"FUNDAMENTAL WORKERS' RIGHTS": A REPORT AND RECOMMENDATION ON ARTICLE 25 OF THE ILLINOIS CONSTITUTION

Matthew W. Finkin
College of Law
The University of Illinois College of Law
at Champaign-Urbana

PART TWO: THE DRAFT LAW IN TEXT AND EXPLAINED

AN ACT IMPLEMENTING ART. 25 OF THE ILLINOIS CONSTITUTION

SECTION 1. BASIS AND POLICY

(a) The electorate of Illinois committed the state constitutionally to assure "Workers' Rights" that:

Employees shall have the fundamental right to organize and to bargain collectively through representatives of their own choosing for the purpose of negotiating wages, hours, and working conditions, and to protect their economic welfare and safety at work.

(b) This statute, which shall be called "The Vulnerable Workers' Representation Act," executes part of the constitution's commitment.

COMMENT

The Preface explains the context of this law. It attends to the situation of workers who would be excluded from the protections of the National Labor Relations Act as being "independent contractors" under the common law of agency, but whose economic dependence on employment has call on the state to treat them as workers covered by Art. 25.

SECTION 2. DEFINITIONS

(a) The term "employer" includes any natural or legal person or entity howsoever organized, for profit or otherwise, that suffers or permits work to be done by a cumulative total of at least 20 workers during the course of any calendar year whether on a full time, part time, on-call, casual, or other basis. The term "employer" does not include the United States, any instrumentality of the United

States, the State of Illinois, any local government, or any governmental instrumentality.

COMMENT

The definition of an "employer" is drafted broadly but within the limits of practicality. Even civil rights laws exempt small enterprises from their reach. In Illinois, though over one and a quarter million workers are employed by what the U.S. Small Business Administration classifies as small businesses, only about 220,000 are employed in business with workforces of nineteen workers or less. U.S. SBA *2022 Small Business Profile (Illinois)* p. 2. Thus the twenty employee cut-off was calculated on the assumption that workers in smaller settings do not need a law to be heard effectively by their employers on how they are being treated as they would more likely than not be in close contact with their employers.

The statute applies only to the private sector. Jurisdiction is wanting over federal workers who have a separate federal statute governing collective representation. State and local government employees in Illinois are subject to a separate collective bargaining law as well. But, 52% of public employees in Illinois are represented as compared to less than 9% of private sector workers. The draft is premised on the expectation that whatever gaps exist in Illinois' public sector labor law, Art. 25 would command that these be addressed and would be best addressed by the to revision of extant law.

(b) To "suffer or permit to work" is to have the capacity, whether or not exercised, directly or indirectly, to determine the wages, hours, working conditions, safety, health, or the economic welfare of workers.

COMMENT

A statutory employer includes all forms of enterprise or undertaking for which work is done. It addresses in particular "lead companies" at the apex of lines of contracting and supply who have effective if indirect control of wages and, often, hours and working conditions as well and who, if excluded from the law's reach, would render the law a nullify as the immediate employer, a contractor down the supply chain, has no funds other than what the lead company pays from which to increase wages. Absent such a provision, the lead company, whose contracts with suppliers and others down a chain of subcontracts effectively determines the proximate employer's wage, could not be brought to the bargaining table. This point is made pellucid in agriculture *e.g.* W.K. Barger & Ernesto Reza, THE FARM LABOR MOVEMENT IN THE MIDWEST (1994) and in the many forms of "fissuring" in which work is divided down line of contracting and supply. David Weil, THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT 8 (2014) (italics added). The NLRB has taken a step in that direction using the "joint employer" doctrine. 88 Fed. Reg. 73946 (Oct. 27, 2023) adopting 29 CFR § 103.40. This statute makes its reach durable.

(c) The term "worker" includes any person who is suffered or permitted to work, whether compensated or not, but shall not include: (i) any person who

(A) has been and will continue to be free from control or direction over the performance of work; and

(B) whose work is outside the usual course of the employer for which work that such service is performed; and

(C) such individual is customarily engaged in an independently established trade, occupation, profession or business;

(ii) any person who is represented by or eligible to be represented by a collective bargaining representative under the Railway Labor Act or the National Labor Relations Act;

(iii) any person who is a supervisor or manager under the National Labor Relations Act;

(iv) any person employed as an agricultural laborer;

(v) any person employed in domestic service of any family; and

(vi) any person employed by a parent or spouse

COMMENT

The definition tracks the test set out in the Fair Labor Standards Act, termed one of "economic reality," based on child labor law: it is enough that the child's presence in the workplace to do work was tolerated by the employer to render the child a worker, whence suffer *or* permit. *Discussed in* Matthew Finkin, AMERICAN LABOR AND THE LAW: DORMANT, RESURGENT, AND EMERGENT PROBLEMS § 4.01 at 18-21 (Bull. Comp. Lab. Rel. No. 104) (2019). As compensation is not made an element of coverage the status of unpaid workers – interns, volunteers, students and trainees who might not be covered by the Labor Act – is made clear: so long as they are suffered or permitted to do work, even if unpaid, they have a right collectively to be heard about whether they should be paid and as well on their working hours and conditions including safety and health.

The definition of worker employs the "ABC" test adopted in several states to govern coverage for the purpose of wage payment, wage and hour law, and unemployment compensation law. Thus the law extends the right of collective bargaining to those within the federally excluded group whose economic situation renders them

employee-like, needful of statutory coverage. The total exclusion of supervisors and managers is made necessary by *Beasley* v. *Food Fair of North Carolina, Inc*., 416 U.S. 653 (1974).

(d) The term "worker representative organization" is an organization in which workers participate and which exists for the purpose, in whole or in part, of bargaining with employers over wages, hours, working conditions, safety, health, or economic welfare and over disputes or grievances and is not dominated or controlled by an employer, employer group, or any party acting in employer interest.

COMMENT

The definition is based on the NLRA definition of a "labor organization" save that it tracks Art. 25 more closely to cabin the organization's function to bargaining rather than the more expansive "deal with" contained in federal law. As the persons covered by this law are not "employees" within the meaning of the NLRA the prohibition of employer dominance or control applicable to labor organizations under that law needs be made express here.

(e) The term to "bargain collectively" is the performance of an obligation to engage in a mutual process in which proposals on wages, hours, working and safety conditions, and economic welfare are engaged with by the parties in a good faith effort to arrive at an agreement.

(i) "good faith" obligates the parties, on request, to share all information in their possession that is relevant to a matter under negotiation or that is the subject of a grievance or dispute. If a party refuses to disclose information and the Board [as created *infra*] finds the refusal to be without merit and for the purpose of

obstructing the bargaining process the party will be deemed to have engaged in a willful refusal to bargain within the meaning of section 9;

(ii) any agreement made shall be placed in writing and circulated to those who are or will be governed by it.

COMMENT

This provision imposes a duty to bargain in good faith. Most plural union or "members only" bargaining systems do not. The German system is a good example: whether the parties will bargain is a function of the union's having enough power – *soziale Mächtigkeit* – to compel the employer to bargain. An extensive commentary on German law put it in a nutshell: "A worker's organization that is situated in such a way that it cannot mount a conflict with the other side [the employer] is no union, it has neither capacity to contract nor to engage in workplace struggle…." TARIFVERTRAGSGESETZ 758 (Herbert Wiedemann *et. al*. eds. 8th ed. 2019) (translation by Professor Finkin). In German law such an organization lacks the legal capacity to make a collective agreement and so a contract made by such an organization, a "sweetheart agreement" in American parlance, is void.

It is interesting that the German "members only" system mirrors the factional bargaining that work groups in non-unionized workplaces in the United States are free to pursue, the effectiveness of which turns on the degree of power they possess by strategic situation in the work process or sheer weight of number. If that alone sufficed there would be no need for law to impose a duty to bargain.

The stark fact is that most workers lack strategic situation nor are they organized *en masse*. Even as their individual bargaining power many combine in a collective, the

collective is not ordinarily close to being equal in power to the employer, it lacks the "social power" to compel an employer to bargain seriously with it. For this reason the proposed law aids the weaker party. Whence the imposition of a duty to bargain.

Subsection (e) grasps the essence of what bargaining is. Though it tracks the parallel provision added to the Labor Act in 1947, it omits that provision's notion that good faith bargaining does not require "the making of a concession." That clause has been generally disregarded as the failure of a party to make *any* proposal or to make *any* concession has long been understood to evidence an intent to make no agreement. *See generally*, Robert Gorman & Matthew Finkin, LABOR LAW: ANALYSIS AND ADVOCACY Ch. XX (2013).

Subsection (i) expands on the information-sharing component of the duty to bargain in good faith which the U.S. Supreme Court has read the Labor Act to impose. *See* Gorman & Finkin, LABOR LAW, *id*. §§ 20.4, 20.5. First, it adopts a test of "relevance" to a "matter" on the table. Contrary to the Court's reading in *NLRB* v. *Truitt Mfg. Co*., 385 U.S. 432 (1967), the information sought does not necessarily require that a claim to has actually to be made in bargaining, so long as it would help in analyzing and negotiating a matter the party would consider raising. The provision is based on the principle that efficient bargaining is obstructed by informational asymmetry and is aided by informational transparency: that both parties should have a full and equal understanding of what the facts are when relevant to what is being bargained about – financial information, productivity information, safety information, plans on the direction of the enterprise, and the like.

(f) The terms "working condition" and "economic welfare" include:

(i) any matter that significantly affects a substantial worker interest;

(ii) over which the employer directly or indirectly exercises or can exercise control, and

(iii) which is amenable to resolution by collective bargaining.

COMMENT

The definition of bargaining subjects is based on the gloss placed on the federal Act by the U.S. Supreme Court's decision in *Fibreboard Paper Pdts. Corp.* v. *NLRB*, 379 U.S. 203 (1964). The test of "amenability" plays an important role to the extent the law places the substantial interests to be addressed into the hands of employers with indirect control in the matter.

This provision rejects the distinction between mandatory and permissive bargaining subjects that the U.S. Supreme Court created in *NLRB* v. *Wooster Division of Borg-Warner Corp*., 356 U.S. 342 (1958). The parties are largely free to bargain about what they will bargain about so long as the workers' interest in it is substantial; that is, important enough for the workers to seek to have it addressed in a collective contract. The *Borg-Warner* distinction has other downstream effects. One is on the duty to disclose information. As this provision rejects the distinction, the obligation to share information applies to any matter a party can raise that conforms to subsections (e) and (f). Another effect is on the zone of economic pressure that could be brought to resolve a bargaining dispute, notably the strike. Again, under this proposal anything bargainable is strikable.

It is dubious, however, that the departure from the federal taxonomy is meaningful in practice. Under federal law if a union makes a demand on an arguably non-

mandatory term – say, hotel housekeepers demanding a 7% occupancy tax to be paid into a fund to defray the workers' increasing housing costs, as hotel housekeepers have in Los Angeles, *i.e.* a demand to bargain on pricing, on what the employer will charge its customers – and the employer refuses to talk about it because it is a non-mandatory matter reserved for "entrepreneurial control," the union need only offer an alternative, say a much heftier wage increase in lieu of a housing support occupancy tax, and express its willingness to bargain about one or the other as the employer will. Such would be consistent with the mandatory/permissive distinction.

The most serious consequence of the Court's mandatory/permissive distinction is the unilateral action rule which requires an employer ordinarily to exhaust the duty to bargain before it can implement a change in a mandatory, but not a permissive subject. An employer may alter or abrogate a policy on a permissive subject without bargaining about it – though the consequences to employees in terms of wages, hours, work opportunities and working conditions would have to be bargained. The unilateral action rule is set out in Section 4, subject to limitation. Any complexity added when the prohibition on unilateral action is extended to a number of "members only" bargaining representatives can be anticipated and dealt with in treating the matter of bargaining structure, Section 5, *infra*.

SECTION 3. REPRESENTATION

(a) A workers' representative organization is authorized to represent workers for purposes of collective bargaining and grievance adjustment by a written membership application signed by the worker clearly and conspicuously designating the organization as the worker's representative for those purposes.

(b) A workers' representative organization may establish requirements for eligibility for membership save that no requirement may violate any federal or state law; a workers' representative organization may waive its dues, initiation or other fees for members who join prior to the execution of a collective bargaining agreement governing them.

(c) Upon a workers' representative organization's acceptance of a written application for membership that clearly and conspicuously designates the organization as the applicant's collective representative the organization becomes the member's collective bargaining representative.

(i) a worker may be represented in collective bargaining with respect to one employer by only one worker representative organization

(ii) if a worker represented by an worker representative organization seeks no longer to be represented by that organization the worker must tender a written resignation to the organization that currently represents the worker; if the worker representative organization had been recognized by the employer as the member's bargaining representative the organization will inform the employer that it no longer represents that worker

(iii) if the resignation is tendered during the term of a collective bargaining agreement between the employer and the worker representative organization the worker will continue to be bound by the collective agreement for the remainder of its term or for a one-year period whichever terminates earlier.

(d) Upon receipt of membership from (i) at least 10 workers working in or assigned to a common plant, office, store, facility, shop, center, or like unit, or (ii) by at least 20 workers employed by the employer, the workers' representative organization may notify the employer of these designations; within five working days of receipt of notice the employer will recognize the representative for those and all future workers whose memberships are transmitted to the employer

COMMENT

Under "members only" bargaining the employer has to know who is represented. Inasmuch as any resulting collective agreement would bind only the organization's members, the employer has to identify those to whom the contract will run. Thus the demand for recognition would have to inform the employer of those represented.

The draft gives an employer five days to assure itself that the persons identified to it are workers within the meaning of the law. There would be no other ground for it to deny recognition. If the employer refuses to bargain on the ground that the persons are not workers covered by the Act or are not its workers such would be subject to a refusal to bargain determination by proposed Board. If the Board finds workers status and there to have been a willful refusal to bargain the statute's interest arbitration remedy would apply. *See* section 7, *infra*.

The minimum number of workers for representation are first for those in a discrete location. This matches up against the complement of workers in single locations that, on average, comprise bargaining units under the NLRA. That is, if the median bargaining unit is composed of 23 workers and if forty percent, a number short of a majority but reflective of demand nationally, desire representation, a complement of ten

in any one location would be substantial enough to warrant an employer's bargaining obligation. A purist might argue that a "collective" bargain requires only two workers, no more. (Interestingly, Japanese law requires only two employee members to qualify for representative status; but that is provided for in the presence of dominant company-based unions.) The concern here is for the law's workability.

The representation alternative triggered by the number of workers state-wide, deals with the situation where workers may be widely dispersed, few in number in any one location, or, in view of remote work or working from home. Here, a slightly larger number makes sense, but, as in the single location, enough to be workable for the bargaining process.

Subsections (i) through (iii) are intended to assure stability in collective bargaining relationships. Subsection (iii) follows section 302(c)(4) of the Labor Management Act; *cf*. *Stewart* v. *NLRB*, 851 F.3d 21 (D.C. Cir. 2017).

Because a "members only" system is created, a representative can limit its membership to those having necessary education, training, experience, or skill and agree to supply those so qualified to an employer on condition of negotiating their wages, hours, and working conditions. Such is allowing under the NLRA only in the construction trades. Otherwise, a union cannot make a collective agreement as a majority representative for a majority it does not represent. That does not apply to a "members only" representative.

A waiver of dues prior to a collective agreement would be an unfair labor practice for a majority-seeking union to do. *NLRB* v. *Savair Mfg. Co*., 414 U.S. 270 (1973). The Court's reasoning rested on the distorting effect the practice might have in an ensuing

election. As in the proposed system there would be no election the Court's reasoning would not apply.

SECTION 4. DUTY TO BARGAIN

(a) The duty to bargain commences upon the employer's recognition under section 3(d)

(b) An employer may (i) after bargaining with a workers' representative organization to impasse, make unilateral changes in that are comprehended within its pre-impasse proposals; or (ii) take unilateral action without exhausting the duty to bargain where a genuine business emergency requires immediate action

(c) If during the course of collective bargaining the employer implements an increase in wages or more advantageous treatment of hours, working or safety conditions or in the economic welfare of workers not represented under this Act those changes shall extend to similarly situated workers represented under this Act.

COMMENT

Subsection (b) adopts the NLRA's "unilateral action" rule; taking unilateral action without bargaining is contrary to the purposes of representation. However, the statute does not tell the parties how they should bargain; that is, they could agree to bargain on an item by item basis sealing each agreement with a moratorium, an agreement not to raise the matter for a period of time. The impasse rule would apply to a single issue when negotiated on that basis. Or, as is far more common, the parties may bargain for a complete package in which demands on unrelated subjects are traded off in order to arrive at a comprehensive agreement. In that situation, impasse would have be on the totality of terms.

Subsection (c) ensures that employees who have sought representation may not be disadvantaged by it, intentionally or otherwise. The mandated equality in treatment applies only before a collective agreement has been concluded. The parties are free to bargain for an equality in treatment provision for employer changes applicable to those represented under the Act instituted during the duration of the collective agreement.

SECTION 5. BARGAINING STRUCTURE

(a) An employer may (i) demand joint bargaining by two or more worker representatives with respect to matters which have customarily been provided on a uniform basis among the employees represented by those representatives, or (ii) if joint bargaining is not agreed to by those representatives or if no agreement is reached acceptable to all parties, it may conclude an agreement as to such matters with the representative or representatives which represent the largest number of represented workers and refuse to bargain further with any other representative as to such matters unless that representative agrees to accept the terms so negotiated.

(b) Two or more representatives may require joint bargaining with an employer with respect to matters which have customarily been provided on a uniform basis among the workers represented.

COMMENT

Subsection (a) attends to what additional complexity might be added by the "members only" component to what could an employer faces in multi-union representation under the Labor Act; that is, the prospect of bargaining with a multiplicity of small bargaining units under the NLRA. Because under the NLRA the employer's duty to bargain is owed to the union for each of the units it represents, it has long been the law

that an employer may not insist on bargaining being conducted jointly by the union, nor by unions for all of the units they represent. F.W. Woolworth Co., 179 NLRB 748 (1969). The latter can allow an employer to obstruct bargaining by insisting on bargaining on a unit-by-unit basis – for example Starbucks store by Starbucks store. This provision would disallow that tactic.

The "members only" system bears the possibility that different interest groups in the company's employ would be attracted to join different organizations reflecting the emphasis they attach to those interests. Under exclusive representation it falls to a union inclusive of all interests to reconcile them, to make the internal trade-offs in priority to secure a collective agreement, subject to the possibility of an interest group rejecting an agreement it deems inadequately reflective of its interests were the collective agreement to be voted on. Under a "members only" system it might fall to the employer to reconcile those differing claims and priorities assert by different representatives. This provision draws from the experience of some of those foreign "members only" bargaining systems that attach a duty to bargain to the relationship to all non-majority unions to create statutory machinery fostering the creation of coalitions of the various representatives to the point of allowing pressure to be put on them to reconcile their differences and achieve a bargain acceptable to all.

SECTION 6. WORKER RIGHTS

(a) Workers have the right of self-organization, to form, join, or assist a worker representative organization, to engage in collective bargaining and other activity to protect their interests as workers free of employer restraint, coercion, or interference.

(b) [Herein the creation of the Illinois Art. 25 Worker Representation Board, its power and procedures]

COMMENT

As the workers this law treats are not within the NLRA, provision has to be made to protect the exercise of their statutory rights. This provision tracks section 7 of the NLRA save that it omits the restriction of protected activity other than unionization to concert of action for mutual aid or protection. At times, the distinction between individual and group protest requires some legal gymnastics, *compare* Alstate Maintenance, LLC, 367 NLRB No. 68 (2019) *with* Miller Plastic Pdts., Inc., 372 NLRB No. 134 (2023). There is no good reason to disallow the discharge of a worker for saying, "Please, sir, may we have some more," while allowing the worker to be discharged for saying, "Please, sir, may I have some more." The capacity of the individual to seek better wages, hours, and working conditions, in a group should include the lesser capacity to seek economic advancement per se.

Resort to an administrative agency is not without difficulty as effectiveness turns on the imponderables of adequate funding and the sufficiency and competence of the staff. Even so, realistically, there is no alternative. The state is experienced with legislation creating such agencies; for example, the Illinois Labor Relations Board, 5 ILCS 315/5. As those provisions are readily available to draw on, this draft will not do so.

SECTION 7. REFUSAL TO BARGAIN

(a) An employer is in violation of this law if it refuses to bargain with a worker representative organization with which it is required to bargain or to bargain with it in bad faith

(b) [Complaint of a violation of section (a) can be made to the Board and after hearing under its procedures may be remedied thusly]

(c) An employer that has failed to bargain or to have bargained in bad faith may be ordered to institute such terms or to bargain on such terms and subject to such reporting and supervision as the Board determines warranted under the circumstances and will make represented workers whole for any loss suffered by its action, and, as circumstances warrant, to make the worker representative organization whole for the costs of negotiation and litigation

(d) Should the Board find the violation of subsection (a) to have been willful, with the agreement of the worker representative organization or organizations involved the Board may order the resolution of contract terms by the impasse procedure set out in section 8 save that the arbitrator's costs and fees shall be borne by the employer.

COMMENT

Re subsection (c). Currently, the NLRB is pursuing the remedy of scheduled bargaining for refusals to bargain. *E.g. Columbus Elec. Coop., Inc*., 372 NLRB No. 89 (2023). The NLRB's capacity to order an employer to accept a union demand as a remedy has been held to be statutorily foreclosed. *H.K. Porter Co.* v. *NLRB*, 397 U.S. 99 (1970). There is no reason for this law to do the same.

SECTION 8. FIRST CONTRACT IMPASSE

(a) If after the expiration of 180 days from the date of initial recognition under section 3 no collective bargaining agreement has been made, the employer, the worker representative organization, or the coalition of worker representative organizations with which the employer has bargained may petition the Board to initiate an arbitration of all outstanding issues.

(b) Within ten days of receipt of the petition the Board will notify the Federal Mediation and Conciliation Service of the request, of the parties to the dispute, and request the initiation of the process for arbitral selection with which the parties shall comply.

(c) No more than ten days after the arbitrator has been selected the parties will exchange and with the arbitrator a final statement of each issue in dispute accompanied by written proffers of the relevant contractual terms they seek.

(d) The parties and the arbitrator will agree on the hearing date and manner of presentation which, if not agreed to, shall be decided by the arbitrator.

(e) The arbitrator shall adopt that written offer on each issue presented in which the arbitrator will consider the following factors in addition to any others stipulated by the parties:

(i) a comparison of the offer with how the matter at issue is dealt with for workers performing similar work or duties in comparable employments in comparable communities taking account of educational qualifications, training, skills, and career advancement

(ii) the interests of the represented workers considering the hazards to safety, physical and mental health, and economic and family welfare

(iii) the financial ability of the employer to pay the demand or the administrative burden of compliance

(v) such other factors traditionally taken into consideration in the determination of wages, hours, working conditions, safety, health and economic welfare in voluntary collective bargaining or otherwise

(f) Within thirty days of the conclusion of the hearing or from the submission of post-hearing written argument the arbitrator will serve the parties and the Board with the written award disposing of all issues presented

(g) The arbitrator's fees and expenses shall be shared equally between the parties.

(h) The arbitrator's decision will be final and binding. It may be vacated only if the award

(ii) is the product of evident partiality

(ii) is the product of misconduct in the arbitral process

(iii) fails to attend to or exceeds what was presented for decision

(i) From the date of the petition for arbitration and during the pendency of an arbitration the workers represented shall not strike nor shall the employer lock out.

COMMENT

The draft proposes to employ a "best last offer" arbitral system in the event of the failure to make an initial collective bargaining agreement, often the most important step in the maturation of the relationship between parties that have had no experience in bargaining with one another. The best last offer approach is designed to encourage the parties seriously to engage with one another. It has been used successfully in the public

sector for those employees who lack the capacity to strike. 5 ILCS 315/14. Though the workers covered by the law have the strike available, their lack of strategic workplace situation or the weight of numbers may make that resort futile. For employees so situated the best last offer system offers a strike-like alternative. That it would be particularly apt in first contract situation draws support from the use of first contract arbitration for small bargaining units of public employees in Illinois, 5 ILCS 315/7, and the proposals for it in the "Employee Free Choice Act" bills in 2007 and 2009. H.R. 800, 110th Cong., 1st sess. (2007), H.R. 1409, 111th Cong., 1st sess. (2009). The period allowed for bargaining to impasse, 180 days, accommodates the difficulties of "first contract" negotiation for parties for whom the process is new while placing a workable limit consistent with the fact that a generation ago the *average* time consumed from union certification to contract consummation was a little over 350 days. *How Long It Takes a Union to Get a Contract*, (figure), Bloomberg Business News (Nov. 22, 2023) at p. 3.

SECTION 9. STRIKE

(a) A strike is a concerted refusal by workers to perform all or some of their assigned tasks.

(b) An employer may not discharge or discriminate against workers for engaging in a strike authorized by a worker representative organization under the Act nor may it hire, threaten to hire, or employ any person or contractor as a permanent replacement for any worker engaging in such a strike.

(c) "Permanence" means the giving of or acting on any assurance, express or implied, that the replacement will or may retain the job after the striker has made an

unconditional offer to return to work or despite any strike settlement agreement made with a worker representative organization.

(d) On making an unconditional offer to return to work a striking worker will be returned to the position occupied before the commencement of the strike with no loss of seniority or benefits unless that position has been eliminated for legitimate business reasons.

(e) A striking worker whose position has been eliminated for a legitimate business reason will be offered a suitable position for which the worker is qualified or can reasonably be qualified without loss of seniority, wages, or benefits.

COMMENT

The rights of strikers under the Labor Act has crystallized following a *dictum* – an observation by the U.S. Supreme Court in 1938 on a point neither before the Court nor argued to it – that an employer may resist a strike by permanently replacing the strikers. *NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938). Strikers retain the right to vote in a later representation election, one to decertify the union, for a period of one year. Strike replacement remain voting members of the bargaining unit. The United States is alone in a rule under which a struck employer could hire its way out of unionization. Congress sought to redress the asperity of the law in the early 90s; but, in July 1994, it failed in the face of a threatened filibuster. S.55, 103d Cong., 1st sess. (1993). This provision pursues that earlier effort.

SECTION 10. ACCESS

A. IMPERSONAL

(1) A worker representative organization may inform the Board of its interest in reaching the workers of an identified employer to educate these workers about their Art. 25 rights and secure their membership.

(2) Upon receipt of the request set out in subsection (1) the Board will determine if the request is that of a bona fide worker representative organization and that the organization has certified that it is bound by subsection (5).

(a) a employee representative organization may not make more than one request of the same employer for employee contact information within any one 180 day period.

(3) On finding the conditions set out in subsections (1) and (2) have been met the Board will notify the employer of the request and require it to submit the requested contact information to the Board.

(a) worker contact information consists of the workers' full names, work locations, shifts, job classifications, home addresses, personal email addresses, home and cellular telephone numbers in the employer's possession.

(b) the Board will not disclose the identity of the worker representative organization requesting the information to the employer.

(4) On receipt of the worker contact information, the Board will contact the workers informing them that a worker representative organization has requested access for the purpose of education and membership and will notify them that absent a decision not to be contacted, communicated to the Board in a timely manner and by such means as the Board will establish, the Board will provide their contact information to the requesting organization. After the expiration of the time allowed the Board will

transmit to the requesting organization the worker contact information of those who have not opted out.

(5) The requesting organization

(a) may use the worker contact information supplied by the Board exclusively for the purpose of education and membership solicitation, the contact information may not be transferred, revealed, or used for any other purpose;

(b) the worker representative organization will be liable for any breach in the security or misuse of the information;

(c) the worker representative organization will bear the cost incurred by the Board in the gathering of the information supplied to it.

B. PHYSICAL

(1) Agents of worker representative organizations may engage in educational activity and the solicitation of worker membership from workers on the premises of an employer where:

(a) the organization's activity is conducted in non-work areas open to the public,

(b) the workers are on non-work time,

(c) the timing, manner, and number of organizational representatives are reasonable in the context of the use to which the public space is devoted and is non-disruptive of that use.

COMMENT

Re Part A. Commonly, unions seek out incumbent employees who have earned the respect of their coworkers to form an intramural organizing committee to enlist the support of their coworkers in advance of any more public effort. In fact, these early moves are commonly

accompanied by efforts to keep the employer ignorant of them. (Some employers have developed trip wires to alert them of organizing which triggers the direction of resources from the corporate center to counteract organizational efforts.) The search for internal support is made more difficult, perhaps insuperable, where employees work from dispersed or remote locations, at unpredictable hours or only intermittently, and the like. The Supreme Court has made physical access to employees on private property by union agents who are not the employer's own employees almost impossible. *Lechmere, Inc*. v. *NLRB*, 502 U.S. 527 (1992).

This provision would give a union the option, to be exercised at a time when it is willing to accept that the employer will learn its intentions, to secure such contact information as will allow it to access those it wishes to represent: to educate them about their rights under the law, of which many might well be ignorant, and to solicit membership. The procedure involves the state agency in its execution to assure the integrity of the process: to the extent personally identifiable contact information might implicate a legal interest in privacy – a proposition by no means obvious to the extent the information might otherwise be capable of being known albeit with difficulty – employee consent to disclosure via an opt out is provided for those would not wish to be contacted. *Cf. Detroit Edison Co.* v. *NLRB*, 440 U.S. 301 (1979) (disclosure of sensitive personal employer information to the employees' unions conditioned on individual consent). The employee contact information would be known in the first instance to the state agency, but not by the union, and the agency would be required not to disclose that information for those who have opted out. Again, to the extent privacy might be implicated these safeguards, as well as those the union is required to observe, should allay any concern. It bears reiteration that access for education and solicitation is a significant element of effecting the fundamental rights at stake.

Those workers classified by an employer as independent contractors are reported on IRS 1099 forms and so those so treated would be readily identifiable by the employer.

Re Part B. The NLRB had long held that, an employer's "open space" – space open to the general public as well as employees – could be used by union organizers to reach off-duty workers. The employer's disallowance of access would be an unfair labor practice. The Trump Board abrogated that rule. *UPMC Presbyterian Hosp.,* 368 NLRB No. 2 (2019). The Biden Board might reinstate it. The rule is adopted here as striking a sound balance between the employer's property right and the right of union access.

Might the state afford an expressive easement on private property for organizational purposes? Because the space is open to the public the mandate of an expressive easement on it would not be an unconstitutional "taking" of property without compensation. *Cedar Point Nursery* v. *Hassid*, 141 S.Ct. 2063, 2076-77 (2021) distinguishing *Prune Yard Shopping Center* v. *Robbins*, 447 U.S. 74 (1980), on that ground.