

**TESTIMONY BEFORE THE  
HOUSE COMMITTEE ON EDUCATION AND LABOR,  
SUBCOMMITTEE ON HEALTH, EMPLOYMENT, LABOR AND PENSIONS  
UNITED STATES HOUSE OF REPRESENTATIVES**

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*"Protecting Workers' Right to Organize: The Need for Labor Law Reform"*

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Chairperson Wilson, Ranking Member Walberg, and Members of the Committee, thank you for the opportunity to testify today about the need for reform of our nation's basic labor law, the National Labor Relations Act.

My name is Devki Virk and I am a Member of the law firm of Bredhoff & Kaiser, P.L.L.C., in Washington, D.C. Since joining Bredhoff & Kaiser in 1996, I have represented labor organizations and workers in the public and private sector in a wide array of industries, including manufacturing, hospitality, public safety (fire and police), railway, and construction. In addition to litigation of various types, including in federal and state court and before administrative agencies, my practice is devoted to providing day-to-day advice regarding the rights of workers and their unions, and participating in collective bargaining and contract enforcement. After graduating from the University of Chicago in 1989, I worked for several years for a Chicago-based non-profit organization, and then obtained a law degree from the University of Illinois College of Law in Urbana-Champaign, graduating with honors in 1995 and serving as a law review editor and a teaching assistant for first-year contracts. Following law school, I clerked for the Honorable Martin L.C. Feldman, U.S. District Judge for the Eastern District of Louisiana in New Orleans from 1995-1996 before joining Bredhoff and Kaiser as an associate. I have been with the firm ever since.

**BACKGROUND**

As you know, the NLRA was adopted in 1935. It was amended significantly in 1947 with the passage of the Taft-Harley Act, narrower amendments were adopted in 1959 in the Landrum-Griffin Act, and in 1974 it was amended to extend coverage to non-

profit hospitals. Since that time, almost half a century, despite a persuasive case for reforming the law, it has remained unchanged. Under the Carter Administration, the Clinton Administration, and again under the Bush and Obama Administrations, a persuasive case for reform was brought to the Congress. Three times, comprehensive reform legislation was drafted, and bills were adopted in the House of Representatives, only to be thwarted by filibuster or a threat of filibuster in the Senate. As a result, the essential flaws in the Act identified remain largely unaddressed and, in fact, have only worsened over time.

As a practitioner, I have seen working people come together and, in doing so, meaningfully and dramatically change their lives and the lives of their families. Dishwashers, once scraping by working for multiple employers, are able put their children through college on one good job. Firefighters join together to strengthen safety standards and raise awareness of health issues prevalent in their profession. Manufacturing workers unite to resist massive employer concessions and ultimately are able win protection from plant closures at the bargaining table. Workers who have spent their lives with dangerous chemicals can retire with adequate health care coverage for themselves and their spouses. In my years of practice, I have seen many examples of the power of worker self-determination.

Unfortunately, I have also seen, far too often, examples of utter failure of our system of labor law, instances in which workers in need of protection were left vulnerable, deprived of their basic statutory rights, and told they must wait years for any redress. In multiple areas, the NLRA, as currently construed, fails to ensure workers meaningful access to or enforcement of the rights that it was enacted to establish. In my brief time today, I will focus on only four specific problems with the existing law – its allowance of unfair and coercive conduct, its insufficient mechanisms for insuring good faith collective bargaining, the inadequacy of its remedies, and its failure to extend even the limited protections that it does offer to the full range of workers who need it.

## SELECTED PROBLEMS

### 1. **Unfair and Coercive Campaign Practices**

First, some practices that have been held lawful under the NLRA are clearly unfair and grossly distort both the freedom of choice and the balance of power the Act was intended to create.

Specifically, the current law permits employers to force employees, upon pain of termination, to listen to their employers (or consultants or lawyers hired by their employers) tell them all of the reasons that they should not vote to be represented by a union – chief among them that the employer does not want to deal with the Union. These mandatory meetings can be held with a large group of employees, a subgroup (such as a department or shift), with small groups of employees, or even one or more employer representatives in a room with one employee.

These sessions – called “captive audience” meetings – have been permitted by the Act for decades. *See Babcock & Wilcox Co.*, 77 NLRB 577 (1948) (captive audience meetings are not unfair labor practice); *S & S Corrugated Papers Mach. Co.*, 89 NLRB 1363 (195) (captive audience meetings do not interfere with fair election). As one Board Member clearly explained, “the Act does not preclude an employer from calling his employees together as a ‘captive audience’ to hear his anti-union views.” *J.P. Stevens & Co.*, 219 NLRB 850, 854 (1975) (Member Fanning concurring in part and dissenting in part), *enfd*, 547 F.2d 792 (4th Cir. 1976).<sup>1</sup> If the meeting takes place in a group setting, employers can also exclude union supporters from such meeting or prevent them from speaking to ensure there is no free discussion or debate. *See Luxuray of New York*, 185 NLRB 100 (1970), *enfd in part*, 447 F.2d 112 (2d Cir. 1971); *F.W. Woolworth Co.*, 251 NLRB 1111 (1980), *enfd*, 655 F.2d 151 (8th Cir. 1981), cert. denied, 455 US. 989 (1982). An employee who has the “temerity to ask questions” may be fired. *See NLRB v. Prescott Indus. Prod. Co.*, 500 F.2d 6, 11 (8th Cir. 1974). And lest there be any mistake about what compels attendance at captive audience meetings, the Board has upheld the

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<sup>1</sup> Prior to 1947, the Board held such captive audience meetings were unlawful. *See Clark Bros. Co.*, 70 NLRB 802 (1946), *enforced as modified*, 163 F.2d 373 (2d Cir. 1947).

firing of employees who quietly and without disruption attempt to leave such meetings, holding that employees have “no statutorily protected right to leave a meeting which the employee were required to attend on company time and property to listen to management’s noncoercive antiunion speech designed to influence the outcome of a union election.” *Litton Sys., Inc.*, 173 NLRB 1024, 1030 (1968). Unsurprisingly, these speeches have both the purpose and effect of further tilting the balance in favor of employers.

Such inherently unfair practices are the norm under the current law. A study of over 200 representation elections found that employers conducted mandatory meetings prior to 67 percent of the elections. *See* John J. Lawler, *Unionization and Deunionization: Strategy, Tactics, and Outcomes* 145 (1990). A more recent study found that in 89 percent of campaigns surveyed, employers required employees to attend captive audience meetings during work time and that the majority of employees attended at least five such meeting during the course of the campaign. *See* Kate Bronfenbrenner & Dorian Warren, *The Empirical Case for Streamlining the NLRB Certification Process: The Role of Date of Unfair Labor Practice Occurrence*, ISERP Working Paper Series 2011.01 at 6 (June 2011), available at [iserp.columbia.edu/research/working-papers](http://iserp.columbia.edu/research/working-papers).

And, because the employer has control over the workplace – and the livelihood of the employees it forces to attend these meetings – these practices also favor the employer because, by reason of its coercive power, the employer is able to communicate its message to *all* eligible voters, whether or not they want to hear it, while leaving the union able to communicate only with those it can persuade to listen. One study of union elections demonstrates the obvious result – unions typically communicate largely with their supporters while employers, who can compel attention, also reach undecided and opposing voters. *See* J. Getman, S. Goldberg & J. Herman, *Union Representation Elections: Law and Reality* (1976).

Congress should and can prevent this obviously unfair practice. As Justice William O. Douglas recognized in *Public Utilities Commission v. Pollak*, 343 U.S. 451, 468 (1952) (Douglas, J., dissenting), it is “a form of coercion to make people listen.” And although those words appear in a dissent of Justice Douglas, a majority of the

United States Supreme Court has subsequently recognized that “no one has a right to press even ‘good’ ideas on an unwilling recipient.” *Rowan v. United States Postal Office Dept.*, 397 U.S. 728, 738 (1970). In fact, the Court has stated that “[t]he unwilling listener’s interest in avoiding unwanted communications has been repeatedly identified in our cases” as a proper basis for narrowly tailored government regulation. *Hill v. Colorado*, 530 U.S. 703, 716 (2000).

## **2. Inadequate Mechanisms for Encouraging Good Faith Bargaining**

Second, in several respects, the Act fails in its central objective -- “encouraging the practice and procedure of collective bargaining.” 29 U.S.C. § 151. That is true because the Act has been construed to provide no meaningful remedy for employers’ failure to bargain in good faith while at the same time employees’ right to strike in order to encourage good faith bargaining has been gutted.

Section 8(a)(5) of the current Act makes it an unfair labor practice for an employer “to refuse to bargain collectively with the representatives of his employees.” 29 U.S.C. § 158(a)(5). Yet in most circumstances, if an employer simply refuses to bargain or engages in surface bargaining, going through the motions with no intention of reaching an agreement, the remedy consists of an order that the employer cease and desist such unlawful conduct.

In *H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970), eight years went by after the employees voted to be represented by a union. The Supreme Court observed that the delay “appears to have occurred chiefly because of the skill of the company’s negotiators in taking advantage of every opportunity for delay.” *Id.* at 100. Specifically, both the Board and the Court of Appeals found that the employer’s refusal to agree to a standard clause permitting employees to voluntarily have their union dues deducted from their wages was not in good faith, but rather “was based on a desire to frustrate agreement and not on any legitimate business reason.” *Id.* at 107. The Court of Appeals further held that the Board could order the employer to agree to such a clause. But the Supreme Court reversed, holding that the current law bars the Board from ordering either party to agree to any provision of an agreement.

Not only can the Board not require a party to agree to any term, even as a remedy for unlawful conduct, it cannot compensate employees injured by an employer's unlawful refusal to agree to a term of employment. In *Ex-Cell-O Corp.*, 185 NLRB 107 (1970), the employer wholly refused to bargain with the employees' chosen representative, in defiance of the Board's order that it do so following the employees' voting for representation in a Board-supervised election.<sup>2</sup> In the resulting unfair labor practice proceeding, the trial examiner both ordered the employer to bargain and "to compensate its employees for monetary losses incurred as a result of its unlawful conduct." *Id.* at 108. But the Board reversed, holding that current law and the Supreme Court's decision in *H.K. Porter* do not permit employees to receive compensation for the injuries suffered as a result of an unlawful refusal to bargain. The Board clearly explained the regrettable consequences of its decision:

We . . . are in complete agreement with his finding that current remedies of the Board designed to cure violations of Section 8(a)(5) are inadequate. A mere affirmative order that an employer bargain upon request does not eradicate the effects of an unlawful delay of 2 or more years in the fulfillment of a statutory bargaining obligation. It does not put the employees in the position of bargaining strength they would have enjoyed if their employer had immediately recognized and bargained with their chosen representative. It does not dissolve the inevitable employee frustration or protect the Union from the loss of employee support attributable to such delay. The inadequacy of the remedy is all the more egregious where . . . the employer had raised 'frivolous' issues in order to postpone or avoid its lawful obligation to bargain.

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<sup>2</sup> It should be noted that this procedure, commonly called a "technical refusal to bargain," although there is nothing "technical about it whatsoever, represents another flaw in the current law in two respects. First, because the Board's certification that employees have voted to be represented is accompanied by no order that the employer respect that choice by commencing bargaining, an entirely separate proceeding is necessary in order for the Board to issue such an order. This obviously causes significant delay in bargaining when an employer refuses to respect its employees' express desires. Second, because the results of the initial representation case are not directly appealable by any party, only employers can obtain judicial review of decisions in representation cases via such a technical refusal to bargain. Over time, of course, permitting only employers to obtain judicial review tilts the construction of the law in their favor.

*Id.* at 108. The Board concluded, “Much as we appreciate the need for more adequate remedies in 8(a)(5) cases, we believe that, as the law now stands, the proposed remedy is a matter for Congress, not the Board.” *Id.* at 110.<sup>3</sup>

Absent adequate legal remedies, you might think that the current law at least gives employees the right to strike as a last resort when their employers will not address legitimate grievances and desires at the bargaining table. But, in reality, that is also not the case.

Certainly, the current law was *intended* to protect the right to strike. The express language of the Act makes that purpose clear: Section 13 provides, “Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike.” 29 U.S.C. § 163. And the NLRB has repeatedly held that employees are protected by the Act when they strike. *See, e.g., California Cotton Cooperative Ass’n*, 110 NLRB 1494, 1556 (1954). Indeed, the Supreme Court had recognized that “the right to strike” is at the “core” of the system of collective bargaining envisioned by Congress. *Business Employees v Missouri*, 374 US 74, 82 (1963). That is because employees’ ability to strike as a last resort when their legitimate concerns are not addressed “in great measure implements and supports the principles of the collective bargaining system.” *NLRB v Erie Resistor Corp.*, 373 US 221, 234 (1963).

But the core right to strike has been hollowed out over the years. The protection accorded strikers has become little more than nominal, and the type of strikes that receive even that protection have been unjustifiably narrowed.

While the law on its face protects workers who exercise the express right to strike, most employees perceive that protection as nothing more than a legal technicality that must be observed by employers who are permitted to “permanently replace” but not fire strikers. That perverse construction of the statutory right resulted from dicta in the 1938 Supreme Court case of *NLRB v Mackay Radio & Telegraph Co.*, 304 U.S. 333, 346

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<sup>3</sup> It should also be noted that the Board’s refusal to compensate employees for losses due to an employer’s refusal to bargain or failure to bargain in good faith is not limited to the context of a “technical refusal to bargain,” but extends across-the-board to all such violations excepting only losses due to unilateral changes imposed by employers without bargaining.

(1938) (“The assurance . . . to those who accepted employment during the strike that if they so desired their places might be permanent was not an unfair labor practice . . .”). It is now settled law that employers can permanently replace striking workers. *See, e.g., Hot Shoppes, Inc.*, 146 NLRB 802 (1964). Strikers cannot be fired, but if their jobs are taken by replacement workers who are promised permanent status, the strikers retain only a right to be recalled should a position open up in the future. *See Laidlaw Corp.*, 171 NLRB 1366 (1968). Employer need not even make a showing that permanent replacement is needed to maintain operations, *i.e.*, that temporary replacements are not sufficient or that supervisors and managers cannot fill in for striking employees.

The only exception to employers’ ability to permanently replace employees who exercise the right to strike is if the strike is motivated by the employer’s unfair labor practices. *See Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956). That exception is itself, at least from a remedial standpoint, an odd one, since employees have a legal means through which to redress employer unfair labor practices – filing a charge with the Board. In contrast, “economic” strikers have no such alternative means effectively to force their employer to address their legitimate claims at the bargaining table.

Not only does current law extend what employees rightly perceive as hollow protection to the right to strike, that protection only extends to a narrow category of strikes. Despite the unqualified language in the NLRA (“Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike.”), both the Supreme Court and the NLRB have held that a variety of types of strikes are unprotected altogether, including partial strikes and intermittent strikes. Thus, if employees’ primary grievance is that they are being forced to work excessive overtime, raising the risk of accidents in a factory or errors in a hospital, and, after unsuccessful airing their concern with their employer, the employees decide that, rather than causing much more significant disruption with a complete and open-ended strike, they will simply refuse to perform the overtime, the “partial strike” is unprotected, exposing the more cautious employees to termination. *See, e.g., Lake Development Mgmt. Co.*, 259 NLRB 791 (1981). Similarly, if employees’ concern is about arbitrary or discriminatory discipline and rather than completely shut down their employer’s operation they resolve to strike over each such action, they risk termination for engaging in an “intermittent

strike.” See, e.g., *NLRB v. Insurance Agents’ International Union, AFL-CIO*, 361 U.S. 477 (1960); *International Union, United Automobile Workers, Local 232 v. Wisconsin Employment Relations Board (Briggs-Stratton)*, 336 U.S. 245 (1949);<sup>4</sup> *Embossing Printers, Inc.*, 268 NLRB 710 (1984). While these and other limitations on the right to strike find no support whatsoever in the text of the current law, they are well-established in the Board’s jurisprudence. Thus, the current law appears to force employees into more rather than less disruptive forms of strikes and to force them into the form of strike that most exposes them to retaliation in the form of permanent replacement.

That result is of a piece with the dismantling of the law. An Act expressly intended to encourage “the practices and procedures of collective bargaining” has not done so. In fact, a recent study of representation elections conducted by the NLRB between 1999 and 2003, found that despite employees voting to be represented for purposes of collective bargaining, in a majority of cases no agreement had been reached a year after the election. Two years later, a third of the workplaces still had no agreement in place and three years later approximately 30% still had no collective bargaining agreement. Ross Eisenbrey, *Employers can stall first union contract for years*, Economic Policy Institute (May 20, 2009), at [https://www.epi.org/publication/snapshot\\_20090520/](https://www.epi.org/publication/snapshot_20090520/) (citing study by Cornell University Professor Kate Bronfenbrenner).

### **3. Inadequate Remedies for Violations**

Third, the Act’s inadequate remedies for unlawful conduct not only fail to deter or fully remedy violations, but rather actually encourage unlawful practices. The National Labor Relations Act, as compared to many other employment-related laws, provides only limited remedies for violations. Section 10(c) of the NLRA limits the remedies to a cease and desist order and, in the event of an unlawful firing, reinstatement with back

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<sup>4</sup> *Briggs-Stratton* was overruled in *Lodge 76, International Ass’n of Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976), but only to the extent it permitted state agencies to enjoin intermittent strikes. Together, the three Supreme Court cases construe the NLRA to permit employers to retaliate against employees who choose to strike intermittently instead of continuously. See *Insurance Agents*, 361 U.S. at 493.

pay, along with a required posting. By comparison, victims of race- or sex-based discrimination are eligible for compensatory and, in some cases, punitive damages under Title VII of the Civil Rights Act. Plaintiffs who bring a claim for unpaid wages or overtime under the Fair Labor Standards Act can recover liquidated damages in addition to their lost wages because Congress recognized that withholding employees pay is likely to “result in damages too obscure and difficult of proof for estimate other than by liquidated damages.” *Brooklyn Savings Bank v. O’Neil*, 324 U.S. 697, 707 (1945). And, in a slightly different context, federal antitrust law permits treble damages for those injured by violations of competition law.

The lack of effective remedies under the NLRA is of obvious importance for individual workers who are fired for organizing a union or engaging in other protected activity under Section 7 of the NLRA. But limited remedies also result in noncompliance with the NLRA because employers calculate that non-compliance is less costly in the long run – because by defeating an organizing drive they may avoid having to engage in collective bargaining with their employees – than following the law.

As a result, even though it is illegal to fire workers for organizing a union, employers nevertheless do it all the time, because they know what a chilling effect this has on the organizing campaign, and they know the consequences they will face are little more than a slap on the wrist. Data shows that one-third of employers fire workers during organizing campaigns.<sup>5</sup> And that some 15% to 20% of union organizers or activists can expect to be fired as a result of their activities in a union election campaign.

The NLRB investigates hundreds of charges of illegal firings and retaliation each year. In fiscal year 2018, the NLRB obtained 1,270 reinstatement orders from employers for workers who were illegally fired for exercising their rights under labor law, and the NLRB collected \$54 million in back pay for workers.<sup>6</sup> But because there are no significant monetary penalties against employers who illegally fire workers – only the back pay that the employer would have been paying the worker all along, minus any

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<sup>5</sup> Josh Bivens et al., “How today’s unions help working people.”

<sup>6</sup> National Labor Relations Board, NLRB Performance Reports–Monetary Remedies/Reinstatement Offers, accessed February 2019.

wages the worker did or could have earned in the meantime – employers just keep on firing workers when they try to organize a union.

To make matters worse, even where a violation of the NLRA can be proven, there is frequently a very lengthy delay between when a worker is fired and any offer of reinstatement. Proving that a firing is illegal typically requires an investigation by the NLRB's regional office, a hearing before an administrative law judge, and a decision by the National Labor Relations Board itself. Even then, Board orders are not self-enforcing, so employers routinely simply refuse to comply with the Board's orders or appeal those orders to the federal courts of appeals for purposes of delay. In the meantime, the fired worker can only wait. By the time the Board's order is finally enforced, often several years after the worker was fired, the union organizing drive is long over and, more often than not, the employee has been forced by circumstances to find other work and thus never returns to the workplace. The Board's remedies are, therefore, not only ineffective deterrents to employer lawbreaking economically, but also practically, as employees never get to see an unlawfully fired employee made whole by returning to the workplace at a time when it still matters for an organizing drive.

In strong contrast to the delay that characterizes remedies for unlawful employer behavior under the NLRA, federal labor law *requires* the Board to go to federal district court to seek an injunction anytime a union engages in unlawful picketing or strike activity. *See* 29 U.S.C. § 160(l). Astoundingly, the law contains no parallel requirement that the Board do the same when an employer violates the NLRA, even when that violation involves firing workers for organizing a union. *Compare* 29 U.S.C. § 160(j). Because there is no such requirement in the law, the Board only rarely seeks an injunction to put a fired worker back on the job.

Even more to the point, remedies are not just delayed but basically non-existent for a substantial proportion of cases filed with the Board. For example, in cases where an employer has illegally threatened workers who wish to organize but has stopped short of suspending or firing anyone for union activity, the sole remedy available is the posting of a notice promising not to do it again. (When it happens again, the remedy remains the same: a notice must be posted or, in particularly egregious cases, read by a manager to assembled workers.) The same notice posting “remedy” is given in cases

where an employer illegally stalls negotiations for months on end, and refuses to deal with the workers' chosen representatives. And in cases where the employer unilaterally changes terms without negotiating, or deals directly with employees, and otherwise undermines the workers' chosen representatives, the remedy is limited to a notice posting – accompanied by an order to rescind the unilateral changes upon request. These violations, which constitute breaches of the core principles of the Act, simply have no consequences.

An effective Act requires meaningful penalties for violations and a faster process for putting unlawfully-fired workers back to work. Without such reforms, the right to organize and act collectively, as promised by federal labor law, will largely remain an abstraction rather than a reality.

#### **4. Inadequate Coverage of Workers**

Finally, the Act, as currently construed, does not extend even these limited protections to many workers who could benefit from coverage. I will touch briefly on two such categories.

***Independent Contractors.*** The growth of Uber, Lyft, Instacart, GrubHub, and the hundreds of other “gig economy” services that perform tasks on a per-job basis has focused attention on the distinctions between a worker classified as an “employee” and one classified as an “independent contractor,” and the implications of that distinction.<sup>7</sup> Those implications are substantial, and govern everything from which

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<sup>7</sup> According to the most recent Contingent Worker Supplement published by the Bureau of Labor Statistics, approximately 10% of workers receive their primary source of income from “contingent” work, which is a category that includes freelancing, gig work, and other work as a non-employee. U.S. Bureau of Labor Statistics, “Contingent and Alternative Employment Arrangements – May 2017” (Washington, DC: U.S. Department of Labor, 2018), <https://www.bls.gov/news.release/pdf/conemp.pdf>. Of course, that survey does not count the substantial additional percentage of the workforce who supplements income through engaging in contingent work, many of whom do so because their primary earnings are insufficient to sustain themselves and their families.

See also generally, the data hub maintained by the Future of Work Initiative and the Cornell School of Industrial and Labor Relations that focuses on the “gig economy,” <https://www.gigeconomydata.org/> (last visited 3/23/19).

party – company or worker – must pay employment taxes; whether the worker is entitled to minimum wages, overtime, and leave protection; who bears the risk if the worker is injured on the job; and on and on. Significantly for this Committee, the distinction between classification as an “employee” and an “independent contractor” also governs whether a worker has rights under the NLRA, including the right to organize with others, and engage in collective bargaining – and collective action -- to better their terms and conditions.

Although new technological capabilities have brought this issue to the fore, misclassification – that is, a worker who is really an employee but who is classified as an “independent contractor” – is not new problem. Nor is it limited to these types of workers: historically, everyone from miners to waiters, and from janitors to seamstresses performing piecework has been dubbed an “independent contractor.” Categorizing workers as “independent contractors” has always been economically and legally beneficial for employers.

And, although the scale and presentation of the problem may be different, the criteria used to distinguish employees from independent contractors have – at least on paper -- remained the same. The Supreme Court set out the test fifty years ago, in *NLRB v. United Insurance Co. of America*, 390 U.S. 254 (1968). As the Court there explained, “There are innumerable situations which arise in the common law where it is difficult to say whether a particular individual is an employee or an independent contractor. . . . *There is no shorthand formula or magic phrase that can be applied to find the answer, but 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 in light of the pertinent common-law agency principles.” *Id.* at 258 (footnote omitted; emphasis added). The NLRB expressly adopted that open-ended test, most clearly in its unanimous 1998 decision in *Roadway Package System*, 326 NLRB 842, and reaffirmed it in its decision in *FedEx Home Delivery*, 361 NLRB 610 (2014).

This January, however, the NLRB abandoned that approach, and instead adopted a new formulation that purports to measure the degree of “entrepreneurial opportunity” available to the worker, and makes that factor paramount in determining employee

status. *SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (slip op., Jan. 25, 2019). Notably, although the Restatement (Second) of Agency §220(2) lists ten factors that should be considered in that determination, “entrepreneurial opportunity” is not among them. By placing that concept at the forefront of the analysis, “[t]he [Board’s] majority seems to have been bewitched by just the sort of “magic phrase” the Supreme Court warned about,” *id.* at 19, as Member McFerran observed in her dissent.

Moreover, the notion of “entrepreneurial opportunity” is itself amorphous and unlikely to provide guidance to either workers or companies. The *SuperShuttle* case is in itself illustrative: there, the Board majority found that airport van drivers were “independent contractors” even though the company “perform[ed] the very core of its business” with these drivers, who were “unskilled workers,” were “otherwise prohibited from working in the industry,” and who were required to accept payment from fares set by the company, adhere to company standards, and sign a “uniform agreement” imposed upon them by the company. *Id.* at 25. But on very similar facts, the Board has earlier found such workers to be “employees” entitled to the Act’s protections. *E.g.*, *Stamford Taxi*, 332 NLRB 1372 (2000); *see also Prime Time Shuttle*, 314 NLRB 838 (1994). Although the common law factors that the Supreme Court directed the Board to use, *United Insurance, supra*, are not mathematically precise, they are well-established, and their interpretation has been informed by decades of case law. In contrast, the *SuperShuttle* assessment of “entrepreneurial opportunities” depends in large measure on the eye of the beholder. For the Act to work as it was intended, employee status, and its attendant rights, should not be subject to such inconsistency.<sup>8</sup>

**Supervisors.** Contrary to Congress’s clear and repeatedly stated intent, the exclusion of “supervisors” from the protections of the National Labor Relations Act has developed into a source of contention over the status of employees, such as nurses, who

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<sup>8</sup> *SuperShuttle* is one of several cases decided by the new majority Trump-appointed Board that reversed existing Board precedent and substituted rules favored by employers. *See also PCC Structural, Inc.*, 365 NLRB No. 160 (Dec. 15, 2017), overruling *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011), *enfd. sub nom. Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013) (bargaining unit determinations); *see also Hy-Brand Industrial Contractors, Ltd. (Hy-Brand I)*, 365 NLRB No. 156 (2017) (overruling *Browning Ferris Indus.*, 362 NLRB No. 186 (2015) (joint employer standard)).

exercise a degree of responsibility in performing their jobs. The result has been to leave employers, unions and the employees themselves uncertain over who is or is not protected by the Act. This uncertainty not only leads to prolonged disputes over the status of certain key employees, it also directly interferes with the ability of contested employees who are not supervisors to exercise their rights under the Act.

When Congress amended the NLRA in 1947 to exclude “supervisors,” it clearly stated its intent to exclude only those individuals who are “vested with such genuine management prerogatives as the right to hire or fire or discipline or to make effective recommendations with respect to such action” and not to exclude “straw bosses, lead men, set-up men, and other minor supervisory employees.” S. Rep. No. 105, 80th Cong., 1st Sess. 4 (1947). As Senator Taft put it, the exclusion was “limited to bona fide supervisors, . . . to individuals regarded as foremen and employees of like or higher rank.” 93 Cong. Rec. 6442 (1947).

For many decades following enactment of the supervisory exclusion, the NLRB was faithful to Congressional intent, classifying as employees rather than supervisors those professionals, journeymen construction workers and other skilled and experienced employees who primarily worked at their profession or craft but also had limited authority to assign work and direct other employees to perform discrete tasks. *See Southern Bleachery and Printworks, Inc.* 115 NLRB 787, 791 (1956) (highly skilled employees whose primary function is physical participation in the production or operating processes of their employers' plants and who incidentally direct the movements and operations of less skilled subordinate employees based on their working skill and experience not supervisors); *Skidmore, Owings & Merrill*, 192 NLRB 920, 921 (1971)(architect who as project leader gave directions to others did so only to ensure quality of work on project and, in this capacity, was acting according to professional norms, not supervisory status).

In 1967, the Board extended its jurisdiction to for-profit healthcare facilities and began to apply its construction of the supervisor definition to so-called “charge nurses,” i.e., “the nurse, RN or LPN, on a particular shift who is responsible for seeing that the work is done, that medicines are administered to the patients, that the proper charts are kept, and that the patients receive whatever treatment has been prescribed.” *Abingdon*

*Nursing Center*, 189 NLRB 842, 850 (1971). Between 1967 and 1974, the Board decided numerous charge nurse cases, generally finding that the charge nurses were not supervisors, either because the nurse's actions were not performed with independent judgment, or in the case of RN's, because they directed others not as an exercise of supervisory power in the interest of the interest of the employer, but as a manifestation of their professional skill and training. See, e.g., *Madeira Nursing Center*, 203 NLRB 323, 324 (1973) (finding that RNs and LPNs who issued work assignments to aides were not supervisors because independent judgment was not required as assignments either were in accord with scheduling issued by director of nursing or were dictated by needs of patients); *Doctors Hospital of Modesto*, 183 NLRB 950, 951-52 (1970) (distinguishing between nurses who exercise authority as a product of their professional duties and those who are vested with true supervisory authority such as power to affect job and pay status).

In 1974, when Congress extended the jurisdiction of the Act to cover not-for-profit hospitals, it expressly relied on these and similar decisions by the Board in concluding that it was unnecessary to amend the Act to expressly protect health care professionals, including registered nurses, from being considered supervisors on the basis of the direction they routinely give to other employees. The Senate report explained that such an amendment was unnecessary, because the Board's decisions had "carefully avoided applying the definition of 'supervisor' to a health care professional who gives direction to other employees in the exercise of professional judgment, which direction is incidental to the professional's treatment of patients, and thus is not the exercise of supervisory authority in the interest of the employer." S. Rep. No. 93-766, 6 (1974). See also H.R. Rep. No. 93-1051, 7 (1974) (stating that amendment to supervisor definition is unnecessary given Board's prior precedent).

The Board continued on the course that Congress had endorsed until the 5-4 decision in *NLRB v. Health Care & Retirement Corp. of America*, 511 U.S. 571 (1994), rejected the Board's approach as inconsistent with what the five-member majority considered the "plain meaning" of the statutory language. In the 15 years following the Supreme Court's decision in *Health Care*, controversy over the application of the supervisor definition to nurses and other professionals as well as other sorts of skilled

employees and “team leaders” who provide direction to less skilled or experienced co-workers has engendered expensive and wasteful litigation that delays the NLRB election process and deprives workers of the right to freely choose whether to be represented for purposes of collective bargaining that is supposed to be guaranteed them of the Act.

In 2000, the issue returned to the Supreme Court, resulting in another 5-4 decision in the case of *NLRB v. Kentucky River Community Care Inc.*, 532 U.S. 706 (2001), again rejecting another attempt by the Board to harmonize the literal language of the statute with Congress’ expressed intent not to exclude professionals and others with minor supervisory authority from the protections of the Act. After that, in *Oakwood Healthcare*, 348 NLRB No. 37 (2006), the NLRB essentially abandoned the effort to reconcile the statutory definition with Congressional intent, adopting a reading of the statutory terms that threatens to exclude from coverage countless nurses and other professionals, as well as skilled craft workers who typically direct the work of less skilled employees.

While the problem of categorizing highly trained and highly skilled workers began with nurses, it soon spread to other categories of workers. *See, e.g., Entergy Mississippi, Inc.*, 357 NLRB 2150 (2011) (where the Board split over whether utility dispatchers were supervisors). The resulting confusion creates serious problems for employers, union, and, most especially, for those workers whose status is in question.

Because supervisors are not covered by the Act, a supervisor can be disciplined or fired for engaging in pro-union activity. And under current Board law, a supervisor can also lawfully be conscripted to participate in the employer’s efforts to prevent workers from forming a union. *See, e.g., Western Sample Book and Printing Co.*, 209 NLRB 384, 389-90 (1974). Supervisors who express qualms or are seen as insufficiently committed to the anti-union effort can and do lose their jobs. *Western Sample Book and Printing Co., supra*; *World Evangelism, Inc.*, 261 NLRB 609 (1982); *Crouse-Hinds*, 273 NLRB 333 (1984).

This puts the contested workers in an impossible situation. If they are found to be “supervisors,” they could be lawfully fired for supporting the organizing efforts of

their co-workers or even for refusing an employer directive to actively oppose those efforts. The NLRB litigation process can drag on for years before the status of an affected individual would be finally settled. Given the risks, it would take a particularly hardy union-support to insist on her rights to support – or at least not oppose – the organizing efforts of her co-workers.

The employer, too, is put in a difficult position. If it calls upon an individual to oppose an organizing campaign who turns out to not be a “supervisor,” the employer will have committed an unfair labor practice. In addition, that conduct could constitute grounds for re-running a representation election.

On the other side of the equation, a finding that a particular individual is a supervisor and not an employee can have a devastating effect on the organizational rights of the other employees in the workplace. Under *Harborside Healthcare Inc.*, 343 NLRB No. 100 (2004), the participation by a supervisor in pro-union activities can be grounds for setting aside a vote by the employees in favor of unionization, even if the employer itself vigorously opposed the union and made that opposition known to the workforce. Thus in *SNE Enterprises*, 348 NLRB No. 69 (2006), the Board overturned the results of an election in which the employees voted in favor of the union because two lead persons—whose sole authority over the other employees consisted of the ability to assign workers to different production line tasks as needed —had participated in soliciting authorization cards used only to support the filing of a petition for an election. The Board held that the leads’ actions on behalf of the union were “inherently coercive,” even though the leads had voted as employees, without objection, in three previous NLRB elections, didn’t regard themselves and weren’t regarded by co-workers as supervisors, and ceased their card solicitation three months before the election, when the employer—who had meanwhile actively campaigned against the union—informed them that it considered them to be supervisors.

The Act should be amended to expressly incorporate the definition of “supervisor” reflected in the Board decisions approved by Congress in 1974, when it failed to foresee that without such an amendment the Supreme Court would interpret

the Act to thwart the intent that the exclusion for supervisors would “limited to bona fide supervisors,” 93 Cong. Rec. at 6442, and not reach “minor supervisory employees,” like “lead men,” S. Rep. No. 105 at 4.

### **CONCLUSION**

Almost 50 years ago, in *H.K. Porter*, discussed above, the Supreme Court acknowledged that “[i]t may well be true . . . that the present remedial powers of the Board are insufficiently broad to cope with important labor programs.” 397 U.S. at 109. “But,” the Court continued, “it is the job of Congress, not the Board or the courts, to decide” whether enhanced remedial authority is merited. *Id.* The past 50 years has demonstrated conclusively that enhanced remedies and other amendments to the NLRA are necessary to fulfill the original promise of our labor laws. Among those amendments that would be the most meaningful are the following:

- \* A strong regime of enforcement mechanisms and remedies to deter violations, and provide meaningful, reasonably prompt remedies. Such a regime would include civil penalties, including mandatory minimum penalties for violations such as illegal threats or coercion, refusals to deal in good faith, or other violations that do not involve direct monetary damage to individuals. It would also include a requirement that the Board seek injunctions to reinstate workers fired for engaging in protected activity. Finally, it would include provision to place Board orders on the same, self-enforcing footing as the orders of other federal agencies – rather than requiring the Board to seek enforcement of its orders before the Courts of Appeal.

- \* Measures to ensure that employees can make meaningful, non-coercive choices about representation, including, most importantly, prohibiting employers from requiring employees to attend “captive audience” meetings or otherwise forcing them to listen to the employer’s message.

- \* Provisions designed to facilitate collective bargaining in first contract situations, including mandatory mediation and interest arbitration to resolve disputes.

- \* Provisions discouraging misclassification of workers as “independent contractors” or “supervisors,” and adopting clarifying statutory language so that such determinations have stability, and no longer rest as greatly in the eye of the beholder.