2003

Workers’ Freedom of Association in the United States: The Gap Between Ideals and Practice

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Abstract
[Excerpt] What is most needed is a new spirit of commitment by the labor law community and the government to give effect to both international human rights norms and the still-vital affirmation in the United States’ own basic labor law of full freedom of association for workers. A way to begin fostering such a change of spirit is for the United States to ratify ILO conventions 87 and 98. This will send a strong signal to workers, employers, labor law authorities, and to the international community that the United States is serious about holding itself to international human rights and labor rights standards as it presses for the inclusion of such standards in new global and regional trade arrangements.

Keywords
worker rights, labor movement, union organizing, human rights, freedom of association

Disciplines
Labor Relations

Comments
Suggested Citation

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CHAPTER 2

Workers' Freedom of Association in the United States

The Gap between Ideals and Practice

Lance Compa

Workers' Freedom of Association under International Human Rights Law

The International Background

International human rights analysts and advocates have been slow coming to grips with issues of workers' rights. Attention has focused on pressing problems of arbitrary detention and torture, massacres of indigenous peoples and ethnic minorities, atrocities of war and civil war, and other gross human rights violations, not on workers' rights to form and join trade unions and bargain collectively. For their part, worker representatives have been slow to see human rights aspects in their work. The day-to-day challenge of organizing and bargaining in complex frameworks of national labor laws leaves little time to learn from international human rights discourse. In the United States and in many other countries, union and management officials and attorneys, as well as administrators and judges, seldom turn to international law to inform their work.

All that is changing under the pressures of a globalizing economy and new sensitivity to the human rights implications of workers' rights advocacy. For example, employers' organizations, trade unions, and governments joined together at the International Labour Organization (ILO) in 1998 to issue a landmark Declaration on Fundamental Principles and Rights at Work. Their common declaration set out freedom of association and the right to organize and bargain collectively as the first such principles.

At the same time, the 1998 action at the ILO was not a complete novelty. Freedom of association for workers has long been universally acknowledged as a fundamental right. A widely accepted body of international norms has established standards for workers' freedom of asso-
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ciation covering the right to organize, the right to bargain collectively, and the right to strike.¹

Sources of international labor law on workers’ freedom of association include human rights instruments developed by the United Nations and by regional human rights bodies, principles elaborated through worker, employer, and government representatives at the ILO, and labor rights clauses in international trade agreements. The United States has acknowledged its international responsibility to honor workers’ freedom of association by ratifying human rights instruments, in particular the International Covenant on Civil and Political Rights. It has also accepted obligations under ILO conventions on freedom of association and under the 1998 declaration.

The United States has committed itself, through international agreement, to effectively enforce U.S. laws protecting workers’ rights to organize, bargain collectively, and strike. It has affirmed obligations to honor workers’ freedom of association in its own trade laws and in laws governing U.S. involvement in the World Bank, the International Monetary Fund, and other multilateral bodies. In all these laws, freedom of association is held out as the foremost internationally recognized workers’ right.

International Human Rights Instruments

• The Universal Declaration of Human Rights (1948) states that “everyone has the right to freedom of peaceful assembly and association,” and “everyone has the right to form and to join trade unions for the protection of his interests.”²

• The International Covenant on Civil and Political Rights (ICCPR, 1966) declares: “Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.”³

• The International Covenant on Economic, Social, and Cultural Rights (ICESCR, 1966) obliges governments to “ensure the right of everyone to form trade unions and join the trade union of his choice . . . the right of trade unions to function freely . . . the right to strike.”⁴

The United States ratified the International Covenant on Civil and Political Rights in 1992. The ICCPR requires ratifying states “to respect
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and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant" and "to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant." The ICCPR also constrains ratifying states "to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy."5

When the U.S. Senate ratified the International Covenant on Civil and Political Rights in 1992, it took several reservations, understandings, and declarations sidestepping certain obligations in the covenant, perhaps most notably reserving the right to impose capital punishment on minors.6 But it took no reservations, understandings, or declarations with respect to Article 22 on the right to form and join trade unions, or to Article 2 requiring an "effective remedy" for rights violations.7

Acknowledging the obligation, the U.S. State Department's first report on compliance with the ICCPR stated that "provisions of the First, Fifth and Fourteenth Amendments guarantee freedom of assembly in all contexts, including the right of workers to establish and join organizations of their own choosing. . . . The rights of association and organization are supplemented by legislation."8 Distressingly, however, the United States devalued the importance of protecting the right to freedom of association by claiming that the widespread exclusion of workers from coverage under U.S. labor laws—primarily agricultural workers, domestic workers, and supervisory employees—"means only that they do not have access to the specific provisions of the NLRA . . . for enforcing their rights to organize and bargain collectively."9 "Only" lacking access to enforcement mechanisms means these workers' rights can be violated with impunity. There is no labor board or other authority to remedy violations.

Regional Instruments

Regional human rights instruments reaffirm the consensus on workers' freedom of association as a basic right:

- The American Declaration of the Rights and Duties of Man (1948) states: "Every person has the right to assemble peaceably with others in a formal public meeting or an informal gathering, in connection with matters of common interest of any nature. Every
person has the right to associate with others to promote, exercise and protect his legitimate interests of a political, economic, religious, social, cultural, professional, labor union or other nature.\textsuperscript{10}

- The later American Convention on Human Rights (1969) declares: "Everyone has the right to associate freely for ideological, religious, political, economic, labor, social, cultural, sports, or other purposes."\textsuperscript{11}

- Reflecting the international consensus on workers' freedom of association, though it does not involve the United States, the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) says: "Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests."\textsuperscript{12}

- The European Union's Community Charter of Fundamental Social Rights of Workers (1989) holds: "Employers and workers of the European Community shall have the right of association in order to constitute professional organisations or trade unions of their choice for the defence of their economic and social interests . . . the right to negotiate and conclude collective agreements under the conditions laid down by national legislation and practice . . . the right to strike, subject to the obligations arising under national regulations and collective agreements.\textsuperscript{13}

ILO Conventions and OECD Guidelines

Building on this international consensus, the ILO, a UN-related body with nearly universal membership and tripartite representation by governments, workers, and employers, recognizes freedom of association and protection of the right to organize as core workers' rights. Over decades of painstaking treatment of allegations of violations of workers' rights, the ILO's Committee on Freedom of Association has elaborated authoritative guidelines for implementation of the right to organize, the right to bargain collectively, and the right to strike.

- ILO Convention 87 on freedom of association and protection of the right to organize says that "workers and employers, without distinction whatsoever, shall have the right to establish and, subject
only to the rules of the organization concerned, to join organizations of their own choosing without previous authorization.”

- ILO Convention 98 declares that “workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment. . . . Such protection shall apply more particularly in respect of acts calculated to—(a) make the employment of a worker subject to the condition that he shall not join a union or shall relinquish union membership; (b) cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities.”

In greater detail, Convention 98 goes on to say:

“Workers’ and employers’ organizations shall enjoy adequate protection against any acts of interference by each other. . . . Machinery appropriate to national conditions shall be established, where necessary, for the purpose of ensuring respect for the right to organize . . . . Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilization of machinery for voluntary negotiation between employers’ and workers’ organizations, with a view to the regulation of terms and conditions of employment by means of collective agreements.”

- The ILO’s Declaration of Fundamental Principles and Rights at Work says expressly: “All members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization, to respect, to promote, and to realize, in good faith and in accordance with the [ILO] Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely: (a) freedom of association and the effective recognition of the right to collective bargaining.”

ILO core conventions were officially recognized at the 1995 World Social Summit conference in Copenhagen. In addition to those covering freedom of association and the right to organize and bargain collectively, ILO norms on forced labor, child labor, and employment discrimination were defined as essential to ensuring human rights in the workplace. Signed by the United States, the Copenhagen summit’s fi-
nal declaration called on governments to ratify these ILO conventions, to respect them even if they have not ratified them, and to use international labor standards as a benchmark for their national legislation. The U.N. High Commissioner for Human Rights includes these ILO conventions in an authoritative list of "international human rights instruments." 

At the Organization for Economic Cooperation and Development (OECD), the United States subscribes to a statement that "enterprises should, within the framework of law, regulations and prevailing labor relations and employment practices, in each of the countries in which they operate: respect the right of their employees to be represented by trade unions . . . and engage in constructive negotiations . . . with such employee organizations with a view to reaching agreements on employment conditions." The OECD has characterized freedom of association and the right to organize and bargain collectively as labor standards that "reflect basic human rights which should be observed in all countries, independently of their levels of economic development and sociocultural traditions."

U.S. Commitments in the Multilateral Setting

The United States championed the 1998 adoption of the ILO's Declaration on Fundamental Principles and Rights at Work that set out freedom of association as the first such principle and right. On adoption, U.S. labor secretary Alexis Herman declared, "The ILO has underlined and clarified the importance of the fundamental rights of workers in an era of economic globalization . . . ILO members have accepted the need to be accountable, and with this action there will now be a process within the ILO to demonstrate that accountability." Whether or not a country has ratified conventions 87 and 98, the ILO has determined that ILO member countries are "bound to respect a certain number of general rules which have been established for the common good . . . among these principles, freedom of association has become a customary rule above the Conventions." Though it has so far not ratified conventions 87 and 98, the United States has accepted jurisdiction and review by the ILO Committee on Freedom of Association (CFA) of complaints filed against it under these conventions. Several ILO cases involving the United States in the past fifteen years
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have challenged its compliance with international labor standards. The United States has defended itself in these cases by describing its elaborate system of labor laws and procedures and asserting that the system generally conforms to ILO standards. In many cases, the CFA "noted with concern" and "drew the attention of the U.S. government" to problems the committee perceived. In some cases, the committee recommended changes in policy and practice. However, the ILO has no enforcement powers, and the United States took no action to implement the recommendations.

Reporting on compliance and defending against complaints, the United States likewise has taken the position that its labor law and practice are generally in conformance with the conventions but that some elements of U.S. federal and state labor laws conflicted with the conventions' detailed requirements. Ratification of ILO conventions would amount to "back door" amendments to U.S. labor laws without following the normal legislative process because the ratification of an international treaty would supersede preexisting domestic law under the United States' constitutional system. The leading U.S. employer representative to the ILO cautioned against making U.S. law subject to ILO supervision because "this machinery is not in our control" and the United States could be embarrassed by holding "our domestic laws and practices up to greater international scrutiny and criticism than is presently the case."

Before 1999, U.S. reports to the ILO on compliance with freedom of association standards offered boilerplate descriptions of American labor law and asserted that U.S. law and practice "appears to be in general conformance" with conventions 87 and 98. Significantly, however, the United States in a 1999 report acknowledged for the first time that "there are aspects of this [U.S. labor law] system that fail to fully protect the rights to organize and bargain collectively of all employees in all circumstances."

The 1999 U.S. report stated that "the United States is concerned about these limitations and acknowledges that to ensure respect, promotion and realization of the right to organize and bargain collectively, it is important to reexamine any system of labor laws from time to time to assure that the system continues to protect these fundamental rights." An ILO Committee of Expert-Advisors that reviewed country reports called the U.S. statements "striking for their open recogni-
tion of difficulties still to be overcome or situations they deemed relevant to achieving full respect for the principles and rights in the Declaration."27

U.S. Trade Laws

The United States has also affirmed the importance of international norms and obligations regarding workers' freedom of association in its own trade statutes. Although these laws create obligations for trading partners, they underscore the U.S. commitment to freedom of association under international standards. In these statutes governing trade relationships with other countries, Congress defined freedom of association and the right to organize and bargain collectively as "internationally recognized workers' rights."28

Labor rights amendments have been added to statutes governing the Generalized System of Preferences (GSP) in 1984,29 the Overseas Private Investment Corporation in 1985,30 the Caribbean Basin Initiative in 1986,31 section 301 of the Trade Act of 1988,32 Agency for International Development (AID) funding for economic development grants overseas,33 and U.S. participation in the World Bank, International Monetary Fund, and other international lending agencies.34 All these measures hold out the possibility of economic sanctions against trading partners that violate workers' rights. In every case, freedom of association and the right to organize and bargain collectively are the first rights listed.

In formulating the labor rights clauses in U.S. trade laws, Congress has relied on ILO guidance. In its report on legislation governing U.S. participation in international financial institutions, Congress pointed to "the relevant conventions of the International Labour Organization, which have set forth, among other things, the rights of association [and] the right to organize and bargain collectively."35 Analyzing the application of workers' rights provisions in U.S. trade laws, the General Accounting Office underscored the fact that "the international standards have been set by the International Labour Organization, which is part of the U.N. structure."36

Since passage of the 1984 GSP labor rights amendment, the U.S. State Department's annual Country Reports on Human Rights Practices
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... refer to ILO Convention 87 as the basis of U.S. policy on workers' freedom of association. The reports say that "the 'right of association' has been defined by the International Labour Organization to include the right of workers to establish and to join organizations of their own choosing," and "the right to organize and bargain collectively includes the right of workers to be represented in negotiating the prevention and settlement of disputes with employers; the right to protection against interference; and the right to protection against acts of antiunion discrimination." 37

Regarding strikes, the State Department's human rights policy is that "the right of association includes the right of workers to strike. While strikes may be restricted in essential services (i.e., those services the interruption of which would endanger the life, personal safety or health of a significant portion of the population) and in the public sector, these restrictions must be offset by adequate guarantees to safeguard the interests of the workers concerned." 38 The State Department's formulation of the right to strike reflects the determination by the ILO that the right to strike is an essential element of the right to freedom of association.

The North American Free Trade Agreement

The North American Free Trade Agreement (NAFTA) among the United States, Canada, and Mexico brought with it a labor side agreement, the North American Agreement on Labor Cooperation (NAALC). Freedom of association and protection of the right to organize, the right to bargain collectively, and the right to strike are the first three "labor principles" of the NAALC. This international agreement was negotiated at the insistence of the United States government following a commitment made during President Clinton's 1992 electoral campaign. 39

The NAALC characterizes the first labor principle as "the right of workers exercised freely and without impediment to establish and join organizations of their own choosing to further and defend their interests." The agreement formulates the right to bargain collectively as "the protection of the right of organized workers to freely engage in collective bargaining on matters concerning the terms and conditions of em-
ployment.” It describes the right to strike as “the protection of the right of workers to strike in order to defend their collective interests.” With its North American trading partners, the United States committed itself to promote the NAALC labor principles and to “effectively enforce its labor law” to achieve their realization.

U.S. Labor Law and International Norms—Violations and Case Studies

American workers secured the right to organize, to bargain collectively, and to strike with passage of the National Labor Relations Act (NLRA) of 1935. The NLRA declares a national policy of “full freedom of association” and protects workers’ “right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.”

The NLRA makes it unlawful for employers to “interfere with, restrain, or coerce” workers in the exercise of these rights. It creates the National Labor Relations Board (NLRB) to enforce the law by investigating and remedying violations. All these measures comport with international human rights norms regarding workers’ freedom of association.

However, some provisions of U.S. law openly conflict with international standards on freedom of association. Millions of workers, including farm workers, household domestic workers, and low-level supervisors are expressly barred from the law’s protection of the right to organize. United States law allows employers to permanently replace workers who exercise the right to strike, effectively nullifying the right. New forms of employment relationships have created millions of part-time, temporary, subcontracted, and otherwise “atypical” or “contingent” workers whose freedom of association is frustrated by the law’s failure to adapt to changes in the economy.

The reality of U.S. labor law enforcement falls far short of its goals. Many workers who try to form trade unions are spied on, harassed, pressured, threatened, suspended, fired, deported, or otherwise victimized in reprisal for their exercise of the right to freedom of association.
A culture of near-impunity has taken shape in much of U.S. labor law and practice. Any employer intent on resisting workers' self-organization can drag out legal proceedings for years, fearing little more than an order to post a written notice in the workplace promising not to repeat unlawful conduct. Many employers have come to view remedies like back pay for workers fired because of union activity as a routine cost of doing business, well worth it to get rid of organizing leaders and derail workers' organizing efforts.

Private employers are the main agents of abuse. But international human rights law makes governments responsible for protecting vulnerable persons and groups from patterns of abuse by private actors. The United States is failing to meet this responsibility. As noted above, many groups of workers are unprotected by the law. And even when the law is applied for workers who come under its coverage, enervating delays and weak remedies invite continued violations.

Patterns of violations exemplified in the case studies that follow are not exceptional and the accelerating pace of violations is not a new phenomenon. Congressional hearings in the 1970s and 1980s revealed extensive employer violations and ineffective enforcement of laws supposed to protect workers' rights. Other government studies and reports from independent commissions in the 1980s and 1990s reached similar conclusions. But those research efforts did not analyze violations in light of international human rights standards, which is the goal of this study.

Discrimination against Union Supporters

Firing or otherwise discriminating against a worker for trying to form a union is illegal but commonplace in the United States. In the 1950s, workers who suffered reprisals for exercising the right to freedom of association numbered in the hundreds each year. In the 1960s, the number climbed into the thousands, reaching slightly more than 6,000 in 1969. By the 1990s more than 20,000 workers each year were victims of discrimination for union activity—23,580 in 1998, the most recent year for which figures are available. An employer determined to get rid of a union activist knows that all that awaits, after years of litigation if the employer persists in appeals, is
a reinstatement order the worker is likely to decline and a modest back-pay award. For many employers, it is a small price to pay to destroy a workers' organizing effort by firing its leaders.

Case Study: A Nursing Home in Southern Florida

Workers at the King David Center in West Palm Beach voted 48-29 in favor of union representation in an NLRB election in August 1994. "I had a determination to get respect," said Jean Aliza, the first of several workers fired for organizing activity at King David. "I am a citizen, and I deserve respect." 45

According to the administrative law judge's decision in the case, King David management proceeded systematically to fire the most active union supporters. 46 Jean Aliza, Lude Duval, Marie Larose, Marie Pierre Louis, Michelle Williams, Carline Dorisca, and Ernest Duval were all fired on fabricated charges. They were ordered reinstated by the administrative law judge who heard testimony and reviewed documents, and the NLRB upheld the judge's order. In 1999 the workers were still not reinstated because of appeals to the courts. No collective agreement has been reached.

Jean Aliza was "set up" by managers and fired early in the organizing effort, after a yearlong "satisfactory" record suddenly became "unsatisfactory" based on warning notices he never saw. 47 King David "was determined to rid itself of the most vocal union supporter from the beginning," said the administrative law judge's ruling, referring to Ernest Duval. 48

Ernest Duval was still vocal about his union support when he spoke in July 1999, but he was also frustrated. "I see the government protecting management," he said. "It's been four or five years now, and I've got bills to pay. Management has the time to do whatever they want." 49

Forced Attendance at Captive-Audience Meetings

Almost without limits, employers can force workers to attend captive-audience meetings on work time. Most often, these meetings include exhortations by top managers that are carefully scripted to fall within the wide latitude afforded employers under U.S. law—allowing "pre-
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dictions” but not “threats” of workplace closings, for example—to de-
ter workers from choosing union representation. Employers can fire
workers for not attending the meetings. They can impose a “no ques-
tions or comments” rule at a captive-audience meeting and discipline
any worker who speaks up.

Case Study: Food Processing Workers in
Wilson, North Carolina

Smithfield Foods is the world’s largest hog processing company. A
Smithfield Foods plant in Wilson, North Carolina, employs some three
hundred workers who produce bacon, sausages, hot dogs, and other re-
tail pork items. Workers here tried to form a union in early and mid-
1999, but they lost an NLRB election. Several workers detailed threats
by Smithfield managers in captive-audience meetings to close the plant
if workers voted in favor of collective bargaining.50

Recounting management’s captive-audience meetings with workers,
shipping department employee Robert Atkinson said, “I saw about
seven different videos on how the union just takes your dues, goes on
strike, gets into fights and stuff. It really hurt us that the people only
heard one side. It would be a lot fairer if the union could come in and
talk to us. The company has a big advantage, making people come to
meetings and showing videos. A lot of people don’t come to union meet-
ings. They’re scared the company will know.”51

“Predicting” Reprisals

Under U.S. law, employers and antiunion consultants they routinely
hire to oppose workers’ organizing have refined methods of legally “pre-
dicting”—as distinct from unlawfully threatening—workplace clo-
sures, firings, wage and benefit cuts, and other dire consequences if
workers form and join a trade union. A “prediction” that the workplace
will be closed if employees vote for union representation is legal if the
prediction is carefully phrased and based on objective facts rather than
on the employer’s subjective bias.

This fine distinction in the law is not always apparent to workers or,
indeed, to anyone seeking common-sense guidance on what is allowed
or prohibited. Unfortunately for workers’ rights, federal courts have
tended to give wide leeway to employers to “predict” awful things if workers vote for a union.

One prediction a court found to be “carefully phrased” was made by the owner of an Illinois restaurant where workers sought to form a union and bargain collectively. In a tape-recorded speech in a captive-audience meeting the owner stated, “If the union exists at [the company], [the company] will fail. The cancer will eat us up and we will fall by the wayside... I am not making a threat. I am stating a fact... I only know from my mind, from my pocketbook, how I stand on this.” The NLRB found this statement unlawful. A federal appeals court reversed the board, finding the employer’s statement a lawful prediction that did not interfere with, restrain, or coerce employees in the exercise of the right to freedom of association.52

Case Study: Manufacturing Plant in Maryland

In the mid-1990s, a new company called Precision Thermoforming and Packaging, Inc. (PTP), employed more than five hundred workers in a Baltimore, Maryland, factory. The workers packaged and shipped flashlights, batteries, and computer diskettes. PTP’s wages were five dollars to seven dollars per hour. Health insurance cost employees thirty-six dollars per week from their paychecks—a benefit most of them declined, since they made only $200–$280 per week. There was no pension plan.

In mid-1995, a group of PTP workers began an effort to form and join a union. PTP management fired eight workers active in the union organizing effort. In addition to the firings, PTP managers and supervisors:

- threatened to close the plant if a majority of workers voted in favor of the union;
- threatened to move work to Mexico;
- threatened to fire workers who attended union meetings;
- threatened to fire anyone who joined the union;
- threatened to transfer workers to dirtier, lower-paying jobs if they supported the union;
- told workers to report to management on the activities of union supporters;
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• stationed managers and security guards with walkie-talkies to spy on union handbilling and report on workers who accepted flyers;
• denied wage increases and promotions to workers who supported the union.

"I'd say I was the one who got the union going," said Gilbert Gardner, who began working at PTP in April 1993. "Then they fired me the day after I went to a hearing at the NLRB to set up the election," he told interviewers. Union supporters lost the NLRB election by a vote of 226–168. Before the vote, 60 percent of the workers signed cards authorizing the union to represent them in collective bargaining. Management admitted committing the acts noted in the NLRB complaint and settled NLRB charges, but then declared bankruptcy and closed operations. Victimized workers were still waiting for back pay payments five years later.

Delays in NLRB and Court Procedures

Delays in the U.S. labor law system arise first in the election procedure. NLRB elections take place at least several weeks after workers file a petition seeking an election. In many cases, employers can hold up the election for months by challenging the composition of the "appropriate bargaining unit."

An employer can also file objections to an election after it takes place, arguing that the union used unfair tactics. It takes several months to resolve these objections. But even when the NLRB rules in workers' favor and orders the company to bargain with the union, the company can ignore the board's order. This forces workers and the NLRB to launch a new case on the refusal to bargain, often requiring years more to resolve in the courts. In many of the cases studied for this report, workers voted in favor of union representation years ago, but they are still waiting for bargaining to begin while employers' appeals are tied up in court.

Long delays also occur in unfair labor practice cases. Most cases involve alleged discrimination against union supporters or refusals to bargain in good faith. Several months pass before an administrative law judge hears the cases. Then several more months go by while the judge ponders a decision. The judge's decision can then be appealed to the
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the nlrb, where often two or three years go by before a decision is issued. the nlrb's decision can then be appealed to the federal courts, where again up to three years pass before a final decision is rendered. many of the workers in cases studied here were fired many years earlier and have won reinstatement orders from administrative judges and the nlrb, but they still wait for clogged courts to rule on employers' appeals.

case study: shipyard in new orleans, louisiana

with more than six thousand workers, avondale industries is louisiana's largest private-sector employer. the u.s. navy is avondale's biggest single customer, accounting for more than three-quarters of its business—$3 billion in navy contract awards in the past decade.

in 1993 avondale workers launched an effort to form a union. avondale management unleashed a massive campaign against the workers' organizing effort. "they told us they'd shut the door if the union came in, that we'd lose navy contracts," said sheet-metal worker bruce lightall, who has worked at the plant since 1979. the company also fired twenty-eight union activists.

in a speech to assembled avondale workers at a captive-audience meeting before the 1993 election, company president albert l. bossier, jr., said, "if you really want to destroy avondale, vote for the damn union. those of you who don't want to destroy avondale, you better make sure these whiners, malcontents, and slackers don't even come close to winning this election ... secure your future by rejecting this union and its bosses."

despite management's threats and firings, the union won the election by a vote of 1,950–1,632. avondale management refused to accept the results and began a series of appeals to the nlrb. in april 1997—nearly four years after the election—the nlrb certified the results and ordered avondale to bargain with the union. the company still refused, appealing the board's order to the federal courts. in 1999 a federal appeals court overturned the election results because voter lists contained workers' first initials rather than their first names. no nlrb election had ever been overturned on such grounds before.

in a 1998 decision, a judge characterized avondale's behavior as "egregious misconduct, demonstrating a general disregard for employees' fundamental rights." the judge ordered avondale to reinstate fired
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Frank Johnson, an Avondale machinist with twenty-five years in the yard, said in 1999, “After the election I thought we'd sit down after a week or so and start bargaining. Now it's six years later, and we're still waiting.”

Echoing Johnson, Bruce Lightall said, “I thought we'd sit down after the election and negotiate a contract like reasonable people, to get some justice, respect, dignity. In time I found out how the law doesn't work for workers. It just helps the companies. They can appeal forever.”

Surface Bargaining, Weak Remedies

Even after workers form a union and bargaining begins, employers can continue to thwart workers' choice by bargaining in bad faith—going through the motions of meeting with the workers and making proposals and counterproposals without any intention of reaching an agreement. This tactic is called “surface bargaining.” The problem is especially acute in newly organized workplaces where the employer has fiercely resisted workers' self-organization and resents their success.

Case Study: Telecommunications Castings in Northbrook, Illinois

Acme Die Casting, a division of Lovejoy Industries, makes a variety of small aluminum and zinc castings, mainly for the telecommunications industry. In October 1987, Acme employees voted 69–39 in favor of union representation. Jorge “Nico” Valenzuela became the head of the organizing committee and then the president of the shop union in 1987. “When we won the election we thought, 'Finally we can start making things better.' We elected a negotiating committee and asked management to start bargaining,” Valenzuela said. He and the other Acme workers did not know that years would go by before any bargaining would begin and that, when it did, bargaining would be futile.

After the election, the company filed objections to the election so unfounded that the NLRB dismissed them without a hearing. But Acme refused to accept the decision, forcing the union to file refusal-to-bargain charges and a new round of labor board and court proceedings.
In an April 1993 decision, a judge ordered Acme to “cease and desist” from refusing to bargain and to return to the table and bargain in good faith. The judge ruled that the company’s violations “are repeated and pervasive and evidence on its part an attitude of total disregard for its statutory obligations.”

Acme management shifted to a strategy of appearing to bargain by making proposals and counterproposals to the workers on minor subjects. However, the company “made demands they knew would be suicidal for the union” in other areas, said union representative Terry Davis. The company proposed tiny wage increases and demanded enormous hikes in employee payments for health insurance that would far exceed any pay increase. A carefully coached employer can nearly always frame such demands as “hard bargaining,” which is legal, as long as it makes proposals and counterproposals in other areas.

Bargaining went nowhere for six years. In March 1999, the union sent a letter to Acme and to the NLRB disclaiming representation rights. “At this rate,” said union negotiator Davis, “the company would still have deal-killers on the table twenty-five years from now.”

A top Acme official conceded, “We worked long and hard for years to convince our employees that they’re better off with us than with a union. The union did nothing but lie about us. People now believe they’re better off with us than with a union.”

These were years when, under the law, the company was supposed to be bargaining in good faith with the workers with a sincere desire to reach an agreement. The manager’s statement shows how far from sincere the company’s bargaining was. Yet in the end, its methods prevailed against workers’ right to bargain collectively, and the legal structure supposed to protect workers’ rights proved no impediment to these tactics.

Exclusion of Millions of Workers from Protection of Organizing and Bargaining Rights

International norms refer to the right of “every person” to form and join trade unions and to bargain collectively. Several of the cases examined for this report involved workers excluded from coverage by the NLRA, such as agricultural workers, domestic employees, and “independent” contractors who actually work in a dependent relationship with a single
employer for years. Low-level supervisors and managers are also excluded from legal protection.

In all, millions of workers in the United States are excluded from coverage of laws that are supposed to protect the right to organize and bargain collectively. Workers who fall under these exclusions can be summarily fired with impunity for seeking to form and join a union. Even where the employer does not fire them, workers' requests to bargain collectively can be ignored.

Case Study: Household Domestic Workers

More than 800,000 officially reported "private household workers" held jobs as domestic employees in 1998. Nearly 30 percent were foreign migrant workers, and the vast majority were women.Officials of multinational corporations, international organizations, and other elites residing in the United States have brought thousands of domestic workers into the United States.

An employer from Hilda Dos Santos's native Brazil held her as a "live-in slave" for nearly twenty years in a suburb of Washington, D.C. She was never paid a salary, was physically assaulted, and was denied medical care for a stomach tumor the size of a soccer ball. Her plight only came to light when neighbors acted at the sight of her tumor and resulting publicity led to a successful prosecution. Dos Santos's case illustrates the difficulty of uncovering such abuses. After twenty years of servitude, she was granted temporary legal status to testify against her employer but was then subject to deportation. An unknown number of similar victims remain silent because exposure would mean deportation for them, too.

Whether or not they are enforced, minimum wage laws, overtime laws, and child labor laws apply to most domestic workers in the United States. But if they attempt to form and join a union, or exercise any freedom of association even without the intent of forming a union, they can be threatened, intimidated, or fired by their employer because of their exclusion from coverage by the NLRA. The same abuses affect agricultural workers, low-level supervisors, and so-called independent contractors who are really dependent on a single employer for their livelihoods.
Subcontracted and Temporary Workers Are Denied Freedom of Association and Effective Remedies

Many employers can use subcontracting arrangements and temporary employment agencies to avoid any obligation to recognize workers' rights of organization and collective bargaining. This problem affects workers in the apparel manufacturing industry, in janitorial services, in high-technology computer services, and other sectors characterized by layers of subcontracting arrangements. Prime contractors often simply cancel the contracts of subcontractors whose employees form and join unions. The result is widespread denial of workers' freedom of association.

Case Study: High-Tech Computer Programmers in Seattle, Washington

The dilemma regarding freedom of association is stark for workers at temporary employment agencies, even at the high end of the economic ladder. A recent example of temporary agency workers' dilemma is found at the cutting edge of the new economy. More than twenty thousand workers are employed at Microsoft's Redmond, Washington, campus and other facilities in the Seattle area. But six thousand of them are not employed by Microsoft. Instead, they are employed by many temporary agencies supplying high-tech workers to Microsoft and other area companies. Many have worked for several years at Microsoft. They have come to be known as “perma-temps.” Often they work side-by-side in teams with regular, full-time employees.

Some Microsoft perma-temps formed the Washington Alliance of Technology Workers (WashTech) in early 1998. But WashTech has a Catch-22-type problem. By defining perma-temps as contractors employed by various temporary agencies, Microsoft avoids being their employer for purposes of the NLRA's protection of the right to organize. Meanwhile, the agencies tell temps that in order to form a union that agency management will deal with, they have to organize other employees of the agency, not just those working at Microsoft.

"First we asked our Microsoft managers to bargain with us," said perma-temp Barbara Judd, describing an effort by her and a group of
Workers' Freedom of Association in the United States

Temporary workers' freedom of association is a problem that affects many temporary services, in- and out of the United States. Workers at economic levels are often denied unionization rights, and co-workers to be recognized by Microsoft. Management refused. Responding to press inquiries, a spokesman for Microsoft said, "bargaining units are a matter between employers and employees and Microsoft is not the employer of the workers."

Attempts to be recognized by the temp agencies were equally unavailing. "We don't have to talk to you, and we won't," said Judd. "They told us we had to get all the temps that worked at other companies besides Microsoft. We had no way to know who they were or how to reach them. Besides, they had nothing to do with our problems at Microsoft."

Barbara Judd's perma-temp post at Microsoft ended in March 2000 when the company announced it was abandoning the tax preparation software project that she and her co-workers developed. "We received two days notice" of being laid off, Judd said. Some workers moved to another tax preparation software company, but Judd decided to look for full-time employment. "I don't want to be a part of that system," she said. "Workers who take temp jobs do not realize there is a larger impact than just the absence of benefits. You essentially lose the ability to organize...the legal system is just not set up to deal with these long-term temp issues."

Case Study: Sweatshop in New York City

Under current U.S. labor law, retailers and manufacturers who profit from sweatshops' race to the bottom on labor standards are not held responsible for labor law violations committed by contractors or subcontractors, including violations of workers' organizing rights. United States Labor Department studies in 1997 and 1998 indicated that nearly two-thirds of garment industry shops in New York violated minimum wage and overtime laws. A comprehensive study of the Los Angeles garment industry concluded in 1999 that "this important industry is plagued by substandard working conditions...There is widespread non-compliance with labor, health, and safety laws."

In 1997, a group of workers at a midtown Manhattan sewing shop called MK Collections formed a union. Mario Ramirez said that workers took action because they had not been paid for two months and "because the owners screamed at people." Eduardo Rodriguez, who like Ramirez came to New York from Puebla, Mexico, was another union...
adherent. "We would talk outside before work and at lunchtime, but never in big groups," he explained. Rodriguez estimated union support at about forty workers, a majority of the sixty-five to seventy people working at MK Collections.

In January 1997, MK workers brought their organizing effort to a head with a work stoppage demanding back pay for work performed. At first, their movement bore fruit. Seven members of the organizing group signed a handwritten agreement with the owner recognizing the workers' union, setting a just cause standard for disciplinary action, promising to maintain clean bathrooms, and—besides paying wages on time—to pay an additional fifty per week until full back pay was reached for each worker.

The agreement held up for only four months. The employer fired two committee members who did not want to protest because of immigration fears. In early May 1997, the company closed, claiming that a manufacturer had canceled a production contract. According to Ramirez and Rodriguez, the owner reopened at a new location and hired a new work force just a few days later.

Their experience left a mark on Ramirez and Rodriguez. "I've thought about organizing in my new job," said Ramirez, who found other work in the garment industry. "But I need to be guaranteed that I won't be fired." Rodriguez, who took a new job in a restaurant, said, "As long as there is no law to protect us better, I don't think it is likely that I will organize again."

Nullification of the Right to Strike by the Permanent-Replacement Doctrine

Under U.S. labor law, employers can hire new employees to permanently replace workers who exercise the right to strike. This doctrine runs counter to international standards recognizing the right to strike as an essential element of freedom of association. Considering the U.S. striker replacement rule, the ILO's Committee on Freedom of Association determined that the right to strike "is not really guaranteed when a worker who exercises it legally runs the risk of seeing his or her job taken up permanently by another worker, just as legally" and that permanent replacement "entails a risk of derogation from the right to strike which may affect the free exercise of trade union rights."75
Case Study: Steelworkers in Pueblo, Colorado

Oregon Steel Company permanently replaced more than a thousand workers who exercised the right to strike at its Pueblo, Colorado, steel mill in October 1997. Many of the replacements came from outside the Pueblo area, drawn by the company’s newspaper advertisements throughout Colorado and neighboring states offering wages of thirteen dollars to nineteen dollars per hour for permanent replacements. A company notice declared, “It is the intent of the Company for every replacement worker hired to mean one less job for the strikers at the conclusion of the strike.”

On December 30, 1997, three months after it began, Oregon Steel workers ended their strike and offered unconditionally to return to work. The company refused to take them back except when vacancies occur after a replacement worker leaves. Some workers returned under this legal requirement, but most of the Oregon Steel workers were still out of work in 2000 because the company permanently replaced them with new hires.

According to a judge who held an eight-month-long hearing on the case, the company was guilty of interference, coercion, discrimination, and bad-faith bargaining. Oregon Steel management’s unfair labor practices before the strike began included:

- spying on a union meeting where bargaining strategies were discussed;
- threatening to close the plant and “reopen non-union in thirty days” if workers struck;
- assigning undesirable, dirty jobs cleaning arc furnaces and cooling towers to union supporters because of their support for the union;
- threatening to “bust” the union if workers struck (as one witness testified, a supervisor said, “within 15 minutes they would have two bus loads of people in the mill to do our jobs and the union would no longer exist”);
- promising promotions to workers if they would cross the picket lines and return to work during a strike.

In all, said the judge, Oregon Steel’s unfair labor practices “were substantial and antithetical to good faith bargaining.” Under this ruling, workers are entitled to reinstatement because a company that violates the law loses the right to permanently replace strikers. However, the
company appealed the decision and vowed to keep appealing for years before a final decision is obtained in the case. In the meantime, the workers remain replaced and without their means of livelihood for themselves and their families.

Special Vulnerability of Immigrant Workers

International human rights principles apply to all persons regardless of immigration and citizenship status. In the United States, workers' rights violations with particular characteristics affect immigrant workers in nearly every economic sector and geographic area examined in this report. For many, the vulnerability of their undocumented status and related fear of deportation are the most powerful forces inhibiting their exercise of the right to organize and bargain collectively.

During NLRB election campaigns, employers commonly threaten to call the Immigration and Naturalization Service (INS) to have workers deported. Immigrant workers are often afraid to come forward to file unfair labor practice charges or to appear as witnesses in unfair labor practice proceedings because they fear their immigration status will be challenged.

Case Study: Warehouse Workers in the Washington Apple Industry

Thousands of workers are employed in the warehouse sector of the Washington apple industry. Like apple pickers, many seasonal workers in the warehouses are migrants from Mexico.

Apple warehouse workers are not defined as agricultural workers. They are covered by the NLRA, which makes it an unfair labor practice to threaten, coerce, or discriminate against workers for union organizing activity. But when workers at one of the largest apple processing companies sought to form and join a union in 1997 and 1998, management responded with dismissals of key union leaders and threats that the INS would deport workers if they formed a union. Here is how one worker described the company's tactics:

At the meetings they talked the most about the INS... [T]he company keeps talking about INS because they know a lot of workers on the night shift are undocumented—I would guess at least half... It is only now that we have started organizing that they have started looking
for problems with people's papers. And it is only now that they have started threatening us with INS raids. . . . They know that we are afraid to even talk about this because we don't want to risk ourselves or anyone else losing their jobs or being deported, so it is a very powerful threat.79

The union lost the NLRB election even though a majority of workers had signed cards to join the union and authorize the union to bargain on their behalf.

Even Legal Immigrants Unprotected

About thirty thousand temporary agricultural workers enter the United States each year under a special program called H-2A giving them legal authorization to work in areas where employers claim a shortage of domestic workers. H-2A workers have a special status among migrant farm workers. They come to the United States openly and legally. They are covered by wage laws, workers' compensation, and other standards.

But valid papers are no guarantee of protection for H-2A workers' freedom of association. As agricultural workers, they are not covered by the NLRA's antidiscrimination provision meant to protect the right to organize.

H-2A workers are tied to the growers who contract for their labor. They have no opportunity to organize for improved conditions and no opportunity to change employers to obtain better conditions. If they try to form and join a union, the grower for whom they work can cancel their work contract and have them deported.

Case Study: H-2A Workers in North Carolina

More than ten thousand migrant workers with H-2A visas went to North Carolina in 1999, making growers there the leading employers of H-2A workers in the United States.80 North Carolina's H-2A workers are mostly Mexican, single young men, who harvest tobacco, sweet potatoes, cucumbers, bell peppers, apples, peaches, melons, and various other seasonal crops from April until November.81

At home "there's no work," which workers described as their main reason for emigrating.82 Many of the workers come from rural villages in Mexico. Some spoke Spanish with difficulty, as in their village at home people mainly speak Misteco, a local Indian language. In most
cases earnings in U.S. dollars from their H-2A employment are the only source of income for their families and for their communities.

There is evidence of a campaign of intimidation from the time H-2A workers first enter the United States to discourage any exercise of freedom of association. Legal Services attorneys and union organizers are "the enemy," they are told by growers' officials. Most pointedly, officials lead workers through a ritual akin to book-burning by making them collectively trash "Know Your Rights" manuals from Legal Services attorneys and take instead employee handbooks issued by growers.83

On paper, H-2A workers can seek help from Legal Services and file legal claims for violations of H-2A program requirements (but not for violation of the right to form and join trade unions, since they are excluded from NLRA protection). However, in this atmosphere of grower hostility to Legal Services, farm workers are reluctant to pursue legal claims that they may have against growers. "They don't let us talk to Legal Services or the union," one worker said. "They would fire us if we called them or talked to them."84

In December 1997, the U.S. General Accounting Office (GAO) reported that "H-2A workers ... are unlikely to complain about worker protection violations fearing they will lose their jobs or will not be hired in the future."85 The fear of blacklisting is well founded, according to a 1999 Carnegie Endowment study, which based its findings on interviews conducted in Mexico with current Mexican H-2A workers. The Carnegie study found that "blacklisting of H-2A workers appears to be widespread, is highly organized, and occurs at all stages of the recruitment and employment process. Workers report that the period of blacklisting now lasts three years, up from one year earlier in the decade."86

Recommendations

Here is a summary of recommended changes in U.S. labor law to address the problems cited above:

Interim Reinstatement and Tougher Remedies

A worker who is fired for union activity should be reinstated immediately while the case continues to be litigated. Only such an interim reinstatement remedy can overcome the devastating impact on individual workers who are dismissed and on the workers' overall organizing effort.
Remedies and sanctions should have a deterrent effect. Workers should receive full back pay regardless of interim earnings. They should receive punitive damages in cases of willful violations. In addition to paying workers victimized by violations, employers who repeatedly engage in discrimination against union supporters should pay substantial fines to the NLRB.

Equal Access to the Workplace, Faster Elections, “Card-Check” Certification

A principle of equal access should apply where employers force workers into captive audience meetings at the workplace. Workers should have access to information from union representatives in the workplace about their right to form and join trade unions and to bargain collectively. The NLRB should conduct an election as quickly as possible after the filing of a petition, normally within a matter of days. Experience demonstrates that where workers and employers can agree to use card checks—neutral verification that workers freely signed cards authorizing representation and collective bargaining—they can combine the benefits of freedom of choice and a mutually respectful relationship that carries over into collective bargaining. Public policy should encourage the use of voluntary card-check agreements as an alternative means of establishing workers’ majority sentiment and collective bargaining rights.

Tighter Scrutiny and Tougher Remedies

The NLRB should more closely scrutinize employers’ antiunion statements for potentially coercive effect, removing the artificial distinction between “predictions” and “threats.” Where it finds violations, the board should apply strong, swift remedies like additional union access to the workplace or bargaining orders where employers’ conduct makes fair elections impossible.

Legal Responsibility of the Dominant Economic Force

Labor law must change to encompass the rights and interests of contingent workers, contract workers, and others involved in new occupations and industries. Congress should enact legislation cutting through
the fiction of subcontracted employment relationships that are structured to avoid responsibility for recognizing workers’ rights.

Fixing responsibility should be based on a test of effective economic power to set workers’ terms and conditions of employment, not on the formality of an employment relationship. The dominant economic entity in the employment relationship holding real power over workers’ terms and conditions of employment should have legal responsibility to bargain with workers when a majority choose representation.

Stronger Remedies for Surface Bargaining

Stronger remedies should be fashioned for willful refusal to bargain in good faith. For example, where workers have formed and joined a new union in a previously unorganized workplace and the employer is found to bargain in bad faith, workers should have recourse to first-contract arbitration as a remedy, where an independent arbitrator sets contract terms.

Arbitration for a first contract gives workers an opportunity to establish a bargaining relationship that would most likely have taken shape had the employer bargained in good faith. It also provides a chance to demonstrate to the employer that both parties can act responsibly under a collective agreement, making good-faith negotiations more probable in subsequent bargaining.

Eliminate Statutory Exclusions, Protect All Workers’ Organizing Rights

Congress should bring agricultural workers, domestic workers, and low-level supervisors under NLRA coverage with the same rights and protections as all other covered workers. Legal reform should also subject employers’ claims of workers’ “independent contractor” status to strict scrutiny under standards that make the workers’ real-life dependence on employers—not how employers classify them—the test for NLRA coverage.

In general, workers who want to organize and bargain collectively should have the right to organize and bargain collectively, except where there are manifestly no employers to bargain with or where the essence of such workers’ jobs is so truly managerial or supervisory that they effectively would be bargaining with themselves.
Reverse the Permanent-Replacement Doctrine

Congress should enact legislation prohibiting the permanent replacement of workers who exercise the right to strike. The balance should be restored to a genuine equilibrium in which temporary replacements give way to employee strikers when the strike ends. In effect, prohibiting permanent striker replacements effectuates a "balance of pain" in a strike that promotes more rapid resolution of a dispute while respecting both workers' right to strike and management's continued operations.

More Protection for Immigrant Workers, Stronger Remedies

Congress should establish a new visa category for undocumented workers who suffer violations of their right to organize and bargain collectively, and the INS should exercise discretionary authority to allow them to remain in the United States. Workers who obtain a reinstatement order because their right to freedom of association was violated should be immediately reinstated and granted a work authorization card for sufficient time to allow them to seek renewed, extended, or permanent authorization under discretionary authority in such cases.

Mobility and Organizing Rights for H-2A Workers

The H-2A program should allow workers to seek work with a different employer if their employer violates their rights. Where workers are dismissed or discriminated against for exercising rights of association, a strengthened regime is needed to ensure swift reinstatement or placement with another employer who will respect their rights.

Labor Department regulations governing the H-2A program should halt H-2A recruiters' characterizations of unions and legal services as "enemies" of H-2A workers. The H-2A program should instead require that workers be fully informed of their rights to organize and bargain collectively and have access to legal services and to the justice system, as they desire.

Conclusion

Both historical experience and a review of current conditions around the world indicate that strong, independent, democratic trade unions
are vital for societies where human rights are respected. Human rights cannot flourish where workers' rights are not enforced. This is as true for the United States as for any other country.

Labor rights violations in the United States are especially troubling when the U.S. administration is pressing other countries to ensure respect for internationally recognized workers' rights as part of the global trade and investment system—at the World Trade Organization, for example, or in the new Free Trade Agreement of the Americas. United States insistence on a rights-based linkage to trade is undercut when core labor rights are systematically violated in the United States.

Without diminishing the seriousness of workers' rights violations in the United States, a balanced perspective must be maintained. United States workers generally do not confront gross human rights violations where death squads assassinate trade union organizers or collective bargaining and strikes are outlawed. But the absence of systematic government repression does not mean that workers in the United States have effective exercise of the right to freedom of association. On the contrary, workers' freedom of association is under sustained attack in the United States, and the government is failing its responsibility under international human rights standards to deter such attacks and protect workers' rights.

So long as worker organizing, collective bargaining, and the right to strike are seen only as economic disputes involving the exercise of power in pursuit of higher wages for employees or higher profits for employers, change in U.S. labor law and practice is unlikely. Reformulating these activities as human rights that must be respected under international law can begin a process of change.

What is most needed is a new spirit of commitment by the labor law community and the government to give effect to both international human rights norms and the still-vital affirmation in the United States' own basic labor law of full freedom of association for workers. A way to begin fostering such a change of spirit is for the United States to ratify ILO conventions 87 and 98. This will send a strong signal to workers, employers, labor law authorities, and to the international community that the United States is serious about holding itself to international human rights and labor rights standards as it presses for the inclusion of such standards in new global and regional trade arrangements.