

LABOR POLICY FOR THE TWENTY-FIRST CENTURY

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Stated simply, the National Labor Relations Act (NLRA) no longer serves the purposes for which it was originally enacted. While historians continue to debate the intent of the original framers of the Act, my reading of its role was, and continues to be, that it is intended to provide workers with a voice and representation on critical issues affecting their job; to resolve, in an efficient and equitable fashion, conflicts occurring between workers and employers; and to provide a process that enables workers and employers to contribute to the performance of the economy and share equitably in the fruits of their joint labors. Moreover, the Act served as the central statute governing relations between workers and employers for several decades following its enactment in 1935, it is now only one of many laws and regulations governing specific employment rights and issues. Similarly, while collective bargaining was once envisioned as the preferred option for workers seeking a collective voice on issues of concern to them, in practice, it now competes with or is complemented by a variety of other informal and formal participatory and representational processes. Therefore, any efforts to reform this statute must consider its interrelationships with and appropriate role in the broader spectrum of employment law and practice.

Thus, in this essay, I will focus on what I believe is the central question facing labor policy today: which labor and employment policy and enforcement processes are best suited to meet these objectives as we look forward to entering the twenty-first century?

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I. THE BASIC PROBLEMS¹

To solve the NLRA's underlying problems requires that we face squarely and honestly the enormous gap between the assumptions of the original law and current workplace realities and practices. This gap holds both negative and positive lessons. It documents both the problems parties experience with the law and the innovations introduced in some of America's best workplaces in recent years, innovations that I believe provide the basis for a fundamentally new labor and employment policy that empowers workers and employers to take responsibility for governing their relationships in ways that suit their needs and circumstances.

The mismatch between the law and current practices is evident in several ways.

1. The law no longer delivers on the promise that workers will have the opportunity to choose whether or not to be represented by a union on their job. Instead, the process governing representation has been transformed into a high risk, highly conflictive legal battle between employers and unions. Any employer seeking to defeat a union organizing drive can do so by resisting aggressively through legal or illegal means, stringing out the process through various appeals, and, if necessary, stonewalling the union in the negotiation of a first contract or threatening to hire replacement workers. Yet, for more than twenty years, surveys have shown that approximately one out of three nonunion workers would prefer to be represented by the union if given the chance.

Moreover, the law provides only a single form of representation focused around a constrained set of issues while a strong majority of today's work force is calling for more varied forms of participation, voice, and representation which were not anticipated by the framers of the NLRA. Again, surveys have documented that the majority of American workers today want to participate directly in decisions that affect both their immediate and long-term economic interests *and* in decisions that influence how their work is structured and how their efforts contribute to the goals of their enterprise and their profession. Moreover, while workers want to have a voice in selecting who

1. The material in this section draws heavily on the evidence presented in COMMISSION ON THE FUTURE OF WORKER MANAGEMENT RELATIONS, U.S. DEP'T OF LABOR & U.S. DEP'T OF COMMERCE, 1994 FACT FINDING REPORT 63-65 [hereinafter FACT FINDING REPORT]. While I recognize that the Commission's recommendations are controversial, I believe that the facts contained in the Commission's first report will need to be taken into account in any future efforts to modernize labor and employment law.

will represent them in these processes, they also want and expect managers to cooperate and support, rather than oppose, these efforts.² Thus, the law effectively denies the majority of today's workers access to the different forms of representation they want in their jobs.

2. The law no longer works for modern employers either, especially those who seek to compete by involving their work force in cooperative efforts to improve the performance of their enterprise. These employers must draw on workers' knowledge by decentralizing decision making to front-line workers and involving employees in a continuous search for ways to improve productivity, quality, and customer service. This requires breaking down traditional lines of demarcation between workers and supervisors or managers drawn in the law. Indeed, a significant number of employers have ignored the law and are introducing these changes in their organizations. Unfortunately, since these needs were not anticipated in the 1930s when the NLRA was enacted, they are discouraged and inhibited by current law and its interpretation by the National Labor Relations Board interpretations and the courts in both nonunion and union settings. It is very poor public policy to retain doctrines that require the best of our employers (and unions) to violate the law by doing what is in the best interests of the economy and the work force! The effect can only be for the law to fall into further disrepute and, at worst, to constrain the diffusion of practices that are in the mutual interest of employers, employees, and the overall economy.

3. Collective bargaining is no longer the forum where the issues creating many of the conflicts occurring in today's workplace are addressed or resolved. There are two reasons for this. First, unions represent only a small fraction of the work force, and second, collective bargaining contracts and administrative processes address only a subset of the problems and conflicts that arise in workplaces today. Instead, this conflict resolution role has been ceded to the array of employment statutes and regulations enacted since the 1960s

2. See the results of the Worker Representation and Participation Survey directed by Richard Freeman and Joel Rogers and conducted by the Princeton Survey Research Associates as summarized in the Appendix to COMMISSION ON THE FUTURE OF WORKER MANAGEMENT RELATIONS, FINAL REPORT AND RECOMMENDATIONS 63-65 (1994) [hereinafter FINAL REPORT].

that apply to all workers regardless of whether they are covered by a bargaining agreement. However, these employment laws and regulations have become so complex and expansive that they have exceeded the capacity of government agencies to enforce them. They also impose tremendous burdens on employers faced with the task of compliance. Finally, they fail to provide effective justice to many of the workers most at risk of being victims.

Unlike the NLRA, these statutes lack the functional equivalent of the NLRB and private arbitration, through which a body of common law and “common law of the shop” evolved progressively to guide and shape workplace practices. As a result, we have experienced a 400% increase in federal lawsuits between 1971 and 1991, a backlog of over 100,000 cases at the Equal Employment Opportunity Commission, and continuous declines in staffing levels of Department of Labor enforcement agencies. There is growing agreement on the need to find an alternative to the rigid “command and control” regimes used to enforce these policies. Mediation and arbitration tools initially developed under collective bargaining, along with newer alternative dispute resolution (ADR) techniques, may serve as viable alternatives. However, we have not yet determined how to incorporate these techniques into an alternative system for delivering workplace justice and resolving the conflicts occurring in today’s workplaces.

4. The implicit model of the employment relationship that underlies much of labor and employment law and regulation no longer accommodates an increasing number of today’s workers or firms. The standard image of employment is one of an ongoing relationship between a full-time career employee and a single employer responsible for complying with all workplace laws and providing a broad range of fringe benefits and training opportunities. The increased diversity of the work force, growth of contingent work, outsourcing of work not central to the core mission or competencies of the firm, and increased demand for flexibility in working hours and career patterns all make it more difficult to assign these responsibilities to a single firm. Reforms of labor and employment laws must therefore take into account the diverse nature of the work force, the range of employment relationships, and the shared and ambiguous locus of traditional managerial responsibilities found in the modern economy.

II. PRINCIPLES FOR A MODERN LABOR AND EMPLOYMENT POLICY

The scope and magnitude of these problems suggest that minor tinkering with the law or incremental adjustments dealing with particular problems will not suffice. Nor will efforts to modify the NLRA without regard to developments in current workplace practices or to the problems facing other areas of employment law and regulation. Finally, any reform effort should take advantage of the opportunity to privatize responsibilities for enforcing and adapting employment laws by drawing on the innovative capacities and potential found in many of today's employment relationships.

Thus, I suggest three principles to guide efforts to update and modernize labor and employment law. We need to (1) take a comprehensive approach, (2) encourage development of private self-governance processes to adapt the law to different settings, and (3) promote experimentation with new institutional arrangements that allow us to learn as we go.

A. *Taking a Comprehensive Approach to Updating Employment Law*

The problems summarized above are not only serious and critical, but also highly interrelated. They cannot be addressed through piecemeal, incremental reforms of one part of the NLRA, nor by responding to the concerns of workers or employers while ignoring the legitimate problems of the other. Moreover, we must recognize the futility of trying to reform labor law in isolation from the broad range of laws and regulations that apply to all workers, not just those covered or seeking to be covered by collective bargaining. Labor law reforms must be seen as part of the larger task of restructuring the entire body of employment law and regulations in ways that are better suited to today's diverse work force and employment arrangements. The concluding comments of the Fact Finding Report are worth repeating here because I believe they outline the essential challenges and opportunities before us:

A diverse workforce requires variation in methods and procedures for employee participation, representation, and dispute resolution. Sustained labor-management cooperation requires acceptance of labor representatives as valued partners in existing work sites under collective bargaining and respect for workers' rights to choose whether or not to be represented in new facilities. Cooperation cannot be sustained in an environment of bitter, prolonged, and inflammatory debates over the process of worker representation. Collective bargaining relationships that follow long battles over union recognition cannot be easily transformed into cooperative and highly

participative workplaces.

Alternative dispute resolution procedures cannot take on a broader role in enforcing workplace justice unless the parties affected participate in both the design and oversight of the system.

The issues and the parties . . . no longer fit the traditional labels of “worker” versus “supervisor” or “manager,” or “exempt” versus “nonexempt.” The issues of concern in the modern workplace transcend those covered by a traditional collective bargaining contract. Thus, participation in the design and oversight of workplace dispute resolution must also transcend these traditional labels and boundaries between employee groups.

The success of any formal dispute resolution system requires effective workplace policies and institutions that both prevent problems from arising in the first place and resolve as many as possible informally before they escalate into formal complaints or lawsuits Workplaces that have been successful in developing the trust needed to foster and sustain employee participation and cooperation are more likely to have these types of policies and the capability to resolve those problems that do arise. The question is whether it is possible to take advantage of existing labor-management relationships and employee participation processes to fulfill some of these workplace justice roles.³

These interdependent features of contemporary labor policy challenge us to see the problems in their full dimension and to fashion a comprehensive alternative, rather than a piecemeal approach.

B. Encouraging Development of Self-Governing Workplaces

Many of our most functional employment relationships have practices in place that, if used to their full advantage, are capable of addressing many of these interrelated problems. We should both learn from and take advantage of the “best practices” that already exist in some of America’s workplaces. By doing so, we can replace the rigid “command and control” approach to enforcement with one that encourages self-governance and development of private dispute resolution systems that are more efficient, flexible, speedy, and just. However, to do so will require that we differentiate between those innovative employers and workers that have the capacity to take on self-governance responsibilities and those that lack

3. FACT FINDING REPORT, *supra* note 1, at 140.

these capabilities and, therefore, require an updated but more traditional form of regulation, protection, and enforcement.

Thus, I propose we create a "Two-Track" labor and employment policy. One track would apply to those employment relationships that demonstrate they have in place the types of participative, dispute resolution, and representational structures and processes that would allow them to internalize responsibility for enforcing and applying a broad range of laws and regulations governing employment relations. The second track, applicable to those employment relationships lacking these internal responsibility capabilities, would be governed by traditional methods of enforcement and adjudication of alleged infractions of laws or regulations.

A primary objective of national policy should then be to promote the development and broader diffusion among employees and employers and their organizations of the capabilities needed to internalize responsibility for enforcing employment law and for adapting regulations to fit their particular circumstances. Those employers and employees with effective self-governance systems should be granted greater flexibility in how they meet the goals and standards contained in various employment regulations.

C. Supporting Experimentation and Learning

These new principles require considerable institutional innovation, especially if they are to address the needs of those workers who are not employed full-time for an extended period by a single employer at a fixed work site. Unions and/or other associations need to develop the strategies and capabilities to represent workers as they want to be represented. Government enforcement agencies, neutrals, the courts, and the parties to employment disputes all need to develop fair procedures for resolving disputes privately. Employers need to create workplace environments and policies that win and sustain the trust and support of employees and add economic value to the enterprise. These efforts will require a process of experimentation and learning. Fostering this experimental learning process should be an explicit goal and high priority of labor policy makers and administrators.

III. IMPLEMENTING THE PRINCIPLES: A TWO-TRACK PROPOSAL

Principles are fine; however, as with any policy, the action (or the devil) is in the details. Therefore, I want to outline here a set of specific legislative and administrative actions that would put these principles to work and begin the testing and learning process. The basic proposal is to create a flexible self-governance option for adapting and internalizing enforcement of workplace laws and regulations that would be available for

those employers and employees that have instituted state-of-the-art employee participation practices and dispute resolution systems. This self-governance option would be built on the foundation of other necessary reforms to labor and employment law that would apply to all employment relationships. However, participants of the self-governance option would be encouraged to meet some of their legal requirements through practices adapted to fit their particular circumstances that produce equivalent or better results.

A. *The Self-Governance Option*

The self-governance option would provide a simple, non-litigious way of promoting fair dispute resolution systems for enforcing legal rights while encouraging further expansion of broad-ranging employee participation processes. It would work as follows:

1. Employers and employees that have in place an employee participation process and a fair dispute resolution process would be allowed to resolve alleged legal violations through private mediation and arbitration. They could meet the requirements of workplace laws with "equivalent practices or standards" that are adapted to meet their specific situation, but are at least equal to or better than the standard or requirements contained in the law. Employees could appeal to the arbitration process and the relevant agency if they believe a local practice does not meet the "equivalency" test. The relevant government agency should be responsible for reviewing whether the decisions of private arbitrators conform with existing law and meet the equivalency standard, just as the NLRB currently does under the Spielberg doctrine.

2. NLRA provisions limiting employee participation would be waived in employment relationships that have in place fair procedures that meet the tests of due process for resolving disputes involving workers' legal rights.⁴ This means that employee participation processes could expand into any legally protected or regulated issue if a fair dispute resolution process, including arbitration by a neutral, is available to employees for appealing claims that their legal rights have been violated.

4. The Commission's Final Report outlined a set of quality standards that would meet these requirements. More recently, a group of respected neutrals and organizations have developed a "Protocol" for formal dispute resolution procedures that incorporate these quality standards. See *A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship*, Daily Lab. Rep. (BNA) No. 91, at D-34 (May 11, 1995).

3. Minimum standards for the employee participation process should be included in the law providing for:
 - a. prohibition of discrimination for exercising rights to participation and representation;
 - b. information disclosure, training, and access to outside expertise that is needed for effective employee participation and consultation;
 - c. employee voice in selecting their representatives on committees or other groups charged with adapting workplace laws and regulations or overseeing administration of the dispute resolution system; and
 - d. involvement of union representatives if some or all of the employees involved are covered by a collective bargaining agreement.
4. The employer would have the burden of establishing the procedures required to meet these standards. Consequently, the standards would be enforced by exception, i.e., employees would have the right to file a complaint or appeal if they believe that either their individual rights have been violated or that the minimum standards are not being met. The advantage of this approach is that it avoids creating a new bureaucracy to handle debates and litigation over the initial "certification" of any participation or dispute resolution plan in the abstract before it is tried and tested in practice. Instead, it allows the parties to learn as they go along and, through arbitration, to develop the modern day equivalent of the "common law of the shop" that grievance arbitration has provided to collective bargaining over the years.
5. Employees would have the right to be represented as individuals in workplace matters and, in these dispute resolution systems, by any individual or organization of their choosing.

B. Updating the Standard Provisions in Labor and Employment Law

None of the above features of the self-governance option is feasible unless the laws governing union representation and collective bargaining are updated to support these new participatory and representational forums and revised in ways that allow employees to choose freely, in a non-hostile environment, whether or not they wish to be represented by a union or some other organization and the form of participation and representation, including collective bargaining, best suited to their circumstances. Specifically:

1. The current law governing representation elections would be modified to promote orderly and prompt election processes and to insure that once employees vote to be represented for purposes of collective bargaining, the parties successfully reach a first contract expeditiously and also establish an efficient and cooperative bargaining relationship. In practice, this entails a combination of statutory and administrative changes to:

a. reduce delays in holding and certifying election results;

b. increase the incentive to comply with the law by stiffening penalties for violations and providing injunctive relief where appropriate; and

c. provide alternative dispute resolution assistance to the parties as soon as a union is certified (e.g., interest-based bargaining, mediation, and, where appropriate, one of a variety of forms of arbitration). By joint agreement, the parties could decline any or all of these forms of assistance in dispute resolution, or could design their own system.

2. These standard provisions also would apply to firms and employees participating in the self-governance option. Moreover, eligibility for the self-governance option would be forfeited if an employer violates the standard provisions governing the representation elections or first contract negotiations process. However, under the self-governance option, these provisions would be enforced through the arbitration system in the same fashion as other workplace laws. As in other areas, the parties also would be encouraged to establish their own equivalent standard procedures to govern any future union organizing drive that might occur.

3. Those employment relationships that do not participate in the self-governance option, or that fail to meet the minimum standards required for that option, would continue to be subject to the provisions of section 8(a)(2) as interpreted by the NLRB.

IV. QUESTIONS AND ANSWERS

This brief outline of a "Two-Track" labor policy obviously raises many questions. Some of the most obvious are discussed below.

Is it too easy for an employer to "control" employee participation under the self-governance option?

Employers obtain relief from section 8(a)(2) limitations under this

arrangement even though the employee participation process is clearly “employer dominated” by traditional definitions of this term. However, the employer continues to carry the burden of meeting the minimum standards specified for these processes. By adopting this approach, we are essentially recognizing the reality of nearly all workplace relationships and legal responsibilities. Employers initiate policies and then are held accountable for meeting accepted standards for their design and administration.

How does it “solve” the section 8(a)(2) problem?

It creates an avenue for progressive employers to solve the section 8(a)(2) problem for themselves by choosing the self-governance option. This avoids the need to try to write new and equally futile language into the law that would attempt to distinguish between “exempt” and “nonexempt” personnel or “supervisors” and “employees,” or between issues of interest to “employers” and issues involving “wages, hours, and working conditions.”

We retain the protections of section 8(a)(2) in those relationships characterized by more traditional management methods, and let the NLRB handle the few issues likely to arise in these relationships on a case-by-case basis.

Would it reduce or increase opportunities for unions to organize workers?

Under this arrangement, unions and/or other professional associations would have at least three options for recruiting members. In turn, workers would have three models of representation from which to choose:

- a. Under a self-governance option plan, unions and other organizations could market their services (e.g., technical advice, etc.) to individual workers and also represent individuals in complaints and dispute resolution processes where no bargaining relationship exists.
- b. Unions could provide the individual services described above and also provide collective bargaining representation in settings where a majority of employees want not only the consultative and dispute resolution rights provided by a voluntary plan, but also the right to bargain over wages, benefits, and other conditions of employment.
- c. Unions could provide collective bargaining representation to employees in settings where no self-governance plan is in place, and could then propose development of a plan as a supplement to their collective bargaining representation. This model would be appropriate for employees faced with a relatively traditional employer that has not adopted an ADR or

employee participation-based human resource strategy.

How do we insure that employees' rights to choose whether or not to be represented are not further reduced by these arrangements?

This concern can only be addressed if we combine the self-governance plan with necessary labor law reforms that protect employee rights, and if the arbitrators are empowered to rule on individual or group claims that employee statutory rights are being violated.

How do we insure that the arbitrators are experts in the appropriate subjects, reflect the demographic make-up of the relevant employee population, are not controlled by the employer, and do not simply reinforce existing power imbalances in the employment relationship?

These concerns would need to be addressed by developing a cadre of trained arbitrators and other neutrals who reflect the demography of the work force and by making their selection in specific cases (or the choice of a permanent umpire) a joint process between the employer and the claimant and his or her representative. The task force that developed the "Protocol" is now working with the American Bar Association, the American Arbitration Association, and other organizations to develop a program to train arbitrators in the relevant statutes and due process procedures.

How do we avoid a multiplicity of collective bargaining representatives?

"Minority" representation would be only for individuals. Collective representation would remain only for collective bargaining based on majority status.

How do we avoid long bureaucratic delays and rigid bureaucratic oversight of the plan?

We rely on the arbitration process to enforce the plan with oversight and minimal scope of review by the government agency responsible for the relevant law. This avoids the need for debates over elections or for an agency decision on whether or not to "certify" the initial plan before it is tested in action. The employer and employees have the incentive to design and implement a plan that meets the requirements in the law. Consequently, individuals can challenge the plan through arbitration if they believe their rights have been violated or the plan does not meet the requirements. Over time, the published arbitrators' decisions will lead to a new "common law of the workplace" for others to learn from and adapt. The range of remedies available to the arbitrator would allow the plan to be modified and improved as experience is gained. Revocation of the plan is reserved for only the most serious or repeated violations of the minimum

standards, or of individual rights under the law.

How do employers gain flexibility to adapt workplace regulations to fit their particular settings?

This is accomplished by having an “equivalent standard” provision in the law that would allow employers (enforced by arbitrators) to follow practices that depart from the general regulations, provided they offer equivalent, if not greater, protections to employees. This would be an important incentive for employers to develop a voluntary plan and participate in this option.

How do these proposals deal with the problems of contingent employees and other “non-standard” employment relationships?

This is perhaps the most difficult challenge facing employment policy makers today. The range of employment relationships and problems are so varied and rapidly changing that any effort to write uniform rules applying to all settings is futile. Instead of uniform rules, I believe there is a need for organizations that can provide representational and labor market services for workers not tied to a specific employer or work site. This has been one of the historic functions of craft or professional unions. The legislative and administrative reforms proposed here provide both the opportunities and the incentives for unions and/or other organizations to meet this need.

V. WHO BENEFITS?

Any comprehensive reform of labor policy must serve the interests of workers, their representatives, employers, and a society eager to reduce the costs and burdens of government. The approach outlined above would provide considerable benefits to each of these parties. Specifically, the benefits to employers would include:

1. flexibility to establish employee participation processes and to address whatever issues are relevant to improving the competitiveness and quality of relations at the workplace;
2. flexibility to develop equivalent practices to comply with workplace laws and regulations that fit their specific setting, as long as these practices do not reduce employee rights and employees have a voice in the development of the equivalent practices; and
3. a private dispute resolution process that can resolve employment claims, subject to limited rights of appeal or review by the government enforcement agency and the

courts, that is cheaper to administer, involves arbitrators with expertise on the relevant issues, and avoids costly and unpredictable jury awards.

Employees would benefit from:

1. increased participation and representation with a quick, low cost, and private system for resolving disputes over their legal rights at the workplace;
2. the right to be represented in statutory dispute resolution proceedings by any individual or organization of their choosing;
3. effective and low cost access to the right to organize for purposes of collective bargaining, should this suit their needs and circumstances; and
4. effective access for employees of all income levels to a fair system for enforcing their legal rights in which they select their representatives and participate in selecting the arbitrator.

Unions would benefit from:

1. opportunities to recruit and represent workers in a variety of ways;
2. a more effective way of resolving disputes over union organizing; and
3. an opportunity to obtain binding decisions on disputes involving their members' legal rights. This opportunity is currently precluded under the Gardner-Denver doctrine.

Government and society would benefit from:

1. reduced caseloads and regulatory burdens, and broad application of private dispute resolution processes to resolve workplace issues;
2. diffusion and continuity of broad forms of employee participation and labor-management cooperation that hold the most promise of achieving significant economic and social benefits;
3. less conflict in processes for deciding worker representation issues;
4. reduced costs of regulation and litigation, since the parties, rather than the government, would bear the costs of resolving employment disputes; and

5. the ability to focus scarce regulatory resources on the most egregious violators.

VI. GETTING FROM HERE TO THERE

I realize that the policy outlined here is wholly inconsistent with the politics of the day. The current political reality is such that it is nearly impossible to sustain a serious discussion of labor policy issues in Washington. Thus, I do not expect that these ideas will produce the necessary legislative action to implement them in the foreseeable future, given the partisan and surreal nature of current debates over labor policy. However, precisely because there is little prospect for breaking the political stalemate over labor policy at this juncture, professionals in this field need to focus on the facts before them and to work on solutions to the root causes of our problems, rather than spar over their symptoms.

However, we also need to be practical and take advantage of the opportunities for opening up labor law to the period of experimentation needed to test new ideas. Indeed, some experimentation is underway. The Occupational Health and Safety Administration has announced new rules that would allow experimentation with a form of self-governance similar to the ideas proposed here. Other agencies of the Department of Labor, the EEOC, and state agencies, such as the Massachusetts Commission Against Discrimination, also are experimenting with the use of private dispute resolution. We need to track and learn from these experiments, as well as from the broad range of innovative practices that various companies, unions, and workers have implemented in their work sites. In the end, our national policies can only be as good as the best practice models upon which they are based. Ultimately, it is out of these experiments and innovations that the foundation will be laid for a labor policy that works for the work force and economy of the twenty-first century.