
The Perfect Storm for Labor Reform: Past, Present, and Possibilities for the National Labor Relations Act

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In this article, the author discusses why it is imperative that the National Labor Relations Act (NLRA) be amended to resolve the issue of employers purposely employing undocumented workers with no threat of penalty, to rectify the inability to punish for proven unfair labor practices, and to add minimum percentage requirements for American citizens in the workplace. Part one of the article lays out the legislative history and economic climate which gave rise to both the NLRA and the Taft-Hartley Amendments. Part two provides an in-depth analysis of the judicial and structural weaknesses of the Act. Part three offers detailed solutions, including a draft bill, to eradicate the weaknesses and a step-by-step plan to turn the solutions into law. Part four will discuss the proposal from a public policy perspective.

The substance of the National Labor Relations Act¹ (NLRA) has gone fundamentally unchanged since the addition of the Taft Hartley Amendments² in 1947. Congress's denial of all legislative attempts to update the NLRA has rendered the Act incapable of rectifying common issues arising in today's labor disputes. To bring the NLRA back in line with its policy and purpose, it must be amended to address the rise in use of undocumented workers, provide minimum required percentages of domestic workers for U.S. corporations, provide maximum percentages for H1B visa (and similar) workers for U.S. corporations, and repeal *Consolidated Edison*,³ which determined that remedies cannot act as punishments for employers that commit unfair labor practices. For any NLRA amendments to be enacted, the Democratic Party, unlike the five previous attempts, must exercise party unity in both Houses of Congress and have the support of the President.

INTRODUCTION

In 2012, more than 8.1 million undocumented workers were employed in the United States illegally.⁴ Also in 2012, approximately 4.6 million young adults, ages 20-34, were unemployed and actively seeking work.⁵ At present, the NLRA does not provide a remedy for the ever increasing number of undocumented workers in the United States. In *Hoffman*

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Plastic,⁶ the Supreme Court determined the National Labor Relations Board (NLRB) lacked the authority under the Immigration Reform and Control Act⁷ (IRCA) to award back pay to an undocumented worker who had been unlawfully laid off for participating in a union campaign.

Thus, employers are incentivized to hire undocumented workers as there is minimal threat of recourse while millions of American young workers remain unemployed.

The courts' frustration of the policy and purpose of the NLRA did not start in the 21st century. The ability to appropriately remedy unfair labor practices was stunted soon after the NLRA was enacted. In 1938, the Supreme Court determined in *Consolidated Edison* that remedial actions ordered by the NLRB may not be punitive in nature.⁸ Since the Act's inception, the courts have been given the ability to undo the very purpose of Congress's legislation.⁹ Over time, the power of the NLRA has been eroded and must be updated to maintain its functionality and purpose.

The appropriate time to align the NLRA with today's temporary and transitional workforce is long overdue. Several attempts have been made throughout the decades, but they all have failed to deliver in one critical area: Democratic Party unity. Since the NLRA's enactment, only the Republican Party has managed to overwhelmingly come together in unified interest and pass their agenda, the Taft-Hartley Amendments.

This article will demonstrate why it is imperative that the NLRA be amended to resolve the issue of employers purposely employing undocumented workers with no threat of penalty, to rectify the inability to punish for proven unfair labor practices, and to add minimum percentage requirements for American citizens in the workplace.

It will also discuss how a democratic president and democratic unity in the House and the Senate will be necessary for these changes to occur. Part one of this article lays out the legislative history and economic climate which gave rise to both the NLRA and the Taft-Hartley Amendments. Part two provides an in-depth analysis of the judicial and structural weaknesses of the Act. Part three offers detailed solutions, including a draft bill, to eradicate the weaknesses and a step by step plan to turn the solutions into law. Part four will discuss the proposal from a public policy perspective. Lastly, this article will conclude with a brief summary and final thought on this critical topic.

CONSTRUCTION & DEVELOPMENT OF LABOR LEGISLATION

The Courts' Role in Determining Labor Disputes Prior to the NLRA

No other piece of legislation has shaped the labor industry like the NLRA of 1935. Prior to the NLRA, courts played a primary role in determining labor disputes. Designed to encourage collective bargaining,

protect the rights of employees to organize, unionize, and select representatives of their own choosing, the NLRA came into existence over 100 years after workers were criminally prosecuted for coming together to negotiate their wages.¹⁰ In labor's first case, two journeyman shoe and boot makers (cordwainers) traveled to each shop master (employer) to negotiate being paid \$4 instead of \$3.75 for each pair of shoes they made, as the master would then sell the footwear at a cost of about \$14 a pair.¹¹

After a few masters agreed to the pay increase, more than 16 masters joined together and decided not to increase the wages of workers.¹² In addition to the denial, criminal charges were filed against the journeyman boot makers.¹³ In 1806, a Philadelphia court charged and prosecuted eight journeyman cordwainers with "criminal conspiracy to raise their wages."¹⁴ The journeymen were found guilty and fined \$8.00 each plus costs.¹⁵

The courts continued to determine the outcome of labor disputes even after the criminal conspiracy doctrine subsided.¹⁶ In *Commonwealth v. Hunt*,¹⁷ Judge Shaw concluded that on its face, organizing and collective bargaining cannot be outright unlawful. It must be first proven that unions are engaging in unlawful activity before a verdict of criminal conspiracy can be reached.¹⁸ This reasoning went largely ignored for about 50 years, as criminal conspiracy charges continued to stifle union formation until the late 1800s.¹⁹ Just before the turn of the 20th century, civil action replaced the criminal charges, and the court injunction²⁰ became the primary means of limiting worker's collective actions to improve their working conditions.²¹

Leaning on a warped interpretation of the Sherman Antitrust Act of 1890,²² anti-union employers now had a federal legislative basis for their disruption of commerce and competition claims.²³ Many lower courts and the Supreme Court ruled against unions, especially during boycotts, stating that their activities were against the law.²⁴ One of the most prominent examples of such a ruling occurred during the *Danbury Hatters*²⁵ case. The United Hatters of North America chose to boycott Loewe and Company during an organizing effort.²⁶ The Supreme Court determined that the Hatters union was in violation of the Sherman Act §1.²⁷ Seven years later, the court ruled that 248 members of the Hatters union were liable for treble damages (three times the amount of the actual loss).²⁸

In 1908 the Clayton Act²⁹ breathed a breath of hope into union leaders wishing to escape the wrath of the labor injunction. Clayton Act §6 stated, "Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations instituted for the purposes of mutual help... nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws."³⁰ Samuel Gompers, President of the American Federation of Labor referred to Clayton Act §6 as the Industrial Magna Carta.³¹ Soon

thereafter, however, the courts held this language to the standard set by *Commonwealth v. Hunt*, which deemed that unions in and of themselves were not illegal.³²

It was also very common during this era for employers to have their employees sign contracts (often referred to as yellow-dog contracts) upon employment that prohibited the employee from joining a union or engaging in union activity during the course of employment.³³ The Supreme Court affirmed the use of the yellow-dog contracts three times³⁴ by refusing to deem the contracts illegal when cases were brought before them.³⁵ The Supreme Court reasoned that yellow-dog contracts were voluntarily entered into by the employees, and an employer had a right to make an agreement with employees, to have that agreement protected, and the contracts were at will and terminable by either party at any time.³⁶ Because of *Hitchman Coal* and cases like it,³⁷ it is believed that the federal courts developed a stained reputation as Congress began to side more in favor of labor unions.³⁸ For example, Judge John J. Parker was denied the opportunity to serve on the Supreme Court when the Senate rejected his nomination in 1930 because of his issuance of a labor injunction which heavily affected the United Mine Workers.³⁹ Several factors of the time led to a change in focus by Congress and the eventual abolishment of the yellow-dog contract: the passing of The Railway Labor Act in 1926, the Davis Bacon Act in 1931, and most notably the great Depression in 1929.⁴⁰ In 1932, the Norris-LaGuardia Act⁴¹ not only barred the one-sided employer favored contracts, it regulated the resolution of labor disputes in a manner that allowed unions to organize without a threat of undue injunctions and without infringing on an employer's rights to run their business.⁴²

The Language of the NLRA

The stage was now set for massive labor reform. The National Industrial Recovery Act⁴³ of 1933 (NIRA) was ushered in by newly elected Democratic President Franklin Delano Roosevelt as a part of the New Deal.⁴⁴ The Act's purpose was to stimulate economic growth after the Great Depression by stabilizing America's core industries.⁴⁵ The NIRA set wage and hour standards in every industry as well as and most importantly, expressly gave employees the right to organize, bargain collectively through representatives of their own choosing, and participate in concerted activities⁴⁶ for the purpose of collective bargaining.⁴⁷ As a result, union formation and membership thrived.⁴⁸ However, the NIRA did not provide a means for resolving labor disputes.⁴⁹ Thus, the National Labor Board was soon created by executive order, and tasked with ensuring representation elections occurred fairly and free of improper influences.⁵⁰ Nevertheless, the executive order gave the National Labor Board no enforcement authority and was replaced with the NLRB in 1934.⁵¹

In 1935, the NIRA was declared unconstitutional⁵² by the Supreme Court on the grounds that Congress lacked the authority under the Commerce Clause⁵³ to determine the wages and hours of workers receiving products that once traveled in interstate commerce but were to be distributed locally from that point on.⁵⁴ Forty-eight days later, the NLRA, championed by Senator Wagner of New York, was signed into law by President Roosevelt.⁵⁵ The NLRA's constitutionality was verified in the 1937 case *NLRB v. Jones & Laughlin Steel Corp.*⁵⁶ The National Labor Relation Act held on to the NIRA's §7(a) language and the enforcement function of the NLRB establishing it has a new independent federal agency.⁵⁷ The agency was primarily tasked with enforcing the §8 unfair labor practices and the representative election guidelines laid out in §9.⁵⁸

To protect the §7 rights of employees, it was declared an unfair labor practice for an employer:⁵⁹

- §8(1): to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
- §8(2): to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it;
- §8(3): to discriminate in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization...;
- §8(4): to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act;
- §8(5): to refuse to bargain collectively with any representatives of his employees, subject to the provisions of section 9(a).

Expressly stated in the Findings and Policies of the NLRA,⁶⁰ Senator Wagner designed the NLRA with the purpose of bridging the inequality gap between unorganized workers and employers who are able to freely come together and make decisions.⁶¹ Wagner believed the balancing of the inequality of association through allowing employees to organize and collectively bargain would help catapult the nation out of Depression.⁶² The NLRA encouraged collective bargaining between employers and employee representatives which allowed union membership to grow five-fold from 1935 to 1947.⁶³ During World War II, unions made no strike agreements in exchange for the promise that worker protection laws like the NLRA would stay intact.⁶⁴ However, once the war ended with a questionable economy, many unions went on strike to secure their positions.⁶⁵ In 1945, over three million workers were on strike affecting almost every industrial industry.⁶⁶ In 1946, the government seized control of the mines

and fined both the United Mine Workers union and its President, John L. Lewis, for violating a court injunction against the strike.⁶⁷ To lessen organized labor's control over the industries, the Taft-Hartley Amendments to the NLRA were passed in 1947.⁶⁸

The Taft-Hartley Amendments shifted the focus from the sole rights of employees to include the rights of the employers as well.⁶⁹ The amendments declared that while employees had the right to engage in §7 activities, they also had the right to refrain from doing so.⁷⁰ The Amendments also added six unfair labor practices⁷¹ against unions, mostly mimicking the previous existing employer unfair labor practices.⁷² Secondary boycotts were completely barred by the legislation and employers were allowed to demonstrate their stance on organized labor during union organizing campaigns.⁷³ Among other significant alterations, supervisors were eliminated from the definition of employees covered by the NLRA.⁷⁴ The Taft-Hartley Amendments also created the state right to work language which disallowed requiring union membership as a condition of employment.⁷⁵ In addition to the substantive changes, the Taft-Hartley Amendments made the procedural change of adding two additional members to the NLRB.⁷⁶

NLRA INCONSISTENCIES

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.

Findings and Policies, National Labor Relations Act 1935⁷⁷

In its Findings and Policies, the NLRA expressly states its policy and purpose. These statements create the framework in which every amendment and judicial ruling should be founded upon. Any inconsistency with the Act's policy and purpose should be timely barred or remedied. However, well into the 21st century, courts have continued to deliver rulings that frustrate and negate Congress's intent to encourage collective bargaining.

Case Law Weaknesses

The substance of the NLRA has gone virtually unchanged⁷⁸ by Congress since the Taft-Hartley Amendments of 1947. However, since its

inception through to the modern era, courts have modified and limited the NLRA.⁷⁹ Section 10(c) of the NLRA gives the NLRB the authority to give an order demanding an entity to “cease and desist” any unfair labor practice in use and to take “affirmative action...as will effectuate the policies of the Act.”⁸⁰ However, the court in *Consolidated Edison*, makes it clear that the Board’s affirmative action shall only seek to eliminate or prevent the outcome of an unfair labor practice (ULP) where the outcome frustrates the purpose of the Act.⁸¹ Regardless if the Board is of the opinion that a specific course of action would better effectuate the purpose and policies of the NLRA,⁸² *Consolidated Edison* limits the ability of the Board to act solely in a “remedial and not punitive manner in response to the outcome of a ULP not the ULP itself.”⁸³ In this case, the Board was limited to remedies of reinstatement with back pay and the required posting of notices in the workplace detailing the forbidden actions from which the employer was required to refrain after the employer was found in violation of §8(a)(1) and §8(a)(3).⁸⁴

This “remedial not punitive” reasoning took root and continues to act as a foundation for other inconsistencies regarding remedies and the NLRA. In *Phelps Dodge Corp. v. NLRB*, the court examined the limitations of the NLRB’s authority to fulfill the purpose of the Act regarding two mine workers who were discriminatorily denied reinstatement because of their union affiliation.⁸⁵ The court determined the objective of §8(a)(3) is to reestablish employment conditions and wages, as close as possible, to the state that would have been without the illegal discrimination.⁸⁶ Following the traditional pattern of restoration, reinstatement, and back pay with interest from the date of termination to the offer of reinstatement is common practice.⁸⁷

Hindering the Board’s ability to restore but for the discrimination, simply because an employee acquired alternative employment after the illegal discharge, limits the policies and purpose of the NLRA.⁸⁸ The Board was not designed to operate with such hinderances.⁸⁹ To the contrary, the NLRB is tasked to operate in such a way as to make real and “concrete” the protections of the right to self-organize for the good of the public and to eliminate any obstacles to the free flow of interstate commerce by promoting collective bargaining.⁹⁰ To honor this obligation, neither reinstatement nor back pay, separately or together allow the Agency to meet its goal.

Reinstatement after discharge comes with obvious consequences that interfere with the restorative process. The likelihood of an unbiased employee-employer relationship upon reinstatement, at the very least, is up for debate. Will it ever be possible for either side to operate from a clean slate and in each other’s best interests after an incident of discrimination resulting in termination occurs? Will the employer look or be able to find a legal means of terminating the employee upon his return?⁹¹ On the other side of the coin, isolating the illegal termination to the resulting financial injuries distracts from the policy and purpose of the NLRA in achieving its goals of protecting concerted activities and the

right of employees to organize.⁹² Focusing on the financial harm alone circumvents the core of the NLRA, its §7 rights.⁹³

The doctrine of mitigating damages, derived from principles of contract law, also complicates the matter. The doctrine requires illegally discharged employees to seek similar employment to minimize the back pay the employer that broke the law may be required to pay. As stated in Justice Murphy's partial dissent in *Phelps Dodge Corp.*, "It must be conceded that nothing in the Act requires such a limitation in so many words. To be sure nothing in the Act requires a back pay award to be diminished by the amounts actually earned,⁹⁴ but that should admonish us to hesitate before we introduce yet another modification which Congress has not seen fit to enact . . ."⁹⁵ The remedial actions to which the courts have limited the NLRB, do not sufficiently restore the employment conditions and wages, or protect the right to self-organize, or promote collective bargaining and should be able to be combined with punitive remedies.

Without a punitive component employers are incentivized to violate the NLRA and further frustrate its policies and purposes. In *Hoffman Plastic Compounds, Inc. v. NLRB*, an undocumented worker who provided falsified documents to gain employment was denied back pay when he was unlawfully terminated for participating in a union organizing campaign.⁹⁶ The court relied on its prior ruling in *Sure-Tan, Inc. v. NLRB*,⁹⁷ which held that although a violation of the NLRA occurred which justified the award of back pay, the NLRB did not have the authority to award remedies to undocumented workers unable to lawfully enter the United States.⁹⁸ In 1986, the IRCA⁹⁹ was enacted and served as the legal authority in *Hoffman Plastic*.¹⁰⁰ In a 5-4 majority, Justice Breyer writes in the dissent that back pay serves as a discouragement for employers to obey the law.¹⁰¹ Without it, the Board has no means to rectify current violations and can only attempt to discourage future violations.¹⁰² "And in the absence of the back pay weapon, employers could conclude that they can violate the labor laws at least once with impunity . . ."¹⁰³ Justice Breyer continues by acknowledging that the majority decision lessens the employer's financial burden and thus "increases the employers incentive to find and to hire illegal-alien employees."¹⁰⁴

Another controversial case regarding the policies and purpose of the NLRA is *NLRB v. MacKay Radio & Telegraph Co.*¹⁰⁵ *MacKay Radio* allows an employer, not in violation of a NLRA unfair labor practice, to replace lawfully striking workers with permanent replacement workers.¹⁰⁶ The case also clarifies that there is no requirement to reinstate the striking worker after the lawful strike has ended.¹⁰⁷ This rule is in clear tension with §163 of the Act which states, "Nothing in this Act . . . shall be construed so as either to interfere with or impede or diminish in any way the right to strike . . ."¹⁰⁸

Many arguments¹⁰⁹ have been made in support of the *MacKay Radio* ruling, but it cannot be denied that being replaced or the anxiety of being replaced "interferes with, impedes, or diminishes the right to strike."¹¹⁰

Structural and Legislative Flaws

The structure of the NLRA is outdated and overdue for an overhaul. Thirty years ago, in celebration of the Act's 50th anniversary, United States Court of Appeals Judge Abner Mikva addressed the dramatic changes in society since the passing of the Wagner Act and stated "only by understanding the limited effectiveness of the Act in today's economy can we contemplate a realistic and fair national labor policy."¹¹¹ Twenty-five years later in recognition of the Act's 75th anniversary, former NLRB Chairwoman Wilma Liebman discloses that the Board struggles to find resolution through an Act that is at war with itself.¹¹² Since the addition of the Taft-Hartley Amendments in 1947, the Board has been tasked with the responsibility "of administering a law that sets forth contradictory and, in considerable measure, irreconcilable purposes."¹¹³ Liebman also describes the NLRA as a "pro-business" labor law detailing that the Act was not necessarily created for labor's benefit, but more as a means to preserve capitalism.¹¹⁴

As Chairwoman of the NLRB, Liebman found herself guiding a Board, objective by design, but obligated to adjudicate a body of law that was biased by nature.¹¹⁵ The Findings and Policies, often referred to as the preamble of the NLRA state,

[t]he 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 association substantially burdens and affects the flow of commerce... experience has proved that protection by law of the right of employees to organize or bargain collectively safeguards commerce from injury...¹¹⁶

During the promulgation of the Act, the drafters were not concerned that businessmen like Andrew Mellon or John D. Rockefeller Jr. would be intimidated or overrun by the labor force.¹¹⁷ The NLRA was created to favor labor, and any attempts to make it impartial, weakens its policy and purpose.¹¹⁸

Like every other federal government agency, the NLRB is subject to the federal appropriations budget and limitation riders¹¹⁹ making the NLRB especially vulnerable to the will of the President and or Congress.¹²⁰ A most recent example of the political conundrum that slows the NLRB's progress was the two Member Board (Peter Schaumber and Wilma Liebman) from January 2008–March 2010.¹²¹ After making over 600 rulings the Supreme Court determined¹²² that a two person board did not comprise a quorum and did not have the authority to make the rulings, thus invalidating their previous decisions.¹²³ Prolonged vacant seats, prohibiting movement on controversial topics, and understaffing due to budget restraints cause unspeakable delays in the adjudication of matters that impact the very livelihood of workers.¹²⁴ These structural flaws

need to be addressed by legislation to help catapult the NLRA back in line with its purpose.

Outside of the Board's control, there are also a few prevalent modern issues that only amended legislation can address for the NLRA: the global economy, fair competition, and today's transient labor force. Foreign competition regarding labor and materials place urgency in the marketplace for new legislation.¹²⁵ It is not uncommon for a Mexican worker to cross the border to work for subpar wages and ship the money home to her family.¹²⁶ The fight to organize recent immigrants and undocumented workers has proved a daunting but a crucial component to collective bargaining. Traditional methods of removing undocumented workers from the labor force or organizing them has focused on enlisting the worker or crippling the contractors who employ them. However, in the last few years, some organizers have begun to focus on those orchestrating the hiring and placement of undocumented workers. This approach has led to the discovery of companies often called shells or brokers that exist solely to funnel undocumented workers to contractors of specific trades or general contractors in the place of qualified union labor. While this shift in organizing technique has proved beneficial, it has also uncovered a new set of issues as well. As undocumented misclassified employees, these workers are not protected by much of the labor and employment law unions rely on to protect their members and organize authorized workers. It is also extremely difficult to prosecute shell companies as they typically pay employees in cash, if they pay at all, and go the extra mile not to leave a paper trail. Coupled with an employer's ability to purchase materials overseas for a fraction of the costs, the American worker and buy American employer are left gasping to keep up in the global market.¹²⁷

LEGISLATIVE SOLUTIONS

The concept of amending the NLRA is not new. Since the 1960s there have been five attempts to modify this legislation to no avail. Each has not been able to succeed against the impending Senate cloture vote.¹²⁸ The first attempt to amend the Act came in 1965 with an effort to repeal §14(b) of the Taft-Hartley Act.¹²⁹ A victory here would have eliminated what is now referred to as the Right to Work¹³⁰ authorization language in the NLRA.¹³¹ In 1977, an attempt focused on strengthening union organizing efforts called the Labor Law Reform Act narrowly failed by two votes in the Senate.¹³² In 1993, an attempt to overturn the *MacKay Radio* precedent of permanent replacement workers, was shot down in the Workplace Fairness Act.¹³³ In 2008, The Employee Free Choice Act, also focusing on strengthening union organizing met its doom on the Senate floor. One of the most important lessons these failed attempts to alter the NLRA teach us, is that party unity is critical to passing any labor reform legislation. In addition

to addressing the inconsistencies and weaknesses of the NLRA, it is apparent that organized labor and the Democratic Party must overwhelmingly unite to be successful.

TABLE 1: HISTORICAL COMPARISON OF VOTING ON LABOR LAW BILLS WITH PERCENTAGE OF DEMOCRATS VOTING WITH LABOR¹³⁴

Employee Free Choice Act, 2007 (failed)

House (March 1, 2007)

Democrats: **228 yes (99%), 2 no**
Republicans: 13 yes, 183 no
Total: 241 yes, 185 no

Senate (June 26, 2007 cloture vote)

Democrats: **48 yes (100%), 0 no**
Independents: 2 yes
Republicans: 1 yes, 48 no
Total: 51 yes, 48 no

Workplace Fairness Act (Striker Replacement Bill), 1993 (failed)

House

Democrats: **221 yes (87%), 33 no**
Independents: 1 yes
Republicans: 17 yes, 157 no

Senate (cloture vote)

Democrats: **50 yes (89%), 6 no**
Republicans: 3 yes, 40 no
Total: 53 yes, 46 no
Total: 239 yes, 190 no

Labor Law Reform Act, 1977–1978 (failed)

House

Democrats: **221 yes (79%), 59 no**
Republicans: 31 yes, 104 no
Total: 252 yes, 163 no

Senate (1978 cloture vote)

Democrats: **44 yes (72%), 17 no**
Republicans: 14 yes, 22 no
Total: 58 yes, 39 no

Repeal of Section 14(b) of Taft-Hartley Act, 1965–1966 (failed)

House

Democrats: **200 yes (70%), 86 no**
Republicans: 21 yes, 117 no
Total: 221 yes, 203 no

Senate (1966 cloture vote)

Democrats: **45 yes (67%), 22 no**
Republicans: 6 yes, 26 no
Total: 51 yes, 48 no

Repeal of Taft-Hartley Act, 1949 (failed)

House

Democrats: **193 yes (75%), 62 no**
Republicans: 18 yes, 147 no
Total: 211 yes, 209 no

Senate

Democrats: **29 yes (56%), 23 no**
Republicans: 12 yes, 30 no
Total: 43 yes, 53 no

Initial Passage of Taft-Hartley Act, 1947 (passed over labor opposition)

House

Democrats: **93 yes, 84 no (47%)**

Republicans: 215 yes, 22 no

Total: 308 yes, 96 no

Senate

Democrats: **21 yes, 21 no (50%)**

Republicans: 47 yes, 3 no

Total: 68 yes, 24 no

Language for the Amendment

Regardless of the approach that is used to amend the NLRA, it is clear that it must align with the policies and purpose of the Act. With this in mind, perhaps, the first and most logical place to start would be to repeal Taft-Hartley. As previously stated, these amendments blatantly frustrate the policy and purpose of the NLRA by attempting to equalize an Act that was intended to be biased in favor of labor.¹³⁵ Repealing Taft-Hartley would not address the modern day issues absent from the legislation, but it would eradicate the present dichotomy of the Act's dueling objectives. Immediately supervisors and professional employees would be eligible to join bargaining units and states would not be able to thin out the resources of unions¹³⁶ by enacting right to work laws. This would also provide the opportunity to review the General Counsel's role as prosecutor¹³⁷ in the NLRB and mandate a maximum vacancy period before an appointment must be made for the five panel Board as is done with the General Counsel seat. While it would be a longshot, it would be worth debating a level of minimum funding and minimum staffing to the Agency.

Whether the Taft-Hartley Act is repealed or not, there are still several other issues the new legislation must address; one being the rise of undocumented workers in the labor force. The General Counsel's Office has already recognized the limitations created by *Hoffman Plastic*, and has offered some additional instruction and support regarding the situation.¹³⁸ The General Counsel suggests involving the Department of Justice's Office of Special Counsel for Immigration-Related Unfair Employment Practices and possibly the Department of Homeland Security as a means enforcement for the new rules.¹³⁹ Recognizing the inability to issue back pay or to reinstate, The General Counsel goes as far as to recommend consequential damages¹⁴⁰ and the mandatory recognition of a *Gissel*¹⁴¹ bargaining order¹⁴² regarding violations involving undocumented workers. The new legislation should take the General Counsel's recommendations one step further by supplying language that overturns *Hoffman Plastic*, and sets forth a specific course of action and remedies for the use of undocumented workers. In 2011, President Obama proposed a detailed immigration plan which could be relied upon to update the NLRA.

For example, the President proposed a gradual mandate for employers to utilize the E-Verify system to ensure workers are eligible to

work in the United States.¹⁴³ In addition, the President suggests an “increase in civil penalties for employers who knowingly hire undocumented workers.”¹⁴⁴ Combining the heightened ability to pursue criminal charges through the Department of Justice with an increase in civil penalties would discourage instead of incentivize employers to hire undocumented workers. The new legislation should take these principles a step forward by adding a Criminal and Civil Remedies Department to the NLRB. This department would not only increase efficiency during the enforcement process, but it would also support the policies of the NLRA by “eliminat[ing] the causes of certain substantial obstructions to the free flow of commerce,” “restoring equality of bargaining power between employers and employees,” and “encouraging collective bargaining.”¹⁴⁵

Acknowledging that the United States is the land of hope and far too often immigrants are brought to or born in the U.S. due to circumstances beyond their control, the General Counsel also included an avenue of assisting immigrants with obtaining a type U or type T¹⁴⁶ visa when fitting.¹⁴⁷ On a more voluntary basis, H1B visas allow specialized foreign workers to gain employment in the United States for a predetermined amount of time.¹⁴⁸ As listed, there are several means for persons to legitimately enter the United States. While these methods are capped, there is currently no method of tracking or enforcing the number of American citizens employed in comparison to those invited to work in the U.S in any individual company. To solve this problem, any additions to the NLRA should include a mandate that 75 percent of all employees in U.S. incorporated companies or companies based on U.S. soil, must be U.S. citizens. This will encourage noncitizens to gain citizenship and provide an additional means of accountability for employers.

President Obama commented in his proposed immigration plan, “We cannot continue just to look the other way as a significant portion of our economy operates outside the law. It breeds abuse and bad practices. It punishes employers who act responsibly and undercuts American workers.”¹⁴⁹ Those who hire undocumented workers or fall below the mandated percentages of employed citizens must be required to pay a fine of \$5,000 per person, thus overturning *Consolidated Edison*. These funds could be used to help immigrants gain citizenship and fund the increased duties of NLRB. It is imperative that the United States find a means of balancing domestic employment issues with immigration concerns. In 2012, more than 8.1 million undocumented workers were employed in the United States illegally,¹⁵⁰ while approximately 4.6 million young adults, ages 20–34, were unemployed and actively seeking work.¹⁵¹ In the AFL-CIO’s *Young Workers: A Lost Decade* report, 12.9 percent of workers between the ages of 16 and 34 were unemployed, 34 percent of these young workers reside in their parent’s home, almost one-third do not have health coverage, and over half do not receive any type of retirement savings plan at the work place.¹⁵²

To combat these concerns, an updated NLRA could institute a mandated minimum worker benefit package. Ideally, this package would be created and provided by the government, but employers accepting the responsibility would receive either a tax credit or annual quarterly payment. To receive either, an employer must match the health benefits of the Patient Protection and Affordable Care Act.¹⁵³ Also, a required defined benefit or defined contribution retirement plan must be funded for every employee, regardless of full-time or part-time status, place of employment, or type of employment. This can be achieved by requiring each employee to have an Individual Retirement Account (IRA), 401(k), or similar financial vehicle. The employer can contribute to the employees retirement account or enroll the employee in their pension fund with a reasonable vesting period. An employer can contribute a specific amount per hour worked, match a percentage of the employee's contribution, or invest on behalf of the employee separate from the employee's contribution. This type of benefits package allows workers to be transitory, which is common in today's society.¹⁵⁴ Obviously, every employer must abide by the federal minimum wage requirements, with incentives¹⁵⁵ to pay a living wage.¹⁵⁶

Passing the Legislation

As Table 1 details, the Democratic Party has failed to unite to pass their agenda regarding labor reform. Starting the process with Vermont Senator Bernard Sanders and Massachusetts Senator Elizabeth Warren working with the House to introduce the bill would help gain public attention and momentum. For the perfect storm to occur, the House must pass the legislation and there must be a majority Democratic Senate united in vote to defeat a Republican filibuster if necessary. Currently there are 56 Republican Senators with 24 up for election in 2017.¹⁵⁷ Ten Democratic Senators are up for election in 2017 as well.¹⁵⁸ The previous attempts to pass labor reform legislation in the House of Representatives has been met with resounding success. To be safe, Democrats would have to acquire an additional 16 seats in the Senate to comfortably pass any labor reform. The last step would be a Democratic president, like Hillary Clinton, to sign the bill into law.

SERVING THE PUBLIC INTEREST

Many activists, newscasters, and community leaders pointed out the link between the long term lack of employment, opportunity, and affordable housing and the chaos and unrest occurring in Baltimore after the death of Freddie Gray. In Baltimore, less than 60 percent of high school students graduate.¹⁵⁹ In zip code 21217, where the bulk of the unrest occurred, 16.6 percent of the residents live below the poverty line and 19

percent of the residents were unemployed in 2011.¹⁶⁰ In Freddie Gray's neighborhood of Sandtown-Winchester, over 51 percent of residents were unemployed.¹⁶¹ Both Ferguson, Missouri and Baltimore have endured over a hundred years of discriminatory and unfair housing segregation.¹⁶²

It is very apparent that employment boosts self-esteem and civic participation resulting in peaceful and productive neighborhoods. Even other countries like Senegal, Africa,¹⁶³ and the European Union¹⁶⁴ recognize the "ticking time bomb" effect unemployment and lack of opportunity can have on Society. Regardless of race, culture, or geographical place on the planet, access to employment and opportunity are essential to productivity and health. It is in America's best interests to provide opportunity and employment to America's citizens as well as those who migrate here long-term. Otherwise, there is no mystery to what will occur: loss of life, destruction, and civil unrest. Even after the breaking point, a community can respond in a positive manner by shining light on the issue and starting the process of resolution. For example, in 2009 when faced with devastating unemployment across the continent, African government leaders met and organized a multi-tier plan of action to create jobs across the region for the unemployed.¹⁶⁵ By contrast, the direct opposite approach can be taken also. After only a few days of what some compared to the race riots of the 1960s, Maryland officials agreed to spend \$30 million on a new detention center for juveniles charged as adults.¹⁶⁶

Amending the NLRA will create jobs for those who are eligible to work in the United States. It also will encourage employers to invest in the young workers that need the opportunity and training to inherit the workplace. The amendments will foster a sense of hope and possibility for the American dream for those seeking employment and for those who desire to come to the United States to work.

CONCLUSION

At the time of the New Deal, America was in an economic crisis and relied on government legislation to restore stability for both the economy and workers. In 1935, the NLRA was necessary to balance power between employers and employees. Beginning with the Taft-Hartley Amendments, the policies of NLRA slowly have been eroded. The outdated law inadequately addresses today's global transient workforce. Without change, the Act will continue in some respects to act contrary to its purposes.

Strengthening the NLRB by overturning the key judicial decisions which seek to balance the bargaining power of employers, adding provisions to handle undocumented workers concerns, and making long-term provisions for workers will ultimately add stability to the U.S. economy and improve conditions for workers and their communities alike. These steps, in combination with democratic unity, will achieve a feat that has not occurred in 70 years: labor law reform.

NOTES

1. National Labor Relations Act, 29 U.S.C. §§ 151-169 (1994).
2. Labor Management Relations (Taft-Hartley) Act of 1947, 29 U.S.C. §§ 401-531 (2006).
3. *See*, Consolidated Edison Co. v. NLRB, 305 U.S. 197, 220 (1938).
4. Pew Research Center, *Unauthorized Immigrants: Who they are and what the public thinks* (Jan. 15, 2015), <http://www.pewresearch.org/key-data-points/immigration/>.
5. Bureau of Labor Statistics, The Employment Situation—September 2012 (Oct. 2012).
6. *See*, Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 142-152 (2002).
7. Immigration Reform and Control Act of 1986, Pub. L. 99-603, 100 Stat. 3359 (1986) legislation making it illegal for employers to hire undocumented workers or for employees to falsify documents to prove eligibility to work in the U.S.
8. *See*, Consolidated Edison Co. v. NLRB, *supra* at 235. This holding goes against §10(c) of the NLRA which states ... [the Board shall] “take affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act” Ellen Dannin & David E. Bonior, *Taking Back the Workers Law: How to Fight the Assault on Labor Rights*, 52, ILR Press (2006).
9. *See also*, Ford Motor Co. v. EEOC, 458 U.S. 219, 231 (1982) requiring a potentially wrongfully terminated employee to mitigate back pay damages by using “reasonable diligence” to find other appropriate employment or risk ineligibility for back pay. *See also*, Labor Board v. McKay Radio & Telegraph Co., 304 U.S. 333 (1938).
10. *See*, Commonwealth v. Pullis, Philadelphia Mayor’s Court (1806), 3 Doc. Hist. of Am. Ind. Soc. 59 (2d ed. Commons 1910).
11. John T. Nockleby, *Two Theories of Competition in the Early 19th Century Labor Cases*, 38 Am. J. Legal Hist. 452, 461 (1994).
12. *Id.* at 462.
13. *Id.*
14. *See*, Walter Nelles, *The First American Labor Case*, 41 Yale L.J. 165, 193 (1931).
15. Michael C. Harper & Samuel Estreicher, *Labor Law Cases, Materials, and Problems*, 35, Vicki Been et al. (7th ed. 2011).
16. Cooke, William N. 1985, *Evolution of the National Labor Relations Act: In Union Organizing and Public Policy: Failure to Secure First Contracts*, Kalamazoo, MI, W.E. Upjohn Institute for Employment Research, 4.
17. Commonwealth v. Hunt, 45 Mass. (4 Met.) 111 (1842).
18. Cooke, *supra*, note 16 at 3.
19. *Id.* at 4.
20. Injunction: court order prohibiting or requiring a specific act.
21. Harper & Estreicher, *supra*, note 15 at 40.
22. Sherman Antitrust Act, 26 Stat. 209 (1890), as amended 15 U.S.C. §§ 1 et seq.

23. The chief argument of employer's who made conspiracy allegations against unions and workers coming together to improve working conditions was rooted in the claim that their activity was a disruption to commerce and competition. Cooke, *supra*, note 16 at 4.
24. *Id.* at 5.
25. See generally *Loewe v. Lawlor*, 208 U.S. 274 (1908).
26. Cooke, *supra*, note 16 at 5.
27. Sherman Act §1: Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person ... deemed guilty ... shall be punished by fine not exceeding \$10,000,000 if a corporation or if any other person, \$350,000, or by imprisonment not exceeding three years.
28. See generally *Loewe v. Lawlor*, 235 U.S. 522 (1915).
29. Clayton Act, 38 Stat. 730 (1914), as amended 15 U.S.C. §§ 12 et seq.
30. *Id.* §6
31. Cooke, *supra*, note 16 at 5.
32. *Id.*
33. *Id.* at 6.
34. See generally *Adair v. United States*, 208 U.S. 161 (1908), *Coppage v. Kansas*, 236 U.S. 1 (1915), *Hitchman Coal & Coke. Co. v. Mitchell*, 245 U.S. 229 (1917).
35. Harper & Estreicher, *supra*, note 15 at 66.
36. *Hitchman Coal & Coke. Co. v. Mitchell*, *supra* at 249.
37. See, e.g., *United Mine Workers v. Red Jacket Consol. Coal &Coke Co.*, 18 F.2d 839 (4th Cir. 1927) (Judge John J. Parker granted the employer an injunction which put almost all of West Virginia's coal mining industry out of the reach of United Mine Worker organizers.).
38. Harper & Estreicher, *supra*, note 15 at 67.
39. *Id.*
40. *Id.*
41. Norris-LaGuardia Act of 1932, 29 U.S.C. §§ 101-115.
42. Cooke, William N. 1985, *Evolution of the National Labor Relations Act: In Union Organizing and Public Policy: Failure to Secure First Contracts*, Kalamazoo, MI, W.E. Upjohn Institute for Employment Research, 67.
43. National Industrial Recovery Act, Pub. L. 73-67, 48 Stat. 195.
44. Harper & Estreicher, *supra*, note 15 at 80.
45. *Id.*
46. Concerted activity—two or more workers coming together to improve working conditions.
47. *Id.* at 81.

48. Union membership rose from three million in 1933 to over 12 million in 1943. Harper & Estreicher, *supra*, note 15 at 80.

49. *Id.*

50. *Id.*

51. *Id.* at 81.

52. *Schechter Poultry Corp. v. United States*, 295 U.S. at 543 (1935) (holding that “the flow of interstate commerce had ceased” upon arrival at the Schechter Slaughterhouse and thus the Commerce Clause could not provide authority to regulate the wages and hour of the workers at Schechter Slaughterhouse).

53. The Commerce Clause gives Congress the power “to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.” U.S. Const. art. I, § 8, cl. 3.

54. Harper & Estreicher, *supra*, note 15 at 82.

55. *Id.*

56. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 43 (1937) (holding that Congress’s power is plenary and can be exercised to control intrastate commerce that may put a burden or obstruction on interstate commerce).

57. National Labor Relations Act, 29 U.S.C. § 157 (1994).

58. *Id.* at §§ 158, 159.

59. *Id.* at § 158.

60. *Id.* at § 151.

61. *See, id.* at § 151.

62. Cooke, William N. 1985, *Evolution of the National Labor Relations Act: In Union Organizing and Public Policy: Failure to Secure First Contracts*, Kalamazoo, MI, W.E. Upjohn Institute for Employment Research, 87.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. National Labor Relations Act, 29 U.S.C. § 157 (1994).

71. *Id.* at § 158(b).

72. *See, Id.* at § 158(a).

73. *See, Id.* at § 158(b)(4)(A).

74. *Id.* at § 152(3).

75. *Id.* at § 164(b).
76. *Id.* at § 153(a).
77. National Labor Relations Act, 29 U.S.C. § 151 (1994).
78. To provide oversight for internal union affairs and curb corruption, the Landrum-Griffin Act was enacted in 1959. 73 Stat. 519 (codified at 29 U.S.C. §§ 401-531). Relating specifically to the NLRA, the Act returned the voting rights for up to 12 months to striking workers who were permanently replaced, added extended picketing under certain circumstances as an unfair labor practice, rectified the secondary boycott loophole, and allowed pre-hire agreements between employers and unions for the building and construction industry. In 1974, amendments were made to the NLRA to include provisions relating to the health care industry.
79. Ellen Dannin, *The Future of the National Labor Relations Act*, Am. Const. Soc'Y Blog (Jan. 11, 2013), <http://www.acslaw.org/acsblog/the-future-of-the-national-labor-relations-act>.
80. National Labor Relations Act, 29 U.S.C. § 160(c) (1994).
81. *See Consolidated Edison Co. v. NLRB, supra* at 235 (1938).
82. *Id.* at 236.
83. *Id.* at 220.
84. *Id.* at 211-212.
85. *See generally, Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941).
86. Harper & Estreicher, *supra*, note 15 at 159.
87. *Id.*
88. *Phelps Dodge Corp. v. NLRB, supra* at 192.
89. *Id.* at 193.
90. *Id.*
91. Harper & Estreicher, *supra*, note 15 at 160.
92. *See Phelps Dodge Corp. v. NLRB, supra* at 193.
93. *Id.*
94. *Compare Republic Steel Corp. v. NLRB*, 311 U.S. 7, 12 (1940).
95. *Phelps Dodge Corp. v. NLRB, supra* at 206.
96. *See generally, Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002).
97. *See generally, Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984).
98. *Hoffman Plastic Compounds, Inc. v. NLRB, supra* at 138.
99. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 100 Stat. 3359 (1986).
100. *Hoffman Plastic Compounds, Inc. v. NLRB, supra* at 140.
101. *Id.* at 153.

102. *Id.*
103. *Id.*
104. *Id.* at 155.
105. See generally, *NLRB v. MacKay Radio & Telegraph Co.*, 304 U.S. 333 (1938).
106. *Id.* at 346.
107. *Id.*
108. National Labor Relations Act, 29 U.S.C. § 163 (1994).
109. Some resort to Public Resolution 44 as a precedent which states that the absence of a 7(a) violation takes away any right for strikers to be reinstated. Others look to the legislative history of the NLRA including Senator Wagner's initial bill and a Senate Committee Report implying that all strikers are not required to be reinstated. Others also believe that *MacKay Radio* is in line with the creators of the NLRA, the NLRB, and organized labor's understanding of the law at the time. *Harper & Estreicher, supra*, note 15 at 597.
110. *Dannin, supra*, note 79.
111. Abner J. Mikva, *The Changing Role of the Wagner Act in the American Labor Movement*, 38 Stan. L. Rev. 1123, 1124 (1985).
112. See, Wilma B. Liebman, *Labor Law During Hard Times: Challenges on the 75th Anniversary of the National Labor Relations Act*, 28 Hofstra Lab. & Emp. L.J. 1, 3 (2010).
113. *Id.* at 4.
114. *Id.* at 2.
115. See *Mikva, supra*, note 111, at 1126.
116. National Labor Relations Act, 29 U.S.C. § 151 (1994).
117. See *Mikva, supra*, note 111, at 1126.
118. *Id.*
119. Limitation riders are amendments to appropriations bills that purposefully restrict funding for specific actions. Devins, Neal, *Appropriation Riders* (1994). *Faculty Publications*. Paper 1635. <http://scholarship.law.wm.edu/facpubs/1635>. For example, an appropriations rider in the FY 2015 budget restricts funding toward "any new administrative directive or regulation" regarding electronic voting in representation elections conducted by the NLRB. Harold P. Coxson and Christina M. Crockett, *Congress passes FY 2015 Omnibus Appropriations Bill: what it means for labor and employment agencies*, Ogleetree Deakins Blog (Dec. 13, 2014), <http://www.lexology.com/library/detail.aspx?g=768c0b68-d0db-4073-952c-6040a0acb5ae>.
120. The President of the United States nominates Members of the NLRB that must be confirmed by the Senate. Congress and the President also must agree on a federal budget which reflects the priorities of the nation. In the early 1980's the NLRB went underfunded and thus understaffed. Due to a variety of political stresses placed on the Board, there were 15 members who served from 1979–1985. During this time, the Board was also placed at disadvantage because of President Reagan's failure to reappoint senior members and his decision to leave seats vacant for more than a year. David P. Gregory, *The NLRB*

and the Politics of Labor Law, 27 B.C.L. Rev. 39, 41-42 (1985), <http://lawdigitalcommons.bc.edu/bclr/vol27/iss1/2>.

121. See, Wilma B. Liebman, *Labor Law During Hard Times: Challenges on the 75th Anniversary of the National Labor Relations Act*, 28 Hofstra Lab. & Emp. L.J. 1, 6 (2010).

122. See generally, New Process Steel, L.P. v. NLRB, 130 S. Ct. 2635 (2010).

123. Liebman, *supra*, note 121, at 6.

124. In *Spencer Foods v. NLRB*, 268 N.L.R.B. 1483 (1984), 420 union workers were laid off and discriminated against during the re-hiring process. Although a NLRA violation was found, it took over 3 years for a decision to be made. See *Mikva, supra*, note 111, at 1134.

125. See *Mikva, supra*, note 111, at 1132.

126. See, Natalie Kitroff, *Immigrants Pay Lower Fees to Send Money Home Helping to Ease Poverty*, The New York Times, (April 27, 2013), http://www.nytimes.com/2013/04/28/us/politics/immigrants-find-it-cheaper-to-send-money-home.html?_r=0.

127. See generally, Alex Lach, *5 Facts About Overseas Outsourcing: Trend Continues to Grow as American Workers Suffer*, Center for American Progress (July 9, 2012), <https://www.americanprogress.org/issues/labor/news/2012/07/09/11898/5-facts-about-overseas-outsourcing>.

128. Cloture vote: Super-majority of 60 votes from the 100 member Senate to overcome a filibuster. Taylor E. Dark, *Prospects for Labor Reform*, Perspectives on Work, Summer 2008, at 24, <http://50.87.169.168/OJS/ojs-2.4.4-1/index.php/LERAMR/article/view/1632>.

129. *Id.* at 24.

130. Right to work laws authorize states to prohibit union security agreements that “require membership in a labor organization as a condition of employment.” National Labor Relations Act, 29 U.S.C. § 164(b) (1994). In essence, this language allows “free riders” to enjoy the protections and aids of union representation without actually being a union member or financially contributing to the union. Maryruth Vollstedt, Note, *Labor Law-Section 14(B) Extended to Prohibit the Assessment of a Representation Fee Against Nonunion Employees in Right-to Work States*, 57 Tul. L. Rev. 1030, 1034 (1983).

131. Taylor E. Dark, *Prospects for Labor Reform*, Perspectives on Work, Summer 2008, at 24 <http://50.87.169.168/OJS/ojs-2.4.4-1/index.php/LERAMR/article/view/1632>.

132. *Id.*

133. *Id.*

134. Taylor E. Dark III, Assistant Professor of Political Science California State University, Los Angeles, Representing Labor in Congress: The Enduring Quest for Labor Law Reform, 2008 Annual Meeting of the Western Political Science Association, (Mar. 20–23, 2008).

135. See National Labor Relations Act, 29 U.S.C. § 151 (1994).

136. See Maryruth Vollstedt, Note, *Labor Law-Section 14(B) Extended to Prohibit the Assessment of a Representation Fee Against Nonunion Employees in Right-to Work States*, 57 Tul. L. Rev. 1030, 1035 (1983).

137. In NLRA § 153(d) the General Counsel is appointed by the President for a four-year term. “He shall have final authority... in respect of the investigation charges and

issuance of complaints...and in respect of the prosecution of such complaints before the Board..." However, found in a House Report during the creation of the Taft-Hartley Amendments the General Counsel's discretion not to issue a complaint was limited to "only when the facts the complainant alleges do not constitute an unfair practice, or when the complainant clearly cannot prove his claim... implying that in all other cases a complaint should issue." Johnathan B. Rosenblum, *A New Look at the General Counsel's Unreviewable Discretion Not to Issue a Complaint Under the NLRA*, 86 Yale L.J. 1349, 1353-1354 (1977).

138. See generally, Office of the General Counsel, GC-15-03, Updated Procedures in Addressing Immigration Status Issues that Arise During Unfair Labor Practice Proceedings, (2015).

139. *Id.* at 2.

140. See generally, *Freeman Decorating Co.*, 288 NLRB 1235 (1988) (awarding reimbursement of medical expenses and rehabilitative services for an employee that was unlawfully discharged due to discrimination and lost his insurance).

141. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 610 (1969) (authorizing the acknowledgment of a bargaining unit based on a majority of authorization cards when an employer commits an unfair labor practice that makes an impartial election not likely).

142. Office of the General Counsel, *supra*, note 138, at 3.

143. The White House, Building a 21st Century Immigration System, 21 (2011).

144. *Id.* at 22.

145. National Labor Relations Act, 29 U.S.C. §151 (1994).

146. Type U and Type T visas were created by Congress to embolden victims of human trafficking and other crimes to cooperate with law enforcement during criminal investigations. Type T visas are limited to 5000 annually. The grantee must be a victim of human trafficking and must prove a hardship if denied. Type U visas are capped at 10,000 annually and awardees must prove substantial physical or mental abuse and must cooperate with law enforcement to a larger degree. Kristina Gasson, NOLO Law for All, Differences Between T and U Visas, <http://www.nolo.com/legal-encyclopedia/differences-between-t-u-visas.html>.

147. Office of the General Counsel, GC-15-03, Updated Procedures in Addressing Immigration Status Issues the Arise During Unfair Labor Practice Proceedings, 2, (2015).

148. For Fiscal Year 2016, H1B visas are capped at 65,000 for those with an undergraduate degree. An additional 20,000 persons will be allowed with advance degrees. U.S. Citizenship and Immigration Services, H1-B Fiscal Year Cap Season, <http://www.uscis.gov/working-united-states/temporary-workers/h-1b-specialty-occupations-and-fashion-models/h-1b-fiscal-year-fy-2016-cap-season>.

149. The White House, Building a 21st Century Immigration System, 19 (2011).

150. Pew Research Center, *Unauthorized Immigrants: Who they are and what the public thinks* (Jan. 15, 2015), <http://www.pewresearch.org/key-data-points/immigration/>.

151. Bureau of Labor Statistics, The Employment Situation—September 2012 (Oct. 2012).

152. AFL-CIO, *Young Workers: A Lost Decade, 3-4*, (2009), <http://digitalcommons.ilr.cornell.edu/laborunions/18/>.

153. See generally, Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, 124 Stat.110-1025, (2010).

154. In 1973, 24 percent of all jobs were nonfarm manufacturing. In 2007, these type of jobs only account for 10 percent of the workforce. The majority of jobs are now service based instead of manufacturing or factory based. Marlene A. Lee & Mark Mather, *U.S. Labor Force Trends*, 63 *Population Bulletin* 1, 7 (2008).

155. Tax credits can act as an incentive for employers to pay workers over the minimum wage. Higher earnings will allow workers to spend more and boost the economy. Higher earners will also afford the worker the stability necessary to support themselves and make positive contributions to society.

156. Between 1995 and 2005 productivity has increased by 30 percent in the United States. However wages and benefits have been stagnate. Wages for entry level worker declined from 2000–2005. The gap between low wage and middle wage income workers has been increasing since 1979. However, the gap between middle wage workers and the top wage earners grew considerably from 1970–2005. From 1992–2005, the average CEO of a large company pay increased by 186 percent while the average worker's pay grew seven percent. In 1964, the average CEO earned 24 times the average worker. In 2005 the average CEO earned 262 times more than an average worker. *Id.* at 11.

157. United States Senate, Senators of the 114th Congress, (2015). <http://www.senate.gov/senators/contact/>.

158. *Id.*

National Labor Relations Act (NLRA) Amendments—Draft Bill

Be it amended by the Senate and House of Representatives of the United States of America in Congress assembled, that:

Section 1: In 1935, pursuant to its authority under the Commerce Clause, Congress made it the policy of the United States to encourage collective bargaining. The amendments set forth herein have been written with the purpose of strengthening labor's voice and realigning the National Labor Relations Act with its policy and purpose by establishing provisions were undocumented workers, adding functions to the National Labor Relations Board, and establishing penalties for employers in violation of the Act.

(a) This Act may be cited as the “National Labor Relations Act Amendments of 2015”.

(b) The following terms shall be defined as follows:

1. *Employee*: as defined by the National Labor Relations Act but to include salts, organizers, or supervisors working for an open shop employer for the purposes of educating unorganized employees.
2. *Employer*: as defined by the National Labor Relations Act
3. *Salt*: otherwise qualified workers gaining employment at a firm for the purpose of organizing the firm or its employees
4. *Undocumented worker*: any person not authorized to work in the United States because of an inability to produce a valid government issued ID, social security card, permanent resident card or alien registration number, USCIS number, passport number, visa, or green card in accordance with the Immigration Reform and Control Act I-9 form.⁴

The Perfect Storm for Labor Reform

Sec. 2: Repeal Taft-Hartley Amendments of 1947.

- (a) All amendments to the National Labor Relations Act contained in the Taft-Hartley Act of 1947 are repealed.

Sec. 3: provisions for undocumented workers in the labor force

- (a) Employers are required to collect and verify employee documentation authorizing the employee's eligibility to work in the United States.
- (b) The National Labor Relations Board is required to maintain at least one investigator in each regional office that assists the Department of Justice with investigations involving labor disputes and the illegal hiring of undocumented workers.

Sec. 4: GOVERNANCE AND FUNDING

- (a) The National Relations Board shall have the authority to adjudicate any and all labor disputes including representation issues.
 - (1) The National Labor Relations Board is required to operate with no less than 3 and no more than 5 Board members at all times. The President of the United States and Congress must fill a vacant Board seat within 6 months of its vacancy regardless of reason. Each member shall serve a term of 5 years with the ability to be reappointed. One member shall serve as the Chairman at the President's appointment. One member shall be up for reappointment every year starting one year after enactment starting with the most senior member and ending with the least senior member.
- (b) The federal courts shall continue to affirm or deny National Labor Relations Board decisions and conduct appeals when appropriate.
- (c) The National Labor Relations Board shall have a Criminal and Civil Remedies Department which works in conjunction with the Department of Justice and department of Labor when appropriate.
 - 1. The Criminal and Civil Remedies Department may also assist undocumented workers with gaining United States citizenship or other classifications deeming them eligible to work in the United States.
 - 2. The Criminal and Civil Remedies Department has the authority to conduct unscheduled audits of employees known to have employees with invalid working visas or under suspicion of hiring undocumented workers. These audits are to ensure that 75% of the work force of any employer incorporated in the United States or any business located on United States soil are American citizens.
- (d) The National Labor Relations Board shall have the sole authority over all penalty fees collected including the National Labor Relations Fund.
 - 1. The National Labor Relations Fund shall be used to supplement the budget of the National Labor Relations Board as needed.
 - a. Fund monies can be used for but are not limited to: investigations, staffing, assisting undocumented workers with gaining citizenship or classifications deeming them eligible for employment in the United States, and litigation regarding topics prohibited by Congress.

Sec. 5: This Act shall be regarded as federal law and enforceable throughout the United States and its territories.

Sec. 6: PENALTIES

- (a) Any employer found to be employing one or more undocumented workers shall be subject to a fine of \$5000 per undocumented employee payable to the National Labor Relations Fund.
- (b) Employers are subject to a criminal investigation through the Criminal and Civil Remedies Department if the National Labor Relations Board in conjunction with the Department of Justice if found to be employing one or more undocumented workers.
- (c) Undocumented workers reserve the right to pursue civil charges against employers who wrongfully hire or wrongfully terminate them.
- (d) Undocumented workers found working illegally in the United States or found to have falsified documents to work in the United States shall be subject to a \$1000 fine payable to the National Labor Relations Fund.

Sec. 7: The amendments made by this Act shall take effect on the date that is 90 days after the date of enactment of this Act.

159. Dan Diamond, *Why Baltimore Burned*, Forbes, (April 28, 2015, 5:45 am) <http://www.forbes.com/sites/dandiamond/2015/04/28/why-baltimore-burned/>.

160. Bryce Covert, *The Economic Devastation Fueling the Anger in Baltimore*, Think Progress (April 28, 2015, 11:50 am) <http://thinkprogress.org/economy/2015/04/28/3651951/baltimore-freddie-gray-economic/>.

161. *Id.*

162. *Id.* See also, Melissa Harris Perry, *Baltimore and US History of Housing Segregation* (May 9, 2015), <http://www.msnbc.com/melissa-harris-perry/watch/baltimore-and-us-history-of-housing-segregation-442619459831>.

163. See generally, Kingsley Ighobor, *Africa's youth: a "ticking time bomb" or an opportunity?* Africa Renewal Online (May 2013), <http://www.un.org/africarenewal/magazine/may-2013/africa%E2%80%99s-youth-%E2%80%9Cticking-time-bomb%E2%80%9D-or-opportunity>.

164. See generally, Tiernan Brady, *The flaw at the heart of the EU? Not prioritising unemployment* The Journal (August 15, 2013: 7:30 pm) <http://www.thejournal.ie/readme/column-the-flaw-at-the-heart-of-the-eu-not-prioritising-unemployment-1038405-Aug2013/> (discussing how the European Union's neglect of an generation facing significant unemployment and little opportunity threatens to take down the entire economic system).

165. Kingsley Ighobor, *supra*, note 163.

166. Ben Ross, *Maryland Approves \$30 million youth prison in Baltimore*, Baltimore Sun (May 14, 2015; 1:53 pm) <http://baltimore.suntimes.com/bal-news/7/101/122556/maryland-approves-30-million-youth-prison-baltimore>.

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