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RESTORING BALANCE AND FAIRNESS TO THE NATIONAL LABOR RELATIONS BOARD

HEARING

BEFORE THE

SUBCOMMITTEE ON HEALTH, EMPLOYMENT, LABOR, AND PENSIONS

COMMITTEE ON EDUCATION AND THE WORKFORCE

U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED FIFTEENTH CONGRESS

FIRST SESSION

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RESTORING BALANCE AND FAIRNESS TO THE NATIONAL LABOR RELATIONS BOARD

Tuesday, February 14, 2017
House of Representatives,
Subcommittee on Health,
Employment, Labor, and Pensions
Committee on Education and the Workforce,
Washington, D.C.

The Subcommittee met, pursuant to call, at 10:03 a.m., in Room 2175, Rayburn House Office Building, Hon. Tim Walberg [chairman of the subcommittee] presiding.

Present: Representatives Walberg, Wilson of South Carolina, Roe, Rokita, Allen, Lewis, Rooney, Mitchell, Smucker, Ferguson, Sablan, Wilson of Florida, Norcross, Blunt Rochester, Shea-Porter, Espaillat, Courtney, Fudge, and Bonamici.

Also Present: Representatives Foxx and Scott.

Staff Present: Bethany Aronhalt, Press Secretary; Andrew Banducci, Workforce Policy Counsel; Courtney Butcher, Director of Member Services and Coalitions; Ed Gilroy, Director of Workforce Policy; Callie Harman, Legislative Assistant; Nancy Locke, Chief Clerk; Geoffrey MacLeay, Professional Staff Member; John Martin, Professional Staff Member; Dominique McKay, Deputy Press Secretary; James Mullen, Director of Information Technology; Krisann Pearce, General Counsel; Alissa Strawcutter, Deputy Clerk; Olivia Voslow, Staff Assistant; Joseph Wheeler, Professional Staff Member; Tylease Alli, Minority Clerk/Intern and Fellow Coordinator; Austin Barbera, Minority Press Assistant; Denise Forte, Minority Staff Director; Nicole Fries, Minority Labor Policy Associate; Christine Godinez, Minority Staff Assistant; Richard Miller, Minority Senior Labor Policy Advisor; Veronique Pluviose, Minority Civil Rights Counsel; and Elizabeth Watson, Minority Director of Labor Policy.

Chairman WALBERG. A quorum being present, the Subcommittee on Health, Employment, Labor, and Pensions will come to order.

Good morning to each of you. Welcome to the first hearing of the HELP Subcommittee in the 115th Congress.

Before I begin, I'd like to congratulate Ranking Member Sablan on his selection to serve as the subcommittee senior Democrat. Welcome. I look forward to working together throughout the 115th Congress as we tackle the tough challenges facing our country.

After years of struggling through an anemic economy, sluggish job growth, rising healthcare costs, and stagnant wages, American people are expecting—in fact, they are demanding—a new direction for this country. They want policymakers to advance a bold, pro-growth agenda that will reduce the regulatory burden on small businesses, deliver a stronger, healthier economy, and provide hope and prosperity to families and future generations.

The American people are looking for a better way, and this is precisely what this Congress, working with the new administration, is committed to delivering. Restoring balance and fairness to the National Labor Relations Board will play an important role in this effort.

More than 80 years ago, President Franklin Delano Roosevelt signed the National Labor Relations Act to guarantee the right of workers to organize and collectively bargain over terms and conditions of employment, such as wages and benefits. Approximately 10 years later, Congress would reform the law to enact a basic set of protections for employers as well, such as the right to communicate with their workforce on employment and union-related matters.

Together, both the original law and the subsequent amendments to the law are designed to provide a level playing field between employers and union leaders. But more importantly, they're designed to protect the right of workers to make free and informed decisions about whether they want to join a union.

A neutral arbiter was created to maintain the balance Congress established in the law, protect worker free choice, and serve as an unbiased judge over labor disputes. The goal was to have an impartial referee who would apply the rules of the game fairly and objectively. The neutral arbiter was the National Labor Relations Board, although you wouldn't know it from the actions it has taken in recent years.

We have repeatedly seen the Obama NLRB overturn longstanding labor policies and put in place new policies designed to empower special interests. It's why the board adopted an ambush election rule that chills employers' free choice and free speech, cripples worker free choice, and jeopardizes the privacy of workers and their families. It's why the board endorsed a new joint employer standard that will destroy jobs and make it harder for entrepreneurs and small businesses to pursue the American dream.

It's also why the board is advancing a micro-union proposal that gerrymanders the workplace, thereby limiting the workplace mobility of employees and tying up employers in red tape. And it's also why the NLRB is expanding the power of union organizing on college campuses, whether it's organizing graduate students, student athletes, and others.

This is, by no means, a comprehensive list of extreme partisan actions the NLRB has taken in recent years. As Republicans raised concerns with harmful consequences of these policies, our colleagues told us not to worry; these were all innocent changes that will improve the lives of working families. Meanwhile, workers have less time to make informed decisions in union elections. Micro unions are being certified across the country, and small businesses, franchises, are uncertain about the future. None of this, none of

this, has helped invigorate the slowest economic recovery since the Great Depression.

Small business owners and entrepreneurs deserve better. Workers and their families deserve better. And this Congress will demand better. In the weeks and months ahead, we will do everything we can to turn back this failed activist agenda and restore balance and fairness to the board. We will work to protect the rights of workers and employers and help create an environment where businesses can grow, and all workers can achieve a lifetime of success.

Again, I look forward to working with all my colleagues on this important effort. With that, I will now recognize Ranking Member Sablan for his opening remarks.

[The statement of Mr. Walberg follows:]

Prepared Statement of Hon. Tim Walberg, Chairman, Subcommittee on Health, Employment, Labor and Pensions

After years of struggling through an anemic economy, sluggish job growth, rising health care costs, and stagnant wages, the American people are expecting—in fact, they are demanding—a new direction for this country. They want policymakers to advance a bold, pro-growth agenda that will reduce the regulatory burden on small businesses, deliver a stronger, healthier economy, and provide hope and prosperity to families and future generations.

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Together—both the original law and the subsequent amendments to the law—are designed to provide a level playing field between employers and union leaders. But more importantly, they are designed to protect the right of workers to make free and informed decisions about whether they want to join a union.

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This is by no means a comprehensive list of the extreme, partisan actions the NLRB has taken in recent years. As Republicans raised concerns with the harmful consequences of these policies, our colleagues told us not to worry; these were all innocent changes that will improve the lives of working families. Meanwhile, workers have less time to make informed decisions in union elections, micro unions are being certified across the country, and small business franchisees are uncertain about the future. None of this has helped invigorate the slowest economic recovery since the Great Depression.

Small business owners and entrepreneurs deserve better. Workers and their families deserve better. And this Congress will demand better. In the weeks and months

ahead, we will do everything we can to turn back this failed, activist agenda and restore balance and fairness to the board. We will work to protect the rights of workers and employers, and help create an environment where businesses can grow and all workers can achieve a lifetime of success.

Mr. SABLAN. Thank you very much, Mr. Chairman. Let me also begin by congratulating you on your selection to be chairman of the—our Subcommittee on Health, Employment, Labor, and Pensions.

I'd also like to greet and welcome all our witnesses this morning. We would very much like to hear your points of view.

This is my first meeting, too, as ranking member of this subcommittee. And I know that we have different personal backgrounds and experiences, and I know as chairman and ranking member we are both expected to represent the views of our respective side of the aisles, but I hope that coming fresh to our jobs, as we both do, we may be able to be free from preconceptions.

I hope we can remain willing to listen to each other and to the many points of view we will hear from other members and witnesses who will appear before this committee. I really do look forward to working with you.

And as I see it, we have two choices in today's hearing and over the next 2 years, as we examine the National Labor Relations Act. The purpose of the NLRA is to strengthen unions as an institution in our economy to ensure that wealth is more fairly shared.

The preamble to the Act states, and I quote, "The inequality of bargaining power between employees who do not possess full freedom of association, or actual liberty of contract and employers who are organized in the corporate or other forms of ownership associations substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing destabilization of competitive wage rates and working conditions within and between industries," end quote.

Here is the policy prescription set forth in the National Labor Relations Act: "It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate this obstruction when they have occurred by encouraging the practice and procedure of collective bargaining, and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." Nothing harmful there.

Now, the question is, does this committee update the National Labor Relations Act so it can be more effective in implementing these goals? Or do we go back to the year prior to its enactment, eighty years ago—older than I am, and I'm an older man—and find ways to undermine its purposes? We have choices. We can address the needs of working Americans whose pay has been largely stagnant over the past several decades, despite rising productivity. We can try to rebuild the middle class and those who want to climb the ladder to get there.

This is particularly important following the hollowing out of so many good-paying jobs caused by the economic collapse during the Great Recession. We can study the economic history of our country to assess how unions helped to make sure that growth in productivity rates was closely linked to growth in wage rates.

When the economy grew after the Great Recession, data shows that most of the new wealth was funneled disproportionately to the 1 percent. While the benefits began to spread more widely in the past few years, one thing is unmistakable: Far too many have been left behind. We know from studies that the declining union density and collective bargaining coverage is closely associated with rise in income inequality.

The median weekly income of full-time wage or salary workers who are union members in 2014 was $1,004, according to the U.S. Bureau of Labor Statistics. For non-union members, it was $802. Unionized workers also have more access to paid holidays, paid sick leave, life insurance, and medical and retirement benefits than those workers who are not unionized.

At home in my district, in the Marianas, we don't have many unions. But I know that our unionized communication workers are earning about $3.50 above the minimum wage, which is $6.55 an hour at the entry level, and two to three times as much as minimum at the higher levels.

Another choice is to go down the same path we have been following for the past three sessions of Congress when there have been 25 hearings and markups focused exclusively on weakening the National Labor Relations Act. Bills have been passed which give employers greater power to block union organizing efforts. Other bills actually blocked the ability of the National Labor Relations Board to function.

When you consider that private sector unions represent a mere 6.4 percent of the workforce, it is troubling that the committee has directed so much time on this small, independent agency. But attacks on the National Labor Relations Board are what they are: a proxy for attacks on unions.

We would like to work with you, Mr. Chairman, to try to chart a new path. We have legislative ideas to improve the National Labor Relations Act, which are outlined in the WAGE Act, and I would like to see if we can get this discussed in committee.

I want to thank our witnesses for their work in preparing for today's hearing, and I look forward to hearing your testimony.

And with that, Mr. Chairman, I yield back. Thank you very much.

[The statement of Mr. Sablan follows:]

Statement of Gregorio Kilili Camacho Sablan, Ranking Member

House Education and Workforce Committee

Subcommittee on Health, Employment, Labor and Pensions

"Restoring Balance and Fairness to the National Labor Relations Board"

February 14, 2017

Chairman Walberg, let me begin by congratulating you on your selection to be Chairman of the Subcommittee on Health, Employment, Labor and Pensions.

This is my first hearing, too, as Ranking Member of this subcommittee.

I know that we have different personal backgrounds and experiences. And I know, as Chairman and Ranking Member, we are both expected to represent the views of our respective parties.

But I hope that coming fresh to our jobs, as we both do, we may be able to be free from preconceptions. I hope that we can remain willing to listen to each other – and to the many points of views, we will hear from other Members and witnesses, who will appear before this subcommittee.

I look forward to working with you.

As I see it, we have two choices in today's hearing and over the next two years as we examine the National Labor Relations Act.

The purpose of the NLRA is to strengthen unions as an institution in our economy to ensure that wealth is more fairly shared.

The preamble to the Act states:

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Here is the policy prescription set forth in the NLRA:

> *It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self- organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.*

The question is, does this Committee update the National Labor Relations Act so it can be more effective in implementing these goals, or do we go back to the era prior to its enactment 80 years ago and find ways to undermine its purposes?

We have choices.

We can address the needs of working Americans whose pay has been largely stagnant over the past several decades, despite rising productivity.

We can try to rebuild the middle class and those who want climb the ladder to get there. This is particularly important following the hollowing out of many good paying jobs caused by the economic collapse during the Great Recession.

We can study the economic history of our country to assess how unions helped to make sure that growth in productivity rates was closely linked to growth in wage rates.

When the economy grew after the great recession, data shows that most of the new wealth was funneled disproportionately to the one percent. While the benefits began to spread more widely in the past few years, one things is unmistakable. Far too many have been left behind.

- We know from studies that the decline in union density and collective bargaining coverage is closely associated with rise in income inequality.
- The median weekly income of full-time wage and salary workers who were union members in 2014 was $1,004, according to the U.S. Bureau of Labor Statistics. For nonunion workers, it was $802.[1]

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[1] [1]Economic News Release: Union Membership 2016. Bureau of Labor Statistics. http://www.bls.gov/news.release/union2.toc.htm

- Unionized workers also have more access to paid holidays, paid sick leave, life insurance, and medical and retirement benefits than those workers who are not unionized.
- At home in the Marianas we don't have many unions but I know that our unionized communications workers are earning about $3.50 above the minimum wage at the entry level and 2 to 3 times as much as minimum at the higher levels.

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Bills have been passed which give employers greater power to block union organizing efforts. Other bills actually blocked the ability of the NLRB to function.

When you consider that private sector unions represent a mere 6.4% of the workforce, it is troubling that the Committee has directed so much time on this small independent agency. But attacks on the NLRB are what they are—a proxy for attacks on unions.

We would like to work with you, Mr. Chairman, to try to chart a new path. We have legislative ideas to improve the NLRA which are outlined in the WAGE Act, and I would like to see if we can get these discussed in committee.

I want to thank our witnesses for their work in preparing for today's hearing and I look forward to hearing their testimony.

With that, I yield back.

Chairman WALBERG. I thank the gentleman.

Pursuant to committee rule 7(c), all members will be permitted to submit written statements to be included in the permanent hearing record. And without objection, the hearing record will remain open for 14 days to allow such statements and other extraneous material referenced during the hearing to be submitted for the official hearing record.

It's now my pleasure to introduce our distinguished panel of witnesses. First, Mr. Kurt G. Larkin is a partner of Hunton & Williams, LLP, in Richmond, Virginia. Mr. Larkin advises businesses of all sizes on a host of traditional labor subjects, including union organizing campaigns, single and multiemployer collective bargaining, handling strikes and lockouts, and responding to and litigating unfair labor practice charges. He has advised clients in numerous union organizing campaigns, including under the NLRB's new representation case procedures, the ambush election rules, and help clients prepare advanced strategies for responding to union organizing under the board's new rules. Welcome.

Ms. Reem Aloul is the owner of BrightStar Care of Arlington, in Arlington, Virginia. After over 20 years of senior executive experience in management consulting, Ms. Aloul decided to focus on helping people in her local community remain in the comfort of their homes. She founded BrightStar Care of Arlington and became a certified senior adviser in the field. She will testify on behalf of the Coalition to Save Local Businesses. Welcome.

Ms. Susan Davis is a partner at Cohen, Weiss, and Simon of New York City. Ms. Davis specializes in the representation of national regional, and local labor unions in all aspects of collective bargaining, litigation, mergers, affiliations, organizing, strategic planning, and internal union governance. Welcome.

And finally, Mr. Raymond LaJeunesse is a vice president and legal director for the National Right to Work Legal Defense and Education Foundation, Incorporated, in Springfield, Virginia. The Foundation is a nonprofit, charitable organization that works on behalf of employees. Its mission is to eliminate compulsory unionism abuses through strategic litigation, public information, and education programs. Mr. LaJeunesse has extensive experience assisting employees with matters before the NLRB.

I now ask our witnesses to stand and raise your right hand.

[Witnesses sworn.]

Chairman WALBERG. You may be seated. Let the record reflect the witnesses answered in the affirmative.

Before I recognize you to provide your testimony, let me briefly explain our lighting system, which is not new to all of you, but you have five minutes to present your testimony. When you begin, the light in front of you will turn green, go; when one minute is left, the yellow light will turn on; and then when the red light comes on, finish up your concluding thought as quickly as possible so that we have the opportunity for all testimony to be given and then the opportunity for questioning.

So having said that, let me recognize Mr. Larkin for your five minutes of testimony.

TESTIMONY OF KURT G. LARKIN, PARTNER, HUNTON & WILLIAMS LLP, RICHMOND, VIRGINIA

Mr. LARKIN. Thank you. Chairwoman Foxx, Subcommittee Chairman Walberg, Ranking Member Sablan, and members of the subcommittee, it's an honor to be here with you today to discuss the topic of restoring balance to the National Labor Relations Board.

The NLRB has a long and distinguished history of administering our Federal labor laws, and regulating the conduct of labor management relations in the United States. Now, the Board's primary obligation under the National Labor Relations Act are to oversee the formation of collective bargaining units, and to investigate and remedy unfair labor practices committed by employers and labor organizations alike. In carrying out these duties, the Board is generally expected to act as a neutral arbiter of facts in cases.

Since the Board is made up of political appointees, its interpretation and application of the policies underlying the act, its enforcement priorities, and its case precedence do tend to shift depending on which political party holds the majority. As a result, labor practitioners like myself have come to expect at least some changes when control of the Board changes hands.

Now, provided that its members and its general counsel confine their actions to the limitations of the act, the system remains workable, although sometimes unpredictable. Unfortunately, and in contrast to the modest and gradual changes we've seen back and forth over the years, the Board, over the past eight years, has produced some of the most drastic and one-sided policy changes in its history.

And in almost every instance, these changes have worked substantial hardships on the business community. For example, the Board has promulgated burdensome new election procedures that dramatically reduce the time employers have to respond to union organizing campaigns and which paralyze them with administrative tasks. It has established an obtuse new standard announced in the Board's now infamous Specialty Healthcare decision for creating collective bargaining units to too easily allow unions to gerrymander the unit, based only on the extent of organization.

This standard has created the potential to balkanize an employer's workforce by dividing it into multiple units and paralyzing the employer with endless and competing negotiations. The Board's also rewritten the rule book for determining whether a business is a joint employer of the employees of another business. I'm talking, of course, about Browning-Ferris.

The test in that case overturned decades of settled law and allows for a joint employer finding if a business merely retains the right to affect the employment terms of another business' employees. The Board has since sought to force that test on other industries, including the franchising industry, threatening what is arguably the Nation's number-one engine for minority and small business growth.

Finally, the Board has waged an assault on an employer's right to maintain commonsense workplace policies, including confidentiality rules, employer arbitration programs, civility codes, and even rules that protect an employer's legal obligation to investigate and remediate complaints of workplace misconduct. These are just

a few examples of the precedents the Board has made over the past eight years.

And the common theme in all of these cases is that the Board's rationale for the change neglects to account for the realities of the American workplace and the challenge business owners of all sizes face in today's economy. The Board has given little thought over the last decade to how its policies can hinder an employee's ability, or an employer's ability to run a business and maintain a productive workplace.

So while the ability to set the agenda may be the prerogative of those in control of the Board, its actions over the past 8 years have turned the labor management landscape upside down. We're not asking the Board to be pro-business; we're just asking that it not be anti-business.

I respectfully submit that its long pastime to restore a sense of fairness and commonsense at the NLRB. That starts with the re-examination of some of these precedents. Some changes may be made here in Congress. For example, there have been proposals to modify certain definitions in the act, and return the joint employers standard to that which existed prior to the Board's recent decisions. And that would be a good start. But the Board itself must undertake some of these changes. This can't take place, however, until it's fully constituted. Only three members are presently serving terms, leaving two seats open.

In closing my remarks, I would just suggest that it's perhaps more imperative than ever that Congress and the President reconstitute the Board to its full five-member capacity so that it can begin to re-examine and hopefully restore its precedents to a State that more meaningfully accounts for the realities of the American workplace.

Thank you, again, for the privilege of testifying today.

[The statement of Mr. Larkin follows:]

Written Testimony of Kurt G. Larkin[1]
Hunton & Williams LLP

Before the U.S. House of Representatives Committee on Education and the Workforce

February 14, 2017

"Restoring Fairness to the National Labor Relations Board"

I. INTRODUCTION AND EXECUTIVE SUMMARY

The National Labor Relations Board ("Board") has a long and distinguished history of administering the federal labor laws and regulating the conduct of labor-management relations in the United States. The Board's primary charges under the National Labor Relations Act ("Act") are to oversee the formation of collective bargaining units and to investigate and remedy unfair labor practices committed by employers and labor organizations alike. In carrying out these duties, the Board is generally expected to act as a neutral arbiter of facts and cases.

Because the Board is comprised of political appointees, its interpretation and application of the policies underlying the Act, its enforcement priorities, and its case precedents, are prone to occasional shifts depending on which political party holds the majority. As a result, labor practitioners have come to expect at least some policy changes when control of the Board changes hands. Provided the Board's Members and its General Counsel confine their actions within the bounds of the Act, the system remains workable, albeit sometimes unpredictable.

Unfortunately and in stark contrast to the modest and gradual changes we have seen in previous administrations, the Board over the past eight years has produced some of the most drastic and one-sided policy changes in its history. In virtually every case, these changes have worked decided hardships on the employer community. For example, the Board has:

- Promulgated onerous new election procedures that dramatically reduce the time employers have to respond to union organizing campaigns and which paralyze them with burdensome administrative tasks.

- Established an obtuse new standard for creating collective bargaining units that too easily allows unions to gerrymander bargaining units based only on the extent of their organization, setting up the potential to balkanize an employer's workforce into multiple bargaining units and paralyze it with endless and competing labor negotiations.

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- Announced a controversial new test for determining whether a business is the joint employer of the employees of another business. This test, which contravenes decades of settled law, allows for a joint employer finding if a business merely retains the right to affect the employment terms of another business' employees. Since announcing this test, the Board has sought to force it on the franchising industry, threatening what is arguably the nation's number one engine for minority and small business growth.

- Waged an all-out assault on an employer's right to maintain common sense workplace policies including confidentiality rules, employer arbitration programs, civility codes and even rules that protect an employer's legal obligation to investigate and remediate complaints of workplace misconduct and harassment.

These highlights only scratch the surface of the many precedents the Board has either unwound or remade over the past eight years. While its efforts to rewrite American labor law have spanned a variety of issues, there is a common theme in most of the Board's actions. In almost every instance in which the Board has changed the law in a manner it contends makes the Act more employee-friendly (some would say more union-friendly), its rationale underlying the change has been tone deaf to the realities of the American workplace and the challenges business owners of all sizes face in today's economic landscape. The Board has given little thought over the last decade to how its policies might hinder an employer's ability to run a business and maintain a productive workplace. This fundamental lack of understanding of how overregulation can interfere with legitimate business interests is reflected in so many of the Board's policy shifts that many have come to believe the Board simply doesn't care whether its policies negatively impact the business community.

While the ability to set the agenda might be the prerogative of those in control of the Board, the agency's actions over the past eight years have left the labor-management relations landscape virtually unrecognizable compared to what it was at the beginning of 2009. The time has come to restore sense to the NLRB and re-examine the many precedents it has turned upside down. Some of that change can happen in Congress. For example, there have been legislative proposals to change certain definitions in the Act and return the joint employer standard to that which existed prior to the Board's recent decisions. Those efforts, if successful, would be a good start.

But the Board itself must undertake some of these changes—or at least take a second look at the controversial decisions issued under the previous administration. This cannot take place, however, until the Board is fully constituted. Only three Members are presently serving terms, leaving two seats open. The Board has a long tradition of not overruling precedent without a three-Member majority. With two Democrats and one Republican currently sitting on the Board, changes are unlikely to happen.

In summary (and as the detailed discussion of the Board's legal precedents below amply demonstrates), it is perhaps more imperative than ever before that Congress and the President reconstitute the Board to its full, five-member capacity so that it can begin to re-examine and, hopefully, restore its precedents to a state that more meaningfully accounts for the realities of the American workplace.

II. THE BOARD'S NEW REPRESENTATION CASE RULES AND BARGAINING UNIT PRECEDENT PLACE UNDUE LEGAL AND PROCEDURAL BURDENS ON EMPLOYERS

It is no secret that union membership in the United States has been on the decline. A recent report from the U.S. Bureau of Labor Statistics confirms that the union membership rate among private-sector employers has dropped from 16.8 percent in 1983 to 6.4 percent through 2016.[2] Over the past eight years, the Board has attempted to reverse that trend through a series of legal and procedural overreaches. Its actions have unjustifiably tilted the playing field in favor of unionization and created substantial legal and procedural burdens for employers.

The Board's overreach is most evident in its new representation case rules (labeled the "ambush election rules" by some) which became effective in April 2015. The rules—which artificially shorten the time period between the filing of a petition and the holding of an election and sideline the resolution of key legal challenges until after the election—depart drastically from prior procedure and all but eliminate an employer's ability to respond effectively to union election petitions. The rules saddle employers with onerous new administrative requirements that in many cases monopolize their attention during the now-shortened election time period. They force employers into rushed and ineffective campaign communications with employees, who no longer have time to hear both sides of the debate. Even more troubling, the rules compel employers to address the question of unionization with employees before a petition is filed—sometimes, before any union is even on the horizon—lest they lose the opportunity to do so effectively during a truncated election period.

The Board's one-sided new election rules compounded an already-problematic landscape for employers. In 2011, the Board's decision in *Specialty Healthcare & Rehabilitation Center of Mobile*[3] upended years of long-standing precedent and redefined the standard for determining the appropriate bargaining unit. In *Specialty Healthcare*, the Board introduced a test that too easily allows unions to draw bargaining units based on the apex of their organizational strength. This practice is inimical to the concept of majority rule enshrined in our nation's labor laws. Indeed, Congress passed the Taft-Hartley amendments to the National Labor Relations Act in 1947 to insure that the extent of a union's organizational efforts never controls the outcome of a bargaining unit determination. *Specialty Healthcare* turns a blind eye to that mandate.

Together, the Board's burdensome new rules and union-friendly bargaining unit standard place enormous administrative and legal burdens on employers and facilitate rushed elections in gerrymandered bargaining units that do not meaningfully relate to the reality of an employer's workplace or to the desires of its employees—including those who may have been intentionally segregated from the voting group under *Specialty Healthcare*.

Ironically, there was little reason for the Board to pile these burdens on employers. While the rate of unionized workers in the United States has most certainly dropped in recent decades, the rate that unions prevail at the ballot box has remained consistently high—well over

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[2] *See* "Union Members Summary," U.S. Bureau of Labor Statistics (Jan. 26, 2017).

[3] 357 NLRB 934 (2011).

65% since 2010. There simply was no need for the Board to change a system that already produced results favorable to organized labor. A return to the Board's common-sense rules and bargaining unit standards that existed before these recent changes is unlikely to have a negative effect on unions. On the other hand, a continuation of the Board's "ambush" and *Specialty Healthcare* rules will have a substantial negative effect on employers as well as employees, whose rights are ultimately at stake in election proceedings.

A. The "Ambush" Election Rules Are Designed To Facilitate Union Victories

The Board's expedited election rules fundamentally restructured the representation election process. Taking effect on April 14, 2015, the rules ushered in comprehensive changes to the election process by, among other things:

- Eliminating the 25-day waiting period between the date an election is ordered and the date it is held, stating now that the election should be held "as soon as practical";
- Requiring the employer to file a burdensome Statement of Position within seven days of the date the election petition is filed;
- Limiting the issues that may be litigated in a pre-election hearing to whether a "question of representation" exists in the proposed bargaining unit;
- Requiring that the pre-election hearing (if there is one) must be held within eight days of the date the election petition is filed and barring continuances of longer than two days except in "extraordinary circumstances";
- Allowing Regional Directors to limit employers to "offers of proof" during pre-election hearings and deny them an opportunity to introduce evidence based on cursory "review" of those offers of proof; and
- Requiring the employer to provide the union with private employee information, including their home addresses, home and cellular phone numbers, and personal e-mail addresses, all on pain of invalidating the election results if the employer fails to provide any such information that is reasonably available.

Viewed as a whole, these modifications artificially shorten the pre-election period, burden employers with administrative obligations, and interfere with formal consideration of issues integral to the conduct of the election, such as voter eligibility and appropriate inclusion in the proposed unit.

Section 102.63(a), for example, requires employers to post a notice of election within 2 business days after service of the notice of hearing and prior to any determination by the Board that the petition has sufficient merit to justify an election.[4] It also severely abbreviates the time between the filing of the union petition and the first day of a hearing, except in limited cases

[4] *See* 29 C.F.R. §102.63(a).

shown to be sufficiently "complex" to warrant delay for a limited additional time period or under undefined "special circumstances" and/or "extraordinary circumstances."[5]

The rules also require employers, during the critical initial days following the filing of a petition for election, to prepare and file a written "Statement of Position" addressing the basis for any employer contention that the petitioned-for unit is inappropriate, the basis for any employer contention that certain employees should be excluded from the petitioned-for unit, and the basis for all other issues the employer intends to raise at the hearing, upon risk of waiving employers' statutory rights to contest any omitted issues.[6]

Section 102.63(b) further requires employers to prepare and include with the Statement of Position a list of all employees in the petitioned-for unit, including their work location, shifts, and job classifications, a second list (together with the above described additional information) of all individuals in any alternative unit sought by the employer, and a third list (together with the above described additional information) of any individuals who the employer contends should be excluded from the petitioned-for unit.[7]

Section 102.64(a) contemplates that the pre-election hearing required under Section 9(c) of the Act be conducted solely "to determine if a question of representation exists" and provides that "disputes concerning individuals' eligibility to vote or inclusion in an appropriate unit," which have traditionally been deemed necessary and appropriate issues for pre-election consideration, "ordinarily need not be litigated or resolved before an election is conducted."[8] Relatedly, the rule arbitrarily restricts the right to introduce evidence at the hearing solely to that which is "relevant to the existence of a question of representation."[9]

Practically, this means that if an employer believes an employee in the proposed unit is a statutory supervisor, it cannot obtain a determination whether the individual should be excluded from the bargaining unit until <u>after</u> the election. This presents an obvious conundrum for the employer: it can treat the employee as a supervisor during the campaign, and risk unfair labor practice liability for doing so, or it can back off, and lose the ability to campaign through an individual who may well not even be eligible to vote.

The rules also require parties to prepare and present "offers of proof" at the outset of the hearing, and authorize Regional Directors to bar employers from entering evidence into the

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[5] *Id.* The author can state based on practical experience that the filing of a petition three business days before the Christmas weekend—making the employer's Statement of Position due two business days after Christmas Day and calling for a pre-election hearing three business days after Christmas Day—does not, in the Board's view, constitute "extraordinary circumstances" justifying any more than a two-day extension of time. The challenges such a scenario presents to an employer's ability to analyze the petition and the proposed bargaining unit, marshal evidence, complete the Statement of Position, and be prepared to present evidence at a pre-election hearing, all over a nationally recognized holiday weekend, are too obvious and numerous to list.

[6] *See* 29 C.F.R. §§102.63(b); 102.66(d).

[7] *See* 29 C.F.R. § 102.63(b).

[8] *See* 29 C.F.R. §102.64(a).

[9] *See* 29 C.F.R. §102.66(a).

record if—in the subjective view of the Regional Director—the employer's offer of proof is insufficient to warrant conducting the hearing. Employers are further precluded from introducing evidence on issues not previously addressed in the newly required Statement of Position.[10] Regional Directors have used these rules to stifle employer attempts to introduce evidence supporting bargaining unit challenges, and in some cases have even refused to allow employers to make testimonial proffers that would allow the employer to preserve for appeal a contention that barring the evidence violated its right to a fair hearing.

It goes on. Section 102.66(h) precludes employers from presenting post-hearing briefs and from reviewing a record transcript prior to stating their post-hearing positions, except upon special permission from, and addressing only subjects permitted by, the Regional Director. Practically, this means that if an employer somehow raises issues suitable for a hearing and is then permitted to present evidence on those issues, it may be limited to an oral summation at the close of that hearing which in some cases has been required to be made mere minutes after the last witness has testified.[11]

Once a Decision and Direction of Election is issued, the rules require employers to disclose unprecedented personal and private employee information, including home addresses, home and cellular telephone numbers and personal email addresses.[12] The rules drastically shorten the time within which such information must be released by employers and require such personal disclosures even as to employees whose eligibility to vote has been contested and not yet determined. Moreover, the rules provide that a failure to disclose all such information that is reasonably available is grounds for setting aside the results of the election.

Early results show the rules are having their desired effect. In the first year after the rules became effective, the average time between the filing of a petition and the election decreased from 38 days to 23 days.[13] Statistics also show that union success rates are up five percent from 2014 and up eight percent from 2013. In 2013, for example, unions won 64.1% of elections, while unions won 72.6% of elections in 2016.[14] Again, unions were winning a clear majority of elections before implementation of the new rules, leading many to question why the Board was trying to fix what was not broken. By any measure, there was no pressing statistical need to saddle employers with these new burdens.

(i) The New Rules Lead To An Uninformed Workforce

For all of the reasons described above, the new rules severely restrict an employer's rights to a fair hearing and a reasonable opportunity to communicate with its workforce during the pre-election period. These obligations also frustrate the rights of the employees who must

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[10] *Id.*

[11] *See* 29 C.F.R. §102.66(h).

[12] *See* 29 C.F.R. §102.67(1).

[13] *See* "Ambush At The NLRB: Data On New Union Election Rule," Timothy M. Mconville, *Law360* (June 16, 2015).

[14] *See* https://www.nlrb.gov/reports-guidance/reports/election-reports.

make the decision whether or not to unionize. As Board Members Miscimarra and Johnson noted in their dissent to the final rule: "[T]he inescapable impression created by the Final Rule's overriding emphasis on speed is to require employees to vote as quickly as possible—at the time determined exclusively by the petitioning union—at the expense of employees and employers who predictably will have insufficient time to understand and address relevant issues."[15]

The practical consequence of the rule is that employees hear only one-side of the debate. Unions often organize in secret. They can act at their leisure in soliciting support from a targeted group of employees and delay the filing of a petition until that group has been organized. The prior election procedures provided an employer—even one with no notice of employee organizing efforts—adequate time to meaningfully address the relevant issues with its workforce and to respond to employee questions about subjects such as collective bargaining, union dues, and other issues relevant to the question of unionization. The new rules, however, unreasonably curtail an employer's opportunity to respond to these inquiries. This ultimately can lead to an election decided by uninformed voters.

Such a result flies in the face of the stated purpose of the Act. By its own terms, Section 7 of the Act provides that: "Employees shall have the right to self-organize, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities . . . and shall have the right to refrain from any or all of such activities."[16] The right to refrain is only meaningful when employees have access to information from both sides. The new rules, however, dramatically increase the likelihood that they will not.

(ii) The Board's Rules Infringe On Employers' Statutory Right to Communicate With Employees

Section 8(c) of the National Labor Relations Act provides that "[t]he expressing of any views, argument, or opinion, or the dissemination thereof . . . shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit."[17] Consistent with this aspect of the statute, "an employer's free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the Board."[18] The Board's new rules, however, infringe on these rights in a number of respects.

First, by reducing the critical period between the filing of a petition and the election itself, the rules deprive employers of adequate time to present their views on unionization in a meaningful fashion. The Board has long considered the pre-election period to be a "critical period . . . during which the representation choice is imminent and speech bearing on that choice takes on heightened importance."[19] However, the additional administrative obligations with

[15] 79 Fed. Reg. 74,460.

[16] 29 U.S.C. § 157.

[17] 29 U.S.C. §158(c).

[18] *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969).

[19] *See* 79 Fed. Reg. at 74, 439-40 & n. 591 (Dec. 15, 2015) (dissent)(citations omitted).

which employers are saddled during the pre-election campaign can preoccupy and divert them from exercising their free speech rights during the most important phase of a representation proceeding. Practically, these modifications hamper an employer's lawful communications with employees about campaign issues.

Second, the unfairly shortened critical period, combined with the many ministerial tasks that consume precious time during that period, have compelled some employers to address the subject of unionization with employees before a petition is filed—and quite often before any organizing efforts have even occurred—for fear they will not have adequate time to do so once a petition is filed. The danger is obvious: addressing the issue of unionization before a petition is filed forces employers to bring attention to a situation that might never arise and could easily have the unintended consequence of planting the seed of unionization in the minds of employees.

Moreover, the possibility that an employer may make generic, pre-petition statements concerning unionization, based on general observations at a time when no apparent organizing is taking place, is no substitute for post-petition speech. The benefit of the "critical period" is that it permits an employer to identify and understand the issues involved in a campaign so that it may develop lawful communication responses on those issues.

Ultimately, the First Amendment, which protects "both the right to speak freely and the right to refrain from speaking at all,"[20] vouchsafes in an employer the ability to decide when and how to address the issue of unionization with employees, or to refrain from doing so. The employer's right to refrain from such speech is directly, and prejudicially, implicated by the new rules.

(iii) The New Rules Have Turned the Representation Case Proceeding Into An Adversarial Procedure That is Inconsistent With Its Purpose

The many legal and procedural problems created by the new rules would be bad enough on their own. But as a practical matter, the rules have also fostered confrontation and adversarial conflict in a procedure that is supposed to be anything but. The Board's charge in a representation case proceeding is to serve as a neutral investigator and to determine whether the petitioned-for unit is appropriate for purposes of collective bargaining.[21] In carrying out this charge, the Board's Regional Directors are not supposed to favor one side or the other.

Unfortunately, the rules themselves are so one-sided that they often compel Regional Directors into decisions and rulings that are themselves extraordinarily one-sided. Pressuring employers to stipulate to the appropriateness of proposed bargaining units; forcing employers who decline and insist on challenging unit appropriateness to make unexpected and rushed offers of proof; speeding along pre-election hearings as quickly as possible—sometimes even refusing to allow parties a lunch break so that the hearing might be completed in a single day, and barring employers from preparing post-hearing briefs, are but a few examples of the kinds of rulings that

[20] *Wooley v. Maynard*, 430 U.S. 705, 714 (1977).

[21] *See generally*, "President Obama's Pro-Union Board: The NLRB's Metamorphosis from Independent Regulator to Dysfunctional union Advocate," Staff Report U.S. House of Representatives, 112th Congress, Committee on Oversight and Government Reform (Dec. 13, 2012).

are now commonplace in representation case proceedings. When played out in practice, this draconian process has led to a perception in the employer community that the Board's rules are one-sided and unfair. This undermines both the process and the Board's standing as a would-be neutral arbiter of labor-management relations in the United States.

B. The Board's *Specialty Healthcare* Standard Has Insulated Proposed Bargaining Units From Meaningful Review

The Board's efforts to increase union membership did not begin with its "ambush" election rules. In 2011, the Board issued its controversial decision in *Specialty Healthcare*, reversing decades of precedent and establishing a new standard for challenging the appropriateness of a petitioned-for bargaining unit. The new standard, which provides that any collection of employees "readily identifiable as a group" will be found appropriate for bargaining unless the employer shows that some other group of employees has an "overwhelming community of interest" with the proposed group, makes it nearly impossible for an employer to alter the composition of a union's would-be unit. In fact, in every case that has reached the Board level in which the *Specialty Healthcare* standard has been fully applied, the party opposing the proposed unit has failed to alter it.

Specialty Healthcare's convoluted test has had the practical effect of allowing unions to seek bargaining units that reflect little more than the extent to which they have been successful in recruiting employees who support unionization. This approach is inconsistent with the Act's express command in Section 9(c)(5) that the extent of union organization shall not control the Board's determination of whether a proposed bargaining unit is "appropriate" under the Act. A brief review of the history of Taft-Hartley and its contemporaneous legislative history, as well as the well-developed precedent that the Board used to determine the appropriate unit for decades, shows just how far the *Specialty Healthcare* standard has strayed from the norm.

In order to assure employees the "fullest freedom in exercising the rights guaranteed by" the Act, the Board must "decide in each case" whether a petitioned-for unit is "appropriate for the purposes of collective bargaining."[22] Congress carefully chose this language to ensure that bargaining unit formation would not frustrate effective bargaining. The Board's role in bargaining unit determinations was part of a larger debate over the wisdom of majority elections and *who* should decide the appropriate unit:

> The major problem connected with the majority rule is not the rule itself, but its application . . . Section 9(b) of the Wagner bill provides that *the Board* shall decide the unit appropriate for the purpose of collective bargaining. . . . To lodge the power of determining this question with the employer would invite unlimited abuse and gerrymandering the units would defeat the aims of the statute. If the employees themselves could make the decision without proper consideration of the elements which should constitute the appropriate units they could in any given instance defeat the practical significance of the majority rule; and,

[22] 29 U.S.C. § 159(b).

> *by breaking off into small groups, could make it impossible for the employer to run his plant.*[23]

Early Board decisions disregarded this guidance and essentially allowed the union to select the bargaining unit.[24] To eliminate this practice, Congress passed the Taft-Hartley amendments to the Act in 1947, adding Section 9(c)(5)'s proscription against allowing the extent of organization to control unit determinations. The House Report on Section 9(c)(5) confirms it was a response to the Board's early overreliance on the extent of organization:

> Section 9[(c)(5)] strikes at the practice of the Board by which it has set up as units appropriate for bargaining whatever group or groups the petitioning union has organized at the time . . . While the Board may take into consideration the extent to which employees have organized, *this evidence should have little weight, and as section 9 [(c)(5)] provides, is not controlling.*[25]

Thus, the plain language of the Act and its legislative history reflects Congress's intent that the Board must decide "in each case" the appropriate bargaining unit, and that in fulfilling that obligation it cannot allow the extent of union organizing to control the outcome.

The Board's unit determination precedent remained faithful to Taft-Hartley for decades. Before *Specialty Healthcare*, it never addressed "solely and in isolation" whether a petitioned-for unit shared a community-of-interest to itself.[26] Instead, the Board would "necessarily proceed[] to a further determination whether the interests of the group sought are sufficiently distinct from those of other employees to warrant the establishment of a separate unit."[27] In making this determination, the Board would examine the interrelatedness of the employees in the proposed unit with those an employer sought to add to the group. Factors considered included the degree to which the employees were organized into separate departments; whether the employees had distinct skills and/or training; the amount of overlap and interchange between the two groups; whether the groups were functionally integrated with other employees; and the overall terms and conditions of employment for each group.[28]

In *Specialty Healthcare*, however, the Board replaced this standard test with a subterfuge designed to isolate and highlight the commonalities between employees in the proposed group before allowing any analysis of whether they share any interests with employees outside of the group. *Specialty Healthcare* asks whether a proposed unit consists of employees "who are

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[23] *Hearings on S. 1958 Before the S. Comm. On Educ. & Lab.*, 74th Cong. 82 (1935) (statement of Francis Biddle), *reprinted in 1935 Legislative History* 1458 (emphases added).

[24] *See, e.g., Botany Worsted Mills*, 27 NLRB 687 (1940) (unit of trappers and sorters, a single department in employer's plant, deemed appropriate).

[25] 1 NLRB, Legislative History of the Labor Management Relations Act, 1947, at 328 (1947) (House Report No. 245, April 11, 1947) (internal citations omitted) (emphasis added).

[26] *Newton-Wellesley Hospital*, 250 NLRB 409, 411 (1980).

[27] *Id.* at 411.

[28] *See e.g., United Operations, Inc.*, 338 NLRB 123 (2002).

readily identifiable as a group (based on job classifications, departments, functions, work locations, skills, or similar factors)."[29] If they are, the Board will find that the unit is appropriate unless the employer can demonstrate that other employees "share an overwhelming community of interest with those in the petitioned-for group."[30]

This supposed two-part test encourages Regional Directors to rely on job titles, departmental lines, work locations and skills—factors that concern only those in the proposed unit—as a proxy for finding them "readily identifiable as a group." But virtually any employees who share a job title, or who work in one department, will be "readily identifiable" under this rule. As well, almost any group of employees with the same job title or in the same department will have a community-of-interest among themselves. Thus, the first prong of *Specialty Healthcare* is designed to identify similarities among the employees in the proposed group that by definition constitute distinctions between those employees and any others the employer may seek to add.

While the Board claims it still conducts a "traditional" community of interest analysis—i.e., the one called for in *Newton-Wellesley*—as part of the *Specialty Healthcare* test, doing so only after finding the proposed group "readily identifiable" allows the Board to engage in the very inward-looking analysis against which *Newton-Wellesley* warns. Moreover, the "overwhelming community-of-interest" burden placed on an employer at step-two of the *Specialty Healthcare* test is a standard that is unattainable in practice. In order to meet that standard, the employer must show that the employees it seeks to add to the unit have interests that "overlap almost completely" with those of the employees in the unit.[31]

This is impossible. No employees who are "readily identifiable as a group" and who possess a "community-of-interest" among themselves can simultaneously have interests that "overlap almost completely" with those of other employees. The Board has even admitted as much in a recent decision upholding the *Specialty Healthcare* standard: "The employer failed to demonstrate that the [proposed additional] employees share an 'overwhelming community of interest with [the petitioned-for] employees . . . it is impossible to say that the factors [between the two groups] overlap almost completely."[32]

In practice, the *Specialty Healthcare* standard shifts far too much discretion to unions to select a bargaining unit tailored specifically to their interests and the extent of their organizing success. As such, the Board's "approach to unit determination [] permits easy rationalization of any desired result" sought by the union and impermissibly cedes its gatekeeping function to the union.[33]

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[29] *Specialty Healthcare*, 357 NLRB at 945-46.

[30] *Id.*

[31] *Id.* at 944.

[32] *Volkswagen Group of America, Inc.*, 364 NLRB No. 11, slip op. at fn 1 (Aug. 26, 2016) (emphasis added).

[33] *DPI Secuprint, Inc.*, 362 NLRB 172 (2015) (Johnson, dissent).

Perhaps the biggest problem with the *Specialty Healthcare* standard is that it is blind to the realities of an employer's workplace. For decades before its advent, the Board would not make a unit determination without considering the nature and function of the particular business setting in which the employees sought to organize: "[I]f the unit determination fails to relate to the factual situation with which the parties must deal, efficient and stable collective bargaining is undermined rather than fostered."[34] The Board also recognized that permitting bargaining "based upon a [job] title . . . would result in creating a fictional mold within which the parties would be required to force their bargaining relationship. Such a determination could only create a state of chaos rather than foster stable collective bargaining."[35] These are the precise ills the *Specialty Healthcare* standard has fostered.

Subsequent decisions applying *Specialty Healthcare* highlight the practical illogic of this new standard. In *Macy's, Inc.*,[36] for example, the Board approved of a unit limited solely to employees in the employer's cosmetics and fragrance department. In reaching this ruling, the Board turned its back on decades of precedent holding that in the retail industry, the "optimum" bargaining unit is a storewide unit.[37] The Board thus rejected the employer's argument that the only appropriate unit should include all sales floor personnel, holding that the unit was rationally drawn based on the employer's own departmental lines (ignoring, of course, that those lines were nothing but small sections of a single department store and that the employees in each department were performing essentially the same function, only with different products).[38]

Taken to its logical conclusion, there is nothing in a decision like *Macy's* that would prevent the union there from going on to organize myriad additional units in the same department store, each requiring their own collective bargaining unit and union representative. Indeed, just last month, a Board Regional Director certified elections in nine separate bargaining units consisting of teaching fellows assigned to nine different academic departments at Yale University. Applying the *Specialty Healthcare* standard, the Regional Director found the nine separate units were all separate, "readily identifiable" groups because each included "all teaching fellows who teach for a specific academic department."[39] The Regional Director found separate units could be allowed because the employees in each different group "share a community of interest <u>with one another</u>."[40]

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[34] *Kalamazoo Paper Box Corp.*, 136 NLRB 134, 137 (1962).

[35] *Id.* at 139-40.

[36] 361 NLRB No. 4 (2014).

[37] *See, e.g., May Department Stores Co.*, 97 NLRB 1007 (1952) (storewide unit "optimum unit for purposes of collective bargaining."); *I. Magnin & Co.*, 119 NLRB 642 (1957) (storewide unit "basically appropriate unit" in retail); *Sears, Roebuck and Co.*, 184 NLRB 343 (1970) (storewide unit "presumptively appropriate.")

[38] *See Macy's*, slip op. at 8-9.

[39] *Yale University*, Case Nos. 01-RC-183014 et seq., Decision and Direction of Election at 29 (Jan. 25, 2017).

[40] *Id.* at 30 (emphasis added).

The burdens such a bizarre results create for employers are all too obvious. In Yale's case, the artificial fragmentation of its faculty could spawn in-fighting between departments, each of which will have similar motivations to fight for the most favorable terms and conditions of employment. In the meantime, the university will be paralyzed by endless collective bargaining negotiations and hampered in its ability to promulgate workplace policies if restricted by different terms and conditions in nine different labor agreements.

Former Board Member Brian Hayes predicted just such adverse consequences shortly after *Specialty Healthcare's* issuance in 2011: "[T]his new standard will encourage petitioning for small, single classification and/or single department groups of employees . . . lead[ing] to the balkanization of an employer's unionized workforce, creating an environment of constant negotiation and tension resulting from competing demands of the representatives of numerous micro-units."[41] That is precisely the situation many employers are now in as a result of the *Specialty Healthcare* standard. In an effort to facilitate organizing in the unit preferred by the union, the Board has opened the door to a "balkanization" of the American workplace that plainly is out of step with the policies underlying the Act and decades of prior precedent. [42]

III. REDEFINING THE "JOINT EMPLOYER" DOCTRINE THREATENS TO UNDERMINE LONGSTANDING BUSINESS RELATIONSHIPS

As troubling as these recent developments in the Board's representation case rules and precedent have been, they may not be the worst blow the Board has dealt employers. That

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[41] *Northrop Grumman Shipbuilding, Inc.*, 357 NLRB 2015 at 2020-23 (2011) (Hayes, dissent)

[42] To date, most of the federal appellate courts to have addressed challenges to *Specialty Healthcare* have ruled that while application of the standard might violate the Act under certain circumstances, the test articulated in the majority opinion is not unlawful on its face. *See, e.g., Nestle Dreyer's Ice Cream Co. v. NLRB*, 821 F.3d 489, 499 (4th Cir. 2016) (*Lundy* prohibits "overwhelming" test where Board "conducts a deficient community-of-interest analysis – that is, where the first step of [*Specialty*] fails to guard against arbitrary exclusions."); *Constellation Brands U.S. Operations, Inc. v. NLRB*, 842 F.3d 784, 792 (2d Cir. 2016) (denying enforcement and noting that "[s]tep one of [*Specialty*] expressly requires the [Board] to evaluate several factors relevant to whether the interests of the group sought were sufficiently distinct from those of other employees."); *NLRB v. FedEx Freight, Inc.*, 832 F.3d 432, 441 (3d Cir. 2016) ("This initial community-of-interest test—and its application—reflects the standard used by the Board in prior decisions."). Some federal judges, however, have seen the test for what it is. *See, e.g., Macy's, Inc. v. NLRB*, 844 F.3d 188 (5th Cir. 2016) (dissent from denial of rehearing *en banc*) ("The panel erred by allowing the NLRB's decision to stand when it and its underlying foundations are marred by the misapplication of the NLRA and its historical interpretation."). The author respectfully suggests that the decisions ratifying bargaining units under the *Specialty Healthcare* framework are out of step with the analysis that these courts have historically identified as necessary to a meaningful community-of-interest analysis. Although not recognized as such in these decisions, the real first step in the *Specialty Healthcare* test is limited to whether the proposed unit is "readily identifiable." As discussed, this analysis is by no means "traditional," does not consider the interests of anyone besides those in the proposed group, and inherently dismisses commonalities that may exist between the proposed group and other employees. Application of *Specialty Healthcare* as prescribed in the majority opinion therefore does—by its own terms—accord controlling weight to the extent of organization in violation of the Act. While it remains to be seen whether the courts will recognize this irremediable flaw in the *Specialty Healthcare* framework and invalidate the standard altogether, the Board can (and should) save the courts and the parties to representation cases the trouble by revisiting and returning its unit determination precedent to the traditional *Newton-Wellesley* analysis.

arguably came in August of 2015, when the Board announced a new legal standard for determining if a business is the "joint employer" of individuals employed by another business. The decision, *Browning-Ferris Industries, Inc.* departed from decades of established precedent and established a test of sweeping scope that threatens to redefine the employer-employee relationship across all areas of business and industry in the United States.[43]

The *Browning-Ferris* majority premised its decision on a claimed need to return the Board's joint-employer standard to the state in which it existed before the Board supposedly narrowed the test in recent decades. The history of the Board's joint-employer precedent suggests this premise is inaccurate at best, and intentionally misleading at worst. The new standard promises to go *much* further in practice than prior Board precedent by dramatically increasing the number of entities who will face joint-employer liability.

Under the new standard, the Board considers two or more businesses to be joint employers if: (1) both entities are employers under the common law; and (2) both employers share or codetermine those matters governing the "essential terms and conditions of employment." This standard, on its face, is essentially a restatement of earlier Board precedent. However, *Browning-Ferris* goes much further:

> We will no longer require that a joint employer not only *possess* the authority to control employee's terms and conditions of employment, but also *exercise* that authority . . . Nor will we require that, to be relevant to the joint-employer inquiry, a statutory employer's control must be exercised directly and immediately. If otherwise sufficient, control exercised indirectly – such as through an intermediary – may establish joint employer status.[44]

In other words: (i) a company's retention of an unexercised right to control another company's employees, or (ii) a company's exercise of mere indirect control on the employment terms of those employees, are now both relevant and potentially dispositive of joint-employer status. This leads to an obvious question: if a putative joint employer never actually exercises direct control over the employees of another company, how much retained or indirect control will be sufficient to establish joint-employer status?

The murky guidance provided by the Board's majority opinion makes this question almost impossible to answer. And the consequences of a finding that a customer business and its subcontractor are joint employers could be significant, including: (i) a requirement that the customer participate in collective bargaining with the union that represents (or seeks to represent) the subcontractor's employees; (ii) a finding that picketing directed at the customer is no longer illegal secondary activity under federal labor law; (iii) shared liability for unfair labor practices committed against the subcontractor's employees; and (iv) potential limitation of the customer's business flexibility.

All of these risks are now likewise inherent in the dealings between franchisor and franchisee; temporary staffing agency and end-user of temporary labor; general contractor and

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[43] 362 NLRB 186, slip op. (August 27, 2015).

[44] *Id.* at 2.

subcontractors, and perhaps even parent and subsidiary. The test articulated in *Browning-Ferris* is broad enough on paper to cover all of these relationships, many of which have never before been subjected to joint-employer liability under the Act.

Uncertainty continues to predominate over how to deal with the Board's new standard. This Subcommittee introduced legislation in the prior term that would amend the National Labor Relations Act to return the definition of "employer" to that which existed prior to the Board's decision in *Browning-Ferris*. I fully support that effort.

In the meantime, and unless and until such a change is made by Congress or a newly constituted Board, employers are left to guess at how to address the risks created by this new standard. Some may conclude that if they are going to be held responsible for the liabilities of their suppliers, subcontractors or franchisees, they must exert more control over their day-to-day operations so that they can be more aware of, and seek to mitigate, these liabilities. Franchisors would become responsible for matters like who to hire, when to fire, and how much to pay. On the other hand, franchisees would be relegated to middle managers, no longer in control of their own success.

Other employers may decide to avoid joint-employer liability by reducing their level of control over business partners. The potential unintended consequences of this course could include an increase in incidents of workplace violence and harassment, if the putative employer relinquishes a say in who can work on its jobsite; an increase in on-the-job accidents, if the putative employer decides to no longer require subcontractors to comply with its own safety rules, or refuses to supply them with safety equipment; and a degrading of the integrity of a franchised brand, if the franchisor/putative employer decreases or discontinues its oversight over matters such as product line and preparation, customer experience and satisfaction, and store appearance. None of these outcomes would be beneficial to American business.

Ironically, the Board may wind up discouraging the very behaviors it claims its new policy is intended to foster in labor-management relations. Unions, human rights groups and others in the employment community have challenged companies to implement responsible contractor policies and codes of conduct not only for their own employees, but for those of their suppliers and business partners. *Browning-Ferris* discourages employers from doing just that. If, for example, a general contractor were to require that its subcontractors pay a living wage, comply with federal anti-discrimination and overtime regulations, or implement minimum safety procedures, they may be cementing their status as joint employers under the Board's new standard.

The Board's previous joint-employer standard worked well for over thirty years. It provided management and labor alike with predictability in terms of who is the employer of any given group of employees, knowledge that is vital to stable collective bargaining and effective labor relations. The new standard shatters that stability and throws both sides into new and unprecedented territory.

A. The Act (and The Common Law) Limits The Board's Authority to Define Who is an "Employer" and Who is an "Employee"

The history underlying passage of the Taft-Hartley amendments to the Act make clear that Congress has restricted the Board to well-established principles of common law agency in determining who is an employer and who is an employee under the Act, and that those principles do not support the Board's sweeping decision in *Browning-Ferris*. Prior to Taft-Hartley, the U.S. Supreme Court had held that the Act's definition of "employee" should include independent contractors. The Court based this holding on the belief that anyone having an "economic relationship" with a firm should be deemed its "employee," and that the employment relationship should be determined based on "economic facts rather than technically and exclusively by previously established legal classifications."[45]

In response to the Supreme Court's decision in *Hearst*, Congress amended the Act to expressly exclude "independent contractors" from the definition of "employee."[46] Congress also revised the definition of "employer," limiting the definition to those who are "acting as an agent of an employer."[47] Taft-Hartley's legislative history illustrates that Congress' intention in making these changes was to limit the employer-employee concept to instances in which the putative employer exercised some direct form of control over the putative employee:

> [The concept of "employee"], according to all standard dictionaries, according to the law as the courts have stated it, and according to the understanding of almost everyone, with the exception of members of the National Labor Relations Board, means someone who works for another for hire . . . [and who] work for wages or salaries under direct supervision.[48]

Thus, Taft-Hartley reflects Congress' rejection of more expansive and policy-based notions like the "economic realities" philosophy in favor of the principles of common-law agency. Those principles have long been recognized by the courts as requiring much more than the indirect or retained but unexercised control espoused by the majority in *Browning-Ferris*. For instance, the Supreme Court has held for over 100 years that "under the common law loaned-servant doctrine immediate control and supervision is critical in determining for whom the servants are performing services."[49] More recent judicial decisions have emphasized that the common law test for employer status requires evidence of direct and immediate control.[50]

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[45] *NLRB v. Hearst Publications*, 322 U.S. 111, 128-28 (1944).

[46] 29 U.S.C. §153(3).

[47] 29 U.S.C. §152(2) (emphasis supplied).

[48] H.R. Rep. No. 245, at 18, 80th Cong., 1st Sess. (1947)(emphasis supplied); *see also id.* at 11 (revised definition of "employer" "makes employers responsible for what people say or do only when it is within the actual or apparent scope of their authority, and thereby makes the ordinary rules of the law of agency equally applicable to employers and unions."); and *id.* at 68 ("before the employer can be held responsible for a wrong . . . the man who does the wrong must be specifically an agent or come within the technical definition of an agent.").

[49] *Shenker v. Baltimore & Ohio R. Co.*, 374 U.S. 1, 6 (1963), citing *Standard Oil Co. v. Anderson*, 212 U.S. 215 (1909).

[50] *See, e.g., Cmty. For Creative Non-Violence v. Reid*, 490 U.S. 730 (1989)(because Copyright Act of 1976 does not define "employer" or "employee," Court must look to common law to determine whether work of artist hired by petitioner was "work for hire" under statute; common law focuses on "the hiring party's right

The lesson to be drawn from this history is simple: (1) the Board must use traditional common law principles when deciding who is an "employer" and who is an "employee" under the Act, and (2) those principles have always been understood by interpreting courts as requiring more than mere indirect, or reserved but unexercised, control by the putative employer over the day-to-day work of the putative employees.

B. The Board's Prior Joint-Employer Standard Provided Businesses With Predictability and Stability in Their Business Relations

The Board's pre-*Browning-Ferris* precedent remained relatively consistent for decades and was faithful to Congress' command that employer status under the Act must be established based on common law agency principles. Over the past thirty years, the Board's joint-employer decisions established several clear-cut and easy to understand principles:

> (1) the "essential element" in the joint-employer analysis is whether a putative joint employer's control over employment matters is "direct and immediate;"[51]
>
> (2) control, to be sufficiently indicative of joint-employer status, cannot merely be "limited and routine,"[52] and
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> (3) the Board should not "merely" rely on the existence of contractual provisions, but rather must look "to the actual practice of the parties;" in other words, retained but unexercised control is insufficient by itself to create joint-employer status.[53]

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to control the manner and means by which the product is accomplished"); *Gulino v. N.Y. State Education Department*, 460 F.3d 361, 379 (2d Cir. 2006) (interpreting *Reid* in Title VII case as "countenanc[ing] a relationship where the level of control is direct, obvious and concrete, not merely indirect or abstract")(emphasis supplied); *Doe I v. Wal-Mart Stores, Inc.*, 572 F.3d 677 (9th Cir. 2009) (Wal-Mart not joint employer of the employees of its suppliers where it had no right to "immediate level of day-to-day control")(emphasis supplied); *Patterson v. Domino's Pizza, LLC*, 333 P.3d 723 (Cal. 2014) (franchisor not liable for franchisee's harassment of its employee under California Fair Employment and Housing Act, because traditional agency principles "require[] a comprehensive and immediate level of day-to-day authority over matters such as hiring, firing, direction, supervision, and discipline of the employee.")(emphasis supplied).

[51] *Airborne Express*, 338 NLRB 597, 597 fn. 1 (2002); *see also Southern California Gas*, 302 NLRB 456 (1991) (building management company was not the joint employer of workers supplied by a janitorial company—regardless of the fact that the building management company dictated the number of workers to be employed, communicated specific work assignments to the workers' manager, and ultimately determined whether the cleaning tasks had been completed properly—because manager exercised no direct control besides communicating the job to the contractor and making sure contracted work was completed as requested).

[52] *AM Property Holding Corp.*, 350 NLRB 998 (2007) (noting the Board generally has found supervision to be limited and routine where a supervisor's instructions consist primarily of telling employees what work to perform, or where and when to perform the work, but not how to perform the work).

[53] *Id.* ("[T]he contractual provision giving AM the right to approve [contractor] hires, standing alone, is insufficient to show the existence of a joint employer relationship.").

The Board's requirement that control must be "direct and immediate" to establish joint-employer status, and that retained but unexercised control alone is not probative of such status, are concepts that are easy to comprehend and apply in practice. These benchmarks have allowed businesses of all sizes to structure and enter into myriad business relationships—contractor and subcontractor; lessor and lessee; franchisor and franchisee; and parent and subsidiary, to name a few—with confidence that they could operate free from the fear of being found a joint employer, provided they followed the Board's guidance.

The Board's "direct and immediate" requirement also ensured that a putative employer must actually be involved in those matters most critical to the employment relationship, such as hiring, firing, scheduling, establishing wages, and directly supervising the performance of work. In a practical sense, employers who do not exercise this level of control over the employees of a staffing firm, subcontractor or franchisee are not "meaningfully" affecting the terms and conditions of their employment. The Board's prior precedent recognized this fact and did not subject companies to disputes or liability involving employees over which they had little control.

Moreover, the standard made sense for both "sides" of a given business transaction. A larger franchisor, or general contractor, may have contractual relationships with dozens (or even thousands) of business partners. It makes no sense to impute joint-employer liability to such entities if they are not in a position to directly address workplace issues, meaningfully affect the outcome of collective bargaining, or remedy the unlawful actions of their business partners.

On the other hand, the vast majority of small business owners—whether they are franchisees, subcontractors, or suppliers of temporary labor—are not in business to be middle managers. The Board's prior joint-employer standard allowed them to enter business relationships with the knowledge that they could operate their business with a degree of autonomy and freedom, which is the very reason they may have started a business to begin with.

At the same time, the Board's recognition that the exercise of control that is merely "limited and routine" does not give rise to joint-employer status allowed businesses to maintain a reasonable degree of commercial oversight over brand integrity, contractor efficiency, and overall quality without risking liability for doing so. It is not unreasonable for a major franchisor, for example, to expect that its franchisees adhere to certain standards that preserve and maintain the status of the franchised brand. Preservation of such standards are what enable the brand to succeed in the first place. Franchisees likewise benefit from adherence to such standards. Indeed, a small business owner may elect to open a successful restaurant franchise rather than his or her own branded restaurant specifically because the value and commercial attraction of the brand is likely to enhance the restaurant's profitability and ultimate success. That would not be possible if the franchise did not impose certain minimum standards on its franchisees. The Board's prior precedent recognized that maintenance of such standards alone should not turn the franchisor into a joint employer.

Similarly, a general contractor performing a major commercial or residential construction project must rely on the work of dozens of specialty trades. Sequencing the timing and execution of each of these trades is critical to successful completion of the project. Exercising control over the timing of the work performed by a subcontractor and expecting that the work will meet a certain minimum standard should not turn the general contractor into a joint

employer. Again, the Board's prior standard would not have found a joint-employer relationship between the general contractor and its subcontractors based on the exercise of such indirect controls.

C. The *Browning-Ferris* Standard Radically Departs From Prior Precedent and Leaves Employers in The Dark as to The Relevant Standard

In *Browning-Ferris*, the Board jettisoned its previously clear precedent in favor of a new standard of virtually unbounded scope. The Board's majority opinion takes employers, unions and employees alike on a confusing journey through prior precedent—misconstruing it along the way—and concludes by establishing an amorphous standard that is both theoretically limitless and practically unworkable. The new standard allows for a finding of joint-employer status where an employer *retains, but does not exercise*, control over another firm's employees, or where it exerts only *indirect* control over their employment terms. This standard is a marked departure from the precedent discussed above. Moreover, it is unfaithful to the legislative intent underlying Taft-Hartley and divorced from the realities of American business.

To justify its expansive holding, the *Browning-Ferris* majority argued that the current test's requirements "leave the Board's joint employment jurisprudence increasingly out of step with changing economic circumstances, particularly the recent dramatic growth in contingent employment relationships." The majority claimed that the increase in the number and scope of temporary employment arrangements in the United States over the past two decades "is reason enough to revisit the Board's current joint-employer standard."[54] Despite the majority's claims to the contrary, its justification for revisiting the test is grounded in the same "economic realities" philosophy that Congress rejected when it passed Taft-Hartley.

Thus, in restating the joint-employer standard, the *Browning-Ferris* majority issued the following sweeping statement that goes well beyond any reading of its "traditional" precedent:

> We will no longer require that a joint employer not only *possess* the authority to control employees' terms and conditions of employment, but also *exercise* that authority . . . Nor will we require that, to be relevant to the joint-employer inquiry, a statutory employer's control must be exercised directly and immediately. If otherwise sufficient, control exercised indirectly – such as through an intermediary – may establish joint employer status.[55]

Despite referring to the common law, the majority offered no guidance, besides the new and disturbing passage quoted above, for determining when such a relationship might exist between putative employer and putative employee. The majority's articulation of its new test disturbingly suggests that retained control <u>by itself</u> can give rise to a joint-employer finding, and/or that the exercise of indirect control <u>by itself</u> can result in such a finding.

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[54] *BFI*, 362 NLRB 186, slip op. at 1, 11.

[55] *Id.* at 2.

D. The Uncertainty Created By The Board's New Standard Will Lead to Unintended Legal Consequences, Stifle New Business Growth, Inhibit Job Creation, and Harm Small Business

The Board has a responsibility to establish and maintain precedents that offer some measure of predictability for employers and unions alike, and for good reason. "To comply with [the Board's] rules . . . substantial planning is required . . . When it comes to the duty to bargain . . . there is no more important issue than correctly identifying the 'employer.' Changing the test for identifying the 'employer,' therefore, has dramatic implications for labor relations policy and its effect on the economy."[56]

Accordingly, the Board must articulate a compelling reason for changing a standard as critical as identifying the "employer," and when changing such a standard must do so in a manner that is understandable and practicably workable for the layperson. The new *BFI* standard does the opposite. As Member Miscimarra and former Member Johnson pointed out in their dissent:

> The majority abandons a longstanding test that provided certainty and predictability, and replaces it with an ambiguous standard that will impose unprecedented bargaining obligations on multiple entities in a wide variety of business relationships, even if this is based solely on a never-exercised 'right' to exercise 'indirect' control over what a Board majority may later characterize as 'essential' employment terms. This new test leaves employees, unions and employers in a position where there can be no certainty or predictability regarding the identity of the 'employer.' . . . This confusion and disarray threatens to cause substantial instability in bargaining relationships, and will result in substantial burdens, expense, and liability for innumerable parties, including employees, employers, unions, and countless entities who are now cast into indeterminate legal limbo, with consequent delay, risk and litigation expense.[57]

Thus, the biggest concern with the Board's new test may be the sheer confusion that it has created. Indeed, the *BFI* majority's sprawling opinion has been challenging to fully understand, even for the most experienced labor law practitioners. Since its release in August of 2015, labor lawyers have puzzled over how the test may apply in future cases. The test leaves numerous questions unanswered. For example, in the absence of evidence of the exercise of direct control by a putative employer, how much <u>indirect</u> control must the firm exercise before it is a joint employer? Must it exercise indirect control over a large number of factors, or just one or two? And how much retained, but unexercised, control will now be sufficient? Must the firm retain near total control? What if the evidence suggests the firm has actually exercised <u>no control at all</u>? And what about the case where a firm retains only the right to exercise indirect control? Could the Board now find joint employer status in the case of an entity that retains only indirect control, and exercises no control, over a group of putative employees? The *BFI* majority does not answer.

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[56] *Id.* at 21 (Miscimarra and Johnson, dissent).

[57] *Id.* at 23 (Miscimarra and Johnson, dissent).

These unanswerable hypotheticals beg a troubling question: if experienced labor lawyers are unable to determine with confidence how the test may apply in future cases, how can the business community possibly be expected to understand how *Browning-Ferris* may affect their businesses going forward?

The answer is simple: they cannot. And that is the biggest problem with what the *Browning-Ferris* majority has done. The uncertainty created by the Board's new test is likely to lead to industrial paralysis as firms struggle with how to avoid joint-employer status under the standard. In this regard, the NLRB is not like the Department of Labor, or OSHA, where employers can request, and receive, opinion letters on the lawfulness of planned business activities. Notwithstanding the recent spate of overregulation from these agencies, employers seeking to comply with federal wage/hour and workplace safety laws can at least obtain reliable feedback from the agencies charged with enforcing those laws.

But the Board has no equivalent to the opinion letter. Employers cannot call or write to the Board and ask whether they will become a joint employer if they enter into a business transaction or include certain controls in commercial contracts. Instead, the Board's legal precedents are supposed to provide that guidance. And, as demonstrated throughout, the *Browning-Ferris* decision does the opposite. The uncertainty over how the new standard might be applied will hamstring those in the business community seeking to structure their contractual relationships going forward.

The *Browning-Ferris* test is not just a problem for businesses involved in leased worker arrangements. The test is open-ended enough to be applied to find joint-employer status in virtually *any* business relationship. The dissenting Members understood and highlighted this troubling fact:

> Contrary to [the majority's] characterization, the new joint-employer test fundamentally alters the law applicable to user-supplier, lessor-lessee, parent-subsidiary, contractor-subcontractor, franchisor-franchisee, predecessor-successor, creditor-debtor, and contractor-consumer business relationships under the Act.[58]

The dissent's warning is easily illustrated by several examples:

Franchisor – Franchisee

According to the International Franchise Association, which submitted an amicus brief in *Browning-Ferris* opposing the new standard, in 2012 there were 750,000 franchises in the United States employing over 8 million workers. These businesses generated a staggering $769 billion in economic output and accounted for approximately 3.4 percent of America's gross domestic product.[59] Virtually all franchises must exercise some level of control over the consistency and integrity of the franchised brand so that both parties can reap the benefits of the brand. Indeed, the franchisor is legally required to maintain control over its brand in order to maintain the

[58] *Id.* at 23 (Miscimarra and Johnson, dissent).

[59] Br. of IFA at 1.

trademarks it has licensed to franchisees.[60] Prior to *Browning-Ferris*, the Board avoided finding joint-employer status in most franchisor-franchisee relationships absent evidence of direct control.[61] But now, if a franchisor retains and/or exercises control over the manner in which the franchisee sets up a store, how it prepares and markets its products, what tools or equipment it uses in the performance of the franchised business, and how the franchisee's employees operate the business, the Board may find it has retained sufficient indirect control over the employment terms of the franchisee's employees to be their joint employer. Thus, franchisors may be exposing themselves to joint-employer liability simply by maintaining controls that are legally required in order to preserve the status of their trademarks under federal law.

The consequences of a broad application of the *Browning-Ferris* standard to the franchising industry could be catastrophic. Large franchisors cannot possibly be expected to know, let alone attempt to control, all of the minute details regarding the employment relations of their franchisees. But if *Browning-Ferris* would make them joint employers with their franchisees, many franchisors might elect to reduce their use of the franchise model in order to protect themselves from legal liabilities the franchise model was created to avoid in the first place. The reduction in the use of the franchise model could have a deleterious effect on job creation and reduce the number of opportunities for small business entrepreneurs to realize their dreams of owning their own business. Small business franchisors could be equally damaged by the ruling. For example, the owner of a fledgling franchise may decide never to expand, lest he or she risk the unthinkable prospect of becoming a joint employer every time a new franchisee signs on.

Alternatively, franchisors may decide, as in the construction industry, that control over their brand is too important, not to mention legally required. Instead of implementing measures to avoid joint-employer status (indeed, in most cases it will be unrealistic for a franchisor to allow franchisees to make their own decisions about store appearance, product type and quality, etc.), franchisors may embrace that status and impose near total control over their franchisees. Franchise owners would be reduced to middle managers and lose the ability to manage their small business free from outside interference.

General Contractor – Subcontractor

One of the primary responsibilities of a general construction contractor is making sure that projects are completed on time in order to meet inspections and delivery requirements. To do this, general contractors commonly exercise tight control over the timing and sequencing of the services performed by specialty trades and other subcontractors. They may require additional labor and/or increased overtime when delays threaten to run a project behind schedule. They may also delay the completion (or even the commencement) of a particular subcontractor's work in order to allow for the completion of a different part of the project. This is arguably strong

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[60] *See, e.g., Barcamerica International USA Trust v. Tyfiled Importers, Inc.*, 289 F.3d 589, 596 (9th Cir. 2002)("A trademark owner may grant a license and remain protected provided quality control of the goods and services maintained under the trademark by the licensee is maintained.").

[61] *See, e.g., Tilden, S.G., Inc.*, 172 NLRB 752 (1968) (franchisor not a joint employer, despite franchise agreement dictating "many elements of the business relationship," because franchisor did not exercise "direct control" over franchisee's labor relations).

indicia of control by the general contractor over the terms and conditions of employees of its subcontractors, i.e., scheduling. It is unclear, given the amorphous new standard, whether the exercise of control over subcontractor scheduling alone would turn a general contractor into a joint employer, but in combination with other indicia, it would be almost certain to do so.

A finding of joint-employer status between general contractor and subcontractor could cause a variety of problems at a construction site. If the general contractor is a joint employer with its subcontractors, and a labor dispute arises between one of the subcontractors and its union, it may be impossible for the general contractor to set up a valid reserved gate system, which allows neutral employers to avoid picketing and other concerted activity in which unions may lawfully engage during disputes with primary employers. Moreover, the general contractor's status as a joint employer could prevent it from replacing a subcontractor whose employees go out on strike, as doing so may now be an unfair labor practice. Thus, an entire commercial construction project could be paralyzed because of the labor problems of a single subcontractor. The resulting delays could cause the general contractor to incur millions of dollars in penalties for failing to complete the project on time.

While some might view such actions by a general contractor to be "anti-union," it should be obvious that a general contractor's decision to replace a striking subcontractor may have no effect on the result of collective bargaining negotiations between the subcontractor and its union or on the ultimate employment status of the subcontractor's employees. The subcontractor may have dozens of other jobs (all of which may be union jobs) to which it can assign its workforce. The general contractor should not be forced into the practical equivalent of commercial handcuffs while it waits for a subcontractor to resolve matters with its union. But a finding of joint-employer status under *Browning-Ferris* would do just that. A general contractor with several dozen specialty subcontractors could be completely paralyzed as a result.

In this way, *Browning-Ferris* could have the perverse result of encouraging general contractors to avoid bidding on union jobs, which would shrink their portfolio of projects and impact their own employment levels. Alternatively, general contractors may simply refrain from working with unionized subcontractors in order to avoid being trapped in a business relationship they cannot get out of without risking substantial labor law liability. Another possibility is that general contractors will insource specific trades. Such decisions will reduce the number of opportunities for outside subcontractors. The economic impact on the subcontractors—many of which are small businesses—and their employees, could be significant.

Alternatively, general contractors who cannot insource the specialty trades may decide to exert total control over the work of their subcontractors. If a general contractor concludes it is going to be a joint employer under *Browning-Ferris* no matter what it does, it may go in the other direction and dictate everything about a subcontracted project. This would dramatically reduce the subcontractor's own flexibility and reduce it to a mere subdivision of the general contractor instead of an independent business.

Building Owner – Cleaning Contractor – Private Equity Owner

Many commercial building owners outsource certain tasks like facilities management and janitorial work. Under *Browning-Ferris*, a building owner that requires its cleaning

subcontractor to provide a certain number of cleaners per shift, to complete the work by a certain time each night (for example, before normal business hours the following day), and to clean using certain, environmentally-friendly solutions, may now be a joint employer, even if the owner does not dictate who the contractor assigns to do the work or how much they are paid, and/or if the contractor supervises all of the work performed by the cleaners.

Further complicating matters, the cleaning contractor may be owned by a private equity firm. Under *Browning-Ferris*, if the private equity firm selects the contractor's board of directors and key officers, dictates changes in its employee benefit plans or other workplace policies, and decides whether the contractor should pursue certain business opportunities (such as the types of cleaning services it offers), the private equity firm may also be a joint employer with the cleaning contractor.

This hypothetical provokes many more disturbing questions. If a union successfully organized the janitors working for the cleaning contractor, the Board might now require all three entities—cleaning contractor, building owner and private equity firm—to participate in bargaining. As far-fetched as this seems, it is clearly the *Browning-Ferris* majority's intent. After all, the majority noted the new standard was motivated in part by a desire to "encourage the practice and procedure of collective bargaining."[62] The obviously divergent interests of these three independent businesses suggests bargaining could be difficult. Indeed, the businesses at the table may be required to disclose the details of their other business relationships not only to the union, *but to each other*. While they are all involved in a business partnership with respect to the building in question, they may also be competitors in other respects. The private equity firm may own other buildings that compete with the building owner for commercial leasing tenants. The cleaning contractor may have subcontracts to clean those other buildings with economics that are not as lucrative as those in its contract with the building owner. And the building owner may employ a security contractor that is owned by a different parent entity, again with different (and better) economics.

The possibilities for conflict between the parties—not over the cleaning employees and their union, but over their other commercial endeavors and their desire to prevent the disclosure of those endeavors to arm's-length business partners—are literally endless. In this way, the *Browning-Ferris* test may have the ironic unintended effect of *frustrating* collective bargaining instead of facilitating it.

Yet another potentially sinister effect of the *Browning-Ferris* test is that it might also prohibit the parties from modifying (or even terminating) their business relationships. If the building owner receives bids from competing cleaning firms to perform the work at a lower price, it might be inclined to terminate its contract with the cleaning contractor and select a different partner, or insource the work. But if the building owner is a joint employer with the outgoing cleaning contractor, and it bases its decision to switch contractors in part on avoiding cost increases resulting from the cleaning contractor's collective bargaining agreement, it may be violating the Act, which prohibits an employer from taking adverse action against its "employees" for engaging in collective bargaining. The building owner's motivation might not

[62] *BFI*, slip op. at 12.

be "anti-union" in any way, but rather economic. Nevertheless, joint-employer status could prevent the owner from making a switch in contractors.

Similarly (and unbelievably), a decision by the private equity firm to sell the cleaning contractor to another entity because it has become unprofitable could be seen as an unfair labor practice. If the private equity firm is a joint employer with the cleaning contractor and its motivation in selling is to avoid economic losses caused by a labor dispute between the cleaning contractor and its union, selling the company could violate the Act. In other words, the most fundamental aspect of American business—the decision whether to do business at all—may be subject to Board (over)regulation under *Browning-Ferris*.

E. The Board Has Doubled Down On *Browning-Ferris*

Since its decision in *Browning-Ferris*, the Board has issued two other major rulings that even further expand the standard in bargaining unit formation cases. In *Miller & Anderson, Inc.*,[63] the Board overturned Bush-era precedent and held that a union seeking to represent employees in bargaining units that combine both solely and jointly employed employees is no longer required to obtain the consent of the employers, provided the proposed bargaining unit is appropriate under "traditional" Board precedent. Under *H.S. CARE LLC, d/b/a Oakwood Care Center*,[64] the Board would not allow employees from nominally different employers to form a bargaining unit together without employer consent. The Board in *Miller & Anderson* argued this rule was inconsistent with the Act's preference for encouraging collective bargaining and claimed that it would be appropriate to "return" the state of the law to that which existed prior to *Oakwood Care*.

A closer look, however, reveals the Board did no such thing. As Member Miscimarra noted in his dissent, the Board's *Miller & Anderson* rule will affect many more businesses than the pre-*Oakwood Care* rule for two important reasons: (1) whether employers are deemed joint-employers is now determined by the Board's dramatically expanded *Browning-Ferris* test; and (2) the "traditional" precedent used to decide whether a proposed bargaining unit is appropriate is now the infamous *Specialty Healthcare* rule described above. Thus, *Miller & Anderson* greatly increases the chances of a union forming a bargaining unit that includes the employees of two different employers without their consent.

In *Retro Environmental, Inc.*,[65] the Board made it much more difficult for employers to prove that their joint employer relationship has ended. The Board in that case found that Green Job Works and Retro Environmental (the supplier and user of temporary labor, respectively) were joint employers. The companies had worked together for over 5 years and Green Job Works (the supplier) had provided temporary labor on at least 10 of Retro Environmental's construction projects. The parties' relationship was governed by a formal agreement that had expired at the time of the Board's ruling.

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[63] 364 NLRB No. 39 (2016).

[64] 343 NLRB No. 76 (2004).

[65] 362 NLRB No. 70 (2016).

When a union petitioned to represent a unit of laborers including workers retained by Retro Environmental from Green Job Works, the employers argued that the projects on which they were working were nearly finished, that there was no evidence Retro planned to use Green Job Works' employees on future projects, and that the parties' contractual agreement had expired. The Board, however, found that the employers' failed to prove that the planned cessation of their joint operations was imminent and definite. Confirming what many have feared since *Browning-Ferris*, the Board also noted that joint-employer status can indeed turn on whether employers merely possess authority to control employees, even if they do not exercise that control. Thus, the Board stated that three facts can create a joint-employer relationship in the temporary staffing industry:

> [E]ven if the Employers' relationships were altered on future projects, certain key aspects of their relationship will likely remain stable. For example, while Green JobWorks, as the supplier employer, will retain primary responsibility for hiring, assigning employees to project sites, and firing, Retro will assuredly continue to dictate the number of workers to be supplied by Green JobWorks, continue to impose conditions on Green JobWorks' hiring to ensure that the workers supplied are adequately trained and qualified, and continue to retain the right to request a replacement if it is unsatisfied with a Green JobWorks-supplied employee. Therefore, given the distinct functions and areas of responsibility of each of the Employers, it is highly doubtful that the Employers' relationship on future projects could change in such a manner that would render them no longer joint employers of the employees in the petitioned-for unit.[66]

In other words, the Board stated that a joint-employer relationship can be found where the user company states that it needs a certain number of employees with specific qualifications and has the authority to demand replacements. Of course, this description is inherent in most (if not all) temporary staffing arrangements. Under this logic, almost all temporary staffing relationships will result in a finding of joint employment.

IV. THE BOARD HAS RAISED ITS OWN PROFILE AT THE EXPENSE OF AMERICAN BUSINESS

The combination of the Board's "ambush" election rules, *Specialty Healthcare* bargaining unit precedent and *Browning-Ferris* joint employer rules, by themselves, represent some of the most consequential changes our labor law scheme has seen in decades. Incredibly, they are only the tip of a much larger iceberg. In its quest to raise its own profile over the last eight years, the Board has issued numerous other precedents that have come with a heavy price for American business.

The Board's goal to expand the reach of the Act (and the Board's own profile) was never a secret. In Chairman Mark Pearce's own words:

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[66] *Id.*

> A right only has value when people know it exists. We think the right to engage in protected concerted activity is one of the best-kept secrets of the National Labor Relations Act, and more important than ever in these difficult economic times. Our hope is that other workers will see themselves in the cases we've selected and understand that they do have strength in numbers.[67]

Although the Act unquestionably protects non-union employees' rights to engage in concerted activity, the Board's actions over the last eight years have expanded the reach of the Act without much (if any) appreciation for the practical implications of its rulings. Through a series of decisions and guidance memorandums, the Board has extended the Act to individuals who were not previously deemed "employees," pushed the concept of "protected, concerted activity" to absurd new limits, and engaged in a targeted effort to dismantle myriad common sense employer work rules.[68] Employers have been left with a confusing patchwork of decisions that hinder their ability to continue many of the common sense business practices they have relied on for decades.

A. The Board Has Expanded The Scope and Type of Individuals Covered By the Act

The Board has expanded the reach of the Act by reclassifying previously exempt individuals as "employees" under the Act. Its decision in *Columbia University*[69] highlights this troubling trend. In *Columbia University*, the Board held that student teaching assistants can be employees under the Act. In reaching its decision, the Board explicitly overruled its 2004 decision in *Brown University*.[70] There, the Board had held that graduate teaching assistants were primarily students instead of employees, and that their relationship with their school was educational in nature. The Board reasoned that these students often performed their jobs as part of a degree program and that their research positions were designed primarily for educational benefit. In overruling *Brown University*, however, the Board rejected this dichotomy and broadly stated that "the payment of compensation, in conjunction with the employer's control, suffices to establish an employment relationship for purposes of the [A]ct."

Beyond its sweeping conclusion, however, the Board failed to address the practical implications of its decision and actively downplayed its holding. Relying on anecdotal evidence, the Board concluded that "no major disasters [] have arisen because of [graduate student] unions" in other settings and that "examples of collective bargaining in practice appear to demonstrate that economic and academic issues on campus can indeed be separated."[71] From

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[67] "Asserting Influence And Power In The 21st Century: The NLRB Focuses On Assisting Non-Union Employees," Elizabeth Milito, The Federalist Society for Law & Public Policy Studies, Engage Vol. 15, No. 1 (2014); available at: http://www.fed-soc.org/publications/detail/asserting-influence-and-power-in-the-21st-century-the-nlrb-focuses-on-assisting-non-union-employees.

[68] *See id.*

[69] 364 NLRB No. 90 (2016).

[70] 342 NLRB No. 42 (2004).

[71] 364 NLRB, slip op. at 10.

that, the Board noted that there was no empirical evidence showing that collective bargaining would "harm mentoring relationships between faculty members and graduate students."[72]

The Board's decision glossed over the fundamental differences between traditional employment environments and the educational context. For example, the lines between supervisors and employees can be blurred in the university context. Faculty advisors who have traditionally guided students through their degree programs are transformed under the Board's rule into statutory supervisors. This dual-relationship has the propensity to alter the daily interactions between students and faculty and negatively impact a university's ability to execute its primary mission to educate its students.

The Board has also taken steps to extend the Act to the rapidly developing on-demand marketplace, where companies are turning more frequently to independent contractors to deliver their products to consumers. The Board's Division of Advice released a guidance memorandum in August 2016 asserting that employers who misclassify workers as independent contractors violate Section 8(a)(1) of the Act by denying their right to engage in protected, concerted activity.[73] Earlier in the year, the General Counsel issued a GC Memorandum identifying cases involving employee misclassification and cases involving "the employment status of workers in the on-demand economy" as issues "of particular interest" to the Board.[74] These memoranda, which signal the Board is intent on forcing businesses to reclassify independent contractors as "employees," are deeply troubling to many in the gig economy. For example, businesses in the ride-sharing industry depend on workers who retain complete control over when, and how long, they perform work. Many of those workers, in turn, have chosen to work in the gig economy because of the work-life flexibility it offers. If the Board has its way, entire business models delivering new and innovative services in today's on-demand economy will become endangered.

B. The Board Has Stretched The Meaning of "Protected, Concerted Activity"

Section 7 of the Act has long protected employees' right to engage in concerted activity to improve their terms and conditions of employment. In recent years, the Board has stretched the notion of concerted activity to untenable lengths. Waging war on workplace rules, the Board has overturned commonplace employer policies, such as confidentiality provisions and civility codes, and has placed overbroad restrictions on the regulation of employee misconduct. The effect of these decisions has been to create a new frontier in the workplace where employers are asked to abandon many of their longstanding methods of maintaining order and employee civility, and to stand idly by as employees engage in behaviors that, if left unaddressed, expose employers to liability under other federal and state statutes.

(i) The Board Has Protected Offensive and Racist Comments

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[72] *Id.*

[73] *See Pac. 9 Transp., Inc.*, NLRB Div. of Advice, No 21-CA-150875 (Dec. 18, 2015, released Aug. 26, 2016).

[74] *See* General Counsel Memorandum 16-01 (Mar. 22, 2016).

Profane outbursts generally are not protected by Section 7. Although the Board has traditionally granted employees some leeway for statements made in the heat of the moment, it has consistently held that extreme or threatening conduct is not protected. While paying lip-service to these limitations, the Board's recent decisions have protected increasingly offensive and outrageous behavior.

The Board's decision in *Plaza Auto Center, Inc.*[75] highlights this troubling trend. In that case, a used car salesman approached his manager to complain about his wages. During the exchange, the employee shouted profanities, calling his boss an "a—hole." The employee then stood up, pushed his chair aside, and told the manager that "he would regret it" if he fired the employee.

The Board went to great lengths to minimize the employee's behavior, rationalizing that:

- The employee's statement that his manager would "regret it" was not a threat of physical violence, but likely a warning about the legal consequences of firing the employee;
- Pushing the chair was not physically aggressive because the employee needed to move the chair to leave the room;
- The employer's interest in maintaining order in the workplace was lowered because the meeting took place behind closed doors and away from other employees;
- The employer likely provoked the outburst by threatening to fire the employee.

The Board went a step further in *Cooper Tire & Rubber Company*,[76] excusing racially inflammatory comments under the guise that they were protected, concerted activity. In *Cooper Tire*, the company discovered a video of picketers hurling racist comments at replacement workers during a labor dispute. When a car with replacement workers passed by the picket line, one of the union members yelled, "Hey, did you bring enough KFC for everyone?" Another picketer screamed "Go back to Africa, you bunch of f***ing losers." The picketers also joked: "Hey, anybody smell that? I smell fried chicken and watermelon."[77] On review, the Board affirmed an ALJ's decision that although the statements "most certainly were racist, offensive, and reprehensible," the statements were still protected because they were "not violent in character" or "contain[ed] any overt or implied threats to the replacement workers."[78]

Protecting this type of inflammatory (and hateful) speech puts employers in a precarious situation. Now, when an employee engages in outrageous and inflammatory behavior that might also be connected to some workplace complaint or dispute, an employer must decide between upholding its obligation to protect other employees from a hostile work environment and violating the Act. Such employee behaviors, if left uncorrected, could expose the employer to

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[75] 360 NLRB No. 117 (2014).

[76] 363 NLRB No. 194 (2016).

[77] *Id.* at *1.

[78] *Id.*

liability under other federal statutes such as Title VII. Given these types of rulings, it is unclear what (if any) options employers have to effectively address employee behavior that by virtually any measure but the Board's constitutes insubordination and harassment.

(ii) The Board Has Targeted Common Sense Provisions in Employee Handbooks and Policies

The Board has also targeted employer handbooks and work rules. Over the past eight years, it has struck down boilerplate confidentiality clauses, civility codes, innocuous workplace rules, and anti-harassment policies that have been found in employer handbooks and workplace rule guides for years.[79] The Board has reasoned in most of these cases that such policies might "chill" employees from using their Section 7 rights. Based on such assumptions, the Board has left employers wondering how to lawfully promulgate workplace standards for regulating employee conduct.

The Board's treatment of confidentiality policies shows the lengths to which it has been willing to go in its assault on the employer handbook. In *Banner Health*,[80] the Board held that an "Interview of Complainant" form used during workplace investigations violated Section 7. The form requested that interviewees refrain from discussing an ongoing employer investigation with others in order to protect the integrity of the investigation. On review, the Board struck down use of the form, holding broadly that, "[e]mployees have a Section 7 right to discuss discipline or ongoing disciplinary investigations involving themselves or coworkers. Such discussions are vital to employees' ability to aid one another in addressing employment terms and conditions with their employer."[81]

Although lost on the Board, the reasons an employer may want to maintain confidentiality during a workplace investigation are obvious. Confidentiality is necessary to protect the privacy (not to mention the safety) of the parties involved, including the employee who is under investigation or the employee who made the complaint. It is also necessary to insure that employees suspected of wrongdoing do not coerce others into altering or recanting statements. Decisions like *Banner Health* frustrate an employer's ability to insure the integrity of a workplace investigation or protect employee privacy. Even more troubling, the Board's decision fails to explain (or even contemplate) how employers are to reconcile their obligations under the Act with countervailing confidentiality obligations under other federal laws.

The Board's decision in *Columbia University* (discussed above) highlights this conundrum. Colleges and universities, for example, are required under federal law to investigate student complaints against teachers and graduate assistants, some of which might involve highly sensitive and deeply personal sexual misconduct allegations. The Board's holding in *Banner Health* suggests that colleges and universities could violate the Act by complying with their

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[79] *See* "Theater of the Absurd: The NLRB Takes On the Employee Handbook," U.S. Chamber of Commerce (2015).

[80] 362 NLRB No. 137 (2015).

[81] *Id.*, slip op. at 2.

obligations under the Family Educational Rights and Privacy Act[82] and Title IX of the Education Amendments Act of 1972[83] to protect certain investigation files and witness statements from disclosure. Under the Board's rationale, graduate assistants involved in such investigations might be "employees" under the Act and therefore cannot be prevented from discussing the investigation or its results with other "employees."

The Board has also struck down boilerplate non-competition and non-solicitation provisions used by many employers on the grounds that they interfere with protected rights. In *Minteq International, Inc.*,[84] the employer had its new hires sign a relatively standard "Non-Compete and Confidentiality Agreement" that provided, among other things, that employees would not "intentionally solicit or encourage any present or future customer or supplier of the Company to terminate or otherwise alter his, her or its relationship with the Company in an adverse manner." Employers have used such language for years to insure that employees do not leave their employ, form a competing business, and solicit the customers they serviced while working for their old employer. Limitations such as these are as common as they are logical.

Unfortunately, the Board fails to appreciate such logic. In *Minteq International*, it ruled that the employer's non-solicitation language was unlawful on its face because it could be read to restrict employees' ability to "improve terms and conditions of employment . . . through channels outside the immediate employee-employer relationship."[85] Results like this one have left employers wondering whether taking even basic steps to protect the economic lifeline of any business—customer relationships—is now illegal in the eyes of the Board.

(iii) The Board Has Taken An Aggressive Stance on Social Media and E-mail Policies

The Board has also attempted to retool Section 7 for the 21st Century by delving into the area of social media and electronic communications. In most cases, its attempts to adapt the Act to today's platforms have gone too far. For example, the Board held in *Purple Communications, Inc.*[86] that employers cannot prohibit employees from using employer e-mails systems to send personal messages, including union solicitations. Overturning existing precedent, the Board struck down an employer's email policy that limited e-mail use to "business purposes only," prohibited employees from "engaging in activities on behalf of organizations or persons with no professional or business affiliation with the company," and prohibited employees from "sending uninvited email[s] of a personal nature."

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[82] 20 U.S.C. §1232g; *see also* 34 CFR §§ 99.30-31.

[83] 20 U.S.C. §§1681 et. seq.; *see also* "Dear Colleague Letter," U.S. Department of Education Office of Civil Rights (2011) (discussion confidentiality obligations), available at: https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html.

[84] 364 NLRB No. 63 (2016).

[85] *Id.*, slip op. at 7.

[86] 361 NLRB No. 43 (2014).

The Board reasoned that "email is a large and ever-increasing means of employee communication for a wide range of purposes" and that email has effectively become the new "natural gathering place" for employee communications. Although the Board likened email messages to the 21st Century "water cooler," its ruling ignores the fact that if employees are permitted to use their employer's e-mail system to conduct a unionization campaign, particularly during working hours, they can unduly disrupt normal business operations. Again, however, this decision—like like so many others—shows a willingness to elevate purported Section 7 rights over any practical concerns.

The Board has also targeted social media policies that prohibit employees from making disparaging public remarks online about their employer and/or its clients. In one recent decision, the Board found that language in Chipotle's "Social Media Code of Conduct" prohibiting employees from posting "disparaging, false, misleading . . . statements about or relating to Chipotle, our employees, suppliers, customers, competition or investors" was unlawful.[87] Although the policy was clearly designed to prohibit dissemination of false and disparaging information—and was not intended to stifle debate about the terms and conditions of employment—the Board held that the Act permits employees to post false statements about their employer if they are not doing so knowingly or with reckless disregard for the truth. Because the policy applied to all "false" and "misleading" statements, the Board found it tended to chill Section 7 rights. Once again, the Board's logic flouts common sense and completely disregards an employer's legitimate business interest in prohibiting employees from publicly disparaging the business, its employees and its customers.

(iv) The Board Has Attacked Class and Collective Action Waivers

The Board has also sought to prevent employers from entering dispute resolution agreements with employees that bar the arbitration of class and collective action claims. In *D.R. Horton, Inc.*,[88] the Board ruled that requiring employees to agree to a class and collective action waiver in an arbitration agreement violates the Act. The Board's rationale is that class waivers deprive employees of the right to engage in protected, concerted activity. The Board reaffirmed this rule two years later in *Murphy Oil USA, Inc.*[89] In both cases, the U.S. Court of Appeals for the Fifth Circuit denied enforcement, rejecting the Board's logic. The Court held that the Act does not contain any congressional command overriding the Federal Arbitration Act; that the use of class action procedures is not a substantive right under Section 7 of the Act and that seeking to compel arbitration of such claims is not an unfair labor practice.[90]

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[87] 364 NLRB No. 72 (2016).

[88] 357 NLRB No. 184, slip op. (2012).

[89] 361 NLRB No. 72 (2014).

[90] *See Murphy Oil, USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015); *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013). The Board's *D.R. Horton* rule has also been rejected in several federal appellate courts in private party actions not involving the NLRB. *See, e.g., Walthour v. Chipio Windshield Repair*, LLC, 745 F.3d 1326 (11th Cir. 2014); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 296–97 & n. 6 (2d Cir.2013) (determining that the FLSA does not contain a "contrary congressional command" that prevents an employee from waiving his or her ability to proceed collectively and that the FLSA collective action right is a waivable procedural mechanism); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1051-52 (8th Cir. 2013).

Undeterred, the Board has continued to enforce its rule that class and collective action waivers in employment agreements violate the Act. Since its decision in *Murphy Oil*, the Board has held that:

- Section 10(b) of the Act does not apply to claims that class/collective action waivers violate the Act because maintenance of an "unlawful work rule constitutes a continuing violation" not time-barred by Section 10(b);[91]

- An employer violates the Act by moving in court to compel arbitration on an individual basis, even though the language of the agreement does not expressly bar class and collective claims;[92]

- An arbitration agreement that bars class and collective claims but permits employees to file claims with administrative agencies is still unlawful because administrative claims are not the same as a judicial forum where employees may litigate claims on a collective basis;[93]

Despite the fact that most federal appellate courts that have addressed the Board's *D.R. Horton* rule have rejected it, a Circuit split has developed as the Seventh and Ninth Circuits have recently accepted the Board's logic.[94] The U.S. Supreme Court has granted *certiorari* in three cases stemming from the Board's *D.R. Horton* rule, although the Court has indicated it will not consider the issue until its next term, meaning the murky state of the law on class and collective arbitration waivers is likely to persist until late 2017 or 2018.

In the meantime, the Board is likely to continue to invalidate class action waivers and/or discourage employers from adopting them, unless a newly constituted Board revisits this troubling policy and harmonizes its precedent with the Federal Arbitration Act and existing Supreme Court precedent.[95]

V. CONCLUSION

The Board rules and policies addressed in this paper only begin to scratch the surface of the full extent to which the Board overturned or modified longstanding precedent in the past

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[91] *PJ Cheese, Inc.*, 362 NLRB No. 177 (2015).

[92] *Century Fast Foods, Inc.*, 363 NLRB No. 97 (2016).

[93] *SolarCity Corporation*, 363 NLRB No. 83 (2015).

[94] *See Lewis v. Epic Systems*, 823 F.3d 1147 (7th Cir. 2016) (holding that an arbitration agreement that "precludes employees from seeking any class, collective, or representative remedies to wage-and-hour disputes" violates the NLRA), and *Morris v. Ernst & Young LLP*, 834 F.3d 975 (9th Cir. 2016) (citing *Lewis*, holding that "an employer violates the National Labor Relations Act by requiring employees to sign an agreement precluding them from bringing, in any forum, a concerted legal claim regarding wages, hours, and terms and conditions of employment.").

[95] *See, e.g., Am. Express Co. v. Italian Colors Rest.*, 133 S.Ct. 2304, 2309 (2013); *Mobility LLC v. Concepcion*, 131 S.Ct. 1740, 1748 (2011).

eight years. When added together, the amount of precedent changed by this Board is staggering. A December 2016 report published by the Coalition for a Democratic Workplace estimates that since 2009, the Board overturned a mind boggling total of over 4,500 years of prior precedent.[96] Many of these rulings, while not as damaging as the Board's micro-unit, joint employer and other rulings summarized above, are nevertheless problematic for employers.[97]

As stated above, the time has come to reconstitute the Board to full, five-member status so that it can begin to re-examine and unwind the anti-business policies that predominated the Board's previous tenure. Restoring some semblance of fairness to the Board's precedents will balance the playing field of labor-management relations and allow the Board to regain the respect it once had as a highly-regarded agency.

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[96] *See generally* "Was the Obama NLRB the Most Partisan Board in History?," Coalition for a Democratic Workplace and Littler's Workplace Policy Institute (Dec. 6, 2016).

[97] *See, e.g., GVS Properties, LLC*, 362 NLRB No. 194 (2015) (holding successor doctrine applies to a new employer that is required by a worker retention law to hire the predecessor's employees for a specific period of time); *Lincoln Lutheran of Racine*, 362 NLRB No. 188 (2015) (prohibits cancelation of dues checkoff at the expiration of the collective bargaining agreement giving rise to the checkoff obligation, on the grounds that checkoff agreements are part of the "status quo"); *American Baptist Homes d/b/a Piedmont Gardens*, 362 NLRB No. 139 (2015) (requiring employers to provide written employee witness statements to unions in response to information requests); *Babcock & Wilcox Construction Co.*, 361 NLRB No. 132 (2014) (narrowing the conditions under which the Board will defer handling of unfair labor practice charges to the grievance and arbitration procedures in parties' collective bargaining agreements); *New York New York Hotel & Casino*, 356 NLRB No. 119 (2011) (requiring employers to allow subcontractors' off-duty employees access to company property); *Saint John's Health Center*, 357 NLRB No. 170 (2011) (along with related decisions, requiring employers to allow employees to wear union buttons, logos and clothing in the workplace, including employees who have access to patients or customers); *Carpenters Local 1506 (Eliason & Knuth)*, 355 NLRB No. 159 (2010) (along with related decisions, holding that displaying large banners stating "shame on" a neutral employer and proclaiming existence of a labor dispute at the neutral's premises or a common-situs construction site did not violate the Act's prohibition against secondary boycotts).

Chairman WALBERG. Thank you.

Now I recognize Ms. Aloul for your 5 minutes of testimony.

TESTIMONY OF REEM ALOUL, BRIGHTSTAR CARE OF ARLINGTON, ON BEHALF OF THE COALITION TO SAVE LOCAL BUSINESS, ARLINGTON, VIRGINIA

Ms. ALOUL. Thank you, sir. Chairman Walberg, Ranking Member Sablan, and distinguished members of the committee, my name is Reem. I own a BrightStar home care franchise in Arlington, Virginia. I thank you for the opportunity to appear before the subcommittee today.

While there are many issues before the National Labor Relations Board, NLRB, that should be discussed, I'll focus my remarks today on how the NLRB changed the fundamental definition of employer, and how that is directly affecting locally-owned businesses like mine.

I appear before you today on behalf of the Coalition to Save Local Businesses, a diverse group of locally-owned, independent small businesses, associations, organizations that is working to restore the commonsense traditional definition of joint employer.

Mr. Chairman, my path to entrepreneurship started in Jordan where I was born. My father was also an entrepreneur. Like I would many years later, he left a comfortable job to make it on his own and provide a better life for my mom and three siblings. My mom stayed at home, cared for all four of us, and I finished high school in Jordan, went to the American University in Cairo for a degree in economics. I've been living in Arlington, Virginia, since 2004, and I'm pretty sure I got my entrepreneurial bug from my dad.

I've traveled the world before starting my business, supporting businesses and governments around the world to improve their operations and service delivery. In 2013, as many entrepreneurs before and after me have done, I made a bold, risky decision to quit my job and pursue my dream of opening a business, of owning my own business.

I decided to serve my own local community, and risked all of that, and my risk has paid off for my community, because my company is in its fourth year of operation, and I today have about 90 employees on our books. I established my business with two main goals: provide peace of mind for clients and their families, as they age at home; and provide job opportunities for people in my community.

We find ourselves providing jobs to people who may need more flexibility to be able to succeed. We employ single moms, military spouses, students, and those who care for their own families as well. We're as flexible as we need to with their unique schedules, and they seem to greatly appreciate that. Independent monthly employee satisfaction surveys show, on average, that we have a 92 percent satisfaction in the last 16 months.

The decision by government officials here in Washington to change the joint employer standard is a baffling one, frankly, for me. The new employee standard created by the NLRB back in August 2015 is based on indirect control and even reserved, unexercised control. The policy is so broad, so unpredictable, it

could be practically applied to anything in terms of business relations.

Mr. Chairman, you cannot overstate the confusion caused by unlimited joint employer liability. Under this policy, it's a wonder why franchisers provide any support to franchisees because of fear of joint employment lawsuits. Fortunately, I've partnered with a wonderful franchisor, BrightStar out of Illinois. The company provides franchisees with a technology platform for billing, payroll, quality assurance, and things like that.

Such resources are a big reason why entrepreneurs opt for a franchise model as opposed to their own standalone business. But now with the new joint employer standard that is based on indirect and unexercised control, why would franchisors continue to provide such resources? Out of fear of liability risk, they'll stop supporting franchisees, or maybe even regain that power over these businesses. Either way, small businesses lose.

This is a small business issue. I presume you all want to support small businesses. Big corporations, after all, have resources, attorneys, economies of scale to adapt to joint employer. It's the small employers like myself who may run out of business partners because of this. Joint employer eventually will mean more corporations and fewer small businesses on Main Street.

As a franchisee, one of many, I believe that the joint employer unfairly changes the rules of business in the middle of the game. I invested a career's worth of savings in this business, and now joint employer liability threatens everything I and many others like me have worked for. We need Congress to enact legislation that clears up the basic question of what is an employer. It can't be ambiguous. It can't be left to Federal administrations changing it one after the other.

Every member should think what they're doing for small businesses. Many politicians today are making it harder to start the business, harder to thrive as an entrepreneur, and we need your help to make it clear: What does an employer mean?

The joint employer standard doesn't make any sense. It makes it harder for entrepreneurs, for clients, for businesses, for employees, and the government itself as well. I'm in the business of making the tough times in life a little better for people. I'm here today asking Congress to make the lives of small business owners a little easier, a little more certain, providing a fair legislative fix to the harmful joint employer standard.

To conclude, Mr. Chairman, this subcommittee also received a letter from several dozen employer and franchisee associations explaining further this issue. I commend this letter to you. I thank you, Mr. Chairman, for your work on behalf of the locally-owned businesses everywhere, and I would be more than happy to take any questions anybody may have.

[The statement of Ms. Aloul follows:]

COALITION TO SAVE
LOCAL BUSINESSES

REEM ALOUL

PRESIDENT, ZAY ENTERPRISES, INC. D/B/A BRIGHTSTAR CARE OF
ARLINGTON, VIRGINIA

TESTIMONY BEFORE THE U.S. HOUSE SUBCOMMITTEE ON HEALTH,
EMPLOYMENT, LABOR, AND PENSIONS

HEARING ENTITLED ""RESTORING BALANCE AND FAIRNESS TO THE
NATIONAL LABOR RELATIONS BOARD"

FEBRUARY 14, 2017

Good morning, Chairman Walberg, Ranking Member Sablan, and distinguished members of the Subcommittee. My name is Reem Aloul, and I own a BrightStar Care homecare franchise in Arlington, Virginia. Thank you for the opportunity to appear before the Subcommittee to discuss some of the challenges facing my business today. While there are many issues before the National Labor Relations Board (NLRB) that should be discussed, I will focus my remarks on how the NLRB changed the fundamental definition of "employer," and how that is directly affecting locally owned businesses like mine.

I appear before you today on behalf of the Coalition to Save Local Businesses, which is a diverse group of locally owned, independent small businesses, associations and organizations that is working to restore the common sense, traditional definition of "joint employer." In addition to telling you about my path to entrepreneurship, I will also share with you some examples of how this is affecting my ability to operate and grow my business.

My Local Business Story as A Home Care Franchisee

Mr. Chairman, I was born in Jordan. My father was also an entrepreneur. Like I would many years later, he left a comfortable job to make it on his own and provide a better life for my mom and three siblings. My mom stayed at home and cared for all four of us. I finished high school in Jordan and went to the American University in Cairo where I got my Bachelor's Degree in Economics. I've lived in Arlington, VA since 2004. And I'm pretty sure I got my "entrepreneurial bug" from my dad.

Prior to opening my business, I had more than 20 years of senior executive experience in management consulting and international economic and social development. I travelled the world supporting businesses and governments and helped them improve their operations and service delivery.

In 2013 – as many entrepreneurs have done before me – I made a bold decision to quit my job at a Fortune 500 company and pursue my dream of owning a business. I knew I wanted to be in health or education. I did my homework and decided to pursue a franchise business where I would have the support I needed to get off the ground and still be in control of my own business.

I decided to focus on helping people in my local community remain in the comfort and familiarity of their homes and founded BrightStar Care of Arlington, VA. We provide medical and non-medical services to our clients so they can stay in their homes, safely.

I established my business with two goals: 1) provide peace of mind for client and their family members, and 2) provide job opportunities in our community. We find ourselves providing job opportunities for those who need more flexibility to be able to succeed. We employ single moms, students, military spouses, and those who provide care to their own families. We are as flexible as we need with their unique schedules, and they seem to greatly appreciate that. Our independent monthly employee satisfaction surveys averaged at 92 percent in the last sixteen months. We are in our fourth year of business, and have around 90 employees; in any given week, we have 55-60 people on the payroll.

Mr. Chairman, I'm a home health care franchisee. The franchise business model has enabled me to achieve the American Dream of business ownership. And it has helped hundreds of thousands of others become entrepreneurs to serve their local communities too. According to the International Franchise Association, there are 733,000 franchise establishments that

support nearly 7.6 million direct jobs, $674.3 billion of economic output for the U.S. economy and account for 2.5 percent of the Gross Domestic Product. Franchise companies operate in over 300 different business format categories, from early childhood education to fitness clubs, and from professional services to home health care.

I'm also proud to be a home care business owner. Home care provides seniors with the choice to age at home – where most would prefer to be – and promotes peace of mind and wellness for family caregivers.

Home care is a critical industry today because America's population is aging rapidly. The Home Care Association of America revealed that there will be 56 million Americans age 65 or older by 2020. And nearly 70 percent of Americans who reach 65 will be unable to care for themselves at some point without assistance. That's a lot of important health care needs to be met around the country, and I hope to continue to meet these needs in northern Virginia.

How Joint Employment Liability Threatens Locally Owned Businesses

It seems that some government officials do not want us to continue operating our franchise business. We have been concerned with regulatory issues for the last few years. This apprehension certainly distracts any business owner, especially small ones, from running and growing our business.

The decision by government officials here in Washington to change the "joint employer" standard is a baffling one. The new joint employer standard created by the NLRB in August 2015 is based on "indirect control" and even "reserved, unexercised control." The policy is so broad and unpredictable; it could be applied to nearly any conceivable business relationship. Under this joint employer policy, it's a wonder why franchisors provide any guidance or support to, or even communicate in any way with their franchisees, out of fear of joint employment lawsuits.

Fortunately, I have partnered with a wonderful franchisor – BrightStar Care based in Illinois. The company provides franchisees with a technology platform that our franchisees use for billing, payroll, quality assurance, and other functions. It is a cutting-edge technology, and such resources are a big reason why entrepreneurs go into franchising rather than open a standalone business.

If the new joint employer standard is based on "indirect" or even "unexercised" control, why would franchisors continue to provide such resources? Out of fear of liability risk created by this new policy, the safest thing for franchisors to do may be to simply discontinue supporting franchisees. My clients will certainly experience inferior quality and higher costs. Please put yourself in their shoes. We all will need homecare services sooner or later and we deserve a high standard of care.

As a franchisee, one of many, joint employer unfairly changes the rules of business in the middle of the game. I invested a career's worth of savings in this business. And now joint employer liability threatens everything I've worked for.

The Harmful Joint Employer Policy Requires Legislation

Joint employer is certainly one of the regulatory outrages of the last several years. The government issued a case decision – not even a regulation or formal rulemaking – that deeply changes the definition of what is an "employer." This uncertainty disrupts business relationships, and the government clearly doesn't care. The NLRB has not come out with any

guidance, it has provided no direction whatsoever on their policy, which is based on ambiguous "indirect" or "unexercised" control.

This is a small business issue. I presume every member on this Subcommittee wants to support small businesses. The big corporations have the resources, the attorneys, and the economies of scale to adapt to joint employer. It's the small employers like myself that may run out of business partners.

While government agencies may not care, I hope this Subcommittee does. You all have small businesses in your districts who care about this too. We need Congress to enact legislation that clears up the basic question of what is an employer. This cannot be left to the maddening ping-pong from Federal administration to another. While some regulations may be quickly rolled back by the new administration, the actions of the NLRB require legislation to permanently fix this problem.

Every member should think about what they really do to help small businesses. Too few politicians are actually helping us today, and far more are making it harder to start a business, harder to thrive as an entrepreneur, harder to provide livelihoods to our employees and serve our communities. Globalization, technology and regulations make it awfully difficult to compete as a small business owner. At the very least, we need your help to make clear what constitutes an employer.

Conclusion

Mr. Chairman, the joint employer standard doesn't make any sense. It makes things worse – for entrepreneurs, employees, consumers and communities – and it doesn't make anyone's lives better. Franchise businesses feel particularly in the crosshairs of joint employer policy. You see, in our industry there's a saying: "franchising allows you to be in business for yourself, but not by yourself." The new joint employer standard puts franchisees back out by ourselves.

I am in the business of making the tough times in life a little better for people. I am here today asking Congress to make the lives of small business owners a little easier, a little more certain, by providing a fair legislative fix to the harmful joint employer standard.

Thank you, Mr. Chairman, for your work on behalf of locally owned businesses everywhere. I would be happy to answer any questions.

Chairman WALBERG. Thank you, Ms. Aloul.

I now recognize Ms. Davis for your testimony.

TESTIMONY OF SUSAN DAVIS, PARTNER, COHEN, WEISS & SIMON, LLP, NEW YORK, NEW YORK

Ms. DAVIS. Good morning, and thank you, Chairman Walberg, Ranking Member Sablan, and distinguished members of this subcommittee. Thank you for inviting me here today to respond to what I believe has been a bit of overheated rhetoric about what the Obama Board has done.

During the past 35 years, I've practiced before the Reagan Board, the Bush Board, the Clinton Board, and the Obama Board. While that makes me feel a bit old, it also makes me feel well equipped to address what I believe is a misnomer. The Board does not need a re-calibration or a realignment or a restoration of balance in fairness.

As Mr. Larkin noted, the Democratic and Republican Boards have differed on their view of the statute, on whether, as the chairman stated, it is a neutral act, or whether, as the preamble states, it's an act designed to promote collective bargaining. But regardless of our individual views, the Obama Board's view of the statute was rooted in the statute itself.

When the rhetoric is swept aside and the temperature is taken down a bit, which I think is a good idea, the four flash points that brought us here are pretty uneventful. The Board did modernize the election rules to make modest and meaningful changes to the procedures; but when you look at the statistics, the number of cases in which the parties actually are able to agree to stipulate to an election without a hearing, which is 92 percent, and the union's win rate, which is in the mid-60s, those statistics have not changed at all before or after the rules.

Yes, the Board did clarify the standard it would apply in analyzing appropriate bargaining units. But that decision came squarely out of the D.C. Circuit Court of Appeals analysis in the Blue Man Group Vegas case—a three Republican-appointee panel—and seven Courts of Appeals have affirmed the Board's analysis.

Additionally, in spite of the spectre of the proliferation of microunits, which, Mr. Chairman, you alluded to, the median unit before, now, during, after Specialty, about 26 people, is identical to the median unit in the decade prior to Specialty Health.

Yes, in BFI, the Board did apply a common law agency test for analyzing joint employer. That's the same test the Board applied for 50 years prior to the narrowing of the doctrine under the Reagan and Bush Boards. This decision, like many others, the Obama Board issued was designed to make the act relevant in the modern workplace, where we have seen employers continue to shed the employer/employee relationship in order to minimize or negate liability. And we've seen an explosion of permatemps who work side by side with workers and deserve protection as well.

The McDonald's complaint, which has caused such a hue and cry, was issued prior to BFI, under the old standard. And let's remember, McDonald's is only a complaint. There has been no ALJ deci-

sion. There has been no Board decision. We need to let the process run.

It bears noting that the general counsel in the 2015 Freshii franchisor decision—I would commend everyone in this room read that—found that, because the franchisor's control was limited to brand standards and food quality and the sorts of technology platforms that Ms. Aloul mentioned, and not to the employer/employee relationships, there was no joint employer liability.

If a franchisor is currently exercising or reserving contractual authority over labor relations of its franchisees, the solution is simple: It can eliminate its liability by reducing that control; and if it chooses not to do that, there is now some congruity between a franchisor's responsibility and its liability.

Finally, the Obama Board did decide that requiring employees to sign class-action waivers violated the NLRA. The NLRA is the only statute in this country that protects collective rights. And while that is a little more difficult for some to digest, it does protect those rights.

More than 40 years ago, the Supreme Court, in the Eastex case, told us that employees' rights to join together to sue over terms and conditions of employment was protected. And the Supreme Court has said multiple times that an employer may not condition employment on waiving statutory rights. Murphy Oil involves no more than that.

In closing, I'd like to say the following: I fear that the call to restore balance and order and fairness on the NLRB is a euphemism for restoring a labor law regime that delegitimizes unions and prevents workers from having a collective voice at work. I heard the same cry for a restoration of balance after the Clinton Board. It is, I believe, a code, a code for a Board that will weaken labor unions and disempower workers.

History shows us that when workers—when unions are weakened, income inequality, which is at an all-time high right now, increases. Let us remember that President Trump campaigned on the promise of helping American workers on addressing decades of wage stagnation. Weakening the Board, and thereby weakening labor unions will only make that problem worse.

Thank you, Mr. Chairman.

[The statement of Ms. Davis follows:]

Testimony of Susan Davis
Partner, Cohen, Weiss and Simon, LLP
Before the Subcommittee on Health, Employment, Labor, and Pensions
Committee on Education and the Workforce
U.S. House of Representatives

"Restoring Balance and Fairness to the National Labor Relations Board"

February 14, 2017

Good morning, and thank you Chairman Wahlberg, Ranking Member Sablan, and distinguished Members of this Subcommittee for giving me the opportunity to appear at this hearing. My name is Susan Davis, and I am a partner at the law firm of Cohen, Weiss and Simon, LLP in New York City, a firm that has served the interests of working people and their unions for more than 65 years. I have been with the firm for more than 35 years representing unions of nurses, musicians, truck drivers, laborers, airline pilots, steelworkers, letter carriers, autoworkers, actors, broadcasters, recording artists and a myriad of other workers across the country. Together with Cohen, Weiss and Simon, I served as general counsel to the International Brotherhood of Teamsters and the United American Nurses. Currently, I am national counsel to the Screen Actors Guild-American Federation of Television and Radio Artists (SAG-AFTRA), Actors' Equity, the New York State Nurses Association, and a number of local labor unions in New York City.

During the past 30 years, I have practiced extensively before the National Labor Relations Board. I am here to respond to some of the over-heated rhetoric and criticism related to recent actions of the NLRB.

I want to specifically address four actions of the NLRB that have garnered the most attention: 1) the NLRB Election Rule; 2) *Specialty Healthcare* and the Board's standard for determining appropriate bargaining units; 3) *Browning-Ferris* and the Board's joint employer

standard; and 4) *Murphy Oil* and the Board's treatment of arbitration agreements that include a waiver of class and any form of collective claims. I address these in turn.

NLRB's Election Rule

On February 6, 2014, the NLRB issued a Notice of Proposed Rulemaking (NPRM) to modify procedures applicable to the processing of representation petitions. Through notice-and-comment, the NLRB ultimately accepted more than 70,000 comments on the NPRM and with four days of public hearings that resulted in over 1000 transcript pages of oral commentary.[1] *See* 79 FR 74311. On December 15, 2014, the NLRB adopted its Final Rule ("Election Rule") on representation procedures, which took effect on April 15, 2015.

While the employer community has charged the Board with creating "ambush" or "quickie" elections, in reality, the Election Rule makes modest, common-sense changes to the Board's representation procedures to eliminate delays that had plagued the election process for decades. The new Rule reduces unnecessary litigation, streamlines hearings, and modernizes the procedures. These changes not only allow election cases to be resolved more expeditiously and more efficiently, but they also reduce opportunities for manipulation of the representation process that allowed parties to gain unfair advantage and discouraged workers' free choice.

The Election Rule allows parties to file representation petitions and documents electronically, and standardizes the scheduling of pre-election hearings to avoid unnecessary delays. It also reduces unnecessary litigation by requiring parties to state their positions on relevant issues prior to the pre-election hearing, and then focuses the hearing on relevant issues

[1] The NLRB initially issued the NPRM on June 22, 2011, and adopted a final rule on December 22, 2011. 76 FR 80138. A federal court later held that the Board lacked a quorum when it issued that final rule. *Chamber of Commerce of the U.S. v. NLRB*, 879 F.Supp.2d 18 (D.D.C. My 14, 2012). When a fully-confirmed Board re-issued the NPRM on February 14, 2014, it did so under the same docket number so as to allow the Board to consider all comments and oral commentary submitted in response to the initial NPRM. 79 FR 74311. It provided another 60-day period to submit any additional comments and a 7-day period for reply comments, as well as held 2 additional days of hearings for oral commentary. *Id.*

that truly are in dispute. The Rule tightens the election timeline by allowing Regional Directors, in their discretion, to defer questions regarding voter eligibility and the inclusion of a small number of workers in the unit until after the election; it encourages closing arguments rather than post-hearing briefs; and, by expanding the post-election review procedures, eliminates the need for an automatic post-hearing 25-day election stay. In order to utilize technological advances in the past 25 years and facilitate employee free choice, the Election Rule also expands the contact information for workers that unions are entitled to receive prior to the election. Many of these administrative changes mirror procedures at other administrative agencies and in the federal courts.

Importantly, federal courts have rejected the two challenges to the Election Rule. *Associated Builders and Contrs. of Tex., Inc. v. NLRB*, 826 F.3d 215 (5th Cir. 2016); *Chamber of Commerce of the U.S. v. NLRB*, 118 F.Supp.3d 171 (D.D.C. July 29, 2015). In sustaining the Election Rule, the Fifth Circuit wrote,

> [T]he Board identified evidence that elections were being unnecessarily delayed by litigation…, and that certain rules had become outdated as a result of changes in technology… It conducted an exhaustive and lengthy review of the issues, evidence, and testimony, responded to contrary arguments, and offered factual and legal support for its final conclusions. Because the Board acted rationally and in furtherance of its congressional mandate in adopting the rule, the [employer] entities' challenge to the rule as a whole fails.

Associated Builders, supra, 826 F.3d at 229.

Nearly two years of experience under the Election Rules demonstrates that employers' concerns about the changes were overblown. Employers' claims that shortening the period between the filing of the representation petition and the election would lead to an increase in unions' election win rate have not materialized. While the Election Rule did reduce the time it takes to conduct an election, statistics show that the union win rate--64% in the year before the

Rule went into effect and 66% last year--barely budged. *NLRB Annual Review of Revised R-Case Rules*, https://www.nlrb.gov/news-outreach/news-story/annual-review-revised-r-case-rules (last visited February 12, 2017). In a like vein, the total number of petitions filed and the overwhelming number of elections--92%-- that did not require a hearing because the parties stipulated to an election agreement remained the same. *Ibid.*

The Election Rule has accomplished its goal – to reduce unnecessary delays in the processing of representation petitions, increase transparency and utilize technology – without changing any of the broader representation case dynamics or results. Both unions and employers have settled into the new norms, with neither side being advantaged by the modest but meaningful procedural adjustments the Board made.

***Specialty Healthcare & Rehab Ctr. of Mobile*, 357 NLRB 934 (2011), aff'd. *Kindred Nursing Ctrs. E., LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013)**

In *Specialty Healthcare*, the Board clarified the application of its traditional community of interest standard to be applied where a union seeks to represent a particular group of workers and the employer claims the petitioned for unit is not appropriate because it excludes certain other workers. The Board wrote

> We therefore take this opportunity to make clear that, when employees or a labor organization petition for an election in a unit of employees who are readily identifiable as a group (based on job classifications, departments, functions, work locations, skills, or similar factors), and the Board finds that the employees in the group share a community of interest after considering the traditional criteria, the Board will find the petitioned-for unit to be an appropriate unit, despite a contention that employees in the unit could be placed in a larger unit which would also be appropriate or even more appropriate, unless the party so contending demonstrates that employees in the larger unit share an overwhelming community of interest with those in the petitioned-for unit.

Specialty Healthcare, 357 NLRB at 945-946. In other words, an employer cannot displace a proper unit proposed by the petitioning party unless the it can show that the excluded workers share an overwhelming community of interest with those in the petitioned-for unit.

There is certainly nothing radical about this decision. In fact, the "overwhelming community of interest" language is drawn from a decision of three Republican-nominated judges on the D.C. Circuit Court of Appeals. *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417 (D.C. Cir. 2008). Seven additional federal circuit courts have upheld the Board's application of *Specialty Healthcare*. *See Kindred Nursing Ctrs. E., LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013) (enforcing the original *Specialty Healthcare* case); *Constellation Brands, U.S. Operations, Inc. v. NLRB*, 842 F.3d 784 (2d Cir. 2016); *NLRB v. FedEx Freight, Inc.*, 832 F.3d 432 (3d Cir. 2016); *Nestle Dreyer's Ice Cream Co. v. NLRB*, 821 F.3d 489 (4th Cir. 2016); *Macy's, Inc. v. NLRB*, 824 F.3d 557 (5th Cir. 2016); *FedEx Freight, Inc. v. NLRB*, 839 F.3d 636 (7th Cir. 2016); *FedEx Freight, Inc. v. NLRB*, 816 F.3d 515 (8th Cir. 2016).

In enforcing the *Specialty Healthcare* decision and acknowledging that it was not a departure from precedent, the Sixth Circuit wrote:

> [T]he Board did cogently explain its reasons for adopting the overwhelming-community-of-interest standard. The Board explained the need to clarify its law, acknowledging that it had used some variation of a heightened standard when a party (usually an employer) argues that the bargaining unit should include more employees. The Board explained that it has sometimes used different words to describe this standard and has sometimes decided cases such as this without articulating any clear standard... It is not an abuse of discretion for the Board to take an earlier precedent that applied a certain test and to clarify that the Board will adhere to this test going forward.

Kindred Nursing Ctrs. East, LLC v. NLRB, 727 F.3d 552, 562-563 (6th Cir. 2013) (internal quotes and citations omitted). *See also, FedEx Freight, Inc. v. NLRB*, 816 F.3d 515, 525 (8th Cir. 2016) ("We conclude that the overwhelming community of interest standard articulated in Specialty Healthcare is not a material departure from past precedent and is consistent with the requirements of section 9(b) of the Act.").

The employer community has assailed this decision as setting a new standard that invites the proliferation of what it calls "micro" units that will gerrymander workforces. As with the rhetoric

surrounding the Board's Election Rule, this fear has not been realized in the five and half years of experience since the decision issued. As the chart below shows, the median size of approved bargaining units *has remained constant* in the five years prior to *Specialty Healthcare* and subsequently through FY2016, fluctuating between 24 and 28, with a median size of 26 in FY2016.

	Median Size
FY07	24
FY08	26
FY09	24
FY10	27
FY11	26
FY12	28
FY13	24
FY14	26
FY15	25
FY16	26

Median Size of Bargaining Units in Elections, https://www.nlrb.gov/news-outreach/graphs-data/petitions-and-elections/median-size-bargaining-units-elections (last visited February 12, 2017).

Here too, actual facts, not alternative facts, must guide our analysis.

***Browning-Ferris Ind. of Cal.*, 362 NLRB No. 183 (2015)**

The NLRB's decision in *Browning-Ferris* provides another example of over-heated criticism of the Board. In *Browning-Ferris*, the Board restated its joint employer standard and reaffirmed its commitment to the standard articulated by the Third Circuit in *NLRB v. Browning-Ferris Ind. of Penn., Inc.*, 691 F.2d 1117 (3rd Cir. 1982) – that two or more entities that share or codetermine those matters governing essential terms and conditions of employment will be found to be joint employers. In determining whether putative joint employers meet this standard, the Board will 1) inquire whether there exists a common law employment relationship between the employees and the putative joint employer, and if so, 2) inquire whether the putative joint

employer possesses sufficient control over essential terms and conditions of employment to permit meaningful collective bargaining. *Browning-Ferris*, *supra*, sl. op. 2.

The Board explained that its earlier decisions in *TLI, Inc.*, 271 NLRB 798 (1984), *enfd. mem.*, 772 F.2d 894 (3rd Cir. 1985) and *Laerco Transportation*, 269 NLRB 324 (1984), "marked the beginning of a 30-year period during which the Board – without any explanation or even acknowledgement and without overruling a single prior decision – imposed additional requirements that effectively narrowed the joint-employer standard." *Id.* at 10. Noting that *TLI* and *Laerco* precluded weighing certain factors of control that the Board, for decades, had considered in its joint employer analysis, the Board found that these decisions improperly "repudiated its earlier reliance on reserved control and indirect control as indicia of joint-employer status," without any analysis or justification. *Id.*

The Board also criticized more recent decisions such as *TLI* and *AM Property Holding Corp.*, 350 NLRB 998 (2007), *enfd. in rel. part sub nom.*, *Service Employees Int'l Union, Local 32BJ v. NLRB*, 647 F.3d 435 (2nd Cir. 2011) for restricting its joint employer analysis by "refus[ing] to assign any significance to contractual language expressly giving a putative employer the power to dictate workers' terms and conditions of employment." *Id.* These decisions similarly ignored facts establishing that a company "indirectly exercised control that significantly affected employees' terms and conditions of employment." *Id.*, citing *Airborne Express*, 338 NLRB 597, 597 fn. 1 (2002)("[t]he essential element in [the joint-employer] analysis is whether a putative joint employer's control over employment matters is direct and immediate.").

The Board in *Browning Ferris* rejected these restrictions as inconsistent with both a common law inquiry, which is required by the Taft-Hartley Act, and decades of established

precedent. Following passage of the Taft-Hartley Act, the Supreme Court held that the "proper standard" for determining an employment relationship under the National Labor Relations Act is "the [common] law of agency." *NLRB v. United Ins. Co. of Amer.*, 390 U.S. 254, 256 (1968). Under the common law of agency, "[a] servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control." *Restatement (Second) of Agency* § 220(1). In applying the law of agency, "there is no shorthand formula or magic phrase that can be applied" to determine whether an employment relationship exists; rather "*all of the incidents of the relationship* must be assessed and weighed with no one factor being decisive. What is important is that the *total factual context* is assessed." *Id.* at 258 (emphasis added).

By eliminating restrictions on its common law analysis, the Board's *Browning-Ferris* decision simply realigned its jurisprudence to again require consideration of all facts relevant to the right to control inquiry.[2] Hence, it decided that it would "no longer require that a joint employer not only *possess* the authority to control employees' terms and conditions of employment, but also *exercise* that authority. Reserved authority to control terms and conditions of employment, even if not exercised, is clearly relevant to the joint-employment inquiry."[3] *Id.* at 2 (emphasis in original). Additionally, the Board "will no longer require that a joint employer... exercise [its] authority... directly, immediately, and not in a 'limited and routine' manner," *id.* at

[2] It should be noted that the standard prior to *Browning-Ferris* also required a multi-factor analysis. While there may have been fewer factors to weigh, the Board still examined a number of factors on a case-by-case basis to make joint employer determinations, and much grey area existed. Thus, the oft-repeated claim that *Browning-Ferris* overruled a bright-line rule and replaced it with an ambiguous case-by-case analysis is simply not accurate.
[3] While the dissent characterizes this retained control, or right to control, as "potential" control, *Browning-Ferris*, *supra*, sl. op. 22, the majority's decision more narrowly only refers to control over terms and conditions of employment that a putative joint employer explicitly *retains*, most commonly in contract provisions. This analysis of the right to control is required by the common law. *See Restatement (Second) of Agency* § 220(1).

15-16, because "[i]f otherwise sufficient, control exercised indirectly – such as through an intermediary – may establish joint-employer status." *Id.* at 2.

Importantly, the Board stated that the previously eliminated factors would only be *probative* of a joint employer relationship, not that they would be determinative. *Browning-Ferris*, *supra*, sl. op. 16 ("[t]he right to control, in the common-law sense, is *probative* of joint-employer status, as is the actual exercise of control, whether direct or indirect."). Additionally, the Board explicitly stated that it was making no findings as to any contractual relationship other than the one at issue in the case—it expressly made clear it was not addressing matters such as franchising. *Id.*, sl. op. 20, fn 120.[4] Thus, the Board's decision merely requires that all factors are considered in the unique factual context of every case, which is exactly what the common law requires.

Much of the hysteria surrounding *Browning-Ferris* stems from the General Counsel's consolidated complaints against corporate McDonalds and some of its franchisees. 02-CA-093893, *et al.* However, these complaints issued prior to *Browning-Ferris*, an indication that the General Counsel believed corporate McDonalds was a joint employer with its franchisees under the previous standard. It is my understanding that the evidence in that case shows that McDonalds exercises an extraordinary level of control over the terms and conditions of its franchisees' employees.

The General Counsel's treatment of another franchisor, Freshii, is illustrative of the individual analysis that will be applied in each case. The General Counsel determined that

[4] "The dissent is simply wrong when it insists that today's decision "fundamentally alters the law" with regard to the employment relationships that may arise under various legal relationships between different entities: "lessor-lessee, parent-subsidiary, contractor-subcontractor, franchisor-franchisee, predecessor-successor, creditor-debtor, and contractor-consumer." None of those situations are before us today, and we decline the dissent's implicit invitation to address the facts in every hypothetical situation in which the Board might be called on to make a joint-employer determination."

Freshii did not exert sufficient control over the terms and conditions of employment of its franchisees' employees to be a joint employer, even if applying a broader standard such as the one adopted in *Browning-Ferris*. Adv. Memo. Nutritionality, Inc. d/b/a Freshii, 2015 WL 2357682 (NLRB Div. of Adv. April 28, 2015). The different treatment of these two franchisors shows that the General Counsel intends to examine the facts of each case, and only assert that franchisors that exert enough control to establish a common law employment relationship will be considered to be joint employers.

The employer community's portrayal of *Browning-Ferris* as a threat to ordinary contracting-for services and the franchise model is unwarranted. The *Browning-Ferris* decision was modestly crafted to ensure that the Board's joint employer analysis will cover precisely those employers that Congress intended to be covered by the NLRA – common law employers – and no others.

***Murphy Oil*, 361 NLRB No. 72 (2014)**

The Board's decision in *Murphy Oil* and other decisions finding class action and collective waivers to be unlawful has also engendered unjustified criticism. In *Murphy Oil*, the Board held that employers could not force unrepresented employees, on threat of termination, to agree to arbitrate all workplace disputes solely as individuals, that is, to waive their right to file collective court and arbitration cases. As discussed below, here is nothing novel about the Board's decision. Rather, it applied long-accepted law to an employer policy that effectively abrogated employees' right to act collectively.

The Supreme Court long ago upheld both legs of the Board's reasoning in *Murphy Oil*. First, the Court held that the National Labor Relations Act's "'mutual aid or protection' clause protects employees from retaliation by their employers when they seek to improve working

conditions through resort to administrative and judicial forums." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565-66 (1978). That makes sense, as a statute designed to promote labor peace by protecting employees' right to strike to remedy substandard wages surely protects employees' right to sue to remedy substandard wages. Second, more than 75 years ago, the Court held that an employer could not induce employees to contract away their rights: "Obviously, [an] employer[] cannot set at naught the National Labor Relations Act by inducing their workmen to agree not to demand performance of the duties which it imposes." *National Licorice Co. v. NLRB*, 309 U.S. 350, 364 (1940). These venerable principles are the foundation of the *Murphy Oil* decision.

The Courts of Appeals for both the Seventh and the Ninth Circuits have upheld the Board's reasoning in its class and collective action waiver decisions. *Lewis v. Epic Systems Corp.*, 823 F.3d 1147 (7th Cir. 2016); *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016). Indeed, the Ninth Circuit held not simply that it was a permissible construction of the Act, but that "[t]he NLRA is unambiguous" and "the Board's interpretation . . . is correct." 834 F.3d at 983.

While the matter is now before the Supreme Court, the Board's position is firmly rooted in the language of the statute, Supreme Court precedent, and logic.

Conclusion

I hope my testimony today shows that the over-heated rhetoric and criticism leveled at the NLRB over the past few years has been unwarranted. The Board's Election Rule has not made it easier for unions to win elections. *Specialty Healthcare* has not proliferated so-called "micro" units. *Browning-Ferris* merely restored the full common law inquiry to the joint

employer standard and has not resulted in a spate of franchisors being declared joint employers with their franchisees. *Murphy Oil* simply applies long-established principles to new policies.

Nor has the Obama Board been one-sided in its decision-making. It has ruled against unions and workers on several important issues, including holding that certain union policies regarding dues obligations are unlawful, *Machinists Local Lodge 2777*, 355 NLRB 1062 (2010), *IBEW Local 34*, 357 NLRB 401 (2011); that a union interfered with an election when it financed a lawsuit that was filed against the employer during the pre-election period, *Stericycle*, 357 NLRB 582 (2011); and that back pay may not be awarded to unlawfully fired undocumented immigrants, even where the employer knew that the workers lacked work authorization, *Mezonos Maven Bakery*, 357 NLRB 376 (2011).

With income inequality at an all-time high and so much of this nation feeling financial pressure and insecurity, now more than ever, employees' rights to collective bargaining must be protected. In enacting the National Labor Relations Act, Congress recognized that strong unions were a critical component of re-building a middle class in this country, and history has borne that out. To attempt to neuter the Act and the Board now will only serve to increase income inequality and worsen the condition of the hard-working Americans the President pledged to protect. Exaggerated criticism of the modest and well-grounded actions the Board has taken over the past few years is not what is needed. I urge the Members of this Subcommittee to reject these attacks against the NLRB, and instead work to promote its mission.

Thank you for considering these comments.

Chairman WALBERG. Thank you.

I now recognize Mr. LaJeunesse for your five minutes.

TESTIMONY OF RAYMOND J. LAJEUNESSE, JR., VICE PRESIDENT & LEGAL DIRECTOR, NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC., SPRINGFIELD, VIRGINIA

Mr. LAJEUNESSE. Chairwoman Foxx, Chairman Walberg, and distinguished committee members, unfortunately, the National Labor Relations Board majorities President Obama has appointed have often denied or diminished the rights of workers to refrain from union associations, rights they're guaranteed by section 7 of the act.

In States without a right-to-work law, one of the most important rights that workers have is the right not to pay the part of union fees that represents the cost of political and other non-bargaining activity. That right was recognized in Communications Workers vs. Beck. In Beck, the Supreme Court affirmed a Fourth Circuit decision that under the NLRA, objecting non-members cannot be charged for a union's labor legislation expenditures.

Moreover, in Machinists vs. Street, which Beck found controlling under the National Labor Relations Act, the court had held that the Railway Labor Act does not authorize union officials to use objecting employees' exacted funds to support, quote, "the promotion or defeat of legislation." Yet, in United Nurses and Allied Professionals, the Obama Board held that lobbying used—quote, "used to pursue goals that are germane to collective bargaining, contract administration, or grievance adjustment, is chargeable to objectors."

United Nurses exemplifies another way in which the Obama Board has eviscerated non-members' right not to pay for union non-bargaining activities. In *Teachers Local 1 v. Hudson*, the Supreme Court held that potential objectors must be given sufficient information to gauge the propriety of the union's fee, including, quote, "verification by an independent auditor," unquote.

Yet, in *United Nurses*, the Obama Board ruled that a union need not provide objectors with an auditor's verification. The Board majority argued that union's conduct under *Beck* need not be analyzed under a heightened First Amendment standard, as in public sector cases such as Hudson. However, the D.C. circuit had already explicitly rejected that argument in two cases in which it reversed the Board.

The Obama Board also has applied a lenient standard to the common union requirement that objections to subsidizing union non-bargaining activities be renewed annually during a short window period. After three Federal courts ruled that workers should be free to make objections that continue in effect until withdrawn, the Obama Board did not hold annual objection requirements per se unlawful as the courts did. Instead, the Board decided to evaluate those requirements on a union-by-union basis to determine whether the union has a legitimate justification.

Applying that loose standard, the Obama Board upheld the United Auto Workers' annual objection requirement without even considering the union's justifications, finding that the burden on non-members was de-minimus. As the dissent said, the burden is

plainly and decidedly not de-minimus because objecting entails time and cost. And if non-members, quote, fail to timely renew their objection, they will automatically incur the obligation of paying a full agency fee, including funds for expenditures for non-representational purposes.

The Obama Board also has repeatedly undermined the right to refrain from union representation that NLRA section 7 guarantees equally with the right to organize. A union may become an exclusive representative of all employees in an appropriate bargaining unit, either by winning a Board-conducted secret ballot election, or obtaining the employers' recognition based on a union showing of majority support on cards or a petition. Either way, this creates a monopoly. As the Supreme Court has held, exclusive representation extinguishes the individual employee's power to order his own relations with his employer.

Employees can petition for an election to decertify a bargaining agent chosen by election, but not within one year after that election. That statutory bar does not apply to voluntary recognition. And the Board then created—created—it's not in the statute—a bar to decertification elections after voluntary recognition, and created a contract bar which, for up to a three-year period, no decertification election can be held.

In 2007, in *Dana Corporation*, the Board created a procedure by which employees could decertify after a voluntary recognition, but the Obama Board, despite the fact that in the almost four years that followed DANA, the union recognized by the employer based on union authorization cards without a secret ballot election was rejected by the employees in one out every four Dana elections. The Obama Board in *Lamons Gasket* overruled *Dana* 3-1, incredibly asserting that *Dana's* ruling undermined employees' free choice.

Other issues, which adversely affect employees are the ambush elections and the gerrymandering of bargaining units under *Specialty Healthcare*, both of which result in denying employees their right to be free from union association.

I've recommended in my prepared remarks, I've submitted the written statement, presented to the committee several matters that the House can undertake and to solve these problems. But the most important one is the one that's already been mentioned, which is, the Board needs to be filled. We need five members on the Board to return us to sanity and the discussion of labor issues to return to employees—

[The statement of Mr. LaJeunesse follows:]

WRITTEN STATEMENT OF RAYMOND J. LAJEUNESSE, JR.,
VICE PRESIDENT & LEGAL DIRECTOR,
NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC.,
ON
The National Labor Relations Board's Failure to Fully Enforce Workers' Right to Refrain from Union Support under the National Labor Relations Act

House Committee on Education and the Workforce
Subcommittee on Health, Employment, Labor and Pensions
Hearing on "Restoring Balance & Fairness to the NLRB"
Tuesday, February 14, 2017

Chairman Walberg and distinguished Members of the Committee:

Thank you for the opportunity to testify today.

My name is Raymond LaJeunesse. I am Vice President and Legal Director of the National Right to Work Legal Defense Foundation. Since the Foundation was founded in 1968, it has provided free legal aid to workers who wish to exercise their rights to refrain from joining or assisting labor organizations and to freely choose whether or not to be represented by such organizations.

I have worked for the Foundation for more than forty-five years. I currently supervise seventeen Foundation staff attorneys who have represented thousands, of employees in unfair labor practice and representation cases before the National Labor Relations Board. Currently, Foundation attorneys represent workers in sixty-eight cases pending at the Board and in its various Regions.

I commend you for investigating the adequacy of the National Labor Relations Board's enforcement of the rights of individual workers under the

National Labor Relations Act to refrain from union associations. Unfortunately, the Board majorities President Obama appointed have in many respects denied or diminished those rights. In the time that I have today I can only highlight a few of the more important examples.

Forcing nonmembers to subsidize union politics.

In states without a Right to Work law that prohibits agreements requiring payment of union fees as a condition of employment, one of the most important rights that individual workers have is the right not to pay the part that represents the union's costs of political, ideological and other nonbargaining activity. That right was recognized in our victory in *Communications Workers v. Beck*, in which the U.S. Supreme Court affirmed a Fourth Circuit decision that under the NLRA objecting nonmembers cannot be charged a union's "'labor legislation' expenditures."[1] Moreover, in *Beck* the Supreme Court ruled that decisions as to what nonmembers can be charged as a condition of keeping a job under the Railway Labor Act are "*controlling*" under the NLRA;[2] and, in *Machinists v. Street* the Court held that the RLA does not authorize union officials to use objecting employees' "exacted funds to support" "the promotion or defeat of legislation,"[3]

[1] *Beck v. Communications Workers*, 776 F.2d 1187, 1210-11 (1985), *aff'd*, 800 F.2d 1280 (4th Cir. 1986) (en banc), *aff'd*, 487 U.S. 735 (1988).
[2] 487 U.S. at 745 (emphasis added).
[3] 367 U.S. 740, 769 & n.17 (1961).

Yet, in 2012, *United Nurses & Allied Professionals*, the Obama Board held that "[s]o long as lobbying is used to pursue goals that are germane to collective bargaining, contract administration, or grievance adjustment, it is chargeable to objectors," even if the bills lobbied "would not provide a direct benefit to members of the" objectors' bargaining unit.[4] Worse, the Board majority proposed a "rebuttable presumption of germaneness" for legislation, such as minimum wage legislation, that "would directly affect subjects of collective bargaining."[5]

The Board retained jurisdiction in *United Nurses* to decide how it "should define and apply" this new "germaneness standard."[6] Four years later it still has not done so, and thus the Charging Party in *United Nurses*, who is represented by Foundation attorneys, has been unable to appeal the Board's decision. Moreover, two "Members" of the *United Nurses* majority were unconstitutional "recess appointees" under the Supreme Court's *Noel Canning* decision.[7] A request for reconsideration in *United Nurses* on that ground has been pending before the Board for almost three years.

Watering down nonmembers' procedural protections.

United Nurses also exemplifies another way in which the Obama Board has eviscerated nonmembers' rights not to pay for union activities other than

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[4] 359 N.L.R.B 469, 475-76 (2012) (3-1 decision).
[5] *Id.* at 477.
[6] *Id.*
[7] *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2104).

bargaining and contract administration. The Supreme Court has held that if a union negotiates a forced unionism clause under the NLRA, it must notify workers that they may satisfy its "membership" requirement by not joining the union and only "paying fees to support the union's representational activities."[8] And, in *Teachers Local 1 v. Hudson*, the Court held that "potential objectors [must] be given sufficient information to gauge the propriety of the union's fee," including "the major categories of expenses, *as well as verification by an independent auditor*."[9]

Yet, in *United Nurses* the Obama Board ruled that a union need not provide objectors with an auditor's verification, that it is sufficient if the union tells them that its figures were independently verified.[10] The Board majority explicitly declined to follow a directly contrary holding of the Ninth Circuit, *Cummings v. Connell*.[11] They argued that unions' conduct under *Beck* "is properly analyzed under the duty of fair representation," not "a heightened First Amendment standard" as in public-sector cases such as *Hudson* and *Cummings*.[12] However, the D.C. Circuit had already explicitly rejected that argument in three cases, in two of which it reversed the Board.[13]

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[8] *Marquez v. Screen Actors Guild*, 525 U.S. 33, 43 (1998).
[9] 475 U.S. 292, 306-07 & n.18 (1986) (emphasis added).
[10] 359 N.L.R.B. at 471.
[11] 316 F.3d 886, 890-92 (9th Cir. 2003).
[12] 359 N.L.R.B. at 471.
[13] *Penrod v. NLRB*, 203 F.3d 41,45 (D.C. Cir. 2000); *Ferriso v. NLRB*, 125 F.3d 865, 868-70 (D.C. Cir. 1997); *Abrams v. Communications Workers*, 59 F.3d 1373, 1379 & n.7 (D.C. Cir. 1995).

The Obama Board also has applied a lenient standard to a hurdle that union officials typically erect to make it difficult for nonmembers to exercise their right not to subsidize union political and other nonbargaining activities: the requirement that *Beck* objections be submitted during a short "window period"—typically a month or less—and be renewed every year. After three federal courts ruled that workers should be free to make objections that continue in effect until withdrawn,[14] the Obama Board reconsidered its earlier approval of annual objection requirements. But, instead of holding that annual objection requirements are per se unlawful, as the courts did, the Board decided to evaluate those requirements on a union-by-union basis "to determine 'whether the union has demonstrated a legitimate justification for an annual renewal requirement or otherwise minimized the burden it imposes on potential objectors.'"[15]

Applying that loose standard, the Obama Board upheld the United Auto Worker's annual objection requirement without even considering the union's purported justifications for it, finding that the burden the requirement imposed on nonmembers was "de minimis."[16] However, as Member Hayes said, dissenting, the burden of objection under the UAW's scheme "is plainly and decidedly not de minimis," because objecting employees

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[14] *Seidemann v. Bowen*, 499 F.3d 119, 124-26 (2d Cir. 2007); *Shea v. Machinists*, 154 F.3d 508 (5th Cir. 1998); *Lutz v. Machinists*, 121 F. Supp. 2d 498 (E.D. Va. 2000).
[15] *UAW Local #376*, 356 N.L.R.B. 1320, 1320 (2011) (2-1 decision) (quoting *Machinists Local Lodge 2777*, 355 N.L.R.B. 1062, 1062 (2010) (3-2 decision)), *vacated sub nom. Gally v. NLRB*, 487 F. App'x 661 (2d Cir. 2012).
[16] *Id.* at 1322.

> must undertake the affirmative task of writing and mailing a statement of continued objection each year; they must remember to do so before their 1-year objector term expires; and, if they fail to timely renew their objection, they will automatically incur the obligation of paying a full agency fee, including funds for expenditures . . . for nonrepresentational purposes, for some period of time.[17]

Barring secret-ballot elections in "card-check" situations.

The Obama Board has not only failed to enforce fully workers' rights under *Beck* not to subsidize union political and other nonbargaining activities. Perhaps even more egregiously, it also has repeatedly undermined the right to refrain from union participation and support that NLRA section 7 guarantees workers.[18]

A union may become an "exclusive representative" of all employees in an appropriate bargaining unit, including those who oppose the union, in two ways. It may either win a Board-conducted secret-ballot election[19] or obtain the employer's recognition "based on a union's showing of majority support" on union authorization cards or a petition.[20] Either way, this creates a monopoly: exclusive representation "extinguishes the individual employee's power to order his own

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[17] *Id.* at 1323.
[18] 29 U.S.C. § 157 (emphasis added) provides: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, *and shall also have the right to refrain from any and all such activities* . . . ."
[19] 29 U.S.C. § 159(c)(1).
[20] *Dana Corp.*, 351 N.L.R.B. 434, 436 (2007).

relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees."[21]

The Act permits employees to petition for an election to decertify an exclusive representative,[22] but not within one year after a valid secret-ballot election has been held.[23] That statutory bar does not apply to voluntary recognition of a union. However, the Board in 1966 created a policy barring a decertification election after an employer recognizes a union until a "reasonable time" to negotiate a collective bargaining agreement has elapsed.[24] Another Board-created rule was that an agreement "executed during this insulated period generally bars Board elections for up to 3 years of the new contract's terms."[25]

By 2007 the Board had more experience as to how "card checks," which often are coercive, work in practice. That year, in *Dana Corporation*, the Board significantly increased the ability of workers to get rid of unwanted union representatives imposed on them by "card checks." To "achieve a 'finer balance' of interests that better protects employees' free choice," the Board modified the "recognition bar." The Board held that, where an employer recognized a union by card check, decertification elections would be conducted if 30 percent or more of the unit employees filed a valid petition requesting an election within 45 days of

[21] *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967).
[22] 29 U.S.C. § 159(c)(1)(A)(ii).
[23] 29 U.S.C. § 159(c)(3).
[24] *Keller Plastics Eastern*, 157 N.L.R.B. 583 (1966).
[25] *Dana Corp.*, 351 N.L.R.B. at 434.

the employer's posting in the workplace of an official NLRB notice that the union had been recognized and that the workers had a right to an election.[26] Moreover, the majority modified the "contract-bar rules" so that a bargaining agreement executed on or after voluntary recognition did not bar a decertification petition "unless notice of recognition has been given and 45 days have passed without a valid petition being filed."[27]

The *Dana* Board ruled as it did, because "the immediate post-recognition imposition of an election bar does not give sufficient weight to the protection of the statutory rights of affected employees to exercise their choice on collective-bargaining representation,"[28] which "is better realized by a secret election than a card check."[29] The majority noted that "card signings are public actions, susceptible to group pressure exerted at the moment of choice," and that "union card-solicitation campaigns have been accompanied by misinformation or a lack of information about employees' representational options."[30]

In the almost four years that followed, 1,333 *Dana* notices were requested, 102 election petitions were subsequently filed, and the Board conducted sixty-two *Dana* decertification elections. In seventeen (or 25%) of those elections, the union that had been recognized by the employer based on union authorization cards

[26] *Id.*
[27] *Id.* at 435.
[28] *Id.* at 434.
[29] *Id.* at 438.
[30] *Id.* at 438-39.

without a secret-ballot election was rejected by the employees, freeing them from unwanted union representation.[31]

Nonetheless, in 2011, in *Lamons Gasket*, the Obama Board in a three-to-one decision overruled *Dana*.[32] The Board majority disingenuously claimed that, although voluntarily recognized unions were rejected in 25% of the *Dana* elections, the statistics concerning *Dana*'s implementation "demonstrate that . . . the proof of majority support that underlay the voluntary recognition during the past 4 years was a highly reliable measure of employee sentiment."[33] Even more incredibly, the majority asserted that *Dana*'s ruling that employees should have a limited opportunity for secret-ballot elections "undermined employees' free choice by subjecting it to official question and by refusing to honor it for a significant period of time, without sound justification."[34]

Rigging election rules to facilitate unionization: "ambush elections."

On April 14, 2015, a complex revision of the Board's representation election rules went into effect.[35] Adopted 3 to 2, Board Chairman Pearce counter-intuitively trumpeted the 81-page, single-spaced Final Rule as merely "[s]implifying and streamlining the process."[36] Rather, as the two dissenting Board Members said,

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[31] *Lamons Gasket Co.*, 357 N.L.R.B. 739, 742 (2011).
[32] *Id.* at 739.
[33] *Id.* at 742.
[34] *Id.* at 740.
[35] 79 Fed. Reg. 74,308-74,490 (Dec. 15, 2014).
[36] NLRB Issues Final Rule to Modernize Representation-Case Procedures, NLRB Office of Public Affairs, Dec. 12, 2014.

"the Rule's primary purpose and effect" is that "initial union representation elections must occur as soon as possible."[37]

The Foundation strongly opposed the new rules for several reasons that have proven to be true in the rules' application. To begin with, the shortened time-frame for representation elections has adversely affected the ability of individual employees to fully educate themselves about the pros and cons of monopoly union representation, and hampered the ability of employees opposed to union representation to organize themselves in opposition to unions and timely obtain legal counsel to assist them in navigating what the dissenting Board Members correctly called "the Mount Everest of regulations."[38]

Second, the new rules have violated workers' privacy rights by requiring employers to provide employees' personal contact information—including their phone numbers, email addresses, and work times—to union organizers, with no effective limitation upon to whom the information could be passed. This not only gives union organizers an advantage in campaigning among workers but also places workers in danger of harassment or worse.

Third, the new rules have allowed elections to proceed without settling disputes over the bargaining unit's scope if less than 20% of its composition is contested. This makes employees vote without knowing exactly who is in the

[37] 79 Fed. Reg. at 74,430.
[38] *Id.*

proposed unit. It also violates the requirement of NLRA § 9 that the Board determine the scope of the bargaining unit before the election occurs.[39]

That the real purpose of the revised rules is to facilitate monopoly union representation is given away by the fact that the new rules did *not* eliminate the Board's policy that union unfair labor practice charges brought against employers block decertification elections sought by workers while the charges are pending.[40] As the dissenting Board Members pointed out, that policy "impedes the expeditious resolution of questions concerning representation more than any of the processes substantially altered by the Final Rule."[41] Yet, in the Final Rule . . . the blocking charge policy is . . . retained—with the most minimal modifications—and it is [now] embedded in the Final Rule itself" for the first time.[42]

The Foundation's staff attorneys know from decades of experience that the first reaction of almost every union facing a worker's decertification petition is to file a "blocking charge," no matter how frivolous. Indeed, even the Board majority conceded in adopting the new rules that "at times, incumbent unions may abuse the

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[39] *See* 29 U.S.C. § 9(a)-(c).
[40] Prior to the new rules the policy was set out in Section 11730 of the Board's Casehandling Manual for Representation Proceedings.
[41] 79 Fed. Reg. at 74,432.
[42] *Id.* at 74,455.

policy by filing meritless charges in order to delay decertification elections."[43] That practice continues under the revised rules.[44]

Gerrymandering bargaining units to ensure union election victories.

During election proceedings the NLRA protects employees' Section 7 right to refrain from union representation by mandating that the Board, when deciding an appropriate bargaining unit, must "assure employees the fullest freedom in exercising the[ir] rights,"[45] and must consider "the extent to which the employees have organized . . . *not* [to] be controlling."[46]

Yet, in *Specialty Healthcare & Rehabilitation Center*,[47] the Obama Board adopted a new test for determining an appropriate bargaining unit. The new test is that if a union requests a unit of "employees readily identifiable as a group who share a community of interest," the Board will find that unit appropriate unless the employer "demonstrate[s] that the excluded employees share an overwhelming community of interest with the included employees."[48] As Board Member Hayes noted in his dissent, under this standard, the Board will "find almost any

[43] *Id.* at 74,419.
[44] *See, e.g.*, Order Denying Review at 2 n.1, *Cablevision Sys. Corp.*, 29 RD-138839 (NLRB June 30, 2016) (opinion of Member Miscimmara).
[45] 29 U.S.C. § 159(b).
[46] *Id.* § 159(c)(5) (emphasis added).
[47] 357 N.L.R.B. 934 (2011) (3-1 decision), *enforced sub nom. Kindred Nursing Ctrs. E., LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013).
[48] *Id.* at 934

petitioned-for unit appropriate," thus "encourage[ing] union organizing in units as small as possible,"[49] i.e., what are popularly referred to as "micro-units."

Member Hayes' prediction was prophetic. In 2014 the United Auto Workers lost a plant-wide certification election at the Chattanooga, Tennessee, Volkswagen facility by a wide margin.[50] It later petitioned for and won an election in a small unit consisting only of "maintenance employees"[51] that was upheld by the Board based on *Specialty Healthcare*.[52] Thanks to the UAW and Obama Board's gerrymandering of a micro-unit, dozens of VW employees who voted against the UAW are forced to accept a mandatory agent they do not want and cannot control.

The Board majority in *Specialty Healthcare* predicated its ruling on the proposition that the "first and central right set forth in Section 7 of the Act is employees' 'right to self-organization.'"[53] It ignored employees' equally important "right to refrain from any or all of such activities."[54] The *Specialty Healthcare* majority thus wrongfully elevated employees' right to unionize above employees' equal right to oppose unionization.

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[49] *Id.* at 952.
[50] VW Plant Workers Vote Down Union In Blow To Big Labor, *Law360*, https://www.law360.com/articles/510505 (Feb. 17, 2014).
[51] UAW Wins Vote at VW Chattanooga Plant as Some Workers Vote to Unionize, *The Wall Street Journal*, https://www.wsj.com/articles/uaw-wins-victory-at-vw-chattanooga-plant-as-workers-vote-to-unionize-1449283820?tesla=y (Dec. 7, 2015).
[52] Order Denying Review, *VW Group of America, Inc.*, No. 10-RC-16530 (NLRB Apr. 13, 2016) (2-1 decision).
[53] 357 N.L.R.B. at 941 (quoting 29 U.S.C. § 157).
[54] 29 U.S.C. § 157.

Worse, the *Specialty Healthcare* majority reasoned that "[a] key aspect of the right to 'self-organization' is the right to draw the boundaries of that organization—to choose whom to include and whom to exclude," and thus "[t]he statute commands that we assure employees the fullest freedom in exercising all these rights, including the right to choose whom to associate with, when we determine whether their proposed unit is an appropriate one."[55] That rationale not only ignored employees' Section 7 right to refrain from self-organization and the Board's Section 9(b) duty "to assure to employees the fullest freedom in exercising" that right, but also ignored Section 9(c)(5)'s statutory command that the extent of union organizing is *not* controlling.

Recommendations for Restoring Balance and Fairness to the NLRB

1) As soon as possible, President Trump should nominate and the U.S. Senate should confirm nominees to fill the two existing vacancies on the NLRB with individuals who respect the rights of workers to refrain from union support.
2) Congress should pass the National Right to Work Act (H.R. 785), which would eliminate the need to depend on the NLRB to enforce the right of workers not to subsidize union political and other nonbargaining activities.

[55] 357 N.L.R.B. at 941 n.18.

3) NLRA Section 9 should be amended to provide that unions may become exclusive bargaining representatives only through Board-conducted secret-ballot elections.
4) NLRA Section 9(c)(3) should be amended to specify that decertification petitions are barred only within one year of a Board-conducted election.
5) The NLRA should be amended to specify a period, sufficient to allow workers to obtain information about the pros and cons of unionization, that must pass after the filing of an election petition before the balloting can occur.
6) The NLRA should be amended to provide that unfair labor practice charges will not block decertification elections, but instead will be considered (if deemed sufficiently meritorious by the NLRB General Counsel) in conjunction with any objections to an election after the ballots have been cast.
7) NLRA Sections 9(b) and 9(c)(5) should be amended to authorize the Board to determine only the "most appropriate" bargaining unit.

Chairman WALBERG. I thank the gentleman. Your time has expired, and we certainly appreciate the written testimony.

And I'll begin the questioning by recognizing the chairman of the full committee, Dr. Foxx, for her five minutes.

Ms. FOXX. Thank you very much, Mr. Chairman.

And I want to thank all of our witnesses for being here today and sharing their expertise with us.

Ms. Aloul, can employees effectively negotiate with a franchisee over their wages, hours, or other conditions of employment without the franchisor? And how would the inclusion of the franchisor affect the negotiating process?

Ms. ALOUL. Thank you for the question, Madam Chairwoman. They absolutely can do that, and this is what we do today. We decide, based on market demand, what jobs are needed and how many openings do we have. We post for them, we negotiate trades, we do raises, we do performance evaluations, and we do the direct placement of our employees with our clients on a day-to-day basis.

We know where they live, we know their schedules, we know who has family issues and we need to work around their schedule. And it's definitely much harder, much slower, not good for the employees, and will absolutely affect quality and price for clients if it was done differently, ma'am.

Ms. FOXX. Thank you very much.

Mr. Larkin, on average, how many elections are appealed to the Board post election? In your experience, are these appeals based on minor issues, and how have the ambush election rules changed this process?

Mr. LARKIN. I'm not—I couldn't give you the exact number of—as a percentage of cases that are appealed to the Board post election. What I can tell you in my practice is that when one side or the other loses a close election, they often raise objections to the conduct of the election and seek review of the result with the Board.

What the—that process, that part of the process hasn't really changed much under the new rules, but what they have done is that they've deferred until after the election the ability to get answers to some very important questions.

I'll give you an example: Under the old rules, if an employer thought that a proposed bargaining unit included supervisors, the employer could raise that issue with the regional director; and if agreement couldn't be reached between the parties and the regional director on the answer to the question, there would be a hearing. And the regional director would take evidence and issue a ruling as to whether the employee in question is a supervisor.

The reason it's so important to know the answer to a question like that in advance is that you know how to treat that person during the election campaign. If someone is a supervisor, you can communicate as the employer to the rest of the workforce through that individual; if they're not, they're a voter, they have section 7 rights that have to be acknowledged under the new rule. And so, the point being, that if you treat that person as a supervisor and you're wrong, you're violating the law.

Under the new rules, you don't get an answer to that question up front. You basically have to roll the dice and take a guess as

to whether you're right or wrong. So that's just one example of the ways that the change in the rules frustrated my client's ability to be effective in campaigns and something like that could certainly lead to a post-election challenge.

Ms. FOXX. Thank you very much.

Mr. LaJeunesse, you look like you wanted to respond to that a little bit, and you're welcome to do it. But in your experience, when a majority of employees no longer support a union, how are they able to easily get—are they able to easily get rid of it, and do the administrative procedures and red tape often frustrate them to the point that they consider giving up on the effort to get rid of the union?

Mr. LAJEUNESSE. I think the short answer to your last question is yes. The new rules for representation elections, which also apply to decertification elections, are massive, very complex. And workers are not lawyers. And to work their way through that in the short period of time allowed under the new rules, the ambush election rules, it's not only the problem of the complexity, but it's also the problem in that short period of time.

How does the average worker, who's up against the professional union organizer, organize and sell his point of view to his fellow employees at the same time he has got to find a lawyer to help him work his way through what the dissenters, when the rules were adopted, called a Mt. Everest of regulations.

And I would add on the point with regard to the—I'm sorry. I lost my—

Ms. FOXX. The previous, okay. Thank you very much.

Chairman WALBERG. Thank the gentlelady.

Now I recognize the ranking member, Mr. Sablan.

Mr. SABLAN. Thank you very much, Mr. Chairman.

Ms. Davis, in 2015, the National Labor Relations Board general counsel issued an advice memorandum determining not to find a joint employer relationship between Freshii, a food franchisor with over 100 stores in a dozen countries, and its franchisee in Illinois, because the franchisor's control was limited to brand standards and food quality.

Can you explain the significance of this advice memorandum, particularly since it has been overlooked by many commentators who contend that the National Labor Relations Board is arbitrarily deeming franchisors and franchisees as joint employers?

Ms. DAVIS. Yes. Thank you. The Freshii case—which really, I commend to everyone to read. It is an advice memorandum; it indicates how the general counsel will review cases, what it will prosecute and what it will not prosecute. And in the Freshii case, even though there was extensive technological support to the franchisees, the type of support that Ms. Aloul correctly said is so necessary, because there was not franchisor control over labor relations, over what employees were paid, what they were not paid, what their schedules were, the general counsel declined to prosecute and find a joint employer relationship.

So I suggest what Freshii should tell all of us is to keep our powder a bit dry on how big this problem is, until we see what actually takes place as this doctrine evolves.

Mr. SABLAN. Alright. Thank you.

Ms. Aloul, Chairwoman Foxx asked you a question, and I'm not sure that you answered them, but let me try in my own way. Tell me about your franchise agreement with your franchisor. Does this legal agreement dictate how much you should pay employees or what schedules to set up for your employees or set your disciplinary practices? Is that up to you, or does the franchise agreement set the terms and conditions for these arrangements with your employees?

Ms. ALOUL. Thank you for the question, sir. No, it does not. My franchise agreement does not talk about how we hire people, what we pay them, what kind of disciplinary action we do, none of that. So my short answer for you, sir, is no.

Mr. SABLAN. Okay.

Ms. ALOUL. But the issue is, really, when there's ambiguity in the law, it is very difficult for small business owners like myself to manage that. When the language says "indirect," "reserved," "unexercised control," it makes it very difficult for people like me to interpret that. To be frank with you, when I hear language like that, it tells me that the government is telling me I reserve the right to do whatever I want to do with you at some stage in the future.

Mr. SABLAN. All right. So let me ask you, does your franchisor, BrightStar Care, come to your workplace and directly supervise the employees you hire for home care?

Ms. ALOUL. They do not.

Mr. SABLAN. They do not, okay.

Ms. ALOUL. They do visits for general quality assurance for brand standards, but not related to how we hire and manage people, no, sir.

Mr. SABLAN. So let me ask you another—does the franchisor tell you what to do if there is a union organizing effort, or is that up to you?

Ms. ALOUL. That is up to me.

Mr. SABLAN. That is up to you. So it sounds to me like you're managing employee relations as you deem appropriate, and that employee policies are yours to determine as the owner. Given that, can you explain how the BFI decision could impact your business?

Ms. ALOUL. Absolutely. Again, going back to unclear, ambiguous language, this is the enemy of business. When my franchisor hears such language, they are, rightly so, frankly, they're scared of lawsuits, of joint employment lawsuits. Based on that and again, given the fact that the language says indirect, unexercised—

Mr. SABLAN. Who's they? Wait, I am asking you because you're managing your employees. So you said they are worried about—who's they?

Ms. ALOUL. They, the franchisor. I am the contractual agreement—

Mr. SABLAN. So that's my question. So your franchisor may actually also be managing your employees, right, because they're—

Ms. ALOUL. No.

Mr. SABLAN. —working through you—

Ms. ALOUL. The business relationship includes way more than just managing employees. The business relationship includes quality standards, includes—

Mr. SABLAN. I understand that. I understand that. But they come and tell you on how to address your employee/employer relationship?

Ms. ALOUL. They don't.

Mr. SABLAN. They don't, but yet they do and somehow—am I correct?

Ms. ALOUL. No, you're not. I'm sorry, you're not.

Mr. SABLAN. But you're using the word "they," come to you, they are worried about this, they are worried about that.

Ms. ALOUL. They're worried about the lack of clarity in the law, which affects the business relationship.

Mr. SABLAN. About your relationship with your employee?

Ms. ALOUL. No.

Mr. SABLAN. Thank you. My time is up, Mr. Chairman.

Chairman WALBERG. The gentleman's time has expired.

I recognize myself for five minutes of questioning. Ms. Aloul, does operating your business in Northern Virginia create any specific challenges or opportunities that franchisees in other places might not experience?

Ms. ALOUL. Absolutely. When you decide to open your own business, you've got two paths to choose from: One is start your own business, stand alone, Reem and Associates; and the other one is to go up to a franchise model. People like me opt to go for a franchise model because you don't start from scratch. You want to be part of that community, the best practice, the support, like the technology platform that I mentioned in my testimony.

So when—in the future, this interpretation of the NLRB for the new joint employer standard, it makes it less clear for people like me to know how much control am I going to have in my business. Is this going to scare my franchisor so that they want more control in my business? I don't want that. Is it going to scare them the other way around to say, you know what, we have got nothing to do with you. You're on your own. You have no support from us at all.

That scares me as well, because I signed a franchise agreement in 2013 that is a 10-year agreement, and this changes the rules in the middle of the game. I need the support, and it's what encourages people like me to go into business and own their own business.

Chairman WALBERG. So everything for your 90 employees—am I correct, 90?

Ms. ALOUL. That is correct.

Chairman WALBERG. Ninety employees becomes tentative as well?

Ms. ALOUL. Yes. The 90 employees are ours. They have nothing to do with the franchisor. We employ them, we place them, we train them, we promote them.

Chairman WALBERG. Okay. Thank you. I think that clarifies a bit the challenges in running a business to benefit both your clients at specific times in their life that need help—

Ms. ALOUL. Absolutely.

Chairman WALBERG. —but also the employees to know and understand what type of arrangement they are in and that they can go directly to you.

Ms. ALOUL. Absolutely. So if I may add something, when you run a small business, you're it. I visit with my clients myself. I give them my business card, and it has my cell phone number at the back of it. I do that with my employees as well. They have access to me 24 hours a day, seven days a week.

If they need to deal with a franchisor out of somewhere far away, they don't have that. It overcomplicates the process, quality will be lower, cost. Everybody in this room is going to need home care at one day or another. Some of us will need it in the next year or two, others in a couple of decades, but we all will.

And when we do that, we need the service to be the best it can, the least expensive it can, and you want to be able to deal with somebody locally. You don't want to deal with a large—for me, you don't want to deal with a large corporation somewhere in the middle of the country. You want a local office here.

Chairman WALBERG. Appreciate that. Thank you.

Mr. Larkin, our employer concerns about the ambush rule or micro unions based entirely on wanting to avoid a union, or are there other concerns, such as proper conduct during representation elections, employers knowing the right way and employees knowing the right way to deal with? What are some of those challenges?

Mr. LARKIN. Well, I can only speak for myself and not any employer, but the vast majority of my clients don't enter into a particular business proposition, whether it's a franchisor/franchisee proposition, a contractor/subcontractor proposition to avoid unionization. They enter into the business proposition because they think it's good business.

And so I think the problem with the joint employer standard, Ms. Aloul has so eloquently articulated it, is that the uncertainty in the standard as to whether it's going to apply to you or not, based on the facts of your case, has caused many of these business models to be threatened, because as she just said, she doesn't know the answer with the retained and the indirect control elements.

And, you know, I will add that, you know, when I advised my clients under the old standard, it was fairly straightforward. If you exercised direct or immediate control over your business partner, whatever the partnership might be, you're probably going to be a joint employer. And so it was relatively predictable for the business to set up whether they wanted to be one or not.

Under this new standard, there is no predictability to the standard, and it's much more difficult, and just you're sort of crystal-balling what the answer is going to be. I certainly don't like to do that as a lawyer, tell the client I don't know the answer, but unfortunately, that's the answer that we give more often than not.

If I could, I'd like to just—

Chairman WALBERG. My time has expired, and we may get back to that.

I now recognize the gentleman from New Jersey, Mr. Norcross, a fellow Harley rider.

Mr. NORCROSS. Absolutely. Chairman, congratulations. It's good to be here, and certainly to hear some of the testimony today. And it seems like I'm in an alternative universe.

The NLRB changes that I want to focus on have to do more with the election. We're in much more modern times than we were a

quarter century ago, instant news. I guess President Trump really showed that things happen at a very quick pace. And the election rules from everything that we've heard are not burdensome, are, quite frankly, easier to deal with.

And, so, as I try to develop a question, that's why I think I'm in a different universe. I want to read you some statistics. Since the second term with Bush, the percentage of unionized employees in this country went down 1 year, went up the next two years, and remained stagnant for the following year. Every year since the Obama administration, with the rules that you're condemning, union percentage went down.

Let me repeat that: Union percentage went down, even though you're saying these rules are absolutely against the employer. The one thing I do understand, it's a partnership, that we work together. Some of the comments I hear really concern me because most people understand that, with very few exceptions, that they just want to have a voice.

And I guess what we're having a discussion today is, are you going to let your employees have a voice? Are you going to share, in some small measure, the profits that company was able to earn because of both management and labor?

We're having a discussion here, how this controversy—and we're always going head to head. The percentages aren't lying. The election rule that you spoke about, the ambush election, it's horrible one side, but you mentioned that when you decertify, you want the rules to change. So it can't be both ways.

So I guess my question comes down to, when we look over the course of the last 25 years with the changes and the downward trend of unionization, number one, we had some really good lawyers on the other side who know how to stretch it out, because it's not just about getting the election won; it's actually getting a contract. The election is very short.

The fact of the matter is, you talked about the supervisor. It's called a provisional ballot. It's what we do every day, every November. If you're not sure if you're going to vote or not, you vote, and it goes into a special. The provision is set up for there.

So Ms. Davis, we spend a lot of time with folks who want to have a voice and just have a chance to take care of their family. We've seen the disparity in wages over that very same time that—the decline of unionization, the disparity between those who make the most and the least grows wider. What's the number one issue you hear from those who want to join a union with all these rules?

Ms. DAVIS. Well, let me bifurcate your question and tell you, first of all, I share your frustration about living in an alternate universe. I think the one thing I hope everybody in this room can agree on is that facts matter, actual facts. And the facts, as you said, show a declining union density, notwithstanding the rules.

The panoply of things that employers can do legally under the act to prevent a union, one-on-one meetings with employees, captive audience meetings with employees, a constant barrage from the day someone is hired precluding them, telling them it's bad for them to join a union, those are all still there. They can completely avail themselves of that arsenal.

Nothing was taken away in the election rules. The only thing that was taken away in the election rules was the preexisting universe where any employer that wanted to delay an election from taking place could do it.

Mr. NORCROSS. And that, quite frankly, was the strategy?

Ms. DAVIS. Correct.

Mr. NORCROSS. Delay, delay, delay.

Ms. DAVIS. Correct, correct. I've sat in 3-month hearings on supervisory status, where at the end of the day, the union was worn down. All these rules were intended to do was to allow the employees, in the months that the employer has the opportunity still to campaign against them, to decide on their own whether they wanted a collective voice in the workplace.

Mr. NORCROSS. My time is about to run up. In the year since the rule went into effect, unionization went down again. So I think, instead of trying to divide folks, we should be focused on how we can work together, so not only the employer makes a healthy profit, but the employees share in that and we both win.

I yield back the balance of my time.

Chairman WALBERG. I thank the gentleman. His time is expired.

I now recognize the gentleman from Tennessee, Dr. Roe.

Mr. ROE. Thank you very much.

Mr. Larkin made the comment to begin with that he felt like the NLRB, as I do, should be a fair arbiter of the facts. And I played some basketball along the way. When the ball bounced off the other guy, I expected my team to get the ball. What's happening is when the ball bounces off the other guy, the other team is getting the ball.

I am a small business owner and, Ms. Aloul, you pointed out very clearly the uncertainty that creates issues and problems. And what Ms. Davis mentioned was, we'll let this litigate and play out. We don't have, in my business, a legal department, and we don't have hundreds of thousands of dollars and millions of dollars to litigate these things. Maybe big businesses do, but small businesses don't.

I think that one of the reasons that President Trump got elected was he spoke to people in the country who wanted to get this economy going and get jobs started. And I look at the last 30 years. And the recession of 1992 to 1996 during President Clinton, that recovery from that election, 420,000 new businesses were formed. And between 2002 and 2006, President Bush, there was a recession prior to that, 400,000 businesses were formed. Between 2010 and 2014, 167,000 businesses were formed in this country.

That's millions of jobs that never got formed. And what's even worse, in rural America where I live, 20 counties out of 3,000 accounted for half the new business formation in this country. And what we have to do is let entrepreneurs and businesspeople form. And this uncertainty, Ms. Aloul, as you pointed out, is part of it.

Mr. Larkin, I want to have you to explain to me, what is the advantage, why did we go to an ambush, so-called ambush election and reduce the time for unionization? And I grew up in a union household. Full disclosure. What was the point of that? That was a solution looking for a problem.

Mr. LARKIN. I agree with that sentiment. Let me start by saying this: The declining overall rate of unionization in the United

States, in my opinion, has nothing to do with the representation case rules. And I'm not here to give you an editorial on why that number is what it is.

What I can tell you is that the win rate in representation cases that take place for unions has been above 60 percent, and in some cases, in this past year, it's 70 percent. So, as you say, sir, changing those rules was a solution looking for a problem. The rules were working fine for unions. So that's that point.

The other point that I would make is, you asked why were these rules passed? Well, one of the Board members who was seated on the Board when these rules were originally being conceived had written prior to becoming a Board member about how, in his view, employers should have no right to communicate with their employees about unionization.

There is a part of the National Labor Relations Act, section 8(c), that gives employers a free speech right to communicate with their employees. And so things like one-on-one meetings and captive audience meetings, that's called free speech. At least one of the members behind passing these rules doesn't believe that employers should have free speech. And one of the things that the rules do is it severely impinges on the time within which an employer can communicate with his employees about unionization.

So if you ask me, that's one of the reasons, at least, why the rules were passed, to clamp down on the opportunity for employers to communicate with their employees about the union question.

Mr. ROE. I know that in my business, it would be hard for me to find a qualified labor lawyer like yourself in that length of time to educate myself. And you point out, you might be breaking a law you didn't even know you were breaking if you can't identify who it is. And you wouldn't do it on purpose, but you did break the law.

Mr. Larkin, prior to the ambush rule, in your experience, what was the average time between a petition and representation election, how long?

Mr. LARKIN. The median time was about 38 days, and it's dropped somewhere around 22 to 23. So that's a pretty precipitous drop in a year and a half.

Mr. ROE. And so, what is the advantage of that? In other words, where I don't have time to educate myself, my employees don't have time to educate themselves, who benefits from that less education? Less knowledge about what you're doing?

Mr. LARKIN. I can tell you who does not benefit from that is the workforce and the employees who are the ones making the vote. And this is not, in any way, a judgment on the, you know, pros or cons of unionization at all. This is just asking for a fair playing field. Unions can organize employees in secret, and the employer may have no idea that a union is communicating with its employees about the pros of unionization. So it never has an opportunity to talk about its position and whether it thinks that there are other parts of the argument that employees should consider.

That's the problem with these rules. It even further shrinks that opportunity for an employer to have that communication.

Mr. ROE. I yield back, Mr. Chairman.

Chairman WALBERG. I thank the gentleman.

I now recognize the gentleman from Connecticut, Mr. Courtney.

Mr. COURTNEY. Thank you, Mr. Walberg.

And at the outset, first of all, I heard my good friend, Dr. Roe, mention the basketball analogy. I have to mention that the UConn women won their 100th straight victory last night.

Mr. ROE. I yield.

Mr. COURTNEY. And coming from Tennessee, that is quite, you know, impressive.

Mr. Wilson of South Carolina. Mr. Chairman, the Gamecocks join in congratulations, Lady Gamecocks.

Chairman WALBERG. That's bipartisanship. We appreciate it.

Mr. COURTNEY. So, as long as we're on the subject of a solution in search of a problem, in January, just a few days ago, the Bureau of Labor Statistics, again, gave their most recent report on the percentage of unionized employees in the American economy. Once again, it continued on a downward trend, significant downward trend. The total number is 10.6 percent, and in the private sector it's 6.4 percent. That has been a steady trajectory all the way since 2008.

And, again, Mr. Walberg is a good friend, but the narrative that started this hearing, which is that somehow these union rules, unionization rules are somehow acting as a drag on the U.S. economy. I mean, at some point, people have to sort of come up with empirical, you know, economic data that actually demonstrates that there's some spike that these rules have created that somehow would impact hiring decisions. But, in fact, what we're seeing is a steady decline. And, really, at some point, you have to look at this from a macro standpoint to justify the Congress going in and trying to, again, somehow, as I said, find a solution in search of a problem.

The *Specialty Healthcare* rule, which, again, we've had a number of hearings already in the last few years on this, is another example of where, you know, we need to get data to sort of understand whether or not the micro bargaining units is really causing some kind of, you know, outcome here where we're seeing a proliferation of small bargaining units.

Ms. Davis, your testimony actually had some data on that, and I was wondering if you could just sort of walk through what we're actually seeing in the wake of that 2011 decision?

Ms. DAVIS. Certainly. The statistics are kept by the NLRB. They're available on its website. And there's a study from fiscal year 2007 through fiscal year 2016. The median bargaining unit has bounced between 26, 25, 27. It is currently 26.

So, there is—again, I mean, I would urge everybody to look at facts, real facts. There is absolutely no data whatsoever that supports the notion that there is a proliferation of microunits.

In the recent Volkswagen decision that has, again, caused such hysteria, the unit that was organized was over 150 employees. That is more than seven times the size of the average unit. So I would suggest, again, that we need to look at facts and not just look at anticipatory anxiety of what might happen.

Mr. COURTNEY. And that unit actually had a common purpose, which was a maintenance unit. I mean, they had a specific function that created a logic to the appropriate recognition by the NLRB. Is that correct?

Ms. DAVIS. That is absolutely correct. And for the past 50 years, the NLRB, before these rules, before Specialty, has treated skilled units, such as maintenance units, as presumptively appropriate. So all it was doing is following the rules that it followed for decades in that.

Mr. COURTNEY. In my district in Groton, Connecticut, where we have Electric Boat Shipyard, which has about 4,000 shipyard workers that are on the waterfront, again, they have metal trades units, carpenters, electricians, Teamsters, machinists. Again, they come together with the Metal Trades Council in terms of collective bargaining.

But, again, there are specific reasons why they—and this goes back to the '30s, in terms of when those units were recognized. There is nothing inherently obstructionist or, you know, negative about the fact that you recognize that there are skills that really create a logic for separate units. Isn't that correct?

Ms. DAVIS. That is totally correct. And if I may, on your larger point where you started, which I think was the point to start, if you look at every period since 1960, when union density has increased, wage stagnation has decreased. When union density has declined, income inequality has increased.

So if you're looking at what's good for this country, what's good for Americans, there is no doubt that unionization has brought up wages, has increased people having pensions. If you do a comparison between right-to-work States—Mr. LaJeunesse talked about the right-to-work statute—and nonright-to-work States, wages are, on average, $6,000 per worker higher in nonright-to-work States; they have health care 75 percent of the time; they have pension more of the time. And if we're talking about what is good for that country, it seems to me to be something very basic that we all should be able to agree to.

Mr. COURTNEY. Thank you.

Mr. Chairman, I would like to enter the Bureau of Labor Statistics report from January 26, 2017, with the data that I just mentioned.

Chairman WALBERG. Without objection, it will be entered, hearing no objection.

[The information follows:]

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BUREAU OF LABOR STATISTICS
U.S. DEPARTMENT OF LABOR

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UNION MEMBERS — 2016

The **union membership rate**—the percent of wage and salary workers who were members of unions—was 10.7 percent in 2016, down 0.4 percentage point from 2015, the U.S. Bureau of Labor Statistics reported today. The number of wage and salary workers belonging to unions, at 14.6 million in 2016, declined by 240,000 from 2015. In 1983, the first year for which comparable union data are available, the union membership rate was 20.1 percent, and there were 17.7 million union workers.

The data on union membership are collected as part of the Current Population Survey (CPS), a monthly sample survey of about 60,000 eligible households that obtains information on employment and unemployment among the nation's civilian noninstitutional population ages 16 and over. For more information, see the Technical Note in this news release.

Highlights from the 2016 data:

- Public-sector workers had a union membership rate (34.4 percent) more than five times higher than that of private-sector workers (6.4 percent). (See table 3.)
- Workers in education, training, and library occupations and in protective service occupations had the highest unionization rates (34.6 percent and 34.5 percent, respectively). (See table 3.)
- Men continued to have a slightly higher union membership rate (11.2 percent) than women (10.2 percent). (See table 1.)
- Black workers were more likely to be union members than were White, Asian, or Hispanic workers. (See table 1.)
- Median weekly earnings of nonunion workers ($802) were 80 percent of earnings for workers who were union members ($1,004). (The comparisons of earnings in this release are on a broad level and do not control for many factors that can be important in explaining earnings differences.) (See table 2.)
- Among states, New York continued to have the highest union membership rate (23.6 percent), while South Carolina continued to have the lowest (1.6 percent). (See table 5.)

Industry and Occupation of Union Members

In 2016, 7.1 million employees in the **public sector** belonged to a union, compared with 7.4 million workers in the **private sector**. The union membership rate for public-sector workers (34.4 percent) was substantially higher than the rate for private-sector workers (6.4 percent). Within the public sector, the union membership rate was highest for local government (40.3 percent), which includes employees in heavily unionized occupations, such as teachers, police officers, and firefighters. In the private sector, industries with high unionization rates included utilities (21.5 percent), transportation and warehousing (18.4 percent), telecommunications (14.6 percent), construction (13.9 percent), and educational services (12.3 percent). Low unionization rates occurred in finance (1.2 percent), agriculture and related industries (1.3 percent), food services and drinking places (1.6 percent), and professional and technical services (1.6 percent). (See table 3.)

Among **occupational groups**, the highest unionization rates in 2016 were in education, training, and library occupations (34.6 percent) and in protective service occupations (34.5 percent). The lowest unionization rates were in farming, fishing, and forestry occupations (2.2 percent); sales and related occupations (3.1 percent); computer and mathematical occupations (3.9 percent); and food preparation and serving related occupations (3.9 percent).

Selected Characteristics of Union Members

In 2016, the union membership rate continued to be slightly higher for **men** (11.2 percent) than for **women** (10.2 percent). (See table 1.) The gap between their rates has narrowed considerably since 1983 (the earliest year for which comparable data are available), when rates for men and women were 24.7 percent and 14.6 percent, respectively.

Among major **race and ethnicity groups**, Black workers continued to have a higher union membership rate in 2016 (13.0 percent) than workers who were White (10.5 percent), Asian (9.0 percent), or Hispanic (8.8 percent).

By **age**, union membership rates continued to be highest among workers ages 45 to 64. In 2016, 13.3 percent of workers ages 45 to 54 and ages 55 to 64 were union members.

The union membership rate was 11.8 percent for **full-time workers**, more than twice the rate for **part-time workers** at 5.7 percent.

Union Representation

In 2016, 16.3 million wage and salary workers were represented by a union. This group includes both union members (14.6 million) and workers who report no union affiliation but whose jobs are covered by a union contract (1.7 million). (See table 1.)

Earnings

Among full-time wage and salary workers, union members had **median usual weekly earnings** of $1,004 in 2016, while those who were not union members had median weekly earnings of $802. In addition to coverage by a collective bargaining agreement, this earnings difference reflects a variety of influences, including variations in the distributions of union members and nonunion employees by occupation, industry, age, firm size, or geographic region. (See tables 2 and 4.)

Union Membership by State

In 2016, 27 states and the District of Columbia had union membership rates below that of the U.S. average, 10.7 percent, while 23 states had rates above it. All states in the West South Central division had union membership rates below the national average, and all states in both the Middle Atlantic and the Pacific divisions had rates above it. Union membership rates decreased over the year in 31 states and the District of Columbia, increased in 16 states, and were unchanged in 3 states. (See table 5 and the map.)

Nine states had union membership rates below 5.0 percent in 2016, with South Carolina having the lowest rate (1.6 percent). The next lowest rates were in North Carolina (3.0 percent), Arkansas (3.9 percent), and Georgia (3.9 percent). New York was the only state with a union membership rate over 20.0 percent in 2016 at 23.6 percent.

State union membership levels depend on both the employment level and the union membership rate. The largest numbers of union members lived in California (2.6 million) and New York (1.9 million). Over half of the 14.6 million union members in the U.S. lived in just 7 states (California, 2.6 million; New York, 1.9 million; Illinois, 0.8 million; Pennsylvania, 0.7 million; and Michigan, New Jersey, and Ohio, 0.6 million each), though these states accounted for only about one-third of wage and salary employment nationally.

Technical Note

The estimates in this release are obtained from the Current Population Survey (CPS), which provides basic information on the labor force, employment, and unemployment. The survey is conducted monthly for the Bureau of Labor Statistics by the U.S. Census Bureau from a scientifically selected national sample of about 60,000 eligible households. The union membership and earnings data are tabulated from one-quarter of the CPS monthly sample and are limited to wage and salary workers. All self-employed workers are excluded.

Beginning in January of each year, data reflect revised population controls used in the CPS. Additional information about population controls is available on the BLS website at https://www.bls.gov/cps/documentation.htm#pop.

Information in this release will be made available to sensory impaired individuals upon request. Voice phone: (202) 691-5200; Federal Relay Service: (800) 877-8339.

Reliability of the estimates

Statistics based on the CPS are subject to both sampling and nonsampling error. When a sample, rather than the entire population, is surveyed, there is a chance that the sample estimates may differ from the true population values they represent. The exact difference, or sampling error, varies depending on the particular sample selected, and this variability is measured by the standard error of the estimate. There is about a 90-percent chance, or level of confidence, that an estimate based on a sample will differ by no more than 1.6 standard errors from the true population value because of sampling error. BLS analyses are generally conducted at the 90-percent level of confidence. The state section of this release preserves the long-time practice of highlighting the direction of the movements in state union membership rates and levels regardless of their statistical significance.

The CPS data also are affected by nonsampling error. Nonsampling error can occur for many reasons, including the failure to sample a segment of the population, inability to obtain information for all respondents in the sample, inability or unwillingness of respondents to provide correct information, and errors made in the collection or processing of the data.

Information about the reliability of data from the CPS and guidance on estimating standard errors is available at https://www.bls.gov/cps/documentation.htm#reliability.

Union membership questions

Employed wage and salary workers are classified as union members if they answer "yes" to the following question: *On this job, are you a member of a labor union or of an employee association similar to a union?* If the response is "no" to that question, then the interviewer asks a second question: *On this job, are you covered by a union or employee association contract?* If the response is "yes," then these persons, along with those who responded "yes" to being union members, are classified as represented by a union. If the response is "no" to both the first and second questions, then they are classified as nonunion.

Definitions

The principal definitions used in this release are described briefly below.

Union members. Data refer to members of a labor union or an employee association similar to a union.

Union membership rate. Data refer to the proportion of total wage and salary workers who are union members.

Represented by unions. Data refer to both union members and workers who report no union affiliation but whose jobs are covered by a union or an employee association contract.

Nonunion. Data refer to workers who are neither members of a union nor represented by a union on their job.

Usual weekly earnings. Data represent earnings before taxes and other deductions and include any overtime pay, commissions, or tips usually received (at the main job in the case of multiple jobholders). Prior to 1994, respondents were asked how much they usually earned per week. Since January 1994, respondents have been asked to identify the easiest way for them to report earnings (hourly, weekly, biweekly, twice monthly, monthly, annually, other) and how much they usually earn in the reported time period. Earnings reported on a basis other than weekly are converted to a weekly equivalent. The term "usual" is as perceived by the respondent. If the respondent asks for a definition of usual, interviewers are instructed to define the term as more than half of the weeks worked during the past 4 or 5 months.

Median earnings. The median is the amount which divides a given earnings distribution into two equal groups, one having earnings above the median and the other having earnings below the median. The estimating procedure places each reported or calculated weekly earnings value into $50-wide intervals which are centered around multiples of $50. The actual value is estimated through the linear interpolation of the interval in which the median lies.

Wage and salary workers. Workers who receive wages, salaries, commissions, tips, payment in kind, or piece rates. The group includes employees in both the private and public sectors. Union membership and earnings data exclude all self-employed workers, both those with incorporated businesses as well as those with unincorporated businesses.

Full-time workers. Workers who usually work 35 hours or more per week at their sole or principal job.

Part-time workers. Workers who usually work fewer than 35 hours per week at their sole or principal job.

Hispanic or Latino ethnicity. Refers to persons who identified themselves in the enumeration process as being Spanish, Hispanic, or Latino. Persons whose ethnicity is identified as Hispanic or Latino may be of any race.

Table 1. Union affiliation of employed wage and salary workers by selected characteristics, 2015-2016 annual averages

[Numbers in thousands]

Characteristic	2015					2016				
	Total employed	Members of unions[1]		Represented by unions[2]		Total employed	Members of unions[1]		Represented by unions[2]	
		Total	Percent of employed	Total	Percent of employed		Total	Percent of employed	Total	Percent of employed
AGE AND SEX										
Total, 16 years and over	133,743	14,795	11.1	16,441	12.3	136,101	14,555	10.7	16,271	12.0
16 to 24 years	18,311	800	4.4	967	5.3	18,556	816	4.4	988	5.3
25 years and over	115,431	13,995	12.1	15,474	13.4	117,545	13,739	11.7	15,283	13.0
25 to 34 years	30,870	2,985	9.7	3,363	10.9	31,750	2,924	9.2	3,296	10.4
35 to 44 years	28,101	3,457	12.3	3,785	13.5	28,515	3,423	12.0	3,782	13.3
45 to 54 years	28,764	3,909	13.6	4,306	15.0	28,807	3,846	13.3	4,269	14.8
55 to 64 years	21,288	3,035	14.3	3,329	15.6	21,778	2,903	13.3	3,209	14.7
65 years and over	6,408	610	9.5	691	10.8	6,696	643	9.6	726	10.8
Men, 16 years and over	69,298	7,963	11.5	8,760	12.6	70,589	7,888	11.2	8,704	12.3
16 to 24 years	9,250	485	5.2	563	6.1	9,412	484	5.1	568	6.0
25 years and over	60,048	7,478	12.5	8,197	13.7	61,177	7,404	12.1	8,136	13.3
25 to 34 years	16,550	1,639	9.9	1,825	11.0	16,930	1,640	9.7	1,833	10.8
35 to 44 years	14,844	1,857	12.5	2,023	13.6	15,102	1,881	12.5	2,051	13.6
45 to 54 years	14,696	2,079	14.1	2,281	15.5	14,775	2,048	13.9	2,253	15.3
55 to 64 years	10,698	1,588	14.8	1,717	16.0	10,957	1,511	13.8	1,633	14.9
65 years and over	3,259	315	9.7	352	10.8	3,412	323	9.5	365	10.7
Women, 16 years and over	64,445	6,833	10.6	7,681	11.9	65,512	6,667	10.2	7,567	11.6
16 to 24 years	9,061	315	3.5	405	4.5	9,143	332	3.6	420	4.6
25 years and over	55,384	6,518	11.8	7,277	13.1	56,368	6,335	11.2	7,147	12.7
25 to 34 years	14,320	1,346	9.4	1,538	10.7	14,820	1,284	8.7	1,463	9.9
35 to 44 years	13,257	1,600	12.1	1,762	13.3	13,412	1,542	11.5	1,731	12.9
45 to 54 years	14,068	1,830	13.0	2,025	14.4	14,032	1,797	12.8	2,016	14.4
55 to 64 years	10,590	1,447	13.7	1,613	15.2	10,820	1,392	12.9	1,576	14.6
65 years and over	3,149	294	9.3	339	10.8	3,283	320	9.8	361	11.0
RACE, HISPANIC OR LATINO ETHNICITY, AND SEX										
White, 16 years and over	104,991	11,301	10.8	12,627	12.0	106,160	11,120	10.5	12,436	11.7
Men	55,402	6,222	11.2	6,875	12.4	56,007	6,153	11.0	6,769	12.1
Women	49,590	5,079	10.2	5,752	11.6	50,153	4,967	9.9	5,667	11.3
Black or African American, 16 years and over	16,552	2,246	13.6	2,427	14.7	17,014	2,209	13.0	2,475	14.5
Men	7,558	1,097	14.5	1,174	15.5	7,852	1,104	14.1	1,229	15.7
Women	8,995	1,149	12.8	1,253	13.9	9,163	1,105	12.1	1,245	13.6
Asian, 16 years and over	7,883	770	9.8	860	10.9	8,340	752	9.0	839	10.1
Men	4,113	367	8.9	416	10.1	4,368	355	8.1	404	9.3
Women	3,770	403	10.7	444	11.8	3,972	397	10.0	435	10.9
Hispanic or Latino ethnicity, 16 years and over	22,351	2,104	9.4	2,365	10.6	23,085	2,032	8.8	2,308	10.0
Men	12,670	1,211	9.6	1,346	10.6	13,125	1,209	9.2	1,348	10.3
Women	9,681	892	9.2	1,019	10.5	9,960	823	8.3	960	9.6
FULL- OR PART-TIME STATUS[3]										
Full-time workers	109,080	13,340	12.2	14,768	13.5	111,091	13,119	11.8	14,593	13.1
Part-time workers	24,445	1,431	5.9	1,646	6.7	24,832	1,415	5.7	1,655	6.7

[1] Data refer to members of a labor union or an employee association similar to a union.

[2] Data refer to both union members and workers who report no union affiliation but whose jobs are covered by a union or an employee association contract.

[3] The distinction between full- and part-time workers is based on hours usually worked. These data will not sum to totals because full- or part-time status on the principal job is not identifiable for a small number of multiple jobholders.

NOTE: Estimates for the above race groups (White, Black or African American, and Asian) do not sum to totals because data are not presented for all races. Persons whose ethnicity is identified as Hispanic or Latino may be of any race. Data refer to the sole or principal job of full- and part-time wage and salary workers. All self-employed workers are excluded, both those with incorporated businesses as well as those with unincorporated businesses. Updated population controls are introduced annually with the release of January data.

Table 2. Median weekly earnings of full-time wage and salary workers by union affiliation and selected characteristics, 2015-2016 annual averages

Characteristic	2015				2016			
	Total	Members of unions[1]	Represented by unions[2]	Nonunion[3]	Total	Members of unions[1]	Represented by unions[2]	Nonunion[3]
AGE AND SEX								
Total, 16 years and over	$809	$980	$975	$776	$832	$1,004	$995	$802
16 to 24 years	487	616	605	482	501	600	599	497
25 years and over	860	997	994	831	885	1,022	1,014	858
25 to 34 years	735	886	882	716	751	893	890	734
35 to 44 years	900	1,050	1,048	870	934	1,071	1,059	908
45 to 54 years	923	1,029	1,024	899	955	1,084	1,069	930
55 to 64 years	927	1,020	1,017	904	952	1,072	1,069	930
65 years and over	873	961	963	852	866	984	988	846
Men, 16 years and over	895	1,017	1,014	869	915	1,050	1,042	890
16 to 24 years	510	655	633	505	512	582	581	509
25 years and over	947	1,041	1,038	927	969	1,080	1,074	950
25 to 34 years	770	888	889	756	794	915	915	775
35 to 44 years	983	1,093	1,094	963	1,007	1,123	1,120	990
45 to 54 years	1,040	1,107	1,110	1,023	1,075	1,146	1,140	1,057
55 to 64 years	1,064	1,084	1,082	1,059	1,102	1,136	1,140	1,090
65 years and over	1,003	1,010	998	1,005	992	1,022	1,029	988
Women, 16 years and over	726	928	921	697	749	955	942	723
16 to 24 years	450	567	565	443	486	628	624	481
25 years and over	761	944	940	736	784	972	960	757
25 to 34 years	690	884	876	667	705	865	860	685
35 to 44 years	804	1,002	1,001	764	839	1,015	1,004	804
45 to 54 years	799	958	950	768	836	1,006	988	800
55 to 64 years	784	937	934	759	812	999	992	778
65 years and over	740	894	905	718	749	942	964	723
RACE, HISPANIC OR LATINO ETHNICITY, AND SEX								
White, 16 years and over	835	1,007	999	803	862	1,050	1,034	827
Men	920	1,051	1,044	895	942	1,111	1,099	915
Women	743	952	944	715	766	989	975	738
Black or African American, 16 years and over	641	800	798	617	678	808	807	646
Men	680	824	821	650	718	818	826	690
Women	615	768	768	595	641	799	790	616
Asian, 16 years and over	993	1,094	1,107	977	1,021	1,020	1,017	1,022
Men	1,129	1,097	1,125	1,130	1,151	1,061	1,076	1,160
Women	877	1,091	1,090	835	902	985	975	892
Hispanic or Latino ethnicity, 16 years and over	604	862	847	586	624	886	876	608
Men	631	901	887	610	663	908	901	637
Women	566	778	783	541	586	844	829	565

[1] Data refer to members of a labor union or an employee association similar to a union.

[2] Data refer to both union members and workers who report no union affiliation but whose jobs are covered by a union or an employee association contract.

[3] Data refer to workers who are neither members of a union nor represented by a union on their job.

NOTE: Persons whose ethnicity is identified as Hispanic or Latino may be of any race. Data refer to the sole or principal job of full-time wage and salary workers. All self-employed workers are excluded, both those with incorporated businesses as well as those with unincorporated businesses. Updated population controls are introduced annually with the release of January data.

Table 3. Union affiliation of employed wage and salary workers by occupation and industry, 2015-2016 annual averages

[Numbers in thousands]

Occupation and industry	2015					2016				
	Total employed	Members of unions[1]		Represented by unions[2]		Total employed	Members of unions[1]		Represented by unions[2]	
		Total	Percent of employed	Total	Percent of employed		Total	Percent of employed	Total	Percent of employed
OCCUPATION										
Management, professional, and related occupations	50,939	6,132	12.0	6,983	13.7	52,108	6,064	11.6	6,916	13.3
Management, business, and financial operations occupations	19,636	871	4.4	1,057	5.4	20,289	927	4.6	1,129	5.6
Management occupations	13,213	581	4.4	701	5.3	13,563	605	4.5	736	5.4
Business and financial operations occupations	6,423	290	4.5	356	5.5	6,726	322	4.8	393	5.8
Professional and related occupations	31,302	5,261	16.8	5,926	18.9	31,818	5,138	16.1	5,787	18.2
Computer and mathematical occupations	4,195	162	3.9	221	5.3	4,301	166	3.9	222	5.2
Architecture and engineering occupations	2,777	190	6.8	219	7.9	2,941	187	6.4	219	7.4
Life, physical, and social science occupations	1,309	109	8.3	139	10.6	1,278	112	8.8	138	10.8
Community and social service occupations	2,517	386	15.3	412	16.4	2,506	372	14.8	408	16.3
Legal occupations	1,475	83	5.6	100	6.8	1,412	79	5.6	95	6.8
Education, training, and library occupations	8,766	3,112	35.5	3,466	39.5	8,765	3,031	34.6	3,344	38.2
Arts, design, entertainment, sports, and media occupations	2,120	161	7.6	187	8.8	2,158	141	6.5	162	7.5
Healthcare practitioner and technical occupations	8,142	1,059	13.0	1,183	14.5	8,459	1,051	12.4	1,199	14.2
Service occupations	23,503	2,492	10.6	2,759	11.7	24,271	2,337	9.6	2,596	10.7
Healthcare support occupations	3,305	279	8.4	314	9.5	3,373	233	6.9	275	8.1
Protective service occupations	3,092	1,123	36.3	1,189	38.5	3,093	1,069	34.5	1,133	36.6
Food preparation and serving related occupations	8,016	329	4.1	381	4.8	8,466	333	3.9	394	4.6
Building and grounds cleaning and maintenance occupations	4,868	473	9.7	537	11.0	4,897	430	8.8	491	10.0
Personal care and service occupations	4,222	288	6.8	338	8.0	4,441	272	6.1	304	6.8
Sales and office occupations	30,931	2,055	6.6	2,311	7.5	31,051	2,051	6.6	2,314	7.5
Sales and related occupations	13,574	441	3.3	505	3.7	13,671	421	3.1	483	3.5
Office and administrative support occupations	17,357	1,614	9.3	1,806	10.4	17,380	1,631	9.4	1,831	10.5
Natural resources, construction, and maintenance occupations	11,694	1,751	15.0	1,868	16.0	11,812	1,788	15.1	1,920	16.3
Farming, fishing, and forestry occupations	971	18	1.9	25	2.5	988	22	2.2	31	3.2
Construction and extraction occupations	6,193	1,067	17.2	1,133	18.3	6,387	1,177	18.4	1,240	19.4
Installation, maintenance, and repair occupations	4,530	666	14.7	710	15.7	4,438	589	13.3	649	14.6
Production, transportation, and material moving occupations	16,676	2,365	14.2	2,521	15.1	16,859	2,315	13.7	2,524	15.0
Production occupations	8,180	1,031	12.6	1,098	13.4	8,150	959	11.8	1,049	12.9
Transportation and material moving occupations	8,496	1,334	15.7	1,422	16.7	8,708	1,355	15.6	1,475	16.9
INDUSTRY										
Private sector	113,152	7,554	6.7	8,411	7.4	115,417	7,435	6.4	8,437	7.3
Agriculture and related industries	1,269	15	1.2	22	1.7	1,315	17	1.3	28	2.1
Nonagricultural industries	111,882	7,539	6.7	8,389	7.5	114,102	7,419	6.5	8,409	7.4
Mining, quarrying, and oil and gas extraction	866	47	5.4	57	6.5	765	43	5.6	48	6.3
Construction	7,109	940	13.2	992	14.0	7,488	1,039	13.9	1,095	14.6
Manufacturing	14,547	1,369	9.4	1,462	10.0	14,783	1,295	8.8	1,422	9.6
Durable goods	9,288	874	9.4	933	10.0	9,247	827	8.9	906	9.8
Nondurable goods	5,258	494	9.4	529	10.1	5,536	468	8.4	515	9.3
Wholesale and retail trade	18,798	871	4.6	962	5.1	18,515	780	4.2	887	4.8
Wholesale trade	3,346	126	3.8	139	4.2	3,288	120	3.7	137	4.2
Retail trade	15,452	745	4.8	823	5.3	15,227	660	4.3	750	4.9
Transportation and utilities	5,722	1,106	19.3	1,159	20.3	6,048	1,145	18.9	1,239	20.5
Transportation and warehousing	4,765	901	18.9	946	19.8	5,073	935	18.4	1,014	20.0
Utilities	957	205	21.4	213	22.3	975	210	21.5	225	23.0
Information[3]	2,525	217	8.6	249	9.9	2,473	222	9.0	250	10.1
Publishing, except Internet	495	19	3.9	22	4.4	455	22	4.9	24	5.2
Motion pictures and sound recording industries	314	37	11.7	40	12.8	349	38	11.0	43	12.3

See footnotes at end of table.

Table 3. Union affiliation of employed wage and salary workers by occupation and industry, 2015-2016 annual averages — Continued

[Numbers in thousands]

Occupation and industry	2015					2016				
	Total employed	Members of unions[1]		Represented by unions[2]		Total employed	Members of unions[1]		Represented by unions[2]	
		Total	Percent of employed	Total	Percent of employed		Total	Percent of employed	Total	Percent of employed
Radio and television broadcasting and cable subscription programming	561	37	6.7	48	8.5	534	32	5.9	43	8.0
Telecommunications	883	118	13.3	131	14.8	821	119	14.6	129	15.8
Financial activities	8,781	208	2.4	242	2.8	8,963	205	2.3	274	3.1
Finance and insurance	6,550	103	1.6	129	2.0	6,616	91	1.4	138	2.1
Finance	4,126	53	1.3	70	1.7	4,142	49	1.2	81	2.0
Insurance	2,424	51	2.1	59	2.4	2,473	42	1.7	57	2.3
Real estate and rental and leasing	2,231	105	4.7	113	5.1	2,347	114	4.9	136	5.8
Professional and business services	13,738	348	2.5	458	3.3	14,257	346	2.4	464	3.3
Professional and technical services	8,327	142	1.7	218	2.6	8,728	141	1.6	211	2.4
Management, administrative, and waste services	5,411	206	3.8	240	4.4	5,529	205	3.7	253	4.6
Education and health services	21,572	1,867	8.7	2,132	9.9	22,152	1,808	8.2	2,107	9.5
Educational services	4,551	625	13.7	720	15.8	4,557	561	12.3	652	14.3
Health care and social assistance	17,021	1,242	7.3	1,412	8.3	17,595	1,247	7.1	1,454	8.3
Leisure and hospitality	12,357	389	3.1	449	3.6	12,687	381	3.0	438	3.5
Arts, entertainment, and recreation	2,250	144	6.4	158	7.0	2,329	126	5.4	139	6.0
Accommodation and food services	10,107	245	2.4	291	2.9	10,358	255	2.5	299	2.9
Accommodation	1,575	116	7.4	127	8.0	1,506	114	7.6	123	8.2
Food services and drinking places	8,532	129	1.5	165	1.9	8,852	141	1.6	176	2.0
Other services[3]	5,867	177	3.0	227	3.9	5,973	155	2.6	186	3.1
Other services, except private households	5,055	166	3.3	205	4.1	5,258	152	2.9	179	3.4
Public sector	20,591	7,241	35.2	8,031	39.0	20,684	7,120	34.4	7,834	37.9
Federal government	3,591	979	27.3	1,160	32.3	3,674	1,006	27.4	1,144	31.1
State government	6,875	2,079	30.2	2,312	33.6	6,965	2,064	29.6	2,282	32.8
Local government	10,126	4,183	41.3	4,559	45.0	10,045	4,050	40.3	4,409	43.9

[1] Data refer to members of a labor union or an employee association similar to a union.

[2] Data refer to both union members and workers who report no union affiliation but whose jobs are covered by a union or an employee association contract.

[3] Includes other industries, not shown separately.

NOTE: Data refer to the sole or principal job of full- and part-time wage and salary workers. All self-employed workers are excluded, both those with incorporated businesses as well as those with unincorporated businesses. Updated population controls are introduced annually with the release of January data.

Table 4. Median weekly earnings of full-time wage and salary workers by union affiliation, occupation, and industry, 2015-2016 annual averages

Occupation and industry	2015				2016			
	Total	Members of unions[1]	Represented by unions[2]	Nonunion[3]	Total	Members of unions[1]	Represented by unions[2]	Nonunion[3]
OCCUPATION								
Management, professional, and related occupations	$1,158	$1,152	$1,148	$1,160	$1,188	$1,166	$1,159	$1,197
Management, business, and financial operations occupations	1,258	1,273	1,291	1,257	1,284	1,263	1,266	1,285
Management occupations	1,351	1,386	1,380	1,349	1,370	1,389	1,408	1,368
Business and financial operations occupations	1,137	1,108	1,132	1,138	1,161	1,146	1,141	1,164
Professional and related occupations	1,112	1,140	1,132	1,103	1,141	1,156	1,146	1,140
Computer and mathematical occupations	1,428	1,388	1,327	1,434	1,443	1,372	1,332	1,458
Architecture and engineering occupations	1,424	1,393	1,399	1,427	1,482	1,424	1,411	1,490
Life, physical, and social science occupations	1,206	1,249	1,266	1,187	1,209	1,288	1,278	1,195
Community and social service occupations	889	1,014	1,008	855	919	1,095	1,076	872
Legal occupations	1,391	1,551	1,547	1,373	1,431	1,615	1,621	1,419
Education, training, and library occupations	956	1,095	1,074	860	984	1,130	1,114	887
Arts, design, entertainment, sports, and media occupations	1,001	1,228	1,212	984	1,040	1,252	1,224	1,028
Healthcare practitioner and technical occupations	1,041	1,211	1,194	1,014	1,104	1,191	1,175	1,087
Service occupations	509	753	742	489	523	771	753	505
Healthcare support occupations	498	544	546	495	525	602	602	520
Protective service occupations	796	1,031	1,029	687	809	1,088	1,074	694
Food preparation and serving related occupations	441	515	512	436	465	597	581	459
Building and grounds cleaning and maintenance occupations	486	648	628	469	510	684	647	498
Personal care and service occupations	498	515	521	496	505	559	546	503
Sales and office occupations	673	810	801	662	698	810	804	686
Sales and related occupations	716	702	710	716	744	717	724	745
Office and administrative support occupations	656	831	821	639	679	826	818	661
Natural resources, construction, and maintenance occupations	761	1,070	1,052	711	786	1,127	1,111	735
Farming, fishing, and forestry occupations	464	–	–	460	520	–	–	518
Construction and extraction occupations	749	1,082	1,064	695	784	1,153	1,142	719
Installation, maintenance, and repair occupations	839	1,066	1,051	799	861	1,076	1,069	822
Production, transportation, and material moving occupations	656	850	842	622	665	881	876	631
Production occupations	663	824	826	635	668	841	837	641
Transportation and material moving occupations	646	876	859	610	662	913	904	622
INDUSTRY								
Private sector	776	917	912	765	801	937	932	789
Agriculture and related industries	522	–	–	519	572	–	–	571
Nonagricultural industries	781	918	913	769	806	937	933	793
Mining, quarrying, and oil and gas extraction	1,162	–	1,170	1,162	1,197	–	–	1,190
Construction	784	1,099	1,093	743	822	1,168	1,146	780
Manufacturing	839	876	868	833	857	885	884	852
Durable goods	872	889	881	871	893	907	910	890
Nondurable goods	776	849	841	768	793	839	827	789
Wholesale and retail trade	653	673	671	652	676	701	700	675
Wholesale trade	841	876	863	840	871	921	905	868
Retail trade	610	621	622	609	623	645	645	622
Transportation and utilities	843	1,007	1,003	803	860	1,033	1,023	808
Transportation and warehousing	790	980	977	754	795	972	969	757
Utilities	1,133	1,194	1,188	1,116	1,264	1,408	1,388	1,242
Information[4]	1,102	1,260	1,242	1,077	1,143	1,238	1,257	1,133
Publishing, except Internet	1,098	–	–	1,102	1,094	–	–	1,102
Motion pictures and sound recording industries	996	–	–	935	1,085	–	–	1,030
Radio and television broadcasting and cable subscription programming	980	–	–	968	1,017	–	–	1,020
Telecommunications	1,162	1,212	1,208	1,148	1,182	1,273	1,306	1,153
Financial activities	964	915	924	964	977	896	916	981
Finance and insurance	1,024	983	1,004	1,024	1,039	818	853	1,047
Finance	1,061	923	1,082	1,060	1,089	–	813	1,101
Insurance	973	988	981	973	977	–	907	980
Real estate and rental and leasing	782	891	893	772	827	977	970	817
Professional and business services	951	874	906	953	992	887	935	995
Professional and technical services	1,256	1,297	1,268	1,255	1,273	1,309	1,277	1,273

See footnotes at end of table.

Table 4. Median weekly earnings of full-time wage and salary workers by union affiliation, occupation, and industry, 2015-2016 annual averages — Continued

Occupation and industry	2015				2016			
	Total	Members of unions[1]	Represented by unions[2]	Non-union[3]	Total	Members of unions[1]	Represented by unions[2]	Non-union[3]
Management, administrative, and waste services	$605	$684	$672	$603	$613	$687	$682	$610
Education and health services	787	962	946	768	817	944	937	799
Educational services	918	1,025	1,015	896	936	967	965	931
Health care and social assistance	754	916	904	742	785	929	921	771
Leisure and hospitality	515	606	592	511	528	670	667	522
Arts, entertainment, and recreation	657	672	680	655	678	720	720	673
Accommodation and food services	492	579	558	489	504	642	637	501
Accommodation	546	645	639	532	582	698	703	564
Food services and drinking places	480	492	490	480	491	567	575	490
Other services[4]	684	903	879	677	686	959	869	681
Other services, except private households	710	916	900	703	708	965	893	703
Public sector	944	1,029	1,023	878	967	1,070	1,055	900
Federal government	1,113	1,058	1,064	1,159	1,149	1,093	1,099	1,188
State government	909	988	982	867	931	1,022	1,011	883
Local government	914	1,043	1,033	783	940	1,089	1,071	817

[1] Data refer to members of a labor union or an employee association similar to a union.
[2] Data refer to both union members and workers who report no union affiliation but whose jobs are covered by a union or an employee association contract.
[3] Data refer to workers who are neither members of a union nor represented by a union on their job.
[4] Includes other industries, not shown separately.
- Data not shown where base is less than 50,000.
NOTE: Data refer to the sole or principal job of full-time wage and salary workers. All self-employed workers are excluded, both those with incorporated businesses as well as those with unincorporated businesses. Updated population controls are introduced annually with the release of January data.

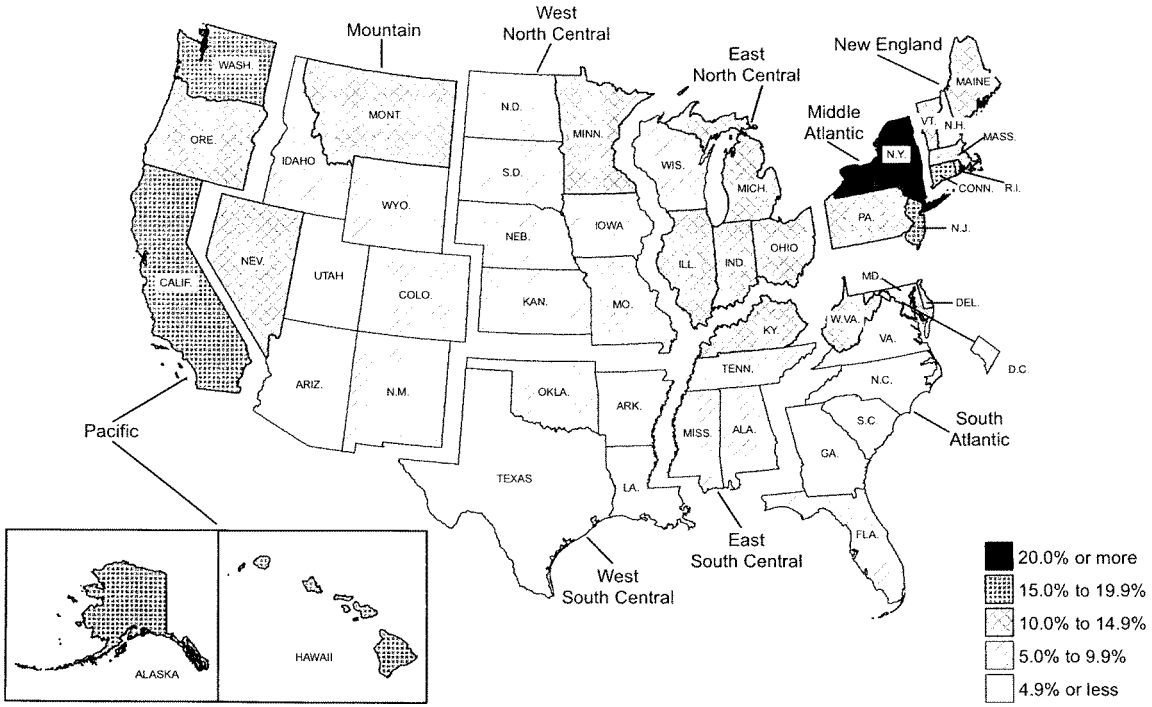
Table 5. Union affiliation of employed wage and salary workers by state, 2015-2016 annual averages
[Numbers in thousands]

State	2015					2016				
	Total employed	Members of unions[1]		Represented by unions[2]		Total employed	Members of unions[1]		Represented by unions[2]	
		Total	Percent of employed	Total	Percent of employed		Total	Percent of employed	Total	Percent of employed
Alabama	1,863	190	10.2	204	11.0	1,895	153	8.1	170	9.0
Alaska	304	60	19.6	66	21.7	297	55	18.5	59	19.9
Arizona	2,661	138	5.2	163	6.1	2,727	122	4.5	151	5.5
Arkansas	1,155	58	5.1	74	6.4	1,186	47	3.9	59	5.0
California	15,657	2,486	15.9	2,689	17.2	16,001	2,551	15.9	2,796	17.5
Colorado	2,310	194	8.4	215	9.3	2,438	238	9.8	263	10.8
Connecticut	1,587	269	17.0	277	17.4	1,568	275	17.5	288	18.4
Delaware	412	38	9.2	43	10.4	419	48	11.4	56	13.3
District of Columbia	334	35	10.4	40	12.1	343	32	9.5	37	10.7
Florida	7,994	546	6.8	671	8.4	8,113	456	5.6	574	7.1
Georgia	4,016	162	4.0	206	5.1	4,249	165	3.9	210	4.9
Hawaii	583	119	20.4	126	21.7	597	119	19.9	125	20.9
Idaho	679	46	6.8	50	7.3	689	42	6.1	47	6.8
Illinois	5,566	847	15.2	892	16.0	5,587	812	14.5	856	15.3
Indiana	2,828	283	10.0	319	11.3	2,927	304	10.4	335	11.4
Iowa	1,435	138	9.6	174	12.2	1,454	129	8.9	153	10.5
Kansas	1,255	110	8.7	136	10.8	1,274	109	8.6	132	10.3
Kentucky	1,705	187	11.0	207	12.1	1,710	190	11.1	228	13.4
Louisiana	1,847	107	5.8	126	6.8	1,799	76	4.2	88	4.9
Maine	549	64	11.6	75	13.6	567	65	11.4	77	13.5
Maryland	2,757	287	10.4	337	12.2	2,815	310	11.0	347	12.3
Massachusetts	3,103	402	12.9	441	14.2	3,158	381	12.1	407	12.9
Michigan	4,083	621	15.2	672	16.5	4,196	606	14.4	651	15.5
Minnesota	2,565	363	14.2	385	15.0	2,563	365	14.2	388	15.2
Mississippi	1,103	60	5.4	75	6.8	1,108	73	6.6	90	8.1
Missouri	2,615	230	8.8	257	9.8	2,711	262	9.7	290	10.7
Montana	427	52	12.2	59	13.9	418	50	11.9	58	13.9
Nebraska	882	68	7.7	80	9.0	876	64	7.4	74	8.5
Nevada	1,232	177	14.3	203	16.5	1,211	146	12.1	182	15.0
New Hampshire	641	62	9.7	73	11.4	669	63	9.4	74	11.0
New Jersey	3,880	596	15.4	644	16.6	4,007	644	16.1	666	16.6
New Mexico	782	49	6.2	61	7.9	784	49	6.3	64	8.2
New York	8,249	2,038	24.7	2,141	26.0	8,227	1,942	23.6	2,075	25.2
North Carolina	4,089	123	3.0	167	4.1	4,225	129	3.0	174	4.1
North Dakota	352	19	5.4	24	6.8	363	20	5.5	25	7.0
Ohio	4,914	606	12.3	670	13.6	4,970	617	12.4	702	14.1
Oklahoma	1,567	88	5.6	116	7.4	1,482	80	5.4	97	6.6
Oregon	1,586	235	14.8	256	16.2	1,691	228	13.5	267	15.8
Pennsylvania	5,601	747	13.3	804	14.4	5,686	685	12.1	724	12.7
Rhode Island	483	68	14.2	72	14.9	481	74	15.5	81	16.9
South Carolina	1,960	41	2.1	57	2.9	1,981	32	1.6	52	2.6
South Dakota	382	22	5.9	26	6.9	379	20	5.2	26	7.0
Tennessee	2,693	146	5.4	175	6.5	2,746	158	5.7	174	6.4
Texas	11,177	503	4.5	626	5.6	11,457	462	4.0	606	5.3
Utah	1,274	50	3.9	67	5.2	1,318	62	4.7	79	6.0
Vermont	284	36	12.6	42	14.7	290	33	11.5	37	12.9
Virginia	3,736	202	5.4	258	6.9	3,748	160	4.3	226	6.0
Washington	2,977	500	16.8	536	18.0	3,090	539	17.4	577	18.7
West Virginia	665	83	12.4	91	13.7	669	79	11.8	88	13.2
Wisconsin	2,682	223	8.3	253	9.4	2,696	219	8.1	244	9.0
Wyoming	261	19	7.1	22	8.2	248	16	6.3	18	7.3

[1] Data refer to members of a labor union or an employee association similar to a union.
[2] Data refer to both union members and workers who report no union affiliation but whose jobs are covered by a union or an employee association contract.
NOTE: Data refer to the sole or principal job of full- and part-time wage and salary workers. All self-employed workers are excluded, both those with incorporated businesses as well as those with unincorporated businesses. Updated population controls are introduced annually with the release of January data.

Chart 1. Union membership rates by state, 2016 annual averages

(U.S. rate = 10.7 percent)



Mr. COURTNEY. I yield back.

Chairman WALBERG. I thank the gentleman.

And now I recognize the gentleman just joining our subcommittee from Minnesota, Mr. Lewis. Welcome.

Mr. LEWIS. Thank you, Mr. Chairman, and thank you to all of the witnesses here today.

Certainly, data and facts do matter. And I think if we look in a somewhat objective way over the last few years of the NLRB, what we see is an activism that's got a lot of people a little bit concerned. I certainly support collective bargaining, especially in the private sector. I certainly support the rights of people to organize.

But if you take a look at what's happened with a joint employer standard, where you're trying to get someone, a franchisor who is not responsible for payroll to be part of a collective bargaining unit strikes a lot of people as a stretch. If you look at the microunions, when you could take it to the extreme, and one person is going to be a union now in order to organize. If you take a look at the free speech concerns on these ambush election rules. If you take a look at a company, a large airline manufacturer relocating a plant, and all of a sudden, that's an unfair labor practice.

And finally, of course, the reason that this activism I suppose on our side of the aisle, anyway, is concerting, or disconcerting, is it had to be done, or it was tried to be done through the recess appointments, which the Court had to intervene on.

So I think if you look at the data and the facts, it's pretty clear there has been something going on at the Board. And I would ask Mr. Larkin to, perhaps, comment on what might be the ultimate, you know, if you want to call it activism or ultimate end game here, and that is, the end of the secret ballot, card check, a card check for everyone.

It's very concerning to me, because that is at the essence of not only our constitutional governance; but philosophically, the idea of the absence of coercion in any form of election is key, is it not?

Mr. LARKIN. Yes. And prior Congresses tried and failed to amend the National Labor Relations Act to remove the secret ballot.

Another thing I suppose that I could add to that comment on card check is, you know, if you look at the joint employer standard, in addition to all of the uncertainty and confusion and chaos it's caused businesses like Ms. Aloul's, based on the legal standard itself, you know, there's more going on beneath the surface of that whole debate.

The new joint employer standard, in my view, has nothing to do with the facts of that case or joint employer in the temporary staffing industry. It is about a need for a change in the law on the side of organized labor to unionize from the top down in the franchising industry.

You know, we've all seen Fight for 15. And I'm not here to pass judgment on whether workers deserve $15 an hour. But what's beneath the surface of that movement is an effort to organize in retail and fast food. It's illegal under the National Labor Relations Act.

Mr. LEWIS. Thank you.

Mr. LaJeunesse, you mentioned back in the private sector, of course, Hudson in the public sector, with regard to First Amendment rights. And I want to elaborate or get your take on that.

In Minnesota, we've got personal care assistants who are having dues taken out of their paycheck, and sometimes they're not aware of it. It's certainly been a card check-type method of organizing there in some of these home healthcare workers and that sort of thing, notwithstanding Quinn.

But if you look back in Hudson, could you elaborate a little bit on getting around that First Amendment protection with agency fees and what those levels are and what they should be?

Mr. LAJEUNESSE. I'm not sure I understand your question.

Mr. LEWIS. Well, for instance, in my home State, you don't have to join the union, obviously. You have a right to join or not join in many cases, but you do have to pay for agency costs, collective bargaining costs.

The problem becomes when those collective bargaining costs become so exorbitant, being 60, 70, 80 percent of the dues, why not join?

Mr. LAJEUNESSE. Well, that's the incentive that employees have. The problem, of course, is who determines what percentage is chargeable to the objecting nonmember. It's the union. And the records are very complex. And the Board has done a lousy job in protecting the rights of private sector employees who object to the use of their forced fees for political and other nonbargaining purposes, as I pointed out in my testimony.

And the solution to that, I see, is the passage of a national right-to-work law sponsored by your colleague, Mr. Wilson from South Carolina, which would take that matter out of the hands of the Board and put it in the hands of the individual employee, who could decide whether he wants to voluntarily join the union or not.

Mr. LEWIS. I thank you for your testimony, as I do all the witnesses.

I yield back. Thank you.

Chairman WALBERG. I thank the gentleman.

I now recognize for 5 minutes of questioning the gentlelady from Oregon, Ms. Bonamici.

Ms. BONAMICI. Thank you, Mr. Chairman.

And thank you to all the witnesses.

Ms. Aloul, thank you for being here. I really appreciate the important services that you provide through your franchise. I'm familiar with the work of home care workers, both in Oregon, and it's really valuable services that they're providing.

And just so you know, when I was in private practice of law, I represented several franchisees. And, so, I am very familiar with what a franchise agreement looks like. And I listened very carefully to your description of your work and what your franchise does and doesn't do. And it sounds to me like you are in a franchise that's much more like the *Freshii* case, where the franchisor is basically ensuring a standardized product and customer experience and, as you said, the technology platform, and not at all in a situation where your franchisor is really directing your employees, or how you handle your employees or your scheduling. And I hope you are familiar with the Freshii franchise case and the situation.

And I also hope that—I know you mentioned uncertainty. And it seems—I don't want to give you something else to worry about, but with home care work and the important work that you do taking

care of seniors and people with disabilities, it seems like you would have a lot of uncertainty about, for example, what's going to happen with Social Security and Medicare and Medicaid in this administration and this Congress, and what might happen with the tax code, and lots of other things that might affect the people you take care of.

So, not to give you something else to worry about, but I think that your franchise and this possibility, remote possibility that something like this might affect your work is not something that you should be concerned about. That's not legal advice.

But, Ms. Davis, I wanted to ask you: Mr. Larkin described the—he said this is a controversial new test. And I'm sure you're familiar with—Browning-Ferris wasn't even about franchises. And this McDonald's case, I mean, I actually have some of the transcript, and H.R. director was actually assisting stores and talking to their employees, talking to them about minimum wage, identifying potential activity, talking to them about changing their store procedures and even said, quote, "this is a partnership between McDonald's and the franchisee that requires 100 percent support."

So I know Mr. Larkin said it's a controversial new test and many business models are threatened. It doesn't seem like that to me.

Would you respond to that? Then I want to ask you another question.

Ms. DAVIS. Thank you very much. I completely agree with you. And I share your desire to tell Ms. Aloul that, as she described her franchise, where she employs, places, trains, promotes everyone, the franchisor gets involved in nothing; and you compare that with the BFI facts, where the franchisor capped wages, set schedules for overtime, set schedules for the production line, set safety schedules, met every day with the supervisors and told them what to do, take that, combine the fact that in a footnote in BFI, they indicated that they were not taking a position on the franchisor-franchisee relationship. Fold in *Freshii's*, which I'm going to provide you a copy afterwards, because I think it will give you some comfort, where there was completely the same level of disengagement by the franchisor in the employment practices of the franchisee, and the general counsel felt there was no basis for a complaint.

So I think, in light of all those factors, there really is no concern that deserves a radical change in the law. The law for 50 years has had the common law test. That's what the Board embraced here. That's what Taft-Hartley instructed the Board to apply.

And finally, with respect to the insecurity of what is going to happen with respect to reserved control, the Board made very clear in BFI that is "reserved contractual control".

Ms. BONAMICI. I want to get in my last minute. The *Murphy Oil* cases, I'm really concerned about the individual arbitration rights. And I know the circuits are split.

So what would be the implications of broadly limiting workers' collective action rights in a forum such as, like, a condition of employment to enter into one of these forced arbitration clauses?

Ms. DAVIS. Thank you. Yes. Well, the Supreme Court is going to soon let us know—I believe this October the case is going to be heard—whether Murphy Oil is going to live or die. I firmly believe that, based on two essential forks of Supreme Court precedent: One

is that workers have a right collectively to join together and file a lawsuit over their terms and conditions of employment; and secondly, you can't condition workers' employment on them giving up their statutory rights; and thirdly, given the collective rights that the statute protects, I think it is a well-reasoned decision that I hope will hold. We won't know that for a couple of months.

Ms. BONAMICI. What would be the implication to workers, though, if—

Ms. DAVIS. I think workers will be, as I believe the statistic is over 65 percent of the employers require employees to sign these agreements, in which cases, they will not have the right and will not be able to afford individually, in most cases, to pursue these claims on their own.

Ms. BONAMICI. Thank you. My time is expired.

I yield back. Thank you, Mr. Chairman.

Chairman WALBERG. I thank the gentlelady.

And now I recognize the gentleman from the thumb of the great State of Michigan, Mr. Mitchell.

Mr. MITCHELL. Thank you, Mr. Chairman.

I grew up in a union household. Dad built trucks in the line for General Motors. I worked both in a union environment at Chrysler Corporation and at a company that was a nonunion company. So I think my colleagues on this side of the aisle are correct. This hearing and the purpose of this committee is, in fact, to get back to what is the core mission of the NLRB. In my opinion, it's about the worker and the employer, not protecting union leadership and union organizations' needs, which it has evolved to in the last 8 years.

Union membership, private-sector union membership has gone down. It's gone down to about 6.4 percent of the private-sector employees now in a union.

And my interpretation, Mr. Larkin, is that an awful lot of these rules have been developed in one last gasp for private unions to hold onto some shred of being something beyond a public union environment. Do you have an opinion on that, sir?

Mr. LARKIN. Well, it's fairly clear to me that the rules were passed to facilitate union success in organizing campaigns. And going back to the "if it ain't broke, don't fix it" thought, unions were already winning 60 to 65 percent of representation cases. So there was no need to improve that system.

One point that I'd really like to make, if I could, because I think it's gone on long enough here today, we've talked about this Freshii memo.

Mr. MITCHELL. I was going to ask you about that, yes.

Mr. LARKIN. And, you know, Freshii is a general counsel advice memorandum. It's not an administrative law judge decision. It is certainly not a decision of the full NLRB. Advice memoranda have no precedential value whatsoever. So that's number one.

Number two is that it was issued before *Browning-Ferris* came out.

And number three is that if that opinion in *Freshii* was truly what the general counsel believed, then I would question why the *McDonald's* case is still going on. The Freshii logic certainly hasn't caused Mr. Griffin to discontinue his pursuit of McDonald's and all

of its franchisees, who I'm certain take no comfort in the *Freshii* memo.

Mr. MITCHELL. Ms. Aloul, I have a question for you, please. Ms. Davis has referenced multiple times anxiety, you know, don't let anxiety bother you. It shouldn't be a concern. It will all work itself out.

What does anxiety do for you and your business when you're looking to hire, expand? What does that do for you?

Ms. ALOUL. Thank you for your question, Congressman. Every hour I spend not working on my business is an hour I'm spending on regulatory issues. That does provoke anxiety. It slows my hiring. It slows my ability to serve customers. It slows my ability to run a much more efficient business. In a small business, I am the most expensive resource in that business. So every hour I spend talking to you about that is a pleasure of mine, obviously, but is an hour I'm not spending on my business, sir.

Nobody in this room, nobody at all, is able to safely assure me that a standard based on indirect, reserved, unexercised, direct, indirect, what have you, control is never going to get me. You can't assure me that. I wish you can, but you cannot. And that is anxiety-provoking, sir, and it affects my ability to run a business. I'm not the only one. I know you know the numbers. Everybody likes statistics.

My background is in economics, and I'd love to share a few numbers with you as well. There are 7.6 million employees in the United States under a franchise agreement one way or another. It generates over 700, or around $700 billion of economic activities. That's 2-1/2 percent of our GDP.

It's 700,000 businesses like mine that are telling you this is affecting my ability to run my business. This has to be heard. You can't just assume leave it alone, it will run away, it will go away on its own. It won't.

Mr. MITCHELL. Thank you. Thank you.

I'll close with this, Ms. Davis. It's not code. There's no code, in my opinion, what we're doing here in the committee. It's critical to go back to the worker and employer relationship, not simply protect the union hierarchy. And anxiety kills jobs. It kills jobs in this country. And I work hard in this committee to ensure that we fix that problem now and going forward.

Thank you. I yield back.

Chairman WALBERG. I thank the gentleman.

I recognize the gentlelady from New Hampshire, a fellow 2006 classmate of mine. Welcome to the committee.

Ms. SHEA-PORTER. Thank you. It's good to be back here. I spent four years on this committee, and I certainly heard a lot of the debate, and it's interesting to me that this has ramped up again. And I'm sorry that it is, because I might be—and forgive me if some of you also had this experience—but I might be the only person here on this committee who actually worked in a nonunion factory when I was putting myself through college, and watched what would happen, because they were trying to unionize at the time, and I saw some pretty awful things to prevent that.

And I know that none of you would agree with this, but I saw things such as a woman who fainted on the line. She was pregnant.

And the foreman came over and said to her, you know, to go to the nurse's office and on the way pick up your check, you're done. And that, we must remember, still happens. It happened then; it happens now.

So as we talk about this, we need to remember that we're talking about people. We're talking about workers. We're talking about a lot of workers who are earning a wage that none of us would accept. We're talking about a minimum wage, which is impossible to live on. And then we're talking about that, too.

So while we're here and we're airing all of this, I ask people on this committee to remember that we have real people's lives at stake here. And I heard your testimony on your small business. And my mother was a small business owner. I do recognize and understand the challenges there as well. But we are talking about people who don't have opportunity and don't have people to defend them in these settings and nowhere to go, and you can't feel safe because you could lose your job. And ultimately, I hope that that's what we think about, those workers.

So, Ms. Davis, my question to you is, we're having a bitter fight in New Hampshire about right-to-work laws, and Republicans and Democrats are working together to try to protect unions in New Hampshire. Are workers' wages and benefits better or worse in States that have right-to-work laws?

Ms. DAVIS. So there's a lot of statistics on this. In right-to-work States, the workers make, on average, $6,000 less than in nonright-to-work States, which is about 12 percent per worker. So it's a significant difference. And then when you add on the pension statistics, where 75 percent of the workers in right-to-work States have no pension as compared to 15 percent in nonright-to-work States. Health care, 80 percent versus 50 percent.

And to address one of the issues you addressed initially, which is health and safety, the fatalities in right-to-work States are 50 percent higher than in nonright-to-work States. We are now, in New York City, seeing in nonunion construction jobs, the fatalities so high that legislation is being considered as compared to unionized jobs.

So I think that collectively as a fabric, there's an enormous difference in terms of the issue you raised, worker well-being, worker safety, worker health.

Ms. SHEA-PORTER. Okay. And then the other question is, what is the impact of right-to-work laws on job creation? Because I know the debate, and I know there are statistics, but I'd like you to assure them that if you are in a State that has right-to-work laws versus—there's going to be a difference in job creation.

So would you address that, please?

Ms. DAVIS. Right. I think the statistics are unassailable that the job creation in right-to-work States is not at all better than in nonright-to-work States. We have a serious problem in this country, whether it's globalization, whether it's technology increasing, that there are fundamentally not the same kinds of good middle-class jobs that existed 50 years ago.

But, as we learned when trickle-down economics failed, the solution to that is not to bust unions. The solution to that is to try to, as the statute itself was designed to do, create a strong economy,

build a middle class as a result of employees having the choice to join a union.

Ms. SHEA-PORTER. Then I have one last thing. Is there anything—I've got about 45 seconds—any last thought you would like to share that we didn't ask you yet, but you want us to know?

Ms. DAVIS. Well, that's a tough one. I think there's a fundamental question of what the role of Congress is and what the role of the Board is. And if we look back at the statute itself, Congress intended this act to be administered by an agency that had expertise. It envisioned that it would change as administrations changed, and its terms were staggered.

So I think we need to let this process run. We need to let the Board do what it is supposed to do, which is set labor policy, and let Congress do the important things that it's supposed to do.

The one final thing I wanted to say about the right-to-work law is that we hear a lot from the Republicans about giving control to the States. And that's what Congress did in the NLRA; it gave right-to-work decisions to the States. I think it is wrongheaded to now take that away.

Ms. SHEA-PORTER. Thank you. And thank you to all the panelists for being here today.

And I yield back.

Chairman WALBERG. I thank the gentlelady.

And now I recognize the gentleman from Georgia, Mr. Ferguson.

Mr. FERGUSON. Thank you, Mr. Chairman.

Ms. Davis, I believe I heard you open with a statement that the changes to the NLRB were modest.

Ms. DAVIS. If you're talking about the election rule changes, that is correct.

Mr. FERGUSON. Okay, thank you.

Ms. Aloul, I want to thank you for your testimony as well. Mr. Mitchell from Michigan touched on a couple of things there about anxiety and what you think about on a daily basis there. And I am certainly empathetic to your position. I have run a small business in my district for 25 years, and certainly understand the uncertainty that occurs when small businesses are faced with those real challenges. I don't think it's appropriate for members of this committee to tell you what you should be worried about. You experience it absolutely every single day. So I will try to avoid doing that as well.

So, Mr. Larkin, the question I have for you, do you mind briefly describing the changes in the Taft-Hartley law regarding how the employer-employee relationship is defined, and what the Congressional intent was of that law, of those changes?

Mr. LARKIN. Sure. If you're referring specifically to *Specialty Healthcare*, I can read you from the original Wagner Act that Senator Biddle, when the debate was about who should have the power to decide what is the appropriate bargaining unit, said that: "To lodge the power of determining this question with the employer would invite unlimited abuse and gerrymandering the units. But if the employees themselves could make the decision without proper consideration of the elements which should constitute the appropriate units, they could, in any given instance, defeat the practical significance of majority rule; and, by breaking off into small groups,

could make it impossible for the employer to run his plant." That's from the original Wagner Act.

And in 1947, when they passed the Taft-Hartley amendments to the act, the legislative history states that the prescription in Section 9(c)(5) that says that the extent of union organization cannot control the outcome of a bargaining unit determination, that was passed to strike at the practice of the Board by which it set up as units appropriate for bargaining, whatever group or groups the petitioning union has organized at the time.

That's the history of the National Labor Relations Act, and that's what, in my view, the *Specialty Healthcare* rule simply departs from.

Mr. FERGUSON. So, Mr. Larkin, when there's that large a departure, would you say that the NLRB directly subverted the legislative process in making its new rules?

Mr. LARKIN. Well, an argument that employers have made, and that I've certainly made in cases involving Specialty Healthcare challenges, is that the Board did go beyond its statutory mandate and that the rule, as it is written, violates what I just read you.

Mr. FERGUSON. So any time that you have an administrative body of people that were either appointed or hired making major changes to the rules—I certainly wouldn't call those changes modest. Would you?

Mr. LARKIN. No.

Mr. FERGUSON. Thank you, sir.

Mr. LaJeunesse, if you could, I want to give you an opportunity to respond very quickly to some of the comments regarding right-to-work States versus union States. You know, I'm from Georgia. It's a right-to-work State. We have seen tremendous job growth. If you could give me your thoughts on that, but also on how the, you know—and, again, I'm not trying to argue for unions or against unions, but just, could you give some background and some facts to that and give us your perspective on it?

Mr. LAJEUNESSE. Sure. I'm a lawyer, not an economist or a statistician, so I'm not an expert on some of the subjects with numbers. You can find statistics to prove anything. But if you look at statistics adjusting wages for cost of living, wages are higher in right-to-work States, not lower.

The suggestion that a law which allows an individual worker to decide voluntarily whether to financially support a union or not causes higher rates of fatalities, that's ridiculous.

I think the short answer to the issue of statistics is go to the website of the National Institute of Labor Relations Research, which collects the studies on this subject, which rebuts all of the arguments that Ms. Davis has made.

Mr. FERGUSON. Thank you.

Mr. Chairman, I yield back.

Chairman WALBERG. I thank the gentleman.

I recognize the gentlelady from the great State of Ohio, Ms. Fudge.

Ms. FUDGE. Thank you so much, Mr. Chairman and Mr. Sablan.

Thank you all for being here today. I've been on this committee for almost 10 years. This is the 25th hearing and/or markup we have had on this same exact subject. I'm happy that all of you

agree that we should have a full complement of members on the NLRB. President Barack Obama tried to do that, and my colleagues on the other side of the aisle blocked him. So I'm happy that you think that was a good thing.

This really is, to be honest, nothing more than a continued attack on unions. It is an attempt to eviscerate all worker rights and to give all rights and all power to employers. In a few minutes, we'll look around and somebody will be saying that we should do away with the minimum wage. Let's just pay people what the market can bear. They'll say, we should have no more paid leave, whether it be sick leave, vacation, whatever, things that have been gained through unions.

It's interesting that we continue to just go around and around and around about this. I just want us to understand what's happening here. This is not something new. This is something that has been a part of this committee's agenda for a long time. I wish they would just come out and say it.

Ms. Davis, the gentleman sitting next to you said that you can find statistics on anything. Sir, I would hope that you'd send me whatever those statistics are that you have.

Ms. Davis, we have been talking about right-to-work States. Just tell me, again, how you know for a fact that right-to-work States do not protect employers, do not make their lives better, do not protect them in any way, really. The floor is yours, Ms. Davis.

Ms. DAVIS. Thank you very much. And I do want to distinguish, to the gentleman on my physical left, that there is a difference between opinion—and I have expressed opinion at times—and statistics and facts, which I have also given you. I have a pile of papers here; I am happy to provide them.

The statistics on income, pension, health, safety in right-to-work States is data; it is not opinion. So I think that whether or not—it is a philosophical question whether or not you want to make it harder for employees to choose to have a union in their workplace. But there is no question whatever in States that make it virtually impossible or extremely difficult, which is right-to-work States, the data on employee well-being, health, safety, wages is unassailable.

Ms. FUDGE. And you talked about the fact that income inequality is at an all-time high. And I am assuming—and you can correct me if I'm wrong—that it is high because union membership is declining.

Ms. DAVIS. That is correct. And there are visual—and I actually think the government puts these out. There are visual graphs that you can see that tracks union density from 1963 to the present and tracks income during that period. And there's an absolute congruity between union density creating higher wages, and union decline, which we have had essentially since the early '80s and the air traffic controllers debacle, leading to declined wages.

There is no question that when employees have a collective voice in their workplace and they are not subject to being fired at whim, they are able to negotiate better terms and conditions that at the end of the day help everyone.

Ms. FUDGE. Thank you. And since our job really is to oversee the Labor Relations Act and not to tell the Board how to conduct them-

selves, is there anything that you think we can do on our side to make the act better?

Ms. DAVIS. Well, we had that aspiration in the '90s and that didn't work out. So I think at this point, given the political realities, that there is nothing that can be done to amend the act.

I actually did testify here during the recess appointment issue. The Supreme Court disagreed with my view that it was constitutional, but I think there is no question that the President was blocked in putting people on the Board and letting the agency do its work. And a lot of the partisanship that we've seen have directly been attributable to the partisanship in the Senate that has prevented the Board appointees from doing their work.

So I think that allowing the Board to function, even in this new administration, it's not going to be something that I'm going to believe in the most part, but I think we need to let the agency do its work, as it has done for 80 years.

Ms. FUDGE. Thank you very, very much. I thank you all.

Mr. Chairman, I yield back.

Chairman WALBERG. I thank the gentlelady.

Now I recognize the gentleman from Georgia, Mr. Allen.

Mr. ALLEN. Thank you, Mr. Chairman.

And, you know, for the last two years—well, 2-1/2 years ago, I was out in the working world and as a small business owner. And the last two years, I've heard all the arguments one way or the other about a lot of this rulemaking.

And, frankly, being in a relationship with my employers, some of these things really were disturbing to me, because it seemed like it was pitting the employer against the employee. And, you know, we just don't have that relationship in our company.

And, real quickly, a story of that is a young man that's been with our company for 40 years, and he was the second person I hired. And his sister needed a kidney transplant and he was a match, and he was going to be out of work for six weeks. And we paid him the entire time that he was out of work. And I think if he had belonged to the union, he would not have been paid. And so, you know, we don't hear stories like that too often. And so, you know, there are certainly pluses and minuses to this control factor.

And then, again, I do have a lot of experience with cost of living. I moved from Georgia, Augusta to Washington. I live here 36 weeks a year. And I will assure you it costs about twice as much to live in Washington as it does in Augusta, Georgia. And so I felt that pressure.

So here we are as a Nation, and we have right-to-work States and we have States that are grappling with how to compete. We have, in Georgia, had a surge of growth in a diverse business climate. And, again, it's all about—the reason a business locates to a State is a skilled workforce. I mean, that is number one. Obviously, other things come into fact, but number one is skilled workforce.

Mr. Larkin, in your opinion, from the standpoint of what we've seen as far as rulemaking, what has that done to contribute to the number one factor, and that's to present an educated, skilled workforce out there for all Americans?

Mr. LARKIN. Are you referring specifically to the election rules or to—

Mr. ALLEN. Well, all of these rules that come down create some problem, you know, in the system. And, again, our goal is to get Americans back to work in this country. We've got, some say 20 million people that really want to go to work that can't go to work right now.

And so are there rules that we experienced over the last couple of years, in your experience, that are keeping us from growing our businesses and employing more people?

Mr. LARKIN. Well, I think the answer to that is yes. And to go back to the joint employer question, I know a tremendous concern articulated in the franchising community is the entire franchise model is set up to be a symbiotic relationship between the small business owner and the large brand. And the large brand gets to spread its brand, and the small business owner gets to be a business owner.

And if the joint employer standard is going to threaten that relationship—and I think Ms. Aloul mentioned this earlier, that her franchisor is worried about all this—one of the things it could decide to do is not franchise anymore. And that would be devastating to small business owners and to job growth.

Mr. ALLEN. Well, Ms. Aloul, as far as your business is concerned, and the government, this kind of top-down, one-size-fits-all approach, whether it be health care-related, or in this case, rules as far as, you know, how folks organize, again, you said you have the anxiety factor, but could you, knowing that you were not going to be affected by this process, I mean, would it be easier for you to grow your business, employ more people?

Ms. ALOUL. Absolutely. And to make this more relevant for Congressmen, it's not just me. You need to multiply that by hundreds of thousands of businesses. If I am able to hire 10 more people or 20 more people this year, multiply that by a million other small businesses.

So the answer is yes, but please don't see it as a small unit. You have to see it as the magnitude, like small businesses are the engine for growing an economy. We go around the world teaching people that, teaching countries that. It's the small businesses that create jobs and create economic output. So the answer is definitely yes, sir.

Mr. ALLEN. Thank you. Thank you for that answer.

Chairman WALBERG. The gentleman's time is expired. Thank you.

And now I recognize the gentleman from New York, a new member of our committee, Mr. Espaillat.

Mr. ESPAILLAT. Thank you, Mr. Chairman.

And thanks to all the witnesses for their many testimonies. I have to concur with my colleague and her previous characterization that this is the 25th hearing on the National Labor Relations Board since the Republicans took control of Congress in 2011. And this hearing makes it clear that part of the majority's agenda will focus on weakening private-sector unions, which only make up 7 percent of the workforce.

And, you know, something was mentioned about the fast food industry, and how franchises there which employ, obviously, millions of Americans are fare off. Now, I happen to think that many of these fast food franchises keep their workers under the minimum wage, and by doing so, these workers fall under the poverty levels in many of the States across the Union and are then eligible for things like food stamps, Section 8, other types of benefits that are paid by the American taxpayer.

And so this is concerning, particularly since the nominee for Secretary of Labor is the owner of one of these fast food franchises.

And I just want, Ms. Davis, for you to elaborate a little bit more about—I know that we've already gone through the discussion of whether right-to-work States have better incomes or not. I think the big elephant in the room is this income inequality across the Nation. If we have impressive job growth in the last eight years, although some folks would like not to admit that, what is it that's happening across the Nation where the 1 percent keeps on growing and then there is a good sector of the population that continues to be having a hard time making ends meet? And, in particular, with the fast food industry, what is it that they're doing that they're keeping these workers on minimum wage levels and are reaping the benefits from the American taxpayers? Do you have any information about that? Considering that the Secretary of Labor nominee is an owner of one of these businesses.

Ms. DAVIS. Thank you, fellow New Yorker.

Yes, a number of us find it very disheartening that the nominee for the Secretary of Labor has come out publicly against an increase in the minimum wage, against the notion of a living wage. I think what we have seen across this country in the last couple years is an explosion of local initiatives, quite frankly, some of them outside of the labor movement, that have demanded a living wage, given the fact that workers in the fast food industry and in other industries cannot support a family even on two jobs.

And so what we've seen—and it's quite heartening—are local ordinances everywhere from New York to Seattle that are imposing a living wage, that are requiring sick leave for employees. And I wish Mr. Allen's view on sick leave was shared by the rest of the nonunion workplace, because it is an aberration to be providing sick leave in the nonunion workplace. It is a hallmark of unionized workers. And it's something that we're seeing in local governments now in New York City itself, because there is such a need for protection.

I think that the American people, what we've seen, and what I hope we will continue to see, is a cry that the level of income inequality that exists now and, quite frankly, that is going to be worsened under some of the tax proposals that we've seen, is not acceptable to a Nation like ours.

Mr. ESPAILLAT. I want to thank God we have the $15-an-hour minimum wage coming into New York next year. I just can't imagine how someone can live on $7.25 an hour in New York, or even here in Washington, D.C. And so these folks will be forced to go to other States, and we may be continuing to lose—when the next session sits, continuing to lose some seats in our State that will go to other States. Maybe that's why this is being done this way.

But I want to thank you for your information. I think income inequality continues to be the big elephant in the room. And these fast food restaurants and their practices should be under greater scrutiny. Perhaps that is why the nominee is facing some issues with the votes on the other side, on the other house.

Ms. DAVIS. In the 10 seconds left, I would like to remind us that McDonald's had on its website a recipe for employees to exist that included holding two jobs, McDonald's and another, and imposing further safety net burdens on our hospitals, which have to take patients.

Mr. ESPAILLAT. Thank you.

Ms. DAVIS. Thank you.

Mr. ESPAILLAT. I yield back my time.

Chairman WALBERG. I thank the gentleman.

And I recognize the gentleman from Pennsylvania, Mr. Smucker.

Mr. SMUCKER. Thank you, Mr. Chairman.

Ms. Davis, I'd just like to get your perspective. It's been mentioned frequently here today by many members the declining union representation in our private-sector workforce. What percentage is that today?

Ms. DAVIS. I think it's 6.4 percent right now in the private sector.

Mr. SMUCKER. And could you give a sense of how that has changed over the past few decades?

Ms. DAVIS. So I think that at its height, union density was over 30 percent. When I first started practicing 35 years ago, it was about 12, 13 percent, and it has continued to decline.

Mr. SMUCKER. So no one disputes that we've seen decline, regardless of any changes that have been made by the NLRB. Why do you think that is occurring, Ms. Davis?

Ms. DAVIS. Well, I wish I could be the expert on this, but I think there are various reasons that experts have looked at. One is globalization. The other is an increase in technology.

I would suggest additionally that under the NLRA, as it has been interpreted and, quite frankly, until recently, any employer that wanted to defeat unionization through practices that the Board had considered legal had a very, very good shot of doing so. Any employer that wanted to defeat unionization by delaying the election and having an antiunion campaign for 3 months could do so.

So I think it's a convergence of a variety of factors, some within our control, some not.

Mr. SMUCKER. Do you think it has anything to do with the changing relationship between employers and their employees?

Ms. DAVIS. Well, I think that there's not a homogeneous answer to that. I think there have been some enlightened employers in various industries, including the technology industry, where there's no density, virtually no density.

Mr. SMUCKER. I can tell you my own experience. I've operated a small business in the construction industry, and we, essentially, built a business from just one or two employees to one employing over 200 individuals over a period of 25 years. The biggest problem we always faced in the growth of our business was finding enough qualified people to fill the spaces that we had available.

And businesses facing that situation are required, whether they want to or not, to do everything they can to create a great work-

place for their employees. And of the 200 employees that we had, they had the ability to grow in their positions. They had the ability to receive training, to increase their pay. And they were family-sustaining jobs, and we saw them as family.

And, you know, I believe that just the demographics that we have dramatically changed the relationship between employers. Employers today know that if they intend—if they want to keep employees and hire the best, they're going to have to create great places to work, create places where people can earn the money to support their families, and they do so.

And so we see a lot of new innovations today. We see employee ownership models. We see profit-sharing models. Our goal always was, we were what we considered an open-book company where we believed that the success of the organization, if we succeeded together, everyone should benefit accordingly. We were one of those companies that was targeted for unionization, and we went through a number of campaigns. And our employees overwhelmingly believed that they had better opportunities through our organization.

So I'll just submit that I believe that what you're seeing today—I believe, my own view is, there have been—unions have been a necessary part of our history, and even today unions are necessary; but the fact of the matter is the employer-employee relationship has changed dramatically. And today, 94 percent of our employees in the private sector choose to be in a nonunionized workplace.

Ms. DAVIS. So I'm an old Pittsburgh Pirates fan, so you should credit what I say. I represent unions in the construction workers in New York, unionized workforce, extremely well-paid, benefits, the kind of situation you're describing.

The nonunionized construction industry in New York has barely minimum wage industry, and has had so many fatalities that the City Council is now holding hearings on this. I wish all employers were like you. Unfortunately, they're not.

Mr. SMUCKER. I have been part of the construction industry and I know that even nonunionized employees, safety, health of our employees is number one priority, and we treat our employees as family. Again, I'm not one that's philosophically opposed to unions.

And I see my time has expired. So thank you, Mr. Chairman.

Chairman WALBERG. The gentleman's time has expired. Thank you.

I recognize now the ranking member of the full committee, Mr. Scott.

Mr. SCOTT. Thank you. Thank you, Mr. Chairman. Mr. Larkin, I heard a back-and-forth about the vacancies on the NLRB. Isn't it true that the three existing members have the full authority to make legal, binding decisions?

Mr. LARKIN. They do, but it's been a long tradition at the NLRB that—this isn't necessarily written anywhere in the statute, but that the Board won't overrule precedent without three members. So there's only three members, so they cannot make any significant changes in the law right now unless all three of them agree.

Mr. SCOTT. They can make legal decisions. I mean, the fact that there are vacancies, I didn't hear a lot of complaints about that last

year, or a vacancy in the Supreme Court, for that matter. But the Board can make legally binding decisions.

Ms. Davis, we've heard a lot about the joint employer, and did you make a comment about whether or not there's any ambiguity about Ms. Aloul's case?

Ms. DAVIS. Well, first of all because I mean—

Mr. SCOTT.—the way she described it.

Ms. DAVIS. Yes. First of all, because this is a board that issues decisions when cases come to it, there is not—there is always an interpretive exercise as each case comes to it. And the joint employer decision, the joint employer analysis is a very fact-driven analysis, like so many others. So there is not—and there will not be and there has not been since the Act was passed—a rule that we could look at on that, on—handbooks were mentioned earlier—policies, that tells us exactly what is what.

But what we can do, what businesses can do, is look at the decision and analyze it and decide whether or not there is risk. We do that all the time in every area of the law. And I suggest if you look at the BFI decision, and it's very, very, very fact-specific—it gives us guidance that franchisees/franchisors can rely on.

Mr. SCOTT. Based on the—her description and the BFI and the Freshii case, is there any question in your mind that would not be a joint employer situation?

Ms. DAVIS. Well, I'm not going to be rendering legal advice to Ms. Aloul, but I think that if you take the factors she listed about her control over her workforce and you contrast that with the factors in BFI, which I discussed earlier, there seems to be no congruity between the BFI joint employer decision and Ms. Aloul's situation.

Mr. SCOTT. Now, what kind of control did BFI have over their employees?

Ms. DAVIS. BFI had both reserved contractual control and actual control over the leased employees. It was not a franchisor situation. Most importantly, it had a salary cap, for our purposes, which precluded the supplier/employer from setting wages higher than a certain level, which is distinct from Ms. Aloul's situation.

Mr. SCOTT. Now, what kind of problems occur when you have a joint employer situation but the joint employer, the franchisor, is not at the table?

Ms. DAVIS. So, if indeed there is the control over labor relations decisions, as we believe there is in McDonald's, based on the evidence that's come out so far, and the franchisor in that case is taken off the hook, if the employees opt to be represented by a union, the union will not be able to bargain with the party that's actually setting the terms and conditions of employment. It's an untenable situation.

Mr. SCOTT. In a right-to-work State, what benefits do non-union members get compared to the benefits of dues-paying members?

Ms. DAVIS. So they get safety net benefits in a right-to-work State. But other than that, there's no guarantee of sick pay, holiday pay, above-minimum-wage conditions, vacation pay—

Mr. SCOTT. If they belong to a union—if they belong to a union and the union has negotiated a contract, what benefits of that contract does a person who didn't pay any dues, what benefits do they get?

Ms. DAVIS. The person who pays no dues gets precisely the same benefits as the union members get under the contract. That's the law.

Mr. SCOTT. So, if the union raised money from its members, negotiated a contract, then people that didn't pay any dues get the same benefits?

Ms. DAVIS. That's correct.

Mr. SCOTT. When can relocating a plant constitute an unfair labor practice?

Ms. DAVIS. Only when it's found to be retaliatory, which was the case in the Boeing complaint. The relocation in and of itself is totally lawful.

Mr. SCOTT. Thank you, Mr. Chairman.

Ms. DAVIS. Thank you.

Chairman WALBERG. I thank the gentleman.

And I recognize the gentleman from Indiana, Mr. Rokita.

Mr. ROKITA. I thank the chairman.

Good morning and welcome to everyone. I appreciate the witnesses' testimony.

I want to begin my questioning to Mr. Larkin, but, first, I want to thank Chairman Walberg for holding this hearing. And let me say it's great to be on the HELP Subcommittee again, so thanks for having me.

Mr. Larkin, did you have any response to Ms. Davis' answers in the last line of questioning regarding right-to-work, regarding joint employer standards, anything like that, anything you want to add or contrast?

Mr. LARKIN. Sure. I would—well, I would defer discussion about right-to-work to Mr. LaJeunesse, who is the expert on the panel on that.

You know, I did want to make a few points about the *Specialty Healthcare* standard because there were some points raised and a particular case raised. And what I heard was statistics about the size of the bargaining unit and that, since the *Specialty Healthcare* decision, the bargaining unit size hasn't gotten smaller.

When we use the phrase "micro unit," it has nothing to do with the number of employees in the unit; it's about the size of the unit in relation to the rest of the employer's workforce. And what—why—the reason the Specialty Healthcare sets up the potential for micro units is that it allows the union to fragment an employer's workforce into artificial segments that don't bear any rational relation to the employer's actual business.

A case that I would mention to you on that is the Yale University case that just came out two weeks ago. The union petitioned for nine separate collective bargaining units, each one of nine separate academic departments at Yale University. And the regional director in that case approved that under Specialty. So they're going to go to nine elections, one in each department.

And so think about how Yale University is going to bargain with the union over nine separate bargaining units, all of whom are academic faculty, meaningfully and effectively. That's the problem we think with the *Specialty* rule. It allows that kind of result. And that just can't be the right answer under the act.

Mr. ROKITA. Is it, in fact—it's not the answer they want; they just want to, in effect, give up then and just have a blanket union covering everybody and some kind of negotiation, right? I mean, wouldn't that be the next logical step? Yes, you can't imagine nine different elections. So we're just going to go ahead and submit to whatever ultimately the union wants.

Mr. LARKIN. I don't know what the union in that case is thinking, but that's certainly—

Mr. ROKITA. Possible?

Mr. LARKIN. —possible, yes.

Mr. ROKITA. Talk to me about *Browning-Ferris Industries*, that the NLRB 3-2 decision revising the joint employer standard.

Mr. LARKIN. Well, there has been quite a lot of discussion about *Browning-Ferris* today on both sides. You know, I think we've heard from Ms. Aloul about what that standard has done to the certainty with—

Mr. ROKITA. Why do you think the general counsel chose to pursue that standard, NLRB counsel?

Mr. LARKIN. Well, you know, I mentioned this earlier but, you know, I think that it has a lot to do with the organizing desires of labor and their desire to organize more easily in franchising. And this standard clearly allows that. And it's no coincidence, I would suggest, that the very first target the general counsel picked after Browning-Ferris came out was McDonald's.

Mr. ROKITA. All right. And switching to you, Mr. LaJeunesse, feel free to comment on right-to-work if you like, but I have a particular question for you.

Mr. LAJEUNESSE. Sure.

Mr. ROKITA. You have practiced at the NLRB for a long time. Over the last eight years, how has it been different from other times in your career?

Mr. LAJEUNESSE. Well, it's more difficult for non-union employees who bring charges against unions for violation of the act to get complaints issued by the general counsel. And the Board, as I pointed out in my testimony, has failed to fully enforce the right of workers to refrain from supporting unions financially and to refrain from union representation.

Mr. ROKITA. But, sir, couldn't you argue that this is just a case of the pendulum swinging from a Democratic flavor to a Republican and back and forth? Or is there something—did you notice something inherently different about the Obama-era NLRB versus other Democratic administrations?

Mr. LAJEUNESSE. Well, it's swung a lot farther this time than ever before.

Mr. ROKITA. Farther left?

Mr. LAJEUNESSE. Farther—well, farther pro-union. Whether you want to call that left or not is—

Mr. ROKITA. Okay.

Mr. LAJEUNESSE. If I may comment on the right-to-work situation that—

Mr. ROKITA. I have 10 seconds.

Mr. LAJEUNESSE. —that Congressman Scott addressed. The employee in a right-to-work State, who is in a unionized shop is stuck with whatever the union negotiates. He cannot negotiate his own

terms and conditions of employment, even if he thinks he deserves more than the one-size-fits-all contract, and he can't work out his own grievances with the employer without the union's approval.

Chairman WALBERG. I thank the gentleman.

The time has expired. Thanks for staying around for the very end and coming back after a busy chairmanship yourself.

Before we go to closing comments, I ask unanimous consent to submit for the record the following two letters: one, a letter from the Coalition for a Democratic Workforce regarding recent actions by the NLRB; and, two, a letter from the Retail Industry Leaders Association also regarding recent actions by the NLRB. Hearing no objection, the letters are submitted.

[The information follows:]

COALITION FOR A
DEMOCRATIC WORKPLACE

February 14, 2017

Dear Chairman Walberg and Ranking Member Sablan:

On behalf of the Coalition for a Democratic Workplace (CDW), we write to thank you for holding today's hearing entitled, "Restoring Balance and Fairness to the National Labor Relations Board." We applaud the Subcommittee for exploring the serious negative consequences associated with the National Labor Relations Board's (NLRB) unprecedented policy changes over the past eight years. These changes, if left unchecked, will continue to create immense uncertainty in labor relations and hamstring economic growth.

CDW is a broad-based coalition of over 600 organizations representing hundreds of thousands of employers and millions of employees in various industries across the country concerned with the disruption caused by the NLRB's eight-year campaign to re-write labor laws. CDW was originally formed in 2005 in opposition to the so-called Employee Free Choice Act (EFCA), which would have replaced secret ballots in unionization elections with "card check," a process that would have forced employees to choose whether or not to sign union authorization cards in front of coworkers and union organizers, exposing employees to potential intimidation and harassment by those in favor of unionization. When EFCA was defeated, CDW turned its focus to the NLRB's regulatory overreach and its efforts to enact the goals of EFCA through its decisions and regulations.

Over the last eight years, the NLRB has overturned an astounding total of 4,559 years' worth of long-standing precedent, blurred numerous bright-line tests, and dramatically overhauled the union election process – all in an effort to benefit organized labor.[1] The Board embarked upon this campaign with little regard as to the negative impact these policy decisions would have on workers, employers and the economy in general. CDW has opposed this regulatory overreach through litigation; both by directly challenging Board rules and through amicus briefs challenging Board decisions. We have also advocated for legislation, policy riders and Congressional Review Act Resolutions to rein in the Board. Despite our efforts, the Board continued with its radical agenda at the expense of worker and employer rights and our economy.

Congress and the new Administration must address the Obama Board's most egregious policy changes, including the sweeping new joint employer standard, the ambush elections rule, and the sanctioning of cherry-picked micro-unions. CDW will continue to advocate for legislative solutions to these harmful changes and urges the new Administration to return balance to the

[1] CDW recently released a detailed report on precedent overturned by the Board during President Obama's term. You can find that report here.

COALITION FOR A
DEMOCRATIC WORKPLACE

NLRB by swiftly nominating new Board members who will interpret the National Labor Relations Act in a manner that is fair to workers, unions and employers alike. Returning the Board to its traditional role as a neutral arbiter of labor disputes will create a climate for economic growth by freeing employers from the unnecessary red-tape and uncertainty associated with recent Board activities.

Thank you again for your attention to these important issues. We look forward to working with members of this Subcommittee to advance policies that benefit both employers and employees.

Sincerely,

Coalition for a Democratic Workplace

RILA
RETAIL INDUSTRY LEADERS ASSOCIATION
Educate.Collaborate.Advocate.

1700 North Moore Street, Suite 2250, Arlington, VA 22209

February 14, 2017

The Honorable Tim Walberg
Chairman
House Committee on Education and the Workforce
Subcommittee on Health, Employment, Labor & Pensions
2436 Rayburn House Office Building
Washington, D.C. 20510

The Honorable Gregorio Kilili Camacho Sablan
Ranking Member
House Committee on Education and the Workforce
Subcommittee on Health, Employment, Labor & Pensions
2411 Rayburn House Office Building
Washington, D.C. 20510

Dear Chairman Walberg and Ranking Member Sablan:

On behalf of the Retail Industry Leaders Association (RILA), I write to thank you for convening today's hearing, "Restoring Balance and Fairness to the National Labor Relations Board" (Board or NLRB). RILA strongly believes that the two current vacancies on the Board must be filled as quickly as possible in order to restore balance to the Board and its membership, and appreciate the emphasis the Subcommittee has placed on this critical matter.

By way of background, RILA is the trade association of the world's largest and most innovative retail companies. RILA promotes consumer choice and economic freedom through public policy and industry operational excellence. Its members include more than 200 retailers, product manufacturers, and service suppliers, which together account for more than $1.5 trillion in annual sales, millions of American jobs and more than 100,000 stores, manufacturing facilities, and distribution centers domestically and abroad.

Given the inherently deliberate nature of the NLRB appointment process, RILA continues to urge President Trump to nominate two qualified experts to fill the vacancies on the Board, as it will allow the Board to resume its ultimate mission of interpreting the National Labor Relations Act in ways that are fair to workers, unions and employers alike. The term of NLRB Acting Chairman Philip Miscimarra expires in December of this year, and if new members are not nominated and confirmed, the Board would lack a quorum to do business and thereby be rendered powerless to decide cases and approve regional directors. These circumstances would cause great economic uncertainty and thereby have serious negative ramifications for millions of employers, workers, and consumers.

In addition to emphasizing the need for nominations of qualified Board members, I wanted to briefly summarize the legislative and regulatory priorities RILA hopes to see addressed during the 115th Congress as it relates to the NLRB. We appreciate the Subcommittee's consideration of our views.

Ambush Elections: The "ambush" election ruling has constrained employers and employees alike by (1) limiting the issues and evidence that can be presented at a pre-election hearing, which may leave important questions unresolved prior to a union election; (2) requiring employers to identify all election-related arguments in a statement of position to be filed only days after receiving the union's election petition; (3) limit employers' rights to appeal Regional Directors' decisions; (4) impacting employees' privacy by forcing employers to provide private phone numbers and email addresses of their employees;

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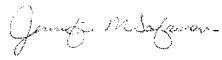
and (5) eliminating the 25-day "grace period," ultimately stripping management the time needed to educate employees.

Micro-unions: In the Board's August 2011 decision in *Specialty Healthcare and Rehabilitation Center of Mobile*, the Board significantly increased the ability of labor unions to establish micro-bargaining units, thus allowing organized labor to gerrymander representation elections and organize bargaining units that purposely exclude similarly-situated employees who oppose unionization, leaving them effectively disenfranchised while greatly benefitting organizing drives. While the decision, on its face, only applied to non-acute health care facilities, the Board has extended this precedent to other industries, including retail. When combined with the current rule on ambush elections, these decisions will have a dramatic effect on the entire business community.

Joint Employer: The Board has also taken significant steps to expand the standard for when a business will be considered a "joint employer" with a contractor for purposes of union organizing. Under the new standard that the Board announced in its August 2015 decision in *Browning-Ferris,* a business will be considered a joint employer if the business has "indirect" or "potential" control over conditions and terms of employment of the contractor's employees. The new standard enhances the likelihood that companies will be considered joint employers for labor law purposes, potentially subject to unfair labor practices allegations or collective bargaining efforts.

Thank you again for your time and consideration of these issues that are so important to RILA and its membership, and we look forward to continuing our work with the Subcommittee in the 115th Congress. If you have any questions, please be sure to reach out to me via email at jennifer.safavian@rila.org or via phone at (703) 600-2057.

Sincerely,



Jennifer M. Safavian
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Chairman WALBERG. At this time, I now recognize the ranking member for closing comments.

Mr. SABLAN. All right. Thank you. Thank you, Mr. Chairman, for holding this hearing.

Today, we've heard how the National Labor Relations Board has adhered to historic precedent and how it has facilitated the core process of the National Labor Relations Act through its election rule. As an indicator that the decisions of the NLRB are squarely within the mainstream, the Board's decisions have been consistently upheld by the court of appeals. In the last five years alone, there were 284 appeals to the courts, and they were sustained 233 times. This includes the *Specialty Healthcare* case, which has been upheld in seven court of appeals.

But it is troubling that there are efforts underway to undermine workers' efforts to organize and to weaken labor unions. This includes right-to-work legislation, which is falsely promoted as promoting economic development.

Mr. Chairman, we have letters from the International Brotherhood of Teamsters, the United Steelworkers, and the International Association of Fire Workers opposing right-to-work legislation introduced to this Congress. I ask that it be inserted in the record.

Chairman WALBERG. Hearing no objection, it will be inserted.

[The information follows:]

TEAMSTERS NEWS
International Brotherhood of Teamsters
25 Louisiana Avenue, NW • Washington, DC 20001 • www.teamster.org 202-624-6911 • fax: 202-624-6918

For Immediate Release
Feb. 1, 2017

Contact:
Kara Deniz, (202) 624-6911
kdeniz@teamster.org

TEAMSTERS STRONGLY OPPOSE NATIONAL RIGHT-TO-WORK LEGISLATION

Teamsters Stand Up Against Damaging Bill, Continue Fight Against Right to Work

(WASHINGTON) – The Teamsters Union strongly opposes national 'right-to-work' legislation introduced today in Congress that will hurt workers and their unions.

The destructive anti-worker bill is sponsored by Reps. Joe Wilson (R-S.C.) and Steve King (R-Iowa).

"Right to work is wrong for working people. We heard it during the presidential election—workers are speaking out that they want good union jobs and a strong voice at work. The last thing they want is their working conditions rolled back and their rights stripped by billionaire interests, like ALEC and the Koch brothers, who advocate for lower standards for workers through right to work," said Jim Hoffa, Teamsters General President.

Right-to-work laws require workers and their unions to cover the costs of non-union workers who benefit from union contracts. These laws are proven to drive down wages and weaken workers' unions by undercutting bargaining power.

Nine of the 10 states with the highest poverty rates are right-to-work states. Workers in states with right-to-work laws make about $1,500 less per year than workers in free bargaining states. Workers in right-to-work states are less likely to have employer-paid health care and pensions, and more likely to die in accidents on the job.

"This legislation does nothing to create jobs, grow the middle class or improve the lives of workers. It's shameful that members of Congress have chosen to prioritize big business interests over the demands of their constituents. The Teamsters Union is committed to improving the lives of working people by fighting against dangerous right to work," Hoffa said.

Founded in 1903, the International Brotherhood of Teamsters represents 1.4 million hardworking men and women throughout the United States, Canada and Puerto Rico. Visit www.teamster.org for more information. Follow us on Twitter @Teamsters and "like" us on Facebook at www.facebook.com/teamsters.

-30-

Leo W. Gerard
International President

February 13, 2017

U.S. House of Representatives
Washington, D.C. 20515

RE: United Steelworkers (USW) urges opposition to H.R. 785, establishing a national "right to work" law.

Dear Representative,

On behalf of the 850,000 members of the United Steelworkers, I strongly urge you oppose H.R. 785 and any legislation which would weaken collective bargaining through the establishment of the deceptively named "right to work" standard.

"Right to work" legislation at its very core is wrong and undemocratic. The premise of the legislation is that a worker should be able to accept the higher wages and benefits a union negotiates, be entitled to the representation the union provides in a grievance with their employer, and yet not share the costs. This allows corporations and business to pit workers against each other and undermines basic principles of fairness.

Anti-union organizations couch this power grab in vague terms of "competitiveness" and "business-friendly environment" but there is overwhelming evidence that there is a direct correlation between the decline of union density and anti-union laws such as H.R. 785 in undermining health and safety standards, wages and economic growth.

- In "Right to Work" states, the workplace death rate is 51 percent higher.[1]
- Wages in states with right to work laws are significantly lower than in fair bargaining states both in statistical and economic terms. Workers on average earn $3.27 per hour less in "right to work" states than in fair share states.[2]
- Seven of the top 10 states with the highest unemployment are "right to work" states.[3]

[1] http://www.aflcio.org/content/download/174867/4158803/1647_DOTJ2016.pdf
[2] http://www.epi.org/publication/right-to-work-states-have-lower-wages/
[3] https://medium.com/@jesseeisbell/right-to-work-is-wrong-for-your-family-whether-you-are-union-or-not-heres-why-8c7b63351063#.4t1i1qdvl

States with "right to work" laws have higher levels of uninsured Americans, higher infant mortality rates, and 9 out of 10 states with "right to work" laws spend the least on public education.[4]

Strong unions are also an equalizing force for ensuring fairness in the workplace no matter gender, sexual orientation, or race. Women in a union make more than their non-union counterparts. In fact, the union wage advantage is large enough in 32 states to cover the full-time child care center costs for an infant.[5] In 2016 unionized women had a median salary that was $232 more than non-union women and $65 more than non-union men.[6]

Unionized African American workers earned, on average, about 27 percent more per hour than African American workers who were not in a union.[7]

Ultimately, national "right to work" will lead to increased wealth inequality which economists across the spectrum argue is destabilizing and must be addressed in this country. The evidence is clear, "right to work" laws have failed to help working Americans therefore, **USW urges you to oppose H.R. 785**.

Sincerely,

Leo W. Gerard

Leo W. Gerard
International President

[4] http://moaflcio.org/wp-content/uploads/2013/10/MORTWHurtsEveryone.pdf
[5] http://www.iwpr.org/press-room/press-releases/unionized-women-earn-more-than-nonunionized-women-in-every-u.s.-state
[6] https://www.bls.gov/news.release/pdf/union2.pdf
[7] http://cepr.net/documents/black-union-2014-02.pdf

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS ®

HAROLD A. SCHAITBERGER
General President

EDWARD A. KELLY
General Secretary-Treasurer

February 2, 2017

The Honorable Virginia Foxx
Chairman – Committee on Education
and the Workforce

The Honorable Robert Scott
Ranking Member – Committee on Education
and the Workforce

Dear Chairman Foxx and Ranking Member Scott:

The International Association of Fire Fighters represents more than 300,000 professional fire fighters and emergency medical personnel, working in every state in the nation. We write to strongly oppose the National Right to Work legislation recently introduced by Congressman Joe Wilson (R-SC) and Steve King (R-IA). Imposing a free-rider system on middle class workers will cripple their ability to fight for better wages, safer working conditions and a better way of life.

Unions work to protect the rights and benefits of all their members. This is especially important because of the dangerous nature of the profession. Fire fighters rely upon safe working conditions including proper equipment, adequate staffing and good training. Fire fighters also require quality and comprehensive healthcare, survivor and disability benefits and a reliable retirement to protect their families in case of injury or death. Without the ability to bargain and come together as a workforce these protections and benefits could easily be diluted or completely eliminated.

Right to Work laws not only undermine safety, health and security, they undermine economic stability. When looking at the facts it's easy to see just how dangerous this policy can be. For example, states with Right to Work laws suffer from:

- Lower Wages and Incomes – Median household income in states with these laws is 13.9% less than in other states and 29.6% of jobs in right to work states were in low-wage occupations, compared with 22.8% of jobs in other states.
- Lower Rates of Health Insurance – People under the age of 65 in states with Right to Work laws are more likely to be uninsured and if they're lucky enough to find insurance, they pay a larger share of their insurance premiums (28.5% of the premium compared with 25% in free-bargaining states.)
- Higher Workplace Fatality Rates – The rate of workplace deaths is 49% higher in states with right to work laws according to the Bureau of Labor Statistics.

As Americans we should be focusing on improving the lives of middle class workers, improving wages and strengthening community safety. We urge you to oppose this dangerous legislation.

Respectfully,

Harold A. Schaitberger
General President

1750 NEW YORK AVENUE, N.W., WASHINGTON, D.C. 20006-5395 • (202) 737-8484 • FAX (202) 737-8418 • WWW.IAFF.ORG

Mr. SABLAN. All right. Let me quote from the Teamsters letter. I quote: "Nine of the 10 States with the highest poverty rates are right-to-work States. Workers in States with right-to-work laws make about $1,500 less per year than workers in free-bargaining States. Workers in right-to-work States are less likely to have employer paying health care and pensions and more likely to die in accidents on the job. Right-to-work does the opposite of empowering workers; it weakens their ability to bargain collectively to build a future for their families."

Mr. Chairman, I would like that this letter be entered into the record. I have already asked that.

I also would like to thank all the witnesses for—I know you have to spend time preparing for today's hearing. And we don't have to agree with one another, but I appreciate the effort you have done to prepare and also for coming and sharing your thoughts with us today. Thank you very much for doing that.

And I yield back. Thank you.

Chairman WALBERG. I thank the gentleman.

And I would concur. Thank you to the panel for being here today. It would be a rather unproductive hearing without you, and so appreciate you being here.

Also appreciation to—though most have left now, except you and me—to the great attendance from both sides of the aisle for this hearing.

Let me say this, as a former United Steelworker myself: Going back to the last time that I paid union dues as a union steelworker at South Works U.S. Steel, south side of Chicago, I certainly would indicate that the working conditions that I see now as I walk through steel plants in my district and other places are far superior to what I experienced back in 1969, 1970. And that's a good thing for safety, et cetera, that goes on.

But I also know that there are 28 States in the Union that now are right-to-work States, my own State of Michigan, as well. And while I hear statistics and figures and assertions thrown all over the place, I have to say, at the very least, that being the case, 28 States in the Union being right-to-work States, individual workers having the opportunity to choose to be in the union or not, a decrease in the numbers in the unions right now indicate to me that it's not because these workers now want to work in worse situations, be paid less, have inferior benefits, that they're choosing to be in these States and these workplaces.

Our concern today and why we have had, over the course of the past 6 years, 25—if that is the number—hearings on NLRB is because the major impact that NLRB has on the workplace and a concern that we are putting a thumb on the scales, especially in these last eight years, to try to stop that slide of union involvement.

As I said, I appreciate what I see when I walk through steel mills now. I don't see workers doing some of the things that I had to do, had no choice. That was the working situation. It isn't the case now.

So I submit to you that we may have other hearings on the NLRB. We want to get things right. We've got a lot of issues to address. We want to make sure that the workplace moves forward,

that it's sustainable, that it expands. Why? So that we have more workers capable of being in a job that's secure, that gives them choices for the future to grow; and that we have needs met of constituents for their economic impact as well and, in this case with Ms. Aloul, the opportunity to have care given in difficult stages of their life; and that we don't have unnecessary bureaucracy, rules, and regs standing in the way.

I would suggest to you that there is a reason why NLRB is pushing to put arbitrary and artificial roadblocks and standards in the way, to put a thumb on the scale, to assist in stopping the slide in the growth of unions, and to turn that around without the request of the employees themselves.

And we see at this point in time almost $2 trillion of regulatory compliance costs that are on the backs of job providers. When we see increased costs to not only the job providers but to the employees because of the Affordable Care Act in its taxes, its mandates, its work-hour requirement, et cetera. Those are problems that are frustrating the growth in our economy, and those are things we need to deal with.

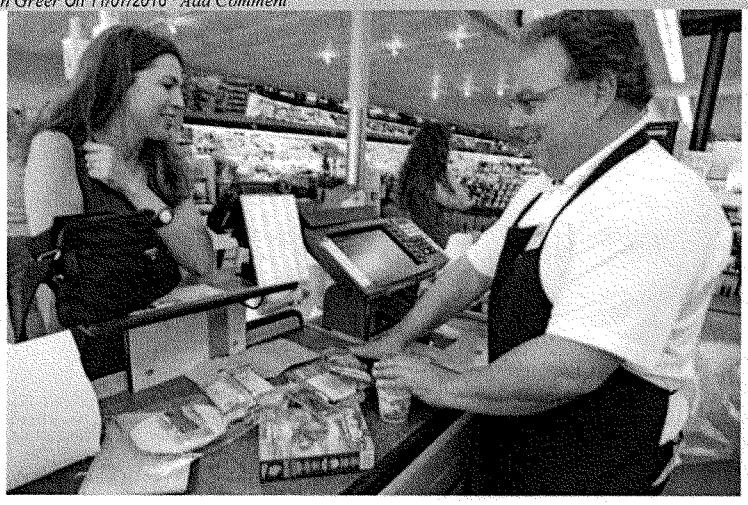
So, while I know there's a difference of opinion, there are, I hope, not two parallel universes, but sometimes it appears that to be the case. I would hope that we could come together to work to ensure that employers and employees benefit in the coming days, months, and years, as opposed to being in a combative relationship that does no good for either side. And we'll do our best on this committee to achieve that.

Having said that and having no other business to come before the Subcommittee, the Subcommittee stands adjourned.

[Additional submissions by Mr. LaJeunesse follow:]

Cost of Living-Adjusted Poverty Higher in Forced-Unionism States

By Stan Greer On 11/07/2016 · Add Comment



Not just housing, but also other necessities like food and health care are substantially more expensive in forced-unionism states than in Right to Work states And higher prices for such necessities hurt the poor and the near-poor most of all. When differences in living costs and other key variables are taken into account, government-imposed forced unionism is correlated with significantly higher poverty rates on average. Image: Associated Press

A few weeks ago, the U.S. Census Bureau (BOC) released its sixth report furnishing estimates for nationwide and regional poverty according to both the standard measure and a special supplemental measure. In 2011, the BOC began calculating poverty according to the alternative method as well as the traditional one in response to rising criticism about the inadequacy of the latter. Scott Sumner, an economist who teaches at Bentley University in Waltham, Mass., and regularly shares his thoughts with academics and laymen across the world in his Money Illusion blog, has explained the supplemental poverty measure (SPM) this way:

The traditional definition of poverty in America has been criticized for ignoring factors such as government benefit programs and regional variation in the cost of living. Now the Census Bureau has released new estimates of poverty, which account for various types of benefit programs and cost of living differences.

Nationwide, the SPM shows that an average of 15.1% of all Americans were in poverty over the course of 2013, 2014 and 2015. Twenty-five states lacked Right to Work laws protecting employees from being fired for refusal to pay dues or fees to an unwanted union throughout this three-year period. The average SPM poverty rate for these forced-unionism states was 15.4%, 0.3 percentage points above the national average. Meanwhile, 24 states had Right to Work laws on the books for the entire time from 2013 to 2015. The average SPM poverty rate for these states was 14.9%, 0.2 percentage points below the national average.

(Since Wisconsin's Right to Work law was adopted and took effect in 2015, it is excluded from this analysis. Since West Virginia did not become a Right to Work state until this year, it is counted as a forced-unionism state here.)

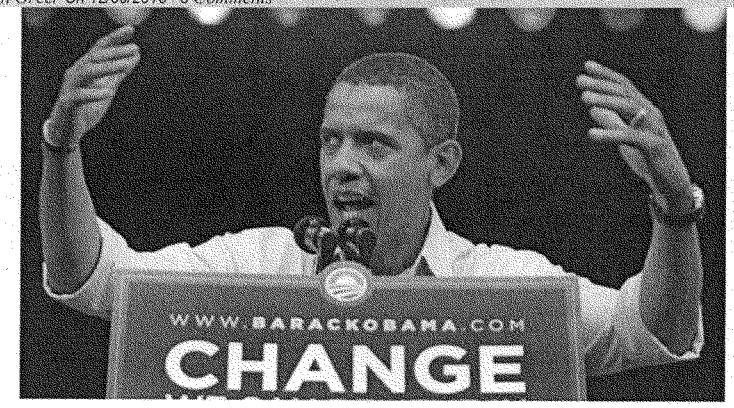
Because the real purchasing power of a household matters much more than its nominal income in assessing how well off it is, the SPM is clearly superior to the traditional measure for comparing and contrasting poverty in different states. But the SPM undoubtedly fails to adjust sufficiently for higher living costs in forced-unionism states. Regional cost-of-living indices calculated and published by the nonpartisan Missouri Economic Research and Information Center show that, on average, not just housing, but also food, health care, and other necessities cost significantly more in forced-unionism states than in Right to Work states. Yet the SPM attempts to account only for interstate differences in housing costs.

In short, once interstate differences in the overall cost of living are factored in, it's obvious that the aggregate poverty rate for forced-unionism states is even higher relatively to that of Right to Work states than the SPM data show.

https://nrtwc.org/cost-living-adjusted-poverty-higher-forced-unionism-states/

Since 2008, Private Health Coverage Has Risen by 6.04 Million in Right to Work States, But Hasn't Risen a Bit in Forced-Dues States

By *Stan Greer* On 12/09/2016 · 3 *Comments*



While presidential candidate Barack Obama promised to increase access to private health insurance, since the year he first captured the White House the number of people with private health coverage has actually fallen in states that still lacked Right to Work laws as of 2015. Meanwhile, private coverage in Right to Work states has increased by 7.6%. Image: AP

Big Labor's allies sometimes concede that states with Right to Work laws, which bar the firing of employees for refusal to pay dues or fees to their "exclusive" (monopolistic) union bargaining agents, enjoy accelerated job creation. Whenever forced-unionism apologists do make this concession, they insist the jobs created in Right to Work states are "the wrong kind."

But the fact is, it is in the non-Right to Work states as a group where new jobs are more typically not productive enough to come with important benefits like health insurance.

Runaway costs associated with Medicare and Medicaid, the two largest taxpayer-funded health-insurance programs, are helping to bust the federal budget and put many state governments deep in the red.

The so-called "Affordable Care Act of 2010," otherwise known as ObamaCare, was sold in part on the theory that it would help stop Medicare and Medicaid costs from spiraling out of control. Not surprisingly for the

majority of Americans who opposed this law from the get-go, this promise hasn't been fulfilled. And with the election of Donald Trump, an avowed ObamaCare opponent, as the 45th U.S. President, the future of the law is now in serious doubt.

Regardless of ObamaCare's fate, the accelerated creation of good jobs that pay enough to absorb the high cost of family health-care benefits remains a key component for resolving the Medicare and Medicaid crises.

Sadly, millions and millions of such jobs were destroyed during the last national recession. But recently released U.S. Census Bureau data (see the link below) show that, despite the tepid national recovery, private insurance has bounced back vigorously in many, though far from all, states since 2008, the first full year of the recession.

From 2008 through 2015, the 22 states that had Right to Work laws on the books for the entire seven years enjoyed a net increase of 6.04 million, or 7.6%, in the number of people covered by private health insurance. Meanwhile, the 25 states that still lacked Right to Work protections as of 2015 experienced a *decline* of nearly 130,000 in total private health coverage.

(Indiana, Michigan and Wisconsin, which adopted Right to Work laws between 2012 and 2015, are excluded from the above analysis and those that follow. Since West Virginia's Right to Work statute was not adopted until this year, it is counted as forced-unionism here.)

All of the nine state experiencing the steepest percentage declines in private insurance access from 2008 to 2015 (Connecticut, Illinois, Massachusetts, New Jersey, New York, Ohio, Rhode Island, Vermont, and West Virginia) were forced-unionism at the time. But eight of the nine states with the greatest increases in coverage have longstanding Right to Work laws.

The data reported here shouldn't surprise anyone.

Where forced dues are legal, union bosses use their power to dislocate labor markets, jack up costs, and bankroll Tax & Spend, regulation-happy politicians. Fewer jobs that pay well and offer good benefits are created as a consequence.

And, when it comes to the private sector, Congress spawned the problem of compulsory unionism. Among the millions of private-sector workers who are forced to pay union dues to keep their jobs, virtually none are forced to do so by state law.

Congress instigated the moral evil of forced unionism and the economic evils it brings. It's Congress's responsibility to correct its mistake.

HIC-4.Health Insurance Coverage Status and Type of Coverage by State–All Persons: 2008 to 2015

https://nrtwc.org/since-2008-private-health-coverage-risen-6-04-million-right-work-states-hasnt-risen-bit-forced-dues-states/

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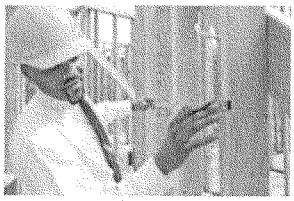
Right-to-Work States Have Lower Workplace Injury Rates

Big Labor's fatal error on state employee afflictions

By JAMES M. HOHMAN | Dec. 6, 2012



It's a repeated and deceptive talking point from Big Labor that becoming a right-to-work state will result in lower workplace safety. This is a convenient objection, but not supported by the data.

Consider Oklahoma, which became a right-to-work state in 2001. From 2000 to 2010 its workplace injury rate plummeted, decreasing their average workplace injuries and illnesses by nearly 40 percent. Oklahoma's injury and illness rate is less than in Michigan. Overall, right-to-work states have a slightly lower incidence of workplace injuries.

It's true that right-to-work states have a greater incidence of fatal workplace injuries, but the very dangerous occupations are concentrated in just a couple of industries and in occupations like farming, fishing and forestry regardless of whether the state has a right-to-work law.

Unions can negotiate over working conditions, but it's unlikely that this has a major influence over workplace safety, especially when there's the Occupational Safety and Health Act, the legal system and better business management. Certainly these have a greater influence over the safety of workplaces than whether unions are able to force members to pay dues or agency fees.

Besides, right-to-work, which prevents a union from getting an employee fired for refusing to financially support a union, does not affect a union's ability to negotiate over working conditions.

Workplaces in America are safer than they've ever been. This, however, is not because of the union's power to collect forced dues and agency fees.

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See also:

Facts On Right to Work vs. Forced Unionization States
~~~~~

The Public Employee Union Problem

10 Stories Showing Why Mandatory Government Collective Bargaining Is Counterproductive

Right-to-Work Law Would Help Ensure Government Unions Could Not Elect Their Own Bosses

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7 January 2017

A Widening Compensation Advantage For Employees in Right to Work States

In States With Longstanding Right to Work Laws in 2015, Cost of Living-Adjusted Annual Pay and Benefits Per Private-Sector Employee Were $45,657, or Nearly $1200 More Than the Forced Unionism-State Average

By Stan Greer

Today roughly 49% of Americans live in one of the 26 states with a Right to Work law on the books prohibiting the termination of employees for refusal to pay dues or fees to an unwanted union. Twenty-two states have had such a statute for at least a decade and a half. Four states (Indiana, Michigan, Wisconsin, and West Virginia) have adopted Right to Work protections for employees since the beginning of 2012. And in 24 states forced union dues and fees are still legally authorized and promoted.

By the time the first Right to Work laws were approved during the mid-1940's, federal labor policy had already long prohibited so-called "yellow-dog" contracts -- that is, contracts under which a worker agreed as a condition of employment not to join and financially support a union.[1]

The ban on "yellow-dog" contracts was and is supported by the vast majority of Americans, including Right to Work champions. That makes sense. Pro-Right to Work citizens emphatically believe that the individual employee should be free to choose which private organizations, if any, he or she financially supports, regardless of what the business owner or other employees think.

State Right to Work laws simply specify that the personal freedom of association guaranteed for the employee under federal policy must be genuine and evenhanded. After all, as U.S. Supreme Court Justice William Brennan's 1984 majority opinion in *Roberts v. Jaycees* acknowledged, "Freedom of association . . . plainly presupposes a freedom not to associate." [2]

The question of whether employees should be legally protected from coerced membership in or financial support for a labor organization does not, and should not, hinge on economics.

[1] The federal ban on "yellow-dog" contracts is part of the Norris-LaGuardia Act of 1932.

[2] 468 U.S. 609.

However, proponents of compulsory unionism have focused heavily on economics in waging their public campaigns against Right to Work measures.[3] Right to Work advocates must periodically respond to an array of Big Labor claims regarding supposed negative economic effects of laws prohibiting forced union dues and fees in order to clear the air.

Forced-Unionism States Were on Average 25.0% More Costly to Live in Than Right to Work States in 2015

There is absolutely no doubt about the fact that Right to Work status is positively correlated with faster growth in jobs and aggregate employee compensation. There is also no doubt that in recent decades Americans in their "peak earning" years (aged 35-54) and their families have been far more apt to move from a forced-unionism state to a Right to Work state than from a Right to Work state to a forced-unionism state.[4]

And U.S. Census Bureau statistics regarding private health-insurance coverage trends in the 50 states show that Right to Work states have a far superior record of creating and sustaining jobs that either directly furnish employees with health-insurance benefits or pay sufficiently well to enable employees to buy their own private insurance.

From 2008 (the earliest year for which comparable data are available) through 2015, the 22 states with longstanding Right to Work laws added roughly 6.04 million people, net, to the ranks of the privately insured, whereas the 25 states that lacked Right to Work laws for the entire time saw their ranks of privately insured people shrink by nearly 130,000.[5]

Very likely because the overall data on growth in employment, compensation and benefits, regardless of how you slice them, are not helpful to propagandists for compulsory unionism, they are rarely even discussed in analyses of the economic impact of Right to Work laws propounded by union officials or Big Labor-allied academics.

Instead, forced-unionism champions tend to furnish snapshots of per employee wage-and-salary data, or other data pertaining to incomes and benefits, for one particular year. Generally ignoring income and compensation growth trends, they assert living standards are lower in Right to Work states than elsewhere.

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[3] See, e.g., Kirk Shelley, "How Oklahoma Was Won: Lesson's From One State's Fight For the Right to Work," *Labor Watch* (Capital Research Center), April 2002, esp. pp. 4-5.

[4] See "Right to Work States Benefit From Faster Growth, Higher Real Purchasing Power – Summer 2016 Update," National Institute for Labor Relations Research, July 2016.

[5] U.S. Bureau of the Census, "Health Insurance Coverage in the United States: 2015," Table HIC-4, "Health Insurance Coverage Status and Type of Coverage by State: All Persons: 2008 to 2015."

Frequently, state wage, salary, and other income data cited by officers of unions and union front groups as grounds for their opposition to Right to Work measures do not incorporate interstate differences in the cost of living in any way.[6] This is a serious flaw.

The fact is, nonpartisan analysts such as the Missouri Economic Research and Information Center (MERIC), a state government agency, consistently find that compulsory-unionism states as a group have a substantially higher cost of living than do Right to Work states as a group.

MERIC's data show that the 25 states that had Right to Work laws on the books as of 2015 had a population-weighted cost of living that year of 94.2, 5.8% below the national average. The forced-unionism states combined (excluding New Mexico, for which MERIC was unable to assemble annual 2015 cost-of-living data) had a population-weighted cost of living of 117.8, or 17.8% above the national average. In short, forced-unionism states were on average 25.0% more costly to live in than Right to Work states in 2015.

(MERIC itself does not weight states based on population size in calculating its indices. For that reason, the national average for population-weighted states not equal 100.)

Back in 2010, Right to Work States' Cost of Living-Adjusted Compensation Advantage Was Just $110 Per Private-Sector Employee

According to the U.S. Commerce Department's Bureau of Economic Analysis (BEA), in 2015 there were 76.306 million full-time and part-time private-sector employees (including contract workers and the self-employed as well as employees on company payrolls) located in the 25 states that had Right to Work laws on the books last year.

After adjusting for regional differences in the cost of living with the help of MERIC's indices for 2015, private-sector employees in Right to Work states earned a total of $3.514 trillion in cash compensation and benefits such as health insurance that year. That comes to $46,057 per employee.

Meanwhile, the 85.622 million private-sector employees in forced-unionism states took in a total of $3.808 trillion in cash compensation and benefits, or $44,475 per employee.

Cost of living-adjusted compensation per private-sector employee is thus, according to the most recent available data, nearly $1600 higher in Right to Work states. And the Right to Work advantage has greatly widened over the course of the past few years.

Considering just the 22 states that have had Right to Work laws on the books since 2001, in 2010, using MERIC's indices for that year to adjust for cost-of-living differences, compensation per private-sector employee in states prohibiting compulsory unionism was $40,661, compared to

[6] See, e.g., "Deceptive Right to Work Laws Hurt Everyone," a page in the "Legislation & Politics" section of the national AFL-CIO's principal web site.

$40,551 in states permitting it. (Indiana, Michigan and Wisconsin are excluded from this analysis and those that follow in the next three paragraphs.)

Subsequently, the cost of living-adjusted compensation advantage for these same 22 states over non-Right to Work states rose to $185 in 2011, $255 in 2012 and $548 in 2013.

In 2014, the compensation advantage for states with longstanding Right to Work laws was $547, holding roughly steady.

But in 2015, cost of living-adjusted annual pay and benefits per employee in states with longstanding Right to Work laws rose to $45,467, or nearly $1200 more than the average for the remaining forced-unionism states.

'Dismissing Correlation Entirely, as if It Does Not Imply Causation,' Is a 'Fallacy' That Would 'Dismiss a Large Swath of Important Scientific Evidence'

Academic apologists for compulsory unionism such as University of Oregon labor-studies professor Gordon Lafer reflexively pooh-pooh evidence showing Right to Work status is correlated with faster growth in employee compensation and higher cost of living-adjusted compensation.

At times, Lafer has implied that, unless every single Right to Work state outpaces every single forced-unionism state according to a particular economic gauge, a strong positive correlation between Right to Work status and growth means nothing.[7]

As the cliché goes, correlation is not causality, but this truism hardly means correlation is irrelevant to the question of whether one phenomenon causes another. Establishing whether or not two phenomena are correlated is a necessary step toward making a scientific assessment of causation.

Steven Novella, a prominent clinical neurologist and professor at the Yale University School of Medicine, pointed out in a brief 2009 analysis of correlation and causation in medical research that "dismissing correlation entirely, as if it does not imply causation," is a "fallacy" that would "dismiss a large swath of scientific evidence."[8]

The fact is, given the unfeasibility of genuine controlled experiments in economics and the complexity of state economies, it is probably impossible to measure with any precision what impact Right to Work laws have on job and compensation growth.

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[7] See, e.g., "What's Wrong With Right to Work: Chamber's Numbers Don't Add Up," a March 2011 policy memorandum by Lafer for the Washington, D.C.-based and AFL-CIO-founded Economic Policy Institute.

[8] "Evidence in Medicine: Correlation and Causation," posted on the Science-Based Medicine web site, November 18, 2009.

But there is ample evidence "implying" Right to Work laws promote faster economic growth, and no meaningful evidence that Right to Work laws cause employee compensation to fall or slow the rate of employee compensation growth.

# # #

Stan Greer is the National Institute for Labor Relations Research's senior research associate. He may reached by e-mail at stg@nrtw.org or by phone at 703-321-9606. *Nothing here is to be construed as an attempt to aid or hinder the passage of any bill before Congress or any state legislature.*

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17 January 2017

Recent Research Bolsters Economic Case For State Right to Work Laws

'The Evidence Suggests That There Is a Positive Relationship Between Economic Growth and the Presence of [a Right to Work] Law and That the Magnitude of the Legislation's Effects May Be Substantial'

By Stan Greer

All across America, Right to Work states have long benefited from economic growth far superior to that of states in which millions of employees are forced to join or pay dues or fees to a labor union just to keep their jobs.

And union bosses and their allies have long tried to argue that no one should pay any attention to the data showing that Right to Work status is correlated with faster growth in jobs and aggregate employee compensation.[1] In recent years, however Big Labor's task in trying to distract public attention from forced-unionism states' poor economic performance has become much more difficult.

A key reason why is the recent publication of a number of scholarly analyses showing that there is a *causal* positive relationship between the presence of a Right to Work law and economic growth.

In a series of articles published since 2010, eminent economist Richard Vedder and his various coauthors have helped build the case that Right to Work laws increase opportunities and raise employees' real incomes.

Workers See 'Greater Economic Opportunity' in Right to Work States

Dr. Vedder, a distinguished professor of economics at Ohio University in Athens, Ohio, and the author of more than 100 papers published in academic journals as well as several books, is a specialist in labor, taxation and education issues.

[1] See, e.g., "Right to Work States Benefit From Faster Growth, Higher Real Purchasing Power: Winter 2017 Update," National Institute for Labor Relations Research, January 2017, available at www.nilrr.org -- the Institute web site.

With fellow Ohio University economist Lowell Galloway, Vedder is the coauthor of the acclaimed book *Out of Work*, an examination of the ties between unemployment and public policies in 20th Century America. [2]

In "An Interstate Analysis of Right to Work Laws," published by the Washington, D.C.-based Competitive Enterprise Institute in 2014, Vedder and coauthor Jonathan Robe summarized a multiple regression analysis conducted by the authors.

Their aim was to determine if some factor or factors other than the lack of Right to Work protections could possibly account for the chronically slower aggregate growth in output and income experienced by states where forced unionism is authorized and promoted. In short, why do workers see "greater economic opportunity" in Right to Work states?

Right to Work Laws Increased 1977-2012 Economic Growth by 11.5 Percentage Points

One Vedder-Robe model incorporated five non-Right to Work variables "for control purposes," including, for example, change "in the employment-population ratio," change "in the proportion of the adult population" with at least a bachelor's degree education, and percentage of the "nonagricultural working population in manufacturing."

Vedder and Robe then reported their findings, which covered the 35 years from 1977 to 2012:

> [O]ur results suggest the overall effect of a [Right to Work] law is to increase [cumulative] economic growth rates by 11.5 percentage points . . . . This result is significant at the 99% confidence level.

In personal per capita income terms, the authors estimated that residents of states that still lacked Right to Work protections as of 2012 had a per income that year $2500 to $3500 lower than would have been the case had forced unionism been prohibited in their state since 1977!

Vedder is just one of a number of respected economists who have concluded in recent years that laws protecting the Right to Work are a means of raising living standards in a state.

Another example is Dr. Michael Hicks, the director for the Center for Business and Economic Research at Ball State University in Muncie, Ind., and the author of three books and more than 50 scholarly papers.

Data Point to a 'Positive' Impact 'on the Economic Well-Being of a State'

In a 2013 study for the Midland, Mich.-based Mackinac Center for Public Policy, Hicks and his coauthor, Michael LaFaive, described a statistical model they had created to measure the

[2] Holmes & Meier, New York, N.Y., 1993.

economic impact of state Right to Work laws. The Hicks-LaFaive model was carefully designed to disentangle Right to Work from "tax policy, weather and other variables" that may affect a state's growth rate.

Hicks and LaFaive also sought specifically to meet the challenge of reverse causation, or "endogeneity," as economists call it:

> There may be factors that influence the adoption of [Right to Work laws], such as high levels of union membership or traditional union antipathy, and these may be correlated with underlying economic growth.

Applied over the 64 years from 1947, when Congress first provided express authorization for state Right to Work laws in Section 14(b) of the Taft-Hartley Act, to 2011, the Hicks-LaFaive model showed "states with [Right to Work] laws had higher economic growth than they would otherwise have had . . . ."

From 1991 to 2011, the most recent period considered by the study, Right to Work laws "boosted average . . . [annual] real personal income growth" by 0.7%, or 15.8 percentage points cumulatively over the course of two decades. Right to Work laws boosted employment growth by a cumulative 8.3 percentage points over the same 20-year period.

Taken as a whole, the Hicks-LaFaive findings "suggest that [Right to Work] laws may have a positive -- at times very positive -- impact on the well-being of a state and its residents."

Yet another highly credentialed economist who has recently investigated the evidence regarding the impact of Right to Work on "growth, employment, investment and innovation" and concluded it is consistent with the findings of scholars such as Richard Vedder and Michael Hicks is Jeffrey Eisenach, senior vice president of NERA Economic Consulting, a global firm that serves clients from offices across North America, Europe, and Asia Pacific.

Eisenach, a specialist in issues concerning market competition, regulation, and consumer protection, has submitted expert testimony in federal court and before the Federal Communications Commission and the Federal Trade Commission, as well as several state utility commissions and foreign courts and regulatory bodies. He has written or edited 19 books and monographs, and has served as vice president of the Washington Economics Club since 2011.

'Weight of the Evidence Strongly and Increasingly Suggests' That Right to Work Laws 'Improve Economic Performance Overall'

In his 2015 paper, "Right-to-Work Laws: The Economic Evidence" (published by NERA Economic Consulting but reflecting his own views only), Eisenach opted not to create his own model to determine whether or not there is a causal relationship between compulsory unionism and diminished growth.

Instead, Eisenach summarized other studies, including the two discussed above, that find that Right to Work is economically beneficial and investigated whether "this evidence is consistent with actual observed results." Again and again, he found that his observations were "in line with the academic literature." With regard to unemployment, for example, Eisenach discovered:

> [Right to Work] states have had lower average annual unemployment in every year from 2001 to 2014. On average, the annual unemployment rate in [Right to Work] states was 0.5 [percentage points] lower than in [non-Right to Work] states. In concrete terms, if [non-Right to Work] states had had the same unemployment rate as [Right to Work] states in 2014, approximately 400,000 more people would have been employed.

Eisenach's observations were also consistent with economic literature suggesting that Right to Work laws "have positive direct and indirect effects on economic output." He cited federal data showing that, from 2001 to 2013, real private-sector GDP cumulatively expanded by more than 30% in Right to Work states, compared to roughly 20% in forced-unionism states.

Theoretical models suggesting that "businesses are more inclined to open plants" in Right to Work states than in non-Right to Work states received especially strong support from the empirical U.S. Census Bureau data cited by Eisenach. He found that, between 2001 and 2012, the number of business establishments in Right to Work states increased by 9.2%, compared with just 2.1% in non-Right to Work states.

Eisenach concluded that the "weight of the evidence strongly and increasingly suggests" that Right to Work laws "improve economic performance overall."

His use of the actual records of states with and without Right to Work laws to test the theories of his fellow economists stemmed from his recognition that "sound analysis is unavoidably a judgment-laden mix of rigorous reasoning ('theory') with careful observation of facts . . . ."[3]

Of course, "data . . . do not speak for themselves . . . ." But at the same time a serious economist cannot simply ignore the real-life experiences of people living under the competing systems he or she is examining:

> It is indisputable that a theory that is inconsistent with empirical data is a poor theory. No theory should be accepted merely because of the beauty of its logic or because it leads to conclusions that are ideologically welcome or politically convenient.[4]

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[3] Don Boudreaux, "Theorizing About Facts: There's No Escaping Theory, " *Cafe Hayek* blog post, April 28, 2015.

[4] *Ibid.*

On the other hand, when sound theoretical models and meaningful empirical data both point in the same direction, as they do in the case of Right to Work laws' positive economic impact, they reinforce each other's credibility. That is one reason why Vedder and Robe could be confident in writing:

> Although many factors besides labor laws affect economic change, the evidence suggests that that there is a positive relationship between economic growth and the presence of [a Right to Work] law and that the magnitude of the legislation's effects may be substantial.

# # #

Stan Greer is the National Institute for Labor Relations Research's senior research associate. He may reached by e-mail at stg@nrtw.org or by phone at 703-321-9606. *Nothing here is to be construed as an attempt to aid or hinder the passage of any bill before Congress or any state legislature.*

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January 2017

Right to Work States Benefit From Faster Growth, Higher Real Purchasing Power -- Winter 2017 Update

Percentage Growth in Non-Farm, Private-Sector Payroll Employment (2005-2015)	Right to Work States	9.7%
	Forced-Unionism States	5.8%
	National Average	6.8%
	Source: Department of Labor, Bureau of Labor Statistics (BLS)	
Percentage Growth in Total Private-Sector, Non-Farm Employment (2005-2015)	Right to Work States	15.4%
	Forced-Unionism States	10.4%
	National Average	11.9%
	Department of Commerce, Bureau of Economic Analysis (BEA)	
Percentage Real Growth in Private-Sector Employee Compensation (2005-2015)	Right to Work States	17.2%
	Forced-Unionism States	12.9%
	National Average	13.6%
	BEA, BLS	
Cost of Living-Adjusted Per Capita Disposable Personal Income (2015)	Right to Work States	$41,355
	Forced-Unionism States	$38,762
	National Average	$40,021
	Missouri Economic Research and Information Center; BEA	
Growth in Number of Residents Aged 35-54 (2005-2015)	Right to Work States	+3.1%
	Forced-Unionism States	-6.2%
	National Average	-3.0%
	U.S. Department of Commerce, Bureau of the Census (BOC)	
Growth in Manufacturing, Private-Sector Payroll Employment (2010-2015)	Right to Work States	7.7%
	Forced-Unionism States	4.4%
	National Average	6.9%
	BLS	
Growth in Employment of Majority-Owned U.S. Affiliates of Foreign Companies (2010-2014)	Right to Work States	20.4%
	Forced-Unionism States	13.4%
	National Average	17.2%
	BEA	
New Privately-Owned Single-Unit Housing Authorizations Per Thousand Residents (2015)	Right to Work States	3.0
	Forced-Unionism States	1.4
	National Average	2.2
	BOC	

(continued on page 2)

(page 2)

Aggregate "Tax Freedom Day"* (2016)	Right to Work States	April 17
	Forced-Unionism States	April 30
	National Average	April 24
	Tax Foundation; BEA	
Welfare (TANF) Recipients Per 1000 Residents (Fiscal 2015)	Right to Work States	4.4
	Forced-Unionism States	14.0
	National Average	9.5
	U.S. Administration for Children and Families; BOC	
Percentage Growth in Number of People Covered by Private Health Insurance (2008-2015)	Right to Work States	+7.6%
	Forced-Unionism States	-0.1%
	National Average	+2.8%
	BOC	

* The term "Tax Freedom Day," was coined and popularized by the nonpartisan, Washington, D.C. -based Tax Foundation. As the Tax Foundation has explained, it is "the day when Americans . . . finally have earned enough money to pay off their total [federal, state and local] tax bill for the year." (For simplicity's sake, the Tax Foundation assumes an equal amount of income is earned every day, and does not distinguish weekdays from weekends.)

Indiana and Michigan became Right to Work states in early 2012 and early 2013, respectively. Both are counted as forced-unionism states for analyses featuring data no more recent than 2011. Indiana and Michigan are both excluded from multi-year analyses including 2013 data. For analyses covering 2013 or 2014 alone, both Indiana and Michigan are counted as Right to Work states. Wisconsin, whose Right to Work law was adopted in March 2015, is counted as a Right to Work state for the analyses covering 2015 or 2016 alone. Otherwise, it is counted as a forced-unionism state. Since West Virginia's Right to Work law was not adopted until this year, it is counted as Right to Work only for the analysis covering 2016 alone.

To obtain more detailed information about how any or all of the above comparative economic data were derived, contact Stan Greer -- e-mail stg@nrtw.org or call 703-321-9606.

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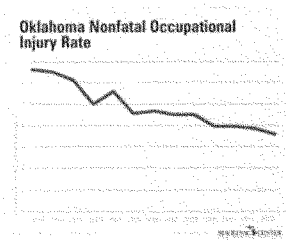
A NEWS SERVICE FOR THE PEOPLE OF MICHIGAN FROM THE MACKINAC CENTER FOR PUBLIC POLICY

Little Evidence That Unions Make Workers Safer

Workplace injuries are plummeting in right-to-work states

By JASON HART | Feb. 5, 2016

Are workers safer when they're forced to pay union fees in order to have a job?



Repeating a talking point used in Michigan and other states, union leaders at the AFL-CIO are warning West Virginians a right-to-work law would lead to more injuries and deaths on the job.

Right-to-work prevents unions from having workers fired for refusing to pay union fees. Right-to-work doesn't restrict union membership or negotiations over safety equipment, training, or anything else.

Recent federal data show workplace injury and fatality rates continuing a decades-long decline in right-to-work and forced unionization states alike. The latest U.S. Bureau of Labor Statistics nonfatal work injury figures are from 2014, just one year after Michigan implemented right-to-work and two years after Indiana did so.

Michigan's nonfatal occupational injury rate was 4.1 per 100,000 full-time employees in 2012, the year before right-to-work took effect. The state's nonfatal work injury rate declined to 3.8 in 2013 and 3.7 in 2014.

In 2011 – the year before Indiana's right-to-work law took effect – Indiana had a nonfatal work injury rate of 4.3 per 100,000 full-time employees. That rate dropped to 4.0 in 2012, dropped again to 3.8 in 2013, and was 4.0 in 2014.

Not only have new right-to-work states reported declining workplace injury rates, in many cases right-to-work states are statistically safer than forced unionization states.

West Virginia had a fatal work injury rate of 8.6 per 100,000 in 2013, higher than all but two right-to-work states. Does that mean mandatory union dues made West Virginia a more dangerous place to work than 22 right-to-work states?

Of course, the mining industry is central to West Virginia's economy, and mining jobs are more dangerous than white collar positions.

This is a point the AFL-CIO hopes policymakers in states considering right-to-work will overlook in the face of "right-to-work is wrong" chants: the mix of industries in each state dramatically affects workplace injury rates, and the most dangerous jobs tend to be more prevalent in right-to-work states for geographic and other reasons.

Right-to-work states North Dakota and Wyoming had the highest fatal occupational injury rates in 2013, followed by forced unionization states West Virginia, Alaska, and New Mexico.

As of 2014, roughly 1 in 5 of the jobs in North Dakota and Wyoming was in a "Construction and Extraction Occupation" or a "Transportation and Material Moving Occupation" according to BLS. Fatal work injuries are far more common in construction, transportation, agriculture, and natural resource extraction jobs than in other professions.

In Hawaii – the state with the lowest fatal workplace injury rate in 2013 – "Construction and Extraction Occupations" and "Transportation and Material Moving Occupations" account for barely 1 in 10 jobs.

Union attempts to prove a causal relationship between right-to-work laws and more dangerous workplaces clash with BLS data nationally, too.

In recent years, the nation's fatal workplace injury rate has declined while at the same time a growing percentage of American jobs are in right-to-work states.

In December 2006, 39 percent of America's nonfarm employment was located in right-to-work states and the fatal work injury rate was 4.2 per 100,000 full-time workers.

By December 2014, 45 percent of America's nonfarm jobs were in right-to-work states and the fatal work injury rate had dropped to 3.3.

NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC.
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February 28, 2017

Honorable Tim Walberg
Chairman
Subcommittee on Health, Employment, Labor, and Pensions
Committee on Education and the Workforce
U.S. House of Representatives
2176 Rayburn House Office Building
Washington, DC 20515-6100

Dear Chairman Walberg:

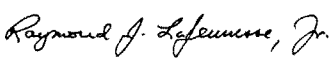
Thank you for inviting me to testify at your Subcommittee's February 14, 2017, hearing entitled "Restoring Balance and Fairness to the National Labor Relations Board." I hope that the members of the Subcommittee found my testimony informative and useful.

During the hearing a number of claims were made by another witness concerning the effects of Right to Work laws on employee compensation, health insurance, poverty, job fatalities, and states' general economic well-being. Because that was not the subject of the hearing, I had not addressed those issues in my written statement. Therefore, I am submitting for the record the following documents which address those issues that, pursuant to the Committee's "Requirements for Witnesses," I have emailed to the Committee staff in electronic format:

- Stan Greer, "A Widening Compensation Advantage for Employees in Right to Work States," National Institute for Labor Relations Research Fact Sheet (Jan. 7, 2017);
- Stan Greer, "Since 2008, Private Health Coverage Has Risen by 6.04 Million in Right to Work States, But Hasn't Risen a Bit in Forced-Dues States," National Right to Work Committee (Dec. 9, 2016);
- Stan Greer, "Cost of Living-Adjusted Poverty Higher in Forced Unionism States," National Right to Work Committee (Nov. 7, 2016);
- Jason Hart, "Little Evidence That Unions Make Workers Safer," Mackinac Center for Public Policy (Feb. 5, 2016);
- James M. Hohman, "Right-to-Work States Have Lower Workplace Injury Rates," Mackinac Center for Public Policy (Dec. 6, 2012);
- "Right to Work States Benefit from Faster Growth, Higher Real Purchasing Power–Winter 2017 Update," National Institute for Labor Relations Research (Jan. 2017); and,

- Stan Greer, "Recent Research Bolsters Economic Case for State Right to Work Laws," National Institute for Labor Relations Research (Jan. 17, 2017).

Sincerely yours,



Raymond J. LaJeunesse, Jr.

RJL/rpc

[Additional submissions by Mr. Sablan follow:]

Appellate Court Outcomes for
National Labor Relations Board Decisions
Fiscal Years (FY) 2012 through 2016

FY 2016
Number of Court Decisions on Appeal: 121
Total Sustained in Full or in Part: 95

FY 2015
Number of Court Decisions on Appeal: 37
Total Sustained in Full or in Part: 30

FY 2014
Number of Court Decisions on Appeal: 13
Total Sustained in Full or in Part: 11

FY 2013
Number of Court Decisions on Appeal: 40
Total Sustained in Full or in Part: 28

FY 2012
Number of Court Decision on Appeal: 73
Total Sustained in Full or in Part: 69

FIVE YEAR TOTAL
Number of Court Decisions on Appeal: 284
Total Sustained in Full or in Part: 233

Data Source: NLRB

[Additional submissions by Chairman Walberg follow:]

Submission for the record

to the

Subcommittee on Health, Employment, Labor, and Pensions

of the

Education and the Workforce Committee

of the

United States House of Representatives

on behalf of

NATSO, Representing America's Travel Plazas and Truckstops

for the Hearing:

"Restoring Balance and Fairness to the National Labor Relations Board"

David H. Fialkov
Vice President, Government Affairs
Legislative and Regulatory Counsel
NATSO
703-739-8501
dfialkov@natso.com

The National Association of Truckstop Operators (NATSO), representing America's travel plazas and truckstops, submits this statement for the record with respect to the House Education and the Workforce Subcommittee on Health, Employment, Labor, and Pensions' February 14, 2017, hearing regarding "Restoring Balance and Fairness to the National Labor Relations Board."

By way of background, NATSO is a national trade association representing travel plaza and truckstop owners and operators. NATSO's mission is to advance the success of truckstop and travel plaza members. Since 1960, NATSO has dedicated itself to this mission and the needs of truckstops, travel plazas, and their suppliers by serving as America's official source of information on the diverse industry. NATSO also acts as the voice of the industry on Capitol Hill and before regulatory agencies. NATSO currently represents approximately 1,500 travel plazas and truckstops nationwide, comprised of more than 1,000 chain locations and several hundred independent locations, owned by approximately 200 corporate entities. Approximately 80 percent of NATSO members' facilities are located within one-quarter mile of the Interstate Highway System, serving interstate travelers exiting the highway and serving as the "home away from home" for the nation's professional truck drivers.

Efficient and effective operations at truckstops and travel plazas allow NATSO's members to sell products to the trucking industry and the American public at lower costs. This makes the costs of traveling less expensive and lowers the costs of transporting goods by truck, which can serve to make all goods more affordable.

NATSO's members operate in a diverse and evolving industry. Every travel center and truckstop includes multiple services, from motor fuel sales to auto-repair and supply shops, to hotels, sit-down restaurants, quick-service restaurants and food courts, and convenience stores. It is an evolving industry that once was tailored primarily to truck drivers, and now caters to the entire traveling public, as well as the local population that lives in close proximity to a travel center location.

NATSO's members are uniquely positioned to address the new joint employer standard because they will experience it as both franchisors and franchisees. Indeed, some of the larger truckstop chains have franchise locations throughout the country; at the same time, many travel plaza owners and operators – from large chains to independent operators – are franchisees of chain restaurants. Some are also hotel franchisees.

The comments that follow will provide a brief overview of how the new joint employer standards will impact NATSO's members, and will conclude by placing these new standards into the larger context of recent executive branch efforts to expand the universe of workers for which employers are responsible for providing benefits. Although well-intentioned, these efforts will result in harming the very individuals that they are designed to protect. NATSO believes the best way to avoid this outcome is for Congress to enact a permanent legislative solution to the joint

employer issue that provides certainty to small and large businesses and promotes economic growth and job creation.

New Joint Employer Standards' Effect on NATSO Members

As the Committee undoubtedly knows, in 2015, the National Labor Relations Board (NLRB) announced a new legal standard for determining if a business is the "joint employer" of individuals employed by another business. Under the new standard, the NLRB will consider two or more businesses to be joint employers if they share or codetermine those matters governing the "essential terms and conditions of employment." Specifically, the NLRB will no longer require that a joint employer *exercise* the authority to control employees' terms and conditions of employment, but simply *possessing or potentially possessing* that authority may be sufficient for a joint employer finding.

A joint employer finding has serious consequences for a business. It could require a business to engage in collective bargaining with a union that represents (or seeks to represent) a subcontractor's or franchisee's / franchisor's employees. It could also lead to shared liability for unfair labor practices committed against a subcontractor's or franchisee's / franchisor's employees.

This has potentially dramatic consequences for the travel plaza and truckstop industry. Beyond the franchisor-franchisee context, travel plazas work with a number of contract workers such as equipment inspectors and fuel delivery personnel. The nature of this work is such that our members – acting responsibly – may provide detailed instructions as to how equipment must be inspected to ensure that there are no substance leaks, or when fuel must be delivered to minimize disruptions and potential dangers. An expanded joint-employer standard could *penalize* truckstop owners by viewing these work requirements as indicia of a joint employer relationship.

The NLRB's previous joint employer standard required that control over another entity's employees must be "direct and immediate" in order for joint employment to exist. This standard was easy to understand and easy to apply in practice. It enabled NATSO's members – large and small – to enter into a variety of business relationships with the confidence that they would not be held responsible for another entity's employees. They knew that they could provide high-level requirements for their business partners' employees (minimum training levels; inspection and delivery methods; etc.) and not be considered joint employers provided they did not affect the *terms and conditions of employment* (hiring; firing; work schedules; wages; etc.)

That certainty is now gone. Beyond the ambiguous, high-level dicta provided in the NLRB's decision in *Browning-Ferris Industries, Inc.*[1], there is very little guidance that

[1] 362 NLRB 186, slip op. (August 27, 2015).

NATSO's members can refer to when determining whether they may be joint employers with other entities with whom which they have contractual relationships.[2] What is an acceptable level of "control" over contractors' methods without becoming a joint employer? How much of this control may actually be exercised?

This uncertainty creates a risky and undesirable business environment for NATSO members. Unless much-needed certainty and stability comes soon, the consequences will be real and harmful.

Some companies fear that they will be considered joint employers with all of their contractors, franchisees, etc., and may decide to exert significantly *more* control over those entities' day-to-day operations in order to mitigate liability exposure. This will entail high administrative costs and an inefficient use of employees' time and energy. NATSO members may need to be more involved in who equipment inspectors hire and how many hours these individuals work per week. At the same time, in their capacity as franchisees they will be relegated to middle managers if the franchisor understandably elects to impose near total control over their franchisees. NATSO members will lose decision-making authority (work schedules, hiring/firing, wages, etc.) with respect to their chain restaurant franchises. The value of these franchises as ongoing business concerns will diminish substantially.

Other companies take the opposite approach and may try to *avoid* joint employer relationships by exerting significantly *less* control over their contractors and/or franchisees. This will also lead to undesirable consequences: Fuel retailers will be disincentivized from ensuring that their contractor-equipment inspector completes his work adequately for fear that micro-managing this process will lead to joint employer status. Franchisors may be less inclined to assist their franchisees on matters unrelated to core issues affecting the franchise brand, when such assistance on matters such as store appearance, product preparation and customer satisfaction. These are the primary reasons for operating as a franchisee. Some franchisors may reduce their use of the franchise model entirely.

All of these results will make it harder for NATSO's members to grow their businesses and create jobs.

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[2] The NLRB's nonbinding memorandum opinion on whether Freshii, a restaurant franchisor, should be held responsible as a joint employer is of little practical utility. *See* Advice Memorandum from Barry J. Kearney, Assoc, Gen. Counsel, Div. of Afvice, Office of the Gen. Counsel NLRB to Peter Sung Ohr, Reg. Dir., Region 13 (April 28, 2015) (concluding that Freshii was not a joint employer). First, as a nonbinding advice memorandum it has no precedential effect and thus cannot be responsibly relied upon by other businesses. Second, the case was not representative of most franchisor-franchisee relationships because Freshii exerts *far* less control over its franchisees than is the case with most franchisor-franchisee relationships.

The New Joint Employer Standard in Context

The NLRB's *Browning-Ferris* case is significant but should not be viewed in a vacuum. The NLRB administers and enforces the National Labor Relations Act (NLRA), which protects employees' right to organize and collectively bargain and defines what are considered to be unfair labor practices by employers. These are important issues but their scope is limited.

The real significance of the NLRB's new joint employer standard is that it reflects a larger trend in recent years to expand the scope of individuals for whom employers are responsible for providing benefits. Shortly after the NLRB's decision in *Browning-Ferris*, the Department of Labor issued its own revised interpretation[3] of when two separate employers could be deemed joint employers and found jointly liable for purposes of the Fair Labor Standards Act, which establishes minimum wage and overtime standards for most private sector employees. This guidance, like the NLRB's new approach, expands the definition of joint employer.[4] This is particularly significant given two parallel Department of Labor initiatives: a final rule to expand the universe of employees entitled to overtime pay (implementation of which is currently tied up on the courts),[5] and new guidance that substantially narrows the definition of an "independent contractor."[6] Additionally, the Occupational Safety and Health Administration (OSHA) reportedly issued an internal memorandum encouraging its investigators to conduct a joint-employer analysis when investigating alleged offenses. The memo outlined a joint-employer standard that is remarkably similar to that outlined by the NLRB in *Browning-Ferris.*

Additionally, the NLRB is in an ongoing unfair labor practice trial against McDonald's alleging that the restaurant franchisor is a joint employer with nearly 80 of its franchisees. This case, if ultimately resolved in favor of the board, would dramatically alter the legal and economic landscape surrounding the franchise business model.

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[3] *See* DOL AI No. 2016-1.

[4] Specifically, it for the first time distinguishes between *horizontal* joint employment and *vertical* joint employment, providing a list of examples of both and describing various factors to be used to assess joint employment.

[5] *See* 81 Fed. Reg. 32391 (May 23, 2016) (increasing the salary threshold for exempt employees); *see also State of Nevada et al v. U.S. Dep't of Labor*; Civ. Act. No. 4:16-CV-00731 (E.D. TX) (Nov. 22, 2016) (temporary restraining order staying enforcement of the Overtime Rule).

[6] DOL AI No. 2015-1 (July 15, 2015) (implying that most, if not all, individuals treated as independent contractors by employers are inappropriately classified as such and should in fact be treated as employees under the Fair Labor Standards Act).

Thus, the new joint employer standards represent a trend that has implications beyond the NLRB but throughout virtually all of the labor regulations in the United States.

But it doesn't stop there. Being considered a joint employer means a small business could have legal exposure under various statutes that contain specific small business exemptions. These statutes include Title VII of the Civil Rights Act and the employer mandate under the Affordable Care Act, among others. The potential legal liability created by this new joint employer standard cannot be overstated.

Conclusion

NATSO reiterates its appreciation to the House Education and the Workforce Committee for highlighting the serious problems associated with the NLRB's new joint employer standard. With a new Presidential administration, business owners and operators are optimistic that certain labor regulations may be more balanced and reasonable for both businesses and employees. However, this optimism does not equate to certainty for their businesses. Congress can and should act to provide this certainty.

As representatives of an industry that will be uniquely harmed by this new standard, and the larger trend of which it is a part, NATSO urges Congress to intervene and return the joint employer standard to the efficient, effective rule that had been in place for more than thirty years before the *Browning-Ferris* case.

February 14, 2017

Dear Chairman Walberg and Ranking Member Sablan:

On behalf of Argentum, thank you for holding today's hearing entitled, "Restoring Balance and Fairness to the National Labor Relations Board." We believe the Subcommittee should carefully examine the serious impact associated with the National Labor Relations Board's (NLRB) unprecedented policy changes over the past eight years. These changes, if not addressed will continue to negatively impact not only labor relations among management and workers but for Argentum, the senior living residents we serve.

Argentum member companies operate senior living communities offering assisted living, independent living, and memory care services to older adults and their families. Argentum is the largest national association exclusively dedicated to supporting companies operating professionally managed, resident-centered senior living communities and the older adults and families they serve. Since 1990, Argentum has advocated for choice, accessibility, independence, dignity, and quality of life for all older adults.

Argentum actively participates with the Coalition for A Democratic Workplace (CDW), a broad-based coalition of over 600 organizations representing hundreds of thousands of employers and millions of employees in various industries across the country. Argentum remains deeply concerned with the disruption caused by the NLRB's eight-year campaign to re-write labor laws. Some of the issues Argentum has advocated independently and in conjunction with CDW and the U.S. Chamber of Commerce include the so-called Employee Free Choice Act (EFCA), which would have replaced secret ballots in unionization elections with "card check," a process that would have forced employees to choose whether or not to sign union authorization cards in front of coworkers and union organizers, exposing employees to potential intimidation and harassment by those in favor of unionization. When EFCA was defeated, Argentum, CDW, and the U.S. Chamber of Commerce turned its focus to the NLRB's regulatory overreach and its efforts to enact the goals of EFCA through its decisions and regulations.

Argentum has become alarmed over the last eight years at the NLRB's seemingly one-sided efforts to amend the union election process to benefit unions at the expense of employers and employees. It is apparent the Board's action did not consider the negative impact its decisions would have on employer, employees and the economy. The NLRB's regulatory overreach have forced Argentum and other organizations to directly challenge the Board rules through amicus briefs and legal actions. Argentum, in conjunction with CDW and the U.S. Chamber of Commerce

1650 King Street #602 Alexandria, VA 22314 703.894.1805 argentum.org

have also advocated for legislation, policy riders and Congressional Review Act Resolutions to rein in the Board. Despite our individual and collective efforts, the Board continued with its agenda at the expense of worker and employer rights and our economy.

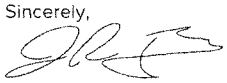
The time has come for Congress and the new Administration to address the Board's most egregious policy changes. We think three issues that Congress and the Administration should address as priorities are the ambush election rule, the Specialty Healthcare decision which allows micro-unions, and the joint employer standard. Argentum will continue to advocate for legislative solutions to these harmful changes.

Argentum has high hopes that the Administration will quickly nominate members to the NLRB who will be fair to employees, employers, and unions. The Board was always intended to act as an impartial entity in deciding labor disputes and we sincerely hope that this occurs again.

We appreciate your consideration of these issues and look forward to working with members of the Subcommittee to advance policies that benefit both employers and employees and that ultimately benefit the residents we serve in senior living communities.

We would welcome the opportunity to discuss these and other NLRB policies and their impact on our senior living employees, employers and residents. Please let me know of any way we can assist you.

Sincerely,



James Balda
President and CEO
Argentum

CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

RANDEL K. JOHNSON
SENIOR VICE PRESIDENT
LABOR, IMMIGRATION & EMPLOYEE
BENEFITS

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WASHINGTON, D.C. 20062
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February 28, 2017

Hon. Tim Walberg, Chairman
Subcommittee on Health, Employment, Labor & Pensions
Committee on Education and the Workforce
United States House of Representatives
Washington, DC 20515

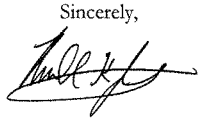
Dear Chairman Walberg:

The U.S. Chamber of Commerce, the world's largest business federation representing the interests of more than three million businesses and organizations of every size, sector, and region, appreciates this opportunity to submit the attached treatise for the record as part of the Subcommittee's February 14, 2017 hearing entitled "Restoring Balance and Fairness to the National Labor Relations Board."

Entitled, *The Record of the National Labor Relations Board in the Obama Administration: Reversals Ahead?*, we believe that this detailed study will be invaluable in helping to chart a path forward in the labor relations arena. As you know, the National Labor Relations Act is designed to strike a balance between the rights of workers, employers and unions. Unfortunately, over the last eight years, the National Labor Relations Board (NLRB) has upset this delicate balance by overturning decades of case precedent and pursuing one-sided regulatory initiatives. The treatise captures these last eight years of the NLRB's policy overreach in one comprehensive document and may serve as a reference point as you look to return balance to national labor law.

We wish to thank you for taking the time to hold this important hearing and trust that the attached treatise will provide you with critical insight into NLRB's recent policy mistakes. We look forward to working with you as you continue to examine these important issues. Please do not hesitate to contact us if we may be of assistance this matter.

Sincerely,



[Extensive material was submitted by Chairman Walberg. The submission for the record is in the committee archive for this hearing.]

[Additional submission by Mr. Wilson follows:]

Rep. Joe Wilson
Statement for the Record
Hearing: "Restoring Balance and Fairness to the National Labor Relations Board"
Tuesday, February 14, 2017, 10:00 a.m., 2175 Rayburn

The title of this hearing, "Restoring Balance and Fairness to the National Labor Relations Board," has real meaning to the people of South Carolina. During the last administration, an attempt was made to block Boeing from operating in Charleston, South Carolina. Boeing had already completed a 1.1 million square foot building and hired 1,000 employees, when the NLRB dictated that they could not produce 787 jetliners.

With the leadership of Ambassador Nikki Haley, Attorney General Alan Wilson, and the entire delegation, South Carolina fought back and won. Now there are 8,000 jobs at the Boeing facility, which is important to me because the suppliers have created jobs throughout the Second Congressional District. The cables are produced by Prysmian of Lexington, the tubing by the Zeus Corporation of Orangeburg and Aiken. AGY of Aiken produces the interiors, Rachel and Bill Best of Thermal Engineering of Columbia provides composite painting experts. Thousands of jobs have been created across our state despite the efforts made by the NLRB.

[Questions submitted for the record and their responses follow:]

MAJORITY MEMBERS:

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JOE WILSON, SOUTH CAROLINA
DUNCAN HUNTER, CALIFORNIA
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GLENN "GT" THOMPSON, PENNSYLVANIA
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CAROL SHEA-PORTER, NEW HAMPSHIRE
ADRIANO ESPAILLAT, NEW YORK

March 16, 2017

Ms. Reem Aloul
BrightStar Care of Arlington
2300 Ninth Street, South
Suite 503
Arlington, VA 22204

Dear Ms. Aloul:

Thank you for testifying at the Subcommittee on Health, Employment, Labor, and Pensions hearing entitled "Restoring Balance and Fairness to the National Labor Relations Board." I appreciate your participation.

Enclosed are additional questions submitted by committee members following the hearing. Please provide written responses no later than March 30, 2017, for inclusion in the official hearing record. Responses should be sent to Callie Harman of the committee staff, who can be contacted at (202) 225-7101.

Thank you again for your contribution to the work of the Committee.

Sincerely,

Tim Walberg
Chairman
Subcommittee on Health, Employment, Labor, and Pensions

Enclosure

cc: The Honorable Gregorio Kilili Camacho Sablan, Ranking Member, Subcommittee on Health, Employment, Labor, and Pensions

Rep. Rooney (FL)

1. I know firsthand how essential the contractor-subcontractor relationship is in the construction industry. During my time running a construction company, which operated in many states, I hired many specialty subcontractors to execute portions of the work based on their record of safety and performance. Those subcontractors controlled the essential terms of working conditions of their employees – not our company. The subcontractors were hired not because I intended to tell them who to hire or how much to pay their employees, but because I did not have to do that.

   How would you react if your franchisor ceased doing business with you to avoid joint employer liability under this illogical, sweeping new standard?

MAJORITY MEMBERS:

VIRGINIA FOXX, NORTH CAROLINA, *Chairwoman*

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CAROL SHEA-PORTER, NEW HAMPSHIRE
ADRIANO ESPAILLAT, NEW YORK

March 16, 2017

Mr. Raymond J. LaJeunesse, Jr.
Vice President and Legal Director
National Right to Work Legal Defense and Education Foundation
8001 Braddock Road
Springfield, VA 22160

Dear Mr. LaJeunesse:

Thank you for testifying at the Subcommittee on Health, Employment, Labor, and Pensions hearing entitled "Restoring Balance and Fairness to the National Labor Relations Board." I appreciate your participation.

Enclosed are additional questions submitted by committee members following the hearing. Please provide written responses no later than March 30, 2017, for inclusion in the official hearing record. Responses should be sent to Callie Harman of the committee staff, who can be contacted at (202) 225-7101.

Thank you again for your contribution to the work of the Committee.

Sincerely,

Tim Walberg
Chairman
Subcommittee on Health, Employment, Labor, and Pensions

Enclosure

cc: The Honorable Gregorio Kilili Camacho Sablan, Ranking Member, Subcommittee on Health, Employment, Labor, and Pensions

Rep. Wilson (SC)

1. In your testimony you identified many issues that have arisen over the last eight years from the NLRB. I was recently grateful to team with Congressman Steve King to introduce the National Right to Work Act. What further remedies do you propose to deal with the problems that you have identified?

2. The NLRB has taken numerous steps to expand union membership. However, I have heard complaints from employees who wish to rid themselves of unions and find the process difficult, especially due to the last ditch efforts of unions who bring blocking charges. In your experience has the current general counsel and his predecessor applied the same degree of scrutiny to union blocking charges that they apply to charges brought by an employee against his union?

3. The ambush election rule requires that employers share employee information with unions. Can an employee opt out of releasing their information if they have personal privacy concerns? Are employee privacy rights protected under the rule?

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March 16, 2017

Mr. Kurt G. Larkin
Partner
Hunton & Williams LLP
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, VA 23219

Dear Mr. Larkin:

Thank you for testifying at the Subcommittee on Health, Employment, Labor, and Pensions hearing entitled "Restoring Balance and Fairness to the National Labor Relations Board." I appreciate your participation.

Enclosed are additional questions submitted by committee members following the hearing. Please provide written responses no later than March 30, 2017, for inclusion in the official hearing record. Responses should be sent to Callie Harman of the committee staff, who can be contacted at (202) 225-7101.

Thank you again for your contribution to the work of the Committee.

Sincerely,

Tim Walberg
Chairman
Subcommittee on Health, Employment, Labor, and Pensions

Enclosure

cc: The Honorable Gregorio Kilili Camacho Sablan, Ranking Member, Subcommittee on Health, Employment, Labor, and Pensions

Rep. Wilson (SC)

1. The recent NLRB decision in Columbia University allowed graduate student assistants to unionize and determined that they were employees under the Act. Are there unintended consequences of expanding the definition of employee out so far?

Rep. Rooney (FL)

1. For nearly forty years, I have been involved in both union and non-union construction in almost all industry sectors. Before that, I learned carpentry in the union apprentice program while in high school and college. Many types of construction (i.e., roads, bridges, waste and water treatment plants and other civil works) require tradespersons who are skilled in multiple crafts. We call this cross-functional skill leverage in our companies. Multi-skill capacity allows a worker and crew to be efficient and productive, adding value consistently as the project proceeds through different phases of execution. Under the Board's misguided decision to allow these fractured, de minimis "micro – unions," employers will be unable to develop this productivity-enhancing skill leverage. In a time when United States businesses compete globally and need as much productivity enhancement and efficiency as possible, this decision will take us backwards.

   What additional costs and barriers to productivity will be sustained if your clients are forced to accept these micro unions? And how would these impact employment and development of the industry's skill development programs?

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March 22, 2017

Chairman Tim Walberg
Subcommittee on Health, Employment, Labor and Pensions
Committee on Education and the Workforce
U.S. House of Representatives
2176 Rayburn House Office Building
Washington, DC 20515-6100

Chairman Walberg,

Thank you for the opportunity to testify at the Subcommittee on Health, Employment, Labor, and Pensions hearing entitled "Restoring Balance and Fairness to the National Labor Relations Board." I very much appreciate the opportunity to have the small business owners' and the franchise community's voice heard on such an important regulatory matter.

I also appreciate the question from Rep. Rooney (FL), enclosed in your correspondence dated March 16, 2017. Enclosed please find my response.

Please do not hesitate to reach out to me if you require additional information.

Sincerely,

Reem Aloul
President
Zay Enterprises, Inc., dba BrightStar Care of Arlington

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Answer for the record
Question from Rep. Rooney (FL)
Hearing entitled "Restoring Balance and Fairness to the National Labor Relations Board"
Subcommittee on Health, Employment, Labor, and Pensions

Thank you for your question, Rep. Rooney. I appreciate your thoughtful comments and understanding of the joint employer issue facing franchising systems and contractors, alike. I also appreciate you sharing your relevant contractor-subcontractor relationship story with me. While legal terms may be different between contracting and franchising agreements, the business premise and approach is actually quite similar. Both aim at growing their businesses/brands, serving more clients, and providing more job opportunities. Both appreciate collaborative partnerships. Both must be deeply acknowledged for enhancing entrepreneurial skills and supporting small businesses in this great country. We are exporting these successful models to the rest of the world.

It is not difficult at all for me to argue that I am the employer in my business; not the franchisor. It is very clear. As a matter of fact, many Committee Members seemed to agree with my position on this at the hearing. The problem, though, is that the written regulation does not support this position beyond any doubt; beyond any room for different interpretation, by different people, at different times. This directly, negatively affects the potential for new franchisor-franchisee relationships (as well as contractor-subcontractor), and of course affects existing relationships/agreements. Economic opportunities exist and flourish in a fair, rational, clear regulatory environment. The NLRB's new definition of employer is not. It is nonsensical to assume that a business owner/leader (whether a successful contractor or a growing franchisor) would choose this path simply to avoid hiring employees. Nonsensical.

You are right in assuming that these illogical policies circumvent the important relationships between business partners, and will strain the long-term health of such contractual arrangements. I am fortunate that I partnered with a good franchisor. We are in a years-long agreement— typical of the committed partnerships you find in the franchising system. We are in business together, but we are not employers together. I am the employer; the franchisor only provides tools that help me take good care of my employees in a reliable, cost-efficient manner. If business owners are not distracted with these regulatory issues, they will spend their time, energy and resources on growing their businesses and providing even greater job opportunities. We could be more creative in employee recruiting and retention and create more jobs if it weren't for the current doctrine of joint employer.

Reem Aloul, President
Zay Enterprises, Inc., dba BrightStar Care of Arlington
03/22/2017. Arlington, VA

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March 30, 2017

Honorable Tim Walberg
Chairman
Subcommittee on Health, Employment, Labor, and Pensions
Committee on Education and the Workforce
U.S. House of Representatives
2176 Rayburn House Office Building
Washington, DC 20515-6100

Dear Chairman Walberg:

Below are my responses to the additional questions submitted by Representative Joe Wilson (SC) following my testimony at your Subcommittee's February 14, 2017, hearing entitled "Restoring Balance and Fairness to the National Labor Relations Board."

1. In your testimony you identified many issues that have arisen over the last eight years from the NLRB. I was recently grateful to team with Congressman Steve King to introduce the National Right to Work Act. What further remedies do you propose to deal with the problems that you have identified?

RESPONSE: The National Right to Work Act is an important remedy for the failures of the NLRB over the past eight years to vigorously enforce the rights of individual workers covered by the National Labor Relations Act, because it would eliminate the need to depend on the NLRB to enforce the right of workers not to subsidize union political and other non-bargaining activities recognized by the Supreme Court in *Communications Workers v. Beck*, 487 U.S. 735 (1988). Other remedies that I propose are as follows:

a) As soon as possible, President Trump should nominate and the U.S. Senate should expeditiously confirm nominees to fill the two existing vacancies on the NLRB with Board Members who respect the rights of workers to refrain from union support.
b) Provide that unions may become exclusive bargaining representatives only through Board-conducted secret-ballot elections by amending NLRA Section 9(a), 29 U.S.C. § 159(a), to read: "Representatives selected, through a Board-conducted secret-ballot election, for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes shall be the exclusive representatives of all the employees in such unit for the

purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . ."

c) Specify that decertification petitions are barred *only* within one year of a Board-conducted election by amending the first sentence of NLRA Section 9(c)(3), 29 U.S.C. § 159(c)(3), to read as follows: "No election shall be directed in any bargaining unit or any subdivision within which in the preceding twelve-month period a valid election shall have been held, but the Board shall not thereafter bar any election petitioned for by unit employees under section 159(c)(1)(A)(ii)."

d) Specify a period, sufficient to allow workers to obtain information about the pros and cons of unionization, that must pass after the filing of an election petition before the balloting can occur by amending the final sentence of NLRA Section 9(c)(1) to read, e.g., as follows: "If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof, *Provided*, That no election shall be conducted sooner than forty (40) days after the filing of a petition for an election."

e) Add a subsection (6) to NLRA Section 159, 29 U.S.C. § 159, providing that unfair labor practice charges will not block decertification elections, but instead will be considered (if deemed sufficiently meritorious by the NLRB General Counsel) in conjunction with any objections to an election after the ballots have been cast.

f) To make it more difficult for the Board to gerrymander "micro-units," amend NLRA Sections 9(b) and 9(c)(5), 29 U.S.C. §§ 9(b) & 9(c)(5), to authorize the Board to determine *only* the "most appropriate" bargaining unit.

g) End the common union practice of utilizing dues deduction authorizations ("checkoffs") with narrow "window periods" for revocation to prevent employees who otherwise have no obligation to pay union dues (either because they are in a Right to Work state or the contract has expired) to stop dues deductions by amending 29 U.S.C. § 186(c)(4) to provide that such authorizations "shall be revocable at will" rather than "shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner." The Board enforces this provision and often allows unions to manipulate their "window periods" to continue to collect dues for months and even years after workers attempt to revoke their checkoffs. *See*, e.g., *Stewart v. NLRB*, No. 15-1102 (D.C. Cir. Mar. 21, 2017), *vacating & remanding* 358 N.L.R.B. 704 (2012); *Teamsters Local 385*, Cases 12-CB-136934 etc. (ALJ Decision Mar. 22, 2017) (a particularly egregious example of this union practice).

2. The NLRB has taken numerous steps to expand union membership. However, I have heard complaints from employees who wish to rid themselves of unions and find the process difficult, especially due to the last ditch efforts of unions who bring blocking charges. In your experience has the current general counsel and his predecessor applied the same degree of

scrutiny to union blocking charges that they apply to charges brought by an employee against his union?

RESPONSE: The short answer to this question is "no." The experience of the Foundation's Staff Attorneys, several of whom regularly handle Board cases for workers, has been that under General Counsel Richard F. Griffin, Jr. (appointed 11/4/13), and his predecessor, Acting General Counsel Lafe Solomon (appointed 6/21/10), union blocking charges, including frivolous charges, have been routinely granted to delay and/or prevent decertification elections while charges brought by workers against unions have frequently been dismissed or, if not dismissed outright, their disposition was often delayed by mandatory submission to the Division of Advice in Washington, D.C., which then usually directed the applicable Regional Director to dismiss the charges. *See*, e.g., General Counsel Memo 16-01 (Mar. 22, 2016) (mandatory submissions to Advice continue to include "Cases involving difficult *Beck* issues").

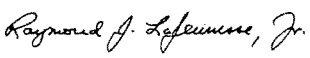
3. The ambush election rule requires that employers share employee information with unions. Can a employee opt out of releasing their information if they have personal privacy concerns? Are employee privacy rights protected under the rule?

RESPONSE: The ambush election rules do not allow employees who have personal privacy concerns to opt out of the release of their personal contact information, including personal email addresses and phone numbers, to a union that attempts to organize their bargaining unit. In issuing that requirement, the Board cavalierly brushed aside all concerns for employee privacy and personal security, refusing to permit employees to opt out or put themselves on a "do not call" list, 79 Fed. Reg. at 74,341-52, despite the well-known abuse every citizen faces from identity theft and solicitors' misuse of personal information. *See* FTC Do-Not-Call Rule, 16 CFR part 310; CAN-SPAM Act, 15 U.S.C. § 7701 *et seq*. (protecting individuals from receiving unsolicited e-mail communications).

There is no effective protection of employee privacy rights under the ambush election rules. The Board's only response to employees' legitimate privacy concerns is a weak warning to unions not to use the information "for purposes other than the representation proceeding, Board proceedings arising from it, and related matters." 79 Fed. Reg. at 74,336. The Board does not define "related matters," leaving a gaping hole regarding the use of employees' personal data. More importantly, the rules specify no sanctions for misuse of employees' information, dangling only the vague notion that the Board will provide an "appropriate remedy" under the Act "if misconduct is proven and it is within the Board's statutory power to do so." 79 Fed Reg. at 74,360. This nebulous and toothless promise that the Board might sanction unions that misuse employees' personal information is no comfort to employees. In any event, the Board cannot prevent misuse of employees' personal information. Once a union shares employees' personal information with its officers, agents, organizers and supporters, it: (1) cannot control how these individuals will use the information; (2) cannot control with whom

they will share the information; and (3) cannot take the information back if it is misused. Once information is disseminated, the Board cannot put the "cat" back in the proverbial "bag."

Respectfully submitted,



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FILE NO:

March 30, 2017

VIA E-Mail

The Honorable Tim Walberg
U.S. House of Representatives
Committee on Education and the Workforce
Chairman, Subcommittee on Health, Employment, Labor and Pensions

Re: Restoring Balance and Fairness to the National Labor Relations Board

Dear Mr. Walberg:

Thank you for your letter on March 16, 2017. My responses to the two questions from Representatives Wilson and Rooney are outlined below. Please let me know if you or anyone else from the Subcommittee has any additional questions.

Question 1 (Rep. Wilson, S.C.): The recent NLRB decision in Columbia University allowed graduate student assistants to unionize and determined that they were employees under the Act. Are there unintended consequences of expanding the definition of employee out so far?

Response: Yes. As explained below, the Board's decision in *Columbia University* has the propensity to cause labor unrest on campuses throughout the United States and hamstring colleges and universities from successfully carrying out their educational missions.

As I previously testified, the Board in *Columbia University* held that student teaching assistants can be employees under the Act. In reaching its decision, the Board explicitly overruled its 2004 decision in *Brown University*. In *Brown*, the Board had held that graduate teaching assistants were primarily students instead of employees, and that their relationship with their school was educational in nature. The Board reasoned that these students often performed their jobs as part of a degree program and that their research positions were designed primarily for educational benefit.

In overruling *Brown*, however, the Board rejected this dichotomy and broadly stated that "the payment of compensation, in conjunction with the employer's control, suffices to establish an employment relationship for purposes of the [A]ct," even though the "compensation" the Board cited was often tuition reimbursements and credits.

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Although the Board broadly stated that, "[t]here is no compelling reason — in theory or in practice — to conclude that collective bargaining by student assistants cannot be viable or that it would seriously interfere with higher education," the Board's decision raises more questions than it answers.

Most troubling, the Board failed to define or even suggest what topics might constitute mandatory subjects of bargaining in this context. As you can appreciate, the university setting is quite different from the traditional employment setting and the "terms and conditions" of a graduate assistant's employment start to look a lot like fundamental academic decisions typically reserved for the institution. For example, there remains an open question whether graduate students can now force an institution to bargain over their degree requirements, exam schedules, grade policies, and/or the sizes of the classes that they teach. These decisions have always been left to the institution, but the Board's decision has the propensity to shift the locus of decision-making from educational institution to the students themselves, potentially at the cost to the overall graduate program.

It also remains unclear what new "rights" graduate students now have under Section 7. Existing broad precedent seems to suggest that colleges and universities cannot discipline students for outrageous conduct directed at their supervising faculty members, have rules that promote civility and/or prohibit profanity and abusive language, limit students' email accounts or usage, or prohibit outrageous social media posts from teaching assistants.

Moreover, colleges and universities are left guessing how they can legally respond to labor unrest on campus. It remains unclear whether a student can receive an unexcused absence or a failing grade for missing a scheduled test if the student was participating in a strike or other concerted protective activity. In some respects, a failing grade might be seen as retaliation. Moreover, traditional remedies such as "back pay" and "reinstatement" are less apt in the educational setting. It remains unclear whether an aggrieved student can demand a particular grade or remand to be "reinstated" to a degree program if his explosion is found to have violated his Section 7 rights.

The Board dodged these difficult questions, stating simply that "the board's demarcation of what is a mandatory subject of bargaining for student assistants, and what is not, would ultimately resolve these potential problems." Even beyond these questions, however, the Board failed to address (or even acknowledge) how collective bargaining would play out on college campuses. Graduate assistants often are responsible for teaching undergraduate students, who would face the brunt of any labor dispute. Classes would inevitably grind to a

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halt if graduate assistants chose to strike, especially if the strike lasted all semester or occurred at a critical time in the semester (*i.e.* exam time).

The Board also failed to clarify the interaction between the NLRA and other federal laws. The Family Educational Rights and Privacy Act, for example, requires colleges and universities to keep educational records confidential, including disciplinary files. Other Board precedent suggests, however, that requiring witnesses to keep these materials confidential would violate the NLRA. Similarly, it remains unclear if (and to what degree) unions could request certain educational records under an information request during a campaign or during negotiations. Again, disclosing these confidential educational records could conflict with colleges and universities' obligations under FERPA.

The Board's *Columbia University* decision leaves these difficult questions for another day. In its sweeping decision, the Board has ushered in a new era of labor relationships on college campuses, without any clear guidance how to actually manage these new responsibilities. The unintended consequences of this decision are only beginning to emerge and colleges and universities will likely struggle with this decision for years to come.

Question 2 (Rep. Rooney, FL): For nearly forty years, I have been involved in both union and non-union construction in almost all industry sectors. Before that, I learned carpentry in the union apprentice program while in high school and college. Many types of construction (i.e., roads, bridges, waste and water treatment plants and other civil works) require trades persons who are skilled in multiple crafts. We call this cross-functional skill leverage in our companies. Multi-skill capacity allows a worker and crew to be efficient and productive, adding value consistently as the project proceeds through different phases of execution. Under the Board's misguided decision to allow these fractured, de minimis "microunions," employers will be unable to develop this productivity-enhancing skill leverage. In a time when United States businesses compete globally and need as much productivity enhancement and efficiency as possible, this decision will take us backwards.

What additional costs and barriers to productivity will be sustained if your clients are forced to accept these micro unions? And how would these impact employment and development of the industry's skill development programs?

Response: The Board's *Specialty Healthcare* has serious consequences for business across several key industries. The *Specialty Healthcare* test has ushered in the proliferation of micro-units that have led to an artificial fragmentation among various groups of employees.

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Before *Specialty Healthcare*, the Board had always reasoned that: "[I]f the unit determination fails to relate to the factual situation with which the parties must deal, efficient and stable collective bargaining is undermined rather than fostered." The Board recognized that permitting bargaining "based upon a [job] title . . . would result in creating a fictional mold within which the parties would be required to force their bargaining relationship. Such a determination could only create a state of chaos rather than foster stable collective bargaining." *Specialty Healthcare*, however, all-but-ensures the very ill that previous Boards sought to prevent.

Former Board Member Brian Hayes predicted the adverse consequences shortly after *Specialty Healthcare's* was decided: "[T]his new standard will encourage petitioning for small, single classification and/or single department groups of employees . . . lead[ing] to the balkanization of an employer's unionized workforce, creating an environment of constant negotiation and tension resulting from competing demands of the representatives of numerous micro-units." That is precisely the situation many employers are now in as a result of the *Specialty Healthcare* standard. This new test erects artificial barriers and stifles interchange between functionally similar employees. At its heart, this test isolates and pits employees against their colleagues, who for all practical purposes, perform similar jobs under similar conditions.

The proliferation of micro-units has two immediate impacts. First, these smaller units will lead unions to insert protectionist provisions in the collective bargaining agreements to prevent the employers from shifting employees around the workplace or integrating employees from different units. Second, even short of express prohibitions in the collective bargaining agreement, employers will think twice before integrating employees for fear the unrepresented employees will be accreted into existing bargaining units.

This artificial fragmentation hurts both employers and employees. For employers, this standard makes it more difficult to ensure continuous operations, as the employer cannot easily move employees around to respond to business or logistical needs. For employees, this new standard leads to stagnation. Employers have an incentive to keep these groups separate, which inevitably hurts industry development programs and skills development.

The new test also increases the risk of unrest among groups of similar employees. These micro-units divide the workforce into smaller and smaller units, all with their own representatives and collective bargaining agreements. Inevitably, employers will have to treat similar employees differently, depending on their bargaining representative. As such, this

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The Honorable Tim Walberg
March 27, 2017
Page 5

fragmentation can lead to in-fighting and pits groups of similar employees against one another.

* * *

I hope you find these answers helpful. I implore this Subcommittee to do everything in its power to restore some semblance of fairness and balance to the National Labor Relations Board.

Sincerely,

Kurt G. Larkin

cc: The Honorable Gregori Kilili Camacho Sablan, Ranking Member, Subcommittee on Health, Employment, Labor, and Pensions

[Whereupon, at 12:20 p.m., the Subcommittee was adjourned.]

○