten* rights to non-union employees;²⁰⁵ almost 12 years later, the Board changed direction and conferred such rights to non-union employees.²⁰⁶ In 2004, the Board again reversed course and returned to *Dupont* and its refusal to extend *Weingarten* to non-union employees.²⁰⁷ Given the mandate of the General Counsel, it is likely that the NLRB will change course again.²⁰⁸

198 *Id.*; see also, Ben James, *NLRB Approves Union’s Gifts To Striking Wal-Mart Workers*, LAW360 (Nov. 25, 2013), <http://www.law360.com/articles/491311/nlrapprovesunionsgiftstostrikingwalmartworkers> (Last visited 3/19/14). This position contradicts established Board precedent. See, e.g., *Machinists Dist. 91 (Pratt & Whitney)*, 278 NLRB 39, 46 (1986) (union vested with stringent control over strikes and maintains a strike fund from which benefits are paid directly to striking members).

199 See e.g., *Flatbush Manor*, 287 NLRB 457, 457 (1987).

200 *General Cable Corp.*, 170 NLRB 1682, 1682-83 (1968).

201 Advice Memorandum, Case No. 16-CB-099612, (Nov. 15, 2013).

202 General Counsel Memorandum, *supra* note 160.

203 420 U.S. 251 (1975).

204 *Op. Cit.*, General Counsel Memorandum.

205 *E.I. Dupont*, 289 NLRB 187 (1988).

206 *Epilepsy Foundation of Northeast Ohio*, 331 NLRB 676 (2000).

207 *IBM Corp.*, 341 NLRB No. 148 (2004).

208 In fact, in a recent Charge, the Board’s Milwaukee Regional Office decided to issue a complaint against an employer because “there was reasonable cause to believe [employees] had been unlawfully interrogated,” after the employees’ request to be interviewed as a group during an investigation was denied. See *Protected Concerted Activity*, NLRB, <http://www.nlr.gov/rights-we-protect/protected-concerted-activity> (last visited March 5, 2014).

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The non-union *Weingarten* issue is not new; however, when considered within the current context of NLRB policy, it would appear that it is one more means to further non-majority representation in the workplace.

Other NLRB Measures to Avoid the Requirement of Demonstrating Majority Support — The Section 8(f)/9(a) Conversion

Finally, a recent Memorandum from the General Counsel sanctions Section 9(a) bargaining relationships even when the representative union does *not* enjoy majority support.²⁰⁹ By way of background, Section 8(f) of the NLRA permits employers “engaged primarily in the building and construction industry” to enter into an agreement with a union regardless of the union’s majority status.²¹⁰ These industry-specific “pre-hire” agreements exist because Congress concluded that the traditional representation structure under Section 9(a) was impractical when applied to the construction industry, where the same core group of workers can be employed by many different employers. Section 8(f) agreements are enforceable for their term, but they do not bar a representation petition and the employer has no duty to bargain for a new agreement when the agreement expires.²¹¹

Over the years, there has been considerable litigation about what is required to transform 8(f) agreements into 9(a) agreements.²¹² In *Nova Plumbing Inc. v. NLRB*, the employer signed an agreement that included specific Section 9(a) recognitional language, but the employer argued that the agreement was an 8(f) agreement, in part, because there was clear evidence that the union did *not* have majority support at the time the agreement was signed.²¹³ The D.C. Circuit agreed with the employer and held that allowing a Section 9(a) relationship to be created out of a contractual relationship alone, where the facts establish that no majority representation exists, ran counter to the principles of majority rule in the Act.²¹⁴

On February 4, 2014, almost 11 years after *Nova Plumbing*, the General Counsel issued a directive to NLRB Regional Offices that effectively eliminated the requirement that a party demonstrate majority support to convert a Section 8(f) bargaining relationship into one established under Section 9(a). The directive provides that Regional Offices are not to seek or require evidence to show a union possessed majority support at the time the agreement was entered into, and they should not seek evidence that contradicts the agreement’s language.²¹⁵ Indeed, only if “the Region is presented with direct evidence that the union

²⁰⁹ General Counsel Memorandum, *supra* note 160.

²¹⁰ 29 U.S.C. § 158.

²¹¹ *John Deklewa & Sons*, 282 NLRB 1375, 1381-83, 1385-87 (1987).

²¹² See, e.g., *Goodless Elec. Co.*, 321 NLRB 64 (1996); *Staunton Fuel & Material, Inc. dba Central Illinois Construction*, 335 NLRB 717 (2001); *Nova Plumbing Inc. v. NLRB*, 330 F.3d 531 (D.C. Cir. 2003); *Diponio Constr. Co.*, 357 NLRB No. 99 (2011).

²¹³ 330 F.3d 531 (D.C. Cir. 2003).

²¹⁴ *Id.*

²¹⁵ General Counsel, Memorandum, *supra* note 160.



did not actually have majority support at the time the employer extended the Section 9(a) recognition to the union” should the Region investigate whether majority support exists.²¹⁶ In fact, after the General Counsel issued this directive, all NLRB Regions were required to seek assistance from the Board’s Division of Advice on all “[c]ases that involve an assertion of 9(a) status in the construction industry based on contractual language.”²¹⁷

This directive will inevitably result in determinations that 9(a) agreements exist in situations where unions do *not* enjoy majority support. Employers unfamiliar with the particulars of the law may sign agreements they believe to be 8(f) “pre-hire” agreements and may then find that, upon trying to repudiate the agreement, the Region has determined that the agreement is a 9(a) majority status agreement even though no such majority status exists. More important, however, is that the Memorandum provides further evidence of the Board’s shift toward promoting members-only unions.

The Department of Labor’s Promotion of Members-Only Representation

The scope of federal agency conduct facilitating members-only representation extends beyond the NLRB. In recent years, the DOL has promoted its alliances with worker centers, both in terms of funding and collaboration on enforcement.²¹⁸ Through these alliances, the DOL is, in its own way, promoting a members-only representation model.

“... In recent years, the DOL has promoted its alliances with worker centers, both in terms of funding and collaboration on enforcement. Through these alliances, the DOL is, in its own way, promoting a members-only representation model.

The Department of Labor’s Endorsement and Funding of Worker Centers

The Department of Labor’s website includes a section titled “Center for Faith-Based & Neighborhood Partnerships (CFBNP).”²¹⁹ Established by President George W. Bush’s first Executive Order, this executive branch office was originally known as the Office of Faith-Based and Community Initiatives (OFBCI).²²⁰ The OFBCI and similar agency-level offices were designed “to lower the legal and institutional barriers that prevented government and faith-based groups from working as partners — and to ensure that the armies of compassion played a central role in our campaign to make America more promising and more just.”²²¹

²¹⁶ *Id.* at p. 2.

²¹⁷ *Id.* at p. 2.

²¹⁸ See Worker Protection, U.S. DEPT. OF LABOR, CENTER FOR FAITH-BASED AND NEIGHBORHOOD PARTNERSHIPS, <http://www.dol.gov/cfbnp/protection.htm> (last visited March 1, 2014) (noting “community organizations, including worker centers, play a vital role in educating workers about their rights and helping them file complaints with” the United States’ Department of Labor Wage and Hour Division).

²¹⁹ U.S. DEPT. OF LABOR, CENTER FOR FAITH-BASED & NEIGHBORHOOD PARTNERSHIPS (CFBNP), <http://www.dol.gov/cfbnp/> (last visited March 5, 2014).

²²⁰ *President Bush Attends Office of Faith-Based and Community Initiatives’ National Conference* (Press release), THE WHITE HOUSE (June 26, 2008), <http://georgewbush-whitehouse.archives.gov/news/releases/2008/06/20080626-20.html> (last visited March 5, 2014).

²²¹ *Id.*

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On the DOL's website, it now states that the agency "builds partnerships with faith-based groups, community organizations, and neighborhood leaders to better serve disadvantaged and underserved workers and job seekers."²²² The DOL's CFBNP reaches out to these groups and individuals to provide information and to seek input on the work that the DOL performs. According to the DOL, the CFBNP seeks to build lasting community partnerships between these groups and the DOL's workforce development and worker protection agencies.²²³ Among the resources offered online is a database that includes DOL grants that were competitively awarded to various faith-based & neighborhood partnership groups in 2011 and 2012.²²⁴ The CFBNP also provides a document explaining "How to Work with the Department of Labor" on issues relating to workforce development and worker protection.²²⁵

The DOL offers suggestions on such arrangements. Suggestions include partnering with a local grantee, joining a local partnership to apply for funding, and providing input to the DOL on regulations.²²⁶ Additionally, the DOL explains that these groups can join the "Know Your Rights Campaign" — the DOL's public outreach campaign.²²⁷ The CFBNP website also includes a link to "new solicitations for grant applications."²²⁸ Thus, worker centers and community organizations can ally directly with the DOL, and receive financial assistance, to assist in employee organization efforts.

The DOL has also directly funded worker centers. For example, ROC received a \$275,000 grant under the Susan Harwood grant program in 2009, the National Day Laborers Organizing Network received \$312,500 in 2013, and Interfaith Worker Justice received a \$220,000 grant in 2010.²²⁹ ROC received an additional boost from the DOL in 2011 when it signed an "alliance" agreement with OSHA. Among its terms, the agreement stated that ROC would "rais[e] awareness of OSHA's rulemaking and enforcement initiatives" and assist the agency with "outreach and communication," and that OSHA would "speak, exhibit, or appear" at events held by ROC.²³⁰

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222 U.S. DEPT. OF LABOR, CENTER FOR FAITH-BASED & NEIGHBORHOOD PARTNERSHIPS (CFBNP), <http://www.dol.gov/cfbnp/> (last visited March 5, 2014).

223 *Partnership Opportunities for Organizations and Communities*, U.S. DEPT. OF LABOR, CENTER FOR FAITH-BASED & NEIGHBORHOOD PARTNERSHIPS (CFBNP), (Jan. 2013), <http://www.dol.gov/cfbnp/20130319FS.pdf> (Last visited 3/19/14).

224 *Faith Based & Neighborhood Partnerships Resources*, WORKFORCE ONE, <https://partnerships.workforce3one.org/page/resources/1001118233606726797> (last visited Dec. 10, 2013).

225 *Partnership Opportunities for Organizations and Communities*, U.S. DEPT. OF LABOR, CENTER FOR FAITH-BASED & NEIGHBORHOOD PARTNERSHIPS (CFBNP), (Jan. 2013), <http://www.dol.gov/cfbnp/20130319FS.pdf> (Last visited 3/19/14).

226 *Id.*

227 *Id.*

228 *New Solicitations for Grant Applications*, U.S. DEPT. OF LABOR, CENTER FOR FAITH-BASED & NEIGHBORHOOD PARTNERSHIPS (CFBNP) (March 18, 2013), <http://www.dol.gov/cfbnp/grant.htm> (Last visited 3/19/14).

229 www.USASpending.gov

230 *Agreement Establishing an Alliance Between the Occupational Safety and Health Administration, U.S. Department of Labor and Restaurant Opportunities Centers United*, U.S. Department of Labor, OSHA, (10/20/11) https://www.osha.gov/dcsdp/alliances/roc/roc_final.html, last visited 3/19/14.



In addition to its direct promotion and support of worker centers, in 2010, the DOL's Wage and Hour Division solicited a lengthy article: "Improving Working Conditions through Strategic Enforcement."²³¹ It addresses ways the DOL's Wage and Hour Division can improve enforcement and deterrence techniques as employment models change. It concludes that worker centers can be an effective ally in assisting with enforcement and compliance initiatives.²³²

The article identifies a number of so-called priority industries, including fast food service, janitorial work, agriculture, and retail — all industries where worker centers have been particularly active.²³³ Indeed, the author, David Weil, who has been nominated to serve as Wage and Hour administrator, concludes that worker centers are a solution to some of the DOL's enforcement limitations, and he advocates "working with key stakeholders (industry associates, labor unions, companies, worker centers and advocates, and other labor market institutions) whose activities at the workplace — and industry level — are natural complements to government efforts."²³⁴ Weil recommends that the DOL "reach out" to and connect with worker centers directly as part of its enforcement protocol.²³⁵ He notes that "[t]he decline of unionization generally and low levels of representation in many of the industries with a concentration of vulnerable workers require the development of different models of outreach with community groups, worker centers, and other worker advocates to encourage the exercise of rights among vulnerable groups in priority industries."²³⁶ To

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pursue this outreach, Weil stated that the DOL should convene worker center dialogues.²³⁷ These forums would be two-way flows of communication, and the meetings would afford organizations in the worker advocate community the ability to build relationships with the agency.²³⁸

Under this proposed framework, worker centers would become empowered to address issues in the workplace irrespective of whether they, in fact, represent any workers there. When one looks at this empowerment within the context of many worker centers effectively functioning as “labor organizations,” it becomes quite clear that the DOL is also promoting a members-only representation model.

231 David Weil, *Improving Workplace Conditions through Strategic Enforcement: A Report to the Wage And Hour Division* (May 2010), Boston U. School of Management Research Paper No. 2010-20, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1623390#. (Last visited 3/19/14).

232 *Id.* at p. 16.

233 *Id.* at pp. 2–3.

234 *Id.* at p. 94.

235 *Id.*

236 *Id.*

237 *Id.* at p. 86.

238 *Id.*

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OSHA Letter Ruling

In one very obvious area, the DOL has put its words into practice. In an interpretive letter dated February 21, 2013, the Occupational Safety and Health Administration (OSHA) announced that during inspections of non-union worksites, anyone designated by the employees could accompany the employees on the inspection.²³⁹ Previously, employee representatives were permitted to accompany an inspection only when it involved a facility where the workforce was represented by a properly designated labor organization.²⁴⁰

According to OSHA's letter, unrepresented employees can choose a person who is affiliated with a union or a "community organization" to act as their personal representative in filing complaints, requesting inspections, and participating in conferences to resolve citations.²⁴¹ The interpretative letter also states that a person affiliated with a union, without a collective bargaining relationship, or with a community representative can act on behalf of employees as a walk-around representative who accompanies OSHA inspectors.²⁴²

OSHA's new interpretation is a significant — and some would say unauthorized — departure from the existing standard. Under the new standard, OSHA has provided unions and worker centers access to workplaces on behalf of employees they claim to represent, even if they have not been designated as the representative by a majority of the workforce. This access is a "stepping stone" that follows the "New Organizational Approach" identified by Morris.²⁴³

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239 Occupational Safety and Health Administration, *Letter of Interpretation* (Feb. 21, 2013), https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=28604, (Last visited 3/19/14).

240 29 U.S.C. § 657(e).

241 OSHA Letter of Interpretation, *supra* note 239.

242 *Id.*

243 Morris, *supra* note 64, at p. 186.



CONCLUSION

The laws of the United States governing worker representation were based on the principles of industrial democracy and majority rule. These longstanding principles, which have been in place for more than half a century, appear to be giving way to a very different system that allows for members-only representation. This system, as defined by Morris, reflects a major paradigm shift in a direction that was expressly rejected by Congress. The NLRB and the DOL have taken significant measures to promote this system and to promote organizations that have never demonstrated majority support by employees.

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unrelated employees. This would validate the substantial investments unions are making in worker centers. Rather than simply protest, small pockets of employees recruited by a worker center could actually form a formal union with dues-paying members.

The members-only model of representation is, at its heart, an end-run around the framework established by Congress. The NLRA was intended to ensure that changes made at a workplace are aligned with the wishes of a majority of employees. Moving away from

this paradigm is not only inconsistent with longstanding U.S. labor law but also with this country's core democratic principles.

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