A Special Labor Day 2013 Report: Is Labor Poised For Rebirth?

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INTRODUCTION

In July 2013, the AFL-CIO released a report in advance of its annual convention that provides a blueprint of how the labor movement intends to reinvent itself. The document—*Interim Report to the AFL-CIO Executive Council on AFL-CIO Pre-Convention Outreach and Engagement* (the Report)[1]—discusses the organization's many outreach efforts, and how it plans to evolve and adapt to combat waning membership.

The release of this Report coincides with significant executive-level appointments to federal agencies that are ready to advance Obama administration policies that have languished or been judicially delayed. For the past three years, Democrats have enjoyed a slim majority in the Senate,[2] while Republicans control the House of Representatives.[3] Because of this ideological divide, very few bills stand a chance of becoming law. According to recent reports,[4] the 113th Congress is poised to be the most unproductive Congress in recent history, having passed only 22 bills to date. Because of this legislative logjam, the administration is turning increasingly to federal agencies to carry out its agenda. Federal agencies recently published their spring 2013 regulatory agendas.[5] The Department of Labor's (DOL) regulatory roster alone contains an ambitious 68 items to be proposed or finalized in the coming months.

Despite this full schedule, a number of factors have stemmed the regulatory tide over the past few years. In January, Hilda Solis stepped down as Secretary of Labor, leaving the DOL rudderless. At the National Labor Relations Board (NLRB or the Board), several significant rule-making efforts were stayed after various federal courts found the rules invalid on either constitutional or procedural grounds. Notably, on January 25, 2013, the U.S. Court of Appeals for the D.C. Circuit held in *Noel Canning v. NLRB*[6] that President Obama's January 4, 2012 recess appointments of NLRB members Sharon Block, Terence Flynn, and Richard Griffin were unconstitutional, and therefore the Board lacked a legitimate quorum.[7] As a result of this decision, several rules and Board decisions made since the recess appointments have been challenged.[8]

The turn of events in July 2013 should remove any sense of complacency that had set in while agency activity was put on hold. In an effort to push consideration of the stalled executive nominees, Senate Majority Leader Harry Reid (D-NV) threatened to change Senate filibuster rules, commonly referred to as invoking the "nuclear option." As part of a deal to avoid this change, Senate leaders agreed to a series of concessions, including immediate consideration of Thomas Perez as Labor Secretary without the threat of a filibuster, the removal of the two remaining NLRB recess appointees,[9] the appointment and rapid consideration of two new, AFL-CIO-vetted Board candidates,[10] and a vote on all five pending Board nominations.[11]

In the days leading up the deal, in what some believe to be an effort to exert pressure on Senate leaders to ensure the nominees would be confirmed, Presidents of the International Brotherhood of Teamsters, United Food and Commercial Workers, and UNITE Here sent a letter

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1 Interim Report to the AFL-CIO Executive Council on AFL-CIO Pre-Convention Outreach and Engagement (July 2013), *available at* http://www.aflcio.org/content/download/88871/2368791/LSreportjuly.pdf.

2 The Senate comprises 53 Democrats, 45 Republicans, and 2 Independents (who caucus with the Democrats).

3 The House of Representatives comprises 233 Republicans and 200 Democrats.

4 *See* Rachel Weiner and Ed O'Keefe, *Judging the (un)productivity of the 113th Congress*, The Washington Post (Aug. 2, 2013), *available at* http://www.washingtonpost.com/blogs/the-fix/wp/2013/08/02/judging-the-unproductivity-of-the-113th-congress/; *see also* Amanda Terkel, *113th Congress on Pace to be Least Productive in Modern History*, Huffington Post (July 8, 2013) *available at* http://www.huffingtonpost.com/2013/07/08/113th-congress-bills_n_3563008.html.

5 *See* Ilyse Schuman and Michael Lotito, *Workplace Policy Institute: Agencies Release Spring 2013 Regulatory Agendas; Final Persuader Rule Expected in November*, Littler ASAP (July 8, 2013) *available at* http://www.littler.com/publication-press/publication/workplace-policy-institute-agencies-release-spring-2013-regulatory-age.

6 705 F.3d 490 (D.C. Cir. 2013). Additional Courts of Appeal have since come to the same conclusion as the D.C. Circuit in *Noel Canning*.

7 The U.S. Supreme Court held in *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010), that the Board requires at least three sitting members to constitute a valid quorum.

8 The U.S. Supreme Court has agreed to consider *Noel Canning* during its October 2013 term.

9 Recess appointee Terrence Flynn announced his resignation from the Board in May 2012 following allegations cited in an NLRB Inspector General report that he committed ethics violations while employed by the Board, but before he assumed his Board member position. Therefore, Sharon Block and Richard Griffin were the remaining Board recess appointees.

10 Kent Hirozawa (D) and Nancy Schiffer (D).

11 The full slate of Board candidates comprises Chairman Mark Pearce (D), Kent Hirozawa (D), Nancy Schiffer (D), Harry I. Johnson, III (R) and Philip A. Miscimarra (R).

to Sen. Reid and Rep. Nancy Pelosi (D-CA) criticizing the Affordable Care Act's[12] impact on union-sponsored, multiemployer health plans. The timing of this public criticism of the President's signature legislative achievement suggests that labor's support of the administration is not unwavering. The success of this tactic indicates that labor's political influence should not be discounted.

The practical effects of this deal are many and far-ranging. On July 18, 2013, the Senate confirmed the nomination of Perez to be the next Labor Secretary. With restored leadership, the DOL will be able to carry out its aggressive agenda.[13]

The NLRB now has a full complement of members—and is restored to full operating capacity.[14] As such, it can implement rules, issue decisions, and create policies that have remained relatively dormant.

NEW FACE OF THE NLRB

The current Board members are Chairman Mark Pearce (D), Kent Hirozawa (D), Nancy Schiffer (D), Harry I. Johnson, III (R) and Philip A. Miscimarra (R). With Schiffer and Hirozawa joining current Chairman Pearce as the Democratic members, the Board will likely reveal its pro-labor bent. Pearce was sworn in as a Board Member on April 7, 2010, and named Chairman on August 27, 2011. During this period, the Board issued several divisive rules and opinions.

In December 2011, Pearce and former member Craig Becker approved a final rule[15] that adopted a subset of the more expansive representation election proposal[16] issued in June 2011. While Pearce was a member, the Board also issued the controversial Notice Posting rule—*Notification of Employee Rights Under the National Labor Relations Act*[17]—which would have required most private sector employers to post a notice informing employees of their rights under the NLRA.[18]

Bargaining Unit Determination

In addition to rule-making, the Board during Pearce's first term issued many precedent-upending decisions. Notably, in *Specialty Healthcare*,[19] the Board overruled its prior decision in *Park Manor Care Center*[20] and adopted a new standard for determining appropriate bargaining units that could lead to the creation of "micro" bargaining units. Under the new standard articulated in *Specialty Healthcare*, so long as a union's petitioned-for unit consists of a clearly identifiable group of employees, the Board will presume the unit is appropriate. An employer would need to demonstrate that any additional employees it feels should join the unit share an "overwhelming" community of interest with those in the petitioned-for unit.[21]

On August 15, 2013, the U.S. Court of Appeals for the Sixth Circuit affirmed the Board's *Specialty Healthcare* decision.[22] A nursing home operator had appealed the Board's order certifying a petitioned-for bargaining unit that consisted only of certified nursing assistants. The

12 For more information on the impact of the Affordable Care Act on employers, *see* Ilyse Schuman, Michael Lotito, Steve Friedman, Barry Hartstein, Linda Jackson, and Tammy McCutchen, *Workplace Policy Institute: The Labor, Employment and Benefits Law Implications of the Affordable Care Act - Are You Prepared?*, Littler Report (May 9, 2013), *available at* http://www.littler.com/files/press/pdf/WorkplacePolicyInstitute-TheLaborEmploymentAndBenefitsLawImplicationsOfTheAffordableCareAct-AreYouPrepared.pdf.

13 Just days after Perez was sworn in as Labor Secretary, two far-ranging rules under development by the DOL's Office of Federal Contract Compliance Programs (OFCCP) were sent to the Office of Management and Budget (OMB) for final review. The two rules will amend a contractor's and subcontractor's affirmative action and nondiscrimination obligations towards protected veterans and individuals with disabilities. This is the last action in the rule-making process before the agency can formally publish the final rule in the *Federal Register*.

14 Chairman Pearce's current term expires on Aug. 27, 2013, but was confirmed for another 5-year term on July 30, 2013; Nancy Schiffer was sworn in on Aug. 2, 2013, for a term expiring on Dec. 16, 2013; Kent Hirozawa was sworn in on Aug. 5, 2013, for a term expiring on Aug. 27, 2016; Philip Miscimarra was sworn in on Aug. 7, 2013, for a term expiring on Dec. 16, 2017;, and Harry Johnson, III, was sworn in on August 12, 2013 for a term expiring on Aug. 27, 2015. Updated information on Board members and their terms is available at http://www.nlrb.gov/who-we-are/board.

15 76 Fed. Reg. 80,137-80,189 (Dec. 22, 2011).

16 76 Fed. Reg. 36,811-36,847 (June 22, 2011).

17 76 Fed. Reg. 54,005-54,050 (Aug. 30, 2011).

18 On June 14, 2013, the U.S. Court of Appeals for the Fourth Circuit joined the U.S. Court of Appeals for the D.C. Circuit in invalidating this rule. *Chamber of Commerce of the United States v. NLRB*, No. 12-1757 (4th Cir. June 14, 2013); *National Association of Manufacturers, et al. v. NLRB*, No. 12-5068 (D.C. Cir. May 7, 2013).

19 356 NLRB No. 56 (2010).

20 305 NLRB 872 (1991).

21 *See* Anita Polli and Carie Torrence, *NLRB Defines New Standard for Determining Appropriate Bargaining Units*, Littler ASAP (Sept. 7, 2011), *available at* http://www.littler.com/publication-press/publication/nlrb-defines-new-standard-determining-appropriate-bargaining-units.

22 *Kindred Nursing Centers East v. NLRB (Specialty Healthcare II)*, No. 12-1027 (6th Cir. Aug. 15, 2013).

employer sought to include other employees who shared common benefits, personnel policies, training, and break areas, and attended the same work-related meetings and holiday functions, among other similarities. The Board, however, denied their inclusion on the grounds that they did not share an *overwhelming* community of interest with the nursing assistants, and referenced earlier cases in which the Board instead adopted the "traditional" community of interest test.

The Sixth Circuit, in affirming the Board's unit determination, accorded the agency a great deal of deference: "If the Board believes that it can best fulfill its statutory duty by adopting a test from one of its precedents over another, then the Board does not abuse its discretion."[23] Provided the NLRB can explain its reasoning in abandoning established precedent and choosing another to follow, the appellate court stated, it does not abuse its discretion.[24] Employers should therefore anticipate that the new Board, bolstered by this decision, may deviate from past precedent in other instances so long as they provide some rationale for doing so.

Notably, the Sixth Circuit rejected the employer's argument that the Board impermissibly enacted a new standard through adjudication instead of following the requisite public notice and comment process. The appellate court stated that:

> the Board did not abuse its discretion in adopting a generally applicable rule through adjudication instead of rulemaking because *NLRB v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 294 (1974), holds both that "the Board is not precluded from announcing new principles in an adjudicative proceeding and that the choice between rulemaking and adjudication lies in the first instance within the Board's discretion."[25]

As a result of this appellate case affirming the *Specialty Healthcare* decision, expect not only the rise of micro bargaining units that are easier to organize but harder for the employer to administratively manage, but also an emboldened Board that will continue to use decisions to alter existing labor policy.

Other Precedent-Changing Decisions

Evidence of the trend to upset long-standing labor precedent is already apparent. Another controversial case decided during Pearce's reign was *D.R. Horton, Inc.*[26] In this case, the arbitration agreement at issue required "as a condition of employment" that all employees agree to waive the right to bring class or collective actions in any forum.[27] The Board held that the agreement violated Section 8(a)(1) of the NLRA, which guarantees the rights of employees to engage in concerted, protected activity.[28]

The Board also issued *Banner Health System*[29] during Pearce's Chairmanship. In this case, the Board held that that an employer must establish a specific legitimate business justification for requiring employees to maintain confidentiality during internal investigations of employee complaints.[30] In a separate precedent-upending case, *WKYC-TV*,[31] the Board effectively overturned 50 years of dues check-off policy by holding that, like most other terms and conditions of employment, an employer's obligation to check off union dues continues after expiration of a collective bargaining agreement that contains such a provision. As a result of this decision, unless a CBA clearly provides otherwise, unions will continue to receive dues after contract expiration unless the employee resigns from the union or revokes the check-off authorization, or if employees are not paid during a strike or lockout.[32]

These are just a few examples of Pearce's readiness to drastically re-orient labor policy.

23 *Kindred Nursing Centers East* at 12.

24 *Id*. at 15.

25 *Id*. at 19.

26 357 NLRB No. 184 (2012).

27 *See* Henry Lederman, Gavin Appleby and William Emanuel, *NLRB Strikes Down Arbitral Class Action Waiver*, Littler ASAP (Jan. 9, 2012), *available at* http://www.littler.com/publication-press/publication/nlrb-strikes-down-arbitral-class-action-waiver.

28 *Id*. http://www.littler.com/publication-press/publication/nlrb-strikes-down-arbitral-class-action-waiver.

29 358 NLRB No. 93 (2012).

30 *See* John Skonberg, Earl "Chip" Jones III, and Gregory Brown, *Mum's Not Necessarily the Word: NLRB Complicates Employers' Internal Investigations*, Littler ASAP (Aug. 14, 2012) *available at* http://www.littler.com/publication-press/publication/mums-not-necessarily-word-nlrb-complicates-employers-internal-investig.

31 359 NLRB No. 30 (2012).

32 *See* Glenn Smith and David Broderick, *NLRB Overturns 50-Year-Old Precedent in Latest Decision on Dues-Checkoff Provision*, Littler ASAP (Dec. 21, 2012), *available at* http://www.littler.com/publication-press/publication/nlrb-overturns-50-year-old-precedent-latest-decision-dues-checkoff-pro.

New NLRB Members

The two other members filling the Democratic seats will likely follow Pearce's lead. Hirozawa had served as Pearce's chief counsel since 2010, and had worked as a Region II attorney earlier in his career. In addition, Hirozawa spent more than two decades in private practice representing unions, workers and employee benefit funds.

Nancy Schiffer came straight to the Board from serving as associate general counsel of the AFL-CIO. While serving as counsel for the AFL-CIO, Schiffer twice testified before congressional committees in support of Employee Free Choice Act (EFCA).[33] Although Schiffer acknowledged that EFCA can only be implemented through legislative action,[34] the stalled "ambush election" rule introduced in June 2011 contains several provisions that could achieve the same end.

This proposal would create a dozen changes to the current election process.[35] Most of these changes seek to expedite the election period in a variety of ways, such as holding a pre-election hearing within seven days from the filing of the petition, and deferring voter eligibility challenges until after the election is held, instead of addressing these preliminary questions at a pre-election hearing. These changes—if they are resurrected by the new Board—would clearly facilitate unionization. Now that the Board is operating with a full slate of members, there is no reason to think that movement on this rule—or others—will be delayed any further.

NLRB General Counsel

The Senate's anticipated confirmation of former recess appointee Richard Griffin, Jr., to serve as the Board's next General Counsel (GC)[36] would certainly aid the Board's transformation. Griffin—along with Sharon Block—was seated to the Board via recess appointment on January 4, 2012, and removed from his position as part of the recent Senate deal to approve a full complement of Board members and avoid filibuster reform.

Prior to his recess appointment to the Board, Griffin was a long-term attorney for the International Union of Operating Engineers (IUOE), acting as its general counsel toward the end of his tenure with the union. In addition, Griffin served on the board of directors for the AFL-CIO Lawyers Coordinating Committee for nearly two decades. Earlier in his career, Griffin worked as counsel to various Board members.

The NLRB general counsel position is a powerful and important one. The GC's office is ostensibly independent from the Board, and is charged with investigating and prosecuting charges of unfair labor practice cases, and supervising NLRB field offices. It is the GC who decides which cases to pursue, and which policies and procedures field agents should follow.

Although acting GC Lafe Solomon has been widely criticized for various policies he has implemented while serving in an acting capacity, there is no indication that Griffin's ideology would be dramatically different. Given his decidedly pro-labor background, time will tell whether Griffin will forge his own path or carry on where Solomon left off.

The Board's job is ostensibly that of neutral arbiter and enforcer of the nation's labor laws. Yet, three of the five Board members and nominated chief prosecutor have strong pro-labor backgrounds. If past is prologue, employers should anticipate an extremely active—and activist—Labor Board in the years to come.

AMBUSH ELECTIONS AND SOCIAL MEDIA

To increase its outreach efforts, the labor movement is increasingly relying on social media. According to the AFL-CIO's Report, in order to reach a wider base, labor must "include a wider diffusion of online tools for local use, pulling in young workers who have a facility for social media to work on communications and advertising on the Internet rather than traditional media."[37]

33 The Employee Free Choice Act was last introduced in the House and Senate in 2009, but failed to advance. The most contentious aspect of this bill is the "card check" provision, which would enable the National Labor Relations Board to certify a union as the employees' exclusive bargaining representative based on signed authorization cards only. The measure also contained a number of other expedited election procedures, including a mechanism for ratifying a first contract through binding arbitration, and provisions that would strengthen penalties for and enforcement of certain unfair labor practices.

34 Senate Committee on Health, Education, Labor and Pensions hearing, July 23, 2013. An archived webcast of the hearing is available at http://www.help.senate.gov/hearings/hearing/?id=169b019b-5056-a032-529b-881d2a8a9b11.

35 *See* Alan Model, *NLRB Proposed Rules Would Make it Easier for Unions to Organize*, Littler ASAP (June 27, 2011) *available at* http://www.littler.com/publication-press/publication/nlrb-proposed-rules-would-make-it-easier-unions-organize.

36 The White House sent Griffin's nomination, and acting General Counsel Lafe Solomon's withdrawal, to the Senate on August 2, 2013.

37 AFL-CIO Report, at 13.

Contacting employees directly via email is one way in which unions could expand their reach and conduct organizing campaigns. The previously-mentioned proposal[38] issued by the NLRB in June 2011 would, among other significant changes to pre- and post- union election procedures, require employers to provide a final voter list (the "Excelsior list") that includes names, addresses, phone numbers and email addresses of their employees. Notably, under the proposed rule, the Excelsior list including the email addresses would need to be provided within two days after the election is scheduled.

A pared-down version[39] of the proposed rule was finalized in December 2011—and eventually stayed due to litigation finding the rule invalid[40]—but did not contain the email requirement. Nonetheless, these provisions are not gone for good.

During a July 23, 2013 Senate Committee hearing to consider the nominations of Nancy Schiffer and Kent Hirozawa to be members of the NLRB,[41] lawmakers asked the nominees whether they would pursue this expansion of the Excelsior list requirements if confirmed. Schiffer said that these portions of the proposal are still pending, so if the Excelsior list provisions were to once again come before the Board, she would "consider it at that point in time." Both Schiffer and Hirozawa claimed that they would not want to prejudge the issue before considering it with other members, but acknowledged that the potential privacy issue raised "legitimate concerns that would have to be considered." Hirozawa noted that these privacy concerns "are very substantial." Both candidates said they would be willing to consider an employee "opt out" provision, but made no commitments.

It would come as no surprise if the fully-functional NLRB were to soon revisit the June 2011 rule, complete with the email contact provisions. If such a rule is enacted, unions will no doubt exploit this means of direct employee communication.

The use of electronic communications for labor-related purposes has been a hot-button issue in recent years. Whether an employer's policy limiting employees' social media use unlawfully interferes with employees' Section 7 activities under the NLRA is an evolving area of law.[42] Between the summer of 2011 and the spring of 2012, acting GC Lafe Solomon published three Advice Memos that expressed his views on the application of the NLRA to social media policies.[43] While the Board has not established any hard and fast rules, it has made clear that certain blanket policies prohibiting electronic media use—and disciplinary action based on such use—can be deemed unlawful. The bottom line for employers is that the Board has made it more challenging to enforce certain restrictive social media policies, which has enabled more employees—and therefore unions—to engage in concerted activity.

Given the new composition of the Board, it is possible that in addition to issuing new decisions that further restrict an employer's ability to enforce social media workplace policies, it may also revisit a prior administration decision regarding electronic communications. Specifically, in 2007 the Board ruled in *Register Guard*[44] that employers may prohibit employee use of a company's email system for non-work solicitations, including union-related solicitations.[45] This precedent is in danger of being overturned.

The bottom line is that the more avenues unions can take to engage employees, the more likely they are to succeed in their organizing campaigns.

38 76 Fed. Reg. 36,811-36,847 (June 22, 2011).

39 76 Fed. Reg. 80,137-80,189 (Dec. 22, 2011). *See also* David Kadela, *Two-Member NLRB Majority Adopts Unprecedented Resolution to Move Forward With Subset of Election Rule Amendments*, Littler ASAP (Dec. 5, 2011), *available at* http://www.littler.com/publication-press/publication/two-member-nlrb-majority-adopts-unprecedented-resolution-move-forward-.

40 In *U.S. Chamber of Commerce v. NLRB*, Civil Action No. 11-2262 (D.D.C. May 14, 2012), the U.S. District Court for the District of Columbia held the NLRB rule invalid for lack of a quorum. Following this decision, the Board decided to stay the enforcement of the rule.

41 An archived webcast of the Senate Committee on Health, Education, Labor and Pensions hearing is available at http://www.help.senate.gov/hearings/hearing/?id=169b019b-5056-a032-529b-881d2a8a9b11.

42 For more information on the intersection of labor law and social media policies, *see* Chip McWilliams, Philip Gordon, and Kathryn Siegel, *Social Media Policies in the NLRB's Crosshairs*, Littler ASAP (Oct. 9, 2012), *available at* http://www.littler.com/publication-press/publication/social-media-policies-nlrbs-crosshairs.

43 *See* Mark Robbins and Jennifer Mora, *The NLRB and Social Media: General Counsel's New Report Offers Employers Some Guidance*, Littler ASAP (Sept. 9, 2011), *available at* http://www.littler.com/publication-press/publication/nlrb-and-social-media-general-counsels-new-report-offers-employers-som; Philip Gordon, *NLRB Report Challenges Validity of Many Commonly Used Social Media Policies*, Littler ASAP (Jan. 27, 2012), *available at* http://www.littler.com/publication-press/publication/nlrb-report-challenges-validity-many-commonly-used-social-media-polici; and Philip Gordon, *Three's a Charm: NLRB's Acting General Counsel Issues Third Guidance Document on Social Media and Approves One Policy*, Littler ASAP (June 5, 2012), *available at* http://www.littler.com/publication-press/publication/threes-charm-nlrbs-acting-general-counsel-issues-third-guidance-docum.

44 351 NLRB 1110 (2007).

45 *See* Philip L. Gordon and Michael Mankes, *NLRB Rules That Employers May Implement a Corporate E-Mail Policy That Has the Effect of Barring Union-Related Communications*, Littler ASAP (Dec. 28, 2007), *available at* http://www.littler.com/publication-press/publication/nlrb-rules-employers-may-implement-corporate-e-mail-policy-has-effect-.

AFL-CIO REPORT

The AFL-CIO Report serves as a tactical guide to the future of the labor movement. In the Report, the AFL-CIO identifies the organization's weaknesses, and discusses ways in which it can bolster union membership. The Report acknowledges that union membership has been steadily declining. Notably, the AFL-CIO states that union membership "is down by 1.9 million people since 2000. . . With the population growing and union membership flat or falling, our share of the electorate is down 30% since 2000."[46]

The latest U.S. Bureau of Labor Statistics (BLS) survey on union membership[47] supports this finding. According to the BLS survey released in January of 2013, 11.3% of wage and salary workers belonged to a union in 2012, down from 11.8% in 2011. Twenty years ago, the union membership rate was 20.1%. In addition, out of the 14.4 million union members in 2012, only seven million were private sector workers.

In order to address its dramatically shrinking support base, the AFL-CIO has been carrying out a massive outreach program to find ways to repackage itself and court new members. To this end, the Report focuses on creating "new models of representation" in which to engage more people to become part of the labor movement.[48]

UNION FRONT ORGANIZATIONS

One suggestion the AFL-CIO Report made was that labor should "open its rolls to other workers outside a collective bargaining context," and focus on organizing workers at the community level.[49] The Report states:

> . . . innovations such as Working America and community-based worker centers are making a difference in engaging America's workers and in building new capacity. The AFL-CIO and many of its affiliates are engaged in partnerships that support these organizations. Many feel that labor should pilot structural changes that would enable some type of formal affiliation for workers' organizations that do not engage in collective bargaining. Exciting examples of this work and the achievements of these worker-oriented organizations were numerous. Especially noteworthy are organizations that are helping workers achieve justice through community organizing, legislative, legal and regulatory campaigns—everything except collective bargaining. These efforts are viewed by many as a key element of a revitalized and successful labor movement.[50]

Union Front Organizations (UFOs)—often referred to as "worker centers" by labor—are typically non-profit organizations offering a variety of services to their members, including worker advocacy, lobbying, employment services, and legal advice.[51] A growing number of UFOs, however, are also "directly engaging employers or groups of employers to effectuate change in the wages, hours, and terms and conditions of employment for their members."[52] For example, the Retail Action Project (RAP), founded in 2005, is a UFO "dedicated to improving opportunities and workplace standards in the retail industry."[53] The Restaurant Opportunities Center (ROC) is a national UFO that has secured benefits for restaurant workers through its "workplace justice campaign" via, among other tactics, lawsuit settlements. These benefits include the formulation of grievance procedures and improvements in other workplace policies.[54] In many instances, the ROC demanded to negotiate with the restaurants on behalf of the workers. Similarly, the Korean Immigrant Worker Advocates (KIWA) is a UFO that has participated in "industry-wide organizing" resulting in increased minimum wage payments in certain Los Angeles restaurants.[55] The KIWA engaged in picketing and boycotting, as well as efforts to organize an independent workers union.

46 AFL-CIO Report, at 3.

47 Bureau of Labor Statistics, *Union Members Survey*, released January 23, 2013, *available at* http://www.bls.gov/news.release/union2.nr0.htm.

48 AFL-CIO Report, at 5.

49 *Id*. at 2-3. *See also* Kris Maher and Melanie Trottman, *AFL-CIO Seeks Answers in Crisis*, The Wall Street Journal, (July 26, 2013) ("The centerpiece of the strategy . . . expected to be unveiled to union members at a convention in September, involves bringing large grass-roots groups, such as the NAACP, the Hispanic civil-rights group National Council of La Raza and the Sierra Club, under the federation's umbrella and giving them decision-making power.").

50 *Id*. at 6.

51 *See* Stefan J. Marculewicz and Jennifer Thomas, *Labor Organizations by Another Name: The Worker Center Movement and its Evolution into Coverage under the NLRA and LMRDA*, Federalist Society for Law & Public Studies, Volume 13, Issue 3 (Oct. 2012).

52 *Id*. at 64.

53 *Id*. at 71.

54 *Id*. at 73.

55 *Id*. at 74.

More recently, the New York Communities for Change started its "Fast Food Forward"[56] initiative in various states to increase the minimum wage.[57] Protests orchestrated by Fast Food Forward are scheduled at various fast food restaurants nationwide. The organization claims that it is "a coalition of working families in low and moderate income communities fighting for social and economic justice throughout New York State" and that "by using direct action, legislative advocacy, and community organizing, NY Communities' members work to impact the political and economic policies that directly affect us."[58] It bears noting, however, that the organization is partially funded by the Services Employees International Union (SEIU), among other members of organized labor.

These "worker centers" are arguably labor unions as defined under the NLRA[59] and the Labor Management Reporting and Disclosure Act (LMRDA).[60] 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, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."[61]

The LMRDA provides an even broader definition. Section 3(i) of the LMRDA 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 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.[62]

These statutes delineate certain rights and protections for members. The LMRDA, for example, has established a number of recordkeeping and reporting requirements to ensure transparency and organizational democracy.[63] By working outside the "labor union" rubric, UFOs are able to operate in many respects as a union would, but without the accompanying reporting and legal obligations. UFOs have been actively representing and bargaining on behalf of workers regarding their wages and working conditions, yet cannot be held accountable for financial improprieties. It is not surprising, therefore, that the AFL-CIO seeks to capitalize on this loophole.

Such tactics have not gone unnoticed. On July 23, 2013, Rep. John Kline (R-MN), Chairman of the House Committee on Education and the Workforce, and Rep. David Roe (R-TN), Chairman of the House Subcommittee on Health, Employment, Labor, and Pensions, requested that the new Labor Secretary, Thomas Perez, make an official determination as to the LMRDA filing requirements for such "worker centers."[64] To date, Mr. Perez has not issued a determination.

Holding UFOs accountable to LMRDA obligations is only fair considering the drastic changes in store for employers and their labor consultants under the Act by way of the imminent "persuader" rule.

PERSUADER RULE

The DOL's Office of Labor Management Standards (OLMS) is slated to issue a final rule that will not only make it easier for unions to organize, but will dramatically jeopardize attorney/client confidentiality. The DOL's spring regulatory agenda indicates that the OLMS's "persuader rule"[65] will be finalized by November 2013. As indicated by the proposal[66] issued in June 2011, the OLMS seeks to broaden

56 More information about the Fast Food Forward movement is available at http://www.fastfoodforward.org/en.

57 *See* Diana Furchtgott-Roth, *Hiking Minimum Wage Threatens U.S. Jobs, Fast-Food Worker Protests Help Labor Unions, Not Labor*, MarketWatch (Aug. 2, 2013), *available at* http://www.marketwatch.com/story/hiking-minimum-wage-threatens-us-jobs-2013-08-02?dist=beforebell.

58 About NY Communities For Change, *available at* http://www.nycommunities.org/about.

59 29 U.S.C. §§ 151-169.

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

61 29 U.S.C. § 152(5).

62 29 U.S.C. § 402(i).

63 The Department of Labor's Office of Labor-Management Standards (OLMS) has posted a list of the LMRDA's filing requirements and applicable forms on its website, *available at* http://www.dol.gov/olms/regs/compliance/formspage.htm.

64 Letter to the Honorable Thomas E. Perez from Rep. John Kline and David P. Roe, July 23, 2013.

65 Persuader Agreements: Employer and Labor Relations Consultant Reporting Under the LMRDA, Regulation Identifier Number (RIN) 1245-AA03, Spring 2013 Regulatory Agenda, *available at* http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201304&RIN=1245-AA03.

66 76 Fed. Reg. 36,177 -36,230 (June 21, 2011), *available at* https://www.federalregister.gov/articles/2011/06/21/2011-14357/labor-management-reporting-and-disclosure-act-interpretation-of-the-advice-exemption.

the scope of an employer's and employer consultant's reportable activities by substantially narrowing its interpretation of the "advice exemption" in Section 203(c) of the LMRDA. It is estimated that this rule, if implemented, will "triple the number of LM-10 Employer Reports[67] filed annually"[68] and generate a "twelve-fold increase in LM-20 Reports[69] required from firms" engaged in the expanded scope of persuader activities.[70]

The practical effect of this rule—if it resembles the proposal—will be that employers and their advisors, including legal counsel, will be required to disclose detailed information about activities that have not been considered reportable since the LMRDA's enactment in 1959. Willful non-reporting carries possible criminal sanctions. As a result, labor attorneys who provide advice to their clients will face the Hobson's choice of filing the LMRDA disclosures and potentially violating their attorney/client confidentiality obligations, or refusing to file the required LM forms and facing criminal penalties.

This rule would significantly hinder an employer's ability to obtain legal advice during union organizing campaigns, and create a chilling effect on employer free speech during such campaigns. By blunting an employer's ability to counter an organizing campaign, unions will surely be able to make headway in their organizing efforts.

Moreover, the proposed rule is extremely broad, covering all manner of "consultation." The Board is continually changing its policies and procedures. Small employers in particular rely on counsel to track these changes and provide advice. Under the proposal, even reviewing and revising a company's employee handbook in light of these changes would be reportable activity. It is virtually impossible to run a legally compliant operation today without relying on outside experts. These experts include not only legal counsel, but also PR, benefits consulting, and salary survey firms, to name a few. Even trade associations conceivably fall under the rule's "consultants" umbrella.

Moreover, large employers often rely on outside professionals during corporate campaigns. This information—if reported—would no doubt become fodder for negative publicity.[71]

Although the timeframes established in the regulatory agendas are more aspirational than realistic, the rule will advance, especially now that the DOL once again has leadership. It remains to be seen how close the final rule resembles the initial proposal.

COURTING NEW MEMBERS

As discussed in the AFL-CIO Report, unions are actively seeking to target new members and new job sectors. Recognizing that the existing labor movement has lost some of its allure and relevancy, the AFL-CIO intends to repackage itself for non-traditional workers as a form of "'alt-labor,' organizations for workers that are outside the tortured paradigm of the National Labor Relations Act."[72]

Independent Contractors

The Report states "today more and more working people are considered 'independent contractors,' work multiple part-time or temporary jobs, work for very small employers . . . We need a labor movement that can engage all working people."[73] To this end, the AFL-CIO intends to make headway with, among other workers, network engineers and software coders,[74] workers who are often independent contractors.

67 Form LM-10 Employer Report must be filed annually by employers to disclose certain specified financial dealings with their employees, unions, union agents, and labor relations consultants. Form LM-10 is available at http://www.dol.gov/olms/regs/compliance/GPEA_Forms/blanklmforms.htm#FLM10.

68 *See* Jeffrey C. Kauffman, *Department of Labor Proposes New Reporting Rules to Expand Reach of "Persuader Activity" Regulation and Narrow the Advice Exemption*, Labor Relations Counsel (June 22, 2011), *available at* http://www.laborrelationscounsel.com/agency-rulemaking/department-of-labor-proposes-new-reporting-rules-to-expand-reach-of-persuader-activity-regulation-an/.

69 Form LM-20 Agreement and Activities Report (Consultant) must be filed by "every person, including a labor relations consultant, who enters into an arrangement with an employer under which he or she undertakes activities where an object thereof is, directly or indirectly, to: persuade employees about exercising their rights to organize and bargain collectively, or obtain information about the activities of employees or a union in connection with a labor dispute involving the employer (except information solely for administrative, arbitral, or court proceedings)." OLMS, Form LM-20, *available at* http://www.dol.gov/olms/regs/compliance/GPEA_Forms/blanklmforms.htm#FLM20.

70 *See* Employer-Consultant Reporting: Interpretation of the "Advice" Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act: Notice of Proposed Rulemaking, Office of Labor Management Standards (OLMS), *available at* http://www.dol.gov/olms/regs/compliance/ecr_nprm.htm.

71 The threat of negative publicity during a corporate campaign has been a powerful union weapon. This threat has spawned the creation of neutrality agreements, contracts between the union and an employer whereby the employer concedes to any number of specified union demands during the organizing campaign in exchange for no negative publicity. The U.S. Supreme Court in *Mulhall v. UNITE HERE Local 355* has agreed to review the legality of certain neutrality agreements.

72 AFL-CIO Report, at 6.

73 *Id* at 5.

74 *Id*. at 6.

Over the past few years, the DOL has taken a number of steps to combat worker misclassification. As part of the agency's misclassification initiative,[75] the DOL signed a Memorandum of Understanding (MOU)[76] with the Internal Revenue Service (IRS), whereby the agencies agree to coordinate their efforts and share information to reduce the incidences of misclassification. In addition, labor commissioners and other agency leaders from at least 14 states have signed MOUs with the DOL's Wage and Hour Division (WHD), and in some cases, with the Employee Benefits Security Administration (EBSA), Occupational Safety and Health Administration (OSHA), Office of Federal Contract Compliance Programs (OFCCP), and the Office of the Solicitor.[77] This information-sharing initiative has led to numerous enforcement actions against employers for alleged misclassification of employees as independent contractors.[78] These efforts are expected to intensify. The WHD's fiscal year 2014 budget request, for example, calls for $3.8 million "to provide for increased efforts to deter and detect worker misclassification."[79] The WHD has requested another $10 million to provide grants to states to help them identify and recover unpaid taxes.

During a House Committee on Appropriations hearing to discuss the DOL's FY 2014 budget,[80] Seth Harris, the former Acting Secretary of Labor, testified that in the construction industry in particular, the misclassification rate is as high as 30%. He said that the DOL is working with the unemployment insurance (UI) system to find employers that are misclassifying employees as independent contractors, and are therefore avoiding UI payments.

The labor movement will certainly capitalize on these regulatory efforts. Having fewer independent contractors increases the pool of employees subject to unionization. Moreover, the construction industry is one in which labor still maintains a modest toehold. According to the BLS survey, private-sector trades with high unionization rates include the construction industry, with a 13.2% membership rate.[81]

Younger Workers

The AFL-CIO will make a concerted effort to woo younger workers. As discussed, unions intend to target network engineers and software coders, who tend to skew on the younger side of the workforce spectrum. In addition, labor has been extremely supportive of the NLRB's decision to "revisit" its views that graduate student assistants are not statutory employees subject to the NLRA.

On June 22, 2012, the Board granted review in two cases—*New York University*[82] and *Polytechnic Institute of New York University*[83]—that present the question of whether graduate student assistants are employees eligible to collectively bargain under the NLRA. The Board also invited legal briefs[84] asking whether it should modify or overrule its decision in *Brown University*,[85] in which it found that graduate student assistants are not employees under Section 2(3) of the Act because they "perform services at a university in connection with their studies, [and thus] have a predominantly academic, rather than economic, relationship with their school."[86]

In a vigorous dissent to the decision to grant review, former Board Member Brian Hayes said:

> The Petitioner, in both *NYU* and *Polytechnic*, urges the Board to reconsider and overrule *Brown*. Even after an evidentiary hearing in this case, it is readily apparent that there is no factual basis for granting review and that the Acting Regional Director correctly applied *Brown* to dismiss the petition once again. . . . The asserted compelling reason for reconsidering *Brown* consists of nothing more than a change in the Board's membership. Thus, the request for review in this case and *Polytechnic* simply recycle arguments made by the dissenters and rejected by the majority in *Brown*.

75 *Available at* http://www.dol.gov/whd/workers/misclassification/.

76 Memorandum of Understanding between the Internal Revenue Service and the U.S. Department of Labor (Sept. 19, 2011), *available at* http://www.dol.gov/whd/workers/MOU/irs.pdf.

77 An interactive map of states participating in the DOL's Misclassification Initiative is available at http://www.dol.gov/whd/workers/misclassification/.

78 A list of such enforcement actions is available at http://www.dol.gov/whd/workers/misclassification/pressrelease.htm.

79 FY 2014 Budget Request, Wage and Hour Division, *available at* http://www.dol.gov/dol/budget/2014/PDF/CBJ-2014-V2-09.pdf.

80 House Committee on Appropriations, FY 2014 Budget Hearing – Departments of Labor (Apr. 16, 2013). An archived webcast of the hearing is available at http://appropriations.house.gov/calendar/eventsingle.aspx?EventID=327203.

81 BLS *Union Members Survey*, *supra* n. 47.

82 Case 2-RC-23481.

83 Case 29-RC-12054.

84 Notice and Invitation to File Briefs, Case 02-RC-023481and Case 29-RC-012054, *available at* http://mynlrb.nlrb.gov/link/document.aspx/09031d4580ab0b5d.

85 342 NLRB 483 (2004).

86 *Id*.

> The evidentiary remand gambit having failed, the majority now bends to assist the Petitioner once more by granting review and inviting *amici* to file briefs. . . . Even absent any supplemental information or argument of significance, there is the distinct possibility that my colleagues will change the law in this area for the third time in twelve years. Such a course would tend to undermine both the predictability inherent in the rule of law as well as the Board's credibility. It would also impermissibly distort both labor relations and student relations stability in the higher education industry.[87]

These cases are still pending. Now that the Board is fully operational, a decision cannot be far off. If the Board were to overrule *Brown*, unions would be able to bring younger workers into the fold, one of the AFL-CIO's stated goals.

Immigrant Workers

Immigrants represent another growing demographic group on the AFL-CIO's radar.[88] Immigrant workers often fill low-wage, low-skilled positions that are more amendable to organization. The prospect of comprehensive immigration reform has provided another opening into which unions hope to assert their influence.

On June 27, 2013, the Senate passed the Border Security, Economic Opportunity, and Immigration Modernization Act (S. 744), a comprehensive immigration reform bill. While its prospects appear dim in the House, the push for immigration reform will likely heat up again in the fall. As expected, labor has been working to ensure that its interests are represented in the process. For example, the AFL-CIO has created an Immigration Organizations and Resources page[89] on its website, offering resources and information to this community. In addition, the AFL-CIO has launched a traveling "campaign for a common-sense immigration process" that has already visited 14 U.S. cities. According to the AFL-CIO, "comprehensive immigration reform with a road map to citizenship is essential to all of America's workers."

According to the union's information page, the AFL-CIO is advocating:

> a data-driven approach to immigration that would determine future visas based on labor market needs, as well as the improvement—not expansion—of guest worker visa programs that too often deny basic civil rights to immigrant workers. The framework also recognizes that a new immigration system must include rational operational control of our borders supplemented by effective work authorization mechanisms that hold employers accountable.[90]

The current Senate bill includes provisions for victims of serious violations of labor and employment laws, mandates the use of E-Verify, revises the computation of prevailing wage levels, allows for increases to employment-based nonimmigrant visas, increases the DOL's investigative authority, increases protections against fraud in the hiring of foreign workers and creates a new guest worker program. It is unclear which of these provisions—if any—would remain in final legislation that is eventually enacted into law, if the measure even progresses beyond the Senate. What is certain is that the AFL-CIO intends to remain vocal on this issue to ensure that its voice is heard, and possibly to curry favor with the immigrant community.

The Board is also expanding its outreach efforts to the immigrant community. The agency recently announced that it has entered into a cooperative agreement with the Ministry of Foreign Affairs of the United Mexican States to provide Mexican employers, employees, and new Mexican immigrants, information about their labor law rights. According to NLRB acting GC Solomon, the purpose of the agreement is to "promote a broader awareness within the Mexican community of the rights and responsibilities of employees and employers, along with the services that the NLRB provides."[91]

Information provided by the Ministry of Foreign Affairs describes the accord as an agreement that:

> promotes and protects the labor rights of Mexican immigrants in the United States, especially the right to free association, *regardless of their immigration status*. Under this agreement, the Mexican consulates and the NLRB will take joint steps to inform Mexican workers of *their right to join or be part of a union,*

87 NLRB Order (June 22, 2012), *available at* http://mynlrb.nlrb.gov/link/document.aspx/09031d4580aa9744.

88 AFL-CIO Report, at 7.

89 *Available at* http://www.aflcio.org/Issues/Immigration/Immigration-Resources.

90 AFL-CIO, *Immigration Reform Campaign Launch - Las Vegas, available at* http://www.aflcio.org/Features/Creative-Action/Immigration-Reform-Campaign-Launch-Las-Vegas.

91 NLRB Press Release, *National Labor Relations Board and Mexican Foreign Ministry Sign Letter of Agreement to Strengthen Collaborative Efforts* (Aug. 1, 2013), *available at* http://www.nlrb.gov/news-outreach/news-releases/national-labor-relations-board-and-mexican-foreign-ministry-sign-letter-.

> *elect a representative to negotiate on their behalf with employers, and work with other employees for their benefit and protection*. It formalizes the relationship forged at the local level due to the work of the Mexican consulates. The agreement also increases ways in which possible violations of migrants' job rights can be investigated and, if applicable, corrected.[92] (Emphasis added).

The accord is notable in that both the U.S. Court of Appeals for the Fourth and D.C. Circuits have invalidated the Board's Notice Posting rule.[93] The accord appears to be creating a similar form of employee rights notification for non-U.S. citizens.

Expect union leaders, therefore, to be extremely supportive of this Board outreach effort.

Women, Minorities

The AFL-CIO recognized in its Report that in order to remain viable, organized labor must increase its diversity. To that end, the organization plans to include more women and minority members in its ranks and train them for leadership positions.

Increasing diversity within the union is a strategy for increasing union membership as a whole. According to the BLS survey, in 2012, more men than women were union members (12% men compared to 10.5% women).[94] As for other demographic differences, 11.1% of Caucasian workers were union members, compared to 13.4% of African American workers, 9.8% of Hispanic or Latin American workers, and 9.6% of Asian workers.[95]

Focusing on issues that impact these workers is one way of increasing membership. Unions have been supporters, for example, of the pending final rule that would apply minimum wage and overtime requirements to home care workers. Under the terms of the proposed rule[96] issued in December 2011, the WHD would revise the Fair Labor Standards Act's (FLSA) companionship and live-in worker regulations[97] to limit the types of duties that render a home caregiver exempt from FLSA requirements, clarify the type of activities and duties that may be considered "incidental" to the provision of companionship services, amend the recordkeeping requirements for live-in domestic workers, and specify that the exemption is limited to care givers employed by the individual, family or household using the services only. Third-party employers, including in-home staffing agencies, would not be entitled to claim the exemption even if the worker is jointly employed by the third party and the family/household.[98] If the final version of this rule resembles the proposal, millions of home healthcare workers would be affected. According to the DOL's spring regulatory agenda, this final rule is imminent.[99]

The AFL-CIO is strongly in favor of this rule.[100] The organization states that nearly two million home care workers, the vast majority of whom are women and minority workers, work more than the standard 40 hours per week. As noted in the BLS report, approximately 289,000 individuals who worked in personal care and service occupations were represented by unions in 2012.[101] Despite the general decline in unionization rates, unions are making inroads in the healthcare industry. Therefore, expect the AFL-CIO to push for the companionship rule's implementation.

The labor movement will also be a reliable proponent of the Fair Minimum Wage Act of 2013 (H.R. 1010; S. 460), legislation that would raise the minimum federal hourly rate from $7.25 to $10.10, in $.95 increments, over a three-year period. The legislation would also increase the hourly wage rate for tipped workers from $2.13 to $3.00 during the first year, and then increase this base amount by either $.95 or an amount necessary to raise the rate to 70% of the minimum wage, whichever is less.

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92 Press Release, *Foreign Ministry - U.S. National Labor Relations Board Agreement, available at* http://www.sre.gob.mx/en/index.php?option=com_content&view=article&id=2062:foreign-ministry--us-national-labor-relations-board-agreement&catid=27:archives&Itemid=64.

93 *See supra* n. 22.

94 Bureau of Labor Statistics, *Union Members Survey, Table 1. Union affiliation of employed wage and salary workers by selected characteristics, available at* http://www.bls.gov/news.release/union2.t01.htm.

95 *Id*.

96 76 Fed. Reg. 81,189 -81,245 (Dec. 27, 2011).

97 29 U.S.C. 213(a)(15), 29 CFR part 552.

98 A comparison chart showing current versus proposed rule changes is available on the DOL's website, http://www.dol.gov/whd/flsa/companionNPRM-SidebySide.htm.

99 DOL/WHD, *Application of the Fair Labor Standards Act to Domestic Service*, Regulation Identifier Number (RIN) 1235-AA05, *available at* http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201304&RIN=1235-AA05.

100 *See* Mike Hall, *Home Care Workers Need Labor Law's Protection*, AFL-CIO Now, (March 21, 2012) *available at* http://www.aflcio.org/Blog/Political-Action-Legislation/Home-Care-Workers-Need-Labor-Law-s-Protection.

101 Bureau of Labor Statistics, *Union Members Survey, Table 3. Union affiliation of employed wage and salary workers by occupation and industry, available at* http://www.bls.gov/news.release/union2.t03.htm.

Another effort is also underway to raise the minimum wage to $15 dollar per hour. Hundreds of fast food workers recently went on strike at 30 Chicago food and retail stores as part of the "Fight for 15"[102] movement to "demand $15 an hour and the right to form a union without retaliation." The Chicago strikes in early August were the latest in a series of protests by nonunion employees calling for labor reform.

On the regulatory front, the DOL's Office of Federal Contract Compliance Programs (OFCCP) plans to issue a proposal that would create a compensation data collection tool to identify contractors likely to violate Executive Order 11246,[103] which, among other things, prohibits federal contractors and federally-assisted construction contractors and subcontractors from making discriminatory compensation decisions on the basis of sex or race. According to the DOL, this tool "could play a key role in OFCCP's establishment-specific, contractor-wide, and industry-wide analyses. Through publication of Notice of Proposed Rulemaking (NPRM), OFCCP will seek to develop an effective and efficient data collection instrument."[104]

A related OFCCP proposal[105] would revise the agency's sex discrimination guidelines for federal contractors and subcontractors. According to the OFCCP, current guidance[106] is more than 30 years old, and therefore warrants "a regulatory lookback." Many of these regulatory efforts have been in the works for years. Now that the DOL has new leadership, some of these proposals may advance with the requisite push from organized labor.

OTHER LABOR-FRIENDLY AGENCY ACTIVITIES

Unions are already subtly gaining influence with OSHA. In a letter of interpretation[107] dated February 21, 2013, OSHA's deputy assistant secretary informed a health and safety specialist with the United Steelworkers Union that *any* employee representative—including outside union agents—can accompany the employee during an onsite OSHA inspection, *even if the facility is nonunion*.[108] Unions will undoubtedly welcome the newfound access to an employer's worksite.

Notably, this policy change came about without the appropriate regulatory notice and solicitation of comments from interested parties. Allowing unions and other outside organizations to participate in and potentially disrupt a nonunion employer's safety inspection process is an unprecedented agency move. As previously discussed, labor is already making strides with nonunion employees via UFOs and other community-based efforts. The ability to participate in an OSHA inspection without first being accorded such rights through a collective bargaining agreement will surely be another way to promote union organization.

It is unsurprising that many of the strategies outlined in the AFL-CIO's Report seek to take advantage of a more labor-receptive DOL and NLRB, and align with policies that are slated to take effect in the months ahead.

CONCLUSION

Substantive labor and employment rules and policy changes are looming. While Congress appears impotent, agencies—particularly the DOL and NLRB—are gaining steam. The AFL-CIO's upcoming convention will no doubt highlight this political theater, as well as labor's perceived gains. Expect the organization to extol the virtues of grass roots organizing, and publically embarrass companies targeted by union and UFO flash mob strikes.

The labor movement has recognized this opportunity to revamp itself and take advantage of the changing demographic and political landscape. The business community must also take notice of these changes, and similarly prepare.

102 More information on the Fight for 15 movement is available at http://fightfor15.org/en/.

103 30 Fed. Reg. 12319, 12935 (Sept. 24, 1965), 3 CFR, 1964-1965 Comp., p.339.

104 DOL/OFCCP, Nondiscrimination in Compensation: Compensation Data Collection Tool, Regulation Identifier Number (RIN) 1250-AA03, *available at* http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201304&RIN=1250-AA03.

105 DOL/OFCCP, *Sex Discrimination Guidelines*, Regulation Identifier Number (RIN) 1250-AA05, *available at* http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201304&RIN=1250-AA05.

106 41 CFR part 60-20.

107 Letter of Interpretation from OSHA's Richard E. Fairfax, Deputy Assistant Secretary, to Steve Sallman, Health and Safety Specialist with the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (Feb. 21, 2013), *available at* https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=28604.

108 *See* Ben Huggett, *OSHA Changes Course: Will Allow Outside Representatives, Including Union Agents, to Enter Non-Union Worksites During OSHA Inspections*, Littler ASAP (Apr. 23, 2013), *available at* http://www.littler.com/publication-press/publication/osha-changes-course-will-allow-outside-representatives-including-union.

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