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Hot Topic
Future Worker Mngmnt

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The Commission on the Future of Worker-Management Relations
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My name is Matthew W. Finkin. I am the Albert J. Harno Professor of Law and Professor in the Institute of Labor and Industrial Relations at the University of Illinois. I am delighted to appear before this distinguished body, and in such good company, to discuss the future of the law of employee representation.

The existing law is founded on the principle that every employee has a right to a representative of the employee's "own choosing." The rest of the law is an effort to realize that principle. Despite economic and social change, the statutory purpose is no less vital today than when it was enacted.

It has been suggested that global competition has diminished the demand for collective representation for it has reduced the ability of traditional unions to take wages out of price competition and, more important, has tied employees ever more closely, economically and psychologically, to the success of their employers. It has also been argued that today's workers bear scant resemblance to the workers of the 30s: Federal and state legislation, a burgeoning body of state common law, and employer policies and welfare benefits have created a complex skein of labor protections unheard of when the Labor Act was fashioned.

Neither of these diminish the law's significance. The Act never uses the word "union." It speaks of a "representative," which could be a membership organization -- organized on product market or enterprise lines -- a "service provider" subscribed to by employees, or even a lawyer. In other words, the statutory guaranty of representation is remarkably flexible; it is capable of accommodating a variety of competitive environments

and business structures. And today's complex web of law and employer policies only underlines the employee's need for a representative to act on the employee's behalf with the expertise to understand these complexities. The alternative model against which collective representation historically resonates is individual self-representation. But we do not realistically expect the individual employee to deal knowledgeably with her employer over such matters as the actuarial bases for contributions to her pension, the toxicology of substances to which she might be exposed, the content of rules governing discipline, or even the factual bases for her own discharge.

This is not to deny that today's workplace may be very different from the mass production world of the 30s and 40s. The delivery of services has eclipsed the production of goods. Employers have increasingly adopted flexible staffing arrangements using part-timers, temporary employees, leased workers, and independent contractors. These workers have neither an expectation of job security nor many of the welfare benefits that employers provide for their permanent employees; but they may also be difficult for unions to reach or may be excluded from coverage by law. If this represents a sea change in the organization of work, if we are increasingly to rely on cohorts of nomadic or, at least, mobile workers concerned more with employability than job security, then we must be concerned about how they will be dealt with.

An assessment of how well the law of representation comports with contemporary circumstances should attend to four fundamental questions: First, are some excluded from the right of representation who should be included? Second, how effective is access to representation for those who might desire it? Third but closely related, how effective is the

assurance of non-retaliation for having sought representation? And most important, how effective is the law governing the process of representation?

Coverage: For reasons adverted to, the statutory exemption of "independent contractors" should be eliminated in favor of a more realistic test of economic dependence, as it was prior to 1947. Moreover, the judge-made exemption of "managerial" employees should be limited to managers responsible for labor policy.* That "middle managers" are needful of representation is evidenced in the Nation's recent experience with a "white collar" recession, in wholesale layoffs and by the not uncommon unilateral abrogation of benefits without prior notice to or consultation with those adversely affected.

Access: Three points need be addressed. First, most employees gain knowledge of their right to be represented from those who would seek to represent them. But these would-be representatives have been given very limited access to employees, to inform them of their rights or of the representative's interest in them. In a perverse twist, representative organizations are given access to the names and addresses of employees only after they have been able to petition for an election. (And the Supreme Court has rejected even the Labor Board's altogether moderate balancing test for determining when a representative may have access to employees on non-work time in areas otherwise open to the public.) The law should allow the widest practicable dissemination to employees of their statutory rights and of the availability of representation. It does not.

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* Any modification in the law to encourage more widespread adoption of "employee participation plans" would require a recasting of the managerial exemption, lest the employee- participants become statutory non-employees.

Second, employees should be able to secure representation with as little cost or delay as possible. At one point, employers were required to deal with representatives designated by employees virtually as a matter of course; but today the law makes that designation only an opening volley in a confrontation over the employees' loyalties -- or fears. There is no reason why an obligation to deal with the designated representative should not be determined by that designation alone (as was Labor Board policy prior to 1939), by an immediate election (as was Labor Board policy in 1945), or by a showing of paid membership (as was done under the predecessor National Industrial Recovery Act).

Third, access to representation is premised upon the existence of a relatively stable complement of employees in a workplace who comprise "an appropriate bargaining unit," from which an exclusive representative is designated by a majority. But the emergence of unstable, contingent employment relationships -- in some instances of work performed at home or by those in only electronic communication with the workplace -- places in question how these employees are to be represented. (And the law's exclusive provision for representation by majority rule does nothing for workplace non-majorities who desire representation.) Thought ought to be given to alternative forms of representation -- to more flexible representational arrangements better in keeping with today's more flexible staffing arrangements -- perhaps by non-majority representation that would allow for the emergence of occupationally based representatives of these mobile cohorts.

Anti-retaliation: At least since 1961, when a subcommittee of the House recommended substantially increased penalties for discharge or discrimination due to union activity, we have been aware of the inadequacy of the current remedial system. That

inadequacy is only highlighted by the development of state tort relief in a great many jurisdictions for a discharge that violates public policy, including policies found in federal law, except the policy of non-retaliation for workplace association. (Even under the Railway Labor Act punitive damages may be available for a discriminatory discharge.) An effective means of enforcing the anti-retaliation prohibition is long overdue, possibly by creating a statutory presumption of irreparable harm and making resort to injunctive relief mandatory.

Effective Representation: The law requires the employer to share information in its possession necessary for the representative to perform its function, and to bargain in good faith before implementing a change in terms or conditions of employment. These are necessary but insufficient conditions of effective representation, for there is no legal deterrent for the employer merely to go through the motions of meeting and conferring with the representative. For a variety of reasons, including but not limited to the "permanent replacement" rule, the prospect of a strike has diminished as a motive force for dealing in good faith. The hiring of permanent strike replacements should be prohibited; I know of no respectable statutory defense of it. But that prohibition may not alone be adequate to deal with the "surface bargaining" problem. Some more effective devices should be considered, including compulsory arbitration.

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These questions test whether the Republic remains committed to the right of employee representation. Irrespective of the suggested proposals, they are the questions worth asking. And I do not think that disinterested answers to them can be other than dispiriting.