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A Mackinac Center Report

Michigan Labor Law: What Every Citizen Should Know

by Robert P. Hunter, J. D., L L. M

**Workers' and Employers' Rights and Responsibilities, and Recommendations
for a More Government-Neutral Approach to Labor Relations**



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Executive Summary

Jimmy Hoffa. Walter Reuther. Many famous figures from America's organized labor movement have their roots in Michigan, the birthplace of the automotive industry. Today, Michigan remains one of the most unionized states in the country, with a long and sometimes troubled labor history that continues to powerfully shape workplace relationships, economic decisions, and everyday consumer activity in the state and nation.

As of 1998, the number of Michigan union members in both private-sector and government employee unions totaled 953,800 employees. This number represents 16.7 percent of private-sector and 55.2 percent of government employees, or roughly one-fifth of the state's total labor force. Yet most Michigan citizens—including union members—do not recognize the pervasive influence of the labor movement on the state's political and economic life or understand the laws that govern unions and employment practices.

Labor organizations' influence extends far beyond affecting unionized workers. Unions also affect how and when Michigan parents can visit their children's classroom at a government school or volunteer to help the teachers. They significantly increase the cost of health care. They impair the city of Detroit's ability to deal effectively with fiscal crises. Labor unions affect (and not always positively) their members' wages, benefits, and working conditions, which in turn affect the prices consumers must pay for a variety of products, from fruits and vegetables to minivans and new homes. And unions also have a powerful influence, through multimillion-dollar lobbying efforts, on political causes and campaigns.

This handbook provides Michigan citizens, policy makers, consumers, employees, union members, and employers with important information about labor law and unions to help them understand the role organized labor plays in the state's economy and the life of every citizen. It is designed to counter many prevalent misconceptions and educate Michigan citizens about vital labor issues so that they are able to make informed, individual decisions about their economic and workplace obligations and opportunities. The primer explains

- How current federal and Michigan labor laws favor mandatory unionism over the individual rights of workers;
- How government employee unions politicize state and local governments, including school boards;
- Why and how unions are created and how they establish themselves in workplaces;

Michigan's 953,800 union members make it one of the most unionized states in the country, yet few citizens recognize organized labor's pervasive influence on the state's political and economic life or understand the laws that govern unions and employment practices.

This handbook provides Michigan citizens, policy makers, consumers, employees, union members, and employers with important information about labor law and unions to help them understand the role organized labor plays in the state's economy and the life of every citizen.

- The legal rights and responsibilities of employees and employers;
- The current decline and future prospects of the organized labor movement; and
- How to reform federal and Michigan labor law toward a traditional, government-neutral approach toward labor representation.

The handbook is divided into three parts. Part I is an overview of labor unions, union membership, and the organized labor movement as a whole. It includes a brief history of the movement as well as an explanation of the advantages and disadvantages to employees of joining a union. It also explains the three historical approaches government has taken toward the labor market, the difference between private-sector and government employee unions, and the proliferation of new workplace laws.

Part II provides a detailed, step-by-step description of how private-sector and Michigan and federal public-sector employee unions respectively use the National Labor Relations Act of 1935, Michigan's Public Employment Relations Act of 1947, and the federal Civil Service Reform Act of 1978 to "organize" employees as new members. It also explains the legal obligations of both unions and employers during each step of this organizing process, including what sorts of behavior constitute unfair labor practices.

Part III details the decreasing influence of the labor movement and offers specific recommendations for improvements to federal and Michigan labor law that will free individual workers, help unions survive in a globally competitive economy, energize the state's labor market, and make Michigan a magnet for expanding companies, good-paying new jobs, and booming economic growth. The recommendations are as follows:

End compulsory union membership and financial support. Congress or the Michigan Legislature should enact a right-to-work law that frees workers from having to join or pay dues or fees to workplace unions in order to keep their jobs.

Enforce workers' constitutional rights. The Michigan Legislature should pass a "paycheck protection" law that requires unions to obtain up-front, written approval from workers before spending dues money on political, social, and ideological purposes unrelated to employee representation duties.

Encourage employee workplace involvement. Congress should amend the National Labor Relations Act to give non-union employees and management greater freedom to cooperatively solve workplace problems without counterproductive union intervention and subsequent inquiries from the National Labor Relations Board.

Guarantee employees' rights to participate in union governance. Congress should amend the National Labor Relations Act to guarantee the rights of all employees to vote to establish a union, approve a strike, agree to pay union dues as a condition of employment, and ratify union-negotiated labor contracts.

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Part I

An Overview of Labor Unions

1. Introduction

Labor unions affect the daily lives of Michigan citizens in dramatic and powerful, though often indirect and hidden, ways. Everyone—from blue collar factory workers, white collar accountants, soccer moms, and business owners to elementary school students, retirees, Detroit citizens, and residents of the Upper Peninsula—is affected every day by the organized labor movement. Few, however, understand the legal and historical role labor unions have played and continue to play in Michigan’s economy, politics, and culture.

Part I of this handbook provides a basic overview of organized labor and contemporary labor law. It includes a brief history of the American labor movement, the three approaches government has historically taken toward unions, how unions are created, the difference between public- and private-sector unions, how collective bargaining works, and the advantages and disadvantages to employees who choose to join a union.

This overview is designed to counter many prevalent misconceptions about unions and labor law and expand Michigan citizens’ knowledge about vital labor issues so that they are able to make informed, individual decisions about their workplace obligations and opportunities.

The Prevalence of Unions in Michigan

Michigan is one of the most unionized states in the country, with a long and sometimes troubled labor history that continues to powerfully shape employment relationships in the state today. As of 1998, the number of Michigan union members totaled 953,800 employees. This number represents 16.7 percent of private-sector and 55.2 percent of government employees. The combined number of union households in Michigan equates to 21.6 percent of the total workforce, or over one-fifth of all employment relationships.¹

The combined number of government and private-sector union households in Michigan equates to 21.6 percent of the total workforce, or over one-fifth of all employment relationships.

Labor unions are a major reason why Michigan state government employees earn an average of 16 percent more than private sector workers.

Michigan is also the birthplace of the American labor movement, and organized labor dominates auto manufacturing, the state's largest industry. Labor unions are also a major reason why Michigan state government employees earn an average of 16 percent more than private sector workers.² Unions affect how and when Michigan parents can visit their children's classroom or volunteer to help the teachers. They significantly increase the cost of health care. They impair the city of Detroit's ability to deal effectively with fiscal crises. Labor unions affect members' wages, benefits, and working conditions, which in turn affect the prices consumers must pay for a variety of products, from fruits and vegetables to minivans and new homes. In other words, unionization plays a significant role in the lives of all Michigan citizens, whether they realize it or not—and many, in fact, do not.

Michigan Citizens Have Little Knowledge of Unions and Labor Law

Most citizens recognize the benefits of unionization, such as higher nominal wages and improved working conditions, but few understand all of the costs associated with labor unions. Families may fail to understand how teacher unions have opposed, often successfully, the education reforms that parents want for their children. Unionized workers often do not know how they can reduce the high cost of their union fees. Owners and managers of businesses often mistakenly believe that they are required to force employees to join and financially support workplace unions. Many taxpayers are unaware of how labor unions routinely oppose privatization as a tool to provide improved government services at lower costs. And voters in general underestimate the role labor unions play in selecting political candidates, funding political campaigns, and otherwise participating in the democratic process.

This lack of knowledge may be due in part to general apathy and inattention, but labor unions do have a vested interest in keeping the public uninformed. For example, school employee unions often prefer public school contract negotiations to be conducted behind closed doors so that they can negotiate concessions that parents and taxpayers might not wish their school district to make.

Unions also fight efforts to inform members of their right to resign and not pay dues for non-workplace-related union expenditures, because such information might drain union treasuries. All too often, union members who inquire about their constitutional or statutory rights are given misinformation or met with downright dishonesty. Coercion, threats, and physical violence are tactics all too often employed in labor disputes which jeopardize workers' safety and force them to make untenable choices in either supporting a questionable strike or crossing a picket line to return to work.

2. History of American Labor Law and Unions

From the Teamsters to the United Auto Workers to the National Education Association, labor unions figure prominently in national and Michigan politics and have a dramatic effect on everything from the price of a new car to the education of children. But how did this come to be so?

The purpose of this section is to describe the history of the modern organized labor movement, the laws that have shaped and are shaping it, and government's role in establishing the prominence of "Big Labor" in American economic and political life.

Government's Three Historical Approaches to Labor Unions

A labor union can best be defined as an organization that exists for the purpose of representing its members to their employers regarding wages and terms and conditions of employment.³ Historically, government has taken three approaches to labor unions: the *criminal conspiracy approach*, the *free-market (government-neutral) approach*, and the *compulsory unionism approach* (see Chart 1, next page).

Under the *criminal conspiracy approach*, the government views labor unions as illegal organizations that conspire to disrupt commerce or harm employers. Membership in a labor union is illegal under this approach, and so are strikes and threats designed to force employers to bestow additional benefits upon their workers. This approach existed in many states for a brief time in American history (roughly between 1806 and 1842).

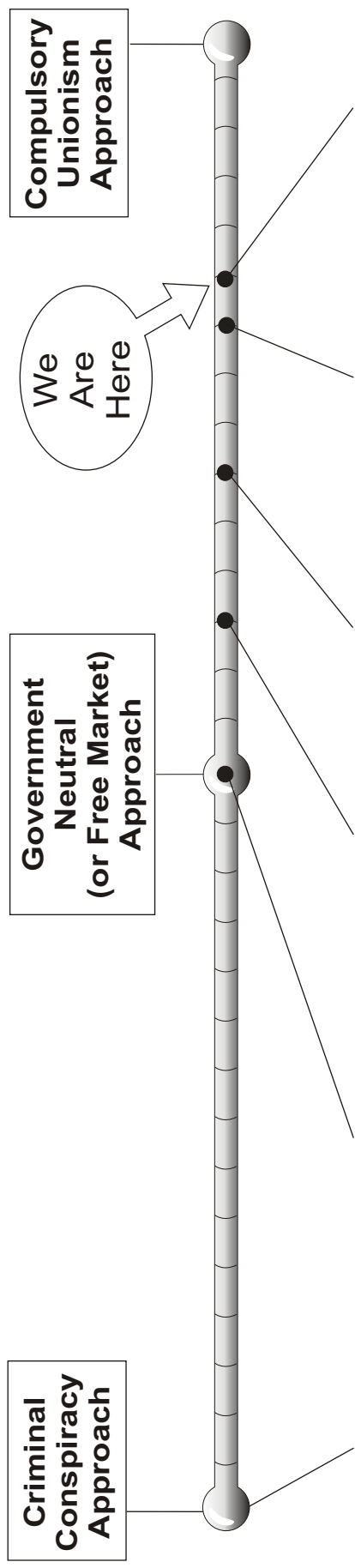
The *free-market (or government-neutral) approach* requires that the government neither encourage nor discourage the formation of labor unions. Workers who choose to form a union are free to do so. Government does not prohibit union membership or union activity, provided existing laws against fraud, violence, and property damage are not violated. Individual workers may join or not join a union, and union leaders must earn each worker's voluntary support by providing desired benefits. Under this approach, employers may choose to deal or not deal with the labor union and workers are free to strike regardless of how much it may economically harm their employer. This approach existed in a number of states mostly prior to the 1850s.

The third government approach to labor unions is the *compulsory unionism approach*, where government plays an active role in encouraging labor unions. The government forces employers to recognize labor unions and negotiate with them in a process called "mandatory collective bargaining." Unions are recognized by law as "exclusive bargaining representatives" who may prohibit individual workers in their bargaining units from negotiating individual working arrangements with their employer, even if they would be better off doing so and their employer is willing. This approach arose out of the Great Depression era of the late 1920s to the mid-1930s.

Likewise, the privilege of exclusive representation prevents workers from being represented by a union other than the one approved by a majority of their co-workers. Everyone in the bargaining unit is in turn required to work under the terms of any contract the union approves. If the contract includes a union security clause, then all unit members are required to pay for the union's workplace representation through dues or fees.

The free-market (or government-neutral) approach toward labor unions requires that the government neither encourage nor discourage the formation of unions. Individual workers are free to join or not join a union, and union leaders must earn each worker's voluntary support by providing desired benefits.

Chart 1 – Spectrum of Government Intervention in Organized Labor



Criminal Conspiracy Approach

Government Neutral (or Free Market) Approach

Compulsory Unionism Approach

We Are Here

Union Activity Illegal

During certain periods in our nation's history, labor unions were prohibited as illegal conspiracies.

Free Market in Labor Representation

Prior to 1926, workers, unions, and employers were free to negotiate without government intervention. Unions had to earn the voluntary support of each union member.

Individual Choice in Representation

Workers are permitted to decide whether or not they want to be represented by the union or negotiate their own arrangements.

Right-to-Work Law

Taking a small step toward government neutrality, 21 states have enacted Right-to-Work laws, which prevent workers from being forced to join or financially support a labor union.

Paycheck Protection

Unions are required to obtain annual written permission from workers before dues may be deducted from their paycheck for political and other non-collective bargaining purposes.

Today in Michigan

Once a union is "certified," the government forces workers to be represented by the union, prevents individual workers from negotiating independently with their employer, and forces employers to bargain with union representatives.

The Modern Approach to Labor Unions

Today, both the federal and Michigan state governments have adopted the compulsory unionism approach. Under the National Labor Relations Act (NLRA), private-sector unions are granted special legal powers and privileges, including the privilege of exclusive representation and the power to extract dues and fees from all workers in a bargaining unit if the employer agrees to it. This latter power amounts to a private “tax” since it is levied against all workers, including those who voted against union representation, and the amount of the dues and fees is never subject to a vote.

The NLRA does not, however, apply to government employee unions, including military and school personnel, due to concerns that compulsory unionism for them would overpoliticize government, make it more expensive and inefficient, and cause public security problems.

Many states shared those concerns and have not established mandatory collective bargaining for their government employees. In Michigan, however, government employee unions are promoted under the Public Employment Relations Act (PERA), which was originally passed in 1947.

In 1965, the Michigan Legislature substantially revised PERA to establish mandatory collective bargaining and exclusive representation for state and local government employees, including those in schools. Since that time, the number of unionized government employees in Michigan has risen dramatically and affected state politics and government significantly.

The NLRA and PERA represent the statutory cornerstones of modern Michigan labor law. The NLRA is administered by the National Labor Relations Board (NLRB) in Washington, D. C. PERA is administered by the Michigan Employment Relations Commission (MERC), which is headquartered in Detroit.

The following section details the significant events that led the U. S. and Michigan away from a free market in labor representation and toward compulsory unionism, culminating with the passage of the NLRA in 1935 and subsequent amendments to it.

The Beginnings of the American Labor Movement

For much of American history, labor relations went largely unregulated by government; they were considered private matters best settled directly between employers and employees. In the late nineteenth century, however, this “government-neutral” view of the workplace began to change. Employees acting together to address workplace issues increasingly drew the attention of the courts.

Many of the early labor court cases held that these employees’ concerted workplace activity was really a form of criminal conspiracy.⁴ Though these cases were primarily adjudicated in civil, not criminal, proceedings, the conspiracy theory was nevertheless broadly invoked to limit or prevent concerted or union activity.⁵ The prevailing judicial view was that most forms of concerted employee protest aimed at interfering with an employer’s

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business operations, including strikes and picketing, were illegal.⁶ The courts therefore frequently halted forms of concerted employee activity that were often initiated by unions.⁷

Toward the turn of the century, organized labor unions became increasingly assertive as the federal government began to eye the emerging “big business” class of employers with suspicion, believing they engaged in restraint of free trade. Congress soon passed laws, such as the Sherman Antitrust Act, to prohibit monopolistic business practices⁸ and in this climate, labor and management began to engage in a battle for supremacy over workplace terms and conditions of employment that continues today. Recent examples of this ongoing battle include the labor disputes between General Motors and the United Auto Workers union and United Parcel Service and the Teamsters union.

Early labor skirmishes were often waged in the courts. In the 1908 “Danbury Hatters” case,⁹ the U. S. Supreme Court held that the United Hatters Union had violated the Sherman Antitrust Act by initiating a nationwide boycott against a Danbury, Connecticut, hat company with the intent to force it to recognize the union. In response to the Danbury decision, the organized labor movement shifted strategy, turning its attention to the legislative front and becoming more active politically.

By 1914, the unions’ political strength had grown to such an extent that it could successfully pressure Congress into passing the Clayton Act,¹⁰ which exempted labor organizations from the antitrust laws. The Clayton Act provided

The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purpose of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the anti-trust laws.¹¹

The Clayton Act also placed restrictions on the ability of courts to stop strikes and picketing.¹² Labor unions heralded this legislation as the solution to the judicial application of antitrust laws to curb union activity. The organized labor movement’s celebration, however, was short-lived.

In 1921, the Supreme Court analyzed another union boycott, similar to the one in the Danbury Hatters case, in *Duplex Printing Press Co. v. Deering*.¹³ This time, the unions had initiated a boycott of nonunion printing presses in an effort to protect unionized printing companies from price competition. The Court held that such a boycott was not protected under the Clayton Act, ruling that attempts to exert pressure on companies other than the ones that employed the unionized employees still violated antitrust law.

In another decision the following year, the Supreme Court held that the United Mine Workers union had unlawfully conspired to inhibit production and distribution of nonunion-mined coal.¹⁴ Thus, despite the passage of the Clayton Act, court decisions remained an impediment to the success of many of organized labor’s goals at the end of the 1920s.

By 1930, other events began to influence the direction of labor relations. During World War I, a War Labor Board was created to regulate relations between employers and unions in order to forestall any workplace disputes which might imperil goods and services necessary for the war effort.¹⁵

The War Labor Board officially recognized a process by which employees could bargain through unions and imposed restrictions on employers that interfered with their employees' ability to organize unions.¹⁶ Additionally, in 1926, after a number of strikes in the railroad industry, Congress passed the Railway Labor Act into law.¹⁷ That act, which applies to "common carriers" such as railroads and now airlines, was the result of negotiations between railroad companies and unions and sets forth an elaborate procedure for collective bargaining for that industry.¹⁸

In 1929, the Great Depression era was ushered in. The sudden economic upheaval threw thousands of people out of work, and they soon began to exert unprecedented pressure on government and private employers to address the crisis in employment. This massive unemployment combined with an increasingly favorable legislative climate set the stage for a significant change in governmental regulation of labor-management relations and created the environment in which "Big Labor" grew to its current size and influence.

The National Labor Relations Act and the Growth of Organized Labor

The economic chaos of the Great Depression intensified the organized labor movement's desire for a comprehensive, national labor law that would permanently end judicial and employer interference with workers' union activity.

The first attempt at a national labor law came with the passage of the National Industrial Recovery Act (NIRA) in 1933. NIRA was intended as a general plan to promote economic recovery,¹⁹ and as part of the package it conferred upon employees statutory rights to organize labor unions and bargain collectively. However, the law lacked a mechanism for implementing these rights; for example, employees had no ability to hold elections to choose their bargaining representatives.²⁰ As a result, many employers formed their own company-dominated unions or else simply ignored the law.²¹ The Supreme Court ultimately struck down the largely ineffective and counterproductive NIRA as unconstitutional in 1935.²²

But later that same year, the unions' dreams of a national labor law were realized. Congress passed the National Labor Relations Act (NLRA),²³ which has served as the framework for federal regulation of private-sector labor-management relations ever since. In introducing the bill that would eventually become the NLRA, Senator Robert Wagner of New York emphasized that "[g]enuine collective bargaining is the only way to attain equality of bargaining power between management and labor."²⁴

The NLRA made it illegal for employers to interfere with three significant areas of employee activity:

- organization into labor unions;
- collective bargaining through labor unions; and
- concerted activities such as striking and picketing.²⁵

The economic chaos of the Great Depression intensified the organized labor movement's desire for a comprehensive, national labor law that would permanently end judicial and employer interference with workers' union activity.

In 1935, Congress passed the National Labor Relations Act, which has served as the framework for federal regulation of private-sector labor-management relations ever since.

The NLRA outlawed as “unfair labor practices”²⁶ any employer attempts to interfere with, restrain, or coerce employees engaged in these protected union activities. The NLRA also forced employers to bargain in “good faith” with unions that represented their employees; failure to do so was considered an “unfair labor practice.”²⁷

A new federal agency, the National Labor Relations Board (NLRB) was established to enforce these and other provisions of the NLRA.

The original NLRA as passed marked a radical departure from the country’s previous governmental “hands-off” approach to labor-management relations; Congress in fact later amended the NLRA several times in an effort to restore to the employment relationship a balance of power between labor and management.

In 1947, Congress passed the Taft-Hartley amendments to the NLRA, which sought to enhance the legal rights of individual employees under the law and prevent excessive union coercion and abuses. These amendments recognized the right of employees to refrain from union activities, added new provisions to prohibit union unfair labor practices, and set forth the duties of each party in collective bargaining.

Taft-Hartley also prohibited unions from engaging in coercive conduct (such as strikes or picketing) against neutral persons in certain circumstances, including “work jurisdiction disputes” between two or more unions over employee work assignments. Provisions for mandatory and discretionary injunctions against this activity were added, and administrative changes to the NLRB were also made.²⁸

Other major features of Taft-Hartley included a new provision that authorized suits in federal court by or against labor organizations for violations of labor contracts, and, most importantly, a provision that allowed states to pass “right-to-work laws.” Right-to-work laws make union membership optional by preventing labor unions and employers from agreeing to force workers to join or financially support a labor union as a condition of employment. Since Taft-Hartley was enacted, twenty-one states²⁹ have passed right-to-work laws to give workers more freedom from compulsory unionism, although Michigan has yet to do so.

In 1959, Congress amended the NLRA again to correct various union and management abuses of employees uncovered by the Senate during investigative hearings.³⁰ These amendments, known as the Landrum-Griffin amendments, were primarily intended to establish additional legal rights for union members to participate in the internal governance of their unions.

Landrum-Griffin strengthened NLRA provisions that prohibited unions from striking or picketing employers who were not directly involved in a labor dispute and established new legal rights for union members and duties for labor organizations,³¹ including the following:

- a “bill of rights” for union members, including the rights to criticize union policies, nominate candidates for officer positions, and run for office;
- reporting and disclosure requirements for unions;
- requirements for democratic union elections;

- greater regulation of union officers' spending; and
- a prohibition against union picketing for purposes of organizing employees or forcing employer recognition.

In 1974, Congress again amended the NLRA to extend its coverage to nonprofit hospitals, broadly define the term "health care institution," and establish some special procedures covering collective bargaining in the health care industry.³²

This was the last significant legislative change to the NLRA. But how do unions today actually function under the law and what do they do? That is the focus of the next section.

3. How Labor Unions Operate

Today, labor unions exist in a wide variety of industries and fields, yet many workers, whether they are members of a union or not, do not fully understand how unions function or recognize all the advantages and disadvantages associated with union representation.

The purpose of this section is to briefly explain how and why employees join or form labor unions, the benefits and disadvantages to them of doing so, the obligations union membership imposes, the difference between government and private-sector unions, and the basic workings of the collective bargaining process.

How and Why Unions Are Created

Employees may unionize for a number of different reasons. The impetus is often nothing more than a desire to improve the compensation they receive for work that they may believe is undervalued. Poor job security, nepotism, discrimination, and the absence of opportunity for advancement are also frequent causes of employee unrest and interest in unionization.

Employee unionization in a particular workforce usually happens in one of two ways. The first is that the employees believe they are being treated unfairly or unreasonably by their employer and want to band together to exert greater influence over their wages, benefits, and working conditions. These employees may then either found a new labor union or organize to create a local affiliate of an established union.

The second way a labor union is created is when an existing union approaches the workers of a particular employer and encourages them to join the union, usually by promising job protection and expanded benefits.

This second process is similar under both Michigan and federal law, and usually begins with the union organizers distributing pamphlets about the benefits of joining a union. The employer may counter with information about the problems and disadvantages to employees involved with bringing a union into the workplace.

Today, labor unions exist in a wide variety of industries and fields, yet many workers, whether they are members of a union or not, do not fully understand how unions function or recognize all the advantages and disadvantages associated with union representation.

Under both the federal National Labor Relations Act (NLRA) and Michigan's Public Employment Relations Act (PERA), the union organizers must convince 30 percent of the workers to sign employee election authorization cards. If the organizers succeed, they request that the appropriate government agency³³ hold a "certification election." At the election, each worker is allowed to vote, by secret ballot, either for or against unionization. If the union receives "yes" votes from a simple majority (more than 50 percent) of the workers who cast a ballot, the union becomes "certified" as the exclusive representative of all the workers in the workplace, or "bargaining unit."

How Collective Bargaining Works

Once a union is established in a workplace, discussions begin between the union and the employer regarding a new labor contract which will govern the working relationship between the employer and all the workers in the bargaining unit. This process is known as "collective bargaining."

Collective bargaining is similar under both the NLRA (which applies only to private-sector employees) and PERA (which applies to most Michigan public-sector employees, including public school teachers). There are, however, many legal and technical considerations which are determined by the specific circumstances of each employment situation: The following description is intended as only a general outline of the collective bargaining process.

Under collective bargaining, the union is the exclusive employee representative; individual workers are prevented from negotiating their own work arrangements with the employer. Union representatives instead do the negotiating with the employer, and each worker is required to abide by the terms of the approved contract (though workers cannot be forced to join the union or to pay non-workplace-related union fees, even if the contract states that such is required).

The employer is required by law to negotiate with the union over various terms and conditions of employment, which may range from wage and benefit issues to work rules that govern how workers are to perform certain tasks.

The collective bargaining process begins with the union and the employer presenting their proposals. Both parties are required by law to negotiate in "good faith," and are subject to penalties if they fail to do so. This does not mean that an employer must necessarily agree to any specific proposal brought forth by the union.³⁴ Rather, the duty to bargain in good faith is simply a mutual obligation to participate actively in the deliberations, indicating a present intention to find a basis for agreement.³⁵ The legal right to collectively bargain is viewed as the employees' unified voice, through the union, in helping to determine their wages, hours, and other benefits of employment.

Possible topics of collective bargaining fall into one of three categories: *mandatory*, *permissive*, or *illegal*. *Mandatory* topics are issues that must be discussed if one of the parties requests it. Examples of mandatory topics include wages and benefits.

Under collective bargaining, the union is the exclusive employee representative; individual workers are prevented from negotiating their own work arrangements with the employer.

Permissive topics are issues that either party, the union or employer, may ask to discuss, but which the other party is not required to discuss. Examples of permissive topics include whether job applicants will be required to undergo pre-employment drug testing, or whether the company will use the union's label on its products.

Illegal (also called "prohibited") topics of collective bargaining are those topics that neither party may raise, such as proposals to discriminate against people of a particular race or allow workers to refuse to handle goods produced by non-union companies.

The employer and union discuss the issues, present information to show the reasonableness of their demands, and try to achieve concessions. Neither party is required to agree to any provision, only to discuss it in good faith. If the parties cannot resolve one or more issues, they have reached what is called "impasse." At this point the union may call a strike, or the employer may "lock out" the union workers. In some circumstances, the employer may bring in replacement workers to continue operations.

There are many ways to deal with impasse, strikes, and lockouts. These include mediation and arbitration. During the negotiation, one of the parties may charge that the other has committed an "unfair labor practice," and if the appropriate government regulatory agency agrees, the guilty party may be prohibited from engaging in certain actions.

The employer's duty to bargain includes an obligation to supply to the union, when requested, any information that is "relevant and necessary" for union agents to bargain intelligently and effectively. The employer is not compelled to surrender confidential or proprietary information such as its profits and losses, unless it claims a financial inability to meet the union's demands at the bargaining table.

The employer's duty to bargain also precludes it from taking any unilateral action by changing the conditions for which bargaining is first required. This means that, for example, the employer cannot put a wage increase into effect until the union agrees, unless it has a demonstrated past practice of raising wages without union agreement. If the parties reach impasse, then the employer is free to make the changes and the union is free at any time to resort to a strike or picketing to enforce its demands.

Important Differences between Government and Private-Sector Unions

When the NLRA was being drafted and debated in the 1930s, a central question was whether or not compulsory unionism should apply to government employees. The growing pool of government employees made a tempting target for union organizers, but there was great opposition for a number of reasons.

First, opponents of mandatory collective bargaining for government employees argued that compulsory unionism would threaten public safety. Forcing military leaders to bargain collectively with armed forces personnel unions, for example, would pose a serious threat to the effectiveness of the national defense. A union contract that specified how military personnel should perform would take the discretion and flexibility away from commanders who were required to act creatively and decisively at a moment's notice. And

When the NLRA was being drafted and debated in the 1930s, a central question was whether or not compulsory unionism should apply to government employees. Forcing military leaders to bargain collectively with armed forces personnel unions, for example, would pose a serious threat to the effectiveness of the national defense.

Competition among businesses forces private-sector unions to be reasonable in their demands or face losing employment for their members by causing a business bankruptcy. With government, however, there is no such competition.

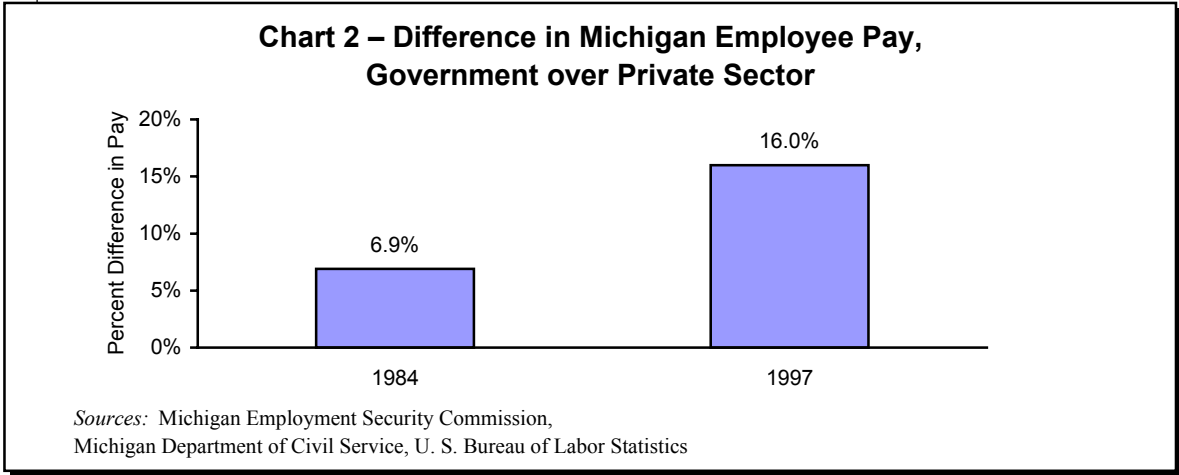
what would happen, they asked, if Air Force pilots threatened to strike during war time, or local police or firefighters staged a walkout, threatening the safety of their community?

Second, critics argued that there is a major difference between government and the private economy in the areas of competition and consumer choice. For example, private-sector businesses that negotiate union contracts with extravagant wages and inefficient work rules are soon forced to drive up their prices and sacrifice customer service to meet the demands of their labor agreement. But consumers have choices, and they will avoid high prices and poor service by patronizing other businesses. This competition forces the labor unions to be reasonable in their demands or face losing employment for their members by precipitating a business bankruptcy.

With government, however, there is no such competition. If a state government negotiates costly and inefficient union contracts with state employees, citizens and taxpayers have no alternative. Without packing up and moving to another state, citizens have no direct way to drive on lower cost roads, support a less expensive prison system, or otherwise seek options in the functions of state government.

Citizens who do not or cannot move are forced to either continue to pay higher taxes or else spend their time, energy, and money lobbying their elected officials for change, which most just cannot afford to do. Unlike in the private sector, citizens cannot easily choose a better provider of government activities.

Government employee unions therefore experience little external pressure to moderate their demands. This is one reason why salaries and benefits for government employees are routinely higher than salaries and benefits for private-sector employees (see Chart 2, below).



It is certainly debatable whether collective bargaining as an institution is appropriate to government.³⁶

Another concern over compulsory unionism for government employees focuses on the incentives it creates for agencies to become politicized. For example, private citizens have little financial incentive to get involved in politics because they could work long hours

to bring about change and end up reaping only a few dollars, if any, off of their tax bills. Government employees, on the other hand, have significant financial incentives to get involved in politics because they can help elect their “boss.” By electing public officials who are friendly to union interests, government employees can expect favorable treatment, which may come at the expense of the citizens and taxpayers.

Compulsory union laws force government employees to financially support labor unions. The unions contribute heavily to candidates seeking positions on political bodies such as the local school board, county commission, state legislature, or even Congress. If the union-backed candidates are successful, they may support policies that benefit government employees at the expense of citizens and taxpayers (see Chart 3, next page).

Few Michigan citizens fully understand the pervasive influence that government unions have on Michigan politics. For example, the Michigan Education Association (MEA), the state’s largest government school employee union, is frequently the largest single contributor to Michigan political campaigns. In 1998, the MEA’s political action committee (PAC) topped the list of contributors to the Democratic party, giving \$1,075,050 to various political campaigns. Government employee unions have extensive networks of supporters to rally their members and make partisan politics an institutional priority.

One example of how citizens and taxpayers can be harmed by compulsory unionism in government is the unions’ categorical opposition to privatization, whereby government services such as trash collection are contracted out to a private firm. Many communities have found that privatization saves significant amounts of tax dollars and improves services. Flint Mayor Woodrow Stanley, for example, once saved \$1.4 million out of a \$6.2 million waste collection budget simply by threatening to privatize unless the union workers performed more efficiently.³⁷ Most unions strongly oppose privatization because they believe that it always means unionized government employees will be replaced with private, non-union workers.

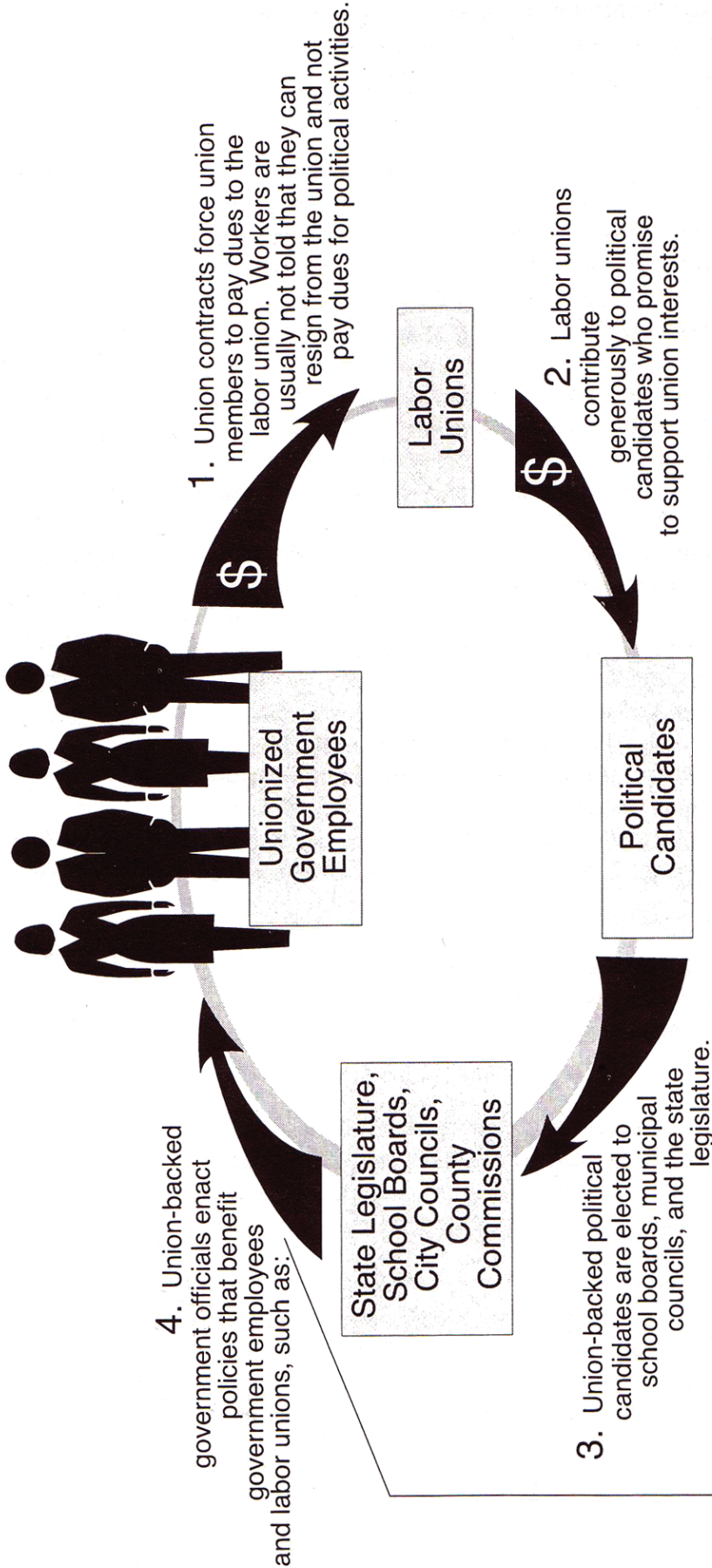
Union-backed public officials may also oppose any efforts to repeal compulsory union laws, work to strengthen those laws, or support forcing all workers covered by collective bargaining agreements, including non-union members, to financially support unions.

Such public officials may also keep more government employees on the payroll just to increase their political support. They may also support “prevailing wage” laws which require contractors working on government projects to pay union-scale wages, benefits, and employ restrictive work rules, effectively eliminating more efficient, non-union competitors and driving up costs to taxpayers.

Recognizing these and other potential problems with public-sector compulsory unionism, Congress exempted government employees from mandatory collective bargaining. Some states, however, ignored these concerns and enacted their own mandatory collective bargaining laws for government employees. With PERA’s passage in 1947, Michigan became one of them.

Few Michigan citizens fully understand the pervasive influence that government unions have on Michigan politics. For example, the Michigan Education Association, the state’s largest government school employee union, is frequently the largest single contributor to Michigan political campaigns.

Chart 3 – How Public Sector Unions Politicize Government



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Michigan Labor Law: What Every Citizen Should Know

Currently there are 36 states that have mandatory collective bargaining for all or some government employees.³⁸ In addition, federal legislation was enacted in 1978 that implemented mandatory collective bargaining for many federal employees.

Union Security and Membership Obligations

In order to build membership and bolster their financial resources, unions often try to convince employers to include a “union security clause” in the contracts they negotiate. These clauses specify union membership and financial support requirements for employees. Security clauses are necessary, argue the unions, to support the costs of bargaining and employee representation.

Many employers mistakenly believe that they are legally required to have such clauses in their contracts, but the law does not mandate union membership or employees’ financial support. A union security agreement is only a permissive topic of bargaining, not a mandatory one: The employer must agree to it before it can be enforced against employees as part of a collective bargaining agreement. In other words, no employee is automatically bound to join or make financial contributions to a union until a valid employer-union agreement on this issue has been reached.

Several terms are used to describe the employer-employee relationship with respect to union membership and financial support:

- A “merit shop” or “open shop” describes a workplace where there is no contract between a union and the employer.
- An “agency shop” is a workplace where there is a union contract that does not require union membership, but does require each worker to pay a union representation or service fee.
- A “union shop” is a workplace where the union contract requires each worker to join the union within a certain time period after employment and to financially support the union by paying dues.
- A “closed shop” is a workplace where a union contract requires the employer to hire only workers who are already union members. (This type of contract is illegal under the Taft-Hartley amendments of 1947.)

In Michigan, PERA, which governs labor relations for public-sector employees, prohibits labor-management agreements from requiring employees to join a labor union.³⁹ The maximum form of compulsory unionism permitted under PERA is an agency shop agreement, which compels all employees to either join the union that represents them or pay a “service fee” to it as a condition of employment.

Many employers mistakenly believe that they are legally required to have “union security clauses” in their contracts, but the law does not mandate union membership or employees’ financial support. The employer must agree to such a clause before it can be enforced against employees.

Employees dissatisfied with their union can petition the National Labor Relations Board to determine by secret ballot whether the employees covered by a particular “union shop” agreement desire to withdraw their union’s authority.

Employee Rights in a Unionized Workplace

Employers may decide not to include a union security clause in their labor contracts. However, if they do include one, individual employees have other legal protections against the use of their dues or fees for union non-representation activities including lobbying, public relations, or image building.⁴⁰

For private-sector employees who are dissatisfied with their union security arrangement there is an additional provision in the NLRA which allows the National Labor Relations Board to determine by secret ballot whether the employees covered by a particular “union shop” agreement desire to withdraw their union’s authority. This is called a union-shop de-authorization election and can be brought about with a petition signed by 30 percent or more of the employees in a bargaining unit.

The union shop contract requirement to “join a union” and to remain a member “in good standing” has largely meant that an employee must pay dues and initiation fees, but not actually “join” the union if he declines to do so. U. S. Supreme Court rulings have affirmed that any employee who refuses under a union shop agreement to pay dues—excluding those spent on non-representation activities such as political lobbying—may be discharged by the employer when the union presents proof of this refusal.

However, an employee who has offered to pay dues and appropriate fees but is denied membership by the union or declines to join cannot be legally discharged.⁴¹ This is one of the least known and most misunderstood features of the labor laws among employees and employers. These individual protections against compulsory union membership are rooted in the First Amendment protections of freedom of association and freedom of speech.

Advantages of Union Representation

The primary advantage union representation offers employees is the solidarity it brings to dealing with their employer. A high rate of membership is an important sign of the union’s economic strength and its ability to force contractual concessions from an employer. Union membership also gives employees a legal right to influence the direction of their union by participating in its internal governance. Members can vote in union elections or on ratification of the bargaining agreement. Unions in turn support employees in circumstances where they decide to withhold their services, engage in an economic strike or a threat to strike, and put greater economic pressure on the employer to agree to their demands.⁴²

The agreements reached between unions and employers through the collective bargaining process often provide an element of security and certainty, and may establish employee privileges and benefits which otherwise may not have been provided by an employer dealing individually with employees. Such agreements become the primary source of employee rights and responsibilities in the workplace and govern such things as wages, holidays, and health insurance. They are legally enforceable and binding contracts to which the employer, employees, and the union must adhere, and generally cover two- or three-year periods.

Many collective bargaining agreements also provide for a “just cause” standard of review that an employer must use when deciding to discipline or discharge any employee. An arbitration process may be incorporated into an agreement to enable a neutral third party to settle labor-management disputes as to what “just cause” means in each individual case. These employee due process guarantees help workers avoid unexpected or arbitrary terminations.

Disadvantages of Union Representation

One of union representation’s greatest advantages can also be one of its main disadvantages: the ability to engage in economic strikes.

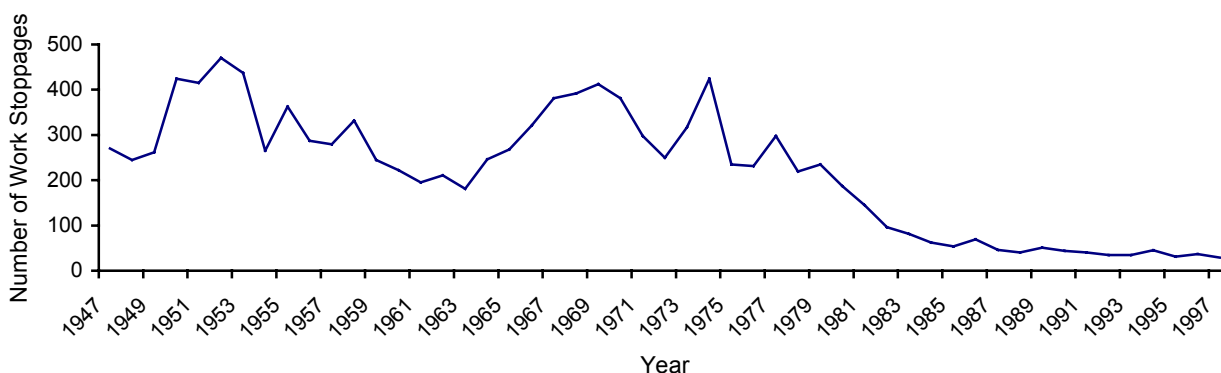
The decision to strike for improved wages or working conditions is a serious subject that requires a thorough analysis of the strike’s likelihood for success before it is undertaken. Union officials need to be experienced and knowledgeable about the many economic and social factors that will be brought to bear on striking employees before they make a decision. Incorrect judgments about striking can be harmful to employees who choose to engage in this activity.

Employers of striking workers have the legal right to continue to operate their business with permanent replacement employees who need not be discharged once the strike ends.⁴³ In such circumstances, the best that striking employees can expect is to be recalled when an employment vacancy occurs for which they are qualified. This assumes that the striking employees have not already obtained regular and equivalent employment elsewhere and have made an unconditional request for reinstatement. They are not entitled to immediate and unconditional reinstatement or back pay when their jobs are filled by permanent replacements.

Though employees cannot be discharged for their decision to strike, there is nothing in the law that guarantees them a successful outcome once a strike is commenced. Accordingly, strike activity as a weapon in collective bargaining is decreasing in the United States (see Chart 4, below).

Employers of striking workers have the legal right to continue to operate their business with permanent replacement employees who need not be discharged once the strike ends.

Chart 4 – Union Work Stoppages, 1947-1997



Source: U. S. Bureau of Labor Statistics

When a union is certified as the exclusive employee representative, employees become members of an overall bargaining unit in which the majority rules. Union leaders make decisions for all employees, which many may deem not to be in their best individual interest.

Another disadvantage for unionized workers is the loss of individuality. When a union is certified as the exclusive employee representative in a workplace, employees become members of an overall bargaining unit in which the majority rules. The ruling majority may not be sympathetic with each individual's specific employment needs or aspirations. Individual agreements between employees and management are not allowed because the employer is under an obligation to deal exclusively with the union. The union leaders make decisions for all employees, which many may deem not to be in their best individual interest. Loss of individuality is of prime concern for many employees, as well as the loss of the opportunity to negotiate for themselves an individual arrangement.

Still another disadvantage of union representation is the cost to employees. Most collective bargaining agreements require all employees to support the union financially as a condition of their continued employment. Federal law provides that employees may, regardless of the language in the agreement, opt not to formally join the union; however, they may still be required to pay certain dues and initiation fees. Additionally, the union can demand the discharge of any employee who fails to pay required dues and fees, unless a right-to-work law has been enacted in the state where the business operates. Michigan does not have a right-to-work law.

The costs of union membership vary widely from union to union, but regardless of the amount, dues represent an expense to employees that they would not otherwise have. The typical Michigan union worker pays hundreds of dollars per year as a result of dues requirements. Nonunion employees may well ask why they should pay more for employee benefits that they already enjoy as a part of the employer's wage and fringe benefit program. (Nonunion members are, however, entitled to pay less than full dues if they assert their rights under the U. S. Supreme Court's *Beck*⁴⁴ decision.)

The power of exclusive employee representation can also be a disadvantage to workers. This power carries with it a duty of fair representation that requires the union to negotiate fairly on behalf of all employees in the "bargaining unit," whether they are union members or not. A labor union, however, is granted by law tremendous discretion in fulfilling its responsibilities as bargaining representatives, and it can be difficult to force it to side with any particular employee on an issue that it feels is unmeritorious. In other words, the power of exclusivity gives unions the right to advance the interests of the group over those of the individual.⁴⁵

One last disadvantage to union membership is that members can be fined or otherwise disciplined by their union for engaging in activities, which, in the union's opinion, are "unbecoming" of union members or which violate the union's constitution and by-laws. Examples of such activities may include crossing a picket line during a strike, exceeding production quotas, or seeking to be represented by a different union. The fines assessed against offending employees can be substantial and are judicially enforceable. Non-members, however, are not subject to any union discipline and private-sector employees may resign from unions at any time in order to avoid union rules and any possible resulting fines.⁴⁶

4. Employee Legal Rights and Opportunities in Unionized and Nonunionized Workplaces

As noted in Section 2, the history of American labor relations has mostly been one of freedom of contract and association, which included labor services. For many years, individual employers and employees were free to contract out their services and decide their own terms largely without interference from government. This was known as the “at-will” principle, which left both employers and employees free to terminate their relationship at any time and for any reason.

With the passage of the National Labor Relations Act by Congress in 1935, compulsory unionism for private-sector workers became official public policy in federal law. The enactment of Michigan’s Public Employment Relations Act in 1947 made compulsory unionism for government employees Michigan’s policy. Subsequent amendments to both of these laws have returned a measure of freedom to workers who do not want to support labor union activities or who wish to play a more active role in the affairs of their workplace union.

At the same time, however, a plethora of new federal and state laws has begun to further complicate the employment relationship. Employees, whether unionized or not, have legal recourse through an ever-expanding array of laws intended to prevent discrimination, ensure on-the-job-safety, and accomplish many other social goals. The unfortunate consequence of these laws, and various court decisions based upon them, has been the erosion of freedom in the workplace and the decline of the traditional employment-at-will principle.

The purpose of this section is to provide a clear explanation of the legal rights of Michigan employees—government or private, union or nonunion—to allow them a greater degree of control over their workplace associations and the use of their hard-earned wages.

Unionized Workers’ Employment Rights and Opportunities

When a union is established in a workplace, it becomes the exclusive representative of all employees in a bargaining unit, even the ones who did not vote for or desire union representation. Often, these nonunion employees must pay union dues or fees to cover the costs of this representation or else lose their jobs.

However, a number of U. S. Supreme Court decisions and legal provisions have guaranteed to these employees the right to abstain from membership or resign from their union, the right to limit their dues payments to specific purposes, and the right to raise religious objections to union membership.

Many unions do not inform workers of these rights because they do not wish to forfeit the dues that union coffers would otherwise receive from workers compelled to pay them. Below is a brief discussion of each of these important workplace rights.

Compulsory unionism for private-sector workers became federal public policy in 1935. The enactment of Michigan’s Public Employment Relations Act in 1947 made compulsory unionism for government employees Michigan’s policy.

RIGHT TO RESIGN UNION MEMBERSHIP OR TO NOT JOIN A UNION

The U. S. Supreme Court has ruled that private-sector employees have the right to refuse membership in their workplace unions, even though the language of their labor contract may state otherwise.⁴⁷ Each worker has the legal right to resign from his union and cease to be bound by its constitution and by-laws which may require participation in strikes and other activities.

This does not mean, however, that the worker is exempt from the other provisions of the labor contract between the union and the employer that specify the terms and conditions of employment. In other words, even if a worker resigns from his union, he must still abide by the union-negotiated work rules in the contract.

The “cost” to an employee who declines full union membership is that he will be unable to participate in important union activities such as voting in elections, voting for a new labor contract, voting to engage in strike activity, and so forth. Benefits of nonmembership include being free of union fines and rules, such as those prohibiting members from crossing a valid union picket line.

Nonmember workers also may exercise their right not to pay dues for their workplace union’s political or other non-workplace-related spending, which may add up to several hundred dollars each year.

RIGHT TO FREEDOM OF SPEECH

Unions spend the dues collected from their members on a number of different things, including activities that exceed the realm of employee representation activity. U. S. Supreme Court decisions have firmly established that private-sector and government employees who decline union membership have a legal right to choose not to pay the portion of their dues that is used for non-workplace-related expenditures.

In other words, although nonunion member workers may be forced under contract to financially support their workplace union, they cannot be forced to pay for that union’s political activities, public relations campaigns, or other activities not related to the core purposes of collective bargaining.

The Supreme Court has ruled that forcing government employees to financially support their unions’ political activities was a violation of their right to freedom of speech. In *Abood v. Detroit Board of Education*, the Court held that it was a violation of the First and Fourteenth Amendments for a government employee union to use the fees collected from a nonmember employee for political and ideological purposes unrelated to collective bargaining to which the nonmember objected.⁴⁸

Another Supreme Court decision, *Chicago Teachers Local 1 v. Hudson*, established the ground rules for determining the appropriate fee payments of objecting nonmembers by imposing procedural requirements on the union:

The U. S. Supreme Court has ruled that private-sector employees have the right to refuse membership in their workplace unions, even though the language of their labor contract may state otherwise.

The constitutional requirements for the Union's collection of agency fees include an adequate explanation of the basis for the fees, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decision maker, and an escrow for the amounts reasonably in dispute while such challenges are pending.⁴⁹

While the *Hudson* case involved a government employee union and was decided on First Amendment grounds, the procedures and principles outlined above should fundamentally apply to private-sector arrangements under the NLRA⁵⁰ and the Railway Labor Act,⁵¹ which governs railroad and airline labor relations.

Private-sector workers have similar protections against union coercion. In its 1988 decision in *Communications Workers of America v. Beck*,⁵² the Supreme Court ruled that for workers covered by the NLRA, the obligation to pay dues is limited to support of union activities "germane to collective bargaining, contract administration, and grievance adjustment."⁵³

The Court ruled in this case that it was illegal for the union to collect dues from objecting employees to spend on organizing employees of other employers, lobbying for labor legislation, or participating in social, charitable, and political events. These expenditures constituted a significant chunk of worker dues: An examination of the union's financial records in *Beck* discovered that 79 percent of the dues it normally collected could not legally be charged to objecting nonmembers.

While each of these three major Supreme Court decisions deals with government, private, and railroad and airline employees, the principles are essentially the same, even if the statutory and constitutional texts and theories are different. The costs of union political activities may not be charged to objecting nonmember workers under any view of the law.

Private-sector workers who object to paying dues for non-workplace-related union activities can also exercise their rights under the unfair labor practice procedures of the NLRA. When a union commits an unfair labor practice, the aggrieved worker may petition the National Labor Relations Board (NLRB) to force the union to cease and desist from violating employee rights.

In *California Saw & Knife Works*, the NLRB's lead case explaining *Beck* rights, the board held that when nonmembers object to the union's use of monies they are required to pay under a union security agreement, the union must reduce the fees by excluding any non-chargeable expenses.⁵⁴ The union was further made to notify these objecting employees of the subsequent percentage decrease in their fees and specify "the basis for the calculation, and the right to challenge these figures."

Precedent established by *California Saw* further requires unions to provide objecting nonmembers with sufficient information so that they can intelligently decide whether to challenge the union's dues calculations. Under *California Saw*, unions are required to provide objecting nonmembers with a breakdown of their calculations by major categories of expenditures, designating which categories it claims are chargeable and non-chargeable to the objectors. If a union fails to do these things, it commits an unfair labor practice.

The Court ruled that it was illegal for the union to collect dues from objecting employees to spend on organizing employees of other employers, lobbying, or participating in social, charitable, and political events.

Many workers believe that labor unions provide the only (or best) way to address employment issues and disputes, but unions are not the only options available. In fact, many employers now encourage their employees to participate in management decisions directly.

In *Production Workers Local 707*, the NLRB held that a union that spent employees' money collected under a union security agreement on activities unrelated to collective bargaining, contract administration, or grievance adjustment violated the NLRA. In this case, the union had the employer discharge three employees who were delinquent in payment of union dues. The union, however, did not give employees notice of their rights under *Communications Workers of America v. Beck* to object to its non-workplace-related expenditures.⁵⁵ In the absence of such notice, the NLRB ruled that the union could not seek to enforce the union security agreement by causing the discharge of employees in order to obligate them to pay dues and fees under the agreement.⁵⁶

The practical significance of these cases is that a dissenting employee whose rights under the Supreme Court's *Beck* decision are being ignored by his employer or union may have an avenue of redress through the unfair labor practice process of the NLRB. Such an employee may file an unfair labor practice charge at the nearest NLRB regional office, and the government will then investigate the matter. If the employee's claim has merit, the government will seek a remedy on his behalf in a timely and cost-effective manner. This method is probably the least costly way in which an employee can hold a union accountable for *Beck* violations.

State labor agencies such as the Michigan Employment Relations Commission tend to pattern their decisions after NLRB developments. It may therefore be possible for a dissenting municipal or local government employee to file an unfair labor practice charge against his union to seek enforcement of his dues rights under *Hudson*, *Lehnert*, and other Supreme Court decisions applying to government employees.

RIGHT TO FREEDOM OF RELIGION

Health care workers who have deeply held religious objections to becoming members of a union, or supporting a union financially may be exempt from paying dues and initiation fees. These employees may, however, be required to pay sums equal to union dues and initiation fees to a tax-exempt organization of their choosing, provided that it is neither religious nor union-affiliated. Unions representing religiously objecting health care employees may, however, charge them the reasonable cost of any grievance processed at their behest.⁵⁷

Nonunionized Workers' Employment Rights and Opportunities

Many workers believe that labor unions provide the only (or best) way to address employment issues and disputes, but unions are not the only options available for employees. In fact, many employers now encourage their employees to participate in management decisions directly. In the public sector, where government employees are increasingly forming and joining unions, constitutional protections against potential employer abuse have always existed.

The NLRA's passage in 1935 marked a radical break with the American tradition of a government-neutral approach toward labor relations, and recent decades have seen even

greater departures free-market principles. Various employment laws and court decisions have supplanted the union's traditional role and now afford employees, whether unionized or not, legal recourse for a variety of workplace disputes with their employers.

PARTICIPATORY EMPLOYEE INVOLVEMENT PROGRAMS

Many businesses provide employee involvement (EI) programs (also known as "quality circles" or "labor-management committees") as an opportunity for employees to participate in managerial decision making. EI is a workplace process by which individual employees are encouraged to communicate their thoughts and suggestions directly to the management concerning a variety of workplace issues, including productivity, scheduling, and technologies.

As much as 75 percent of all U. S. companies use some form of EI, ranging from suggestion boxes to self-directed work teams. Successful EI arrangements increase productivity, boost employee satisfaction, improve quality, and lead to a more competitive position in the marketplace for the company. Rising productivity and quality in turn provides a rising standard of living for workers and their families.

In December 1994, Princeton Survey Research Associates reported the findings of a national survey on worker participation:

- 63 percent of employees would "like to have more influence" in workplace decisions;
- 76 percent believe that if "more decisions about production and operations were made by employees, instead of managers," their company would be "stronger against its competitors";
- 79 percent believe that employee involvement would improve the "quality of products or services"; and
- 87 percent think that "employees would enjoy their jobs more" in EI arrangements.

Additionally, the survey asked employees if they preferred employee-management committees, unions, or laws as a way to discuss or resolve workplace issues and problems. Fully 63 percent of surveyed employees preferred committees, 20 percent chose unions, and 15 percent chose laws.⁵⁸

Despite the popularity among workers of EI programs, there is a legal cloud over them due to current interpretations of the NLRA.⁵⁹ Unions attempting to organize employees in an EI environment often feel threatened, worrying that their services are unnecessary when workers are free to deal directly with their employers over workplace issues in a constructive and non-adversarial manner. Consequently, many unions use the law to strike down these programs in an attempt to increase organizing opportunities. However, employee

When workers were asked if they preferred employee-management committees, unions, or laws as a way to discuss or resolve workplace issues, 63 percent preferred committees, 20 percent chose unions, and 15 percent chose laws.

involvement programs do seem to enjoy greater acceptance by unions when the union officials can also participate in the process.

CONSTITUTIONAL EMPLOYMENT PROTECTIONS FOR GOVERNMENT EMPLOYEES

All government employees, regardless of their union status, enjoy constitutional protections against potential employer abuse. The rights of individuals as specified in both the U. S. and Michigan Constitutions apply against the conduct of government, not that of private employers, so these constitutional rights in labor law are of importance mainly to government employees.

All government employees, regardless of their union status, enjoy constitutional protections against potential employer abuse.

The First Amendment to the U. S. Constitution provides that “Congress shall make no law abridging freedom of speech. . . .” This means that government, as employer, cannot take adverse action against its employees on a basis that infringes any employee’s constitutionally protected interest in freedom of expression. Employees’ speech, however, must relate to a matter of public concern in order to be protected under the First Amendment.

The Fourth Amendment to the U. S. Constitution provides for “the right of people to be secure against unreasonable searches and seizures.” This provision ensures against unreasonable intrusions into a government employee’s privacy and covers such employer conduct as searches of employee lockers and personal belongings. The Supreme Court has characterized the right to privacy as “the most comprehensive of rights and the right most valued by civilized men.”⁶⁰

Although various aspects of personal privacy have received legal recognition and protection, it remains a somewhat vague concept. In a legal sense, “privacy” lacks a precise definition and the law is still evolving. There is no express “right to privacy” specifically guaranteed by the U. S. Constitution; however, the courts have developed a common law right to privacy based on the Bill of Rights,⁶¹ which protects individual citizens from unreasonable government intrusions.

The Fourteenth Amendment to the U. S. Constitution provides that no state may deprive any person of life, liberty, or property without due process of law. Under this amendment, a government employee is guaranteed “due process” when a threatened or actual personnel action deprives the employee of either a “property” interest or a “liberty” interest in his continued employment. Due process generally requires that the employee be afforded an opportunity to be heard at a meaningful time and in a meaningful manner.

Mandated Employment Laws and the Erosion of the “At-Will” Doctrine

The general rule in American employment has been that an employment relationship for no specified duration may be terminated at any time and for any reason (or no reason) by either the employee or employer. This rule is known as the “at-will” doctrine.

Recently, however, courts in a number of states have created broad exceptions to the at-will doctrine which severely limit business managers’ discretion in terminating employees.

Nonunion employees operating without an individual employment contract or a union collective bargaining agreement may also be covered under these judicial exceptions.

These court decisions are commonly known as “wrongful discharge” cases and can be divided into two broad categories. The first category involves “public policy/retaliatory discharge cases,” where employers have been held liable for employee discharges that violate a clearly defined public policy—such as employer retaliation against employees for filing a worker’s compensation claim, “whistle blowing,” or refusing to perform unethical or unsafe activities on the employer’s behalf.

The second category involves “implied contract claims,” which generally concern written or oral statements made by an employer that are alleged to create an implied promise that an employee may be discharged only for cause. Under this theory, courts have looked to specific statements in employer notices, employee manuals, and handbooks;⁶² employer policies and procedures; and favorable employee evaluations, as well as oral assurances of continued employment, to find a limit on the employer’s right to terminate employees at will.

The trend of the law in this area is to expand exceptions to the at-will doctrine. The source of change is at the state level only and the exceptions to the at-will doctrine vary from jurisdiction to jurisdiction. In Michigan, the at-will doctrine is steadily eroding.

NLRA APPLIES TO ALL PRIVATE-SECTOR WORKERS

The provisions of the National Labor Relations Act apply to all private-sector employees; employees need not be union members, or even work in a unionized business, in order to be covered by the NLRA’s employment provisions.

The NLRA guarantees all employees a legal right “to engage in concerted activities for the purpose of collective bargaining *or for other mutual aid or protection* [emphasis added].” If an employee chooses to act through a bargaining representative, that right to do so is protected under the NLRA. Employees can also represent their own interests by collective action, without union intervention: This is commonly known as the doctrine of protected concerted activity.

The NLRA also protects employees against discrimination or discharge for any lawful concerted activity aimed at improving workplace conditions. This “concerted activity” may include protesting to a government agency about undesirable situations at the workplace, or even in some cases, walking off the job to avoid an obviously dangerous condition.⁶³ These employee activities do not have to be related to any union organizing attempts and are protected even if a union does not represent the protesting worker, provided that the activities are legal.

In order to be protected under the NLRA, however, the employee activity must be *concerted*, meaning that it involves two or more workers acting together or that a single employee is engaged with, or on the authority of, other employees. Generally, the NLRB does not accept the notion that when an individual employee complains about a workplace condition (such as wages) that he is in fact or by implication speaking on behalf of his fellow workers. Employee concerted activity must also be related to conditions in the workplace—

The National Labor Relations Act applies to all private-sector employees; employees need not be union members, or even work in a unionized business, in order to be covered by the NLRA’s employment provisions.

such as, wages, hours, and terms of employment—in order to qualify for protection under the NLRA.⁶⁴ Unlawful actions such as trespassing, defaming the employer, and threatening fellow employees are not protected.

THE PROLIFERATION OF EMPLOYMENT LAWS

In addition to the NLRA, employees and employers are subject to a rapidly growing number of federal and state employment laws covering a variety of circumstances, and the list keeps growing. There are laws that

- regulate worker health and safety (Occupational Safety and Health Act of 1970);
- prevent discrimination based on gender, race, age, or disability (Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act of 1990, and Michigan’s Elliot-Larsen Civil Rights Act);
- provide workers’ compensation (Michigan’s Worker’s Disability Compensation Act of 1969);
- protect pensions that are established at the workplace (Employee Retirement Income Security Act of 1974);
- protect older workers (Older Workers Benefit Protection Act of 1990);
- guarantee job security to parents who need time off to care for a newborn, newly adopted, or seriously ill child (Family and Medical Leave Act of 1993); and
- protect the rights of disabled employees to compete for employment opportunities for which they are qualified with or without reasonable employer accommodation (Americans with Disabilities Act of 1990).

Unfortunately, most federal and state employment policies, including those of the past 30 years, have been enacted with too little regard for modern economic realities, such as the globalization of commerce. Congress and, to some extent, state legislatures have been more than willing to act in this new and rapidly changing business climate by mandating all sorts of employment laws on businesses—which often hurt the very workers these laws are supposed to help. A prime example is the minimum wage, which hurts low-income workers by pricing them out of the labor market.

As a result, government—through direct intervention—has changed the legal nature of the employer-employee relationship. The at-will nature of the employment relationship, the traditional view, has been replaced by the view that employment is now one of social obligation. Employers now find themselves owing new and expanded duties and obligations to their employees (either mandated by statute or by the extensions of common law principles) by simple virtue of the fact that they are employers. Unless some development occurs to reverse this trend, government will continue to transform the basic nature of the employment relationship from one of employer-employee to “social partners” through the passage of new occupational and employment laws.

The at-will nature of the employment relationship, the traditional view, has been replaced by the view that employment is now one of social obligation.

Part II

Modern Labor Relations: The Legal Framework and Its Dynamics

1. Compulsory Unionism for Private-Sector Employees

The purpose of this section is to describe how a labor union organizes employees of a private-sector business under the National Labor Relations Act (NLRA) and to explain the legal rights and responsibilities of employers, employees, and unions during each step of this process, including during strikes.

The interpretive decisions regarding the NLRA by both the National Labor Relations Board (NLRB) and the courts are voluminous and complex; consequently, what follows is only a brief overview of the law. Individual employees should conduct further research and consult other resources before making important employment decisions about unionization or seeking remedies for employer or union labor law violations.

Employees, especially those unfamiliar with unions, should also ask penetrating questions of any union attempting to organize their workplace until they are satisfied that they understand all the consequences—legal and financial—of union representation.

The National Labor Relations Board and “Unfair Labor Practices”

Congress created the National Labor Relations Board (NLRB) to administer the National Labor Relations Act of 1935 (NLRA), which covers unionization for most private-sector employees.⁶⁵ (Certain classes of workers, such as managers and supervisors, independent contractors, agricultural employees, and domestic servants are excluded from the NLRA as a matter of law.⁶⁶) The NLRB has jurisdiction over almost all labor disputes that affect commerce among the states, as mandated by the language of the NLRA itself.

The NLRB adjudicates private-sector labor disputes arising under the NLRA, including charges of “unfair labor practices.” An unfair labor practice may be filed by either a union against an employer or an employer against a union. The following explains which actions by an employer or a union may constitute unfair labor practices under the NLRA.

Employees, especially those unfamiliar with unions, should ask penetrating questions of any union attempting to organize their workplace until they are satisfied that they understand all the consequences—legal and financial—of union representation.

EMPLOYER UNFAIR LABOR PRACTICES

The NLRA establishes a number of lawful employee activities under Section 7 of the statute, entitled “Rights of Employees,” which employers may not interfere with. Section 7 is the heart of the NLRA and provides as follows:

Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection and shall also have the right to refrain from any or all such activities.⁶⁷

Under the NLRA, employees may lawfully

- form an employee union;
- sign a union authorization card;
- strike to secure better working conditions;
- circulate a petition among employees for the redress of a grievance; or
- refrain from any and all activity on behalf of a union.

There are five major categories of behavior for which an employer may be charged with an unfair labor practice.⁶⁸ They are as follows:

1. Interfering with, restraining, or coercing employees attempting to exercise their rights as guaranteed in Section 7 of the NLRA. Examples of this include
 - questioning employees about their union activities or views in circumstances that tend to coerce the employees;
 - promising or implementing employee wage increases to discourage their union activity or support;
 - threatening plant closure to discourage union activity or support;
 - threatening employees with loss of benefits or promotional opportunities because of their union activities or support;
 - stating to employees that union bargaining is futile or a strike is inevitable;
 - spying on employee union activities or requesting employees to report on the union activity of others.
2. Dominating or interfering with the formation or administration of any labor organization or contributing financial or other support to it. Examples of this include
 - bringing pressure on employees to join a union; or
 - providing financial support to a union by direct monetary payments;
3. Discriminating against workers in their hiring, tenure of employment, or any other term or condition of employment with the purpose of either encouraging or discouraging membership in any labor organization. (This fundamentally prohibits employers from treating similar employees’ situations differently if the

difference is attributable to union activities or sympathies.) Examples of this include

- discharging employees because they signed a union authorization card or urged other employees to join a union; or
 - demoting employees because they circulated a petition to redress an employee grievance.
4. Discharging or otherwise discriminating against any employees who file or give testimony under the NLRA.
 5. Refusing to bargain collectively with employee representatives. Examples of this include
 - refusing to sign a contract after a full agreement is reached;
 - failing to furnish a union with relevant and necessary information for bargaining purposes;
 - announcing a wage increase before consulting the employees' bargaining representative.

UNION UNFAIR LABOR PRACTICES

The NLRA is primarily concerned with the legal rights of employees to engage in union and collective bargaining activities, so the legal restrictions on labor unions' dealings with employees are less intrusive than those on employers' relationships with employees. However, there are still seven activities for which a labor union may be charged with an unfair labor practice.⁶⁹ They are as follows:

1. Restraining or coercing employees who are attempting to exercise their rights guaranteed by the NLRA or interfering with an employer in the selection of his representatives for collective bargaining or grievance adjustment purposes. Examples of this include
 - acts of force or violence on the picket line or during a strike;
 - threatening employees with the loss of their jobs unless they support a union; or
 - fining employees for crossing a picket line after they resigned from the union.
2. Causing an employer to discriminate against an employee in violation of Subsection 8(a)(3) or to discriminate against an employee for whom membership in the union has been denied or terminated for reasons other than nonpayment of the periodic dues and initiation fees required under a union security clause. Examples of this include

- seeking the discharge of an employee for failure to pay a union fine; or
 - causing an employer to discharge employees because they disagreed with union policy.
3. Refusing to bargain with employers in good faith. Examples of this include
- refusing to negotiate a mandatory subject of bargaining; or
 - insisting on the inclusion of an illegal contract provision such as a closed shop.
4. Striking, picketing, or threatening such actions to force an employer to
- cease doing business with another employer;
 - recognize or bargain with a labor union when a different labor union has already been certified;
 - assign particular work to employees represented by a particular union; or
 - join a labor organization or use only vendors or service suppliers whose employees are represented by a labor union.

Examples of this include

- striking to force an employer to assign particular work to one union when the same work is claimed by another union; or
 - picketing an employer to force it to stop doing business with another employer who has refused to recognize the union.
5. Charging prospective members exorbitant or discriminatory initiation fees.
6. Causing or attempting to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value for services that are not performed or not to be performed. Examples of this include causing an employer to pay an employee for work not performed.
7. Picketing or threatening to picket an employer to force it to confer recognition on the picketing union as its employees' bargaining representative after
- the employer has lawfully recognized a different labor union;
 - a certified NLRB election has been conducted in the past 12 months; or
 - the picketing has been conducted for 30 days without a petition for an election being filed with the NLRB.

Examples of this include

- picketing by a union for organizational purposes shortly after the employer has entered a lawful contract with another union;
- picketing by a union for organizational purposes within 12 months after a valid NLRB election was held and no union was selected.

The Union Organizing Drive

During a union organizing drive, the employer will likely try to convince employees that joining a union is not in their or the company's best interests. Union organizations, of course, will have a different message.

These messages, however, must be communicated within the confines of permissible speech under the NLRA. Employers may express to their employees their views on unionization, but the law prohibits any employer interference with an employee's right to organize and engage in "concerted activity" and employer discrimination designed to either encourage or discourage membership in a labor organization.

The line between lawful and unlawful employer expression and conduct during a union organizing campaign is not always clear. Union communications usually do not involve employee restraint or coercion because the union cannot control the job or the economics of an employer's business, facts which also prevent it from using job security or job benefits as a either a threat or promise. However, the union violates the NLRA if it threatens workers verbally or physically assaults them.

UNION ORGANIZING TECHNIQUES

Most labor organizations assign an organizer or team of organizers to the target company. Their mission is to "sell" the union to the company's employees. Typically, they will try to recruit a cadre of sympathizers on the inside of the company to secure enough support for an NLRB employee secret ballot election.

Occasionally, unions use "plants"—individuals on the union's payroll who seek and obtain employment at a target company for the express purpose of organizing the company's employees. This practice of using plants is known as "salting" and has recently been upheld by the U. S. Supreme Court.⁷⁰

The organizers next distribute "authorization cards" which designate the union as representative for purposes of collective bargaining and usually also include a flyer containing promises of higher wages, better benefits, and job security. If 30 percent or more of the employees sign these cards, the union will submit them to the NLRB as a petition for a union certification election.

Employees are often misled about the purpose of these authorization cards, and many may sign them for reasons unrelated to interest in unionization, such as peer pressure, getting the organizer off their backs, and so forth. Employees should therefore read the authorization card carefully before signing it.

Often, these cards serve a dual purpose as both a union membership application and as authorization for the union to petition the NLRB for a secret ballot election. The employer has the legal right to recognize the union as the employees' exclusive representative if more than 50 percent of employees sign these cards. Employees who

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Labor unions are required to file financial reports and copies of their constitutions and by-laws with the U.S. Department of Labor.

neither want to join nor be represented by the union attempting to organize them have the legal right to refuse to sign authorization cards.

Unions may also use the personal information provided by signers of the authorization cards to phone or visit these employees at their homes. These employees need not respond to the organizers' inquiries, but they are free to do so if they choose.

An alternative way that some unions use to try to organize employees of a particular business is to picket the business, demanding to be recognized as the employees' representative. Generally speaking, such picketing is legal and cannot be enjoined for at least 30 days.⁷¹

GATHERING INFORMATION ON THE UNION

An employee's decision to join or form a labor union is an important one with significant financial and legal consequences. It should never be made lightly or without all the appropriate information necessary to ensure that an employee has made the right choice for himself and his family.

Prior to signing any union literature, employees should therefore research the particular labor organization that is seeking to organize them. For example, labor unions are required to file financial reports with the U. S. Department of Labor. These reports provide data from individual unions regarding dues and initiation fees, officer salaries, and other expenditures.

Unions must also file copies of their constitutions and by-laws with the Department of Labor. These and other documents, such as LM-1, LM-2, and LM-3, can provide a wealth of information about the privileges and obligations held by members of a particular union. Employees should seek to get this public information—directly from the union, if possible—before authorizing the union to act on their behalf in their workplace.

UNDERSTANDING ALL ASPECTS OF UNIONIZATION

Unions rarely, if ever, tell employees about the possible disadvantages that come with being a union member or bargaining collectively. Nevertheless, there is a wide range of issues that each employee must consider before making the important career decision of supporting a union. Among these issues are the following:

Strikes. The only leverage a union has over an employer that does not meet its demands is the strike. The employer, however, cannot say that a strike is “inevitable” in the event of a disagreement during negotiations. During a strike

- Wages and benefits are not paid to striking employees.
- Later wage increases rarely make up for the resulting monetary losses.

- Unemployment insurance is unavailable in many states until after a lengthy waiting period. Under Michigan's Employment Security Act, an employee who is unemployed due to a strike is not entitled to unemployment benefits.⁷² However, a striking employee who is permanently replaced may receive unemployment compensation until a subsequent event renders the labor dispute a substantial contributing cause of the unemployment.⁷³
- Limited strike benefits paid by the union are available only to those employees who actively participate in picketing the employer.

Replacement Workers. Employees who strike to obtain better wages, hours, and working conditions, which are neither caused nor prolonged by an employer's unfair labor practices, are referred to as "economic strikers."⁷⁴ Workers may, however, be hired to replace them, and these replacements need not be let go when the strike is ended.⁷⁵ As a practical matter, the economic striker may lose his job, but it is unlawful for an employer to express it in those terms.⁷⁶

Violence. This factor is particularly important where there is accurate information linking the union to previous violent strikes and picket lines. For obvious reasons, employees may not wish to commit themselves to a union that routinely resorts to violence to resolve labor disputes.

Bargaining As a "Two-Way Street." Most employees believe that they can only gain from the collective bargaining process, but this is not the case. The give and take of bargaining can just as easily result in losses as well as gains. Nonetheless, employers must be careful in how they communicate this fact to their employees, lest they be perceived as threatening employees and charged with an unfair labor practice.

Union Membership Requirements. In a unionized workplace, employees are still free to decline union membership, but they may nevertheless be required to pay periodic dues and initiation fees to the union. A union may, if the employer agreed to these terms in the contract, demand the discharge of any employee who fails to pay these fees. Employees can never be forced into becoming actual union members; however, many labor contracts are worded as if full union membership is a requirement for employment. The legality of this misleading contract language has been upheld in a recent U. S. Supreme Court case.⁷⁷

Dues and Initiation Fees. Membership costs vary widely among unions, but regardless of their amount, dues represent an added expense to employees that they would not otherwise have to pay. Employees must determine for themselves if third party representation is worth the additional personal expense of supporting a union bureaucracy.

Loss of Individuality. When a union is certified, employees become members of a bargaining unit in which the majority rules. The employer is under a legal obligation to deal exclusively with the union, which means that any individual deals with individual employees are not allowed. The union makes decisions for all employees, which some may not deem to be in their best personal interests.

Unfair Representation. Unions are granted tremendous discretion in fulfilling their responsibilities as bargaining representatives. The prospect for abuse is ever present and

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A union may be voted out, or “decertified,” if employees are dissatisfied with its performance.

difficult to remedy if it occurs because employees must be able to show that their union’s conduct was arbitrary, discriminatory, or in bad faith—a difficult standard to meet for employees.

Management Rights. Although a union may try to create the impression that it will become a partner in the day-to-day operations of the employer’s business, this is a false impression. Under no circumstances will management ever cede its control over business operations to a union.

Decertification. Decertification is the process by which the employees in a bargaining unit change the union designated as their exclusive agent or change to a nonunion status. A union may be voted out, or “decertified,” if employees are dissatisfied with its performance. However, this may be difficult to accomplish in practice because the NLRB or the appropriate state government agency usually limits decertification to a period of between 60 and 90 days prior to the expiration of the current labor contract. The NLRB will conduct a secret-ballot decertification election if 30 percent of the employees in the bargaining unit sign a petition indicating dissatisfaction with their representation. If this election shows that the majority of those voting wish to end union representation, the union is decertified. Once the NLRB conducts such an election, there can be no additional labor union elections within that same bargaining unit for one year.

UNION SOLICITATION AND DISTRIBUTION OF MATERIAL

The earliest decisions of the NLRB recognized that solicitation of union membership and distribution of union literature were among the core legal rights guaranteed to employees by the NLRA. Inevitably, these rights conflicted with the desire of employers to regulate the conduct of their employees during work. In an effort to facilitate review of cases involving these competing interests, the NLRB developed a general guideline.

In the 1943 decision *Peyton Packing Co., Inc.*,⁷⁸ the NLRB announced that employers could prohibit employee union solicitation during working times and that such a prohibition would be presumptively valid unless there were evidence that it was promulgated for a “discriminatory purpose.”

Conversely, the NLRB stated that a prohibition against union solicitation by employees outside working hours would be presumed invalid, unless there were special circumstances to show that the prohibition was necessary to maintain order and production. These presumptions were promptly upheld by the Supreme Court⁷⁹ and continue to serve as the cornerstone for the NLRB’s evaluation of individual employers’ work rules regarding union literature distribution and membership solicitation among their employees.

In 1962, the NLRB clarified the distinction between union solicitation and union literature distribution in the *Stoddard-Quirk Mfg. Co.* decision.⁸⁰ Solicitation, explained the NLRB, is oral and can therefore impinge on employers’ interests during working time. But the distribution of literature carries with it the potential for littering, regardless of the time of distribution. Therefore, the NLRB held that employer prohibitions against union literature distribution at all times in work areas are presumptively lawful. However, employer prohibitions against distribution of union literature in non-work areas are presumptively

unlawful. As with solicitation, there may be special circumstances that will yield exceptions to these general principles. Also, it should be noted that a union's procurement of authorization cards from employees is considered a form of solicitation, not distribution.⁸¹

The NLRB has, at times, applied these principles inconsistently. In particular, the wording of employer work rules has been scrutinized with conflicting results. For example, the NLRB stated in the 1947 decision *Essex International, Inc.*,⁸² that prohibitions against solicitation during working hours would be presumed to be unlawful. In 1981, the NLRB changed its mind and stated that rules prohibiting solicitation during working time should be treated like prohibitions covering distribution of union literature during work hours and presumed unlawful.⁸³ The NLRB then reversed itself again in 1983 and returned to the standard of *Essex International, Inc.*⁸⁴ Thus, while the general presumptions have remained constant, the interpretation of the wording of specific rules has been subject to change.

UNION ORGANIZERS' ACCESS TO EMPLOYER PREMISES

Employer restrictions that prohibit union organizers from gaining access to the employment premises may conflict with certain legal rights of employees granted by the NLRA. According to the U. S. Supreme Court, employers may lawfully prohibit union organizers who are not employees from union solicitation and literature distribution on their premises only if

- the union's message can be communicated by reasonable efforts through other channels; and
- the prohibition does not discriminate against union activity by allowing access for literature distribution or solicitation for nonunion causes.⁸⁵

Under this doctrine, employers retain a general right to bar nonemployee union organizers from their premises and unions bear the burden of establishing that no other reasonable means of communication exists.⁸⁶

UNFAIR LABOR PRACTICES DURING AN ORGANIZING DRIVE

Although it is important for management and the union to speak openly to employees concerning their positions, it is equally important that supervisors and managers be well acquainted with the restrictions that the NLRA places on them. The following is intended as a guide to management in meeting its lawful obligations and ensuring the observance of employees' legal rights. However, it is by no means an exhaustive listing of the types of conduct that the NLRB has found lawful or unlawful.

Section 8(c) of the NLRA, known as the "free speech" provision, states as follows:

The expressing of any views, arguments, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the

Prohibited employer conduct during a union organizing campaign can best be remembered by the acronym TIPS, which stands for threats, interrogation, promises, and spying.

provisions of the Act, if such expression contains no threat of reprisal or force or promise of benefit.⁸⁷

Prohibited employer conduct during a union organizing campaign can best be remembered by the acronym TIPS, which stands for *threats, interrogation, promises, and spying*. Each of these prohibited categories of employer conduct is explained below.

Threats are statements by the employer to employees that have two characteristics. The first characteristic is that the statement conveys some form of detriment to an employee, such as talk of a discharge, layoff, loss of pay, loss of benefits, loss of promotional opportunities, and the like. The second characteristic of an unlawful threat is that the detriment to the employee is conditioned upon an employee's exercising of a legal right established by the NLRA. Examples of employee legal rights that employers might seek to compromise with unlawful threats include employees signing union authorization cards, attending union organizational meetings, wearing union insignia, speaking in favor of unionization, and voting for a union.

Unlawful *interrogation* may be as innocent an event as a supervisor casually asking an employee over a cup of coffee how many people attended a publicly announced union meeting the previous evening. The NLRB's position on what constitutes employee "interrogation" has changed over the years: Current NLRB policy is to apply a test to determine if "under all the circumstances the interrogation reasonably tends to restrain, coerce or interfere with rights guaranteed by the" NLRA. In applying this test, the NLRB considers the surrounding circumstances of the questioning, the relationship between the employee and the supervisor questioning him, the nature or character of the information sought, and the time and place of the questioning.

Promises are the reverse of threats. An employer is prohibited from offering beneficial treatment (such as promotions or higher wages) to an employee in exchange for the employee's forbearance of his legally protected union activities.

Employer *spying* includes supervisors stationing themselves near union meetings and observing and identifying employees attending the meeting, following union supporters to determine where they go after work, or requesting or directing employees to report on the union activities of co-workers. The NLRB also prohibits employers from creating the impression of surveillance of employees' union activities.

In addition to threats, interrogation, promises, and spying, the NLRB also prohibits employers from taking actions such as discharging or demoting employees when such actions are based on the employees' union activities or sympathies rather than legitimate business considerations. Other examples of objectionable conduct by employers include managers or supervisors visiting employees' homes or campaigning near the polls or in the polling area during a union election.

The NLRB also holds unions to similar standards of conduct as employers under the law. Union communications with employees generally do not involve restraint or coercion since an organizing union does not control an employee's job and cannot use job security or job benefits as either a threat or promise. However, a union violates the NLRA if it threatens

workers with violence or injury. The NLRB has held that verbal threats as well as actual physical contact interfere with employees' legal rights under Section 7 of the NLRA.⁸⁸

The Union Representation Election Process

After the union organizing drive has “peaked”—meaning that the union has secured the required number of signed employee authorization cards—a union representative will usually contact the employer to request recognition of the union’s status as exclusive bargaining representative for the employees. The union representative may then offer to have the union’s majority status verified through a “card check,” which consists of nothing more than counting the number of authorization cards that have been signed by employees and verifying those employees’ employment status.

The employer will typically reject the union representative’s offer, insisting instead on an employee secret ballot election to determine whether or not a majority of employees really want union representation. If the card check is performed and the employer has agreed in advance to be bound by the results, and the union has a valid majority of signed authorization cards, the employer is legally obligated to recognize and bargain with the union. The right to a secret-ballot election among employees is lost.

PETITIONING FOR AN ELECTION

If the union collects signed authorization cards from 30 percent of the employees, but not a majority, it may file a petition with the NLRB for a representation election. This 30 percent of employees is known as a “showing of interest.” An employer may also file a petition when one or more individuals or labor organizations present a claim to be recognized as the exclusive employee bargaining agent. The NLRB is the “referee” during the union representation process, and the filing of this petition is the first step in invoking the NLRB’s procedures.

A petition can be filed at any time if there is no incumbent union and there has been no prior union election in the past year. Under the NLRA, there cannot be more than one representation election for the same bargaining unit in a twelve-month period.

The petition is filed with the NLRB office for the region in which the employees are employed, where it is then docketed and assigned to an NLRB staff member for investigation. All interested parties are notified. A copy of the petition is sent to the employer, along with a poster informing employees of their statutory rights, which the employer is requested to post in the workplace.

Soon after the petition is filed, the NLRB contacts the employer and the union to identify any issues raised by the petition, such as the legitimacy of petition signatures, which employees to include in the proposed bargaining unit, and so forth. An informal conference follows, at which time a determination is made as to whether the union has an adequate showing of interest. Unions typically use authorization cards for this purpose and usually submit them with the election petition. In order to process the petition, the NLRB must verify that the union has presented cards from at least 30 percent of the employees in the

If the union collects signed authorization cards from 30 percent of employees, it may file a petition with the National Labor Relations Board for a representation election.

If the scope of the proposed bargaining unit is expanded to include even more employees, it will almost always make it more difficult for the union to carry a majority.

proposed bargaining unit. The authorization cards and the employee signatures on them remain secret.

The employer must rely on the NLRB to properly count authorization cards and validate their authenticity. The NLRB's determination is a non-litigable matter, uncontestable by the employer or union. If there is evidence of signature forgeries or other abuses, the employer should present it to the NLRB office. Under no circumstances will the NLRB reveal to the employer the extent of the employees' support for the union, except to state that support is sufficient to proceed with a representation election. If the showing of interest is inadequate, the union is given extra time (usually 48 hours) to submit additional signed authorization cards, otherwise the petition is dismissed.

SETTING THE TERMS OF THE ELECTION

Representation elections are sometimes conducted pursuant to an agreement, known as a stipulation agreement, between the employer and the union, which expedites the scheduling of the election. If the parties are unable or unwilling to come to such an agreement, the NLRB schedules a hearing to determine, among other things, the scope and composition of the appropriate employee voting bloc, or bargaining unit. Typically, the NLRB will facilitate a conference with the two parties in an effort to help them reach a stipulation agreement.

At the conference, an NLRB agent attempts to narrow the issues to be reviewed. Employers sometimes dispute whether unionization is appropriate for the employees in question, and this dispute requires a separate hearing and delay. In addition, if the scope of the proposed bargaining unit is expanded to include even more employees, it will almost always make it more difficult for the union to carry a majority.

If the employer and union cannot resolve these issues voluntarily, the NLRB will conduct a hearing to resolve them. At the hearing, the employer may also challenge the eligibility of certain employees to vote, for example, supervisors and confidential (executive) employees. Managerial and confidential employees are not subject to unionization since a conflict of interest between them and regular hourly employees would arise.

Hearings are conducted by the NLRB to resolve any disputed issues between the union and the employer. The hearing officer is often the same NLRB agent who investigated the petition and conducted the showing-of-interest conference. He is responsible for developing the record upon which any election disputes will be resolved for use in the event of later court challenges to the election proceedings. The hearing officer neither writes the decision nor makes recommendations.

Hearings are relatively informal. The NLRB generally looks to the employer to come forward with its witnesses first, and the union may also present evidence. All witnesses are subject to cross-examination by both parties as well as the hearing officer. After oral arguments and post-hearing briefs are submitted, the director of the regional NLRB office renders a decision on the issues presented. In cases where there are no clear legal precedents for a decision, the regional director may transfer the case to the NLRB in Washington to decide.

If either the employer or the union is aggrieved by the regional director's decision, it may request a review by the NLRB in Washington. Such a review, however, is rarely granted, and there is no further appeal if the NLRB denies the request. The decision may still be challenged in a subsequent unfair labor practice proceeding if the employer refuses to bargain with the union. This is known as "testing the certification."

THE EXCELSIOR LIST AND THE REPRESENTATION ELECTION

Once the terms of an election have been set, the NLRB directs the employer to submit to the regional director within a specified period of time (usually within seven days of the election) a list of the names and addresses of all eligible employee-voters. The regional director in turn hands over the list to the union. This list is known as the Excelsior List.

The Excelsior List is used by the union to communicate with all eligible voters, not just those who have signed authorization cards, and by the NLRB to check in voters when they arrive at the polls on election day.

The election itself is the culmination of the union organizing process and the various informational campaigns waged by the union and employer. It determines, by secret ballot, whether or not the union will become the exclusive representative of the employees, placing the employer under an obligation to bargain with the union.

Elections are normally conducted within 30 to 60 days after the parties agree to, or the NLRB directs, an election. The time and location of the election is determined by the NLRB, through consultation with the employer and union, with a view toward enhancing turnout and ensuring that all eligible voters have an opportunity to cast their ballots in an atmosphere free from either union or employer coercion.

Elections are frequently held at the employer's place of work on payday. If the proposed bargaining unit of voting employees is very large or works at more than one facility, multiple or split session elections may be arranged. Elections are generally manual—that is, voters physically come to the polling station—but in certain special circumstances, the NLRB may allow mail ballots to be issued. Notices of election are posted at least three working days before the election is to be held.

To be eligible to vote, an employee must be employed at the time of the election as well as during the payroll period immediately preceding the date that the election was ordered by the NLRB (or agreed upon by the employer and union). Probationary employees, regular part-time employees, or laid-off employees (with a reasonable expectancy of re-employment), and employees in the military service are also eligible to vote. Temporary employees, students who work during their summer vacations, and other casual employees are ineligible. If there are economic strikers and/or permanent replacements, both groups have the right to vote in the election if the strike is less than one year old.

The company and the union are permitted to choose non-supervisory individuals to observe the election and assist the NLRB agent and report any irregularities. These observers may "challenge" the eligibility of an individual to vote during the election,

To be eligible to vote, an employee must be employed at the time of the election as well as during the payroll period immediately preceding the date that the election was ordered.

Either party, employer or union, may file objections to the election within seven days on the grounds that impermissible union or employer conduct tainted the election results such that they do not accurately reflect the employees' true choice.

especially if an individual who is not on the Excelsior List arrives to vote. Challenged votes are sealed and set aside for a later NLRB determination of the voters' eligibility.

If a majority of the valid votes cast are for union representation and challenged ballots are not determinative (i.e., if counting them as votes against the union would not alter the election's outcome), the NLRB will certify the union as the exclusive representative of all employees in the bargaining unit, even those who voted against the union. Either party, employer or union, may file objections to the election within seven days on the grounds that impermissible union or employer conduct tainted the election results such that they do not accurately reflect the employees' true choice. Types of impermissible employer conduct generally sufficient to overturn an election are described on page 37 under "Union Organizers' Access to Employer Premises." Unions generally enjoy greater latitude in their pre-election conduct, but they are also subject to certain restrictions.⁸⁹

The NLRB will investigate all timely objections and determinative challenges to the election to discover which, if any, have merit. This investigation may also include a hearing, if factual issues are in dispute. The objections and challenges are resolved by reports issued by the NLRB regional director or the board's members in Washington. If the objections are found to be meritorious, the NLRB will direct that another election be held.

If election results are set aside because an employer's conduct is deemed to destroy the "laboratory conditions" necessary for employees to vote without fear of reprisal, the NLRB may issue a bargaining order rather than direct another election. For this to happen, the union must demonstrate in an unfair labor practice proceeding, through the use of authorization cards, that a majority of the employees would have voted for the union but for the employer's flagrant violations of the law.

If the election has been deemed valid, the NLRB issues either a certification of results (the union did not obtain a majority) or a certification of representation (the union did obtain a majority). Once the NLRB issues a certification of representation, the employer is obligated to bargain with the union.

Contract Negotiations and Strikes

After a union is certified as the employees' exclusive representative, it bargains with the employer on behalf of every employee in the bargaining unit. The objective is to produce a contract that establishes the wages and terms and conditions of employment that will apply to all unit members. The contract (also referred to as the collective bargaining agreement), once signed, binds the union, the unit members, and the employer to its terms.

CONTRACT CHANGES

Neither party may unilaterally terminate or modify a contract, once it is in effect, without the other party's consent, unless the party that desires termination or modification first takes the following steps:

1. The party must notify the other party in writing about its proposed contract termination or modification 60 days before the date on which the contract expires. If the contract is not scheduled to expire on any particular date, notice in writing must be served 60 days before the time the changes are proposed to take effect.
2. The party must offer to meet and confer with the other party to negotiate a new agreement.
3. The party must inform the Federal Mediation and Conciliation Service and any corresponding state agency of the existence of a dispute if no new agreement has been reached within 30 days. Said party must also notify at the same time any state mediation or conciliation agency in the state where the dispute occurred.
4. The party must continue to honor all terms and conditions of the existing contract until 60 days after giving notice to the other party or until the date of the contract's expiration, whichever is later.

It is an unfair labor practice for either employers⁹⁰ or unions⁹¹ to fail to meet these requirements for terminating or modifying an existing contract. If these requirements are not met, a strike to effect contract change is unlawful, and participating strikers will lose their status as employees. However, if the strike was sparked by an unfair labor practice committed by the employer, it is classified as an "unfair labor practice strike," and the employees' status is unaffected by their union's failure to follow the four requirements outlined above.

THE RIGHT TO STRIKE

If the employer and union cannot arrive at a new agreement and the current contract expires, either party is free to use economic action in support of its bargaining position as follows:

- The union is free to strike and picket the employer's workplace (an "economic strike"); and
- The employer can continue business operations by hiring temporary or permanent replacement employees.

Employers may facilitate the hiring of workers to replace striking union members by assuring replacement workers that they will not be terminated when the strike is settled. Workers given such assurances are commonly referred to as "permanent replacements." In an economic strike, an employer need not displace permanent replacements for strikers who make an unconditional offer to return to work.⁹² Economic strikers who have been permanently replaced generally do not lose their status as statutory employees: The employer must put them on a "preferential hiring" list and offer to reinstate them if and when any job for which they are qualified becomes available.⁹³

The NLRB has determined that strikers' rights to reinstatement indefinitely continue "to exist so long as the striker ha[s] not abandoned the employ of [the employer] for other substantial and equivalent employment."⁹⁴ However, if a strike is the result of employer

In an economic strike, an employer need not displace permanent replacements for strikers who make an unconditional offer to return to work.

Strikers who engage in serious misconduct during a strike may be refused reinstatement to their former jobs.

unfair labor practices or only temporary replacements have been hired, the employer must reinstate strikers who unconditionally offer to return to work, even if reinstating them would displace the replacements.⁹⁵

Strikers who engage in serious misconduct during a strike may be refused reinstatement to their former jobs. This applies to both economic strikers and strikers who are protesting an employer's unfair labor practice. Serious strike misconduct has been held by the courts and the NLRB to include, among other things, violence and threats of violence. Strikers engaging in the following activities may also cause them to forfeit their right of reinstatement:

- attacking management representatives;
- physically blocking persons from entering or leaving the workplace;
- throwing nails or tacks under automobiles or throwing objects at non-striking employees; and
- threatening violence against non-striking employees.

As with the right to strike, picketing is also subject to limitations and qualifications. Picketing may be prohibited due to picketers' unlawful objective or misconduct on the picket line.

Filing Unfair Labor Practice Charges

Individual Michigan employees who believe that either their union or employer has committed an unfair labor practice against them or others may file a charge with the regional director of the NLRB in Detroit.⁹⁶ Employees must file within 6 months of the incident or be barred by the period of limitations.⁹⁷ (The same limitations apply for public-sector employees filing unfair labor practice charges with the Michigan Employment Relations Commission.)

The NLRB regional office will investigate the charge and typically determine within 30 to 45 days whether it has merit. If the charge is meritorious, the NLRB will issue a complaint and prosecute the case on behalf of the aggrieved employees and act as counsel for them. The case is heard by an NLRB administrative law judge, then the board members in Washington review the judge's decision and affirm, modify, or reject it entirely. The board's decision may in turn be appealed by employees, the employer, or the union in the federal court of appeals in the appropriate jurisdiction.

The NLRA is not a criminal statute; it is entirely remedial. The act authorizes the NLRB to issue cease-and-desist orders against parties found guilty of unfair labor practices and to take certain actions including ordering the re-instatement of dismissed or striking employees with or without back pay. Once the NLRB rules on a given case, it normally requires notices that inform employees about its decision to be posted in the workplace.

2. Compulsory Unionism for Government Employees

The National Labor Relations Act (NLRA) of 1935 established a policy of compulsory unionism for most of America's private-sector employees; however, its purview does not extend to government employees. State governments in 36 states including Michigan⁹⁸ have instead passed their own legislation to establish compulsory unionism for state and local government employees in their jurisdictions. In 1978, Congress separately established mandatory collective bargaining for many employees of the federal government.

The 40-year decline in private-sector union membership has not been reflected in the public sector, where union members in 1998 represented nearly 38 percent of the public-sector workforce nationwide. In Michigan, over 55 percent of all public-sector employees are unionized,⁹⁹ and many of those unionized employees are public school teachers.

The purpose of this chapter is to explain the legal rights and responsibilities of unionized federal and Michigan state and local government employees, and to describe the similarities and key differences between the Public Employment Relations Act, which governs public-sector employers and labor organizations in Michigan, and the National Labor Relations Act. The Civil Service Reform Act of 1978, which governs unionization among federal employees, is also explained.

Michigan's Public Employment Relations Act

In 1947, the Michigan Legislature passed the Public Employment Relations Act (PERA),¹⁰⁰ which allowed public-sector employees for the first time to organize and enter into collective bargaining agreements. PERA today remains the principal statute governing disputes involving public-sector labor organizations and government employers, including Michigan public school districts.

Section 48 of the Michigan constitution authorizes the legislature to "enact laws providing for the resolution of disputes concerning public employees, except those in the state classified civil service."¹⁰¹ PERA attempts to fulfill this goal in ways similar to the NLRA. Labor disputes involving public-sector unions and employers are decided by the Michigan Employment Relations Commission¹⁰² (MERC), an administrative body similar to the NLRB. Both MERC and the Michigan courts typically look to NLRB case decisions to interpret those sections of PERA that are similar to the NLRA.¹⁰³

PUBLIC-SECTOR EMPLOYEE RIGHTS UNDER PERA

Section 9 of PERA establishes employee legal rights for Michigan public-sector employees in language comparable to Section 7 of the NLRA, which describes the legal rights of private-sector workers. Section 9 of PERA states as follows:

The 40-year decline in private-sector union membership has not been reflected in the public sector. In Michigan, over 55 percent of all public-sector employees are unionized.

It shall be lawful for public employees to organize together or to form, join or assist in labor organizations, to engage in lawful concerted activities for the purpose of collective negotiation or bargaining or other mutual aid and protection, or to negotiate or bargain collectively with their public employers through representatives of their own free choice.

PERA defines a public employee to be

a person holding a position by appointment or employment in the government of this state, in the government of one or more of the political subdivisions of this state, or in the public school service, in a public or special district, in the service of an authority, commission, board, or in any other branch of the public service.¹⁰⁴

Courts have construed this definition to include both tenured and non-tenured teachers¹⁰⁵ as well as paid student interns working at state universities.¹⁰⁶ However, court cases have consistently held that PERA does not cover state classified employees subject to the Civil Service Commission's jurisdiction.¹⁰⁷ (The Civil Service Commission instituted a separate system of compulsory unionism for state employees in 1980, which operates similarly to PERA.¹⁰⁸)

SIMILARITIES BETWEEN PERA AND THE NLRA

There are other sections of PERA besides Section 9 that are closely modeled after the language of the NLRA.

Those activities listed as employer unfair labor practices under PERA are essentially identical to the unfair labor practices described in sections 8(a)(1)-(5) of the NLRA.¹⁰⁹ PERA states, for example, that it is unlawful for a public employer or its officers or agents to

- interfere with public employees in their exercise of their Section 9 rights;
- dominate or interfere with the formation or administration of any labor organization;
- discriminate in regard to hiring, terms, or other conditions of employment in order to encourage or discourage employee participation in a labor organization;
- discriminate against an employee for testifying or initiating proceedings under PERA; and
- refuse to bargain with the employee bargaining representative.

Under PERA, unions are also capable of committing unfair labor practices just as they are under the NLRA. The relevant language in PERA is nearly identical to section 8(b)(1)-(3) of the NLRA.¹¹⁰ It is unlawful under PERA for a labor organization to

- restrain or coerce public employees in the exercise of their Section 9 rights or public employers in the selection of their representatives for collective bargaining or adjustments of grievances;
- cause or attempt to cause a public employer to discriminate against a public employee; and
- refuse to bargain collectively with a public employer.

Many other provisions of PERA mirror the NLRA in their language and their effects. Following are further examples that demonstrate the similarities between Michigan public-sector labor law as defined by PERA and the federal private-sector labor policies wrought by the NLRA:

- Union representation elections under are called when individual employees or labor organization can show that 30 percent or more of the public employees within the proposed bargaining unit have expressed an interest in a union representative and the employer refuses to recognize the representative.¹¹¹
- Public employers may request a union election if more than one individual or labor organization is claiming to be the employees' bargaining representative.¹¹²
- Union representation elections are barred for a 12-month period after a valid election has been held or for a maximum of three years if a valid collective bargaining agreement is already in effect.¹¹³
- Unfair labor practice charges must be filed within six months; complaints that are filed later than six months are time barred.¹¹⁴
- Remedies for employer unfair labor practices committed against employees may include cease-and-desist orders, reinstatement of an unlawfully discharged employee, sometimes with back pay. Back pay is awarded "as will effectuate the policies of [the] act."¹¹⁵ Reinstatement is not available when an employee's discharge was for good cause.
- Public employees facing discipline or discharge for allegedly unlawful strike activity are entitled to make a written request of the governmental employer within 10 days of being disciplined or discharged for a determination of whether their conduct actually violated PERA. Within 30 days after the employer's final determination has been made, aggrieved employees have the right to have that determination reviewed by the circuit court to judge whether the decision is supported by sufficient evidence.

DISTINCTIONS BETWEEN PERA AND THE NLRA

PERA and the NLRA share many similarities, but there are also important differences between the two statutes.

One of the most significant differences is that PERA prohibits employee strikes and employer lockouts. This affects the collective bargaining rights of employees who fall under PERA, since they are not free to use strikes as a way to achieve concessions from their employer—that is, the public. PERA defines a strike as a willful absence or failure to perform work in order to influence the terms and conditions of employment. The fact that PERA defines a strike according to the strikers' motives is an important difference from the NLRA, which does not include intentions as part of its definition. This distinction underscores the point that government employees are more restricted in their strike activity than are their private-sector counterparts.

Michigan's Public Employment Relations Act prohibits employee strikes and employer lockouts, underscoring the point that government employees are more restricted in their strike activity than are their private-sector counterparts.

Public employers and employee bargaining representatives are required to bargain in good faith. The parties' duty to bargain, however, extends only to "mandatory" subjects of bargaining, which concern wages, hours, and other terms and conditions of employment.

PERA's definition of strikes also makes special distinctions for public school employee strikes, which involve a willful absence or work stoppage in protest of an unfair labor practice committed by the public school employer. Public school employees who strike despite PERA's anti-strike provisions each suffer a loss of pay for any full or partial day of striking activity, and this is repeatedly emphasized throughout the act.¹¹⁶ Similar penalties are levied against public school employers who lock out public school employees.¹¹⁷

PERA's complex system to prevent public-sector strikes, including expedited methods to detect when strikes (including "sick-outs") have occurred,¹¹⁸ is designed to curb the exceptional power and influence wielded by public-sector unions. An example of this power and influence is the near-monopoly that public employee unions hold in the education market, where they represent the vast majority of Michigan's public school teachers. Partly because there are relatively few private schools to offer consumers alternatives to the public school system, these public-sector school employee unions face little competitive pressure to moderate their demands. Public school employee unions accounted for nearly 75 percent of public-sector union strikes from 1965 to 1988.¹¹⁹

Another key difference between PERA and the NLRA is that unlike the NLRA, PERA allows supervisory employees to organize into labor unions. However, supervisors cannot be included in the same bargaining unit as other non-supervisory employees.¹²⁰ The only limit on supervisors' right to organize is placed on supervisors who are considered "confidential" employees. Confidential—or executive—employees are not permitted to form a union under PERA when they "formulate, determine and effectuate confidential labor relations policies at the highest level of a public employer."¹²¹ This limit is placed on public-sector supervisors because "there could be no effective collective bargaining on the part of the employer as there would be no employee to administer legislative policy."¹²² Perhaps more importantly, however, is that confidential employees must be accountable to the public: They are bargaining on behalf of the taxpayers and are obliged to act accordingly.

When deciding public-sector labor disputes, MERC and the Michigan courts normally apply NLRB precedents to PERA cases. Occasionally, NLRB precedents may be inapplicable to particular disputes because of PERA's prohibitions against strikes and lockouts. Michigan courts generally follow NLRB precedent when considerations regarding the power to strike are not the only rationale of a precedent and the balance of power between union and employer would not be dramatically affected in a non-strike setting.¹²³

THE DUTY TO BARGAIN IN GOOD FAITH UNDER PERA

Public employers and employee bargaining representatives are required to bargain in good faith under Section 15 of PERA: Failure by either party to bargain in good faith is an unfair labor practice. The parties' duty to bargain, however, extends only to "mandatory" subjects of bargaining, which are those subjects that concern "wages, hours, and other terms and conditions of employment."¹²⁴ All other subjects that may be legally bargained over when both parties agree to do so are known as "permissive" subjects. Both parties are obligated to negotiate mandatory subjects of bargaining until they either reach an agreement or impasse. Disputes regarding permissive subjects may not be taken to impasse.

In 1994, the Michigan Legislature revised Section 15 of PERA to remove certain subjects from the scope of negotiation between public school employers and unions.¹²⁵ These prohibited subjects of bargaining are those which concern matters reserved strictly to the unilateral decisions of public school employers. Examples include the following:

- who is or will be the policyholder of any employee group insurance benefit;
- establishment of the starting day for the school year;
- composition of site-based decision-making bodies;¹²⁶
- decisions regarding whether to allow inter- or intradistrict open enrollment;
- decisions to operate a public school academy (charter school)¹²⁷ or grant a leave of absence to district employees who wish to participate in establishing a public school academy;
- decisions to contract with third parties for noninstructional services, the procedure for obtaining third party contracts, the identity of the third parties, and the impact of such contracts on the bargaining unit;
- use of volunteers to provide services at a school;
- use of pilot programs and decisions regarding the use of technology; and
- additional compensation or work assignments intended to reimburse employees for any monetary penalty imposed on them under PERA.

By placing these bargaining subjects solely under the decision making authority of school districts, the legislature has provided public school employers with greater flexibility to meet the challenges of an increasingly competitive public school marketplace.

MEDIATION AND ARBITRATION UNDER PERA AND PUBLIC ACT 312

Procedures for avoiding public-sector labor disputes entirely or settling them quickly when they do occur are two dominant themes in PERA. PERA requires both parties to a collective bargaining agreement to notify MERC of the status of negotiations 60 days before the expiration of their current agreement. During this time, the employer, the local union bargaining agent, or a majority of employees may request mediation by MERC. If a dispute is unresolved 30 days after the parties have notified MERC and no request for mediation has been received, MERC will appoint a mediator to the dispute.

PERA provides further mediation to avert labor disputes between public school employers and employees.¹²⁸ If both parties agree that impasse has been reached during their negotiations, additional mediation efforts may be employed as follows: The employer and the bargaining representative each appoint an individual to represent their interests. Together, these two representatives select a neutral mediator. The two representatives meet with the mediator and attempt to recommend a settlement within 30 days. If one or both of the parties fails to accept a recommended settlement within the 30-day time limit, the employer may implement its last offer of settlement made before impasse occurred.

Section 17 of PERA, added in 1994, states that final approval of a public school collective bargaining agreement cannot hinge on the assent of the larger parent union of the employees' local affiliate. Once the public school employer and local bargaining agent agree to a collective bargaining agreement, PERA prohibits a parent bargaining representative or

In 1994, the Michigan Legislature removed certain subjects from the scope of negotiation between public school employers and unions, providing districts with greater flexibility to meet the challenges of an increasingly competitive public school marketplace.

The federal Civil Service Reform Act of 1978 declares labor organizations and collective bargaining in the civil service to be “in the public interest.”

educational association from vetoing a collective bargaining agreement reached by the employer and the public school employees’ local bargaining unit.¹²⁹

Another statute related to public-sector collective bargaining, Public Act (PA) 312, applies to employees in police and fire departments. PA 312 provides for compulsory arbitration¹³⁰ for labor disputes arising out of contract negotiation and formation, if mediation efforts fail to resolve them. Due to the overlapping nature of PERA and PA 312, the courts have ruled that they are to be read together; however, there are some important differences between the two statutes.¹³¹ For example, the duty to bargain in good faith and impasse requirements are not employed in PA 312 arbitration and employers are not entitled to impose the last offer of settlement before impasse was met. Furthermore, resort to impasse is only available for resolving contract negotiations; it cannot be used to process grievances regarding interpretations of an existing contract.

The Federal Civil Service Reform Act

Title VII of the Civil Service Reform Act of 1978¹³² governs federal employer and employee labor relations. It specifically declares labor organizations and collective bargaining in the civil service to be “in the public interest.” Accordingly, the act provides federal employees with legal rights similar to private-sector workers’ Section 7 rights under the NLRA. The act states that employees of the federal government have “the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right.”

The Civil Service Reform Act created the Federal Labor Relations Authority¹³³ (FLRA) to “establish policies and guidance” for the administration of the labor-management relations provisions of the act. The FLRA

- determines the composition of employee bargaining units;
- supervises or conducts union representation elections;
- conducts hearings to resolve complaints of unfair labor practices;
- resolves issues involving the duty to bargain in good faith; and
- resolves any exceptions (appeals) to arbitrators’ awards.

The unfair labor practice provisions of Title VII are similar to those of the NLRA; however, there are five major differences between private-sector employees under the NLRA and federal employees under the Civil Service Reform Act as follows:

1. Federal employees are denied by statute the right to strike.
2. The right of federal employees to picket is limited to informational picketing only. It is an unfair labor practice for a labor organization to picket a federal agency in a labor-management dispute if such picketing interferes with an agency’s operations.

3. The scope of mandatory collective bargaining for federal employees is limited to personnel employment practices only. Basic working conditions such as wages, hours of work, and employee benefits are instead subject to statutory provisions.
4. Union and agency contract provisions as well as all other forms of compulsory union support are prohibited in the federal civil service.
5. Recognition of labor organizations as exclusive employee representatives occurs only by a majority vote of employees through a secret-ballot election.

***The scope of
mandatory
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Part III

Organized Labor at the Crossroads: Its Present and Future and Recommendations for Reform

1. Decline of the Organized Labor Movement

Labor unions have had a powerful influence on, and made vital contributions to, the American economy in the twentieth century. Organized labor has helped give birth to America's large middle class of workers, who are part of the most productive workforce on earth. The movement's presence as a potential organizing force has also prompted many employers and businesses to adopt a pro-employee agenda in the workplace—an agenda that respects and fosters the dignity and well being of all members of the workforce.

However, recent economic trends and many unions' refusal to face them have placed the organized labor movement at a crossroads. The purpose of this section is to explain how globalization and other trends are contributing to the rapid decline in union membership and point the way toward reform that can help labor organizations reverse their decline, free workers from compulsory working arrangements, and continue to play a vital role in the twenty-first century workforce.

Union Membership Is Rapidly Decreasing

Labor unions in America have experienced a tremendous decline in membership over the past several decades, losing members even during times of relative prosperity. For example, between 1994 and 1995, the number of union members dropped 300,000—to 16.4 million workers—despite the fact that employment increased by over two million workers during the same period. Largely as a result of a decrease in unionized private-sector workers, the unionized share of the total U. S. labor force declined from 15.5 to 14.9 percent.

This overall trend of decline continued apace in 1998, despite recent gains in public-sector unionization: Unions now represent 37.5 percent of public-sector employees but only 9.5 percent of private-sector workers. Private-sector union representation peaked in 1953 at a level of 35.7 percent, and it has been a downhill slide for unions since that time.

The organizing challenge facing labor unions just to maintain their 10 percent share of private-sector employee representation is formidable. To meet the challenge, unions will have to organize roughly 200,000 private-sector workers each year (assuming current rates of workforce growth). To maintain their representation level in the public-sector workforce, unions will have to add 100,000 public-sector employees per year.

Unions in America have experienced a tremendous decline in membership over the past several decades. For example, between 1994 and 1995 alone, the number of union members dropped 300,000—to 16.4 million workers—despite the fact that employment increased by over two million workers during the same period.

Given the rate at which workers have been leaving unions, the labor movement will have to add nearly 700,000 members per year just to maintain its current levels of employee representation.

However, there is even more to the story. In recent years, unions have been losing membership in absolute, not just relative, terms. Thus, to keep up, they must stem this membership decline while adding new members. Given the rate at which workers have been leaving unions, the labor movement will have to add nearly 700,000 members per year just to maintain its current levels of employee representation. Achieving even a modest one-percent increase in unions' representation rate would increase the organizing task by another one million new workers every year.¹³⁴

Another indicator of the organized labor movement's decline is in the results of NLRB-supervised union elections held over the period from 1984 to 1995. During that period, the overall union success rate in representation elections averaged between 45 to 50 percent. In other words, unions lost over half of all the election petitions filed seeking to certify them as exclusive employee representatives.¹³⁵ Moreover, unions consistently lose more than half of all decertification elections—the elections in which employees vote to determine whether they wish their existing union to continue representing them.

Four Reasons for the Decrease in Union Membership

There are several major trends that have contributed and are contributing to the continued decline in labor union membership, and these trends continue to grow in strength. They are as follows:

Global competition and deregulation in traditionally unionized industries. In recent years, the federal government has deregulated heavily unionized industries including the trucking, railroad, and airline industries. Deregulation has brought greater competition in this industries not only domestically but also from abroad. No longer is the U. S. free from global competitive pressures, as many argue it was in the years following World War II. Economic globalization has resulted in large-scale layoffs and growing economic insecurity for workers, particularly in these historically unionized industries. This in turn has limited union efforts to raise their members' wages and benefits. For example, trucking deregulation hit the Teamsters union hard because competition meant that trucking firms could no longer keep their prices high enough to support the Teamsters' wage premiums. The new competitive labor market freed nonunion truckers from the roadblocks they faced in getting jobs. In the seven years since trucking deregulation began in earnest, the share of truckers who belonged to unions fell by more than half, to 28 percent.

Changes in the American economy and workforce demographics. The rising number of illegal immigrant workers who, fearing deportation, are disinclined to protest substandard employment conditions, much less become involved in a union organizing campaign. The rapidly expanding contingent workforce—composed of mostly women, temporary workers, and part-time employees—has also proven to be difficult for unions to organize. Additionally, shifts in the American job market from the stagnant manufacturing sector to an expanding service sector and the creation of many new largely white collar and technical occupations have also presented organizing challenges to unions.

Federal employment law supplanting traditional union roles. Over the past several decades, Congress has passed a number of new laws and mandates designed to combat employment discrimination of various types, establish safe and healthy workplaces,

provide family and medical leave, give workers notice for plant closings, and much more. The trend has been for government to assume responsibility for more and more of the things traditionally advocated and protected by unions. Unions have thus become less necessary for many workers, and the cultural movement toward legislative protections has to a great extent replaced collective action in the workplace.

Today's workers are less interested in unionization. The declining numbers of union members over the past 20 years has spawned another problem for unions—the current generation of workers comes largely from households where there are no union workers to serve as models. Hence, these younger workers have little knowledge of, and do not particularly care about, unions. More than 70 percent of the current civilian labor force is under the age of 45. Today's workers also tend to be highly mobile, better educated, and often in white-collar or new-collar (computer, technical, etc.) careers. They care about wages, but many care more about such issues as career advancement, day care, quality of life on the job, developing new skills, and having some say in how their jobs are done. Workers of today also tend to be more sympathetic to business. Many came of age during the oil-shocks of the mid-1970s, the back-to-back recessions that followed, and the trade wars. This has led them to appreciate the importance of business in creating jobs and has made them desire unions that are willing to cooperate with management rather than confront it.

The Labor Movement's Perception of Its Decline

Officials in the organized labor movement consistently state that the two greatest causes for the continuing decline in union membership are the anti-union attitudes of employers and weaknesses in the National Labor Relations Act that make employee organizing difficult and provide ineffective remedies for employer labor law violations. Close scrutiny reveals, however, that the principal cause of labor union decline is not so much employer attitudes or the country's labor laws, but rather a lack of worker support for unions.

It is true that there are anti-union employers, but they represent a small component of the overall business community. Legal enforcement mechanisms are effective at catching these labor law violators and remedying any unlawful actions that injure individual workers, and unions will continue to target employers whose actions and policies cause dissatisfaction among their employees.

Most employers, however, obey the law and prefer to operate directly with their employees, without an intermediary. Unionism is a choice for employees, not employers, and employers today are increasingly sophisticated in their knowledge of the law and labor relations practices. The prevailing pro-employee attitude in American workplaces is driven largely by the marketplace as employers compete to recruit and retain good employees.

Unions may complain about this dynamic, but there is little they can do about it. To the extent that employers' pro-employee human resource programs discourage unionism, it is to the direct betterment of employees. "Old-school" unions are left with the shopworn argument that the labor laws are so weak that they are at a competitive disadvantage in enlisting new members. Consequently, the labor movement's central concern today revolves around achieving greater institutional and legal protections of its interests. Devoting as it

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does disproportionate resources and attention to this issue will surely accelerate Big Labor’s decline.

Organized Labor’s Decline: A Diagnosis

The causes of organized labor’s decline are more complex, myriad, and deep-rooted than any change in the law or in White House occupancy. Until the labor movement honestly and squarely faces fundamental issues including its own organizing lethargy and its lack of imagination in adopting new ways of serving potential members, it will remain divorced from the realities of why it no longer appeals to employees.

The labor movement has, in many instances, simply lost touch with the wants and needs of modern-day workers. It is in a quandary as to how to win them back. No law or government intervention can correct these very serious deficiencies. Friends of the unions in the White House, on Capitol Hill, and in Lansing might make a difference in the short run, but the structural weaknesses of unions are likely to doom them in the end, unless these fundamental problems are addressed and corrected.

For example, early in this century, government unemployment and disability insurance did not exist, so unions provided them. Employers did not extend health and life insurance to workers, so unions did. Today, it is still true that unions must find the right “niche” and provide some positive benefit to employees and potential members that is not being provided by someone else. Unions must learn again to earn the support of their members through effective representation.

At the same time, the labor movement should focus on other pressing issues, such as cleaning its own house and ridding itself of corrupt leaders who tarnish honest and hard-working union supporters. Labor unions should also abandon the outmoded adversarial model of labor relations and instead study ways in which they can co-exist with management in the modern workplace and cooperatively solve problems in a way that promotes free enterprise. Unions should cease the harassment tactics against business; the goal for them should be winning back the hearts, minds, and loyalties of workers, not destroying the businesses that employ them.

Union leaders themselves were once leery of laws that mandated membership in their organizations. Samuel Gompers, the father of the American labor movement, warned workers that “compulsory systems” were not only impractical, but also represented a menace to their rights, welfare, and liberty. He was right: A movement that holds compulsion as its main operating principle cannot long endure in a free society marked by a rapidly changing economic and social climate.

2. Recommendations for Labor Law Reform That Enhances Workers' Freedom and Protects Their Rights

With the passage of the National Labor Relations Act (NLRA) in 1935, Congress conferred on labor unions the power to “organize” workers by whatever means the unions chose—including coercion—and to impose on employers the risk of penalties if they questioned or opposed union demands. Since that time, the abuses of some elements of the organized labor movement have twice led Congress, in 1947 and 1959, to amend the law to impose restraints on some of the more flagrant union abuses.

Notwithstanding Congress's legislative efforts to curb union abuses, the NLRB in many respects has evaded or distorted the clear intent of these amendments. The NLRB has in essence kept national labor relations policy far closer to the heavily union-favoring act of 1935 than Congress intended and that the growth of union political power indicates is wise.

It is past time for national and state policy makers to again consider labor law reform. For too long, the assumption has been that what is good for labor unions is therefore in the best interest of employees. But good labor policy should not reflect this one-sided intent. Rather, any reform undertaken should act toward the dual purpose of restoring balance to labor-management relations and protecting workers from abuse by both unions and employers.

Effective labor law reform must protect the “free choice” rights of employees to select a bargaining agent or to reject a union. The purpose of any meaningful reform legislation should be to reaffirm the NLRA's guarantee to employees of their basic rights, which are often neglected during the collective bargaining process. For example, employees' basic right to refrain from collective bargaining is often disregarded by labor unions, who cite as justification the 1935 preamble to the NLRA that declares official U. S. public policy to be the use of collective bargaining as a means of reducing industrial strife.

Labor law reform must instead stress the importance of maintaining a balance between labor union bargaining power and employees' right of free choice to refrain from collective bargaining if they so choose. Business, unions, and workers themselves should each enjoy equal rights and responsibilities under the law.

Although the long-term goal should be to restore a government-neutral, free market in labor representation, the details of such a proposal are beyond the scope of this report. Outlined below, then, are several recommendations for reform that will go far to accomplish the stated purpose of the NLRA to promote industrial peace and to promote the output of goods and services for the benefit of all people.

Effective labor law reform must protect the “free choice” rights of employees to select a bargaining agent or to reject a union.

Once employees can exercise freedom of choice regarding union membership and financial support, unions should be legally free to represent the interests of only those employees who voluntarily choose to join a union.

Recommendation #1: End mandated union membership and financial support by enacting a federal or state right-to-work law. Relieve unions of any duty to represent non-members and end forced collection of union dues from them.

As American society prepares to enter the next millennium, the watchword for real labor reform must be “freedom,” both as an ideal and as a method of operation. Ending the coercive requirements of compulsory unionism and confiscatory union dues collection are essential goals.

Accordingly, in the absence of congressional action, the Michigan Legislature should enact a state right-to-work law which establishes in labor law the principle of voluntary association for workers.

The principle of freedom of association, guaranteed in the First Amendment, was a central tenet in the policy of union pioneer Samuel Gompers. Unfortunately, the labor movement has drifted away from the Gompers principle. Today in most states, when a union gets a mere simple majority of the votes in a representation election, *all* the workers can then be compelled to financially support the union and are subject to discharge if they fail to do so. This simply puts too much power in the union officials’ hands, both in relation to the employee and the employer.

Once employees can exercise freedom of choice regarding union membership and financial support, unions should be legally free to represent the interests of only those employees who voluntarily choose to join a union. This would relieve unions of the legal duty to represent all employees, regardless of whether or not they are union members, and eliminate the so-called “free rider” dilemma. Unions would then have the incentive to focus on providing valuable employment services to attract the voluntary support of each worker.

A national right-to-work law or enactment of a right-to-work law in Michigan that requires unions to earn their membership and dues, just as businesses must earn their customers’ patronage, would motivate unions to better serve their members. Right-to-work will force unions to do indirectly what they seem incapable of doing directly—that is, provide the kind of services and benefits workers want and would be willing to pay for voluntarily.

A national right-to-work law, stressed economist and Nobel Laureate F. A. Hayek in his book, *The Constitution of Liberty*, is “the only practicable way of restoring the principle of freedom” to American labor relations.

Recommendation #2: Enforce employee *Beck* rights and enact a “paycheck protection” law.

Eleven years ago, the U. S. Supreme Court established what are now known as “*Beck* rights” in the landmark decision *Communication Workers v. Beck*.¹³⁶ *Beck* rights dictate that workers cannot be forced under union contracts to pay any dues or fees beyond those necessary for the performance of the union’s employee representation duties. In other words, any worker who objects to his union’s use of his dues money for purposes not directly

related to collective bargaining (such as political lobbying) is entitled to a refund of that portion of his dues.

Freedoms of speech and association are important and fundamental employee rights protected by the *Beck* decision. Most workers, however, do not fully enjoy these freedoms because they are not aware that they have the right to withhold the portion of their dues expended on political, social, or other nonchargeable activities to which they object.

This situation is unlikely to change unless public- and private-sector bargaining laws are amended to place an affirmative requirement on both unions and employers to notify dues-payers of their *Beck* rights. The law should permit employees to decide whether they wish to withhold the portion of their dues used for “extracurricular” union activities such as lobbying, electoral politics, image building, etc. Reform of this type would reinforce each employee’s Constitutional rights to freedoms of speech and association and help prevent the misuse of union funds.

Several states, including Idaho and Washington, have enacted a measure known as “paycheck protection” to remedy the current lack of worker *Beck* rights enforcement. Paycheck protection safeguards worker rights by requiring unions to obtain up-front, written approval from individual workers before they collect and spend dues money on political or other non-workplace related activities.

Michigan has already taken a significant, though limited, step in this area by enacting Public Act 117 of 1994. Under this legislation, payroll dues deductions may be used for political action fund contributions only after individual workers grant their consent each year. Full paycheck protection would extend these requirements to cover all union non-workplace related dues expenditures, which represent a substantial portion of employee dues dollars.

Thomas Jefferson once wrote, “to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical.” This principle should be reinforced in Michigan labor law. Accordingly, the state of Michigan should adopt a paycheck protection proposal by way of law or ballot initiative, as soon as practicable, in order to fully implement worker freedoms of speech and association when requesting and receiving a partial refund of involuntarily taken union dues.¹³⁷

Another reason why Michigan should enact paycheck protection is that the NLRA is unclear about what “union membership” actually means, and the courts have failed to clarify the term. For example, “membership” as described in Section 8 (a)(3) does not necessarily mean full and formal union membership. Under court interpretation, “membership” requires only that employees pay dues and initiation fees.

The U. S. Supreme Court’s recent decision in *Marquez v. Screen Actors Guild* only added to the confusion.¹³⁸ In *Marquez*, the Court decided that a contract clause that states employees must become and remain “member[s] of the Union in good standing”—without explaining the employees’ right to become objecting agency fee payers—is enforceable as written. By tracking the statutory language of the NLRA, the Court theorized that the clause incorporates all of the Court’s prior case law refinements, such as *Beck* and *General Motors*, associated with that language.

“Paycheck protection” safeguards worker rights by requiring unions to obtain up-front, written approval from individual workers before they collect and spend dues money on political or other non-workplace related activities.

Congress should amend the National Labor Relations Act to permit and encourage the use of voluntary employee involvement programs while preserving the legitimate opportunities of unions to organize employees and to bargain collectively.

The Court's ruling is a step backward from its prior case law, which stressed the importance of properly informing employees of their rights. Such contractual language, though legal, does not clearly communicate the extent of the employees' obligation to support the union. The NLRA as written simply does not reflect the true state of affairs, including the employee options of "financial core" membership.¹³⁹ The NLRA should be amended to clarify all employee options under current law.

Recommendation #3: Amend the NLRA to clearly permit the use of employee involvement programs.

In order for American business to compete successfully in the twenty-first century global economy, workplace cooperation between employers and their employees is essential. Many companies are fostering cooperation through the use of employee involvement (EI) teams, which delegate considerable decision-making power from management to front-line employees. Unfortunately, antiquated provisions in the nation's labor laws often hinder employer EI programs.

Currently, the NLRB maintains that it is illegal for an employer and employees to work together to resolve workplace issues that involve terms and conditions of employment through committees or teams that fall within the definition of a "labor organization," *unless those employees are represented by a union.*¹⁴⁰

Section 8 (a)(2) of the NLRA makes it an unfair labor practice for an employer "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it." This section was passed in the original act of 1935 as part of the basic law governing the election of unions and subsequent collective bargaining. At that time, a tactic commonly used by employers to defeat union organizing was to establish sham "company unions." These organizations pretended to engage in collective bargaining, but in reality merely followed management's dictates and were typically run by officers hand-picked by management. Section 8 (a)(2) was written broadly to ensure that all forms of company unions would be eliminated. Today, however, the broad prohibition remains in place and prevents the legitimate cooperative working relationships that encourage worker participation and joint decision-making.

It is difficult to believe that true labor-management cooperation designed to promote the welfare of employers and employees can only be achieved in the context of a union setting. Congress should amend Section 8 (a)(2) of the NLRA to permit and encourage the use of EI programs while preserving the legitimate opportunities of unions to organize employees and to bargain collectively.

Recommendation #4: Guarantee the right of employees to vote, by secret-ballot election, to establish unions, approve strikes, pay union dues as a condition of employment, and ratify collective bargaining agreements.

Congress should amend the NLRA to guarantee the rights of all employees to vote to establish a union, approve a strike, agree to pay union dues as a condition of employment, and ratify union-negotiated labor contracts as follows:

VOTING FOR A UNION

In virtually all union organizing situations, employees should have a right to a secret-ballot election prior to choosing a union representative and before bargaining rights can be granted. Although the NLRA seems to provide employees with this important legal right, the NLRB often forces employers instead to recognize a union as its employees' bargaining agent merely by a show of signed authorization cards when a sufficient number of employer unfair labor practices have occurred in the eyes of the NLRB.¹⁴¹

It has long been apparent that authorization cards are not a true reflection of employee sentiment. A mandatory secret-ballot vote would provide the most accurate account of the employees' desires, and it should be guaranteed before locking employees into a collective bargaining setting which, if established, is difficult to reverse. It would also prevent an employer's recognition of a union based upon a mere card check.

Secret-ballot elections should be required by law, assuring that, in all certification circumstances, employees will be the sole architects of their own destiny and their representation selection; their choice will be preserved in an atmosphere of government-protected secrecy.

VOTING TO STRIKE

Employees should also enjoy the right to determine, through a secret-ballot election, whether or not they wish to commence or continue a strike. A strike can wipe out workers' savings or subject them to replacement. Certainly those individuals most directly affected by strike activities should have some voice in the decision to strike.

Under this approach, a strike referendum could be called by the union, the employer, or by 10 percent of the employees involved. Such a vote would be held at least five days prior to any strike and at 30-day intervals thereafter.

Currently, labor union officials may institute or continue strike action without a majority of unit employees or even union members confirming this action by a vote. Under current law,¹⁴² a secret-ballot process is *suggested* for strike votes but the process is not mandatory nor does it address the situation where a strike is already in progress.

Mandatory secret-ballot elections should be guaranteed before locking employees into a collective bargaining setting which, once established, is difficult to reverse.

Congress should amend the NLRA to guarantee a secret-ballot procedure on strike votes, thus returning to employees the right to determine their own economic destiny, as their individual situations dictate. Even though strike activity is down, even fewer work stoppages would result if employees could retain control over their own fates. Accordingly, the law should forbid strikes that the majority of affected employees have not authorized or have voted to terminate.

VOTING FOR UNION SECURITY AGREEMENTS

Employees currently have the right to file a petition, supported by a 30 percent showing of interest, to rescind a “union security” clause in their collective bargaining agreement.¹⁴³ A union security clause is a contractual agreement between the employer and union that requires employees to become members of the union in order to retain their jobs. Once established in an agreement, a majority of employees in the bargaining unit—not just those who voted in the original representation election—are needed to remove a union security clause.

Unions understandably view union security agreements as a primary source of dues, which they receive from all employees through the compulsory force of the law. Consequently, union negotiators will often trade employees’ economic benefits in order to gain the employer’s agreement to compel each employee to contribute dues. Too often, employers agree to such a deal, leaving employees with less compensation, a restriction on their freedom, and another obligation to pay.

Employees should be allowed to vote on whether they will be required to contribute money to a union to retain their jobs—before a union security clause goes into effect. Federal and Michigan collective bargaining laws should be changed to provide for this employee protection.

VOTING TO APPROVE COLLECTIVE BARGAINING AGREEMENTS

There is currently no requirement that employees be allowed to vote on acceptance of their collective bargaining agreements or any contract offer submitted by an employer. Many unions already provide some type of employee ratification, but some do not, and of those that do have ratification procedures, most typically do not provide for a secret-ballot vote. Where there are no ratification procedures, union officials have free reign to trade direct employee benefits, such as wage increases, for items like paid time off for union officials or free office space, which benefit the union as an institution—but not individual employees.

All bargaining unit employees, including both union and nonunion members, should be entitled to a secret-ballot vote to accept or reject collective bargaining agreement or employer contract proposals that involve vital issues that will determine wages, benefits, and working conditions. Federal and Michigan collective bargaining laws should be amended to ensure direct employee decision-making in these most vital and personal economic concerns.

Unions view union security agreements as a primary source of dues, which they receive from all employees through the compulsory force of the law. Consequently, union negotiators often trade employees’ economic benefits in order to gain the employer’s agreement to compel each employee to contribute dues.

3. Conclusion

The forgotten issue in most discussions and debates about labor law is the issue of personal liberty and autonomy. The point of labor law should not be to help unions win representation elections they would otherwise lose, but to give employees the option of choosing between bargaining individually or bargaining collectively. In a free society, certainly the law should be at least as diligent in preserving individual rights as it is in creating “collective rights.”

Union attempts to expand collectivization and coercion at the expense of individual liberty are not only fundamentally wrong, they go against the grain of the developing law that is striving to protect individual employee rights. The labor movement must instead begin to focus its efforts on the principles of freedom, voluntarism, and value to employees. The primary goals of our national labor policy in the next decade must be government neutrality, the preservation of a free collective bargaining system, and employee freedom of choice. In such an atmosphere, unions must abandon the old way of doing things in order to stay relevant in the twenty-first century.

For Americans to retain their standard of living and competitive advantage in the markets of the future, management and labor must be free to resolve their disputes through an open exchange of policies and ideas, without the intervention of government in favor of either side. It is time for policy makers and citizens to rededicate themselves to the true meaning and philosophy of the First Amendment by embracing the ideal of people freely exchanging ideas and persuading, not coercing, others to accept their goals.

For Americans to retain their standard of living and competitive advantage in the markets of the future, management and labor must be free to resolve their disputes through an open exchange of policies and ideas, without the intervention of government in favor of either side.

Endnotes

- ¹ Barry T. Hirsch and David A. Macpherson, *Union Membership and Earnings Data Book: Compilations from the Current Population Survey (1999 Edition)*.
- ² See *Average Annual Pay by State and Industry 1997*, BUREAU OF LABOR STATISTICS, Table 4, June 23, 1999, posted on Internet at <http://stats.bls.gov/news.release/annpay.t04.htm>. See also Michigan Department of Civil Service Workforce Reports, *Statistical Highlights FY 1997-1998*, posted on Internet at <http://www.state.mi.us/mdcs/wrkfrce/stathil98.pdf>.
- ³ The National Labor Relations Act, Sec. 2(5), 29 U.S.C. § 152(5).
- ⁴ Philadelphia Cordwainers', 3 Commons and Gilmore, *Documentary History of American Industrial Society* 59-236 (Cleveland 1910); *People v. Melvin*, Select Cases III (N.Y. 1810).
- ⁵ *Commonwealth v. Hunt*, 45 Mass. (4 Met.) 111 (1842).
- ⁶ *Vegeahn v. Gunter*, 167 Mass. 92; 44 N.E. 1077 (1896).
- ⁷ *In re Debs*, 158 U.S. 564 (1895).
- ⁸ Sherman Act, 26 Stat. 209 (1890), 15 U.S.C. § 1 *et seq.* (1988).
- ⁹ *Loewe v. Lawlor*, 208 U.S. 274 (1908).
- ¹⁰ Clayton Act, 38 Stat. 730, (1914), 15 U.S.C. § 12 *et seq.* (1988).
- ¹¹ *Id.* at § 17.
- ¹² *Id.* at §§ 14-16.
- ¹³ 254 U.S. 443 (1921).
- ¹⁴ *United Mine Workers v. Coronado Coal Co.*, 259 U.S. 344 (1922).
- ¹⁵ See National War Labor Board, *Principles and Rules of Procedure* (1919).
- ¹⁶ *Id.*
- ¹⁷ 44 Stat. 577 (1926), 45 U.S.C. § 151 *et seq.* (1988).
- ¹⁸ *Id.*
- ¹⁹ 48 Stat. 198 (1933).
- ²⁰ *Id.*
- ²¹ 78 Cong. Rec. 4229, 42230 (1934) (statement by Sen. Wagner), *reprinted in* 1 NLRB, *Legislative History of the National Labor Relations Act, 1935*, at 23 (1985).
- ²² *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).
- ²³ 49 Stat. 449 (1935).

- ²⁴ 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, at 15 (1985). The original NLRA is also referred to as the "Wagner Act" in recognition of the New York Senator's unique contribution to its passage.
- ²⁵ 29 Stat. 452 (1935), *reprinted in* 2 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, at 3273 (1985).
- ²⁶ 49 Stat. 452 (1935); U.S.C. § 158(a) (1) (1988).
- ²⁷ 49 Stat. 452 (1935); U.S.C. § 158(a) (5) (1988).
- ²⁸ 61 Stat. 138-43, 149-51, *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, at 3-13, 15-18 (1985).
- ²⁹ Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Iowa, Kansas, Louisiana, Mississippi, Nebraska, Nevada, North Carolina, North Dakota, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and Wyoming.
- ³⁰ H.R. Rep. No. 741, 86th cong., 1st Sess. 6 (1959), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 759, 764 (1985).
- ³¹ 73 Stat. 522, 524-25, 532, 535, 539, 541-45 (1959), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 4, 6-9, 14, 17-26 (1985).
- ³² 88 Stat. 395 (1974).
- ³³ This will be the National labor Relations Board if it is a private sector employer, or the Michigan Employment Relations Commission, if it is public sector employer.
- ³⁴ 29 U.S.C. § 158(d).
- ³⁵ NLRB v. Montgomery Ward & Co., 133 F2d 686 (1943).
- ³⁶ *See* David Y. Denholm, *The Case Against Public Sector Unionism and Collective Bargaining*, 18 GOVERNMENT UNION REVIEW, Number 1, (May, 1998).
- ³⁷ Lawrence W. Reed, "Michigan's Privatization Revolution," *Viewpoint on Public Issues* 96-15 (Mackinac Center for Public Policy, May 1996). Accessible by Internet: <http://www.mackinac.org/article.asp?VPT96-15>
- ³⁸ PUBLIC EMPLOYEES BARGAIN FOR EXCELLENCE: A COMPENDIUM OF STATE PUBLIC SECTOR LABOR RELATIONS LAWS (Compiled by Krista Schneider, Public Employee Department, AFL-CIO, 1992). Those states include Alaska, California, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Vermont, Washington, Wisconsin, and Wyoming.
- ³⁹ PA 176 of 1939 as amended; MCLA § 423.1 *et seq.*

⁴⁰ These are by no means the sole sources of union spending beyond collective bargaining expenses. In *Lehnert v. Ferris Faculty Ass'c*, 500 U.S. 507 (1991), the U.S. Supreme Court identified seven other examples of union expenses not chargeable to *Beck* objectors:

1. Lobbying, unless necessary to ratify or fund the collective bargaining agreement that is applicable to a nonmember;
2. Public relations activities;
3. Litigation not specifically on behalf of the nonmember's bargaining unit;
4. Expenditures related to illegal strikes;
5. Expenditures related to organizing the employees of other employers;
6. Union "members only" benefits such as prepaid legal insurance; and,
7. Expenditures related to portions of union publications reporting on the above categories.

⁴¹ *NLRB v. Allis-Chalmers Manufacturing Co.*, 388 U.S. 175 (1967).

⁴² 29 U.S.C. § 163.

⁴³ *NLRB v. Mackay Radio*, 304 U.S. 333 (1938).

⁴⁴ *Communications Workers v. Beck*, 487 U.S. 735 (1988).

⁴⁵ *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953).

⁴⁶ *Pattern Makers v. NLRB*, 473 U.S. 95 (1985).

⁴⁷ *General Motors*, 373 U.S. 734 (1963); *Pattern Makers v. NLRB*, 473 U.S. 95 (1985).

⁴⁸ 431 U.S. 209 (1977).

⁴⁹ 475 U.S. at 310 (1986).

⁵⁰ *California Saw & Knife Co.*, 320 NLRB 224 (1995) *enforced sub nom.* *International Ass'n of Machinists & Aerospace Workers v. NLRB*, 133 F3d 1012 (7th Cir. 1998).

⁵¹ *Ellis v. Railway Clerks*, 466 U.S. 435 (1984). *See also* *Lehnert v. Ferris Faculty Association*, 500 U.S. 507 (1991) in which the Court concluded that the first Amendment precluded the public union from charging dissenting objectors for the union's lobbying and political activities.

⁵² *Supra* note 44.

⁵³ *Id.* at 745.

⁵⁴ 320 NLRB 11 (1995).

⁵⁵ *Mayo Leasing Co.*, 322 NLRB (1996).

⁵⁶ *See also* *Weyerhaeuser Paper Co.*, 320 NLRB 12 (1995), (unions must notify current employees of their *Beck* rights if they were not informed of those rights at the time they entered the bargaining unit); *IUS, Local 444 (Paramax Systems Corporation)*, 322 NLRB 1 (1996), (union must provide dissenting employee with a breakdown of its major categories of expenditures or differentiate between chargeable and non-chargeable expenses); *Laborers' International Union, Local 265 (Fred A. Nemann Co.)*, 322 NLRB 47 (1996), (union need not provide employee with financial information to allow an objector to decide whether to mount a dues reduction challenge where the union has waived for the employee all requirements for dues payments); *United Brotherhood of*

- Carpenters, Local 943 (Oklahoma Fixture Co.), 322 NLRB 142 (1997), (union’s use of a charitable dues payment alternative does not relieve it of its obligation to provide the employee and other objectors with *Beck* related financial information).
- ⁵⁷ Labor-Management Relations Act, as amended, 1974, Section 19, “Individuals with Religious Convictions,” 29 U.S.C. § 169.
- ⁵⁸ Princeton Survey Research Associates (Dec. 5, 1994).
- ⁵⁹ NLRB v. Electromation, Inc., 309 NLRB 163 (1992).
- ⁶⁰ *Olmstead v. United States*, 277 U.S. 438, 478 (1928).
- ⁶¹ *See Griswold v. State of Connecticut*, 381 U.S. 479 (1965).
- ⁶² *See Toussaint v. Blue Cross Blue Shield of Michigan*, 408 Mich 579 (1980); and *Rood v. General Dynamics Corp.*, 444 Mich 107 (1993). (written policies and procedures with employee handbook gave rise to legitimate expectations that discharge would be only for cause).
- ⁶³ NLRB v. Washington Aluminum Co., 370 U.S. 9 (1962).
- ⁶⁴ *Meyers Industries*, 281 NLRB 118 (1986).
- ⁶⁵ 29 U.S.C. § 152(2).
- ⁶⁶ 29 U.S.C. § 152(3).
- ⁶⁷ 29 U.S.C. § 157.
- ⁶⁸ 29 U.S.C. §§ 158(a)(1)-(a)(5).
- ⁶⁹ 29 U.S.C. §§ 158(b)(1)-8(b)(7).
- ⁷⁰ NLRB v. Town & Country Electric, Inc. 116 S. Ct. 133 (1995).
- ⁷¹ 29 U.S.C. § 158(b)(7).
- ⁷² MICH. COMP. LAWS § 421.29(8).
- ⁷³ *Plymouth Stamping v. Lipshu*, 436 Mich 1 (1990).
- ⁷⁴ NLRB v. Mackay & Tel. Co., 304 U.S. 333 (1938).
- ⁷⁵ *Id.* at 345-46.
- ⁷⁶ *See, e.g., Technology, Inc.*, 253 NLRB 900 (1980).
- ⁷⁷ *Marquez v. Screen Actors Guild*, 119 S. Ct. 292 (1998).
- ⁷⁸ 49 NLRB 828 (1943), *enfd.*, 142 F.2d 1009 (5th Cir.), *cert. denied*, 323 U.S. 894 (1944).
- ⁷⁹ *Republic Aviation Corp. v. Labor Board*, 324 U.S. 793, 803 n.10 *reh'g denied*, 325 U.S. 894 (1945).

⁸⁰ 138 NLRB 615, 621 (1962).

⁸¹ *Id.* at 620 n.6.

⁸² 211 NLRB 749 (1947).

⁸³ TRW, Inc., 257 NLRB 442 (1981).

⁸⁴ Our Way, Inc., 268 NLRB 394 (1983).

⁸⁵ NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956).

⁸⁶ Lechmere, Inc. v. NLRB, 502 U.S. 527 (1992); *cf.* International Brotherhood of Teamsters v. NLRB, *cert. denied*, U.S. Sup. Ct., No. 95-1760 (10/7/96); Sears, Roebuch & Co. v. San Diego County Council of Carpenters, 436 U.S. 180 (1978).

⁸⁷ 29 U.S.C. § 158(c).

⁸⁸ Clear Pine Mouldings, Inc., 268 NLRB 1044 (1984).

⁸⁹ *See e.g.*, NLRB B. Savair Manufacturing Co., 414 U.S. 270 (1973) (union may not waive initiation fees for employees as an incentive to sign authorization cards before the election); NLRB v. Dunkirk Motor Inn Inc. 524 F.2d 663, 665 (2d Cir. 1975). (court held that an unconditional promise to waive an initiation fee, which is open to all employees regardless of how they vote and which is open to all employees regardless of how they vote and which remains open after the date and certification, is permissible).

⁹⁰ 29 U.S.C. § 158(a)(5).

⁹¹ 29 U.S.C. § 158(b)(3).

⁹² *Id.* Economic strikers may not be entitled to get their jobs back under certain circumstances, such as where the strikers have committed misconduct related to the strike. Clear Pine Mouldings, Inc., 268 NLRB 1044 (1984), *enfd* 765 F.2d 148 (9th Cir. 1985).

⁹³ NLRB v. Fleetwood Trailer Co., 389 U.S. 375, 381 (1967).

⁹⁴ The Laidlaw Corporation, 171 NLRB 1366, 1369 (1968); *See also* Brooks Research & Manufacturing, Inc., 202 NLRB 634, 636 (1973).

⁹⁵ Mastro Plastics Corp. v. NLRB, 305 U.S. 270, 278 (1956). Where permanent replacements have been displaced by unfair labor practice strikers or pursuant to an agreement with the union, the employer may be liable to the permanent replacement for damages on a breach of contract theory. *See* Belknap, Inc. v. Hale, 463 U.S. 491 (1983).

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⁹⁷ 29. U.S.C. § 160(b).

- ⁹⁸ *Supra* note 38.
- ⁹⁹ Union Membership and Earnings Data Book: Compilations from the Current Population Survey (1999 Edition).
- ¹⁰⁰ MICH. COMP. LAWS §§ 423.201 *et seq.*
- ¹⁰¹ MI CONST. Art. IV, § 48.
- ¹⁰² MICH. COMP. LAWS §§ 423.1 *et seq.*
- ¹⁰³ Gibraltar School Dist. v. Gibraltar Mespa-Transportation, 443 Mich 326 (1993); Mt. Clemens Fire Fighters Union, Local 838, I.A.F.F. v. City of Mt. Clemens, 58 Mich App 635 (1975) (comparing NLRA section 8(d) to PERA section 15); MERC v. Reeths-Puffer School Dist., 391 Mich 253 (1974).
- ¹⁰⁴ *Supra* note 100, § 201(e).
- ¹⁰⁵ Rockwell v. Board of Ed. of School Dist. of Crestwood, 393 Mich 616 (1975).
- ¹⁰⁶ Regents of University of Michigan v. MERC, 389 Mich 96 (1973).
- ¹⁰⁷ *See* Welfare Emp. Union v. Michigan Civil Service Commission, 28 Mich App 343 (1970); Service Emp. Intern Union Local 79, AFL-CIO v. State Racing Commissioner, 27 Mich App 676 (1970). *See also, supra* note 3.
- ¹⁰⁸ Chapter 6, Employee Relations Rules, Michigan Civil Service Commission Rules, April 25, 1980, as amended in December, 1998.
- ¹⁰⁹ *See* MICH. COMP. LAWS § 423.210(1).
- ¹¹⁰ *Id.* at § 423.210(3).
- ¹¹¹ *Id.* at § 423.212(a).
- ¹¹² *Id.* at § 423.212(b).
- ¹¹³ *Id.* at § 423.214.
- ¹¹⁴ *Id.* at § 423.216(a).
- ¹¹⁵ *Id.* at § 423.216(b).
- ¹¹⁶ *Id.* at § 423.202a(4). It should be noted that the provisions of 2a(4) that provide for a \$5000.00 fine imposed against the bargaining unit were found unconstitutional in Michigan State AFL-CIO v. Employment Relations Commission, 212 Mich App 472 (1995).
- ¹¹⁷ *Supra* note 100, § 423.202a(5).
- ¹¹⁸ *Id.* at § 423.202a.
- ¹¹⁹ *Public Sector Strikes in Michigan*, Citizens Research Council of Michigan, Report No. 290, December 1988.

¹²⁰ See MICH. COMP. LAWS § 423.213; *cf. also* Detroit Bd. of Ed. v. Local 28, Organization of School Administrators & Supervisors, AFL-CIO, 106 Mich App 438 (1981).

¹²¹ Grandville Municipal Executive Ass'n v. City of Grandville, 453 Mich 428 (1996), quoting Detroit Police Dep't v. Detroit Police Command Officers' Ass'n, 1996 MERC Lab Op 84, 105.

¹²² *Id.*

¹²³ Gibraltar School Dist., *supra* note 103 at 334.

¹²⁴ Detroit Police Officer Ass'n v. City of Detroit Police Dept., 61 Mich App 487 (1975).

¹²⁵ Some sections enhanced the local school board's decision-making powers by removing subjects from bargaining; another aimed at clearing persistent problems associated with the MEA's group insurance plan, MESSA. Finally, some sections were included to ensure that the strike prohibition could not be frustrated by collective bargaining. For example, public school teachers had manipulated the starting day for the school year in the past in order to claim that they were not on strike.

¹²⁶ Established under MICH. COMP. LAWS § 380.1202a.

¹²⁷ Under MICH. COMP. LAWS §§ 380.501-507.

¹²⁸ See MICH. COMP. LAWS § 423.207a.

¹²⁹ The constitutionality of this provision was upheld in *Michigan State AFL-CIO v. Employment Relations Commission*, 453 Mich 362 (1996).

¹³⁰ MICH. COMP. LAWS §§ 423.231 *et seq.*

¹³¹ City of Manistee v. MERC, 168 Mich App 422 (1988).

¹³² 5 U.S.C. §§ 7101 *et seq.*

¹³³ *Id.*

¹³⁴ *The American Workplace 1996 Labor Day Report*, the Employment Policy Foundation (Wash., D.C.).

¹³⁵ 59 NLRB ANN. REP (1994).

¹³⁶ Beck, *supra* note 44.

¹³⁷ For more information on paycheck protection, see Robert P. Hunter, *Paycheck Protection in Michigan* (Mackinac Center for Public Policy, September 1998). Accessible by Internet: <http://www.mackinac.org/article.asp?STD99-01>.

¹³⁸ *Supra* note 77.

¹³⁹ NLRB v. General Motors, 373 US 734 (1963).

¹⁴⁰ NLRB v. Cabot Carbon Co., 360 U.S. 203 (1959); *Electromation, Inc.*, 309 NLRB 990 (1992);

enforced, 35 F 3d 1148 (1994).

¹⁴¹ NLRB v. Gissel Packing Co., 395 US 575 (1969).

¹⁴² 29 U.S.C. § 173(c).

¹⁴³ 29 U.S.C. § 159(e).

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