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# LABOR & EMPLOYMENT LAW

## LABOR ORGANIZATIONS BY ANOTHER NAME: THE WORKER CENTER MOVEMENT AND ITS EVOLUTION INTO COVERAGE UNDER THE NLRA AND LMRDA

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### Note from the Editor:

This paper analyzes the evolution of worker centers as advocates for workers' rights. As always, The Federalist Society takes no position on particular legal or public policy initiatives. Any expressions of opinion are those of the authors. The Federalist Society seeks to foster further discussion and debate about the status of worker centers under U.S. labor law. To join the debate, you can e-mail us at [info@fed-soc.org](mailto:info@fed-soc.org).

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### I. Introduction

The labor union, the primary collective advocate for workers' rights in the United States for more than a century, has experienced a significant decline in membership. In 2011, only 6.9%<sup>1</sup> of American workers in private industry were union members, compared to 9% in 2000 and 16.8% in 1983.<sup>2</sup> As a result of this decline, workers' rights advocates, whether part of a traditional labor union or not, have sought new and innovative means to effectuate change in the workplace.

One of the most significant examples of this effort is the development of organizations known as "worker centers." Today there are hundreds of worker centers across the country. Their structures and composition vary. Typically, they are non-profit organizations funded by foundations, membership fees and other donations, that offer a variety of services to their members, including education, training, employment services and legal advice.<sup>3</sup> They also advocate for worker rights generally through research, communication, lobbying and community organizing.<sup>4</sup> Increasingly, however, worker centers are directly engaging employers or groups of employers to effectuate change in the wages, hours, and terms and conditions of employment for their members. Indeed, when it comes to such direct engagement, these worker centers act no differently than the traditional labor organization.

Yet, few, if any of these worker centers are required to comply with the laws that regulate labor organizations—meanwhile some worker centers use these same laws to promote the rights of the workers they represent.<sup>5</sup> Many provisions of these laws were enacted to ensure certain minimum rights of workers *vis a vis* the organizations that represent them. Statutes like the National Labor Relations Act (NLRA)<sup>6</sup> and the Labor Management Reporting and Disclosure Act (LMRDA)<sup>7</sup> contain significant protections with respect to promotion of the principles of organizational democracy, access to basic information and promotion of a duty of fair representation.<sup>8</sup>

Although compliance with these laws would confer benefits upon the workers these groups represent, many are reluctant to define themselves as labor organizations because the NLRA and the LMRDA are perceived as creating an impediment to the organizational goals of these workers centers.<sup>9</sup> In a 2006 interview, Saru Jayarman, the Executive Director of Restaurant Opportunities Center (ROC), a worker center located in New York, said one of the primary benefits of *not* being classified as a labor organization is the ability to avoid certain legal duties associated with the union-member relationship.<sup>10</sup> According to Jayaraman, this includes not having to spend time and money arbitrating worker grievances because, unlike labor organizations, worker centers do not owe a duty of fair representation to workers.<sup>11</sup> Second, worker centers have not considered themselves to be limited by the NLRA restrictions on secondary picketing and protracted recognitional picketing, and such conduct is a common tool used by these groups to convey their message.<sup>12</sup>

Without the restrictions of the NLRA and LMRDA, these organizations can avoid the legal duty of accountability to the workers they represent. As will be discussed in this article, the laws that provide protections to workers *vis a vis* their labor organizations were designed precisely to establish that accountability. While some of these groups may consider it cumbersome to comply with these obligations, that burden pales in comparison to the benefits afforded to the workers.

The missions of many worker centers are often seen as being an important means of advocating on behalf of underrepresented employees who do not have access to or knowledge of the legal mechanisms to protect their rights.<sup>13</sup> We certainly do not take any position in this article with respect to the value these worker centers may offer to workers. However, no organization, no matter how laudable its mission, is above reproach. Just as corruption plagued the labor movement in the last century, and gave rise to the legislation that governs labor organizations and provides workers the basic protections enjoyed today, so too could similar malfeasance cloud the efforts of worker centers. Compliance with the NLRA and LMRDA serves not only as a protection for workers, but also, perhaps, as a validator of the worker centers that claim to represent them.

A goal of many worker centers is to ensure that employers of their members comply with the basic laws that offer protec-

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tions to the workers. It is quite reasonable to expect worker centers to comply with them as well. Ultimately, the benefits of the laws that govern labor organizations flow to the workers they represent, and, as such, there seems to be no viable justification not to comply with them.

## II. Previous work in this area—A continuation of the dialogue

The rapid rise of worker centers has caused them to evolve quickly. There is little scholarship or legal precedent available with respect to whether the groups qualify for treatment as labor organizations for purposes of the NLRA and LMRDA. Scholarly attention to this issue has been largely limited to two law review articles, each containing divergent views.

In 2006, attorney David Rosenfeld hypothesized that most worker centers lacked sufficient interactions with employers to be considered labor organizations.<sup>14</sup> Rosenfeld postulated, however, that as worker centers gained strength and became more effective, they likely would qualify as labor organizations subject to regulation.<sup>15</sup> Three years later, a colleague of Rosenfeld, Eli Naduris-Weissman, reached the opposite conclusion.<sup>16</sup> In his 2009 article, Naduris-Weissman concluded that the groups did not sufficiently “deal with” employers and were therefore not labor organizations. He further challenged the notion that worker centers could *ever* qualify as labor organizations because the groups did not aspire to negotiate with employers.<sup>17</sup>

In the few years that have followed publication of these articles, we believe Rosenfeld’s predictions have come true. Worker centers have directly engaged employers on topics traditionally associated with collective bargaining, and have sought to become a significant force of change in certain work places. This article seeks to continue the dialogue started by Rosenfeld and Naduris-Weissman within the context of the rapidly evolving worker center movement.

## III. The Legal Framework Governing the Rights of Workers *Vis a Vis* their Representatives.

### A. *The Origins of the Statutory Regulation of Labor Organizations*

#### 1. The Wagner Act—The Absence of Rights for Workers vis a vis their Labor Organizations

In 1935, Congress passed the Wagner Act which came to be known as the National Labor Relations Act.<sup>18</sup> At this time, union membership was under three million people.<sup>19</sup> The new law’s effects were immediate and by the end of World War II, union membership grew to fifteen million.<sup>20</sup> During this period, labor unions requested, and largely received, significant improvements in wages and benefits.<sup>21</sup> However, during the post-war economic contraction employers were unwilling to continue to meet the unions’ increasing economic demands.<sup>22</sup> The resulting conflict generated large-scale work stoppages, some of which were national in scope.<sup>23</sup>

Although the purpose behind the Wagner Act was “to eliminate . . . obstructions to the free flow of commerce . . . by encouraging . . . collective organizing and by protecting . . . workers['] full freedom of association, self-organization and

designation of representatives . . . to negotiate the terms and conditions of their employment,”<sup>24</sup> it did not regulate the power of the labor organizations it promoted. The absence of such regulation subjected the law to criticism<sup>25</sup>—particularly due to incidents of corruption and undemocratic actions exhibited by some labor unions of the time.<sup>26</sup>

There was also another policy force pushing change. Under the structure established by the Wagner Act, when a group of employees designated a labor organization as their representative, that labor organization possessed the right to negotiate on behalf of *all* workers, including those who did not support it.<sup>27</sup> Union security clauses, which required employees to become and remain members of the labor organization or lose their job, were also commonplace.<sup>28</sup> Thus, the system accorded labor organizations tremendous power over the workers, but imposed no corresponding accountability.<sup>29</sup>

#### 2. The Taft-Hartley Amendments – The Creation of Basic Rights for Workers vis a vis Labor Organizations

Concern about the power of labor organizations grew swiftly following World War II.<sup>30</sup> This led to the introduction of the Taft-Hartley Act, which later became the Labor Management Relations Act of 1947.<sup>31</sup> A major goal of the legislation was to provide workers the same protections from labor organizations that the Wagner Act offered from employers.<sup>32</sup>

Congress’s intentions were clear. The Senate Report stated, “the freedom of the individual workman should be protected from duress by the union as well as from duress by the employer.”<sup>33</sup> The House Report echoed this sentiment, saying “the American workingman had been deprived of his dignity as an individual . . . cajoled, coerced, and intimidated . . . in the name of the splendid aims set forth in Section 1 of the National Labor Relations Act . . . His whole economic life has been subject to unregulated monopolists.”<sup>34</sup>

The Taft-Hartley Act was designed to protect employees from the labor organizations that represented them by defining and outlawing a series of unfair labor practices.<sup>35</sup> Protections included a prohibition on a labor organization’s restraint and coercion of employees in the exercise of rights guaranteed to them by Section 7, which includes the right to form, join, or decline to join a labor organization of their own choosing for purposes of collective bargaining.<sup>36</sup> Another section prohibited labor organizations from causing an employer to discriminate against a worker because of the worker’s support for a rival labor organization or none at all, or because the employee had been denied membership in the labor organization for any reason other than the failure to tender periodic dues and initiation fees.<sup>37</sup> The amendments also imposed an affirmative duty on labor organizations to bargain collectively with the employer in good faith,<sup>38</sup> created a variety of unfair labor practices related to secondary activity,<sup>39</sup> prohibited the assessment of excessive dues and fees on workers,<sup>40</sup> and outlawed the practice of “featherbedding,” in which a labor organization causes an employer to pay for work not performed.<sup>41</sup>

The Taft-Hartley Act also created protections for workers from collusion between labor organizations and employers. The legislation added Section 302 to the NLRA which outlawed

employer payments to labor organizations except under a few limited situations, and similarly banned labor organizations from demanding or accepting such payments.<sup>42</sup> Examples of these exceptions included the payment of dues deducted from employee wages, and contributions to trust funds created for the sole benefit of employees, such as pension or health and welfare funds.<sup>43</sup>

Finally, the Taft-Hartley Act contained a new Section 9(f) which provided that no labor organization could take advantage of the rights and protections afforded to them by the statute unless they had filed a copy of their constitution and bylaws with the Secretary of Labor.<sup>44</sup> Labor organizations also were required to file with the Secretary of Labor a report containing the name and address of the labor organization; the names, compensation and allowances of its three principal officers; the manner in which the officials were elected, appointed or otherwise selected; applicable initiation fees; and a detailed statement outlining the procedures and limitations on membership, election of officers or stewards, the calling of meetings, levying of assessments, imposition of fines, authorization for bargaining demands, ratification of contract terms, authorization of strikes, authorization for disbursement of union funds, audits of financial transactions, participation in insurance or other benefit plans and the expulsion of members and the grounds therefore.<sup>45</sup> While this provision may have been influenced in part by the anti-communist tone of the day (Section 9(h) was included to require officers of labor organizations to file affidavits denouncing communism), it was also grounded in concerns about misuse of the labor organization's funds and power.<sup>46</sup> Ultimately, these requirements were not included in Taft-Hartley, but did eventually become law in the Landrum Griffin Act of 1959.<sup>47</sup>

### 3. Continued Concern and Labor Union Corruption

Even with the limitations on unions and protections for workers offered by the Taft-Hartley Act, significant public concern remained over the lack of oversight of labor organizations.<sup>48</sup> Neither the Wagner Act nor the Taft-Hartley Act addressed the internal affairs of labor organizations.<sup>49</sup> This concern prompted a series of hearings by the Senate Select Committee on Improper Activities in the Labor or Management Field, popularly known as the McClellan Committee.<sup>50</sup> In preparation for the hearings, the McClellan Committee:

[C]omplied a monumental record of wrongdoing on the part of certain labor unions and their officers; of coercion of employees and smaller employers through the use of secondary boycotts, hot cargo agreements, and organizational picketing; and of shady dealings and interference with employees' rights by certain 'middlemen' serving as management consultants.<sup>51</sup>

During its two-year investigation, the McClellan Committee documented corruption in a number of prominent labor organizations.<sup>52</sup> The McClellan Committee, which conducted one of the first televised congressional hearings, introduced dozens of witnesses to testify about "fraudulent union elections, pilfered union treasuries, employer-union collusion at the expense of rank and file members and . . . other unsavory

tales."<sup>53</sup> The investigations exposed situations where many leaders of labor organizations remained in power by threatening dissenters with expulsion.<sup>54</sup> The McClellan hearings also made clear to the Committee, and the public in general,<sup>55</sup> that there was an abuse of power by labor organizations at the expense of the workers they purported to represent.<sup>56</sup>

### 4. The Landrum-Griffin Act

The McClellan Committee's first interim report stressed the need for federal regulations to require honest representation for each member of a labor organization.<sup>57</sup> Another conclusion reached in the Committee's report was that labor organizations lacked the democratic procedures necessary to protect the rights of members.<sup>58</sup> Labor organizations with established democratic procedures held their leaders accountable to members in a meaningful way.<sup>59</sup>

The McClellan Committee sparked the debate over further regulation of the structure of labor unions, and ultimately spawned the Landrum-Griffin Act, or the Labor Management Reporting and Disclosure Act of 1959.<sup>60</sup> During floor debates, Senator McClellan compared union members to individual citizens and emphasized that they should have the same protections from labor organizations that citizens receive from the government.<sup>61</sup> He remarked:

It is through unionization and bargaining collectively that [the worker] is able to make himself heard at the bargaining table. It seems clear, therefore that this justification becomes meaningless when the individual worker is just as helpless within his union as he was within his industry, when the tyranny of the all-powerful corporate employer is replaced with the all-powerful labor boss. The worker loses either way.<sup>62</sup>

McClellan emphasized that because labor organizations had rights over workers vested in them by the federal government, they should represent workers in accordance with democratic principles and offer workers the basic rights of liberty, freedom and justice.<sup>63</sup>

Congress created Title I of the LMRDA, often referred to as the Worker Bill of Rights, to specifically address issues of organizational democracy and basic member protections.<sup>64</sup> The Bill of Rights contained a variety of provisions designed to safeguard certain fundamental rights of workers.<sup>65</sup> These included provisions granting equal rights and privileges to all union members to nominate and elect representatives of their choosing and to attend membership meetings and participate in deliberations of the labor organization;<sup>66</sup> granting members the freedom to assemble and to express their views, arguments, or opinions to other members and during meetings of the labor organization;<sup>67</sup> protecting members from increases in dues or initiation fees without majority approval;<sup>68</sup> and providing due process protections for members in disciplinary matters including requiring the labor organization to inform members of any disciplinary charges against them and grant members a reasonable time to prepare a defense prior to a full and fair hearing.<sup>69</sup> Title I further required labor organizations to retain copies of all collective bargaining agreements and to make them available for review by any member or by any employee whose rights are affected by such agreement.<sup>70</sup> Finally, the Bill of Rights gave

members the right to pursue civil enforcement of the statute's protections in federal court.<sup>71</sup>

Title II of the LMRDA required labor organizations to disclose information to members regarding the financial condition of the organization, as well as financial information concerning its officials.<sup>72</sup> Title II also required labor organizations to have a constitution and by-laws containing requirements for membership, regular meetings, censure and removal of union officers, and provisions for how the organization's funds may be spent.<sup>73</sup> In addition to promoting transparency and protecting workers' rights to fair elections of union officials, the disclosure requirements imposed by Title II were also intended to have a deterrent effect on the misuse of an organization's funds.<sup>74</sup> The rationale behind these requirements was that financial disclosure promoted transparency and membership knowledge of a labor organization's affairs—this, in turn, would enable members to exercise their rights of voting and free speech.<sup>75</sup> The McClellan Committee believed officers of labor organizations would be less likely to embezzle or misuse union funds if the organization's finances were documented in reports available to the public.<sup>76</sup> Title II required labor organizations to report this information to the Department of Labor's Office of Labor Management Standards (OLMS) by submitting various disclosure forms, including the LM-1 and LM-2.<sup>77</sup> Those reports are available for review through the OLMS.<sup>78</sup> Title II also granted members, but not the public, the right to inspect and verify records that support an organization's reports to the Department of Labor.<sup>79</sup>

In addition to the protections described above, Title IV of the LMRDA established rules that require secret ballot elections of officers and required that they occur every five years for national and international labor organizations, and every three for local ones.<sup>80</sup>

Title V created a fiduciary duty for union officers and employees to union members regarding the organization's money and property.<sup>81</sup> It required union officers to hold the union's money solely for the benefit of the organization and refrain from "holding or acquiring any pecuniary or personal interest which conflicts with the interest of such organization."<sup>82</sup>

Finally, the legislation amended the National Labor Relations Act to include section 8(b)(7), which imposed a limitation on picketing for organizational or recognitional purposes by a union for more than 30 days if it has not filed a petition with the NLRB to represent the workers.<sup>83</sup> Congress believed that protection was necessary to prevent labor organizations not elected by a majority of workers from forcing their representation on employees.<sup>84</sup>

### B. The "Labor Organization" under the NLRA and LMRDA

#### 1. The NLRA Definition of "Labor Organization"

Section 2(5) of the NLRA defines "labor organization" as "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, in dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."<sup>85</sup> Courts and the NLRB have broadly construed this definition.<sup>86</sup>

To fall within the coverage of the NLRA, a group such as a worker center must satisfy each element of the definition.

The first element of the test is whether the group constitutes an "organization." The concept of an organization has been construed broadly, and a group will be found to be an "organization" even if it lacks any formal structure, does not elect officers, or meet regularly.<sup>87</sup>

A second element of the test is whether employees participate in the organization.<sup>88</sup> The definition of an organization is broad, and includes any group of employees.<sup>89</sup> Similarly, the definition of employee is also broad. However, there are several express exemptions.<sup>90</sup> One that is particularly relevant to the worker center movement<sup>91</sup> is the "agricultural laborer."<sup>92</sup> In defining that term, the NLRB and the courts apply Section 3(f) of the Fair Labor Standards Act (FLSA).<sup>93</sup> The FLSA defines "agriculture" to include farming operations, such as the cultivation and tillage of the soil, dairying, the production and harvesting of any agricultural or horticultural commodities, the raising of livestock or poultry, and any practices performed on a farm as an incident to or in conjunction with such farming operations.<sup>94</sup> The party asserting the exemption bears the burden of establishing that workers are engaged in direct farming operations.<sup>95</sup> To the extent they are engaged in processing or other indirect operations associated with farming, they are not agricultural laborers.<sup>96</sup>

Where an organization represents *only* agricultural laborers, it does not represent employees as defined by the NLRA and, therefore, is not a labor organization.<sup>97</sup> The statute does not, however, have a de minimis standard. If an organization enjoys the participation of *any* employee covered by the NLRA, it will be deemed a "labor organization" subject to the NLRA.<sup>98</sup>

The final component of the labor organization definition under the NLRA is whether the group "exists in whole or part for the purposes of dealing with employers."<sup>99</sup> Within the context of the worker center movement, this clause has generated significant debate.<sup>100</sup> The analysis can be broken down into two parts—"dealing with" and "exists in whole or part for the purpose of."

The concept of "dealing with" has been the subject of extensive litigation. One thing is clear: the phrase is far broader than collective bargaining in the traditional sense. When the Senate debated definitions in the original draft of the Wagner Act, the Secretary of Labor recommended "dealing with" be replaced with "bargaining collectively."<sup>101</sup> That recommendation was rejected in favor of broader language.<sup>102</sup> The Supreme Court considered the legislative history of the definition in *NLRB v. Cabot Carbon Co.*<sup>103</sup> and held that "dealing with" was not synonymous with the term "bargaining with."<sup>104</sup>

The NLRB has also developed a significant body of law surrounding these two words, and has reached the same conclusion.<sup>105</sup> Most of the analysis arises within the context of employer dominated unions or employee committees established for the purpose of regularly meeting with management to discuss matters of employee interest.<sup>106</sup> 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."<sup>107</sup>

“The [NLRB] has explained that ‘dealing with’ contemplates ‘a bilateral mechanism involving proposals from the employee committee concerning the subjects listed in section 2(5), coupled with real or apparent consideration of those proposals by management.’”<sup>108</sup> For example, where an organization makes recommendations to an employer regarding policies and employment actions, and the employer responds to the demand, the Board will find the “dealing with” requirement satisfied,<sup>109</sup> however, there generally needs to be more than a one-time communication with an employer over a discrete issue.<sup>110</sup>

With respect to the second part of the analysis, “which exists for the purpose, in whole or in part,” it is the *intent* of the organization that controls. If the group *intends* to deal with the employer, it satisfies the requirement even if there is no dealing at all.<sup>111</sup> To that end, the NLRB has found groups of employees to be labor organizations where they sought to “deal with” an employer but never managed to do so.<sup>112</sup> The mere making of demands, even if those demands never amount to anything, is evidence that a group’s purpose is to “deal with” an employer.<sup>113</sup> Such demands need not be of much significance to satisfy the requirement. For example, the NLRB has found that refusing to work with an unpopular employee is evidence of an intent to “deal with” because it amounts to “asserting a grievance and seeking to effect a change in their working conditions.”<sup>114</sup>

## 2. The NLRB’s Limited Treatment of Worker Centers

The NLRB has had limited occasion to address how worker centers fit into the definition of a Section 2(5) labor organization. While there have been a number of cases addressing incipient labor unions,<sup>115</sup> few have involved advocacy groups such as worker centers. Cases that do exist show the principal criteria necessary to satisfy the “dealing with” prong is intent. If the group’s intent is to address topics such as wages, hours, and terms and conditions of employment with an employer, it is likely to be found a labor organization.

In a case from the early 1970’s, an organization known as the Center for United Labor Action (CULA) interceded in a dispute between a traditional labor union and manufacturer.<sup>116</sup> CULA, referred to as a “protest group,” engaged in boycotts, protests and other actions designed to persuade retailers to cease selling products manufactured by the employer involved in the dispute.<sup>117</sup> The employer filed a charge with the NLRB claiming CULA was a labor organization and was engaged in an unlawful secondary boycott.<sup>118</sup> The NLRB concluded that CULA was not a labor organization under the NLRA because the organization never “*sought* to deal directly with employers concerning employee labor relations matters.”<sup>119</sup> The Board concluded that because CULA was affecting a social cause and did not seek to directly engage the employer on terms and conditions of employment, it did not exist for the purpose of “dealing with” the employer.<sup>120</sup>

Similarly, in the late 1970’s the NLRB considered whether a chapter of the “9 to 5” group was a labor organization under Section 2(5), and concluded that it was not for much the same reason.<sup>121</sup> In that case, the Administrative Law Judge wrote that “an organization which exists for the purpose of assisting women workers, among others, ‘in their asserted struggle against organizations which are adversely affecting their rights

and interests’ but *eschews* a collective-bargaining role is not a labor organization within the meaning of the Act.”<sup>122</sup>

Yet, in a series of NLRB Advice Memoranda<sup>123</sup> issued around the same time, the NLRB’s General Counsel considered the subject and concluded that in order for a group to be deemed to exist for the purpose of “dealing with” an employer, it merely needs to express intent to do so.<sup>124</sup> For example, in *Blue Bird Workers Committee*, the Division of Advice concluded that a group known as the Blue Bird Workers Committee (BBWC), which was comprised of former Blue Bird employees acting independent of any official organized labor organization, was a labor organization.<sup>125</sup> The reasoning distinguished groups such as CULA and 9 to 5, which picketed or handbilled for the purpose of supporting a general social cause, from the BBWC, which engaged in conduct intended to persuade the employer to adopt certain terms and conditions of employment advocated by the worker group.<sup>126</sup> It concluded the group existed for the purpose of “dealing with” employers because “it is clear that BBWC [was] attempting to achieve these employment-related aims not simply by picketing and handbilling but also by *communications* and *discussions* with [the employer].”<sup>127</sup>

In another case, *Acme/Alltrans Strike Committee*, the Division of Advice opined that a group of former employees picketing an employer constituted a labor organization because the purpose of the pickets was to pressure the employer into dealing with and hiring the picketers.<sup>128</sup> The Committee “was *attempting* to deal with” the employer, and even though it had no communications with the employer other than mere picketing, it was still considered by the Division of Advice to be a 2(5) labor organization.<sup>129</sup> “[T]he absence of any evidence that the Committee had any communication with any of the employers involved in the case or that it intended to engage in collective bargaining with . . . any . . . employer is not dispositive of its status as a labor organization.”<sup>130</sup>

In *Protesting Citizens and its Agent Elvin Winn*, the Division of Advice concluded that a group of unemployed workers who picketed an employer’s worker site, met with the employer on four separate occasions, and convinced the employer to pay union scale wages and benefits and to hire several picketers was a labor organization.<sup>131</sup> According to the General Counsel, the failure of an organization “to concern itself with negotiating a collective bargaining agreement or with all subjects listed in Section 2(5) is not dispositive of its status as a labor organization.”<sup>132</sup> Moreover, the fact that the group in this case “may have sought to rally public opinion in support of its activities does not alter the fact that it also existed for the purpose, at least in part, of dealing with employers over Section 2(5) matters.”<sup>133</sup>

In *Michael E. Drobney, an Agent of Laborers Local 498 (T.E. Ibberson)*, the Division of Advice opined that a group of job applicants who picketed an employer in hopes the employer would hire them was not a labor organization because there was no evidence the applicants actually wanted the employer to deal with them as a group, but simply hire them.<sup>134</sup>

Finally, in his 2006 article, Rosenfield looked at the NLRB’s treatment of this subject and noted the inherent contradiction between the “dealing with” requirement of the definition and the clause “exists, in whole or part, for the purposes of” dealing with the employer.<sup>135</sup> As Rosenfield explained,

the wording of this provision suggests that worker centers do not have to successfully negotiate with employers in order to be labor organizations, so long as a purpose of the group is to deal with employers.<sup>136</sup>

### 3. Restaurant Opportunity Center—The NLRB’s Narrow Interpretation of the Definition of a Labor Organization

In 2006, the NLRB Division of Advice again visited the issue of whether a worker center is a Section 2(5) labor organization when it considered charges filed against Restaurant Opportunity Center of New York (ROC-NY), a worker center focused on employees in the restaurant industry.<sup>137</sup> In that case, the Division of Advice concluded that ROC-NY was not a labor organization.<sup>138</sup> In reaching this conclusion, the Division of Advice analyzed the very narrow issue of “whether, in its role as legal advocate, ROC-NY’s attempt to settle employment discrimination claims has constituted ‘dealing with’ the Employers over terms and conditions of employment.”<sup>139</sup> This narrow analysis by the Division of Advice disregarded certain well-established elements of the test which, had they been considered, would have likely resulted in the opposite conclusion.

At the time the charges were filed, ROC-NY was engaged in a campaign against restaurants in New York City with the goal of improving working conditions of those who worked in those restaurants.<sup>140</sup> In conjunction with those efforts, ROC-NY filed EEOC charges and a lawsuit in which it alleged a variety of claims.<sup>141</sup> It was its activities in furtherance of settlement that were the focus of the Division of Advice’s analysis: “The parties’ discussions were limited to settling legal claims raised by employees,”<sup>142</sup> and while those discussions may have taken place over a period of time, they “were limited to a single context or a single issue – resolving ROCNY’s attempts to enforce employment laws.”<sup>143</sup>

The Division of Advice concluded that ROC-NY met all the criteria necessary to be a Section 2(5) labor organization, but found insufficient evidence to show a purpose of the group was to deal with employers.<sup>144</sup> Applying the test to determine whether ROC-NY met the “dealing with” prong of the test, the Division of Advice concluded that the communications were isolated instances of exchanging proposals, focused on settling the discrimination claims raised by employees.<sup>145</sup> The opinion explained that the discussions between the parties were limited to issues raised in the lawsuit and there was no evidence the parties would continue to negotiate after its resolution.<sup>146</sup> Because ROC-NY was not a labor organization, it followed that the group’s activities did not violate the NLRA.<sup>147</sup>

In reaching its conclusion, the Division of Advice overlooked a crucial piece of the analysis—intent.<sup>148</sup> One commentator, Professor Michael C. Duff, described this omission as an “infirmity” in the analysis because of “its focus on the functional relationship between ROC-NY and the few employers involved in specific cases rather than on ROC-NY’s overall purpose.”<sup>149</sup> He wrote that “the primary consideration in assessing . . . a labor organization’s NLRA status would appear to revolve around its *purpose*, which was not the General Counsel’s focus in the memorandum.”<sup>150</sup> Specifically, he cited the group’s stated accomplishments of conducting campaigns and negotiating

settlements that, among other things, involved “compensation for discrimination, paid vacations, promotion, the firing of an abusive waiter, and a posting in the restaurant guaranteeing workers the right to organize and the involvement of ROC-NY in the case of any future discrimination.”<sup>151</sup> As such, he postulated that ROC-NY’s own publicity raised doubts about whether it was not a Section 2(5) labor organization.<sup>152</sup>

A second flaw in the Division of Advice’s analysis noted by Professor Duff was the fact that the settlements consisted of “open-ended, future-oriented terms concerning promotions, workplace language issues and a fully functional arbitration process.”<sup>153</sup> In most litigation under federal and state discrimination or wage payment statutes, relief is typically limited to monetary damages and attorneys’ fees.<sup>154</sup> Yet, according to Eli Weissman-Nussbaum, the settlements<sup>155</sup> included a promotion policy, wage increases, and the requirement that “the restaurant give ROC-NY’s lawyers three days’ notice when it wishes to fire an employee so that ROC-NY can assess whether the motive is prohibited retaliation.”<sup>156</sup> Those provisions were in addition to payment of money to the eight workers, which presumably constituted settlement of the damages portion of the lawsuit.<sup>157</sup> Not only did the settlement appear to make the claimants whole, but the broad additional provisions also modified terms and conditions of employment for all employees employed by the restaurant at the time of resolution and into the future. These broad-based approaches to the terms and conditions of employment are more akin to modifying working conditions for workers generally, than they are to remedying a past harm.<sup>158</sup>

Ultimately, the Advice Memorandum involving ROC-NY displayed how simple it is for a worker center to engage in activities that satisfy the third prong of the Section 2(5) test. Both Professor Duff and Naduris-Weissman have acknowledged this reality.<sup>159</sup> Indeed, one commentator has even gone so far as to conclude that ROC-NY has crossed that threshold because “[t]hey do indeed raise grievances with particular employers on behalf of particular employees.”<sup>160</sup> A worker center’s Section 2(5) status is defined in “terms of purpose,”<sup>161</sup> and it seems clear that a purpose of ROC-NY was to deal with employers, even if that dealing was done under the auspices of resolution of litigation. Had the NLRB’s Division of Advice looked at ROC-NY within the context of its overall actions, and not merely through the narrow lens it used, it is highly likely that the outcome would have been consistent with earlier opinions by the office, as well as existing Board law.

### 4. The LMRDA—A Broader Definition of a Labor Organization

The definition of a labor organization under the LMRDA is far broader than that under the NLRA. The LMRDA definition appears in two subsections of the statute, Section 3(i) and 3(j).<sup>162</sup> Section 3(i) defines a labor organization as any 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 em-

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.<sup>163</sup>

Section 3(j) provides five examples of organizations that qualify as labor organizations.<sup>164</sup> A labor organization shall be deemed to be engaged in an industry affecting commerce if it:

1. is the certified representative of employees under the provisions of the National Labor Relations Act, as amended, or the Railway Labor Act, as amended; or
2. although not certified, is national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or
3. has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or
4. has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or
5. is a conference, general committee, joint or system board, or joint council, subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection, other than a State or local central body.<sup>165</sup>

Congress defined labor organizations under the LMRDA broadly “to provide comprehensive coverage of groups engaged in any degree in the representation of employees or administration of collective bargaining agreements.”<sup>166</sup> If an organization represents its members in any manner regarding grievances, labor disputes, or terms or conditions of employment, regardless of the organization’s formal attributes or the nature of the exchange with the employer, it will meet the definitional requirements of the LMRDA.<sup>167</sup> For example, in *Donovan v. National Transient Division*,<sup>168</sup> the 10th Circuit Court of Appeals concluded that a local union representing transient employees that held few in person meetings and had no collective bargaining agreements was a labor organization subject to LMRDA.<sup>169</sup> In this situation, rather than seeking to negotiate a collective bargaining agreement, the organization sought to address isolated issues on behalf of their members.<sup>170</sup> The court was satisfied that the conduct met the “dealing with” standard.<sup>171</sup>

The LMRDA and its implementing regulations are very clear with respect to the intent to bring within the ambit of the statute all organizations not expressly excluded from coverage.<sup>172</sup> Labor organizations that represent agricultural workers,<sup>173</sup> workers covered under the Railway Labor Act,<sup>174</sup> and others in industries where the NLRB has not exercised jurisdiction, are

subject to the LMRDA. For example, in *Stein v. Mutual Clerks Guild of Massachusetts, Inc.*,<sup>175</sup> certain dissident union members who had been expelled from a union that represented employees in the horse racing industry (an industry excluded from coverage under the NLRA) sued the union under the LMRDA. The guild objected to the court’s jurisdiction in the case in part because the NLRB has declined jurisdiction over the industry.<sup>176</sup> The court rejected the guild’s argument and held NLRB jurisdiction was not a prerequisite for coverage under the LMRDA.<sup>177</sup> The court further concluded that 3(i) of the LMRDA gave the Department of Labor jurisdiction over any labor organization in an industry effecting commerce and a determination by the NLRB not to extend its jurisdiction does not divest courts of their jurisdiction over an entity under the LMRDA.<sup>178</sup>

In his 2009 worker center article, Naduris-Weissman, argued that the LMRDA does not cover worker centers.<sup>179</sup> In support of that position, he asserted that there was no definitive guidance on how the two sections should be read, and therefore sections 3(i) and (j) should to be read together so that the delineation contained in 3(j) substantially limits the breadth of 3(i).<sup>180</sup> Specifically, Naduris-Weissman claims that worker centers are not “labor organizations” under the LMRDA because the description of worker centers is not included among the examples of labor organizations contained section 3(j).<sup>181</sup> This argument has been tried before and has been unsuccessful.

More than 30 years before Naduris-Weissman’s article, the United States Court of Appeals for the District of Columbia rejected this argument in *Brennan v. United Mine Workers*.<sup>182</sup> In that case, the labor organization asserted it was not covered by the statute because it was referred to as a “District” and the term did not appear on the list under Section 3(j) or referenced in 3(i).<sup>183</sup> Citing legislative history, the court rejected the argument and held “it is clear, however, that this portion of § 402(i) was added to the general coverage provisions . . . to increase the scope of the statute’s reach and not restrict it.”<sup>184</sup> As such, the interpretation advocated by Naduris-Weissman would seem to contradict both the legislative history and available precedent.

#### IV. The Worker Center Movement

##### A. The History of the Worker Center Movement

Worker centers can trace their origin to the South in the late 1970s and early 1980s, a time when the manufacturing sector in the United States was in significant decline and service work on the rise.<sup>185</sup> Few traditional labor unions were in place to advocate for worker rights in the region, which created an opening for worker centers.<sup>186</sup> Their origins varied. For example, in the Carolinas, worker centers arose to challenge issues of institutional racism in employment,<sup>187</sup> and along the U.S.-Mexico border immigrant worker centers arose to support textile workers.<sup>188</sup>

In 1992 there were only five known worker centers in the United States.<sup>189</sup> By 2005 there were 139 in 32 states, and by 2007 there were 160.<sup>190</sup> While worker centers of the 1970’s tended to focus on southern and African-American workers, most modern worker centers represent transient and immigrant employees.<sup>191</sup> The increase in the number of worker centers can be attributed to a variety of factors, but the factor considered

most significant is the increase in immigration during this period.<sup>192</sup> Between 1990 and 2010, the nation's immigrant population doubled,<sup>193</sup> with over half living in four states: California, New York, Texas, and Florida.<sup>194</sup> These four states have the largest concentration of worker centers.<sup>195</sup>

Immigrant workers frequently find work in the service and agricultural sectors, which often are low-level and temporary.<sup>196</sup> Traditional labor unions have tended not to pursue these populations because they can be difficult to organize and the work environments do not lend themselves to union organizing in the traditional sense.<sup>197</sup> As a result, many worker centers serve workers who do not work in any stable workplace, such as day laborers, while other worker centers serve workers of a particular ethnic group, occupation, or community without regard to any particular employer.<sup>198</sup> At least one prominent worker center is dedicated to the employees of a single employer.<sup>199</sup>

Worker centers offer a variety of services based on their membership that typically fall into three categories. The first consists of social services such as education, English as a second language, hiring halls, child care, training, employment services, and legal advice.<sup>200</sup> The second consists of advocacy and includes research, lobbying, and public policy efforts.<sup>201</sup> The third includes organizing and representing employees in connection with employers, and pursuing litigation strategies.<sup>202</sup>

Because individuals represented by these groups tend to be transient, some within the worker center movement do not view the traditional process of organizing workers under the NLRA as a viable option.<sup>203</sup> Instead, these groups work outside the typical confines of the NLRA, and leverage the complaints of a few individuals to facilitate changes for the broader group.<sup>204</sup> Because they operate outside of the bounds of the NLRA, they engage in a wide variety of activities that could otherwise be considered illegal for a traditional union, including protests, picketing, and secondary boycotts, in order to pressure those who are the target of their efforts.<sup>205</sup>

The worker center movement is highly dynamic and there are too many worker centers to address each in detail. Instead, what follows are brief profiles of five prominent worker centers developed from publicly available information, accompanied by an analysis of the application of the NLRA and LMRDA to each. All but one, in our opinion, satisfy the definitions of a labor organization under both statutes.

## *B. Profiles of Several Prominent Worker Centers*

### *1. Retail Action Project*

#### *a. Structure and Organization*

The Retail Action Project (RAP) was founded in 2005 as an organization of workers in the retail sector and is “dedicated to improving opportunities and workplace standards in the retail industry.”<sup>206</sup> Although originally founded as a community organization, in 2010, RAP expanded to a membership organization of retail workers.<sup>207</sup> Not unlike other worker centers, RAP provides education and advocacy for underserved workers, directly and in conjunction with other organizations.<sup>208</sup> RAP pursues a number of political and social causes, such as increases in the minimum wage and expansion of mandatory

health insurance, in addition to managing targeted campaigns at retailers in New York City.<sup>209</sup>

RAP also works in conjunction labor unions and other community advocacy organizations. The Retail, Wholesale and Department Store Union (RWDSU), which is part of the United Food and Commercial Workers Union (UFCW), lists RAP as an RWDSU campaign on its website.<sup>210</sup> RAP and the labor unions also work closely in administering their campaigns against target employers.<sup>211</sup>

The organization's initial success came through a campaign it initiated in 2006 against a New York City clothing chain. Following reports from several employees, RAP accused the chain of violating state and federal minimum wage and overtime laws, failing to comply with New York's reporting pay requirements, and forcing stock employees to work in poor conditions.<sup>212</sup> As part of its campaign RAP engaged in mass picketing in front of the clothing store during business hours,<sup>213</sup> wrote blogs,<sup>214</sup> and talked to customers about the alleged violations.<sup>215</sup> RAP also helped employees file complaints with the New York Attorney General, which led to wage and hour lawsuits against the employer.<sup>216</sup> In February 2008, the chain reached a settlement with the state and RAP for back wages.<sup>217</sup> Rather than negotiate a code of conduct or settlement agreement with increased wages or seniority, RAP appears to have used the lawsuit as a means to convince the employer to enter into a neutrality agreement with RWDSU.<sup>218</sup>

In addition to garnering neutrality agreements on behalf of RWDSU, RAP has also pursued campaigns to pressure employers to increase wages and services to workers. In one instance, RAP led protests, marches, and a media campaign at a shopping center to force employers within the shopping center to pay workers a “living wage,” which RAP defines as “\$10 per hour with benefits or \$11.50 per hour without benefits,” to protest the shopping center's “employees’ right to organize a union without intimidation;” and to provide community space within the shopping center for “English as a Second Language classes and job training programs.”<sup>219</sup>

#### *b. RAP as a Labor Organization*

Applying the test under Section 2(5) of the NLRA, it is likely RAP would be deemed a labor organization subject to the provisions of the statute. It is a membership organization in which employees, namely retail workers covered by the NLRA and the LMRDA, participate.<sup>220</sup> RAP also deals with employers regarding terms and conditions of employment for its members. Worker centers typically attempt to organize and represent workers that traditional labor unions are unable to organize, such as service employees (who often are transient workers).<sup>221</sup> RAP, on the other hand, appears to serve as an agent of the RWDSU labor union by organizing workers and has convinced employers to enter into a neutrality agreement with RWDSU.<sup>222</sup> Aside from facilitating the negotiation of neutrality agreements on behalf of RWDSU, RAP has also directly dealt with employers on issues such as instituting “living wages” and providing space for services such as English as a second language courses.<sup>223</sup> Through RAP's various interactions with employers, RAP engages in a bilateral mechanism with employers regarding various terms and conditions of its

members employment as required by 2(5) of the NLRA. As such, a purpose of RAP is to “deal with” employers.

Because RAP meets the definition of a labor organization under the NLRA, it also does so under the LMRDA. Moreover, the group also satisfies the definition under the LMRDA because it was formed by RWDSU and acts as an organizing arm for the union.<sup>224</sup>

## 2. Organization United for Respect at Walmart (OUR Walmart)

### a. Summary of the Worker Center and its Activities

One of the most active worker centers to date is the Organization United for Respect at Walmart (OUR Walmart) which claims to have organized thousands of hourly workers in dozens of Walmart stores across the United States.<sup>225</sup> OUR Walmart is distinct from most worker centers because its efforts are aimed at a single corporation instead of an industry or sector. Some of the group’s chapters purport to have 50 members or more.<sup>226</sup> Membership is open to any current or former hourly Walmart employee.<sup>227</sup> The effort is supported, in part, by the United Food and Commercial Workers (UFCW) labor union which claims the group as a “subsidiary” in its filings with the U.S. Department of Labor.<sup>228</sup> The group has been involved with another UFCW-affiliated organization called “Making Change at Walmart” to challenge the company’s employment practices and expansion efforts.<sup>229</sup> The UFCW also supplies organizers to recruit workers and is alleged to have paid members to engage in recruiting.<sup>230</sup>

Through its “Declaration of Respect”<sup>231</sup> OUR Walmart seeks to have the company change wages, hours, and terms and conditions of employment.<sup>232</sup> The changes sought include “confidentiality in the Open Door and provide in writing resolution to issues that are brought up and always allow associates to bring a co-worker as a witness;”<sup>233</sup> wages of “at least \$13 per hour and expand the percentage of full-time workers;”<sup>234</sup> “provid[ing] wages and benefits that ensure that no Associate has to rely on government assistance;”<sup>235</sup> “mak[ing] scheduling more predictable and dependable;”<sup>236</sup> and establishing policies and enforcing them evenly.<sup>237</sup>

The group’s pursuit of these goals has included making demands directly to Walmart. In June of 2011, a group of OUR Walmart members traveled to the company’s headquarters and demanded to meet with Walmart’s CEO.<sup>238</sup> When he did not appear, the group presented the Declaration of Respect to another member of senior management.<sup>239</sup> The group has also sought to meet with members of the company’s board of directors.<sup>240</sup> As part of its ongoing effort to promote its demands, OUR Walmart has held marches and rallies at company locations across the country on behalf of the workers the group claims to represent.<sup>241</sup> Even if the group has not succeeded in meeting with the company to discuss its demands, in at least one store the group claims to have successfully demanded the discipline and replacement of an unpopular supervisor.<sup>242</sup>

### b. OUR Walmart as a Labor Organization

OUR Walmart meets the definition of a labor organization under the NLRA and LMRDA. First, it constitutes an “organization” because the broad definition encompasses a

group of workers, and, among other things, it collects dues from its members and organizes events at which it promotes its declaration for respect.<sup>243</sup> Second, it is an organization of “employees” as defined under the NLRA.<sup>244</sup>

With respect to the third or “dealing with” prong of the test, because of its stated mission, and efforts in furtherance of that mission, OUR Walmart satisfies the test. A purpose of the group is to convince Walmart’s management to meet with it and address concerns regarding wages, hours, and terms and conditions of employment at the company.<sup>245</sup> In short, it seeks to engage the “bilateral mechanism” necessary to meet the dealing with element. It does not matter that Walmart may not have formally responded to OUR Walmart’s demands or will ever do so. All that is required is the presence of *intent* to deal with the company.<sup>246</sup> Thus, OUR Walmart presents the same situation as in *Coinmach Laundry Co.* and *Early California Industries*, where the NLRB found groups of employees to be 2(5) labor organizations even though they never actually dealt with an employer on behalf of their members.<sup>247</sup>

Because OUR Walmart meets the definition of a labor organization under the NLRA, it also does so under the LMRDA. However, in addition to that criteria, the group satisfies the definition under the LMRDA through another route. This group is a subsidiary of the United Food and Commercial Workers (UFCW) union,<sup>248</sup> and as such, it is also expressly covered by the statute.<sup>249</sup>

## 3. The Coalition of Immokalee Workers

### a. Summary of the Worker Center and its Activities

The Coalition of Immokalee Workers (CIW) is a worker center organization based in Immokalee, Florida.<sup>250</sup> It claims its membership consists of immigrant workers employed by tomato producers in Immokalee.<sup>251</sup> Initially, CIW sought to meet and negotiate directly with growers, but eventually the group came to focus its efforts on retailers and other end users of tomatoes.<sup>252</sup> The result was the Fair Food Program campaign through which the CIW sought to improve working conditions for its members.<sup>253</sup> Through this and its “penny-a-pound” campaign, CIW sought to engage major retailers to enter into Fair Food Agreements and Codes of Conduct.<sup>254</sup> In the past decade, according to CIW, it has waged ten successful campaigns with national companies under this program.<sup>255</sup> Signatories to the Fair Food Agreements pay a little extra per pound of tomatoes purchased, which is passed on to workers represented by CIW, and commit to purchase tomatoes solely from growers that abide by a Code of Conduct.<sup>256</sup>

In October 2010, CIW entered into a Fair Food Agreements with the Florida Tomato Grower’s Exchange, a trade association that represents the majority of Florida’s tomato farmers.<sup>257</sup> By signing the agreement, the signatory growers became part of the Fair Food Program—where they agreed to increase wages for employee pickers and abide by the Code of Conduct.<sup>258</sup>

The Code of Conduct covering the Florida Tomato Growers Exchange has not been made public. However, similar codes of conduct covering other growers have.<sup>259</sup> A template for the Code of Conduct appears on the Fair Food Standards Council’s

website.<sup>260</sup> It contains many basic terms and conditions of employment one might find in a traditional collective bargaining agreement.<sup>261</sup> In addition to the requirement that growers pass on the “penny per pound” charges paid by retail signatories of the Fair Food Agreement and abide by state and federal wage and hour laws,<sup>262</sup> it includes requirements that growers install time clocks, permit break periods, monitor worker health and safety, and provide written guidelines for employee advancement opportunities.<sup>263</sup> The code requires the grower to grant CIW access to their facility to perform training and orientation of all employees, and creates a CIW investigation mechanism to ensure the employer complies with the requirements of the code and remedies any complaints.<sup>264</sup>

#### b. CIW as a Labor Organization

Applying the same test under the NLRA, there is little doubt that CIW meets most of the elements of a statutory labor organization. Like most worker centers, CIW is a membership organization.<sup>265</sup> CIW has a central leadership structure,<sup>266</sup> files IRS form 990s for tax exemptions,<sup>267</sup> and organizes regular meetings with retailers and growers.<sup>268</sup> CIW likely meets the third prong of the Section 2(5) test because a purpose of the organization is to deal with employers. As evidenced by the existence of Code of Conduct agreements it has with retailers and end users of tomatoes, and the agreements it has with employers and their associations such as the Tomato Growers Exchange, a purpose of the CIW is to deal with employers over wages, hours, and other terms and conditions of employment.<sup>269</sup> In addition to establishing these terms, CIW promotes the agreements through training, and retains the right to enforce mechanisms to address employee complaints and grievances.<sup>270</sup> Finally, through a third party organization created by CIW, the group maintains the contractual right to monitor the payment of the “penny-per-pound” wage increases for workers.<sup>271</sup>

The one prong of the Section 2(5) test that is not clear is whether CIW represents “employees” as that term is defined by the NLRA. CIW does not release information regarding its members, except to refer to them as “farmworkers.”<sup>272</sup> Relying on information put forth by CIW, it would appear that because agricultural laborers are not covered by the NLRA, CIW would not satisfy that prong of the test, and would not be a Section 2(5) labor organization. Were CIW to represent any workers that do not qualify for the “agricultural laborer” exemption, the worker center certainly would qualify as a labor organization under the NLRA.<sup>273</sup> It is possible the group’s expansion in recent years has brought non-agricultural workers under its umbrella. If that were the case, the CIW would constitute a Section 2(5) labor organization, because all that is required is for CIW to represent one non-agricultural laborer in order for the exemption to no longer apply.

Even though information currently available regarding CIW does not support the conclusion that the group is a Section 2(5) labor organization under the NLRA, it clearly falls under the definition under the LMRDA where the exemption for “agricultural laborers” is not present.<sup>274</sup> As such, it is likely that CIW would be bound by the duties established by that statute.

#### 4. Restaurant Opportunities Center and its Affiliates

##### a. Summary of the Worker Center and its Activities

The Restaurant Opportunities Center (ROC) is a national worker center organization with affiliates in various cities throughout the United States, including New York, Los Angeles, Chicago, and Washington, DC.<sup>275</sup> Known commonly as ROC United, it evolved from ROC-NY, a worker center founded by the labor union HERE Local 100 and former employees of the Windows on the World Restaurant.<sup>276</sup> Immigration attorney Saru Jayaraman and Windows on the World employee Fekak Mamdouh launched the group as a worker center for all restaurant employees in New York City.<sup>277</sup>

ROC and its affiliates offer a variety of services to workers, which can be divided into three categories. The first involves research and policy efforts, including lobbying at the state and federal levels.<sup>278</sup> The second is the organization’s High Road Initiative, which includes an organization of employers with ROC approved employment practices, non-profit organizations, and government offices.<sup>279</sup> The third category is the workplace justice campaign. It is this third category that provides the most factual clarity with respect to whether ROC is a labor organization under the NLRA and the LMRDA.

According to its website publications, ROC has organized over 400 workers and won more than \$5 million in settlements of lawsuits.<sup>280</sup> Through its efforts, ROC has secured other benefits for workers at restaurants that have been the subject of its campaigns, which include improvements in workplace policies, including grievance procedures, raises, sexual harassment and anti-discrimination policies, sick days, and job security.<sup>281</sup>

In recent years the group has increased its efforts to obtain benefits that are similar to those contained in a traditional collective bargaining agreement, such as paid sick days, seniority provisions, and grievance procedures.<sup>282</sup> In a 2009 campaign in Michigan, 100 members of the ROC affiliate there submitted a demand letter to a restaurant alleging violations of wage and hour laws and racial discrimination, and demanded to bargain with the restaurant’s ownership over terms and conditions of employment.<sup>283</sup> The demand letter stated that if the restaurant did not negotiate with ROC, the workers would take legal action.<sup>284</sup> When the restaurant’s response was not deemed satisfactory to the group, it filed a variety of claims against the restaurant, including a federal lawsuit alleging violations of the FLSA,<sup>285</sup> charges of retaliation and surveillance with the NLRB,<sup>286</sup> and a charge of discrimination with the EEOC.<sup>287</sup> ROC-NY also began weekly protests at the restaurant, and several labor unions joined the group’s boycott.<sup>288</sup> In 2011, after nearly two years of protests and litigation, the parties engaged in mediation and reached a settlement agreement resolving their dispute.<sup>289</sup> Although the settlement was confidential, the joint press release revealed that not only did the settlement address the legal disputes, but it also created complaint-resolution procedures, and policies for training, hiring, breaks, and uniforms and equipment.<sup>290</sup>

In another example, ROC’s national policy coordinator, Jose Olivia, in a 2010 interview, likened the worker center movement to auto industry labor unions, stating that “[b]efore people were unionized in the auto industry, it was dragging

down the rest of manufacturing. Restaurants set the standards for the service industry. We're trying to create a culture of organizing there, to make restaurant jobs stable jobs."<sup>291</sup>

ROC has also become active in its efforts to convince employers to change their employment practices and terms and conditions of employment. Agreements ROC has negotiated since 2009 contain provisions requiring employers to provide ROC written notice prior to terminating any employee in order to permit ROC the opportunity to investigate.<sup>292</sup> The settlement agreements also contain grievance and arbitration provisions that allow ROC to investigate and grieve a violation of the settlement agreement before it is turned over to arbitration.<sup>293</sup>

#### b. ROC United as a Labor Organization

Applying the test under Section 2(5) of the NLRA, ROC and its affiliates are likely to be considered labor organizations subject to the provisions of the statute. It is an organization in which employees who are covered by the NLRA participate.<sup>294</sup> The critical question, as was addressed by the NLRB in its 2006 Advice Memorandum, is whether a purpose of ROC is to deal with employers over wages, hours, and terms and conditions of employment. As described *supra*, other commentators have reviewed the group's conduct, and argued that, contrary to the Division of Advice's analysis, the goals and successes ROC has achieved from campaigns against employers demonstrate that a purpose of the group is to "deal with" employers.<sup>295</sup> Finally, because ROC is a Section 2(5) labor organization, it is likewise a labor organization for purposes of application of the LMRDA.

### 5. Koreatown Immigrant Workers Association

#### a. Summary of the Worker Center and its Activities

The Koreatown Immigrant Workers Association<sup>296</sup> (KIWA) is a worker center focused on organizing garment, grocery store, and restaurant workers in the Los Angeles neighborhood of Koreatown. KIWA was founded in 1992 just prior to the Los Angeles riots spurred by the Rodney King verdict.<sup>297</sup> Koreatown was one of the communities hardest hit by the riots,<sup>298</sup> and workers whose places of employment were damaged lost income, and, in some cases, their jobs as a result.<sup>299</sup> KIWA's first campaign was organizing workers to protest the Korean American Relief Fund for denying relief money to workers.<sup>300</sup> KIWA organized 45 displaced Korean and Latino workers who successfully demanded and received inclusion of the workers in the relief fund distribution.<sup>301</sup>

From 1996 to 2000, KIWA focused on organizing restaurant workers to oppose poor working conditions.<sup>302</sup> The campaign, called the Koreatown Restaurant Workers Justice Campaign, targeted Korean restaurant owners that violated the FLSA and forced employees to work long hours.<sup>303</sup> KIWA and its members would picket, protest, boycott, and petition employers, and, in some cases, even engage in hunger strikes until the employer agreed to pay back wages, comply with FLSA requirements, and rehire employees.<sup>304</sup>

KIWA also filed suit against the Korean Restaurant Owners Association (KROA) on behalf of a worker who had been blacklisted.<sup>305</sup> KIWA won the worker back wages as well as a

\$10,000 "Workers Hardship Fund," administered by KIWA, to compensate workers who were unjustly fired for speaking out.<sup>306</sup>

The organization's early successes led KIWA to establish the Restaurant Workers Association of Koreatown (RWAK) in 2000, which offered members English classes and wage claim advice.<sup>307</sup> RWAK targeted the KROA and several of the largest restaurant members of KROA to pressure employers to pay minimum wages up to FLSA standards.<sup>308</sup> As part of the campaign "KIWA trained workers at individual restaurants to confront employers over abusive and illegal work conditions; filed lawsuits against specific restaurants challenging egregious labor law violations; organized targeted boycotts; and publicized these work conditions through townhall meetings and stories in the media."<sup>309</sup> By 2005 the KROA agreed to work with KIWA to change industry pay practices and established a Labor Mediation and Arbitration Panel designed to resolve labor disputes in Koreatown restaurants.<sup>310</sup>

KIWA's most recent successes have come through organizing of independent grocery store workers into the worker center's Immigrant Workers' Union (IWU). In 2001, KIWA and the IWU<sup>311</sup> attempted to unionize workers at one of Koreatown's largest supermarkets.<sup>312</sup> The IWU filed a petition for an election with the NLRB on November 15, 2001.<sup>313</sup> The election resulted in a tie, with the NLRB officially declaring "no result."<sup>314</sup> The IWU filed multiple unfair labor practice charges with the NLRB, which were ultimately settled.<sup>315</sup>

Although the organization failed in its attempts to organize super-market workers through the IWU, the experience led KIWA to undertake its "Living Wage Campaign" in 2005. The campaign's goal is to achieve "living wages," for workers in Koreatown markets through voluntary wage agreements with supermarket owners.<sup>316</sup> According to Naduris-Weissman, "In May, 2005, two markets signed an agreement setting a wage floor of \$8.50 per hour and committing to adjust the floor annually by up to three percent based on inflation."<sup>317</sup> Since 2001, KIWA has reached living wage agreements with five separate grocers, including one agreement that tied wage conditions to a private development's land use appeals.<sup>318</sup>

#### b. KIWA as a Labor Organization

KIWA claims that the RWAK and IWU are organizations wholly independent from the worker center. Despite the organization's efforts to convey the appearance of independence, there is little support for this argument.<sup>319</sup> KIWA created, staffed, and housed both organizations, and thus any claim that the organizations are independent simply is not supported by the evidence.<sup>320</sup> The IWU was a labor organization; it not only existed for the purpose of representing employees in dealings with the employer, but it filed a petition with the NLRB for an election to become the certified representative of grocery store workers.<sup>321</sup> Thus, by its affiliation and member involvement with IWU, KIWA also was a labor organization.

Even were KIWA independent from IWU and RWAK, it would still likely qualify as a labor organization under both the NLRA and LMRDA. KIWA is an organization in which employees covered by both statutes participate.<sup>322</sup> KIWA also deals with employers regarding wages and terms and condi-

tions of employment of its members. Through its living wage agreements with grocery store employers, KIWA is trying to set a level of working conditions well above and beyond that mandated by federal or state law.<sup>323</sup> KIWA also services the agreements independently to ensure annual wage increases are paid as required by the terms of the living wage agreement.<sup>324</sup>

Naduris-Weissman claims KIWA is not a labor organization because it does not have “an organizational purpose to form an ongoing bilateral relationship with the signatories” of its living wage campaigns because KIWA sets a wage and simply asks employers to sign on to pay the wage, as opposed to negotiating.<sup>325</sup> That conclusion is probably no longer viable given KIWA’s recent activities. KIWA negotiated with the owners of two super-markets for several months before the markets finally agreed to implement KIWA’s living-wages.<sup>326</sup> Another grocer, according to KIWA’s own website, agreed to a “groundbreaking living agreement,” attaching wage conditions to a private development’s land use agreement “for the first time in the city.”<sup>327</sup> “Groundbreaking” and “first the first time” suggest that KIWA bargained with the employer for something different from its typical living wage demands. As such, KIWA is likely a labor organization under the NLRA, and because of that status, also under the LMRDA.

## V. Conclusion

As is evidenced by the recent evolution of worker centers, their role in the economy and society is expanding into areas that have historically been occupied by traditional labor organizations. Indeed, traditional labor organizations provided the foundations upon which certain worker centers were built. While they may operate in a different manner than the traditional labor organization, they still seek to represent workers with respect to their dealings with employers on certain aspects of their wages, hours, and terms and conditions of employment. Some even collect dues from their members. As such, they are vulnerable to some of the same shortcomings that traditional labor unions faced, and which the NLRA and the LMRDA sought to address, including risks of embezzlement and other financial impropriety. Similarly, if such organizations are to represent workers in their dealings with employers, they should also be held accountable to their membership in the same way as the traditional labor organization. Any inconvenience to the worker center movement is outweighed by the benefit to the members they serve. In short, once a worker center crosses the threshold into addressing the terms and conditions of employment of their members, the institutional interests of the organizations should necessarily give way to the interests of the employees themselves. Legislation that currently exists, such as the NLRA and LMRDA, provide protections for employees, and worker centers, just like traditional labor unions, should be governed by these laws.

### Endnotes

1 Bureau of Labor Statistics, Union Members Summary 2011, January 27, 2012, available at <http://www.bls.gov/news.release/union2.nr0.htm>; see also, Steven Greenhouse, *Union Membership Rate Fell Again in 2011*, N.Y. TIMES, January 27, 2012, available at <http://www.nytimes.com/2012/01/28/business/union-membership-rate-fell-again-in-2011.html>.

2 James Walker, *Union Members in 2007: A Visual Essay*, MONTHLY LAB. REV., October 2008, at 30. 1983 was the first year BLS tracked union membership. There are competing theories as to the cause of this decline. Richard Bales, *Article: The Discord Between Collective Bargaining and Individual Employment Rights: Theoretical Origins and a Proposed Reconciliation*, 77 B.U.L. REV. 687, 694-702 (October 1997) (describing the various theories behind the decline of union membership in the United States).

3 Janice Fine, *Workers Centers: Organizing Communities at the Edge of the Dream*, 50 N.Y.L. SCH. L. REV. 417, 420 (2006) [hereinafter Fine, *Workers Centers*].

4 *Id.*

5 For example, OUR Walmart promotes the NLRA’s protections on its web site. <http://forrespect.org/our-rights/employee-rights/>. (“The National Labor Relations Act protects us acting collectively to address workplace issues. That means that any time we stand together, the law has our back.” *Id.*)

6 29 U.S.C. §§ 151-169 (2006).

7 29 USC §§ 141-144, 167, 172-187 (2006).

8 See Department of Labor Office of Labor-Management Standards compliance page, available at <http://www.dol.gov/olms/regs/compliance/compllmrda.htm> (last visited Sept. 6, 2012) (explaining that “the Labor-Management Reporting and Disclosure Act of 1959, as amended (LMRDA), grants certain rights to union members and protects their interests by promoting democratic procedures within labor organizations. The LMRDA establishes: a Bill of Rights for union members; reporting requirements for labor organizations, union officers and employees, employers, labor-relations consultants, and surety companies; standards for the regular election of union officers; and safeguards for protecting labor organization funds and assets.”).

9 See Eli Naduris-Weissman, *The Worker Center Movement and Traditional Labor Law*, 30 BERKELEY J. EMP. & LAB. L. 232, 238 (2009) [hereinafter Naduris-Weissman, *Worker Center Movement*].

10 Alan Hyde, *New Institutions for Worker Representation in the United State: Theoretical Issues*, 50 N.Y.L. SCH. L. REV. 385, 393 (2006) [hereinafter Hyde, *New Institutions*].

11 *Id.*

12 *Id.*

13 Fine, *Workers Centers*, *supra* note 3, at 419.

14 David Rosenfeld, *Worker Centers: Emerging Labor Organizations - Until They Confront the National Labor Relations Act*, 27 BERKELEY J. EMP. & LAB. L. 469 (2006) [hereinafter Rosenfeld, *Emerging Labor Organizations*].

15 *Id.*

16 Naduris-Weissman, *Worker Center Movement*, *supra* note 9, at 232.

17 *Id.* at 238.

18 Pub. L. No. 74-198, 49 Stat. 449-50 (1935).

19 Michael J. Nelson, *Comment: Slowing Union Corruption: Reforming the Landrum-Griffin Act to Better Combat Union Embezzlement*, 8 GEO. MASON L. REV. 527, 530 (2000) [hereinafter Nelson, *Slowing Union Corruption*].

20 *Id.*

21 *Id.*

22 *Id.*

23 *Id.*

24 Pub. L. No. 74-198, 49 Stat. 449-50 (1935).

25 The Developing Labor Law, 32-33(BNA 2010) (citing MILLIS & BROWN, FROM THE WAGNER ACT TO TAFT-HARTLEY, University of Chicago Press, 284 (1950)).

26 *Id.*

27 *Id.*

28 *Id.*

29 *Id.*

30 Nelson, *Slowing Union Corruption*, *supra* note 19, at 530.

31 *Id.* at 531. The opening line of that legislation provided that “[i]ndustrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another’s legitimate rights in their relations with each other...” Labor-Management Relations Act, 29 U.S.C § 141 (1947).

32 S. REP. NO. 106, Supplemental Views, *reprinted in* 1 LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT OF 1947, at 456.

33 *Id.*

34 H.R. REP. NO. 245 ON H.R. 3010, *reprinted in* 1 LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT OF 1947, at 295.

35 See 29 U.S.C. § 158(b). Section 8(b) pertains solely to unfair labor acts by “labor organizations” towards covered employees and employers.

36 See 29 U.S.C. § 158(b)(1).

37 H.R. REP. NO. 510 ON H.R. 3020 (Conf. Rep.), *reprinted in* 1 LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT OF 1947, at 547; see 29 U.S.C. § 158(b)(2).

38 *Id.*

39 Section 8(b)(4) outlaws various types of picketing including those that result from secondary boycotts.

40 29 U.S.C. § 158(b)(5).

41 29 U.S.C. § 158(b)(6).

42 H.R. REP. NO. 510 ON H.R. 3020 (Conf. Rep.), *reprinted in* 1 LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT OF 1947, at 570; see 29 U.S.C. § 186(a).

43 See H.R. REP. NO. 510 ON H.R. 3020 (Conf. Rep.), *reprinted in* 1 Legislative History of the Labor Management Relations Act of 1947 at 571.

44 Section 9(f) of the LMRA, 61 Stat. 145 (1947).

45 Section 9(f)(1)-(6) of the LMRA, 61 Stat. 145 (1947).

46 Remarks of House Representative Hugh A. Meade, Congressional Record, House, April 24, 1947, *reprinted in* 1 LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT OF 1947, at 869 (“Every member of a union is entitled to know what his dues are used for – how much the union officials are paid and what becomes of the profits on the huge funds they have accumulated, which run into millions of dollars.”).

47 See Sec. 302 of the LMRDA, 29 U.S.C. § 431.

48 Nelson, *Slowing Union Corruption*, *supra* note 19, at 531–532.

49 The Labor Reform Law, Bureau of National Affairs: Washington, D.C. (1959).

50 *Id.*

51 *Id.*

52 Nelson, *Slowing Union Corruption*, *supra* note 19, at 533–34. The labor organizations with documented corruption included Bakery and Confectionery Workers, Allied Trades Union, International Union of Operating Engineers, United Textile Workers Union and International Brotherhood of Teamsters.

53 *Id.*

54 See 2 NRLB LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RECORDING AND DISCLOSURE ACT OF 1959, at 1104, 1115–16.

55 The McClellan Committee hearings were televised nationally.

56 RINKU SEN AND FEKKAK MAMDOUH, THE ACCIDENTAL AMERICAN: IMMIGRATION AND CITIZENSHIP IN THE AGE OF GLOBALIZATION<sup>23</sup> (2008) [hereinafter THE ACCIDENTAL AMERICAN] (“The unions were roiled by infighting and corruption, competing to represent the same workers . . . and rushing to offer employers sweetheart deals.”).

57 Leslie Marshall, *The Right to Democratic Participation in Labor Unions and the Use of the Hobbs Act to Combat Organized Crime*, 17 FORDHAM URB. L. J. 189, 196 (1989) [hereinafter Marshall, *The Right to Democratic Participation*]; S. REP. NO. 187, 86th Cong., 1st Sess. 5 *reprinted in* 1 NRLB Legislative History of the Labor-Management Recording and Disclosure Act of 1959 at 397.

58 *Id.* at 197.

59 *Id.*

60 29 USC §§ 141-144, 167, 172-187 (2006).

61 See 2 NRLB LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RECORDING AND DISCLOSURE ACT OF 1959, at 1098 (The bill of rights “would bring to the conduct of union affairs and to union members the reality of some of the freedoms from oppression that we enjoy as citizens by virtue of the Constitution of the United States.”).

62 *Id.*

63 *Id.*

64 Risa L. Lieberwitz, *Due Process and the LMRDA: An Analysis of Democratic Rights in the Union and at the Workplace*, 29 B.C.L. REV. 21, 34 (1987). Title I of the LMRDA contains the following provisions: “SEC. 101. (a)(1) EQUAL RIGHTS.-- Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization’s constitution and bylaws.

(2) FREEDOM OF SPEECH AND ASSEMBLY.-- Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization’s established and reasonable rules pertaining to the conduct of meetings: Provided, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

(3) DUES, INITIATION FEES, AND ASSESSMENTS.-- Except in the case of a federation of national or international labor organizations, the rates of dues and initiation fees payable by members of any labor organization in effect on the date of enactment of this Act shall not be increased, and no general or special assessment shall be levied upon such members, except-

(A) in the case of a local organization, (i) by majority vote by secret ballot of the members in good standing voting at a general or special membership meeting, after reasonable notice of the intention to vote upon such question, or (ii) by majority vote of the members in good standing voting in a membership referendum conducted by secret ballot; or

(B) in the case of a labor organization, other than a local labor organization or a federation of national or international labor organizations, (i) by majority vote of the delegates voting at a regular convention, or at a special convention of such labor organization held upon not less than thirty days’ written notice to the principal office of each local or constituent labor organization entitled to such notice, or (ii) by majority vote of the members in good standing of such labor organization voting in a membership referendum conducted by secret ballot, or (iii) by majority vote of the members of the executive board or similar governing body of such labor organization, pursuant to express authority contained in the constitution and bylaws of such labor organization: Provided, That such action on the part of the executive board or similar governing body shall be effective only until the next regular convention of such labor organization.

(4) PROTECTION OF THE RIGHT TO SUE.-- No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding, or the right of any member of a labor organization to appear as a witness in any judicial, administrative, or legislative proceeding, or to petition any legislature or to communicate with any legislator: Provided, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof: And provided further, That no interested employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party, any such

action, proceeding, appearance, or petition.

(5) SAFEGUARDS AGAINST IMPROPER DISCIPLINARY ACTION.-- No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.

(b) Any provision of the constitution and bylaws of any labor organization which is inconsistent with the provisions of this section shall be of no force or effect.

#### SEC. 102. Civil Enforcement

Any person whose rights secured by the provisions of this title have been infringed by any violation of this title may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located.

#### SEC. 103. Retention of Existing Rights

Nothing contained in this title shall limit the rights and remedies of any member of a labor organization under any State or Federal law or before any court or other tribunal, or under the constitution and bylaws of any labor organization.

#### SEC. 104. Right to Copies of Collective Bargaining Agreements

It shall be the duty of the secretary or corresponding principal officer of each labor organization, in the case of a local labor organization, to forward a copy of each collective bargaining agreement made by such labor organization with any employer to any employee who requests such a copy and whose rights as such employee are directly affected by such agreement, and in the case of a labor organization other than a local labor organization, to forward a copy of any such agreement to each constituent unit which has members directly affected by such agreement; and such officer shall maintain at the principal office of the labor organization of which he is an officer copies of any such agreement made or received by such labor organization, which copies shall be available for inspection by any member or by any employee whose rights are affected by such agreement. The provisions of section 210 shall be applicable in the enforcement of this section.” 29 U.S.C. §§ 411-415.

65 *Id.*

66 29 U.S.C. § 411(a)(1).

67 29 U.S.C. § 411 (a)(2).

68 29 U.S.C. § 411 (a)(3).

69 29 U.S.C. § 411 (a)(5).

70 29 U.S.C. § 412.

71 29 U.S.C. § 414.

72 29 USC § 431(a); *Id.* at 199. Much of this reporting information initially appeared in Section 9(f) of the Taft Hartley Act. *See* 61 Stat. 145 (1947).

73 Marshall, *The Right to Democratic Participation*, *supra* note 57, at 99; Nelson, *Slowing Union Corruption*, *supra* note 19, at 551.

74 *Id.* at 527, 551.

75 Marshall, *The Right to Democratic Participation*, *supra* note 57, at 197.

76 *Id.*

77 U.S. DEP’T OF LAB., Office of Labor Standards, Online Public Disclosure Room, <http://www.dol.gov/olms/regs/compliance/rlro/lmrda.htm> (last visited Sept. 6, 2012).

78 *Id.*

79 29 U.S.C. §431(c) (“Every labor organization required to submit a report under this title shall make available the information required to be contained in such report to all of its members, and every such labor organization and its officers shall be under a duty enforceable at the suit of any member of such organization in any State court of competent jurisdiction or in the district

court of the United States for the district in which such labor organization maintains its principal office, to permit such member for just cause to examine any books, records, and accounts necessary to verify such report. The court in such action may, in its discretion, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney’s fee to be paid by the defendant, and costs of the action.” (emphasis added))

80 29 U.S.C. § 481. Of lesser relevance to the analysis of this article, but not to the overall policy objective of the statute, Title III of the LMRDA limits a parent labor organization’s ability to create a trusteeship over local or subordinate unions. 29 U.S.C. § 461.

81 29 USC § 501.

82 29 U.S.C. § 501(a).

83 *See* 29 USC § 158(b)(7).

84 *See, e.g.*, 2 LEG. HISTORY OF THE LABOR MANAGEMENT REPORTING AND DISCLOSURE ACT, at 975–76, 993, 994–95, 1029, 1174–93 (1959). Senator Ervin noted, at 105 Cong. Rec. 6656, 2 LEG. HIST. LMRDA 1183 (1959): “Recognition picketing is picketing which is designed to compel the employer to accept the union as the bargaining agent for the employees, regardless of whether the union represents a majority of the employees.”

85 29 U.S.C. § 152(5).

86 *See* NLRB v. Cabot Carbon Co., 360 US 203, 211–13 (1959) (citing S. Rep No. 573, 74th Cong. 1st Session. 7(1935) (“The protections of Section 8 shall extend to all organizations of employees that deal with employers in regard to grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work. This definition includes employee-representation committees.”)). “The fact that a union is in its early stages of development and has not as yet won representation rights does not disqualify it as a labor organization.” NLRB Office of the General Counsel - An Outline of Law and Procedure in Representation Cases, at 51 (2005) (citing Michigan Bell Telephone Co., 182 NLRB 623 (1970)).

87 29 U.S.C. § 152(5); Yale New Haven Hospital, 309 NLRB 363 (1992) (finding the existence of an organization even though the group lacked a constitution, bylaws, meetings or filings with the Department of Labor); *see* Betances Health Unit, 283 NLRB 369, 375 (1987) (no formal structure and no documents filed with the Department of Labor); Butler Mfg. Co., 167 NLRB at 308 (no constitution, bylaws, dues, or initiation fees); East Dayton, 194 NLRB at 266 (no constitution or officers); *see also* NLRB v. Kennametal, Inc., 182 F.2d 817 (3d Cir. 1950) (finding an informal group of employees who came together to present grievances was sufficient to make them a labor organization under Section 2(5)).

88 29 U.S.C. § 152(5)

89 “Organization” encompasses “any organization of any kind, or any agency or employee representation committee or plan.” *See* Electromation, Inc., 309 N.L.R.B. at 994.

90 The exemptions include agricultural workers, domestic workers, independent contractors, supervisors or any individual employed by an employer subject to the Railway Labor Act. 29 U.S.C. § 152(3)

91 As will be described, *infra*, one of the worker centers that has come to prominence is the Coalition of Immokalee Workers, which represents agricultural workers.

92 *Id.*

93 29 U.S.C. 203(f); *see also* NLRB Representation Case Law Review of Developments 2008, at 205, available at <http://www.nlr.gov/publications/manuals> (last visited Sept. 6, 2012).

94 29 U.S.C. § 203(f).

95 Agrigeneral L.P., 325 NLRB 972 (1998).

96 Bayside Enterprises v. NLRB, 429 U.S. 298 (1977).

97 These groups may, however, qualify as labor organizations under the LMRDA which defines “employee” to include agricultural laborers. *See* 29 CFR 451.3(a)(3) stating that employer of agricultural laborers who are excluded from coverage by the NLRA are employees within the meaning of the LMRDA.

98 The United Farm Workers union faced this situation in the 1960’s and

1970's. To address this concern, it pursued a strategy through which the union spun off groups of non-agricultural workers who they had organized. See Jennifer Gordon, *Law, Lawyers, and Labor: The United Farm Workers' Legal Strategy in the 1960s and 1970s and the Role of Law in Union Organizing Today*, 8 U. PA. J. LAB. & EMP. L. 1, 15, n. 45 (2005) [hereinafter Gordon, *Law, Lawyers, and Labor*].

99 29 U.S.C. § 152(5). The term "employer" is broadly defined and only excludes state and federal government and employers covered by the Railway Labor Act, 29 U.S.C. § 152(2).

100 Naduris-Weissman, *The Worker Center Movement*, *supra* note 9, at 285. Naduris-Weissman argues that previous scholarship by Rosenfield and Hyde which concludes that worker centers "deal with" employers are required for coverage by the NLRA are "overly-broad" and inconsistent with case law.

101 *Id.*; S. 1958, 74th Cong., 1st Sess. 66–67.

102 *Id.*

103 360 U.S. 203 (1959).

104 *Id.*

105 Syracuse University, 350 NLRB 755 (2007) (finding that a grievance committee which passed on actions of the employer was not a 2(5) labor organization because it performed an "adjudicative function" and did not make proposals to management to which management was expected to respond).

106 See *e.g.*, Electromation, Inc., 309 NLRB 990 (1992); E.I. du Pont & Co., 311 NLRB 893 (1993); Keeler Brass Co., 317 NLRB 1110 (1995).

107 29 U.S.C. § 158(a)(2).

108 Crown Cork & Seal Co., 334 NLRB 699, 700 (quoting Electromation, Inc., 309 NLRB 990, 995 n. 21 (1992)).

109 Keeler Brass Co., 317 NLRB 1110 (1995)

110 Stody Co., 320 NLRB 18 (1995); Vencare Ancillary Services, Inc., 334 NLRB 965, 969–970 (2001), *enf. denied* on other grounds, 352 F.3d 318 (6th Cir. 2003). *But see* Porto Mills, Inc., 149 NLRB 1454 (1964) (holding that an informal group had "dealt with" the employer by demanding the termination of an employee leading a union organizing effort).

111 Coinmach Laundry, 337 NLRB 1286 (2002); Early California Industries, 195 NLRB 671.

112 In *Coinmach Laundry*, 337 NLRB 1286 (2002), the Administrative Law Judge wrote that "under this definition, an incipient union which is not yet actually representing employees may, nevertheless, be accorded 2(5) status if it admits employees to membership and was formed for the purpose of representing them." (emphasis added). See also Early California Industries, 195 NLRB 671, 674 (1972) (finding a group of employees to constitute a labor organization where the group's purpose was to negotiate wages, hours and working conditions with an employer, even though it had yet to come to fruition).

113 Betances Health Unit, 283 NLRB 369 (1987).

114 Porto Mills, Inc., 149 NLRB 1454, 1471 (1964).

115 See *supra* notes 99–100.

116 Center for United Labor Action, 219 NLRB 873 (1975); see also *Protest Groups and Labor Disputes – Toward a Definition of "Labor Organization: Center for United Labor Action*, 17 WM. & MARY L. REV. 796 (1976).

117 *Id.*

118 *Id.*

119 *Id.* (emphasis added).

120 *Id.*

121 Northeastern University, 235 NLRB 858 (1978).

122 *Id.* at 859.

123 It should be noted that NLRB Advice Memoranda are creations of the NLRB's General Counsel's Office, and serve as legal opinions of the office "which provides guidance to the Agency's Regional Offices with respect to difficult or novel legal issues arising in the processing of unfair labor practice

charges." See Press Release, National Labor Relations Board, Jayme Sophir named Deputy Associate General Counsel in the Division of Advice (February 1, 2012), available at <http://www.nlr.gov/news/jayme-sophir-named-deputy-associate-general-counsel-division-advice> (February 1, 2012) (last visited Sept. 6, 2012). As such, Advice Memoranda do not constitute precedent or serve as law. See D. R. Horton, Inc. and Michael Cuda, 2012 NLRB Lexis 11, \*28 n.14, (refusing to apply an NLRB advice memorandum, explaining that an advice memorandum is merely "the then-General Counsel's advice to the Board's Regional Offices," which "is not binding on the Board").

124 See Acme/Alltrans Strike Committee, Case No. 21-CB-6318, Advice Memorandum dated April 25, 1978; *Protesting Citizens* and its Agent Elvin Winn, Case 15-CC-681, Advice Memorandum dated August 30, 1977; Central Arizona Minority Employment Plan, Advice Memorandum dated November 30, 1977; 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.

125 Blue Bird Workers Committee, 1982 NLRB GCM Lexis \*10.

126 *Id.* at \*11.

127 *Id.* (emphasis added).

128 Acme/Alltrans Strike Committee, Case No. 21-CB-6318, Division of Advice Memorandum dated April 25, 1978, 6 AMR ¶ 14,025, 5033.

129 *Id.* at 5034.

130 *Id.* (citing Porto Mills, Inc., 149 NLRB 1454, 1471-72 (1964)).

131 *Protesting Citizens* and its Agent Elvin Winn, Case 15-CC-681, Advice Memorandum dated August 30, 1977.

132 *Id.*

133 *Id.*

134 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.

135 Rosenfield, *Emerging Labor Organizations*, *supra* note 14, at 493–494.

136 *Id.* at 494.

137 Restaurant Opportunities Center of NY, Cases 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 [hereinafter ROC Advice Memorandum].

138 *Id.*

139 *Id.*

140 See *Boulud settles discrimination suit*, Nation's Restaurant Group, July 30, 2007, available at <http://nrrn.com/article/boulud-settles-discrimination-suit> (last visited Sept. 6, 2012); see also *The Accidental American* at page 168.

141 *Id.*

142 *Id.*

143 *Id.*

144 *Id.*

145 See ROC Advice Memorandum, *supra* note 137, at 3.

146 *Id.*

147 *Id.* The Division of Advice also based its conclusion that ROC-NY was not a labor organization on the basis that the group's proposed settlement with restaurants did not contemplate a "continuing practice" of "dealing with" because it did not require ROC-NY to service the settlement agreement, rather any violations would be reviewed by a third party arbitrator. Advice Memorandum page 3. Advice's conclusion, that no "continuing practice" was contemplated by the proposed settlement agreement, simply is not correct. Moreover, the concept of "continuing practice" is not mentioned anywhere in the *Electromation* line of cases on which the Agency relied and, thus, never was a prerequisite for a "dealing with" determination.

148 Michael C. Duff, *Days Without Immigrants: Analysis and Implications of the Treatment of Immigration Rallies Under the National Labor Relations Act*, 85 DENV. U. L. REV. 93, 134–135 (2007) [hereinafter Duff, *Days Without*

Immigrants].

149 *Id.* at 134.

150 *Id.* at 135 (emphasis added).

151 *Id.*

152 *Id.* As noted *supra*, action of a group of employees to seek removal of a supervisor has been found sufficient to meet the dealing with element of the 2(5) test. See *Porto Mills*, *supra* note 110.

153 *Id.* at 136.

154 The Fair Labor Standards Act confers the rights of employees to recover for unpaid wages, liquidated damages and attorney fees. See 29 USC § 216. Title VII discrimination cases typically permit recovery for compensatory and punitive damages and attorney fees. See 29 USC § 1981.

155 Because the settlements themselves are not public documents, we must rely upon descriptions of those settlements by ROC-NY and others.

156 As Naduris-Weissman pointed out in his article, the settlement agreement between ROC-NY and Daniel which will remain in effect for five years, requires that the restaurant give ROC-NY's lawyers three days' notice when it wishes to fire an employee so that ROC-NY can assess whether the motive is prohibited retaliation. See Naduris-Weissman, *The Worker Center Movement*, *supra* note 9, at 254. Such notice intimates future negotiations between the parties after the resolution of the parties' lawsuits.

157 *Id.*

158 See ROC-NY's mission at <http://www.rocny.org/who-we-are> (last visited Sept. 6, 2012).

159 Duff, *Days without Immigrants*, *supra* note 148, at 136 (noting that it is "undoubtedly unsettling (or should be in contemplating possible civil court litigation where courts may take a quite different view of the matter [than that taken by the NLRB]"). Naduris-Weissman, *The Worker Center Movement*, *supra* note 9, at 255 (noting that "ROC-NY's efforts to settle workplace grievances have brought it close to the threshold of dealing with employers.")

160 Hyde, *New Institutions*, *supra* note 10, at 408.

161 Duff, *Days without Immigrants*, *supra* note 148, at 135.

162 29 U.S.C. 402(i) and (j).

163 29 U.S.C. 402(i).

164 29 U.S.C. 402(j).

165 29 U.S.C. 402(j).

166 *Donovan v. National Transient Division*, 736 F.2d 618 (10th Cir. 1984) (citing S. Rep. No. 187, 86th Cong., 1st Sess. 53, *reprinted in* 1959 U.S. Code Cong. & Ad. News 2318, 2370).

167 *Id.*; see also *Brennan v. United Mine Workers*, 475 F.2d 1293, 1295–96 (D.C. Cir. 1973).

168 *Donovan*, 736 F.2d 618 (10th Cir. 1984).

169 *Id.* at 621–22 (holding that if an organization represents its members regarding grievances, labor disputes, or terms or conditions of employment, the organization is subject to the Act regardless of its formal attributes or the extent of its representative activities).

170 *Id.*

171 *Id.*; see also *Donovan v. NTD*, 542 F. Supp. 957, 958 (D. Kan. 1982) (explaining that NTD did not negotiate collective bargaining agreements with employers, instead it negotiated general Articles of Agreement for the benefit of the NTD membership. This agreement labor disputes, grievances, and hours.).

172 *Roddy v. United Transportation Union*, 479 F. Supp. 57, 60 (N.D. Ala. 1979); see also 29 C.F.R. § 451.2.

173 See 29 CFR 451.3(a)(3).

174 See 29 U.S.C. § 402(e).

175 560 F.2d 486 (1st Cir. 1977).

176 *Id.* at 490; see also 29 C.F.R. § 103.3 in which the NLRB has declined

jurisdiction over the horse and dog racing industries.

177 *Id.*

178 *Id.*

179 Naduris-Weissman, *The Worker Center Movement*, *supra* note 9, at 287–291.

180 *Id.*

181 *Id.*

182 475 F.2d 1293 (D.C. Cir. 1973).

183 *Id.* at 1295.

184 *Id.* (citing 105 CONG. REC. 6516 (1959) (remarks of Senators Goldwater and Kennedy); H.R. REP. No. 741, 86th Cong., 1st Sess. at 28).

185 Fine, *Worker Centers*, *supra* note 3, at 430.

186 *Id.*

187 COREY KURTZ, WORKER CENTERS: VEHICLES FOR BUILDING LOW-WAGE WORKER POWER 30 (2008).

188 *Id.* at 33.

189 Janice Fine, *Worker Centers: Organizing Communities at the Edge of the Dream*, Economic Policy Institute Briefing Paper #159 (2005, December 14), available at <http://www.epi.org/publications/entry/bp159/> [hereinafter Fine, Briefing Paper #159"] (last visited Sept. 6, 2012).

190 Naduris-Weissman, *The Worker Center Movement*, *supra* note 9, at 240.

191 Jennifer Hill, *Symposium: Whither the Board? The National Labor Relations Board at 75: Can Unions Use Worker Center Strategies? In an Age of Doing More With Less, Unions Should Consider Thinking Locally but Acting Globally*, 5 FIU L. REV. 551, 556 (2010); Jennifer Gordon, *We Make the Road by Walking: Immigrant Workers, The Workplace Project, and the Struggle for Social Change*, 30 HARV. C.R.-C.L. L. REV. 407 (1995); see also *Los Angeles Black Worker Center, A New Sense of Power of the People: Fighting for Equity, Transparency, Accountability and Justice in the 21st Century Labor Market*, UCLA Center for Labor Research and Education Research and Policy Brief, February 7, 2011.

192 Fine, Briefing Paper #159, *supra* note 189.

193 Steven A. Camarota, A Record-Setting Decade of Immigration: 2000 to 2010, The Center for Immigration Studies, October 2011.

194 The Foreign-Born Population in the United States: 2010, The US Census Bureau, available at <http://www.census.gov/population/foreign/> (last visited Sept. 6, 2012).

195 In 2005, there were 23 worker centers in New York, 29 in California, 6 in Florida and 7 in Texas. See Fine, Briefing Paper #159, *supra* note 189.

196 *Id.*

197 Fine, *Worker Centers*, *supra* note 3, at 430.

198 Many Worker Centers arise as a result of tragedies that displaced worker in a particular region. ROC-NY arose after the attack on the World Trade Center on September 11, 2001 left hundreds of Windows on the World restaurant employees without work. <http://www.rocny.org/who-we-are>. KIWA arose following the 1992 Los Angeles riots, spurred by the Rodney King verdict, in which 53 people died, 2,000 people were injured, 1,100 buildings were destroyed, and businesses were looted. See JARED SANCHEZ ET AL., KOREATOWN: A CONTESTED COMMUNITY AT A CROSSROADS 1 (April 2012), available at [http://dornsife.usc.edu/perc/documents/Koreatown\\_Contested\\_Community\\_Crossroads\\_web.pdf](http://dornsife.usc.edu/perc/documents/Koreatown_Contested_Community_Crossroads_web.pdf).

199 See OUR WALMART, FAQs, <http://forrespect.org/our-walmart/faq/> (last visited Sept. 6, 2012).

200 The Restaurant Opportunities Center of New York offers members job training and development skills. See ROC-NY, <http://www.rocny.org/what-we-do/job-training-and-job-development> (last visited Sept. 6, 2012). The Coalition of Immokalee Workers offers members weekly community meetings, training sessions, leadership development workshops, cultural events, and classes, as well as non-profit grocery store that enables members to buy cooking supplies, food, phone cards and toiletries at low prices. See

http://www.ciw-online.org/Community\_Center.html (last visited Sept. 6, 2012). The Coalition for Humane Immigrant Rights of Los Angeles offers members hiring hall services and citizenship assistance. See <http://www.chirla.org/> (last visited Sept. 6, 2012).

201 The Retail Action Project advocates for increases to New York's minimum wages and state laws pertaining to "living wages" on its members' behalf, and also publishes studies on the effects of employer retail practices on immigrants and minorities. See <http://retailactionproject.org/advocacy/> (last visited Sept. 6, 2012) and <http://retailactionproject.org/category/studies-and-reports/> (last visited Sept. 6, 2012). KIWA advocates for increases in fair housing funds and building of low-income and fair-housing units in the Koreatown neighborhood of Los Angeles. See <http://kiwa.org/about-kiwa/kiwa-victories/#kiwaleads> (last visited Sept. 6, 2012).

202 OUR Walmart organizes employees to seek to negotiate employment terms with Wal-Mart stores. See <http://forrespect.org/our-walmart/about-us/>. ROC Unites organizes workers, and engages in litigation and public pressure to improve wages and working conditions for employees in the food-service industry. See <http://rocunited.org/our-work/workplace-justice/> (last visited Sept. 6, 2012). KIWA organizes workers to pressure employers into entering living-wage agreements for grocery store workers. See <http://kiwa.org/about-kiwa/kiwa-victories/> (last visited Sept. 6, 2012).

203 As Janice Fine explained in her worker center article "Many immigrant workers are migratory, undocumented, and lack conventional political power. The unskilled nature of their work creates an oversupply of labor and while employers and labor systems vary enormously from one another, they all present formidable challenges, albeit for different reasons, to union or other forms of traditional organizing." Fine, *Workers Centers*, *supra* note 3, at 442; see also the North American Alliance for Fair Employment (NAFFE) Working Paper on Worker Center Strategies, available at <http://www.fairjobs.org/archive/sites/default/files/wp1.htm> (The practical problems posed for union organizers by the contingent workforce include "small groups of workers dispersed throughout a broader workforce; high turnover; little shared "community of interest;" and employers that are often marginal and unable to pay higher wages") (last visited Sept. 6, 2012); Julie Yates Rivchin, *Building Power Among Low-Wage Immigrant Workers: Some Legal Considerations for Organizing Structures and Strategies*, 28 N.Y.U. REV. L. & SOC. CHANGE 397, 411-13 (2004) (noting the disparity between the realities of service industry workers and the traditional union strategies of collective bargaining) [hereinafter Rivchin, *Building Power*].

204 Rivchin, *Building Power*, *supra* note 203, at 416.

205 *Id.*

206 RETAIL ACTION PROJECT, About, <http://retailactionproject.org/about/> (last visited Sept. 6, 2012).

207 *Id.*

208 RETAIL ACTION PROJECT, About: Allies, <http://retailactionproject.org/about/allies> (last visited Sept. 6, 2012).

209 Amongst its social platforms, RAP is involving in the NYC Minimum Wage Campaign which lobbies to raise the minimum wage in New York State from the federal minimum of \$ 7.25 per hour to \$8.50 per hour, the NYC Paid Sick Days Campaign, which lobbies for minimum paid sick time for part-time and full-time employees. See <http://retailactionproject.org/coalitions/>.

210 See RWDSU's website at <http://rwdsu.info/> (last visited Sept. 6, 2012).

211 See RWDSU, <http://rwdsu.info/en/archives/7/rwdsu-community-rally-scoop-workers-7909.html> (last visited Sept. 6, 2012). "Fired workers from high end retail clothing store Scoop NYC joined with leaders of the RWDSU and its Retail Action Project (RAP), elected officials and labor and community leaders to announce a lawsuit against the trendy clothing retailer for labor violations, wage theft and discrimination over a period of 8 years from 2000-2008." (emphasis added.)

212 See Lincoln Anderson, *Cornered, Yellow Rat Bastard must cough up green to workers*, THE VILLAGER, Volume 77 No. 37, Feb. 13-19, 2008, available at [http://thevillager.com/villager\\_250/corneredyellowrat.html](http://thevillager.com/villager_250/corneredyellowrat.html) (last visited Sept. 6, 2012).

213 *Id.*; see also [http://blogs.villagevoice.com/runninscared/2006/10/yellow\\_rat\\_bast\\_1.php](http://blogs.villagevoice.com/runninscared/2006/10/yellow_rat_bast_1.php) (last visited Sept. 6, 2012).

214 See December 2011 blog entry "Yellow Rate Bastard May Have Violated Labor Laws" available at <http://retailactionproject.org/2006/12/yellow-rat-bastard-may-have-violated-labor-laws/> (last visited Sept. 6, 2012) and January 2007 blog entry entitled "Yellow Rat Bastard Sued for \$2million" available at <http://retailactionproject.org/2007/01/yellow-rat-bastard-sued-for-2m/> (last visited Sept. 6, 2012).

215 See [http://blogs.villagevoice.com/runninscared/2006/10/yellow\\_rat\\_bast\\_1.php](http://blogs.villagevoice.com/runninscared/2006/10/yellow_rat_bast_1.php) (last visited Sept. 6, 2012).

216 See *Clothing Store Workers RAP to the Tune of \$1.4 Million*, BRANDWORKERS INTERNATIONAL, available at <http://www.brandworkers.org/node/9075> (last visited Sept. 6, 2012).

217 *Id.*

218 See Mohammed Saleh, et al. v. Shoe Mania, LLC, 09-cv-04016-LTS, Document No. 125; see also Mischa Gaus, *NY Boutique Boss Arrested, Faces 4 Years in Jail for Stealing Wages*, LABOR NOTES, December 25, 2010, available at <http://labornotes.org/2010/02/ny-boutique-boss-arrested-faces-4-years-jail-stealing-wages> (last visited Sept. 6, 2012).

219 RAP's protests resulted in face to face negotiations with the owners of the shopping center. See *Protesters rally in front of Qns. Center*, QUEENS CHRON., November 4, 2010, available at [http://www.qchron.com/editions/central/protesters-rally-in-front-of-qns-center/article\\_38292a89-f2b8-5e4f-bcf2-7b22067b79fd.html](http://www.qchron.com/editions/central/protesters-rally-in-front-of-qns-center/article_38292a89-f2b8-5e4f-bcf2-7b22067b79fd.html) (last visited Sept. 6, 2012).

220 RAP is described on its website as a membership organization of retail workers. See <http://retailactionproject.org/about/> (last visited Sept. 6, 2012).

221 See discussion of Coalition of Immokalee Workers, Restaurant Opportunities Center, and Koreatown Immigrant Workers Alliance, *infra*.

222 See RAP's website explaining that its strategy is to use the lawsuits "to convince employers to sign neutrality agreements and then win union elections." RETAIL ACTION PROJECT, <http://retailactionproject.org/2010/06/u-social-forum-takes-detroit-by-storm/> (last visited Sept. 6, 2012); see also PAM WHITEFIELD, SALLY ALVAREZ, YASMIN EMRANI, IS THERE A WOMEN'S WAY OF ORGANIZING? GENDER, UNIONS, AND EFFECTIVE ORGANIZING, Cornell University Division of Extension and Outreach School of Industrial and Labor Relations Report 13 (2009) (explaining that "RAP was created through the efforts of RWDSU as a way to reach out to young NYC retail workers, spark organizing campaigns, and establish a worker-community base") [hereinafter IS THERE A WOMEN'S WAY OF ORGANIZING].

223 RAP's protests at the Queens Center shopping center in New York resulted in face to face negotiations with the owners of the shopping center over wages and employees services. See *Protesters rally in front of Qns. Center*, *supra* note 219.

224 RWDSU trains members of RAP in organizing: "With our Member Volunteer Organizing Training, we are trying to develop the leadership of RAP so they can get involved in organizing. We do workshops so they can build their skills and can step up. [We have workshops on] how to do outreach, how to talk to your coworkers, how to motivate them, how to deal with excuses, overcome fear, listening skills." See IS THERE A WOMEN'S WAY OF ORGANIZING, *supra* note 222, at 26.

225 Steven Greenhouse, *Wal-Mart Workers Try the Nonunion Route*, N.Y. TIMES, June 14, 2011, available at <http://www.nytimes.com/2011/06/15/business/15walmart.html?pagewanted=all> (last visited Sept. 6, 2012).

226 *Id.*

227 See OUR WALMART, FAQs, available at <http://forrespect.org/our-walmart/faq/> (last visited Sept. 6, 2012).

228 See UFCW National Headquarters' 2011 LM-2 filing with the Department of Labor, Question 11(b) ("The UFCW has a subsidiary organization maintained in Washington DC named the Organization United For Respect at Walmart whose purpose as stated in the by-laws will be the betterment of the conditions of the current and former associates at Wal-Mart Stores, Inc., within the meaning of Section 501(c)(5) of the Internal Revenue Code, and to make Wal-Mart a better corporate citizen. The financial transactions are included in the 12/31/11 filing of this LM2."), available at <http://kcerds.dol-esa.gov/query/getOrgQry.do> (last visited Sept. 6, 2012).

229 See MAKING CHANCE AT WALMART, <http://makingchangeatwalmart>.

org/ (last visited Sept. 6, 2012).

230 See “Wal-Mart Workers Try the Nonunion Route”, explaining that UFCW paid most of the salary of several hundred members, on leave from their jobs, to knock on doors and otherwise reach out to Wal-Mart employees to urge them to join OUR Walmart, *supra* note 174; see also Lila Shapiro, *The Walmart Problem: Uncovering Labor’s Place in an Era of Joblessness*, HUFFINGTON POST, December 12, 2011, available at [http://www.huffingtonpost.com/2011/12/12/our-walmart-labor-unions\\_n\\_1143527.html](http://www.huffingtonpost.com/2011/12/12/our-walmart-labor-unions_n_1143527.html) (last visited Sept. 6, 2012). Article profiles Philip Meza, an member of the UFCW who is paid to organize Walmart employees on behalf of OUR Walmart.

231 OUR WALMART, [http://forrespect.nationbuilder.com/sign\\_the\\_declaration](http://forrespect.nationbuilder.com/sign_the_declaration) (last visited Sept. 6, 2012).

232 *Id.*

233 *Id.*

234 *Id.*

235 *Id.*

236 *Id.*

237 *Id.*

238 See Making Change at Walmart Stands With Walmart Associates in Bentonville, Arkansas, UFCW Newsletter, Volume 10, Issue 11, June 21, 2011, available at [www.ufcw400.org/wp-content/uploads/2011/06/OnPoint10.11.pdf](http://www.ufcw400.org/wp-content/uploads/2011/06/OnPoint10.11.pdf) (last visited Sept. 6, 2012).

239 *Id.*

240 UNITED FOOD AND COMMERCIAL WORKERS UNION, Respect DC, OUR Walmart Visits Walmart Board Member, March 27, 2012, <http://www.ufcw400.org/2012/03/respect-dc-our-walmart-visit-walmart-board-member/> (last visited Sept. 6, 2012).

241 See Patrick Flannery, *Rockers Rally Against Low Wages and New Walmart Store in Los Angeles*, ROLLING STONE MAGAZINE, June 30, 2012, available at <http://www.rollingstone.com/music/news/rockers-rally-against-low-wages-and-new-walmart-store-in-los-angeles-20120630#ixzz204bvsxw6> (last visited Sept. 6, 2012).

242 See Spencer Woodman, *Labor Takes Aim at Walmart—Again*, THE NATION, January 4, 2012, available at <http://www.thenation.com/article/165437/labor-takes-aim-walmart-again> (last visited Sept. 6, 2012).

243 Membership dues are \$5.00 per month. See OUR WALMART, Become a Member, [http://forrespect.nationbuilder.com/become\\_a\\_member](http://forrespect.nationbuilder.com/become_a_member) (last visited Sept. 6, 2012).

244 Wal-mart has been the subject of a number of NLRB cases in which Associate coverage has been presumed. See *e.g.*, Wal-Mart Stores, Inc., 352 NLRB 815 (2008).

245 The OUR Walmart Vision and Mission posted on the organization’s website confirms the participants in the organization are employees: “We envision a future in which our company treats us, the Associates of Walmart, with respect and dignity. We envision a world where we succeed in our careers, our company succeeds in business, our customers receive great service and value, and Walmart and Associates share all of these goals.” OUR WALMART, About us, <http://forrespect.org/our-walmart/about-us/> (last visited Sept. 6, 2012).

246 Moreover, given OUR Walmart’s goals, it would hardly be credible for the group to claim that if given the chance it would not engage Wal-mart in bargaining with the company over the terms and conditions of employment of its members and other associates.

247 *Supra* note 105.

248 The UFCW’s 2011 LM-2 filing with the Office of Labor-Management Standards (OLMS) explains “The UFCW has a subsidiary organization maintained in Washington, DC named the Organization United For Respect at Walmart whose purpose as stated in the by-laws will be the betterment of the conditions of the current and former associates at Wal-Mart Stores, Inc., within the meaning of Section 501(c)(5) of the Internal Revenue Code, and to make Wal-Mart a better corporate citizen.” The UFCW’s LM-2

report is available on the OMLS’s website at <http://kcerds.dol-esa.gov/query/getOrgQry.do> and is on file with the author.

249 29 U.S.C. 402(j)

250 See COALITION OF IMMOKALEE WORKERS, About CIW, <http://ciw-online.org/about.html> (last visited Sept. 6, 2012).

251 *Id.*

252 See *Major Grower to Join Wage Plan*, WALL ST. J., October 13, 2010, available at <http://online.wsj.com/article/SB1000142405274870476390457550550086511426.html>.

253 COALITION OF IMMOKALEE WORKERS, FAQs, [http://www.ciw-online.org/FFP\\_FAQ.html](http://www.ciw-online.org/FFP_FAQ.html) (last visited Sept. 6, 2012).

254 *Id.*

255 *Id.*

256 See Bon Appetite Management Company, Code of Conduct for Sustainable Tomato Suppliers, April 24, 2009, available at <http://www.bamco.com/sustainable-food-service/ciw-agreement> (last visited Sept. 6, 2012). According to CIW’s website, the Codes of Conduct contain the following provisions: 1) A pay increase supported by the price premium Participating Buyers pay for their tomatoes; 2) Compliance with the Code of Conduct, including zero tolerance for forced labor and systemic child labor; 3) Worker-to-worker education sessions conducted by the CIW on the farms and on company time to insure workers understand their new rights and responsibilities; 4) A worker-triggered complaint resolution mechanism leading to complaint investigation, corrective action plans, and, if necessary, suspension of a farm’s Participating Grower status, and thereby its ability to sell to Participating Buyers; 5) A system of Health and Safety volunteers on every farm to give workers a structured voice in the shape of their work environment; 6) Specific and concrete changes in harvesting operations to improve workers’ wages and working conditions, including an end to the age-old practice of forced overfilling of picking buckets (a practice which effectively denied workers’ pay for up to 10% of the tomatoes harvested), shade in the fields, and time clocks to record and count all compensable hours accurately; and 7) Ongoing auditing of the farms to insure compliance with each element of the Fair Food Program. See COALITION OF IMMOKALEE WORKERS, Fair Food Program, Frequently Asked Questions, [http://ciw-online.org/FFP\\_FAQ.html](http://ciw-online.org/FFP_FAQ.html) (last visited Sept. 6, 2012).

257 See Laura Layden, *Tasty deal: Farmworkers get raise, agreement with tomato growers*, NAPLES DAILY NEWS, Nov. 16, 2010, available at <http://www.naplesnews.com/news/2010/nov/16/historic-deal-made-between-immokalee-workers-flor/> (last visited Sept. 6, 2012).

258 *Id.*

259 Pacific Tomato Growers, Ltd.’s Code of Conduct with CIW is available at [www.news-press.com/assets/pdf/A41653681013.PDF](http://www.news-press.com/assets/pdf/A41653681013.PDF) (last visited Sept. 6, 2012).

260 The Fair Food Standard Council is a branch of CIW that monitors retailers compliance with Code of Conduct and investigates complaints. <http://fairfoodstandards.org/code.html> (last visited Sept. 6, 2012).

261 *Id.*

262 <http://fairfoodstandards.org/code.html> (last visited Sept. 6, 2012).

263 See PACIFIC TOMATO GROWERS, LTD., Code of Conduct, available at [www.news-press.com/assets/pdf/A41653681013.PDF](http://www.news-press.com/assets/pdf/A41653681013.PDF) (last visited Sept. 6, 2012). The Code of Conduct also requires that the grower provide transparency to CIW and permit “third-party monitoring” to ensure the worker center is passing the “penny per pound” payments on to workers.

264 *Id.*

265 See COALITION OF IMMOKALEE WORKERS, <http://www.ciw-online.org/101.html> (last visited Sept. 6, 2012).

266 See CIW’s 2010 Form 990 for 501(c)(3) tax exemption status identifying the organization’s corporate structure. The Form 990 is available online at <http://foundationcenter.org/findfunders/990finder/> and a copy is on file with the author.

267 *Id.*

268 See the discussion *supra* of Codes of Conduct negotiated by CIW with the Tomato Growers Exchange, individual growers, and retailers.

269 See PACIFIC TOMATO GROWERS, LTD., Code of Conduct, available at [www.news-press.com/assets/pdf/A41653681013.PDF](http://www.news-press.com/assets/pdf/A41653681013.PDF) (last visited Sept. 6, 2012).

270 *Id.*

271 *Id.*

272 *Id.*

273 It was widely reported that the United Farm Workers had difficulties limiting representation solely to agricultural workers. Indeed, the UFW admitted that it had to create separate organizations for commercial workers on its membership rosters to avoid coverage by the NLRA. See Jennifer Gordon, *Lau, Lawyers, and Labor*, 8 U. PA. J. LAB. & EMP. L. 1, 15, n. 45 (2005). See Laura Layden, *Tasty deal: Farmworkers get raise, agreement with tomato growers*, *supra* note 257.

274 *Supra* notes 92–93 and accompanying text.

275 See ROC UNITED, About Us, available at <http://rocunited.org/about-us/> (last visited Sept. 6, 2012).

276 See *Immigrant Restaurant Workers Hope to Rock New York*, DOLLARS AND SENSE, February 2004, available at [www.dollarsandsense.org/archives/2004/0104labotz.html](http://www.dollarsandsense.org/archives/2004/0104labotz.html) (last visited Sept. 6, 2012).

277 Until 2004, HERE listed Jayaraman and Mamdouh as employees on the union's LM-2 filings with the Department of Labor. See Unite HERE Local 100's LM-2 filings with the Department of Labor for 2002, 2003, and 2004, available at <http://kcerds.dol-esa.gov/query/getOrgQry.do> (last visited September 17, 2012).

278 See ROC UNITED, Our Work, <http://rocunited.org/our-work/> (last visited Sept. 6, 2012).

279 See ROC UNITED, <http://rocny.org/node/123> (last visited Sept. 6, 2012).

280 ROC-NY, Who we are, <http://www.rocny.org/who-we-are> (last visited Sept. 6, 2012).

281 See ROC UNITED, Our Work: Workplace Justice, available at <http://rocunited.org/our-work/workplace-justice/> (last visited Sept. 6, 2012).

282 A ROC website for the organization's Workplace Justice Campaign against one nationwide restaurant chain asks consumers to contact the company and ask it to negotiate with ROC United to increase wages and provide paid sick days to workers. See DIGNITY AT DARDEN, <http://www.dignityatdarden.org/get-involved---consumers.html> (last visited Sept. 6, 2012).

283 See *Andiamo lawyer disputing ROC-MI allegations*, PRESS & GUIDE, Dec. 1, 2009, available at <http://www.pressandguide.com/articles/2009/12/01/news/doc4b155eb173e5d094598629.txt>; see also Olivia Carrino, 'U' students protest *Andiamo* restaurant of Dearborn for workers' rights breaches, THE MICHIGAN DAILY, February 18, 2010, available at <http://www.michigandaily.com/content/u-students-protest-andiamo-restaurant-dearborn> (last visited Sept. 6, 2012) (quoting Jaimie Philip, a ROC-MI intern, who said the organization began its campaign against *Andiamo* restaurant by delivering a demand letter to the restaurant on Nov. 5, which all the workers involved in the campaign had signed.).

284 *Id.* Philip explained that the demand letter stated that if the restaurant did not respond within two weeks, ROC-MI would take legal and community action. *Andiamo* claimed through its attorneys that it had only two days to respond, not two weeks. See *supra* note 283.

285 *Id.* ROC-MI and the workers filed suit in the U.S. District Court for the Eastern District of Michigan on January 12, 2010. See Case No. 2:10-cv-10110.

286 See NLRB Charge numbers 07-CA-052545, 07-CA-052607, 07-CA-052623, and 07-CA-052880.

287 See Sean Delaney, *Ex-Andiamo employees protest their treatment*, PRESS & GUIDE, January 16, 2010, available at <http://www.pressandguide.com/articles/2010/01/16/news/doc4b51de66b6b05191110046.txt> (last visited

Sept. 6, 2012); see also *Cleared plate: Dispute between Andiamo Dearborn and Employees Finds Resolution*, METRO TIMES, March 9, 2011, available at <http://metrotimes.com/news/cleared-plate-1.1116126> (last visited Sept. 6, 2012).

288 See *Cleared plate: Dispute between Andiamo Dearborn and Employees Finds Resolution*, *supra* note 287.

289 *Id.*

290 *Id.*

291 Paul Abowd, *Restaurant Workers Launch Multi-City Campaign to Transform Low-Wage Industry*, LABOR NOTES, February 4, 2010, available at <http://labornotes.org/2010/01/restaurant-workers-launch-multi-city-campaign-transform-low-wage-industry> (last visited Sept. 6, 2012).

292 *Cleared plate: Dispute between Andiamo Dearborn and Employees Finds Resolution*, *supra* note 287. The ROC-United Affiliate in Maine, ROC-ME, launched a similar campaign against the Front Room restaurant in 2010. See *Group of Restaurant Workers Sues Front Room*, MAINE BUSINESS, available at [http://www.pressherald.com/archive/group-of-restaurant-workers-sues-front-room\\_2010-01-06.html](http://www.pressherald.com/archive/group-of-restaurant-workers-sues-front-room_2010-01-06.html); *Employees Defend Owner of Restaurant*, MAINE BUSINESS, available at <http://mainebusiness.maintoday.com/story.php?ac=PHbiz&id=308296> (last visited Sept. 6, 2012). And a Chicago affiliate, CHI-ROC, sued and settled with Ole Ole restaurant the same year. See ROC UNITED BLOG, <http://rocunited.blogspot.com/search/label/Ole%20Ole> (last visited Sept. 6, 2012).

293 *Id.*

294 ROC UNITED, About us, <http://rocunited.org/about-us/> (last visited Sept. 6, 2012).

295 Because Professor Duff and Weissman-Nussbaum covered this point so well in their materials, as summarized *supra* at 28–33, it would be duplicative to cover them here other than to restate the obvious conclusion that a purpose of ROC and its affiliates is to deal with employers and is therefore subject to the NLRA.

296 This organization originally was named “Korean Immigrant Worker Advocates.”

297 Jennifer Sinco Kelleher, *Advocates for Immigrant Worker Rights*, L.A. TIMES, July 26, 2002, available at <http://articles.latimes.com/2002/jul/26/local/me-thelaw26> (last visited Sept. 6, 2012).

298 See JARED SANCHEZ ET AL., KOREATOWN: A CONTESTED COMMUNITY AT A CROSSROADS I (April 2012).

299 Jake Doherty, *Koreatown: Workers Called Hidden Riot Victims*, Los Angeles Times, April 24, 2004, available at [http://articles.latimes.com/1994-04-24/news/ci-49982\\_1\\_american-workers](http://articles.latimes.com/1994-04-24/news/ci-49982_1_american-workers) (last visited Sept. 6, 2012).

300 *Id.*

301 KIWA, About us, <https://kiwa.org/about-kiwa/kiwa-victories/#kiwaorganizeskorean> (last visited Sept. 6, 2012).

302 *Id.*, KIWA Victories, <http://kiwa.org/about-kiwa/kiwa-victories/> (last visited Sept. 6, 2012).

303 *Koreatown: Workers Called Hidden Riot Victims*, *supra* note 299.

304 AZIZ CHOUDRY ET AL., ORGANIZE!: BUILDING FROM THE LOCAL FOR GLOBAL JUSTICE 302 (2012) [hereinafter CHOUDRY, ET AL., ORGANIZE!].

305 Fine, *supra* note 189, at 110.

306 *Id.*

307 *Id.* at 112. “Once a week, RWAK holds a protest outside a local restaurant and offers a seminar on workers’ rights, education, or immigrant rights. In its effort to establish itself as a worker association that would operate as a quasi-union of restaurant workers, the organization offers a range of member benefits.”

308 *Id.* at 109–12.

309 DARANEE PETSOD ET AL., INVESTING IN OUR COMMUNITIES: STRATEGIES FOR IMMIGRANT INTEGRATION 161, available at <http://www.aecf.org/-/media/Pubs/Topics/Special%20Interest%20Areas/Other/InvestinginOurCommunitiesStrategiesforImmigra/Investing%20in%20Our%20Communities%20%20compiled%20%20pdf.pdf>.

310 *Id.*

311 The IWU was self-described as a new type of union that was worker-led, community-based, and independent of the AFL-CIO. KIWA created the IWU as a labor union with a focus on improving working conditions for low-wage immigrant workers with future goals of representing workers at multiple businesses and low-wage industries throughout Koreatown. Assi Super was IWU's first major campaign. After the Union lost the NLRB election of Assi Super employees the union withdrew its petition and its attempts to organize workers. See Yungsuhn Park, *The Immigrant Workers Union: Challenges Facing Low-Wage Immigrant Workers in Los Angeles*, 12 *ASIAN L.J.* 67, 79–80 (2004).

312 *Id.*

313 *Id.* at 81.

314 *Id.*

315 *Id.* The IWU appears to have ceased further activities following the Assi Super campaign.

316 KIWA, KIWA Victories, <http://kiwa.org/about-kiwa/kiwa-victories/> (last visited Sept. 6, 2012); see also CHOUDRY, ET AL., ORGANIZE!, *supra* note 304, at 302; ANGIE CHUNG, LEGACIES OF STRUGGLE: CONFLICT AND COOPERATION IN KOREAN AMERICAN POLITICS 163 (2007).

317 Naduris-Weissman, *The Worker Center Movement*, *supra* note 9, at 248.

318 <http://kiwa.org/about-kiwa/kiwa-victories/> (last visited Sept. 6, 2012); see also CHOUDRY, ET AL., ORGANIZE!, *supra* note 304, at 302.

319 See Naduris-Weissman, *supra* note 9, at 327 (“KIWA, which has spawned several organizations that are tied to it but *nominally* independent, such as the RWAK and the IWU . . . .”) (Emphasis added).

320 See CHOUDRY, ET AL., ORGANIZE!, *supra* note 304, at 302; see also Yungsuhn Park, *The Immigrant Workers Union: Challenges Facing Low-Wage Immigrant Workers in Los Angeles*, 12 *ASIAN L.J.* 67 (2004) [hereinafter Park, *The Immigrant Workers Union*] (“The eight employees walked down the street one block into the office of Korean Immigrant Workers Advocates (KIWA), where the Immigrant Workers Union (IWU) was born . . . .”). KWIA’s website chronicles the successes of both organizations, “After a militant and high-profile campaign during which KIWA organized Korean and Latino restaurant workers to demand an industry-wide reform, labor law compliance in the industry has dramatically increased to 50%. Through this campaign the Restaurant Workers Association of Koreatown was formed and continues organizing workers.” *available at* <http://kiwa.org/about-kiwa/kiwa-victories/> (last visited Sept. 6, 2012).

321 Park, *The Immigrant Workers Union*, *supra* note 320, at 81.

322 See KIWA, <http://kiwa.org/> (last visited Sept. 6, 2012).

323 Naduris-Weissman, *The Worker Center Movement*, *supra* note 9, at 330.

324 *Id.*

325 *Id.* at 329.

326 KIWA, Victories, *available at* <http://kiwa.org/about-kiwa/kiwa-victories/> (last visited Sept. 6, 2012).

327 *Id.*