WORKER REPRESENTATION AND PARTICIPATION IN BUSINESS DECISIONS THROUGH EMPLOYEE INVOLVEMENT PROGRAMS

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I. INTRODUCTION

Over the past several decades, there have been enormous changes in worker participation regarding human resource decisions through union representation and collective bargaining—changes which have varied significantly among different sectors of the economy. While the scope of decisions that public employee unions can affect on behalf of their members varies considerably among federal, state, and local jurisdictions, public sector unions represented 36.7% of employees by 1983 and has continued to represent a similar proportion in the 1990’s.¹ In contrast, representation and participation in business decisions through collective bargaining in the private sector of the economy has become less important, as unionization has plummeted from a peak of about 40% following World War II² to around 10% by 1995.³

Increasingly, worker representation, or the ability of employees to exercise a “voice” in business decisions, relies more on public policies and government workplace regulation than in the past. As discussed below, legislation regulating labor standards in the workplace originated in the 1930’s. However, starting in the 1960’s there was an explosion of legislation affecting labor standards, employee benefits, occupational safety, and health and employment decisions regarding re-employment rights and notification of plant closings. In addition, the new laws and regulations that banned discrimination now mean that a substantial portion

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³ CENSUS BUREAU, U.S. DEP’T OF COMMERCE, supra note 1, at 436.
of the work force belongs to an employee class with special wage, hiring, promotion, and job security protections. The legal recourse to alleged employment discrimination offered by government agencies and trial lawyers has become an alternative to grievance and dispute resolution services which, prior to the 1970's, were among the most sought after benefits offered by private sector unions.

Since the 1970's an increasing proportion of employees have participated in some form of business decisions. For a variety of reasons, employers have found it advantageous to develop employee involvement programs either unilaterally in non-union environments, or with union participation through collective bargaining, in order to improve economic performance.4

A single group, like managers, labor leaders, or workers, is not in a position to determine the degree of employee involvement in human resource and business strategy decisions within an organization. For example, even in non-union situations there are constraints on management's ability to introduce a high degree of employee involvement. As illustrated by the discussion below, the National Labor Relations Act restricts the ability of management to entrust employee involvement groups with decision-making responsibility concerning wages and conditions of employment. The success of a management-mandated employee involvement program also depends on how receptive employees are to this form of worker participation.

If unions are unable to organize workers and win union representation elections, they obviously cannot be a vehicle for providing employees a "voice" in the workplace. On the other hand, in the unionized sector, management and labor have agreed to form employee involvement groups in order to improve product quality and the overall competitiveness of the organization.5

While there have been numerous small-scale studies of employee attitudes toward worker participation in business decisions,6 there has not been a recent comprehensive study of the extent to which employees want to participate in human resource and other major decisions affecting conditions of employment and workplace operations. Professors Richard B. Freeman and Joel Rogers recently completed an extensive telephone survey of approximately 2400 workers in order to determine employees'

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4. FREEMAN & ROGERS, supra note 2, at 90-116 (discussing the effect of various forms of worker involvement on the firm's economic performance).

5. DANIEL J. MECKSTROTH, MANUFACTURERS ALLIANCE/MAPI, ER-212, DOES EMPLOYEE INVOLVEMENT IMPROVE THE PERFORMANCE OF U.S. INDUSTRY? (August 1991) (examining the development of the first generation of employee involvement groups in the United States known as "quality circles").

6. For a discussion of some of these studies see id. at 3-4.
views on the current labor relations system and what they want in terms of workplace governance. This paper briefly discusses the main findings of that study, What Workers Want, which describes the changing nature of employee participation in business decisions and analyzes why it is important to encourage employee participation in both unionized and non-unionized sectors.

II. INTERPRETATION OF THE SURVEY RESULTS

What Workers Want is based on a well-designed survey that provides a wealth of information about workers' attitudes toward employee participation in the workplace. The authors have made every effort to remain completely objective in presenting the survey results and, while representatives of management are likely to disagree with some of the authors' interpretation of the findings, the study is an important contribution to contemporary labor relations literature. The following are some of the most significant results and management's perspective on what the findings mean for workplace decision-making.

A. The Gap Between Desired and Actual Employee Participation

The results in Chapter Three of What Workers Want indicate that approximately 63% of respondents want more influence in their workplace, even though only one-quarter of them were "not too satisfied" or "not at all satisfied" with their influence on workplace issues.\(^7\) The authors conclude that one-third of the respondents are discontented.\(^8\) This is because 25% wish they did not have to go to work, another 9% do not care whether or not they have to go to work, and 29% rate employee-management relations as only "fair" or "poor."\(^9\) The results also suggest that satisfied workers with good employee-management relations at their workplace tend to enjoy a high degree of influence on workplace decisions.

The gap between desired and actual participation tends to be relatively small for the following four categories: influence over how to perform jobs and organize work, setting goals for their work group, setting work schedules, and setting safety standards.\(^10\) In contrast to these operational decisions, the gap was relatively high for financial issues such as the types of employee benefits that are offered, the size of pay raises, and the training

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7. FREEMAN & ROGERS, supra note 2, at 41 Exhibit 3.1.
8. Id. at 44.
9. Id. at 44 Exhibit 3.2.
10. Id. at 47 Exhibit 3.7.
needs of the work group.\textsuperscript{11}

Variations in the size of the gap between desired and actual participation with respect to different workplace issues is not surprising due to the disparate quantities of information and differing priorities between employees and management. For example, the operational level supervisors and the employees within the organization have the most knowledge about how to determine the work process. In contrast, management has much less freedom to encourage employee participation in financial decisions, such as employee benefits and compensation, because employees have less knowledge in this area.

Management has a responsibility to compensate workers according to their skill level and conditions in the labor market. They also want to ensure that their compensation system attracts and retains the work force necessary to make the organization productive. Additionally, management has to make the organization sufficiently profitable in order to compete for financing, which is generally provided by venture capitalists and shareholders, and the large institutional investors responsible for managing employee pension investments.

While short-run profitability is an important goal for managers, the long-term financial health of the organization is a more critical management responsibility. Employees tend to possess a much narrower view of compensation and focus more on wage and benefit improvements for the current work force than on the employment opportunities and benefits for future workers.

\textbf{B. The Representation Gap}

The survey found that 56% of the respondents felt more comfortable raising workplace problems through an employee organization while 38% preferred raising the problem in an individual capacity.\textsuperscript{12} At the same time, those who preferred representation by an employee organization, when discussing workplace problems, overwhelmingly preferred management cooperation with an employee organization rather than conflict.\textsuperscript{13}

The evidence of the representation gap is presented in Chapter Four of \textit{What Workers Want}. According to the survey, 32% of non-union respondents would vote for a union.\textsuperscript{14} In addition, of the 32% who favor a union, approximately 82% stated that they believed their colleagues would also vote for a union.\textsuperscript{15} This finding is the central focus of the study and

\begin{enumerate}
\item Id. at 48-49 Exhibit 3.5.
\item Id. at 55 Exhibit 3.7.
\item Id.
\item Id. at 69 Exhibit 4.1.
\item Id. at 68-69.
\end{enumerate}
raises a very important question: If almost one-third of non-union private-sector employees say they want a union, why has union membership declined so precipitously?

C. The Decline of Unions in Representing Employees in Workplace Decision-Making

There are several possible explanations for why unions are no longer a major force in representing workers in the private sector. The fact that the survey results show that approximately one-third of non-union workers wish to join a union is itself puzzling since, as was pointed out earlier, only about 10% of private sector employees are unionized. There may be a simple explanation for the significant difference between what respondents communicate in a telephone interview and how workers actually vote in representation elections.

In a telephone interview many workers may not, in principle, want to be perceived as opposing an institution that has been part of this nation’s democratic tradition. On the other hand, when confronted with an actual decision that is cast by a secret ballot vote, the worker may be more likely to have a realistic understanding of not only the potential benefits of a union, but also the cost of joining a union. The gap between workers’ views about unions in theory and in practice may be much narrower than the survey results suggest.

While the magnitude of the representation gap may be debated, there are four possible explanations, all with varying degrees of credibility, for the decline in private sector unionization.16

D. An Increase in Management Anti-Union Activity

Freeman and Rogers cite employer anti-union tactics as a typical union explanation for the decline in membership, stating that “[Unions] stress that anti-union managements bring in high-powered consultants, run expensive campaigns that impugn union supporters, and create a literal war at the workplace when workers try to organize.”17 This view is also supported by some academics. Furthermore, Freeman and Rogers are sympathetic to this view and claim that most firms support such management practices:

Most firms welcome the steady decline of private-sector unions and oppose any reform that might reverse that decline, however

16. Some of the data and views expressed in this section of the article appeared in KENNETH MCLENNAN, MANUFACTURERS ALLIANCE/MAPI, ER-493, GLOBALIZATION: IMPLICATIONS FOR U.S. INDUSTRY AND THE WORK FORCE OF THE FUTURE 5-10 (June 2000).
17. FREEMAN & ROGERS, supra note 2, at 86.
justifiable the reform. Once only Neanderthal ideologues dreamed of a “union free” economy, now however, as that reality approaches many businesses support this goal and are prepared to expend substantial resources to achieve it—lobbying to prevent union-friendly changes in existing law and resisting attempts at new organizing.\(^{18}\)

As Freeman and Rogers state in Chapter One of their book, the main reason for conducting this study was to provide information to the Commission on the Future of Worker-Management Relations, which was appointed by the first Clinton Administration to consider changes in labor law. The book was clearly designed to push future debate over labor law reform in the direction of supporting workers’ views and to make it easier for unions to organize the work force in this country.

In order for management anti-union activity to be a major factor in the decline of private sector unionization, management’s labor relation strategy must have undergone a dramatic change in the past forty years. However, in most businesses, management has always preferred a non-union environment and, as is permitted under the National Labor Relations Act, management has often opposed union organizing efforts. Over the years, many union campaigns to organize workers have been replete with unfair labor practices on behalf of both management and unions. United States’ labor history has documented management threats of job loss and actual firing of workers wishing to have a union represent them in collective bargaining.\(^{19}\)

The real question is: Is management anti-union activity greater today than it was forty to fifty years ago? It is very unlikely. What has changed is that now employers are much more sophisticated and effective in opposing union organizing campaigns and this may have contributed to the decline in private sector union membership. However, the claim that employer anti-union activity is a major reason for the precipitous decline in the proportion of private sector workers who are unionized is simply not credible.

\(E. \ Globalization \ and \ Structural \ Changes \ in \ the \ U.S. \ Economy\)

Over the past forty years globalization of the U.S. economy has had a profound effect on the U.S. private sector economy. In the 1960’s exports and imports represented approximately 10% of the U.S. gross

\(^{18}\) Id. at 67.

\(^{19}\) For a series of case studies describing recent employer anti-union activities in the United States, see HUMAN RIGHTS WATCH, UNFAIR ADVANTAGE: WORKERS’ FREEDOM OF ASSOCIATION IN THE UNITED STATES UNDER INTERNATIONAL HUMAN RIGHTS STANDARDS (August 2000).
domestic product ("GDP"). However, by the end of the 1990's, exports and imports were approximately 24% of the GDP. Economic interdependence also accelerated, and as a result, U.S. direct investment abroad and foreign direct investment in the U.S. has increased almost five-fold in the past two decades.

In the 1970's, U.S. industry had relatively low rates of productivity growth compared to other industrialized economies and the rapidly growing Asian economies. Many U.S. manufacturers were no longer leaders in global markets. For many U.S. industries, such as automobiles, primary metals, textiles, electronics and computers, economic survival depended on technological innovation, improved product quality, and higher rates of productivity growth.

Over the past two decades the rate of capital investment, which is the major source of productivity improvement, has increased significantly. In order to restore the competitiveness of U.S. industry, the distribution of capital resources shifted toward high value added industries and away from industries in which the U.S. had little comparative advantage. This reallocation of resources, coupled with management innovations and the increasing skill level of the work force, resulted in an upsurge in productivity. As shown in Table One, productivity for both manufacturing and the entire nonfarm business sector improved significantly in the 1980's and was extraordinarily high in the second half of the 1990's.

<table>
<thead>
<tr>
<th>Years</th>
<th>Manufacturing (percent)</th>
<th>Non-farm Business (percent)</th>
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<tbody>
<tr>
<td>1973-1980</td>
<td>1.9</td>
<td>1.3</td>
</tr>
<tr>
<td>1981-1990</td>
<td>3.0</td>
<td>1.5</td>
</tr>
<tr>
<td>1991-1999</td>
<td>4.3</td>
<td>2.0</td>
</tr>
<tr>
<td>1990-1995</td>
<td>3.5</td>
<td>1.5</td>
</tr>
<tr>
<td>1996-1999</td>
<td>5.1</td>
<td>2.6</td>
</tr>
</tbody>
</table>

21. Id.
22. Id.
23. Id. at 3.
24. Id.
25. Id. at 2.
26. Id. at 2-4.
Capital investment in the non-manufacturing sector also increased rapidly. Investment in manufacturing was highly concentrated with a few industries such as computers, telecommunications and electronics, which became the core of the so-called "new economy." Over time, this dramatically changed the industrial composition of the economy.

Table Two illustrates the contribution of various economic sectors to the GDP, as measured by value added. The contribution of construction, transportation and public utilities, wholesale and retail trade, and government has remained stable for the past four decades. However, agriculture, mining, and manufacturing have declined significantly. Services and finance, insurance, and real estate have increased most dramatically. The contribution of services has increased from 9.5% in 1959 to 20.4% in 1997, with most of the gain occurring in the 1980's and 1990's. Since 1977, the average annual real output growth in business services has been 7.1% compared to a growth rate of 2.7% for manufacturing.

| TABLE 2 |
| CHANGING CONTRIBUTION OF ECONOMIC SECTORS TO GROSS DOMESTIC PRODUCT, 1959-1997 |
| Percent of GDP |
| Agriculture, forestry and fishing | 4.0 | 2.9 | 2.9 | 1.9 | 1.6 |
| Mining | 2.5 | 1.7 | 2.7 | 1.8 | 1.5 |
| Construction | 4.7 | 4.9 | 4.9 | 4.5 | 4.1 |
| Manufacturing | 27.7 | 25.9 | 22.3 | 18.6 | 17.0 |
| Transportation and public utilities | 8.9 | 8.4 | 8.6 | 8.5 | 8.3 |
| Wholesale and retail trade | 16.8 | 16.5 | 16.4 | 15.6 | 15.7 |
| Finance, insurance and real estate | 13.5 | 13.9 | 14.5 | 17.6 | 19.4 |
| Services | 9.5 | 11.3 | 13.0 | 17.8 | 20.4 |
| Government | 12.8 | 14.6 | 13.6 | 13.6 | 12.7 |
| GDP | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 |

The shift towards a service-oriented economy and the high rates of productivity growth in manufacturing changed the industrial distribution of employment. As shown in Table Three, mining and manufacturing, the sectors of the economy which were the backbone of the U.S. labor

Due to rounding, the contribution of sectors may not equal exactly 100.
movement, have declined in employment, despite strong employment growth in the overall work force.

**TABLE 3**

**EMPLOYMENT TRENDS BY MAJOR INDUSTRY GROUP, 1979-1997**

(in Thousands)

<table>
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</thead>
<tbody>
<tr>
<td>Agriculture, forestry &amp; fishing</td>
<td>1,816</td>
<td>1,856</td>
<td>0.2</td>
<td>2,133</td>
<td>1.8</td>
</tr>
<tr>
<td>Mining</td>
<td>955</td>
<td>696</td>
<td>-3.1</td>
<td>600</td>
<td>-1.8</td>
</tr>
<tr>
<td>Construction</td>
<td>4,710</td>
<td>5,381</td>
<td>1.3</td>
<td>5,951</td>
<td>1.3</td>
</tr>
<tr>
<td>Manufacturing</td>
<td>21,184</td>
<td>19,521</td>
<td>-0.8</td>
<td>18,758</td>
<td>-0.5</td>
</tr>
<tr>
<td>Transportation &amp; utilities</td>
<td>5,167</td>
<td>5,669</td>
<td>0.9</td>
<td>6,462</td>
<td>1.7</td>
</tr>
<tr>
<td>Wholesale trade</td>
<td>5,295</td>
<td>6,362</td>
<td>1.5</td>
<td>6,740</td>
<td>-0.9</td>
</tr>
<tr>
<td>Retail trade</td>
<td>15,461</td>
<td>20,166</td>
<td>1.8</td>
<td>22,620</td>
<td>0.7</td>
</tr>
<tr>
<td>Finance, insurance &amp; real estate</td>
<td>5,201</td>
<td>6,842</td>
<td>2.8</td>
<td>7,243</td>
<td>0.7</td>
</tr>
<tr>
<td>Services</td>
<td>19,359</td>
<td>28,945</td>
<td>4.1</td>
<td>37,991</td>
<td>3.5</td>
</tr>
<tr>
<td>Government</td>
<td>18,902</td>
<td>21,287</td>
<td>1.2</td>
<td>22,069</td>
<td>0.5</td>
</tr>
</tbody>
</table>

According to the U.S. Department of Labor, Bureau of Labor Statistics, 1998-2008 Occupational Outlook, manufacturing job losses since 1988 have been concentrated in industries which traditionally represented the strength of the unionized work force. For example, during the 1990’s, employment in blast furnaces and basic steel products, which had been on the decline since the early 1970’s, continued to lose jobs at a rate of 4.7% per annum and is projected to decline approximately 5.0% per annum this decade. Job losses also occurred in other primary and fabricated industries such as iron and steel foundries, nonferrous smelting, refining and metal cans, and shipping containers.

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33. MECKSTROTH, supra note 32, at 10-12.
34. Id.
Job losses were especially large in the textile mill and apparel sectors. For example, between 1988 and 1998 an average of 34,000 apparel jobs were lost per annum. For other highly unionized industries, such as motor vehicles and equipment, employment in the 1980's grew slightly to 990,000 by 1998. However, strong productivity growth is even expected to reduce the number of these jobs in the current decade. Although aerospace experienced a significant decline in employment in the 1990's, it is expected to increase in the current decade.

For at least two decades, union organizers have faced a daunting challenge because employment growth in manufacturing, the traditional base of the U.S. labor movement, declined and job growth shifted toward services. As is shown in Table Three, in 1979 there were approximately two million more manufacturing jobs than service-sector jobs. But by 1997, there were nineteen million more service jobs than manufacturing jobs.

United States unions have generally failed in the very difficult task of organizing workers from job growth industries in the private sector. This is the primary reason why unions have failed to be an important vehicle for providing a significant portion of the work force with more influence in workplace decisions.

F. Union Failure to Provide the Services Demanded by the Work Force

As suggested by Professors Freeman and Rogers, employers frequently claim that unions fail to recognize that the current generation, as well as future generations of workers, are less interested in the traditional services offered by unions. Globalization and the information revolution have made the work force more mobile.

Labor mobility, which has always been high for younger workers, is now accelerating in most age groups in the work force. For example, while the median years of job tenure for workers sixteen years and over is approximately 3.5 years, about the same as in 1983, tenure by specific age groups has declined. For workers age fifty-five to sixty-four, median job tenure is now eleven years compared with fifteen years in 1983; and for those age forty-five to fifty-five, it is now 9.5 years compared with 12.5 years in 1983. About one in ten workers are now independent contractors.

35. Id.
36. Id.
37. Id.
38. Id.
39. FREEMAN & ROGERS, supra note 2, at 86.
42. Id.
or have some form of temporary contract.\textsuperscript{43} The traditional concept of a "social contract," between workers who spend thirty years with one employer, and in return receive considerable job security and generous health and retirement benefits, will become less common in the future.

The trend toward frequent job changes has important implications for employee benefits. In 1975, 39\% of private-sector employees participated in defined benefit retirement plans.\textsuperscript{44} These plans favor employees who remain with the same employer for most of their working lives because the rate of benefit accumulation increases with length of service, and the level of benefit is calculated using the average of the final years of employment. Consequently, while workers who change jobs every five to ten years will be vested under a defined benefit plan and receive retirement income, the benefit amount received from three separate ten year defined benefit plans will be much less than a single thirty year defined benefit plan.

Young workers and other employees who change jobs frequently are much better off with a series of defined contribution plans. Under these plans, employers make contributions to an individual worker's plan based on a percentage of the worker's pay. Workers are usually able to contribute on a pre-tax basis through a 401(k) plan with matching the contributions made by the employer. Under the defined contribution plan, the worker is vested either immediately, or after a one year period.

For young workers who typically have higher rates of mobility, the defined contribution plan obviously provides a much better package than a defined benefit plan. Consequently, since 1980, the number of workers participating in defined benefit plans has declined, and the number of participants in defined contribution plans has increased substantially. Based on data in a study prepared by Watson Wyatt Worldwide, as of 1995 only 23\% of workers were covered by defined benefit plans compared to 39\% in 1975.\textsuperscript{45}

Some of the decline in defined benefit plans has also been the result of government regulation, which places a cap on the annual level of plan funding. This was not a problem when the baby boom generation was relatively young. However, as this population approaches retirement, the cost of funding increases rapidly and employers are beginning to convert to hybrid plans such as cash balance and pension equity plans, which have a high degree of portability. These plans are similar to defined benefit plans in the way in which they are financed. However, from an employee's point of

\textsuperscript{43} Id.
\textsuperscript{44} McLennan, supra note 16, at 9.
\textsuperscript{45} Watson Wyatt Worldwide, The Unfolding of a Predictable Surprise: A Comprehensive Analysis of the Shift from Traditional Pensions to Hybrid Plans iii (2000).
view, they are also similar to defined contribution plans because they are payable as a lump sum and can be rolled over into an IRA for future retirement income. Clearly, in an era of increased labor market mobility, defined benefit plans are less desirable than other types of plans for the future workforce. The importance of defined benefit plans will likely continue to decline well into the future.

Unions have been slow to recognize that employees in growth industries have become less interested in wage and benefit packages traditionally negotiated by unions. Defined benefit plans and first-dollar health insurance plans are less beneficial to an increasingly mobile workforce. The work force of the future is more concerned with pay-for-performance and the opportunity to participate in stock options. The Freeman and Rogers survey results confirm this shift away from traditional collective bargaining compensation package. Some 22% of nonmanagerial employees reported that they are included in some form of employee stock-ownership plan, and 12% describe their firm as employee-owned.46

G. Employer Unilateral Employee Involvement Initiatives

Globalization and increasing competitive pressure in global markets have forced executives of most U.S. manufacturing companies to adopt new strategies and practices. Since the mid-1980's, most Manufacturers Alliance member companies that compete in global markets have gone through some form of "re-engineering," which involves a full evaluation of business management processes in all functional areas of management responsibility. This has had important implications for decision-making in the workplace.

An evaluation of the value added by staff at corporate offices frequently showed that much of the support staff was unnecessary overhead and a by-product of an overly bureaucratic management structure. Companies responded by eliminating middle-level management, and therefore, many white-collar jobs were lost.

Downsizing at corporate offices meant that most decision-making was then shifted to operational levels. While some decision-making, such as research and development, strategic planning, and legal counsel, was retained at the corporate level, most decision-making, such as manufacturing, marketing, international trade and engineering, was located at the division or, in some cases, the plant level. Decentralization of decision-making often encourages management to introduce some form of an employee-involvement program.

Chapter five of What Workers Want describes the extent to which the

46. FREEMAN & ROGERS, supra note 2, at 91-92.
respondents had access to various types of employee-involvement programs. These programs ranged from "open door to management" (available to the vast majority of employees), to an outside arbitrator resolving grievances (available to one-third of respondents), to an actual employee-involvement program with the respondent's firm (available to 52% workers). While some companies may have adopted these human resource practices as a "union avoidance" strategy, many employers are merely increasing employee involvement in some business decisions.

Most employers have introduced employee involvement programs in order to improve the economic performance of their organizations. There is considerable evidence that these programs are an important component of quality improvement and have a modest positive effect on productivity. The results of the Freeman and Rogers survey confirm that employees believe that their firms’ employee involvement program is an important source of productivity improvement.

The survey results also confirm that while employee involvement programs help reduce the representation/participation gap, they do not close it. The authors point out that employee involvement participants are much less likely to state that they would vote for a union in an NLRB election than non-participants.

According to the survey responses, 55% of unionized workers had an employee involvement program at their workplace compared to 49% of non-union workers. While this degree of participation seems relatively high, not all such programs have a high level of decision-making authority. This indicates that the responses undoubtedly included programs which were little more than a vehicle for employees to make suggestions.

The authors interpret the results of employee involvement programs as an indication that these programs complement unions as a way to provide employees a "voice" in the workplace. This conclusion is highly questionable. While employer initiatives encouraging employee involvement are not the primary reason for the decline in union's role in the private-sector, there is little doubt that enlightened human resource strategies, which give the employee a stake in the economic success of the organization, have, in many cases, made unions less relevant.

47. See generally FREEMAN & ROGERS, supra note 2, at 90-116.
48. Id.
50. FREEMAN & ROGERS, supra note 2, at 105.
51. Id. at 113.
52. Id. at 11.
53. Id. at 115-16.
H. Worker Representation and Government Regulation of the Workplace

Since the 1930's, public policies have created an ever-changing legal environment which has given employees a greater "voice" in the workplace. The current complex pattern of laws, government executive orders, and government regulations started by President Roosevelt's "New Deal" has continued to escalate with the Clinton Administration's attempt to enhance the government welfare state through regulation of the workplace. This growth of workplace regulation in the United States has occurred in several phases.

I. The New Deal

This landmark social legislation in the United States was intended to reduce the labor-management conflict over workers' rights to be represented by a union, which had existed since the late nineteenth century. The National Labor Relations Act of 1935 protected the workers' right to organize and established a framework for determining whether workers and employers should bargain collectively. At the same time the Act prohibited the government from setting the terms and conditions of employment. This framework was subsequently modified in 1947 with the passage of the Taft-Hartley Act, which was designed to equalize the balance between union and management roles in union elections.

In 1959, the government's regulatory role in creating a framework which established employer, union, and union members' rights and responsibilities was enhanced by the Labor Management Reporting and Disclosure Act. This act required disclosure by unions and employers of a wide range of financial and administrative information.

Important social legislation affecting workers also originated with the New Deal. For example, the Unemployment Compensation Act was originally enacted as a provision of the Social Security Act of 1935. The Act authorized federal grants for state unemployment compensation administrations in order to encourage states to establish their own compensation programs.

The minimum wage was established by the enactment of the Fair

58. Id.
Labor Standards Act in 1938. This act, which has been amended many times, also regulated hours of employment and requirements for overtime. Wage standards were also regulated by the Davis-Bacon Act of 1931. This act required contractors and subcontractors on federal government public works projects to pay mechanics and laborers prevailing wages and fringe benefits determined by the local labor market. This act was designed to protect federal government construction workers from lower wage competition due to workers migrating from the South to Washington, D.C.

J. *The Great Society*

The next major phase of government intervention in workplace activities was President Johnson's "Great Society" program. The most important features of this program were based on public policies directed at the prohibition of employment discrimination. This group of legislation contained three statutes and one executive order. The Equal Pay Act of 1963 (passed during the Kennedy Administration prior to the "Great Society" program) prohibited discrimination on the basis of sex in the payment of wages. Title VII of the Civil Rights Act of 1964 prohibited employment or membership discrimination by employers, employment agencies, and unions on the basis of race, color, religion, sex or national origin. The Pregnancy Discrimination Act of 1978 prohibited employment discrimination against women affected by pregnancy, childbirth or related medical conditions.

Title VII of the Civil Rights Act was followed in 1965 by Presidential Executive Order 11246. This order required non-discrimination policies and affirmative action programs by federal contractors and subcontractors involved in contracts of $10,000 or more. In addition, the order required the adoption of affirmative action programs in order to ensure that the protected groups, identified in Title VII, would receive some degree of remedial preference in hiring and promotion decisions. Therefore, an effective affirmative action program became a requirement in competing for federal contracts.

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61. Id.
During the Great Society era, the prevailing wage concept, established under the Davis-Bacon Act of 1931, was extended to services under the Service Contract Act of 1965. The Age Discrimination in Employment Act, passed in 1967, protected workers age forty and over from discrimination in the workplace.

K. Implementing "Great Society" Legislation

Much of the implementation of the "Great Society" program occurred during Republican administrations with Democrat congressional majorities. Republican administrations were somewhat critical of labor standards legislation, but they did not take action to change these policies and even supported the existing labor relations public policies. They were generally strong supporters of collective bargaining and believed that unions and management should determine the outcome of negotiations with little government intervention.

As advocates of the free operation of labor markets, Republican administrations favored equal employment opportunities and initiated active enforcement of the Equal Pay Act. They also developed programs to reduce extensive discrimination against minorities and women throughout industries.

Implementation of Title VII of the Civil Rights Act was a difficult issue for the U.S. labor movement since some unions were major perpetrators of discrimination. In the past, a few unions permitted segregation with separate local unions for black and white members. Unions traditionally emphasized improving the conditions of employment for current union members. For many unions, especially craft and professional unions, the strategy had been to control entry into the craft or profession in order to reduce labor supply and raise wages. As a result, by the 1960's, discrimination against minorities and women by unions, often coupled with the acquiescence of employers, was widespread in many industries.

During the Nixon Administration, the Secretary of Labor developed an affirmative action strategy, known as the Philadelphia plan. This plan required employers and unions to employ quotas in hiring so as to secure employment opportunities for minorities in the construction industry. This concept was expanded to the rest of the industry by requiring government

68. One exception to this avoidance of government intervention in determining wages was the Nixon Administration's wage and price guidelines, used to control inflation. Such control is a direct interference with management/union negotiation of wages.
contractors to adopt goals and timetables to increase employment opportunities for minorities and women. To this day, whether affirmative action was intended to mean equal opportunity or equal outcomes remains a controversial issue. It is clear, however, that the protections under Title VII and the development of affirmative action plans to encourage employment opportunities for minorities and women did not contemplate the use of quotas. The use of quotas in recruitment and promotions is illegal in the public sector, although, in practice, employers in the private, public, and academic sectors often achieve “diversity” goals through informal quotas.

Republican administrations and Congress also enacted legislation designed to improve workplace safety and protect employees’ pension and welfare benefits. The Occupational Safety and Health Act (“OSHA”) was passed in 1970,69 and the Employee Retirement Income Security Act (“ERISA”) was enacted in 1974.70 Republican leadership in the House of Representatives was the driving force behind OSHA, and Republican leadership in the Senate was influential in the passage of ERISA.

Both OSHA and ERISA addressed legitimate workplace concerns, but had some adverse effects. ERISA established pension funding and vesting requirements as well as fiduciary responsibilities for plan sponsors. The regulatory burden of managing the complex rules implemented by the program was enormous and imposed substantial costs on industries in large part because four government agencies (the U.S. Department of Treasury, the Internal Revenue Service, the U.S. Department of Labor, and the Pension Benefit Guarantee Corporation) had enforcement responsibilities. As a result, as pointed out earlier, there has been a decline in the number of pension plans covered by ERISA.

OSHA was enacted to improve health and safety in the workplace. Prior to the enactment of ERISA and OSHA, issues concerning pensions and workplace health and safety were primarily the responsibility of management and labor. Although unions were strong supporters of ERISA, initially they were slow in embracing the passage of OSHA. With the passage of pension and health and safety legislation, unions became less important in representing workers on these issues.

L. Toward the New Welfare State

Between 1935-1960, the government set minimum labor standards for wages and hours and established the “rules of the game” for employers and employees in determining workplace practices. The Great Society

introduced more activist government policies regarding workers. Many of these policies were accompanied by complex regulations which produced benefits, but were also costly to businesses. These costs were passed on to consumers, or back to workers, in the form of slower growth in wages or employment. Consequently, while the Great Society programs produced benefits, their costs were not highly visible since, in most cases, no direct government expenditure was involved.

While the Reagan Administration attempted to rationalize the regulatory excesses of the Great Society legislation and the regulatory interventions of the Carter presidency, George W.H. Bush’s Administration witnessed two dramatic increases in the scope of workplace regulation. President Bush prioritized protection for the disabled. With the active encouragement of the Bush Administration, the Americans with Disabilities Act of 1990 (hereinafter “ADA”) was passed nearly unanimously by Congress.\textsuperscript{71} The Act best represents the phenomenon of the law of unintended consequences in public policy. By agency interpretation and judicial decisions, the ADA has become one of the major factors in the increasing legalization of the workplace. The ADA now covers classifications of disabilities, such as learning disabilities and bad backs, that were never contemplated when it was passed.

In 1991, Congress passed the Civil Rights Act of 1991.\textsuperscript{72} The major result of this Act was the introduction of compensatory and punitive damages and jury trials into federal equal employment litigation. While the damages regime did place a cap on damages based on the work force size of the employer, the fact that damages and jury trials were introduced marked a major expansion in employment litigation.\textsuperscript{73}

Despite President Clinton’s claim that “the era of big government is over,” his administration has enacted and proposed legislation that would expand the welfare state by imposing new mandates on employers. For example, the Family and Medical Leave Act of 1993 (FMLA) mandated that employers allow employees to take up to 12 weeks of unpaid, job-protected leave to care for a sick child, spouse or parent, for the birth or adoption of a child, or for the employee’s own serious health condition.\textsuperscript{74}

\textsuperscript{73} According to the testimony of Lawrence Z. Lorber, Esq. of Proskauer Rose LLP, the number of civil rights and employment cases in federal courts decreased from 19,846 in 1985 to 19,100 in 1991. However, by 1998, the number of these cases had increased by 126% to 43,187, far outstripping the growth in employment during the same period. Testimony Before the Subcommittee on Administrative Oversight and the Courts of the Senate Committee on the Judiciary, 106th Cong. 13 attach. A (2000) (statement of Lawrence Z. Lorber, Proskauer Rose, LLP).
Six years later, President Clinton directed the Secretary of Labor to propose regulations that would enable states to find innovative ways of using unemployment insurance to supplement for FMLA. This proposal is simply a back-door attempt to mandate paid family leave since Congress would not enact a government expenditure program to fund the cost of the proposal.

The shift from the government setting the "rules of the game" for union representation and collective bargaining to government mandates on employee benefits and protections has resulted in unions having less of a role in providing these services to employees. This is the most important point about worker representation and involvement in workplace decisions. Employees can now turn to government enforcement agencies or lawyers for assistance in filing legal suits that allege violations of government mandated benefits and protections.

M. Stimulating Employee Participation: A Management Perspective

The research results presented in *What Workers Want* confirm the conclusions of previous studies that employee involvement raises productivity and generally improves the economic performance of the organization. The study also confirms that a majority of respondents favor such involvement. Professors Freeman and Rogers believe that the results of their study should be utilized to shape future labor-management public policies. Asking what workers or management want is not the critical question for public policy development. While the views of workers and managers are important and should be considered, ultimately, labor relations policies should be in the public interest. Consequently, the most important question is: What labor relations reforms will help stimulate employee involvement programs which will in turn contribute to higher rates of economic growth?

Unions and management have divergent views on what the appropriate public policies are that will stimulate the formation of such employee-involvement programs. Unions are concerned that the expansion of employee involvement programs in the non-union sector will allow management to use worker participation as a union avoidance tactic. This is why the AFL-CIO is opposed to policies that allow non-union employers to establish employee involvement programs similar to the ones permitted in unionized facilities, under the National Labor Relations Act.

Unions generally view the demand for greater employee participation as an opportunity to expand private sector unionization through reforms of

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75. Freeman & Rogers, *supra* note 2, at 104-05.
76. Id.
77. Id. at 116.
the NLRA, which will make it easier for unions to represent workers. In contrast, management is opposed to labor law reforms which would allow unions to be certified as a bargaining agent without a secret ballot vote by employees. For example, unions would like to be certified if a majority of bargaining unit employees sign authorization cards. Based on experience with Manufacturers Alliance member companies, however, the vast majority of private sector businesses are strongly opposed to amending the NLRA to allow this method of achieving union representation. Card certification campaigns can result in extensive personal pressure on individual employees to go along with the views of other employees. In the final analysis, there is no substitute for secret ballots to determine the will of individuals.

Management generally supports the free flow of information during union election campaigns and most businesses oppose any explicit intimidation or threats by supervisors regarding the consequences of voting against, or for, a union during certification campaigns. In my view, most business executives would support strengthening the enforcement of unfair labor practices associated with union elections. This would include accelerating the process for investigating claims of unfair labor practices so that frivolous claims can be differentiated from substantively unfair practices. Penalties for proven egregious, unfair behavior should be swift and sufficient in order to discourage such practices.

Management feels strongly that public policy should not inhibit the formation of employee involvement programs. At the same time, management opposes government regulation of how employee work groups should be formed, usually elected or appointed by management, and how such groups should operate.

The wide range of employee involvement groups now in existence confirms the management view that “one size does not fit all.” Employers recognize that unions, as the bargaining agent for employees, should be able to negotiate with respect to employee involvement programs. In non-union situations, employees should also be able to express their views on these programs. In both union and non-union environments, however, the final decision to introduce, modify or eliminate an employee involvement group rests with management.

Management believes that labor relations public policy should enable companies to achieve a high degree of participative management and adopt “high performance” work systems. In these systems: employers invest heavily in human capital; workers receive a significant amount of training in statistical techniques and interpersonal and communications skills; job responsibilities are defined broadly; decision-making is self-directed by work groups; and pay-for-performance is typical.

The current interpretation of § 8(a)(2) of the NLRA discourages the
existence of employee involvement programs where decision-making is self-directed by work groups. In non-union situations, a high degree of devolution of decision-making can affect some of the conditions of employment and may be a violation of § 8(a)(2) of the NLRA. Section 8(a)(2) makes employer domination or interference with the formation or administration of any labor organization an unfair labor practice. The union position is that employee involvement groups are labor organizations under § 2(5) of the NLRA because they "deal with employers" regarding "conditions of work." Congress tried to amend § 8(a)(2) of the NLRA by enacting the Teamwork for Employees and Management Act (TEAM). The TEAM Act would have modified § 8(a)(2) by permitting employers to establish work groups, which would improve quality and productivity, provided that such groups would not negotiate collective agreements or attempt to amend any existing labor contracts. This legislation passed the House of Representatives and the Senate, but was vetoed by President Clinton in 1996.

Since both workers and employers, as well as the public, appear to benefit from this form of participative management, it is necessary to modify labor law in order to disperse these benefits throughout the economy. Management believes that the public policy toward increasing workers' participation in business decisions should support a pluralistic approach by encouraging participation in both union and non-union environments.

79. See id. at § 2(5).
81. BNA, DAILY LABOR REPORT e-1 (Dec. 1997).