THE NEW LABOR MARKET AND REGULATORY INNOVATION FROM AN AMERICAN PERSPECTIVE

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In the United States, the central framework for the regulation of labor relations was setting during the New Deal Era. At the time the National Labor Relations Act was enacted by Congress, it was considered a great regulatory innovation, and the Labor Movement viewed it as a big success for workers. However, in the past several decades, the workplace and work have undergone significant changes. Laws such as the NLRA, that were enacted in order to ensure good work conditions are failing in their task. This paper will describe some of the changes and inadequacies of current policies and structures. It further will explore the possibilities of change and reform, adapting the structures of labor relations and policy to the new political economy. I point to an emerging new literature that proposes a framework of orchestrated, yet participatory, experimentation. While the paper focuses on the changing legal and economic regimes in the United States, similar patterns are experienced in many parts of the world, and thinkers from various places across the globe are coming together to rethink these challenges.

I. THE NEW ECONOMY AND THE NEW WORKPLACE

Although any sharp linear account of the move from an "old" to a "new" economy is inevitably reductionist, there are many feature of today's labor market that are significantly different from the realities of several decades ago. At the beginning of the 20th century, the traditional core worker was male, white, and an American citizen. The vision of collective bargaining was based on a relatively homogenous workforce and a stable single employer for which there would be a collective bargaining unit. However,

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the workforce today has vastly diversified. Workers today constitute many more women, more immigrants, and the workforces of almost any industry are ethnically and racially diverse. At the same time, since their peak in the 1950s, labor unions have been constantly declining and there are predictions of their further decline in the near future.(1) The work relations were based on the paradigm of a large, stable, industrial firm that secures long-term and full-time employment. The old economy was also based on the assumption that the United States economy is relatively autonomous, independent, and free from outside competition. The last several decades have brought new realties that changed all of these past characteristics. The rapid increase in global trade, capital, as well as, although not symmetrical, labor capital mobility, have led firms to change their employment relations. In addition to globalization, developments in technology and communication, as well as what has been termed "the second industrial divide", the move to both high-technology and service industries patterns, have all increased the needs for flexibility. Firms are increasingly outsourcing many of their functions, using part-time employees, leasing employees from temporary help agencies, and adjusting the number of their core employees more often through short term hiring and firing. Temporary help agencies are among the fastest growing industries in the United States.(2)

Thus, the New Deal assumptions that existing labor laws along with individual employment laws protect workers from insecurity and dislocation are now proving to be false. As traditional collective bargaining has declined and new workplace realities are experienced, the major challenge that policy makers must face is to envision an updated framework of employment relations that addresses the concerns and needs of all segments of the workforce as well as the pressure that are faced by employers.

II. TOWARD A NEW FRAMEWORK

A key feature of today's labor market is its heterogeneity. A balance must be struck between the recognition of the diverse realities which different categories of workers must face, and an overall comprehensive understanding of market reform. A first basic distinction exists between "core workers," who work in relatively stable workplace settings and "contingent workers," including part-time, leased, and independent contractors. A second basic distinction exists between professional workers, whether "core" or "contingent", and the low-skilled workforce.

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(1) Unions represented 34.7% of the workforce in 1954, 16.4% in 1990, and approximately 14% in 1997. Although 1998 and 1999 have been marked with renewed labor militancy and strikes, analysts believe that union density will continue to decline in the next century. *See*, Marion Crain & Ken Matheny, *"Labor's Divided Ranks": Privilege and the United Front Ideology*, 84 CORN. L. REV. 1542 FN 3 (1999); Labor Unrest Overshadows Serene Trend, Steven Greenhouse, N.Y. Times News Service, The Journal Record (Tuesday, July 14, 1998); Charles B. Craver, Why Labor Unions Must [and Can] Survive, 1 U. PA. J. LAB. & Employment L. 15 (1998); Rachel Geman, *Safeguarding Employee Rights in Post-Union World: A New Conception of Employee Communities*, 30 COLUM. J.L. & SOC. PROBS. 369, FN6 (1997); Paul C. Weiler, *Hard Times for Unions: Challenging Times for Scholars*, 58 U. CHI. L. REV. 1015, 1017 (1991).

(2) Symposium, *Contingent Workers & Alternate Work Arrangements*, Monthly Lab. Rev., Oct. 1996.

For "core workers" in the United States, the National Labor Relations Act (NLRA) has been the framework for collective bargaining since the vision of the New Deal. In today's economy, various sections of the NLRA must be rethought. The NLRA poses limitations on the nature of the bargaining units as well as the nature of the bargaining process. One example is the distinction the NLRA makes between "mandatory" and "non-mandatory" subjects of collective bargaining. Under current doctrine, employers are only required to share information with the union on mandatory subjects of negotiation.[3] However, workers need to be more informed about technical and strategic issues, and thus the distinction should be eliminated. Other problematic interpretations of the NLRA by the judiciary that should be rethought particularly when facing today's market is the limitations posed on the modes of labor activity, which currently exclude "secondary boycott" and which limit labor speech, excluding from it "political speech."[4] Another important example of the inadequacy of the current legal regime is the limitations posed by the NLRA on worker participation schemes.[5] Currently, section 8(a)(1) of the NLRA prohibits employer practices that "interfere with, restrain, or coerce" workers in the exercise of their Section 7 rights to self-organization, collective bargaining, and other concerted activities.[6] Section 8(a)(2) prohibits employers from "dominat[ing] or interfer[ing] with the formation or administration of any labor organization or contribute financial or other support to it."[7] However, in recent year there has been a proliferation of worker organizations that do not engage in traditional collective bargaining and are not recognized by the Act as unions. One legislative proposal that has been controversial among union leaders and labor scholars is the Teamwork for Employees and Managers Act (TEAM) that was proposed, but not enacted, during the Clinton administration. TEAM would have eliminated the bans on employee participation schemes.[8] Labor organizers rejected TEAM because it was seen as an attempt to undermine independent unionism. However, with adequate protections, labor unions can gain from the liberalization of

(3) See generally, *John D. Feerick*, Information-Sharing Obligations, *in* "Labor Law and Business Change 45" (Samuel Estreicher & Daniel G. Collins eds., 1988).

(4) See generally, *Orly Lobel*, Agency and Coercion in Labor and Employment Relations: Four Dimensions of Power in Shifting Patterns of Work, Univ. of Penn. J. of Labor and Employment Law, (2001).

(5) Article 8(a)(2) of the NLRA prohibits employers from setting up "company unions."

(6) 29 U.S.C. § 158(a) (1988).

(7) *Id.* Section 2(5) of the NLRA defines a "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." 29 U.S.C. § 152(5).

(8) In June 1996, Congress passed the TEAM Act. However, the act was vetoed by President Clinton. Without sufficient votes in Congress to override the presidential veto, TEAM was not enacted. TEAM offered to amend section 8(a)(2) of the NLRA to allow non-unionized employers to establish and participate in worker-management groups. *See*, Teamwork for Employees and Management Act, S. 669, 103d Cong., 1st Sess. (1993). *See* also, *Alvin L. Goldman*, "Potential Refinements of Employment Relations Law in the 21st Century", 3 Employee Rts. & Employment Pol'y J. 269; *Michael H. Leroy*, "Can Team Work? Implications of an Electromation and Dupont Compliance Analysis for the Team Act", 71 Notre Dame L. Rev. 215. (1996).

labor organizing models. In the new workplace, managerial structures are constructed to be more dynamic and participatory.[9] Employers organize production using models such as "self-management," "co-management," "workplace democracy," "co-determination," "employee representation," and "employee involvement plans" (EIP), which involve shop-floor operational consulting to strategic policy-making.[10] These organizational models are thus varied and workers can potentially mobilize around them to use them as an additional vehicle of employee voice.

The need to revitalize worker organization models applies also to categories of workers other than the traditional "core". First, with respect to "managerial employees" have been excluded from the bargaining unit under the NLRA's "managerial exclusion" rule. Section 2(3) of the Act excludes "managerial employees" or "supervisors" from the definition of employees that can form a bargaining unit.[11] Although in today's realities, the distinction between two classes of employees, non-managerial workers and managers/supervisors, is no longer a valid one in many workplace settings, both labor and employment laws continue to form exempt categories around the definition of managerial employees.

With respect to professional workers, the courts, under the NLRA interpretation as well as under other laws, often categorize these workers as independent contractors, consultants, or part-time employed by multiple employers. There are current debates around the world about whether professional associations, such as the American Medical Association, over the feasibility and desirability of establishing a collective bargaining arm.[12] This growing group of workers needs to have the opportunity for certain continuity in representation despite the inherent occupational mobility. A new approach might assume a "full career life cycle" which would enable contingent workers, whether professionals or low-skilled, to have membership in a worker organization that accommodates continuous change in job opportunities.[13] Such "next-generation unions" can provide direct services and benefits to their members, detached from a specific workplace, or even from a specific industry.[14]

Low-skilled, low-income workers are the most vulnerable category of workers of the labor market. Globalization and technology advancements

(9) On these organizational structures, see generally, *Orly Lobel*, "Agency and Coercion in Labor and Employment Relations: Four Dimensions of Power in Shifting Patterns of Work", 4 U. Pa. J. Lab. & Employment L. 121 (2001).

(10) *Id.*

(11) Section 2(3) of the NLRA states: "The term 'employee' ... shall not include ... any individual employed as a supervisor." NLRA § 2(3), 29 U.S.C. § 152(3) (1982). Section 2(11) defines the term "supervisor" as: Any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment NLRA § 2(11), 29 U.S.C. § 152(11).

(12) *Osterman et. al.*, "Working in America: A Blueprint for the New labor Market" 112-13 (2002).

(13) See, *Osterman et. al.*, "Working in America: A Blueprint for the New labor Market" 124 (2002).

(14) *Id.*

has widened the gap between low-skilled and high-skilled workers. While high skilled workers are more likely to remain employable even as job and opportunities are reconfigured, low-skilled workers experience greater uncertainties and dislocation. In our current "human capital era," or otherwise termed "the information age", policies must be further designed to improve the opportunities for skill training and mobility for all workers. One example of such an initiative is one reaction to the effects of global competition by the U.S. federal government — the creation a special fund under the Trade Adjustment Act which provides special training assistance for workers who have lost their jobs because of foreign competition. Moreover, the biggest problem that low-skilled workers face in the new economy is not the lack of direct employment regulation but the lack of coverage and enforcement under existing protective laws, as well as the lack of a greater public infra-structure to address the risks of contingency. First, small businesses are often uncovered by labor and employment regulations because of minimum size requirements for coverage. In such cases a more active role by public administrative agencies is required to ensure adequate labor standards. Innovative attempts in the some states have included the definition of a governmental agency as a "de jure employer" in such cases where a de facto private employer is inadequate. Labor policies must be better linked to other public policies, including welfare, health, unemployment insurance, pensions, education and training. In the United States, the fact that welfare benefits such as health insurance and pensions are employer-based is proving highly problematic for the most vulnerable groups of workers in the new economy. New public laws, including tax incentives and direct social provision should take into account the increased mobility and contingency of work.

Although labor standards are mostly not linked to citizenship or residency, and all workers, including undocumented immigrant workers, are protected by employment laws, in practice, many of the most vulnerable groups of workers are paid less than the minimum wage, receive no overtime, or fringe benefits and are generally exploited in the new economy. A focus on new worker voice structures is the most promising avenue to address these problems. Enabling workers to organize and participate in some of the decision-making processes that affect their work-lives may prove more important to an ever changing economy than a focus on the exact substantive content of various employment laws.

Making the Local, National, and Global Connections

Focusing on process rights, a growing number of legal scholars across the globe are exploring bottom-up activism which makes visible the links between local and global developments. As described above, the great variations in employment arrangements and worker organizations, the heterogeneity of the workplace and the workforce, and the rapidity in which the market is changing these days, all require flexibility and adaptability. Flexibility should not be understood as the domain of firms but rather as an organizing concept for government and civil society as well. Thus governmental agencies should engage civil society and market initiatives

that experiment with process and regulatory innovation by supporting a variety of organizing forms and facilitating alliance building and information sharing from different geographical areas and industries. Attention should be devoted to new market intermediaries, including vocational training programs, placement agencies, temporary help and leasing firms, work/family initiatives, nongovernmental employee advocacy groups, community organizations, cross-sector partnerships and coalitions, immigrant network groups, and mediation and reconciliation services. All of these spaces have become more important within the new global market realties. Yet while some have proved helpful to raising awareness about fair work standards, others, such as some temporary help agencies, have contributed to the decline of these standards. It is the role of public bodies, including administrative agencies and the courts to identify the structures that can build scale and scope, and encourage partnerships across regional, national, and transnational spaces. Responsible practices should be standardize and supported publicly, while unfair arrangements must be discouraged as structural problems and with an eye to equitable distribution, between labor and capital as well as among different categories of workers, within the comprehensive framework of the changing economy.