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# Collective Representation of Workers in The United States: Evolution of Legal Regimes Concerning Collective Autonomy and Freedom Of Association

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# COLLECTIVE REPRESENTATION OF WORKERS IN THE UNITED STATES: EVOLUTION OF LEGAL REGIMES CONCERNING COLLECTIVE AUTONOMY AND FREEDOM OF ASSOCIATION\*

## I. Overview

### *Sources of U.S. Law*

Unlike some national constitutions<sup>1</sup> the U.S. Constitution does not directly address issues of worker rights or trade unions. The First Amendment right to freedom of association has, however, been interpreted to protect the right of individuals to form and join trade unions.<sup>2</sup> This protection, like all provisions in the Constitution, can be enforced only against the government.<sup>3</sup> It does not prevent private actors, such as private sector employers, from interfering with freedom of association. Moreover, there is no constitutional protection for either collective bargaining or strikes.

The U.S. is a member of the ILO, but has not ratified either C. 87(Freedom of Association and Protection of the Right to Organise), C. 98 (Right to Organise and Collective Bargaining), C. 151(Labor Relations Public Service) or C. 154 (Collective Bargaining Convention). It has, however, ratified C. 144 (Tripartite Consultation International Labour Standards), and in 1980 President Carter established the President's Committee on the ILO – a tripartite federal advisory committee that considers all matters relating to U.S. participation in the ILO. The Secretary of Labor is Chair of the Committee and its members include the Secretaries of State and Commerce, the National Security Advisor, the Director of the National Economic Council, and the presidents of the AFL-CIO<sup>4</sup> and the U.S. Council for International Business.

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<sup>1</sup>*E.g.*, Political Constitution of the United Mexican States, Art. 123, *translated in* 12 Constitutions of the Countries of the World 114 (Gisbert H. Flanz ed., 1996); Constitution of the Republic of South Africa, ch. 2, § 23, *reprinted in* 16 Constitutions of the Countries of the World 8 (Gisbert H. Flanz & Patricie H. Ward eds., 2011); Basic Law of the Federal Republic of Germany, art. 9(3), *translated in* 7 Constitutions of the Countries of the World 4 (Rudiger Wolfrum & Gisbert H. Flanz eds., 2009).

<sup>2</sup>*See e.g.*, *Atkins v. City of Charlotte*, 296 F.Supp. 1068, 1075 (W.D.N.C. 1969). *See also*, *NAACP v. Alabama*, 357 U.S. 449 (1958).

<sup>3</sup>The only exception to this general rule that constitutional provisions apply only to the government is the Thirteenth Amendment which prohibits slavery anywhere within the U.S. or subject to its jurisdiction.

<sup>4</sup>The AFL-CIO is the largest U.S. trade union federation.

The two most important federal statutes protecting the right to join unions and engage in collective bargaining in the private sector are the National Labor Relations Act, as amended (NLRA)<sup>5</sup> and the Railway Labor Act (RLA).<sup>6</sup> The RLA applies to railroads and airlines engaged in interstate or foreign commerce whereas the NLRA applies to most other private sector employers engaged in interstate commerce.<sup>7</sup>

The NLRA protects the rights of workers to form and join labor organizations without employer interference or discrimination; protects the rights of employees and unions to strike and engage in other types of concerted activity for mutual aid; requires employers and representative unions to negotiate with each other in good faith; and provides for enforcement of the provisions of collectively bargained agreements. The statute also regulates union activity by prohibiting unions from restraining or coercing employees in the exercise of their rights under the statute; outlawing secondary boycotts; limiting recognitional picketing; and imposing a fiduciary obligation on trade unions to fairly represent employees. Enforcement of the NLRA is entrusted to a single administrative agency – the National Labor Relations Board (NLRB). The NLRB is responsible for both overseeing the procedure for selecting union representation, as well as investigating and prosecuting violations of the statute. If the NLRB determines there is reasonable cause to believe a violation has occurred, it will issue a complaint. An evidentiary hearing is held before an administrative law judge, whose decision is subject to review by the five member Board of the NLRB. The decisions of the Board can be appealed to the federal circuit courts of appeal. Enforcement of the provisions of collective bargaining agreements is governed by the terms of such agreements; the overwhelming majority of agreements provide for a grievance process which culminates in final and binding arbitration. The arbitration process is controlled by the parties. The NLRB plays no role in enforcing collective bargaining agreements.

Similar to the NLRA, The RLA protects the rights of workers to form and join labor organizations without employer interference or discrimination; protects the right of a union to strike and picket; requires employers and representative unions to “exert every reasonable effort to make and maintain agreements;” and provides for the enforcement of the provisions of such agreements. The statute also prohibits unions from: restraining or coercing employees in the exercise of their rights; inducing prohibited job actions; and failing to fairly represent employees. There are three bodies which play a role in the enforcement of the RLA. The National Mediation Board (NMB), composed of three members appointed by the President with the advice and consent of the Senate, exercises jurisdiction over the procedure for selecting union representation, provides mediation services to the parties during the collective bargaining process, and offers voluntary interest arbitration when parties are unable to reach agreement. The second type of body which enforces

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<sup>5</sup>29 U.S.C. §§141 et seq.

<sup>6</sup>45 U.S.C. §§151 et seq.

<sup>7</sup>Agricultural workers, supervisors and independent contractors are specifically excluded from the protections of the NLRA. 42 U.S.C. §152(3).

the RLA are Adjustment Boards which adjudicate “minor” disputes<sup>8</sup> regarding the application and interpretation of collective bargaining agreements. Lastly, the federal courts have jurisdiction over suits filed by employees alleging employer interference or discrimination with the right to form or join unions, as well as jurisdiction over complaints that an employer or union has failed to make a reasonable effort to negotiate an agreement.

As noted above, the NLRA applies to private sector employers *engaged in interstate commerce*. There are some businesses whose operations are purely intrastate or who engage in so few transactions involving interstate commerce as not to fall within the jurisdiction of the NLRA.<sup>9</sup> Approximately 11.29% of the private sector civilian labor force work for employers who are not subject to regulation under the NLRA.<sup>10</sup> Whether these workers have enforceable rights to form and join unions and engage in collective bargaining is determined by state law. Some state have passed “mini” versions of the NLRA and regulate employers not subject to the NLRA.<sup>11</sup> Other states have not enacted any legislation to fill the gap.<sup>12</sup>

Protection of the rights of public sector workers is more diffuse. As previously mentioned, the U.S. Constitution protects the right of government employees to join a trade union, but the rights to collectively bargain and strike have to be guaranteed by legislation. The Federal Service Labor-Management Relations Act (FSLMRA)<sup>13</sup> protects the rights of most *federal* government workers to form and join unions and engage in collective bargaining with their employer.<sup>14</sup> It does not,

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<sup>8</sup>A “minor” dispute is defined as “arising out of grievances or out of the interpretation or application of agreements.” 45 U.S.C. §152, Sixth.

<sup>9</sup>For example, a retail store must generate at least \$500,000 in annual gross revenue in order to fall within the NLRA’s jurisdiction.

<sup>10</sup>AMERICAN RIGHTS AT WORK, THE HAVES AND THE HAVE-NOTS: HOW AMERICAN LABOR LAW DENIES A QUARTER OF THE WORKFORCE COLLECTIVE BARGAINING RIGHTS (2008) (the figures are based on 2005 census data).

<sup>11</sup>*E.g.*, Or. Rev. Stat. §§663.005-.295 (2012); 43 Pa. Stat. Ann. §§211.1-13 (West 2009); Wis. Stat. Ann. §§111.01-.19 (West 2002 & Supp. 2012).

<sup>12</sup>*E.g.*, Alaska, Montana and Virginia.

<sup>13</sup>5 U.S.C. §§7101-7135.

<sup>14</sup>The statute protects employees who work in federal executive agencies, but excludes from coverage, *inter alia*, workers employed by the FBI, CIA, NSA, Secret Service or employees in the Foreign Service. 5 U.S.C. §7103(a)(2) and (3).

however, protect the right to strike; indeed strikes by federal workers are expressly prohibited.<sup>15</sup> Whether workers employed by state or local governmental units can engage in collective bargaining or strikes depends on whether the state has enacted legislation recognizing such rights. Thirty-one states recognize collective bargaining rights for public workers; eleven states grant bargaining rights to some groups of public employees (usually police, firefighters or teachers); and eight states prohibit public sector collective bargaining.<sup>16</sup> In terms of the right to strike, only twelve states allow any public employee to strike.<sup>17</sup>

Unlike many countries, the U.S. does not have specialized labor courts. There are administrative labor tribunals, however, which interpret labor statutes and issue decisions (such as the Board of the NLRB which interprets the NLRA and state employment commissions which interpret state labor relations statutes). These tribunal decisions are subject to appeal to the federal and state courts of appeals of general jurisdiction respectively. With respect to Board interpretations of law, the Supreme Court has held that the reviewing courts are required to give “substantial weight” to the Board’s judgment, and that the latter’s interpretation should be upheld so long as it is “rational and consistent with the [NLRA]. . .”<sup>18</sup> Thus, jurisprudence relating to the application and interpretation of state and federal laws governing the right to organize and collectively bargain is developed initially by administrative labor tribunals but, in some circumstances, may be modified by the reviewing courts.

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<sup>15</sup> U.S.C. §7116(b)(7)(it is an unfair labor practice for a union representing federal government workers to call, or participate in, a strike); 5 U.S.C. §7311(3)(an individual cannot accept or hold a federal government job if s/he participates in a strike against the federal government).

<sup>16</sup>Joseph Slater, *THE ASSAULT ON PUBLIC SECTOR COLLECTIVE BARGAINING: REAL HARMS AND IMAGINARY BENEFITS 2* (2011) available at [http://www.acslaw.org/sites/default/files/Slater\\_Collective\\_Bargaining.pdf](http://www.acslaw.org/sites/default/files/Slater_Collective_Bargaining.pdf)

<sup>17</sup>*Id.* Even in states which allow strikes, that right is not available for all public sector workers; police are prohibited from striking in every state.

<sup>18</sup>*Curtin-Matheson Scientific v. NLRB*, 494 U.S. 775 (1990). This same standard of deference is used in many state court systems when reviewing decisions of administrative labor tribunals. *E.g.*, *Milwaukee Bd. of School Directors v. Wisc. Employment Relations Comm.*, 313 Wis.2d 525, 758 N.W.2d 814 (2008); *Springfield Education Ass’n v. Springfield School Dist.*, 24 Ore. App. 751, 547 P.2d 647 (1976)(agency interpretation should be affirmed unless “contrary to law, capricious, unreasonable and an abuse of discretion.”); *School Dist. of Indian River Cty. v. Fla Pub. Employees Rel. Comm.*, 64 So.3d 723 (Fla. Ct. App. 2011)(agency interpretations upheld unless clearly erroneous).

## *Institutions*

Trade unions are the major players organizing workers for the purpose of improving conditions of work and engaging in collective bargaining. Indeed, any organization in which employees participate and which deals with employers concerning working conditions is, by definition, a trade union.<sup>19</sup> Employees of a specific employer can form their own organization and, if supported by a majority of the workers, can engage in collective bargaining with their employer without any type of affiliation or connection with an “established” trade union.<sup>20</sup> The norm, however, is for employees to organize within an already established trade union.

There are two union federations in the U.S.: the AFL-CIO which is composed of 57 national labor unions representing 12.2 million workers, and Change to Win composed of 4 national trade unions representing 5.5 million workers. Additionally there are about 27 national unions which do not belong to any federation.

Unlike Europe, there is no system of works councils in the U.S. Some companies have “quality circles” which focus on productivity issues but do not address working conditions per se. Other companies have instituted “quality of work life” programs which act as employee advisory committees making recommendations to the employer about work issues. Lastly many larger manufacturing firms have employee safety committees which focus on monitoring and improving safety in the workplace.<sup>21</sup> In those cases where there is no law which regulates and enforces a collective bargaining process (i.e. states which do not recognize public sector bargaining or which have not enacted legislation to regulate employers which do not fall within the jurisdiction of the NLRA), employers remain free to deal with groups of workers about workplace issues but this would take place on an individualized, ad hoc basis; there is no generally recognized institutional arrangement for such representation.

Over the past twenty years, a movement of worker centers has grown. Many of these groups originated within the immigrant rights movement, helping immigrant workers enforce their statutory rights to minimum wage, overtime pay and safe working conditions. For example, the Coalition of

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<sup>19</sup>The NLRA defines a labor organization (i.e. trade union) as “any organization of any kind. . . in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning . . . conditions of work.” 29 U.S.C. §152(5).

<sup>20</sup>For example, the Independent Association of Publisher’s Employees, founded in 1937 by employees of the Wall Street Journal, represented employees at the newspaper and its parent corporation. In the mid-90s, the Association affiliated with the Newspaper Guild, which is an affiliate of the Communications Workers of America, a national trade union.

<sup>21</sup>For a general discussion of non-trade union worker representation *see*, Orly Lobel and Anne Marie Lofaso, *Systems of Employee Representation at the Enterprise: The US Report*, in *SYSTEMS OF EMPLOYEE REPRESENTATION AT THE ENTERPRISE: A COMPARATIVE STUDY* (Roger Blanpain, Hiroya Nakakubo & Takashi Araki, eds., 2012).

Immokalee Workers, founded in 1993, worked to improve the wages of migrant farmworkers in the tomato industry. Subsequently, other centers began organizing around specific industries, such as the Restaurant Opportunities Center, founded in 2001, which employs both legal and advocacy tools in improving working conditions for restaurant workers. It has filed lawsuits on behalf of workers for wage and hour violations, organized workers to picket restaurants to pressure the employers to improve conditions, and engaged in political lobbying for legislative action relating to workplace concerns. Other centers target specific employers, such as OUR Walmart, which has organized protests at Walmart stores to demand higher wages and better benefits and work schedules. Other centers focus on a specific geographic area, such as New York Communities for Change, which uses direct action and legislative advocacy to fight for social and economic justice in New York state. It has recently been involved in a campaign to help fast-food workers obtain a wage increase. Most of these groups are organized as non-profits receiving revenue from foundations and donations. While some of these groups work with traditional trade unions, they do not seek to negotiate with employers. There are currently over 200 such worker centers creating coalitions of workers on a temporary basis to address workplace issues.<sup>22</sup>

In terms of trade unions in the public sector, there are some unions which exclusively organize and represent public sector workers, but there are many national unions which represent both public and private sector employees. An example of the former is the American Federation of State County and Municipal Employees (AFSCME) which is the largest public sector trade union. An example of the latter is the International Union, United Automobile, Aerospace and Agricultural Implements Workers of America, (UAW) which, along with representing auto workers, also represents over 50,000 public sector workers. There are also unions which organize exclusively within the federal public sector, such as the National Treasury Employees Union (NTEU) which, despite its name, represents not only federal treasury employees but also federal workers in, *inter alia*, the Department of Commerce and the Department of Health and Human Services.

There are also other institutional arrangements in the public sector to promote worker participation and representation. For example, in 2009, by Executive Order, the President created the National Council on Federal Labor-Management Relations, composed of representatives of management and trade unions, whose function is, *inter alia*, to collect information and provide guidance on improving labor-management relations and to develop innovative methods to improve services and advance employee interests. This Order also directed each agency to establish its own labor-management forum to provide, *inter alia*, employees and their unions pre-decisional involvement in all workplace matters.<sup>23</sup>

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<sup>22</sup>See, JANICE FINE, WORKER CENTERS: ORGANIZING COMMUNITIES AT THE EDGE OF THE DREAM (2006); Eli Naduris-Weissman, *The Worker Center Movement and Traditional Labor Law: A Contextual Analysis*, 30 BERKLEY J. OF EMP. & LAB. LAW 232 (2009).

<sup>23</sup>Exec. Order No. 13522, 3 C.F.R. 281 (2010), *reprinted in* 5 U.S.C. §7101 nt. (Supp. V 2011).

## *Guarantees of Representational Autonomy and Freedom of Association*

The various laws governing union organizing and collective bargaining, whether at the state or federal level, all contain some type of prohibition on employer interference or control in the formation, administration or designation of a trade union as a representative of employees.<sup>24</sup> Indeed, one of the reasons for the dearth of institutional arrangements for worker representation outside of trade unions in the private sector is the strict prohibition contained in the NLRA against any attempt by an employer to “dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it.”<sup>25</sup> This provision was added to the statute for the purpose of outlawing company dominated unions.

In those cases where the employer has dominated the employee organization, the remedy is disestablishment of the dominated group and the issuance of an injunction against the employer to cease and desist such domination. In cases of unlawful interference or assistance to the organization, an injunction will issue to cease such interference and to re-establish the status quo prior to the interference.

In terms of freedom of association, the Constitutional First Amendment guarantee ensures that public sector employers cannot discriminate against, or discharge, their employees because of forming or joining a union. For the private sector workforce, freedom of association is ensured through one of two means. The RLA, the NLRA and state “mini” NLRAs all prohibit employer discrimination against an employee because of union activity, including forming and joining a union.<sup>26</sup> The prohibition against discrimination is enforced through administrative tribunals, with appeal to the court system, in the case of the NLRA and state “mini” NLRAs. Under the RLA employees can sue their employers directly in federal court. In either instance, the remedy consists of equitable relief: a cease and desist order aimed at the employer and an award to the employee designed to make him whole for the harm suffered. For example, an employee unlawfully discharged would be reinstated to his job with back pay and benefits which would have accrued during the period he was illegally fired.

Employees who work for employers not covered by the RLA or the NLRA and whose states have not enacted “mini” NLRAs, may be able to bring a common law claim in court for wrongful discharge against public policy to vindicate their right to freedom of association. With the exception

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<sup>24</sup>*E.g.*, RLA, 45 U.S.C. §152 Fourth (“[n]o carrier. . . shall . . . assist in organizing the labor organization . . . and it shall be unlawful for any carrier to interfere in any way with the organization of its employees . . .”); Mich. Public Employment Relations Act, §423.210(1)(b) (a public employer shall not “initiate, create, dominate, contribute to, or interfere with the formation or administration of any labor organization.”).

<sup>25</sup>29 U.S.C. §158(a)(2).

<sup>26</sup>*E.g.*, RLA, 45 U.S.C. §152 Third and Fourth; NLRA, 29 U.S.C. §158(a)(3); Or. Rev. Stat. §663.120(1)(2012).



of Montana (which has enacted a “just cause” for discharge statute)<sup>27</sup> every state in the U.S. applies the employment-at-will doctrine. This doctrine allows an employer to fire an employee for good reason, bad reason or no reason at all, so long as the reason does not violate a specific statutory prohibition. In order to ameliorate the severity of the at-will doctrine, courts in 42 states have created a public policy exception to the employment at will rule. Under this exception, employers which terminate a worker for reasons which contravene a clearly defined public policy commit a tort and are liable for damages caused to the employee. At least one court has recognized that public policy supports the right to join a union and that an employer who discharges an employee for that reason is liable in tort.<sup>28</sup> The remedy for a wrongful discharge cause of action includes compensatory damages (damages for pain and suffering and consequential losses), and punitive damages in those cases where the employer acted outrageously, but does not include reinstatement to the job.

If a state does not have a “mini” NLRA and does not recognize a public policy exception, there is no protection for the freedom of association for private sector workers whose employers are not regulated under the RLA or the NLRA.

#### *Evolution of Sources, Institutions and Guarantees*

Although several bills have been introduced in Congress over the last several years to amend the NLRA,<sup>29</sup> there have been no statutory revisions to federal private sector labor laws. There has, however, been a flurry of activity at the state level dealing with both private and public sector labor laws. Indiana and Michigan have recently enacted so-called “right to work” laws banning union security provisions in private sector collective bargaining agreements.<sup>30</sup>

The biggest legislative changes have occurred in state public sector collective bargaining laws. The fiscal crisis created by the Great Recession that began in 2007 exacerbated state budget deficits; some Republican governors and state legislatures viewed collectively bargaining compensation, pension and health benefits for public employees as a major contributing factor to these deficits. Bills were introduced to limit or revoke public sector collective bargaining.<sup>31</sup>

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<sup>27</sup>Mont. Code Ann. §39-2-902 et seq.

<sup>28</sup>Wetherton v. Growers Farm Labor Ass’n, 275 Cal. App. 2d 168 (1969)

<sup>29</sup>E.g., Employee Free Choice Act of 2009, S. 560, 111th Cong. (2009); National Right to Work Act, S. 204 and H.R. 946, 113th Cong. (2013).

<sup>30</sup>Ind. Code §22-6-6-1 to -13 (2012); Mich. Act Nos. 348 and 349, 96th Legis. (2012). Both of these laws are currently being challenged in their respective state courts.

<sup>31</sup>See Slater, *supra* note 16.

In 2011, Wisconsin passed a “Budget Repair Bill” which amended the state’s public sector collective bargaining law by, *inter alia*, eliminating collective bargaining rights for workers employed by the University of Wisconsin system; limiting collective bargaining solely to the issue of wage increases which can be no larger than the percentage increase in the consumer price index (all other issues are non-negotiable); prohibiting both union security clauses and employee dues check-off; and limiting the duration of any collectively bargained agreement to one year.<sup>32</sup>

Michigan enacted a “financial stability act” giving the governor the authority to appoint an emergency manager for local governments undergoing financial emergencies.<sup>33</sup> This manager has the authority to unilaterally reject, modify or terminate any public sector bargaining agreement entered into by the local government.<sup>34</sup>

Indiana passed legislation in 2011 limiting the scope of topics subject to bargaining for public school teachers.<sup>35</sup> That same year Idaho enacted similar legislation restricting bargaining rights for teachers which was repealed by a voter referendum.<sup>36</sup>

Also in 2011 Ohio enacted sweeping changes to its state public sector collective bargaining law, eliminating collective bargaining for some categories of workers, restricting the scope of bargaining for others, and prohibiting all public sectors strikes.<sup>37</sup> This statute was repealed by a voter referendum in November, 2011.

Union membership rates in the U.S. have fallen to their lowest levels since 1916 (a date which precedes the passage of all of the above-discussed federal and state laws protecting the right to join unions and collectively bargain). In 2012, union membership was 11.3%.<sup>38</sup>

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<sup>32</sup>2011 Wis. Act 10, available at docs.legis.wisconsin.gov/2011/related/acts/10.pdf. This law is currently being challenged in both state and federal court.

<sup>33</sup>Michigan passed an emergency manager law in 2011 which was repealed in a voter referendum in November, 2012. Shortly thereafter, the Michigan legislature re-enacted the emergency manager law (with a few revisions) which was signed into law in December 2012. Mich. Act No. 436, 96th Legis. (2012).

<sup>34</sup>In March 2013, Governor Rick Snyder appointed an emergency manager for Detroit.

<sup>35</sup>Ind. Code §§20-29-6-1 to -19 (2012).

<sup>36</sup>2011 Idaho Sess. Laws 208; repealed by Prop. 1, Nov. 2012.

<sup>37</sup>2011 Ohio Laws File 10, repealed Nov. 8, 2011 by referendum.

<sup>38</sup>Steven Greenhouse, *Share of the Workforce in a Union Falls to a 97-Year Low, 11.3%*, N. Y. TIMES, Jan. 23, 2013 available at <http://www.nytimes.com/2013/01/24/business/union-membership-drops-despite-job-growth.html>

## II. Trade Unions

The organizational structure of U.S. trade unions generally consists of three levels - the federation, the national union and the local union.

There are two national federations -- the AFL-CIO and Change to Win. These federations are voluntary associations of labor unions; their primary function is to represent the views of American labor in the political and policy arena. Individual workers are not members of these federations; their membership is composed entirely of unions as institutions. By affiliating itself with a federation, a union does not surrender its autonomy or independence, but retains full control over its own management. The federations play a role for the union viewpoint similar to that exercised by management groups like Chambers of Commerce or the National Association of Manufacturers -- lobbying, public relations, research and education.

The national union is the central organization in the trade union movement. National unions play a dominant role in the collective bargaining process. This is particularly true in the area of wage negotiations where the national will either directly negotiate with management or set guidelines for their locals to follow when they bargain on the issue. The national union also performs other functions in relation to its locals. It inspects and audits the locals' administration and handling of finances, it acts as a forum for appeals from locals' decisions and it provides requested expertise in the form of lawyers, economists and research experts.

The national convention is the governing body of the national union. The convention possesses constitutional, legislative and judicial authority which is exercised by vote of the delegates from the constituent locals. The convention has the power to amend the constitution (the laws and procedures established for the operation of the national), to legislate by resolution on matters dealing with union governance, collective bargaining or public policy, and to decide appeals from decisions made by the national president and executive board. The convention also elects the national officers and executive board members, which entities direct the affairs of the national union between conventions.

The local union is normally a branch of a national union. As such, it receives its charter from the national and is not independent. The local union's primary function is the day-to-day administration and enforcement of the collective bargaining agreements to which it is a party. It also serves as the center for organizing employees within its jurisdiction. In exercising these roles, the local union is the focal point for contact with the individual worker.

The local union operates within the boundaries established for it by the national union's constitution and its own by-laws. The local union executive committee, whose members are elected

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; Dept. of Labor, Bureau of Labor Statistics, *Table 1. Union Affiliation of Employed and Salary Workers by Selected Characteristics*, available at <http://www.bls.gov/news.release/pdf/union2.pdf>.

by the local's membership, sets general union policy and controls the union's administrative functions. The daily supervision, control and conduct of the local's affairs is exercised by an elected president or business manager. The local union's power is derived from its membership, which exercises that power through elections and union meetings. Membership meetings provide a forum for the individual member to discuss his interests, present his problems and attempt to influence union policy. The meeting also gives the union officers an opportunity to transmit information to the members and garner support for union policies. The most significant opportunity for the membership to exert their power, however, is in the election of officials, and on those issues submitted to the membership for voting, *e.g.*, the decision to strike, the ratification of collective bargaining agreements, the disposition of member appeals relating to grievance handling, dues increases and the approval of changes to the by-laws.

A federal law, the Labor Management Reporting and Disclosure Act (LMRDA) as amended,<sup>39</sup> plays a role in regulating the internal affairs of trade unions. This law regulates five areas of internal union affairs: the rights of individual members vis-a-vis the union; reporting requirements imposed on unions; regulation of union imposition of trusteeships on subordinate bodies; the election of union officers; and the fiduciary responsibility of union officials. In enacting these regulations, Congress "recognized the desirability of minimum [government] interference . . . in the internal affairs of unions."<sup>40</sup> The premise was that if minimum democratic safeguards for running the organization are established and essential information about the union is available to the members, the members are competent to regulate union affairs.<sup>41</sup>

Specifically, the LMRDA grants union members equal rights to nominate candidates, vote in elections held by the union, and participate in union meetings. All union members have the right to express their views during union meetings subject to reasonable rules governing the conduct of meetings, as well as the right to vote on any increase in union dues or fees. No union member can be disciplined or expelled from the union until he has been given: 1) written notice of the charges; 2) a reasonable time to prepare a defense; and 3) a full and fair hearing. Union members can enforce these rights by bringing an action in federal court.<sup>42</sup>

The LMRDA also requires unions to file reports with the Department of Labor describing the rules and procedures governing enumerated issues, such as membership qualifications, selection of officers, ratification of contracts and strike authorization. Financial reports are also required detailing, *inter alia*, assets, liabilities and expenses. The contents of these reports are public

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<sup>39</sup>29 U.S.C. §§401-531.

<sup>40</sup>S. Rep. No. 187, 86th Cong., 1st Sess. 7 (1959).

<sup>41</sup>*Id.*

<sup>42</sup>29 U.S.C. §§411-412.

information. The Secretary of Labor is authorized to enforce these reporting requirements in court.<sup>43</sup>

Lastly, the LMRDA regulates the election of union officers. Every national union must conduct an election by secret ballot every 5 years; local unions must conduct such elections every 3 years. Unions are required to distribute every candidates' campaign literature, at the candidates' expense, to all union members. Unions must also have in place safeguards to ensure a fair election. The Secretary of Labor is authorized to bring a civil action to set aside an election conducted in violation of the statute.<sup>44</sup>

Initially trade unions organized workers based on either industry (*e.g.* United Steel Workers Union, United Rubber Workers, United Auto Workers) or profession (*e.g.* American Federation of Teachers, International Union of Operating Engineers, International Association of Machinists). While some unions have maintained this single focus, most unions organize across industries and professions. For example, the United Auto Workers originally focused on representing employees in the auto industry, but today represents, *inter alia*, teachers in higher education, nurses, attorneys and workers who manufacture bathroom fixtures and furnaces. The Teamsters union, which initially represented truck drivers, now represents, *inter alia*, construction workers, healthcare workers, airline pilots, secretaries and police.

Union representation of workers in the workplace is based on the notion of an appropriate bargaining unit. An appropriate unit consists of workers employed by the same employer, who share a commonality of interests in the workplace, i.e similar skills, duties, job responsibilities, and working conditions. Within any single employer there may be more than one bargaining unit. For example, in a school district, there could be a unit consisting of teachers, a unit consisting of administrators, a unit consisting of secretarial personnel and a unit of maintenance workers. Each unit would engage in bargaining a separate contract covering all the workers in that particular unit. For each unit, only one union represents all the workers, chosen by a majority vote of employees in the unit. There is no concept of minority representation.

Union representation of a bargaining unit is generally determined by a secret ballot election conducted by an administrative agency<sup>45</sup> among the employees in the appropriate bargaining unit. A union which receives a majority of the votes becomes the exclusive representative of all the employees in the unit. Once selected, the union maintains its right to represent the employees until there is objective evidence that the union no longer represents a majority.

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<sup>43</sup>29 U.S.C. §§431, 435 and 440.

<sup>44</sup>29 U.S.C. §§481-482.

<sup>45</sup>Where the employer is covered by the NLRA that agency is the NLRB; for employers covered under the RLA that agency is the NMB; for employers covered by state laws, that agency would be the state labor board/commission.

Union representatives do not enjoy any special protections against employer discrimination by virtue of their status as union officers or stewards; the statutory protections against employer discrimination because of union activity which applies to all workers applies equally to union officers. A collective bargaining agreement may, however, provide for super-seniority for union representatives during the time they hold their union office in order to protect them from lay-off, thus allowing for continuity in employee representation.<sup>46</sup>

Employers are not required to provide unions with facilities at the workplace to carry out their representational functions. Providing such assistance may, depending on the circumstances, constitute unlawful assistance interfering with the autonomy of the union. Employer permission for a union to use company property (such as office space) is generally allowed (but not required) when the union is lawfully recognized.<sup>47</sup> Union meetings are generally held on union premises.

### **III Collective Bargaining**

Both the NLRA and the RLA, as well as state laws regulating collective bargaining, impose on both the employer and trade union the mutual obligation to bargain in good faith in attempting to arrive at a collectively bargained agreement. This duty attaches, however, only when a union has been selected by a majority of the employees in the appropriate bargaining unit. In fact, an employer which bargains with a minority union will generally be viewed as having violated the NLRA.<sup>48</sup> In the absence of a designated union, employers generally unilaterally impose terms and conditions of employment or, in some instances, engage in bargaining with individual employees concerning their specific terms of employment -- usually related to salary and benefit issues.

Most collective bargaining takes place at the plant level between the employer and the union representing a bargaining unit at the plant.<sup>49</sup> There is no system for extending the terms of a collectively bargained agreement to other employers in the same industry. Employers and unions can voluntarily create multi-employer bargaining agreements whose terms will cover the group of employers in an industry who have voluntarily agreed to be bound by the terms of the contract; this is, however, not the norm and is relatively rare.

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<sup>46</sup>*Gulton Electro-Voice*, 266 NLRB 406 (1983) *enf'd sub nom. IUE Local 900 v. NLRB*, 727 F.2d 1184 (D.C.Cir. 1984) Only those officers whose responsibilities bear a direct relationship to representation of unit employees are entitled to super-seniority.

<sup>47</sup>*Baker Mine Servs.*, 279 NLRB 609 (1986); *NLRB v. Midwestern Personnel Services, Inc.*, 322 F.3d 969 (7th Cir. 2003).

<sup>48</sup>*ILGWU (Bernhard-Altman) v. NLRB*, 366 U.S. 731 (1961)(employer recognition of a union that does not represent a majority of the employees violates the statutory prohibition against unlawful employer interference and assistance).

<sup>49</sup>Under the RLA, collective bargaining occurs on a systemwide basis (i.e. all of the employees in the craft or class employed by a single employer at any location).

Under the NLRA and the RLA, the duty to bargain in good faith applies only to those issues which are considered mandatory subjects of bargaining related directly to wages, hours, terms and conditions of employment. As to these issues the employer is required to negotiate solely with the union; it cannot bypass the union and deal directly with employees.<sup>50</sup> Moreover, an employer is prohibited from making any unilateral changes to mandatory subjects until it has exhausted its duty to bargain and the parties have reached an impasse.

A second group of issues, designated as permissive subjects of bargaining, involve issues seen as only indirectly effecting employee terms of employment and more directly relating to managerial prerogatives. For example, industry promotion funds, performance bonds, and interest arbitration clauses are permissive subjects. There is no obligation imposed on either party to negotiate over permissive subjects although they may voluntarily agree to do so. Employers may make unilateral decision regarding such issues and may even negotiate directly with employees.

The parties are not allowed to negotiate terms which would violate state or federal law.

Under public sector labor laws, both the FSLMRA and state laws, there are limitations imposed on the subjects that can be negotiated. The FSLMRA excludes from negotiation matters covered by federal statute or government-wide rules and regulations;<sup>51</sup> for example, pay rates which are set by statute, and certain travel expenses and arrangements which are set by regulation, are non-negotiable. Similarly, some state public sector labor laws limit the issues which can be negotiated. For example, Indiana limits collective bargaining for school employees to salary, wages and fringe benefits.<sup>52</sup>

The duty to bargain in good faith under the NLRA also requires the parties to provide information that is necessary and relevant to the bargaining process.<sup>53</sup> Unions often request the employer to provide information relating to wages, benefits and working conditions that will enable the union representatives to negotiate intelligently on the topics under discussion. While, as noted previously,<sup>54</sup> an employer is under no legal obligation to generally grant union representatives access to its property, where the Union seeks information from direct observation of the plant premises and

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<sup>50</sup>The union can, however, permit the employer to negotiate with individual employees on mandatory subjects, which commonly occurs only in professional sports where star players negotiate salary directly with the team owner.

<sup>51</sup>5 U.S.C. §7117(a).

<sup>52</sup>Ind. Code §20-29-6-4.

<sup>53</sup>While there is no explicit duty to provide information under the RLA, when the parties are participating in NMB mediation, the NMB may request a party to provide information that will help to resolve the dispute.

<sup>54</sup>See Section II Trade Unions, *supra*.

processes that is relevant to and necessary for its role as the employees' collective-bargaining representative, the employer must agree to allow reasonable access.<sup>55</sup>

The remedy for a breach of the duty of good faith bargaining depends on the type of violation. Injunctions ordering the offending party to comply with its obligations are the most common remedy in cases involving a refusal by a party to meet and negotiate, or where a party refuses to provide requested information. An employer which bypasses the union and directly negotiates with employees will be ordered to cease and desist dealing with the employees and instead negotiate with the union. An employer which takes unilateral action on a mandatory subject will be ordered to rescind the action and return to the status quo ante. There are no civil penalties imposed for violations; remedies are equitable only.

Once an agreement is reached its terms are binding and enforceable by the parties. The terms of the agreement apply to all employees in the bargaining unit. Most agreements include a grievance and arbitration procedure for resolving disputes concerning the application and interpretation of the agreement. The grievance process is a multi-step procedure. An employee who believes his rights under the contract are violated files a claim with his local union representative explaining the breach. The union representative will discuss this grievance with a representative of the employer in an attempt to resolve the issue. If resolution is unsuccessful at this first attempt, subsequent meetings are held between union and employer representatives to resolve the problem. If these meetings prove unsuccessful, either party can file a request for arbitration. An arbitration hearing before an independent arbiter is held. The decision of the arbitrator is final and binding. In those few instances where an agreement does not include a grievance and arbitration procedure, an aggrieved party can file a lawsuit in either federal or state court to enforce the terms of the contract.<sup>56</sup>

#### **IV. Strikes**

In the private sector, the right to strike is protected and regulated by the RLA, the NLRA and state "mini" NLRAs. Under the NLRA, both unions and employees have a right to strike. In particular, unrepresented workers who have a dispute with their employers concerning terms and conditions of employment have the right to engage in "concerted activity," including the right to strike, in order to pressure the employer to resolve the dispute.<sup>57</sup>

Trade unions can also call a strike. The procedure of a union to call a strike is not governed by law but is subject to the terms of the union's own constitution and by-laws. The NLRA does, however, impose notification requirements on unions in two instances. When a union intends to

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<sup>55</sup>C.C.E. Inc., 318 NLRB 977 (1995).

<sup>56</sup>29 U.S.C. §185.

<sup>57</sup>*See* NLRB v. Washington Aluminum Co., 370 U.S. 9(1962). Whether the right to engage in concerted activity belongs solely to a union under the RLA regime, or whether unrepresented workers also have this right, is currently in dispute.



strike a health care institution, it must provide both the employer and the Federal Mediation and Conciliation Service (FMCS)<sup>58</sup> 10 days notice of the time and date of the strike.<sup>59</sup> Additionally, if the purpose of the strike is to seek termination or modification of an existing contract, the union must provide 60 days notice to the employer of its intent to terminate or modify the contract, and 30 days notice to the FMCS, before it can legally call a strike.<sup>60</sup>

Not all strikes are protected. There are some types of strikes which are expressly prohibited by the NLRA. A union which calls a prohibited strike violates the law, is subject to an injunction and, in some instances, may be liable for damages<sup>61</sup>. Employees who participate in prohibited strikes are subject to discipline or discharge. The NLRA specifically prohibits jurisdictional strikes,<sup>62</sup> and secondary boycotts;<sup>63</sup> it also places limits on recognitional strikes and picketing.<sup>64</sup>

Other strikes may be conducted in such a manner as to significantly infringe on an employer's legitimate interests, and are deemed to constitute unprotected conduct. While these types of strikes do not violate the law, employees who participate in such strikes are subject to discipline or discharge. Strikes which are not prohibited but are considered unprotected include, *inter alia*, strikes in violation of a collectively bargained no-strike provision, intermittent strikes, strikes timed so as to destroy employer property, and sit-down strikes.

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<sup>58</sup>See discussion in Section V, *infra*, concerning the FMCS.

<sup>59</sup>29 U.S.C. §158(g).

<sup>60</sup>29 U.S.C. §158(d).

<sup>61</sup>Employers can sue trade unions in court for damages suffered as a result of strikes prohibited under §158(b)(4) of the NLRA. 29 U.S.C. §303(b).

<sup>62</sup>29 U.S.C. §158(b)(4)(D). A jurisdictional strike occurs when the purpose is to force an employer to assign work to employees who are members of one union when that work has been assigned to, or claimed by, another group of workers.

<sup>63</sup>29 U.S.C. §158(b)(4)(A) and (B). A secondary boycott involves economic pressure, in the form of a strike or threat to strike, on Employer A (with whom the union does not have a direct dispute) in order to force Employer A to cease doing business with Employer B with whom the union does have a dispute.

<sup>64</sup>29 U.S.C. §158(b)(4)(C) and §158(b)(7). A recognitional strike and picket occurs when the purpose is to require the employer to recognize and bargain with a particular union. The statute prohibits such strikes and picketing when 1) a different trade union has been certified as the representative of the employees; 2) the employer has lawfully recognized a different union and no question concerning representation can be raised; 3) a valid representation election under the NLRA has been held within the last 12 months; or 4) such picketing continues for more than 30 days without the filing of a representation petition.

A third group of strikes are expressly protected by the law and an employer's response to such conduct is significantly restricted. Strikes are protected where the purpose is for "mutual aid and protection"<sup>65</sup> or to protest employer unfair labor practices which violate the NLRA. These strikes are categorized as economic strikes and unfair labor practice (ULP) strikes respectively. Workers engaged in either category of strike cannot be disciplined, discharged or otherwise discriminated against because of their participation in the strike. Employers, however, do not have to pay employees while they are on strike, nor are employees legally entitled to accrue benefits for the duration of the strike.

Employers are permitted to hire replacement workers; the status of the replacement workers depends on the type of strike. Employees engaged in a ULP strike can only be temporarily replaced for the duration of the strike. A ULP striker who makes an unconditional offer to return to work is entitled to immediate reinstatement. Employees engaged in an economic strike can be either temporarily or permanently replaced at the discretion of the employer. If the employer chooses to hire temporary replacement workers, then the strikers are entitled to return to their jobs when the strike ends. If, however, the employer hires permanent replacement workers, the strikers have no right to return to their jobs at the end of the strike. Strikers who have been permanently replaced are placed on a recall list and recalled to their jobs as vacancies occur at the business or if additional workers are needed because the business expands.

Under the RLA, parties cannot engage in self-help (i.e. strikes or lock-outs) until they have been released from mediation by the NMB and a subsequent mandatory 30 day cooling off period has elapsed.<sup>66</sup> Even at that point, only relatively small carriers and their unions would be able to engage in self-help. If the NMB determines that a strike or lockout at larger carriers could present the possibility of a major disruption to commerce on a regional or national level it can recommend to the President the creation of a National Emergency Board. If the President appoints such a Board, it has 30 days to make a report on the dispute and after the report is submitted there is a subsequent mandatory 30 day cooling off period. Only at the completion of that period can the larger carrier or its union engage in self-help.<sup>67</sup> Unlike the NLRA, secondary boycotts are lawful measures of self-help, but, like the NLRA, striking workers can be permanently replaced.

As previously noted, all federal government employees are expressly prohibited from striking and only twelve states currently recognize the right of any of their public sector employees to strike. All states prohibit police from striking. In some states which permit public sector strikes,

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<sup>65</sup>Mutual aid and protection covers issues related to wages, hours, terms and conditions of work. 29 U.S.C. §157.

<sup>66</sup>45 U.S.C. §155.

<sup>67</sup>45 U.S.C. §160.

unions are required to participate in mediation as a prerequisite to engaging in a strike.<sup>68</sup>

Utilization of the strike weapon has decreased dramatically in the U.S. From the 1960s to the 1980s strikes involving 1,000 or more workers averaged 277 per year. Since 1982, the largest number of strikes per year was 96 in 1982. Most recently, in 2011 and 2012, there were only 19 strikes per year.<sup>69</sup>

## V. The Settlement of Labor Disputes

Disputes involving the application and interpretation of collectively bargained agreements are generally settled through a grievance and arbitration process. Initially, the parties to the dispute attempt to reach a settlement through negotiation. If such efforts fail, the parties submit the dispute to final and binding arbitration. The use of arbitration as a method to resolve contract disputes is not mandated by the NLRA, but is required under the RLA and the FSLMRA.<sup>70</sup>

Mechanisms used for resolving disputes over the negotiation of an initial collective bargaining agreement or the modification of the terms of an existing agreement vary depending on which statutory regimes applies to the dispute, i.e. the NLRA, the RLA or public sector labor laws.

The 1947 amendments to the NLRA created the Federal Mediation and Conciliation Service (FMCS).<sup>71</sup> Its function is to provide conciliation and mediation services to parties in the event of labor disputes. The parties are not mandated to make use of the services, but as a prerequisite to any strike or lock-out precipitated by disputes over the modification or termination of an existing contract, both the trade union and employer are required to provide 30 days notice to the FMCS. The FMCS, on its own initiative, can contact the parties and offer its services for resolving the dispute.

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<sup>68</sup>*E.g.*, Minn. Stat. §179A.18 (2012)(union must participate in mediation for at least 45 days before striking); Or. Rev. Stat Ann. §§243.712 and 243.726 (Westlaw through 2012)(union must participate in good faith negotiations for 150 days and if no agreement is reached the parties may agree to request mediation); 2011 Ill. Laws Pub. Act 97-0008(requiring certain public school teachers to participate in mediation and wait 14 days after the mediator has made the final offers public before striking).

<sup>69</sup>Dept. of Labor, Bureau of Labor Statistics, *Major Work Stoppages, Table 1*, available at [www.bls.gov/news.release/pdf/wkstp.pdf](http://www.bls.gov/news.release/pdf/wkstp.pdf)

<sup>70</sup>The RLA requires that disputes over the interpretation of existing contract terms be submitted to arbitration through Railroad Adjustment Boards in the case of railroads (45 U.S.C. §153) or to System Boards in the case of air carriers (45 U.S.C. §185). The FSLMRA requires that collective bargaining agreements include a provision for the settlement of grievances but allows the parties to exclude certain issues from the grievance process. 5 U.S.C. §7121(a)(1)(2).

<sup>71</sup>29 U.S.C. §§172-173.

The use of arbitration as a method to resolve negotiation disputes (so-called interest arbitration) is relatively rare in private sector disputes under the NLRA. It is most often seen in professional sports negotiation in hockey and baseball involving disputes over salary terms.

Under the RLA, parties generally make use of the mediation services provided by the NMB. Although not required to participate in mediation, parties are prohibited from engaging in self-help tactics until they have been released from mediation by the NMB.<sup>72</sup>

The FSLMRA created a Federal Services Impasse Panel to provide assistance in resolving negotiation impasses between federal agencies and the unions which represent their employees.<sup>73</sup> The Panel provides mediation and fact-finding assistance and, where the parties are still unable to resolve the dispute, the Panel has the authority to hold hearings on the issues and take action necessary to resolve the dispute. The Panel makes a final decision and order which is binding on the parties.

State public sector labor laws vary widely in the types of procedures made available to the parties to resolve their disputes. Where employees are allowed to strike, states often mandate pre-strike mediation and/or fact-finding processes. In states where strikes are outlawed, final and binding interest arbitration is generally provided.

## **VI. Social Dialogue Mechanisms**

As previously noted, the President's Committee on the ILO (PC/ILO) was established in 1980 to serve as the forum for tripartite consultation regarding U.S. participation in the ILO. Much of the work related to reviewing the feasibility of ratification of ILO Conventions is performed by a technical consultative body, the Tripartite Advisory Panel on International Labor Standards (TAPILS), which formulates recommendations for consideration by the PC/ILO.

In 2007, the International Labor Conference Committee on the Application of Standards (ILCCR) discussed the effectiveness of U.S. mechanisms in meeting its obligations under C.144. It noted that the PC/ILO had not met since 2000 and that TAPILS had met only once. The ILCCR acknowledged that a report from TAPILS had been submitted to the Senate Foreign Relations Committee regarding the possibility of ratification of C.111 and that TAPILS would continue discussion of C. 185.<sup>74</sup> Subsequent published observations by the ILO Committee of Experts (CEARC) in 2008 and 2010 noted that the PC/ILO and TAPILS were meeting more frequently and

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<sup>72</sup>See discussion, *supra*, concerning strikes under the RLA in Section IV Strikes.

<sup>73</sup>5 U.S.C. §7119.

<sup>74</sup>ILCCR, Individual Observations concerning Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144) United States (ratification: 1988)(2007).

that discussions concerning possible ratification of C. 111 and C. 185 were advancing.<sup>75</sup> The CEACR requested the government to keep it informed of the outcome of follow-up consultations concerning ratification.

In terms of tripartite consultation on other issues, there are a variety of advisory committees, established both by government as well as privately constituted, which provide advice and recommendations and undertake advocacy activities related to issues which impact on worker and business interests. None of these groups has the authority to bind the government with their decisions; they are advisory only. These committees do not create enforceable agreements and thus no enforcement mechanisms are established. Many of these committees are set up on an ad hoc basis to address issues as they arise, while others are of a more permanent nature.

For example, the National Advisory Committee for Labor Provisions of U.S. Free Trade Agreements is composed of twelve members, appointed by the Secretary of Labor, including four members from labor, four from business and four from the public at large. This group provides advice to the Secretary of Labor concerning the implementation of labor provisions in free trade agreements. The National Council on Federal Labor Management Relations, consisting of representatives of labor and government officials, makes recommendation to the President on improving government services and advancing employee interests. The Advisory Committee of the Export-Import Bank of the U.S. includes, *inter alia*, leaders from government, labor, business and finance, and advises the Bank on programs for providing financing for the export of U.S. goods. In 2011, President Obama created a Council on Jobs and Competitiveness composed of business executives, labor leaders and economists, to generate ideas for job creation and economic recovery.

State governments also establish tripartite committees to address state issues impacting jobs, the economy and worker interests. In Indiana an Interim Study Committee on Economic Development, whose members include state legislators, labor and business representatives, and government officials, makes recommendations on tax policy and economic development issues. In 2012 New York created a Work Task Force including business, government and labor representatives, to develop strategies for revitalizing the state's economy. Similarly, the Governor of Washington created a tripartite Connecting Washington Task Force to develop a plan for improving the state transportation system.

Such tripartite groups are also created at the local government level. In Chicago, Illinois, the Infrastructure Trust, composed of business, labor and government representatives, considers methods for building the city's infrastructure.

One-time tripartite meetings are also held at both the federal and state levels to strategize over specific policy issues. Lastly, before the enactment of most major legislation, including that

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<sup>75</sup>CEACR, Individual Observations concerning Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144) United States (ratification: 1988) (2008) and (2010).

which would impact business or worker interests, legislative bodies at both the state and federal level hold hearings to secure input from interested stakeholders.

## VII The State and Employers

As a general proposition, remedies for unfair labor practices are equitable not legal. There is no provision for civil or criminal penalties or liabilities. The focus is on make whole relief and ordering the offending party to comply with its obligations under the law.<sup>76</sup>

Since 2007, the ILO supervisory bodies have examined several cases involving U.S. compliance with its obligations as a member of the ILO and under ratified conventions. With regard to the latter, the previous section analyzing social dialogue mechanisms discussed the concerns raised regarding compliance with C.144. In another case, the Committee of Experts on the Application of Conventions and Recommendations (CEACR) brought to the attention of the U.S. concerns relating to compliance with C.105 (Abolition of Forced Labor), ratified by the U.S. in 1991. In particular, the CEACR reviewed a North Carolina law which prohibits strikes by public employees, and provides that any employee who engages in such a strike is guilty of a Class 1 misdemeanor. Punishment for such an offense is community service; a second offense is punishable by imprisonment which includes a requirement to perform work assigned to an inmate. The CEACR noted that C.105 prohibits the use of compulsory labor as a punishment for participating in a strike. The U.S. government responded that there are no instances in which any individual has been prosecuted under the law. The CEACR nevertheless urged the government to repeal or amend the North Carolina statute so as to conform with C.105.<sup>77</sup> To date there have been no changes made to the law.

The other ILO cases all involved complaints filed with the Committee on Freedom of Association (CFA) alleging violations of C.87 and 98. Case No. 2741 addressed a New York state law prohibiting all strikes by public sector workers, and specifically the events surrounding a public transit strike. The CFA noted that public transit is not an essential service in the strict sense of the term and thus New York's complete prohibition on the right to strike is not in conformity with the principles of C.87. Moreover, the punishment imposed on the union – a \$2.5 million fine, the imprisonment of the union president for ten days, and individual fines against the strikers – amounted to sanctions for exercising legitimate industrial action. The CFA recommended that the New York law be amended to conform to principles of freedom of association.<sup>78</sup> While several bills

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<sup>76</sup>See the discussion in previous sections, *supra*, regarding specific remedies for failing to bargain in good faith (Section III), anti-union discrimination and acts of interference (Section I).

<sup>77</sup>CEACR, Individual Observation concerning Abolition of Forced Labour Convention, 1957 (No. 105) United States (ratification: 1991) (2012).

<sup>78</sup>Case No. 2741 (United States): Report in which the Committee Requests to Be Kept Informed of Development, Complaint Against the Government of the United States presented by the Transport Workers Union of Greater New York, AFL-CIO, Local 100, in 362nd Report of

were introduced in the New York state legislature in 2009 and 2010 to create a committee to review the law, to date there has been no action taken on the CFA's recommendation.

Case No. 2460 involved a North Carolina law which prohibits the making of any collective bargaining agreement between government employers and public sector trade unions. The CFA recommended, *inter alia*, that the ban on collective bargaining be repealed.<sup>79</sup> Subsequent reports filed by the U.S. indicated that bills were introduced in the North Carolina legislature to repeal the law, none of which, however, were enacted into law.<sup>80</sup>

Case No. 2547 focused on a decision issued by the Board of the NLRB holding that graduate student assistants are students, not employees, and therefore not covered by the NLRA. The effect of this decision was to deny graduate student assistants the right to bargain collectively through a union chosen by the students for that purpose. The CFA found that graduate teaching and research assistants are employees entitled to bargain collectively concerning their terms and conditions of employment and recommended the government take steps to ensure that right.<sup>81</sup> In a subsequent report, the U.S. government noted that the Board of the NLRB was revisiting its decision.<sup>82</sup> In 2012, the Board granted review in two cases to reconsider whether graduate student assistants are

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the Committee on Freedom of Association (November 2011).

<sup>79</sup>Case No. 2460 (United States): Report in which the Committee Requests to Be Kept Informed of Development, Complaint Against the Government of the United States presented by the United Electrical, Radio and Machine Workers of America, in 344th Report of the Committee on Freedom of Association (March 2007).

<sup>80</sup>Case No. 2460 (United States): Effect given to the Recommendations of the Committee and the Governing Body, Complaint Against the Government of the United States presented by the United Electrical, Radio and Machine Workers of America, in 351st report of the Committee on Freedom of Association (November 2008) and in 362nd report of the Committee on Freedom of Association (November 2011).

<sup>81</sup>Case No. 2547 (United States): Report in which the Committee Requests to Be Kept Informed of Development, Complaint Against the Government of the United States presented by the United Automobile, Aerospace and Agricultural Implement Workers of America International Union (UAW), in 350th Report of the Committee on Freedom of Association (June 2008).

<sup>82</sup>Case No. 2547 (United States): Effect given to the Recommendations of the Committee and the Governing Body, Complaint Against the Government of the United States presented by the United Automobile, Aerospace and Agricultural Implement Workers of America International Union (UAW), in 356th report of the Committee on Freedom of Association (March 2010).

employees covered by the NLRA.<sup>83</sup> A decision on this issue is expected in 2013.

The last CFA case concerned an allegation that the NMB had erected barriers to employees seeking to elect union representation under the RLA. Specifically the election procedures adopted by the NMB require an absolute majority of eligible voters to vote in favor of union representation in order for a trade union to be certified as the bargaining representative; thus employees who fail to vote count as votes against representation. The result has been that employers engage in voter suppression tactics in order to defeat unionization. The CFA expressed concern over the use of such tactics and drew the government's attention to the importance of providing effective protection for the right to select a union.<sup>84</sup> Subsequently, the NMB revised its election procedures to provide that the majority of votes cast in a representation election determines the outcome of the election. This rule change was approved by the federal circuit court of appeals for the D.C. Circuit.<sup>85</sup>

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<sup>83</sup>New York Univ., No. 2-RC-23481, *review granted* June 22, 2012; Polytechnic Inst. of N.Y. Univ., No. 29-RC-12054, *review granted* June 22, 2012.

<sup>84</sup>Case No. 2683 (United States): Report in which the Committee Requests to be Kept Informed of Development, Complaint Against the Government of the United States presented by the Association of Flight Attendants, in 357th Report of the Committee on Freedom of Association (June 2010).

<sup>85</sup>*Air Transport Ass'n of America v. NMB*, 663 F.2d 476 (D.C. Cir. 2011)



