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The Status of **Worker Centers** as Labor Organizations Under the **National Labor Relations Act**



U.S. CHAMBER OF COMMERCE
Employment Policy Division



U.S. CHAMBER OF COMMERCE

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INTRODUCTION

This paper addresses the question of whether a worker center is a “labor organization” under the National Labor Relations Act (NLRA or Act).¹ Put another way, are both traditional labor unions and worker centers included in the term “labor organization” as it is used in the NLRA?

The functions of a traditional labor union are well known. They exist principally for the purpose of organizing employees and representing them in collective bargaining with their employers. Generally, they are organized into local unions, which perform the day-to-day functions of administering collective bargaining agreements, and international or “parent” unions, which are responsible for union organizing and coordinating political and other activities beyond the ken of the locals. Although traditional labor unions can take various other structures, their basic functions remain the same.

In contrast, worker centers are more fluid. Generally, a worker center is a formal or informal organization that advocates for workers vis-à-vis their employers in various ways outside the context of traditional union

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A worker center can take various forms, serve broad or limited purposes, and evolve over time. Well-known worker centers include the Organization United for Respect at Walmart (OUR Walmart) and the Coalition of Immokalee Workers.²

Worker centers have in recent years engaged in various forms of activism

surrounding quick-service food workers, most notably through the Fight for \$15 movement, which has organized numerous street protests and walkouts across the country.³

A worker center may serve as a front group for a traditional labor union, or it may be independent. Likewise, it may or may not coordinate its activities with a labor union or other organization.⁴ Inasmuch as worker centers serve as agents for traditional labor unions, they essentially exist to execute strategies that unions cannot perform as effectively—if at all—given the statutory restrictions imposed on their organizing tactics.

Given those restrictions, the status of labor centers under the NLRA is an important issue for policymakers as well as employers that may be the target of a worker center campaign.⁵ Worker centers that seek to represent the interests of employees vis-à-vis their employers, including affecting their terms and conditions of employment, should qualify as labor organizations if they otherwise meet the NLRA’s definition of the term. Worker centers may not be structured in the same manner as traditional labor unions, but that difference in form should not affect the substantive analysis of their role in advocating for employees.⁶

BRIEF BACKGROUND OF THE NATIONAL LABOR RELATIONS ACT AND KEY AMENDMENTS⁷

A. Wagner Act—1935 (NLRA)

The NLRA is a product of President Franklin Roosevelt’s New Deal legislative program.⁸ Originally enacted in 1935 in reaction to the national economic depression, it was intended to

eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.⁹

This statutory purpose was enshrined in the fundamental rights protected in Section 7 of the Act:

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.¹⁰

Labor organizations and collective bargaining are at the center of the key rights protected by the Act, and Section 2(5) defines the term “labor organization” as follows:

The term “labor organization” means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.¹¹

It is apparent on its face that this broad definition can encompass more than traditional labor unions. As defined, a statutory labor organization could be structured in practically any fashion that allows employee participation and exists to deal with an employer on behalf of employees. In other words, it need not exist simply for the specific purpose of collective bargaining but, instead, for the broader purpose of “dealing with” employers about working conditions or terms.

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As will be discussed further, the obligation to bargain collectively is generally described in Section 8(d) of the Act as requiring:

the employer and the *representative of the employees* to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party. . . .¹²

Thus, both the NLRA's definition of "labor organization" and its statement of the requirements of bargaining collectively are broader than that found in the traditional context of a certified or voluntarily recognized labor union engaging in exclusive representation of employees in formal collective bargaining. While the Act does not impose a legal duty to bargain with a nonmajority, nonexclusive labor organization like a worker center, the language of the NLRA clearly admits to other types of relationships that can exist between an employer and a labor organization that do not require bargaining.¹³

B. Taft-Hartley Act—1947 (LMRA)

The Labor Management Relations Act (LMRA), also known as the Taft-Hartley Act, was the first and most extensive amendment to the NLRA. As relevant here, the LMRA accomplished three key things. First, as noted, Section 7 of the Act was amended by adding the right of employees to refrain from participating in protected concerted activities.¹⁴ Second, as discussed later in more detail, Section 8 was amended to add, for the first time, a series of unfair labor practices applicable to labor organizations.¹⁵ Finally, explicit restrictions were placed on financial transactions between employers and labor organizations.¹⁶

As originally enacted, the NLRA contained five unfair labor practices applicable to employers, but no unfair labor practices applicable to labor organizations. That changed in 1947 when Congress enacted the LMRA—over the strenuous objections of labor leaders and President Harry Truman's veto—to add

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several unfair labor practices covering labor organizations. The newly created unfair labor practices prohibited conduct by labor organizations that impinged on rights created by Section 7. In this way, some of the new unfair labor practices were similar to those already applicable to employers.

But the newly created labor organization unfair labor practices also went further by

including prohibitions against certain types of picketing and secondary conduct. The provisions' primary focus was to shield employers from those types of conduct deemed inimical to the purposes of the NLRA.

For example, a labor organization may not engage in activity against a neutral “secondary” employer, known generically as a secondary boycott. Generally, this means that if a labor organization has a dispute with Employer X (the “primary” employer), the labor organization may not—in an effort to put pressure on Employer X—take action (such as certain types of picketing) against Employer Y, a neutral secondary employer. This prohibition sought to protect these secondary employers from involvement in a labor dispute between a labor organization and the primary employer.¹⁷

The types of unfair labor practices applicable to labor organizations have been more precisely defined through case adjudication by the National Labor Relations Board (NLRB). Examples include prohibitions or limitations on labor organizations engaging in certain types of strikes, mass picketing, trespassing, slowdowns, and similar conduct. Should a worker center qualify as a labor organization under the NLRA, employers and others would have legal recourse to oppose these tactics if a worker center adopts them as part of its campaign.¹⁸

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C. Landrum-Griffin Act—1959 (LMRDA)

The Landrum-Griffin Act, formally known as the Labor-Management Reporting and Disclosure Act (LMRDA), contained both additional amendments to the NLRA as well as standalone legislation administered by the U.S. Department of Labor (DOL). Some of the LMRDA provisions had their roots in continuing concerns regarding union conduct, financial activities, and governance that ran afoul of the NLRA and its goals. The changes included expanding criminal prohibitions, broadening and strengthening restrictions on secondary conduct, placing conditions on picketing for recognition, and providing for enforcement of those rules by the NLRB. The amendments also imposed additional requirements on the internal operations of labor organizations by codifying the rights of individual members and establishing a broad financial reporting regime to be administered and enforced by the DOL.¹⁹

LABOR ORGANIZATIONS UNDER THE NLRA

A. Key Elements of the NLRA Definition of ‘Labor Organization’

The three primary elements to the definition of “labor organization” under the NLRA are: (1) employees participate in the organization; (2) the organization exists, at least in part, for the purpose of “dealing with employers;” and (3) the dealing with employers concerns “conditions of work.”²⁰

The three primary elements to the definition of “labor organization” under the NLRA are: (1) employees participate in the organization, (2) the organization exists, at least in part, for the purpose of “dealing with employers,” and (3) the dealing with employers concerns “conditions of work.”

The first element is simple in that the employee participation prong is satisfied if the organization includes any group of statutory employees.²¹ For example, employees’ involvement in a 30-member Employee-Owners’ Influence Council satisfied the first element,²² as did employees’ participation in a Plant Council designed to offer recommendations

to management about working conditions.²³ If exceptions exist under the statute to exempt a class of workers from the statutory definition of “employee,” then the workers’ participation in a group cannot support the first prong of the analysis.

The second element—“dealing with employers”—is also intuitive, but it is subject to more debate and disagreement. The “dealing with employers” element usually involves a “bilateral mechanism” wherein the employee organization makes requests or demands to the employer and the employer considers them.²⁴ A single interaction between the group and the employer is typically not enough, as the NLRB has interpreted the law to require a pattern or practice of exchanging or submitting employee proposals to show a course of dealing with an employer.²⁵

There have been several NLRB decisions regarding “dealing with employers” that show the difficulty in deciphering whether that standard has been satisfied. As a general matter, the law requires the organization to attempt or intend to deal directly with an employer, rather than use appeals to the public to accomplish its goals.²⁶ Even so, the line is blurry, and the cases are fact-intensive, such that attempts to deal with an employer through appeals to the public might under some circumstance meet the “dealing with employers” element.²⁷

In some cases, particularly for new or emerging organizations, neither the “bilateral mechanism” nor multiple communications are necessary to satisfy the “dealing with” requirement. If a group that includes employees clearly *intends* to create an organization to deal with an employer, then it can

satisfy the “dealing with” requirement even if no actual dealing occurs or no pattern of dealing has been established.²⁸ An organization can demonstrate its intent to deal with an employer if it makes demands, even if the employer fails to respond.²⁹

The third prong of the analysis—that the dealing between the organization and the employer relate to “conditions of work”—allows for broad application. The “conditions of work” language encompasses more than just traditional subjects of collective bargaining. For example, the NLRB has found that a group refusing to work with an unpopular employee is evidence of an intent to deal with an employer because it amounts to “asserting a grievance and seeking to effect a change in its working conditions.”³⁰ While this third prong is not normally an issue and is often combined with the second prong of the analysis, the Board does require an intent for the dealing to impact wages, hours, or terms and conditions of employment.³¹

There have been a handful of recent decisions, guidance documents, and other indications suggesting that the Board may treat nontraditional organizations, including worker centers, as labor organizations under the Act.

For example, in *Sheffield Barbers*, an NLRB administrative law judge (ALJ) held that a Barbers’ Association was a labor organization under the NLRA. The Barbers’ Association was described as an informal association formed by employee barbers and had the following characteristics: (1) it held no regular meetings; (2) it did not require barbers to pay membership dues; and (3) from time to time, certain barbers would speak with each other regarding employment concerns and, when necessary, designate an experienced barber to serve as president and speak on behalf of the Barbers’ Association for negotiations about wages or as a mediator between management and the barbers when problems arose.³² Despite its relatively informal structure, the ALJ found the Barbers’ Association qualified as a labor organization.³³

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In a representation case decision,³⁴ an NLRB regional office determined that the Long Beach Staff Association was a labor organization within the meaning of the Act. Even though the Staff Association had only been founded months earlier, the regional office found it qualified as a labor organization because (1) it sought to represent the employer’s in-house employees; (2) it was organized to deal with the employer on behalf of its members with regard to wages, hours, terms and conditions of employment, and grievances; (3) its membership included more than one of the employer’s employees; and (4) since the Staff Association’s founding, it adopted bylaws and met with its members.³⁵

In a 2017 Advice Memorandum,³⁶ the NLRB’s Office of the General Counsel determined that the Southern Workers Organizing Committee (SWOC), which is one of at least eight organizations involved in the Fight for \$15 movement, qualifies as a labor organization. The General Counsel determined that the SWOC was clearly a labor organization and “[t]he Fight for \$15 movement may be best known for its wage demands, but it also campaigns for union rights.”³⁷ Ultimately, the General Counsel determined that the employee in question who engaged in a solo strike did so to assist the SWOC as a statutory labor organization. Because the employee struck in consultation with the labor organization to further of its organizing campaign and provided notice to the employer detailing the reasons for the strike, the action was protected under Section 7 of the NLRA.³⁸

B. The LMRDA and the NLRA Do Not Have Identical Definitions of the Term ‘Labor Organization’

In comparing the statutory language of the NLRA with the LMRDA, the LMRDA in some respects has a broader definition of “labor organization” than the NLRA, as illustrated by the language that is in bold. These differences could lead to inconsistencies in what constitutes a labor organization under the respective statutes.

NLRA	LMRDA
<p>(5) The term “labor organization” means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.</p>	<p>(i) “Labor organization” means a labor organization engaged in an industry affecting commerce and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization, other than a State or local central body.</p>

As an initial matter, the NLRA appears to limit the universe of what is encompassed by the term “labor organization” by using the word “means” in defining what a labor organization is. In contrast, the LMRDA, added the word “includes,” which is more expansive.

The LMRDA has a broader list of included entities that are not found in the NLRA. Specifically, while both the LMRDA and the NLRA include in their definition “any organization of any kind” and “any

agency, or employee representation committee or plan,” the LMRDA definition also adds any “group” or “association” to the list of entities covered.³⁹

The LMRDA definition also contains the additional phrase “conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization,” which is intended to capture affiliates of labor organizations that actually and directly deal with the employer.⁴⁰

The LMRDA also has a slightly different description of matters that must be the subject of the dealings with the employer.

Both the NLRA and the LMRDA require dealing with “grievances, labor disputes, wages, rates of pay, and hours of employment.” But the NLRA ends that list with the phrase “or conditions of work,” while the LMRDA uses the phrase “or other terms and conditions of employment.”

At first blush, it may appear that the phrase “conditions of work” contained in the NLRA is broader than the LMRDA’s use of “other terms and conditions of employment” because the term “work” implies that it is not necessarily tied to a particular instance of employment.

At first blush, it may appear that the phrase “conditions of work” contained in the NLRA is broader than the LMRDA’s use of “other terms and conditions of employment” because the term “work” implies that it is not necessarily tied to a particular instance of employment. However, the legislative history of the NLRA, as well as other sections of the NLRA, reveal that the phrases are interchangeable. For example, Section 9(a), uses the phrase “conditions of employment” in reference to collective bargaining and the designated labor organization’s role. Likewise, legislative history demonstrates that in the context of discussing an employer-employee relationship or union representation in bargaining, both of which are tied to particular instances of employment, the phrase “conditions of work” was used.⁴¹

Given the foregoing discussion, because of the somewhat broader definition of labor organization under the LMRDA, positions taken by the DOL or the federal courts on what constitutes a labor organization under the LMRDA may not support the same finding by the Board or the courts under the NLRA depending on the specific facts involved.

C. Exclusive Collective Bargaining Representative Status

One of the key differences between a traditional labor union and a worker center is the NLRA requirement that a union must establish itself as the *exclusive* representative for collective bargaining of a group of employees (known as a bargaining unit) working for an employer if it wishes to engage in enforceable collective bargaining with the employer. A worker center, by definition, does not seek such exclusive bargaining representative status.

Although, as discussed, the NLRA definition of labor organization is not limited to organizations that seek exclusive representation status for collective bargaining, there may be circumstances under the NLRA in which a worker center labor organization would be treated differently from a traditional union labor organization because of the principle of exclusive representation.

Section 9(a) of the NLRA provides:

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the *exclusive representatives* of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment . . . [emphasis added].

Under the NLRA, a labor organization seeking to become the exclusive representative must enjoy the majority support of the employees within an “appropriate bargaining unit.” One of the central functions of the NLRB is administering the process for determining the exclusive bargaining representative.⁴²

The NLRA provides a formal mechanism by which a labor organization is designated as the exclusive representative of employees. Although parties are not required to use this formal process, it is usually necessary because the employer declines to voluntarily recognize the labor organization seeking exclusive representation rights.

Under the NLRA, a labor organization seeking to become the exclusive representative must enjoy the majority support of the employees within an “appropriate bargaining unit.”

The labor organization initiates the process by filing a petition with the NLRB to determine whether it is entitled to recognition for purposes of collective bargaining. The petition must contain information about the organization, including the name of the employer, the address, nature of the business,

description of the proposed bargaining unit, confirmation that the employer has declined to recognize the labor organization voluntarily, and details about the proposed election.⁴³

Most important, the petition must include evidence that a “substantial number of employees” support the labor organization, which the Board has defined to mean at least 30% of the proposed bargaining unit. This evidence of support typically comes in the form of signed and dated authorization cards.⁴⁴

Once the petition is filed, the NLRB is required to investigate it. In the process, the NLRB ensures that jurisdictional requirements are met, verifies that there is a showing of employee interest, and determines what comprises an “appropriate bargaining unit,” for which the NLRB determines the size and composition of the unit of employees. Similarly, it considers whether the employees in the proposed unit share a community of interest, i.e., whether they have a substantial mutual interest in

wages, hours, and other conditions of employment that can effectively be addressed in collective bargaining.⁴⁵

Finally, if the employer and labor organization cannot agree on recognition, the scope of the bargaining unit, or on other matters, then the NLRB regional office will hold a hearing upon request to resolve the disputed issues. Following the hearing, the regional office will either dismiss or allow withdrawal of the petition or direct an election and certify the results.

Section 8(b)(3) of the Act imposes the duty on the labor organization to bargain collectively in good faith about the terms and conditions of employment.

Conversely, where the employer and labor organization agree on the group of employees comprising the bargaining unit, and the labor organization can demonstrate support of the majority of the employees in the bargaining unit, the NLRA allows the parties to bypass the formal process described here, and the employer may voluntarily recognize the labor organization as the exclusive representative of the bargaining unit employees for the purpose of collective bargaining.⁴⁶

D. The Duties of Labor Organizations Derived at Least in Part from Exclusive Bargaining Representation Status

As noted, there are certain unfair labor practices that are based, at least in part, on a labor organization's status as the exclusive representative of employees for purposes of collective bargaining. Chief among these are the duty to bargain in good faith and the duty of fair representation. Because of the threshold requirement of exclusive representation, a worker center would not be in a position to be prosecuted for a violation of these duties.

1. The Duty to Bargain in Good Faith

Section 8(b)(3) of the Act imposes the duty on the labor organization to bargain collectively in good faith about the terms and conditions of employment. Examples of violations of Section 8(b)(3) include refusing to negotiate on a proposal, refusing to meet with the employer's designated bargaining representative in negotiations, terminating an existing agreement without notifying the employer, and negotiating a contract that racially discriminates against employees and thus conflicts with the duty to bargain fairly. That said, the duty to bargain in good faith is not solely rooted in the exclusivity.

2. The Duty of Fair Representation

Once a labor organization is certified or voluntarily recognized by the employer, the labor organization becomes the "exclusive representative" of the employees in the bargaining unit. The labor organization acts as the employees' exclusive bargaining agent, and the employer is generally obligated under

the Act to deal directly and only with the labor organization with regard to the terms and conditions of employment.

As the exclusive bargaining representative, the labor organization may exercise a wide range of reasonable discretion in its representative function. Indeed, Section 8(b)(1)(A) of the Act even contains a proviso protection for labor organizations, which recognizes a labor organization's right to control its internal affairs by establishing and enforcing rules of membership. However, as the exclusive statutory bargaining representative, the labor organization is also subject to the duties and limitations imposed by the Act.

While there is no explicit language in the Act requiring labor organizations to represent employees equally and fairly, the Board and the courts have interpreted Section 7 of the Act to provide employees with the right to be free from “invidious or unfair” treatment by a labor organization.

Specifically, a labor organization owes a duty of fair representation to all the employees it represents. While there is no explicit language in the Act requiring labor organizations to represent employees equally and fairly, the Board and the courts have interpreted Section 7 of the Act to provide employees with the right to be free from “invidious or unfair” treatment by a labor organization.⁴⁷

Examples of acts that violate the duty of fair representation include negotiating an agreement that allows the union to spend fees paid by objecting nonmembers for purposes beyond those germane to collective bargaining, contract administration, or grievance adjustment;⁴⁸ refusing to process a grievance because of personal animosity or filing of a charge with the Board;⁴⁹ or careless grievance handling such as abandoning a grievance without informing the grievant.⁵⁰

It is unclear whether the exclusivity-based fair representation obligation may have some analogous obligations for worker centers, which neither have nor seek such exclusive representation status. For example, could a worker center's exclusivity-in-fact (i.e., being the only organization dealing with the employer on behalf of some or all of the employees) be used to imply something similar to the fair representation obligation? Questions like these may be resolved through adjudication if the Board begins to treat worker centers as labor organizations and entertains charges against them.

E. Other Unfair Labor Practices and Duties of Labor Organizations Not Based on Exclusive Representation Status

On the other hand, not all obligations of or prohibitions on a labor organization under the NLRA are based on the exclusivity of representation. Instead, they may be based on statutory directives with other policy underpinnings. Some of these obligations or prohibitions most commonly arise in the context of exclusive representation, but they do not necessarily derive from that status. These obligations and prohibitions could, therefore, be applied to worker centers in appropriate cases.

1. Restraint or Coercion

Section 8(b) of the Act affords protection to employees by prohibiting, among other things, labor organizations from engaging in conduct that restrains or coerces employees in the exercise of their Section 7 rights. Importantly, these include the right to refrain from conduct protected by Section 7, such as participating in a labor organization.

Under Section 8(b)(1)(A), coercion or restraint can come in the form of acts by a labor organization directed at an employee, such as threatening job loss to induce an employee to join a labor organization⁵¹ or threatening to seek discharge of an employee engaged in organizing activities on behalf of another labor organization.⁵² While these actions are more commonly associated with traditional labor unions, a worker center may violate these provisions if it acts as a conduit or front for a traditional labor union or if it competes with another worker center or union for employee support.

While the previously noted proviso language in Section 8(b)(1)(A) allows a labor organization to impose internal discipline against a member, it may do so

only if the rule affects the rights of the employee as a member only and does not affect the employee's employment. Furthermore, the internal rule must reflect a legitimate organizational interest and be consistent with public policy. For example, a labor organization may fine its members for crossing the picket line of a lawful strike. Conversely, any restrictions on a member's right to resign membership in the labor organization would be unlawful (e.g., a direct prohibition from resigning or requiring payment of all dues before resignation becomes effective).

Section 8(b) of the Act affords protection to employees by prohibiting, among other things, labor organizations from engaging in conduct that restrains or coerces employees in the exercise of their Section 7 rights.

2. Causing an Employer to Discriminate

Section 8(b)(2) prohibits labor organizations from causing an employer to discriminate against an employee in order to encourage or discourage membership in a labor organization in violation of Section 8(a)(3). Actions by a labor organization that would violate Section 8(b)(2) include causing an employer to reduce an employee's seniority because of the employee's failure to support a labor organization activity or causing the discharge of an employee who publicly spoke against a change in terms and conditions proposed by the labor organization.⁵³

3. Limits on Labor Organization Access to Employer Property

The Board and courts have had to evaluate and balance continually employees' right to organize or engage in other protected activity with an employer's right to conduct its business. In general, employees have the right to discuss unionization and union business, but an employer may promulgate nondiscriminatory work rules that limit certain union-related activity during work hours or in work areas. However, the rights of nonemployee organizers are much more sharply limited.

For instance, an employer can lawfully prohibit a nonemployee organizer from distributing handbills in a parking lot and walkway if the no solicitation rule is uniformly enforced.⁵⁴ Similarly, an employer may limit labor organization representatives' access to its property to engage in union activity if they are not employees. Such permissible limitations should apply equally to traditional labor unions and worker centers.

4. Limits on Primary Picketing

Under the NLRA, employees are protected in their right to engage in a primary strike or picketing in connection with a current labor dispute or because of an unfair labor practice. By extension, as the exclusive bargaining representative, a labor organization may lawfully organize primary strikes and picketing to further employees' common interests. But a worker center may also urge its employee members to engage in a strike or picketing to protest an employer's unfair labor practices or to urge the employer to change a term or condition of employment.

The NLRA also balances the employees' right to engage in a strike or picketing, on the one hand, with the property and other rights of other persons who may be directly or indirectly involved in the concerted action.

The NLRA also balances the employees' right to engage in a strike or picketing, on the one hand, with the property and other rights of other persons who may be directly or indirectly involved in the concerted action. Thus, the Act regulates a labor organization's use of these economic weapons, and these

restrictions may apply to worker centers that protest the conditions of employment of an employer, even though they are not the exclusive collective bargaining representative.

a. Recognitional or Organizational Picketing

A labor organization is generally not proscribed from engaging in recognitional picketing, which is used to pressure the employer into initial recognition of the labor organization as the bargaining representative of the employees. Under certain circumstances, a labor organization may also engage in organizational picketing, the objective of which is to obtain acceptance from a majority of the employees as their exclusive representative.

However, Section 8(b)(7) makes it an unfair labor practice for a labor organization that is not certified as the employees' representative to engage in recognitional or organizational picketing in some instances, such as

- when the employer has already lawfully recognized another labor organization and a representation election would be barred pursuant to the Act or the Board's rules;
- when a valid election pursuant to the Act has been held within the preceding 12 months;
- when the labor organization fails to file a representation petition with the NLRB within a "reasonable time not to exceed thirty days from the commencement of the picketing."

b. Mass or Violent Picketing

Primary picketing also loses the protection of the Act when conducted in a manner that results in acts of force or violence at the picket line or in connection with a strike. In addition, certain mass picketing may constitute a violation of Section 8(b)(1)(A) if it results in a labor organization's restraint or coercion of an employee's Section 7 rights. For example, mass picketing in a manner that physically bars nonstriking employees and others from entering the employer's property would be prohibited.

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If history is any guide, it is foreseeable that a worker center could engage in this type of conduct and thereby violate Section 8(b)(1)(A).

5. Prohibited Secondary Conduct

As discussed, Section 8(b)(4) addresses a labor organization's use of economic pressure through boycotts and striking that affect the rights of neutral parties not directly related to the labor dispute. Specifically, Section 8(b)(4) prohibits labor organizations from using two types of conduct: (i) striking or persuading employees to strike or boycott and (ii) threatening, coercing, or restraining a person engaged in commerce (which is typically an employer) with the specified objectives of compelling

- an employer or self-employed person to become a member of a labor or an employer organization or to enter into an 8(e) agreement (Section 8(b)(4)(i)(ii)(A)).
- any person to cease doing business with any other person or compelling any other employer to recognize or bargain with a labor organization that has not been certified as the representative of those employees (Section 8(b)(4)(i)(ii)(B)).

- any employer to recognize or bargain with the labor organization when another labor organization has been certified. (Section 8(b)(4)(i)(ii)(C)).
- any employer to assign particular work to one group of employees instead of another group unless the employer fails to conform to a prior Board order or certification establishing the bargaining representative for employees performing the work. (Section 8(b)(4)(i)(ii)(D)).

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pressure on the entity with which the labor organization has a direct dispute (i.e., the “primary”), while shielding uninvolved persons and entities (i.e., the “secondary” or “neutral”) from being entangled in the dispute.

Nevertheless, not all conduct that has secondary effects is prohibited under Section 8(b)(4)(B). The Section contains three provisos that place limits on the reach of the Section: the primary proviso, the sympathy striker proviso, and the publicity proviso.

- The primary proviso allows the resulting pressure on a secondary employer that may occur incidental to the primary strike and picketing.
- The sympathy striker proviso protects the rights of employees to join in sympathy with the employees of another employer that is engaged in a lawful strike against their employer.
- The publicity proviso permits a labor organization to engage in any conduct other than picketing that publicizes a labor dispute, including handbilling, media ads, speeches, letter writing campaigns, consumer boycotts, and peaceful demonstrations as long as the conduct does not induce the employees of the secondary employer to refuse to work.

Moreover, there are circumstances in which an employer may not be protected under a Section 8(b)(4)(B) boycott. First, a determination must be made as to whether the employer is considered neutral in a given dispute or whether, instead, the employer is allied with the primary employer based on the ownership or operational relationship between the primary and secondary employer.

The “dealing with the employer” prong of the labor organization question also holds relevance in the context of secondary picketing or boycotting activity. If a group participates in picketing at an employer’s site but does not otherwise deal or seek to deal with the employer regarding matters affecting employees, then the employer may not receive protection under the NLRA because the group would not qualify as a labor organization.⁵⁵

In addition, in certain situations a labor organization may picket where the primary employer shares a site with a secondary employer. In these so-called common situs situations, the labor organization must sufficiently identify the primary on its signs to make it clear that the dispute is with the primary and limit the picketing to times when the primary employer is present and engaged in normal business operations and at a place that is close to the primary employer's employees.⁵⁶

Finally, picketing at the primary employer's work site is lawful even though it may have an impact on neutral secondary employers (e.g., vendors or suppliers making deliveries during the ordinary course of business).

At first glance, it may appear that the concepts of primary and secondary or neutral do not fit very well outside the traditional labor union setting, where disputes may center on collective bargaining or representation issues. However, if a worker center admittedly and visibly targeted an employer and began to conduct demonstrations and picketing at the locations of others doing business with the targeted employer, it would seem to present a legitimate secondary boycott argument.

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HOW THE WORKER CENTER ISSUE MIGHT ARISE IN AN NLRB CASE

To get a decision from the NLRB on the question of whether a worker center qualifies as a labor organization within the meaning of the NLRA, a proceeding must be initiated before the NLRB. Generally, as mentioned, the NLRB handles two types of proceedings: unfair labor practice charges and representation petitions. There are two potential ways the worker center question could arise in those types of proceedings.

A. Unfair Labor Practice Charge Filed Against a Worker Center

If worker center representatives engaged in conduct that could be considered an unfair labor practice, the company involved or any “person” (typically, an employer) could file an unfair labor practice charge. Accordingly, depending on the facts, the charging party could claim that the worker center’s conduct violated one of the labor organization unfair labor practices found in Section 8(b) of the NLRA, for example, trespassing, secondary picketing, or other conduct; mass or violent picketing; prohibited organizational or recognitional picketing; or discrimination against employees on the basis of their decision to oppose or refuse to engage in worker center activities.

It would also be possible that a charge could be filed against an employer on the basis of its activities involving a worker center (e.g., if the employer treated the worker center in such a way as to

essentially give it status as the exclusive representative of the employees). This issue could be avoided if an employer were not recognizing a worker center as an exclusive representative but, rather, only in a consultative capacity without legally binding representative status.

If a worker center (and/or employer) faced an unfair labor practice charge and defended itself on the basis that the worker center was not a labor

If the General Counsel were to find *both* that the worker center meets the statutory definition of a labor organization and the underlying conduct charged against the worker center (and/or employer) constituted an unfair labor practice, then the issue would be enjoined.

organization, then the worker center’s status would be investigated by the General Counsel’s regional office personnel. If the General Counsel were to find *both* that the worker center meets the statutory definition of a labor organization and the underlying conduct charged against the worker center (and/or employer) constituted an unfair labor practice, then the issue would be enjoined.

If the worker center (and/or the employer) wished to litigate the charge,⁵⁷ a complaint would be issued,

and the question would be litigated before an ALJ, with possible appeals to the Board, a federal court of appeals, and perhaps even the U.S. Supreme Court. It could also generally be settled at any stage if the worker center wished to admit its status as a labor organization.⁵⁸

Conversely, if the worker center admitted its status as a labor organization at the outset, then it (and/or the employer) could argue that the underlying conduct is not a violation of the NLRA. The key in such a case would be to obtain either a settlement in which the worker center admits to being a labor organization or an ALJ or Board decision that determines the worker center to be one.

B. Employer RM Petition Based on Conduct by the Worker Center Evidencing a Demand for Recognition as if It Were a Labor Union

Although unlikely, the status of a worker center could come up in a representation proceeding known as an RM petition, which may be filed by an employer on the basis that a labor organization has demanded representational status because it claims to represent a majority of the employees in an appropriate bargaining unit of the employer. If these facts were established, then the Board would conduct a secret ballot election to test the majority status claim.

However, it is improbable that a worker center would make such a direct representational demand because to do so would essentially be taking on the status of a traditional labor union. An employer filing an RM petition, therefore, would have to establish that the worker center's *conduct* was the legal equivalent of a representational demand, and the conduct would have to be viewed in the context of all the surrounding facts.

It seems likely that such a representational demand alone would be strong evidence of the worker center's status as a labor organization. However, the Board's willingness to process an RM petition involving a worker center may require some accompanying change in Board law to define what constitutes a representational demand or conduct constituting its legal equivalent.

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If the Board determined that an RM petition should be processed on the basis that the worker center was a labor organization that made a representational demand, then an election would be scheduled in which the worker center would be identified as the labor organization. In such a situation, if the workers voted against representation, the case would end, and the worker center would have no basis to appeal the finding that it was a labor organization.⁵⁹

While theoretically possible, determining a worker center's status as a labor organization through an RM petition remains doubtful, but it is nevertheless a potential manner in which the issue could arise.

On the other hand, if the employees voted in favor of representation, the worker center/labor organization could put its status at issue by committing an unfair labor practice (e.g., by refusing to bargain or discriminating against its "members"), allowing some person (e.g., the employer or an employee) to file an

unfair labor practice over the conduct.⁶⁰ In that case, if the General Counsel found merit in the charge, the question could be litigated as an unfair labor practice case as described.⁶¹

While theoretically possible, determining a worker center's status as a labor organization through an RM petition remains doubtful but it is nevertheless a potential manner in which the issue could arise.

CONCLUSION

Unlike labor organizations under the LMRDA, which have an affirmative duty to file annual reports with the DOL, labor organizations under the NLRA have no affirmative reporting duties.

Rather, under the NLRA, a labor organization will only come to the attention of the NLRB if it is involved in an unfair labor practice charge or a representation petition filed by itself or a third party (e.g., an employer, employee, or other person). The NLRA does not otherwise authorize the NLRB to require any reporting or other actions by a purported labor organization.

The question of whether a worker center can qualify as a labor organization under the NLRA will not arise unless one is charged with committing an unfair labor practice or becomes involved in a representation proceeding before the NLRB. Only in such a situation would the NLRB determine its status or order the labor organization to undertake any actions. To evaluate the issue, therefore, action by an employer or a third party to initiate an unfair labor practice charge against or a representation petition involving a worker center would be necessary.

The question of whether a worker center can qualify as a labor organization under the NLRA will not arise unless one is charged with committing an unfair labor practice or becomes involved in a representation proceeding before the NLRB.

The arguments that could support a worker center's status as a labor organization would be heavily dependent on the facts in such a case. Given organized labor's increasing use of worker centers to "represent" employees and harass employers at a minimum suggests that the NLRB may soon need to look more closely at whether these organizations are following the law.

ENDNOTES

¹ 29 U.S.C. § 151 et seq. Throughout this paper, unless the context dictates otherwise, references to the NLRA (or “the Act”) will include the original Wagner Act as amended by the Taft-Hartley Act (Labor Management Relations Act or LMRA), 29 U.S.C. § 141 et seq., and the Landrum-Griffin Act (Labor-Management Reporting and Disclosure Act or LMRDA), 29 U.S.C. § 401 et seq., each of which is briefly discussed on pp. 4–6.

² See U.S. Chamber of Commerce, *The New Model of Representation – An Overview of Leading Worker Centers*, 2014 (Washington, D.C., U.S. Chamber of Commerce, 2014), p. 3.

³ *Id.*, p. 14. See also, <https://fightfor15.org>.

⁴ *Id.*, p. 3; U.S. Chamber of Commerce, *Worker Centers – Union Front Groups and the Law*, (Washington, D.C., U.S. Chamber of Commerce, 2018), p. 2.

⁵ The NLRA definition of “labor organization” differs slightly from the definition under the LMRDA. See pp. 9–10.

⁶ As noted below, however, certain aspects of the NLRA’s regulation of traditional labor unions are based on the concept of exclusive representation of employees in collective bargaining with their employer. Because worker centers generally do not seek such exclusive representation status, those aspects of the Act would not apply to most worker centers.

⁷ The history of labor law in the U.S. is far broader, and more detailed and complex, than the issues addressed in this paper. A good summary of this history is contained in chapters 1 through 5 of *The Developing Labor Law: The Board, The Courts, and the National Labor Relations Act* (Higgins et al., 7th ed., 2017).

⁸ Throughout this paper we will refer to the NLRA (or “the Act”) as it exists today, consisting of the original 1935 Wagner Act as amended by the LMRA and the LMRDA, which are discussed elsewhere.

The NLRA applies to the vast majority of private employers whose activities affect interstate commerce in the U.S., subject to statutory exclusions from the definition of “employer.” See 29 U.S.C. § 152(2).

The only public employer covered is the United States Postal Service, which was added to the Board’s jurisdiction by the Postal Reform Act of 1970, 39 U.S.C. §1201 et seq.

Also, the Board has set minimum jurisdictional standards to meet the “affecting commerce” test (*Siemens Mailing Service*, 122 NLRB 81, 83 (1958), *supplemented*, 124 NLRB 594 (1959); NLRB, Office of the General Counsel, *An Outline of Law and Procedure in Representation Cases*, 1–100 et seq. (2017)), and has declined for policy reasons to exercise jurisdiction in other industries (e.g., horse racing). See, e.g., *Eatz v. IBEW Local 3, DME Unit*, 973 F.2d 64 (2nd Cir. 1992); *El Dorado Club*, 151 NLRB 579 (1965). See also *supra* note 1.

⁹ 29 U.S.C. § 151.

¹⁰ 29 U.S.C. § 157. As noted, the LMRA amended Sec. 7 to add that employees generally had the right to refrain from engaging in any of the aforementioned activities as well. Specifically, the language added to Section 7 by the LMRA provides, in relevant part, that employees “shall also have the right to refrain from any or all such activities” except to the extent permitted under a valid agreement requiring an employee to become a member of a labor organization as a condition of employment with an employer. These clauses are beyond the scope of this paper but are the types of clauses that may be banned under so-called right-to-work statutes, which states are permitted to enact pursuant to Section 14(b) of the NLRA, 29 U.S.C. § 164(b).

¹¹ 29 U.S.C. § 152(5).

¹² 29 U.S.C. § 158(d) (emphasis added).

¹³ See, *E.I. Du Pont De Nemours & Co.*, 311 NLRB 893, 894 (1993); *Electromation Inc.*, 309 NLRB 990, 995 n. 21 (1992). As explained by the Board in *E.I. Du Pont*, a “bilateral mechanism” entails a pattern or practice in which a group of employees over time makes proposals to management, management responds to these proposals by acceptance or rejection by word or deed, and compromise is not required. See *also* pp. 9–10.

¹⁴ See *supra* note 10.

¹⁵ 29 U.S.C. § 158.

¹⁶ 29 U.S.C. § 186.

¹⁷ The intricacies of secondary boycotts and other union unfair labor practices are beyond the scope of this paper, although they are generally discussed again at pp. 22–25 as examples of the types of worker center conduct that could be unlawful if they are deemed to be labor organizations under the NLRA.

¹⁸ There were numerous other changes made by the LMRA that, while important, are not immediately germane to the issue of treating worker centers as labor organizations.

¹⁹ As will be discussed, the LMRDA created a slightly different definition of labor organization for purposes of those parts of the legislation administered and enforced by the DOL.

²⁰ 29 U.S.C. §152(5); *Electromation Inc.*, 309 NLRB 990, 994 (1992); in some cases, the second and third element are combined. See discussion on pp. 20–21.

²¹ *Id.* at 994. Prior to *Electromation Inc.*, a prevalent argument was that employee representation plans or committee arrangements did not constitute labor organizations because they were a method of contact between employers and employees. The clarification that “any group” included employee representation plans or committee arrangements brought such groups under the ambit of the NLRA, which protected employees from unlawful domination or employer

interference by setting up employee representation groups. “Any group” of employees can meet the definition even where it lacks “a formal structure; has no elected officers, constitution, or bylaws; does not meet regularly; and does not require the payment of initiation fees or dues.” *Id.*

²² *Polaroid Corp.*, 329 NLRB 424, 429 (1999).

²³ *Webcor Packaging, Inc.*, 319 NLRB 1203, 1210 (1995).

²⁴ *Keeler Brass Auto. Grp.*, 317 NLRB 1110, 1114 (1995) (holding that the grievance procedure functioned as a bilateral mechanism “in which the Respondent and the Committee went back and forth explaining themselves until an acceptable result was achieved.”); see also Marculewicz and Thomas, *Labor Organizations by Another Name: The Worker Center Movement and its Evolution into Coverage under the NLRA and LMRDA*, 12 Fed. Soc. Engage 66 (2012). The Marculewicz and Thomas paper provided much useful information for this paper and it is a highly valuable resource regarding worker centers and their proper categorization under the LMRDA and NLRA.

²⁵ *Stoody Co.*, 320 NLRB 18 (1995) (stating that “[b]ecause there was only one meeting, it cannot fairly be said a pattern or practice of entertaining employee proposals has been definitively shown,” but finding the committee qualified as a labor organization based on its intent to hold future meetings but for unfair labor practice charges).

²⁶ *Compare Center for United Labor Action*, 219 NLRB 873 (1975) and *Michael E. Drobney, an Agent of Laborers Local 498* (T.E. Ibberson), Cases 8-CC-835, 8-CB-3229, Advice Memorandum dated December 30, 1976, 4 AMR 10,081, 5102 (finding picketing activities in support of employees insufficient to meet “dealing with” requirement) with *Blue Bird Workers Committee*, 1982 NLRB GCM Lexis *10 and *Protesting Citizens and its Agent Elvin Winn*, Case 15-CC-681, Advice Memorandum dated August 30, 1977 (finding that picketing activities, coupled with direct interactions with the employer about conditions of employment, met the “dealing with” requirement).

²⁷ See, *Acme/Alltrans Strike Committee*, Case No. 21-CB-6318, Advice Memorandum dated April 25, 1978 (finding that an absence of communications with employers is “not dispositive,” and attempts to deal with an employer can suffice).

²⁸ *Coinmach Laundry*, 337 NLRB 1286 (2002); Marculewicz and Thomas, *supra* note 24, at 87.

²⁹ *Betances Health Unit*, 283 NLRB 369 (1987).

³⁰ *Porto Mills, Inc.*, 149 NLRB 1454, 1471 (1964); Marculewicz and Thomas, *supra* note 24, at 83.

³¹ *Id.*; See also, *Center for United Labor Action*, 219 NLRB 873 (1975).

³² *Sheffield Barbers, LLC*, 2016 WL 4205625 (N.L.R.B. Div. of Judges).

³³ *Id.* Despite its unique structure, the Barbers’ Association also performed more traditional union functions like collective bargaining and negotiation with the employer. It is unclear whether the ALJ would have reached the same result in the absence of these traditional “dealing with” functions.

³⁴ *City Employees Associates, LLC*, Case 21-RC-216909 (June 8, 2018).

³⁵ *Id.* at 11–12.

³⁶ *RoHoHo, Inc.*, Case No. 10-CA-192458, Advice Memorandum dated September 8, 2017.

³⁷ *Id.* at 6.

³⁸ *Id.* But, see also *Restaurant Opportunities Center of NY*, Cases No. 2-CP-1067, 2-CP-20643, 2-CP-1071, 2-CB-20705, 2-CP-1073 and 2-CB-20787, Advice Memorandum dated November 30, 2006. There, the Division of Advice determined that the ROC-NY was not a labor organization by concluding that in its role as legal advocate, ROC-NY’s attempt to settle employment discrimination claims did not constitute “dealing with” employers over terms and conditions of employment because it was isolated and did not establish “a pattern or practice of dealing over time.” This decision demonstrates the significance of the agency’s selected scope of analysis in determining whether the “dealing with” requirement is satisfied, considering that if the Division analyzed ROC-NY’s overall purpose and intent rather than just its specific role as legal advocate, ROC-NY would likely have been deemed a labor organization. Thus, this Advice Memorandum is perhaps both distinguishable due to the Division’s narrow focus on the worker center’s functional role as a legal advocate, as well as an anomalous determination made without the existence and aid of clear Board law.

³⁹ The LMRDA also requires that the labor organization be in an “industry affecting commerce.” Although this is not set out in the NLRA, is it nonetheless a requirement because jurisdiction under the NLRA is generally limited to employers affecting commerce.

⁴⁰ In many situations, the actual union “dealing with” the employer is a local or district union, which is affiliated with an umbrella organization such as an international union. But certain LMRDA obligations apply to those types of unions as well, even if they are not directly involved in “dealing with” employers, and this could explain the broader language in the LMRDA definition.

⁴¹ See, e.g., 79 Cong. Rec. 2,332-38 (statement from Rep. Boland), reprinted in 2 NLRB, Legislative History of the Labor Management Relations Act 1935, at 2432 (1949); To Create a National Labor Relations Board: Hearing on S. 2926 Before the S. Comm. on Educ. and Labor (1934), National Labor Relations Board: Hearing on S. 1958 Before the S. Comm. on Educ. and Labor (1935).

⁴² *The Developing Labor Law: The Board, The Courts and the National Labor Relations Act*, *supra* note 7, at 10-1.

⁴³ 29 C.F.R. §102.61.

⁴⁴ Under the new election rule, the Board permits electronic signatures as supporting evidence. See, *NLRB Gen. Counsel Memo. 15-08, Guidance Memorandum on Electronic Signatures to Support a Showing of Interest* (Oct. 26, 2015).

⁴⁵ In cases where there may be two or more equally appropriate units, the desires of the employees are a determining factor. *The Developing Labor Law: The Board, The Courts and the National Labor Relations Act*, *supra* note 7, at 11-11.C.

⁴⁶ In practice, if a unit is voluntarily recognized on the basis of a majority showing based on valid authorization cards, the majority must be of all the employees in the unit. On the other hand, if a representation election is held, the majority need only be of those casting ballots, which may be significantly less than all the employees in the unit. In the latter circumstance, the labor union is still the exclusive representative of all the employees in the unit.

⁴⁷ *Miranda Fuel Co.*, 140 NLRB 181, 185 (1962).

⁴⁸ *Communication Workers of America v. Beck*, 487 U.S. 735 (1988).

⁴⁹ *Groves-Granite*, 229 NLRB 56, 62-63 (1977); *Graphic Arts International Union 96B (Williams Printing Co.)* 235 NLRB 1153 (1978).

⁵⁰ *Service Employees Local 3036 (Linden Maintenance)*, 280 NLRB 995 (1986).

⁵¹ *Rockville Nursing Center*, 193 NLRB 959, 976-977 (1971).

⁵² *Town & Country Supermarkets*, 340 NLRB 1410 (2004).

⁵³ This prohibition, however, does not extend to union security agreements, provided that such agreements meet statutory requirements. Pursuant to a lawful union security agreement, an employer may agree, for example, to hire new employees exclusively from a hiring hall, provided that the labor organization does not discriminate in referrals for hire between members and nonmembers.

⁵⁴ See *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992).

⁵⁵ *Ctr. for United Labor Action*, 219 NLRB 873 (1975) (The NLRB adopted an ALJ decision that Center for United Labor Action (“CULA”) did not qualify as a labor organization but disagreed with the ALJ’s holding that CULA had satisfied the “dealing with” requirement based on its picketing activities and general encouragement of employees to seek improved conditions. The Board found “[s]upport for a cause, no matter how active it may become, does not rise to the level of representation unless it can be demonstrated that the organization in question is expressly or implicitly seeking to deal with the employer over matters affecting the employees”).

⁵⁶ See *Moore Dry Dock*, 92 NLRB 547 (1950).

⁵⁷ It is possible that the worker center would challenge only its status, but not the conduct constituting an unfair labor practice, on the basis that unless it is a labor organization, the underlying conduct cannot constitute an unfair labor practice.

⁵⁸ If the case were settled pre-complaint, or post-complaint but before any testimony was given at a hearing, only the approval of the General Counsel would be needed (indeed, the General Counsel may well be a party to the settlement). If the case were settled once the trial is started, then any settlement would require some level of approval by the ALJ, the Board, or the court, as the case may be.

⁵⁹ This is similar to the position of joint-employer entities that are required to undergo a representation election, but if the workers vote against representation, the joint employer entities have no avenue to appeal their status.

⁶⁰ It is also possible that the worker center/labor organization could “disclaim” representation (i.e., walk away from representing the bargaining unit), but this would have little or no impact on the Board’s necessary finding in the representation case that the worker center constituted a labor organization.

⁶¹ In such unfair labor practice proceedings, the findings in the related representation case would be binding on the worker center/labor organization in the absence of new evidence that was not available at the time of the representation case proceeding. This could make it very difficult to overturn a finding of labor organization status made in the representation proceeding.



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