

NATIONAL LABOR RELATIONS BOARD AND NATIONAL LABOR RELATIONS ACT REFORM

Members appointed to the National Labor Relations Board (NLRB), nearly exclusively, come from the organized labor or management-side law firm ranks. As a result, board policy swings like a pendulum. The Board's case precedent flip-flops in favor of organized labor or management, depending on whether Democrats or Republicans hold the Executive Office. The NLRB's biased and ever-changing regulatory landscape makes compliance with the National Labor Relations Act (NLRA) arduous for employees, employers, and unions.

Congress should:

- ◆ Pass the Workforce Democracy and Fairness Act to preempt the National Labor Relations Board's ambush election rule.
- ◆ Amend the Employee Privacy Protection Act to make the disclosure of employees' private information to union organizers a voluntary and exclusively opt-in process.
- ◆ Reverse the franchise/joint-employer standard decision.
- ◆ Abolish or greatly reduce the National Labor Relations Board's adjudicatory role.
- ◆ Pass the Protect American Jobs Act.
- ◆ Pass the Employee Rights Act (ERA) to guarantee a federally supervised secret-ballot election for organizing and recertifying votes and for preventing union interference with employees who seek to decertify a union.
- ◆ Pass the Freedom from Union Violence Act.
- ◆ Pass the Rewarding Achievement and Incentivizing Successful Employees (RAISE) Act to allow firms to offer unionized workers greater compensation for superior performance.
- ◆ End monopoly bargaining by unions by deleting "exclusive" from the National Labor Relations Act.
- ◆ Rein in NLRB overreach on outsourcing and contract staffing agencies through appropriations limitation.

During the Obama administration, the National Labor Relations Board, composed of a majority with the predisposition to a pro-union viewpoint, has issued many decisions overturning long-standing case precedent and proposed rules that tilt the playing field in favor of organized labor at the expense of employees and the free flow of commerce. Currently, the NLRB operates to benefit labor unions, not the public interest, in labor disputes.

Congress could go a long way toward reining in the NLRB by passing legislation to reverse some of its more partisan rulemakings and decisions. At best, Congress should abolish the NLRB or, at least, strip the agency of its adjudicatory and rulemaking authority.

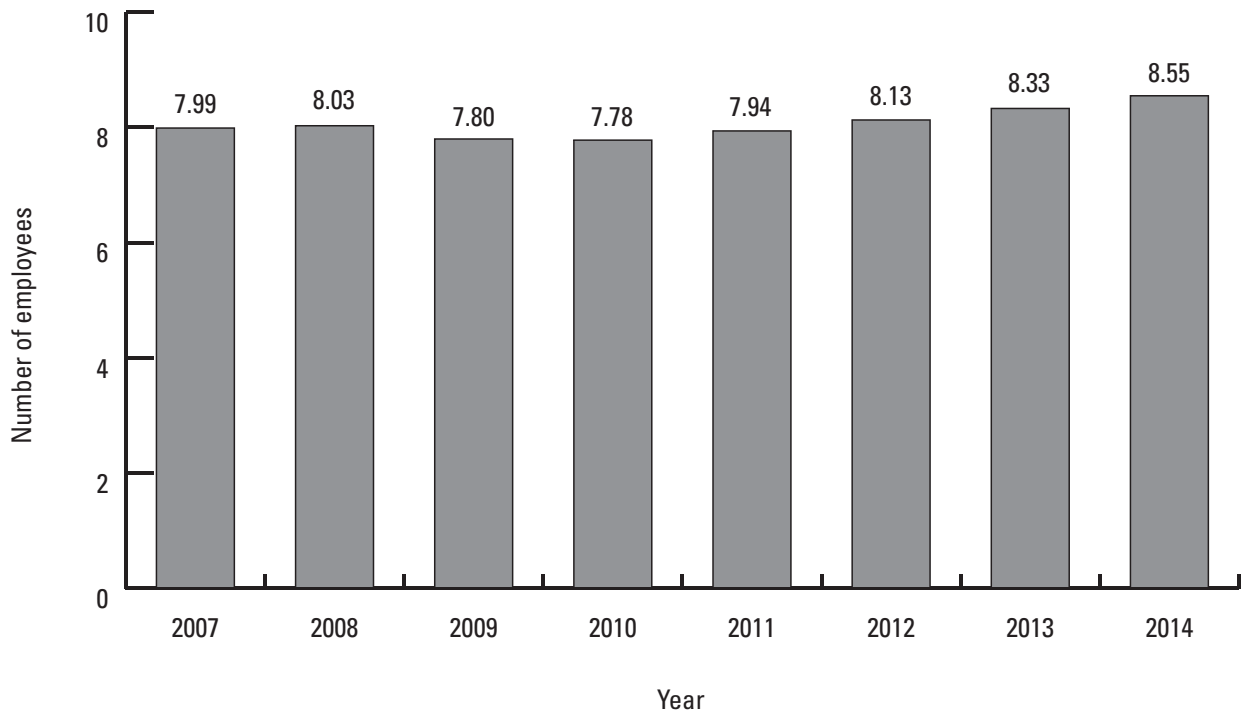
Ambush Election Rule. The NLRB recently amended its rules governing representation case procedures. That rule change, generally known as the "ambush election" rule, is deliberately constructed to limit debate, by minimizing the time workers have to educate themselves on union representation. Specifically, the rule would shorten the time frame between the filing of a petition and the date on which an election is conducted to as little as 14 days. This is unnecessary. In FY 2013, the median time frame from the petition to when the election was conducted was 38 days, with unions winning 60 percent of all organizing elections, according to the NLRB.

To address the shortened time frame of the NLRB's union election process, Congress should pass the Workforce Democracy and Fairness Act, which would amend Section 9 of the National Labor Relations Act and mandate a period of 35 days between the filing of the petition and the actual election.

The rule also would compel employers to provide union organizers with employees' contact information. Congress should preempt this. Government should not have the power to force employers to disclose workers' contact information to a special-interest group for any cause. That rule would almost certainly expose workers—who would not have the choice of opting out of union organizers' obtaining their information—to harassment, intimidation, and much higher risk of identity theft.

To prevent the disclosure of employees' contact information without their consent, Congress should amend the Employee Privacy Protection Act to make the disclosure of such information to union organizers a voluntary and exclusively opt-in process.

Joint Employer Decision. On July 29, 2014, the NLRB's Office of the General Counsel determined that the parent corporation of fast-food giant McDonald's is a joint employer with

Figure 5.1 Number of employees in franchise establishments in the United States from 2007 to 2014 (in millions)

Source: Statista 2014.

McDonald's franchisees and thus is liable for the franchisees' actions for purposes of employment law. The Board's criteria for what would qualify a company as a joint employer are inappropriately broad, extending to such hard-to-define concepts as indirect or potential control over workers.

The NLRB's decision threatens the successful American franchise system. If corporate McDonald's in Chicago were to be held responsible for every worker at every mom-and-pop McDonald's franchise, then corporate McDonald's would be forced to protect itself from liability. The ensuing restructuring would be quite different from the current franchise system.

In a statement, the National Restaurant Association said the decision "jeopardizes the success of 90 percent of America's restaurants who are independent operators or franchisees." And

the decision's repercussions would be felt far beyond the fast-food industry, to include practically all franchised businesses, including car dealerships, hotels, dry cleaners, and a wide variety of service industries.

Organized labor favors the ruling because it would make it much easier to unionize entire franchise businesses. For example, if a local McDonald's franchise were to face unionization and corporate McDonald's were to be a joint employer, then the union would have leverage to bring corporate McDonald's to the collective-bargaining table. (Similar rulings could follow, with the NLRB general counsel filing amicus briefs in similar NLRB cases concerning Browning-Ferris Industries and Leadpoint Business Services.)

Experts: Aloysius Hogan, Trey Kovacs, Ivan Osorio, Iain Murray

The National Labor Relations Board's Adjudicatory Role.

Instead of taking a piecemeal approach to enacting legislation to address problems caused by the NLRB's actions, Congress should abolish the agency or strip it of its adjudication and rulemaking authority. The Board no longer operates as it was intended by Congress—as a neutral arbiter in labor disputes. Worse, federal courts routinely give judicial deference to the NLRB on the basis of the board members' "expertise," which, as former NLRB member John Raudabaugh notes, has "proven nonexistent when case precedent is flip-flopped correlated only with political party majorities."

Congress should pass an amended version of the National Labor Relations Reorganization Act (NLRRA) of 2011, which would abolish the Board. The current version of the NLRRA transfers the NLRB's enforcement authority to the Department of Justice, and its rulemaking and election duties would be transferred to the Department of Labor. The bill should be amended to send NLRA disputes to an Article III court, where judges serve lifetime appointments, unlike NLRB members, who serve five-year terms and are therefore highly politicized.

Congress has introduced legislation to reduce the Board's authority. The Protect American Jobs Act (H.R. 795 in the 113th Congress) would take away the NLRB's authority to promulgate any regulation other than rules concerning internal Board functions.

Employee Rights Act. The Employee Rights Act (ERA) would amend Section 9(a) of the NLRA to guarantee workers a secret-ballot election when voting on union representation. Currently, a union may organize workers in two ways: by secret-ballot election or by the procedure known as card check.

To initiate a federally supervised secret-ballot election, a union must present a "showing of interest"—signed authorization cards that show at least 30 percent of employees support union representation—to the nearest NLRB regional office, which sets the election conditions, including location, time, ballot language, and eligible voters, and then holds the election.

If the union receives 50 percent plus one votes cast in favor of union representation, the union wins recognition and is certified as having exclusive representation over the collective-bargaining unit.

Under card-check, if the union obtains 50 percent plus one signed authorization cards from employees, then the union may persuade the employer to bypass the election and recognize it as the employees' exclusive representative. Without an election, workers are deprived of time to hear the pros and cons of unionization and to reflect on whether they want to unionize, which leaves workers open to union intimidation tactics.

Unions use a strategy known as a "corporate campaign" to browbeat employers into agreeing to card-check organizing. Corporate campaigns are aggressive, public relations campaigns designed to damage an employer's reputation until it accedes to union demands.

The Employee Rights Act would amend Section 9 of the National Labor Relations Act by adding a provision that requires all union recertification elections to be conducted by secret ballot.

That change is needed. Once a union is certified as the exclusive representative of a group of employees, it never needs to stand for recertification. That provision has led to what is known as inherited unions. Heritage Foundation labor researcher James Sherk found that only "7 percent of private-sector union members voted for their union. The remaining 93 percent are automatically represented by a union they had no say in electing."

To ensure that workers continue to desire union representation and new workers have a say in their own representation, the ERA amends the NLRA to require union recertification elections conducted by secret ballot once the workforce has turned over by more than 50 percent since the last election.

The ERA would also protect workers who petition to decertify their union. It would amend Section 10 of the NLRA by inserting a provision that penalizes labor unions that interfere with an employee's right to file a decertification petition, holding unions liable for lost wages or unlawful collection of union dues or fines and damages.

The NLRA already makes it an unfair labor practice for an employer to interfere with or restrain a worker's right to organize. Unions should be held to the same standard when employees

petition to decertify their union. Currently, many union constitutions contain provisions that punish workers who seek to decertify their union, including through steep fines and even termination of employment. (For an example, see Communications Workers of America Constitution, Article XIX—Charges Against Members, <http://cwa-union.org/pages/constitution-continued#A19>; and UNITE HERE Constitution, Article 16, Section 1, Subsection (i) “Secession or fostering secession or sponsoring or advocating decertification of, or deauthorization of union security for UNITE HERE or any affiliate,” <http://unitehere.org/wp-content/uploads/2014UNITE-HEREConstitutionFinal.pdf>.)

Freedom from Union Violence Act. Workplace violence is a crime—unless committed by a union in the course of promoting unions goals. That is the unfortunate outcome of the U.S. Supreme Court’s decision in *U.S. v. Enmons*, in which the Court wrote a huge loophole into the Hobbs Act (Title 18 USC §1951), a major federal anti-extortion law. That loophole, found nowhere in the text of the Act, allows unions to use violence to extort business into giving more money, benefits, and power to unions.

As a result of federal preemption, union violence often goes unprosecuted—such as, for example, threats hurled by members of the Teamsters at the cast and crew of the television show *Top Chef* last August. As Deadline Hollywood reported on August 20, 2014, “Angry that the show had not signed a Teamsters contract and that the production hired local [production assistants] to drive cast and crew vehicles, the dozen or so picketers from Boston’s Teamsters Local 25 kept at it for hours, raining down racist, sexist and homophobic threats and slurs as staffers came to and left the set that summer day.”

The Freedom from Union Violence Act of 2014, introduced by Sen. David Vitter (R-La.) in the last Congress, would amend the Hobbs Act by eliminating the judicially created loophole allowing union violence. That legislation should be reintroduced in the 114th Congress.

In addition, Congress should hold hearings into workplace violence in order to expose that alarming problem.

Experts: Aloysius Hogan, Trey Kovacs, Ivan Osorio, Iain Murray

RAISE Act. Under current federal law, the wages of 7.6 million workers are capped because of inflexible wage structures in union contracts that set not only a wage floor but also a wage *ceiling* for specific categories of workers. Instead, compensation in many union contracts is established on the basis of seniority.

The Rewarding Achievement and Incentivizing Successful Employees (RAISE) Act (S. 1542 and H.R. 3154 in the 113th Congress) would allow businesses to reward employees for outstanding performance by offering them higher wages than union contracts specify. The legislation would allow individuals trapped in ironclad union wage scales to be rewarded for merit, better performance, and higher productivity. Passing the RAISE Act could result in the average union member’s salary increasing by \$2,700–\$4,500 per year, according to calculations by Heritage Foundation analysts.

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End Union Monopoly Bargaining. Under the National Labor Relations Act, a worker’s freedom to choose how he or she is represented in the workplace is restricted by the principle known as exclusive representation. That restriction should be lifted.

Section 9(a) of the NLRA requires that if a majority of employees at a workplace vote in favor of union representation for the purposes of collective bargaining, that union then becomes the exclusive representative of all the employees at that workplace, including workers who voted against unionization. Congress should amend the provision by deleting the word “exclusive.”

Workers should not be forced to accept representation they do not want. Yet the NLRA’s exclusive representation provision prohibits an individual worker who is opposed to union representation to choose representation other than the union.

Eliminating exclusive representation would make unions more receptive to the needs of their membership and would provide workers the ability to negotiate the terms of their employment, instead of being forced into a one-size-fits-all contract covering all workers in a given bargaining unit.

Rein in NLRB Overreach on Outsourcing and Contract Staffing Agencies through Appropriations Limitation. The

battle over what constitutes an independent contractor, as opposed to an employee, has raged for quite a while in labor law circles. However, a series of recent NLRB decisions threatens to undo decades of precedent.

In one such case, *FedEx Home Delivery* (361 NLRB no. 55), the NLRB ruled on September 30, 2014, that drivers for the delivery firm FedEx were to be considered employees, not independent contractors. As a result, writes attorney Todd Leibowitz of the law firm BakerHostetler:

Companies who wish to analyze whether their non-employee workers are properly classified as independent contractors must now contend with a new NLRB test, in addition to the IRS Right to Control Test (used for federal tax purposes), common law Right to Control Test (used for ERISA [Employment Retirement Income Security Act] and federal discrimination law purposes), modified Treasury version of the common law Right to Control Test (used for Affordable Care Act purposes), Economic Realities Test (used for Fair Labor Standards Act purposes), and the multitude of varying state law tests used for state wage and hour laws, workers compensation, and unemployment.

In another case, *CNN America, Inc.*, the cable news network CNN is appealing a recent NLRB ruling that forces the network to rehire workers from a temp agency 11 years after the news giant terminated its contract.

In a third case, the NLRB ruled in favor of the Teamsters union, which argued that Browning-Ferris Industries, a client of Leadpoint, a staffing company it was trying to unionize, is a joint employer of Leadpoint employees and therefore should be bound by a collective-bargaining agreement between Leadpoint and the union. Matthew Austin, a partner at the law firm Roetzel and Andress, comments on Law360: “Let that sink in: BFI will be bound by the union contract between Leadpoint and Leadpoint’s union. This [amicus brief of the NLRB general counsel and potential] ruling undermines the entire staffing and temporary employee industry” (“NLRB’s ‘Joint Employer’ Test Will Rewrite Labor Law,” Law360, September 18, 2014, <http://www.ralaw.com/resources/documents/files/Law360%20Sept%202014%20Article.pdf>).

An NLRB general counsel brief outright states, “The Board should not adhere to its existing joint-employer standard and should instead adopt a new standard,” which would hold that joint-employer status exists in cases of direct control of workers, indirect control of workers, potential control of workers, or where industrial realities give significant control over the other business’ workers (Amicus brief of the general counsel, June 26, 2014, <http://www.laborrelationsupdate.com/files/2014/07/GCs-Amicus-Brief-Browning-Ferris.pdf>).

Does telling a temp receptionist to dress professionally, where to sit, how to answer the phone, and when lunch and breaks occur constitute direct control, significant control, or potential control? Does adding extra tasks make a difference? Is donning a uniform a determining factor? Matthew Austin of Roetzel and Andress observes, “It’s hard to imagine a scenario where the use of temporary workers, employees from a staffing agency, many subcontracting relationships, seasonal workforces and day laborers will not automatically bind the supplying and using companies.”

The NLRB is waging an all-out assault on businesses that hire temps and contractors. Congress will have to step in to maintain the continued operation of those industries.

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For Further Reading

House Committee on Oversight and Government Reform, “President Obama’s Pro-Union Board: The NLRB’s Metamorphosis from Independent Regulator to Dysfunctional Union Advocate,” Staff report, December 13, 2012, <http://oversight.house.gov/wp-content/uploads/2012/12/NLRB-Report-FINAL-12.13.12.pdf>.

Raymond J. LaJeunesse, “Union Organizing Made Easier: The Obama NLRB,” Memphis Federalist Society Lawyers Chapter, July 26, 2012, http://www.nrtw.org/files/nrtw/Union_Organizing_Made_Easier.pdf.

James Sherk, “Unelected Unions: Why Workers Should Be Allowed to Choose Their Representatives,” Backgrounder No. 2721, Heritage Foundation, August 27, 2012, <http://www.heritage.org/research/reports/2012/08/unelected-unions-why-workers-should-be-allowed-to-choose-their-representatives>.