COMMITTEE ON EDUCATION AND THE WORKFORCE

U.S. HOUSE OF REPRESENTATIVES

Written Testimony in Support of H.R. 3094
Workforce Democracy and Fairness Act

Submitted by:

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I. EXECUTIVE SUMMARY

The Workforce Democracy and Fairness Act, H.R. 3094 (WDFA), addresses the National Labor Relations Board's (NLRB or Board) overreaching decision in *Specialty Healthcare*, 357 NLRB No. 83 (August 26, 2011), and the Board's proposed changes to election procedures.

In both *Specialty Healthcare* and its proposed election procedure changes, the NLRB has greatly overstepped its statutory authority and worse, trampled on employees' rights to vote and to get sufficient information from both union organizers and the company before being forced into a quick decision.

The WDFA has two primary components. First, it will protect the right of all employees in a workplace to vote on whether or not to have a union. Under *Specialty Healthcare*, a union organizer could target, organize, and ultimately fragment the workplace into sub-units of employees. The WDFA codifies the "community of interest" test the Board has historically used to determine an appropriate bargaining unit:

(1) similarity of wages, benefits and working conditions;

(2) similarity of skills and training;

(3) centrality of management and common supervision;

(4) extent of interchange and frequency of contact between employees;

(5) integration of the work flow and interrelationship of the production process;

(6) the consistency of the unit with the employer's organizational structure;

(7) similarity of job functions and work; and

(8) the bargaining history in the particular unit and the industry.

In contrast, in *Specialty Healthcare*, rather than use these time-tested factors, the Board wants to presume that a unit composed of employees performing the same job at the same facility is presumptively appropriate. Under the WDFA, all employees in a workplace would get to participate in a campaign and have a right to vote on a union, not just a select few.

The second major component of the WDFA is that it will protect employees' right to information before they are forced to vote on whether or not to have a union. In June 2011, the Board proposed a series of changes to the election procedures governing elections. One of the most dramatic changes is throwing out the traditional 42-day election period and reducing it to as little as 10 days. This change will effectively take away employees' right to get adequate information from their employer after having been bombarded with sales pitches by professional union organizers for weeks, if not months.

For these reasons, and the detailed reasons stated below, we support the Workplace Democracy and Fairness Act.

II. ANALYSIS

A. The WDFA Would Protect Employees' Right to Vote

The Workforce Democracy and Fairness Act (WDFA) is designed, in part, to correct the National Labor Relations Board's over-stepping in *Specialty Healthcare*, 357 NLRB No. 83 (2011):

- The key issue is whether a small group of employees performing the same job at a single location constitute an individual bargaining unit. The Board's decision in *Specialty Healthcare* will affect an estimated six million workplaces covered by the National Labor Relations Act. The Board historically has applied a clear set of standards in determining a unit appropriate for bargaining, which the *Specialty Healthcare* case turned upside down, without any rational basis.

- The impact will lead to an explosion of "micro-unions" within an entire workforce or across multiple locations; and will make it easier for unions to cherry-pick the unit of employees most likely to support the union and separate it from co-workers, effectively disenfranchising them.

- For example, a union may choose to organize poker dealers at a casino, rather than all dealers, because it knows the poker dealers support the unions, while the blackjack, craps, roulette and other dealers may not. Similarly, a union may organize a small group of employees working on one machine rather than all machinists in a manufacturing facility, because the majority of machinists do not want union representation. Another example is a grocery store. Using *Specialty Healthcare*, multiple labor unions could target and organize different groups of employees, such as cashiers, produce employees, baggers, stockers, and others. A single store with one entrance, one payroll, one set of policies and practices, one organizational chart, could be essentially Balkanized by sub-units of employees. Multiple contracts over multiple years covering multiple groups of employees would simply be unmanageable.

- These fractured units also will greatly limit an employer's ability to cross-train and meet customer and client demands via lean, flexible, staffing as employees could not perform work assigned to another unit. The impact on business productivity and competitiveness would be significant. Employees also would suffer from reduced job opportunities as promotions and transfers would be hindered by organization-unit barriers.

While the issue presented in *Specialty Healthcare* was potentially narrow – whether a unit composed solely of certified nursing assistants ("CNAs") is an appropriate unit – it now raises broad concerns for employers in all industries, including the nonacute healthcare industry in particular. The Board's decision in *Specialty Healthcare* portends a sweeping change in the standard for unit determinations in all industries regulated by the Act.

The standard used by the Board majority in *Specialty Healthcare* holds that a unit composed of employees performing the same job at the same facility is presumptively appropriate. This standard has serious economic ramifications for the non-acute health care

industry, at a time when the nation is attempting to provide affordable universal healthcare. It would lead to the proliferation of smaller, fragmented units, and therefore increase the likelihood of strikes, jurisdictional disputes, and other disruptions to operations – all of which is contrary to the national labor policy in the health care industry. With this standard now being applied in the other industries regulated by the Act (based on the broad language of the Board's decision in *Specialty Healthcare*), it will have the same disruptive and costly impact on those industries, many of which are still struggling to recover and create new jobs after a prolonged recession.

Changing the unit determination standard in this manner might lead to increased union organizing in the short-term, but it will not result in meaningful collective bargaining in the long-term. Bargaining with a small unit of employees, which excludes many other employees who share a substantial community of interest whose work is integrated and interdependent, will be more costly and less likely to succeed. Ultimately, the Board has a statutory responsibility to approve bargaining units that are not only appropriate for organizing, but also for collective bargaining.

The WDFA forces the Board to adhere to its longstanding precedent in unit determination cases, which strikes an appropriate balance between the statutory goals of allowing employees to exercise their right to organize and bargain collectively, while at the same time promoting industrial peace and minimizing interruptions to commerce through effective collective bargaining. With an economy showing no immediate signs of recovery and a Board that has lost its way, adoption of the WDFA is needed now more than ever before.

1. The Board Should Adhere to Its Longstanding Precedent Concerning the Scope of Appropriate Bargaining Units.

In *Specialty Healthcare*, the Board concluded that a bargaining unit should be presumptively appropriate, in all industries, if it includes only those employees who perform the same job at a single facility. The argument for such a standard is set forth in the dissenting opinion of Member Becker in *Wheeling Island Gaming, Inc.*, 355 NLRB No. 127 (2010). In that case, dissenting Member Becker argued that a petitioned-for unit consisting only of poker dealers at a casino is an appropriate unit, even though it excludes blackjack dealers and croupiers at the same casino. As the majority opinion noted, however, such a unit would be inconsistent with the Board's longstanding precedent, which holds that the interests of the employees in the unit sought must be "*sufficiently distinct* from those of other employees to warrant the establishment of a separate unit." *Id.*, slip op. at 1 n.2 (quoting *Newton-Wellesley Hospital*, 250 NLRB 409, 411-12 (1980)). Now, it appears that the Board is abandoning that longstanding precedent, in favor of a standard that would find a unit appropriate regardless of whether there are other employees who share a substantial community of interest with the employees in that unit.

Reversing longstanding precedent in this manner is contrary to the fundamental purposes and polices of the Act. Member Becker has argued that the Board's precedent in unit determination cases "have accumulated into complex and uncertain jurisprudence that threatens to thwart employees' efforts to exercise their right to choose a representative." *Wheeling Island Gaming*, 355 NLRB No. 127, slip op. at 3. This argument ignores that the Act does not exist simply to facilitate and protect organizing in whatever unit a group of employees, or the petitioning labor organization, views to be the most desirable and advantageous, but the intent of

the Act is also to foster and protect collective bargaining as a means of promoting industrial peace. *See Fibreboard Paper Prod. Corp. v. NLRB*, 379 U.S. 203, 211 (1964) ("One of the primary purposes of the Act is to promote the peaceful settlement of industrial disputes by subjecting labor-management controversies to the mediatory influence of negotiation."); *Local 24, Int'l Bhd. of Teamsters v. Oliver*, 358 U.S. 283, 295 (1959) ("The goal of federal labor policy, as expressed in the Wagner and Taft-Hartley Acts, is the promotion of collective bargaining . . . and thereby to minimize industrial strife."); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 42 (1937) ("A fundamental aim of the National Labor Relations Act is the establishment and maintenance of industrial peace to preserve the flow of interstate commerce.").

Section 9(c)(5) of the Act was added to reinforce that the Board should not make unit determinations with a singular focus on the desires of the petitioning employees or labor organization. Thus, Section 9(c)(5) provides that "the extent to which the employees have organized shall *not* be controlling" in the Board's unit determinations. 29 U.S.C. § 159(c)(5) (emphasis added). The Board cannot, as suggested by Member Becker in *Wheeling Island Gaming*, and as implied by *Specialty Healthcare,* comply with Section 9(c)(5) merely by pointing to some community of interest factors that are consistent with the extent of the union's organizing effort. *Wheeling Island Gaming*, 355 NLRB No. 127, slip op. at 3 n.2. The Board has a statutory responsibility to ensure that its unit determinations will ultimately promote stable and effective collective bargaining relationships. In the rulemaking for acute care hospitals, the Board recognized that its goal "is to find a middle-ground position, to allocate power between labor and management by 'striking the balance' in the appropriate place, with units that are neither too large or too small." 53 Fed. Reg. 33,904 (1988).[1]

The purposes of the Act are not served by making unit determinations that exclude groups of employees who share "a substantial community of interest with employees in the unit sought." *Colorado Nat'l Bank of Denver*, 204 NLRB 243, 243 (1973). For this reason, the Board historically has not approved of "fractured units" – units that "are too narrow in scope or that have no rational basis." *Seaboard Marine, Ltd.*, 327 NLRB 556, 556 (1999). Fragmented bargaining units may also effectively disenfranchise certain groups of employees, a result that is also contrary to the policy of the Act.

Member Becker argues that *American Cyanamid Co.*, 131 NLRB 909 (1961), supports a sweeping presumption – one that would apply in all industries – that a unit of "all employees doing the same job and working in the same facility" should be approved absent "compelling evidence that such a unit is inappropriate." *Wheeling Island Gaming*, 355 NLRB No. 127, slip op. at 2. No such presumption can be drawn from *American Cyanamid.* To the contrary, in finding a unit of maintenance employees to be appropriate in that case, the Board specifically disavowed any presumption in favor of a maintenance-only unit in other cases: "collective-bargaining units must be based upon all the relevant evidence *in each individual case.*" *American Cyanamid*, 131 NLRB at 911 (emphasis added). Consistent with the statutory

[1] Academic literature describes the economic reasons for striking an appropriate balance between units that are neither too large nor too small. *See* Douglas L. Leslie, *Labor Bargaining Units*, 70 VA. LAW REV. 353, 408-09 (1984).

mandate to foster industrial peace through effective collective bargaining, "each unit determination must have a direct relevancy to the circumstances within which collective bargaining is to take place." *Id.*

Thus, the Board's unit determinations have long considered, and should continue to consider, whether the scope of a proposed unit makes sense from the standpoint of the collective bargaining that will take place if the union prevails in the election. The Board should not, as Member Becker suggests, simply approve the narrowest unit sought by the petitioning labor organization and then leave it to the parties to reshape the unit if their "experience with collective bargaining suggests to them that bargaining would be more productive in a larger or differently contoured unit...." *Wheeling Island Gaming*, 355 NLRB No. 127, slip op. at 2. To do so would undermine the stability of the work environment and the various relationships between employees, employers and unions. The Board has a statutory responsibility to make that determination in advance, and to withhold approval of bargaining units that are not suitable to effective collective bargaining.

2. The Board Should Not Have, in the Context of a Case Arising in the Nonacute Healthcare Industry, Reexamined the Standards Applied in All Other Industries.

Although *Specialty Healthcare* arose in the nonacute health care industry, the Board extended its misinformed ruling to most industries within the Board's jurisdiction. *Specialty Healthcare,* 356 NLRB No. 83, slip op. at 20. This is a dangerous proposition. It is contrary to the Board's decision in *American Cyanamid,* which recognized that appropriate unit determinations are individualized determinations that "will vary from industry to industry and from plant to plant." *American Cyanamid,* 131 NLRB at 911. The Board's determination as to the scope of a proposed CNA-only unit in the nonacute healthcare industry should not have given rise to a presumption that would apply in the many other industries regulated by the Act.

The Board asserts that "[i]ndustry-specific rules are the exception, not the norm." *Specialty Healthcare,* 356 NLRB No. 56, slip op. at 3. Yet, the healthcare industry clearly is one such exception, given the rulemaking and pattern of decision-making that formed the backdrop for this case. Unit determination standards developed in this industry should not be the vehicle for creating a new presumption for all other industries.

Unit determinations in other industries are based on different considerations and patterns of decision-making. In the utility industry, for instance, there is a presumption in favor of system-wide bargaining units. *See Alyeska Pipeline Serv. Co.*, 348 NLRB 808, 809 (2006); *Baltimore Gas & Elec. Co.*, 206 NLRB 199, 201 (1973); *Colorado Interstate Gas Co.*, 202 NLRB 847, 848 (1973); *Louisiana Gas Serv. Co.*, 126 NLRB 147, 149 (1960). This presumption rests not only on community of interest factors, but also on the fundamental policy objective of the Act – minimizing interruptions to commerce resulting from labor disputes. *See Alyeska Pipeline*, 348 NLRB at 812 ("The Board's presumption in favor of a systemwide unit is based, at least in part, on the judgment that an increase in the number of units leads to an increase in the number of potential labor disputes and work stoppages."); *Baltimore Gas*, 206 NLRB at 201 ("That judgment has plainly been impelled by the economic reality that the public utility industry is characterized by a high degree of interdependence of its various segments and

that the public has an immediate and direct interest in the uninterrupted maintenance of the essential services that the public utility industry alone can adequately provide.").

There are also unique considerations and patterns of decision-making in other industries that play a major role in the national economy, including the trucking industry, the maritime industry, the hotel industry, the retail food industry, the television and radio industry, the newspaper industry, the construction industry, and in higher education. The Board should not have, in the context of a case arising in the nonacute healthcare industry, attempted to fashion a new unit determination standard that now applies in all of these industries. The standards to be applied in any industry should be determined only in a case arising in that particular industry, after full development of the unique facts and circumstances and patterns of collective bargaining that exist in that industry.

The Board suggests that changing the unit determination standard may help prevent litigation over the scope of a proposed bargaining unit. *Specialty Healthcare,* 356 NLRB No. 56, slip op. at 3. This is not a sensible reason to upset the unit determination standard in all industries. Under the current standard, litigation concerning the scope of a bargaining unit is rare; over 90% of elections are conducted pursuant to a stipulation. *See* Office of the General Counsel, *Summary of Operations (Fiscal Year 2010)*, Memorandum GC 11-03 (Jan. 10, 2011) (reporting that 92.1% of representation elections in FY 2010 were conducted pursuant to agreement of the parties, compared to a 91.9% election agreement rate in FY 2009).[2] Changing the unit determination standard will produce more, not less, litigation because well-established precedent is now called into question and the parties will have an incentive to litigate in an effort to shape the law under the new standard. For this reason as well, the Board should not have engaged in a sweeping revision of its existing unit determination standards.

3. The WDFA Will Fix the Problems Created by *Specialty Healthcare* and Codify the Board's Long-standing Precedent.

The WDFA will address the issues highlighted above in the following manner:

- Bargaining Unit Determination – To limit proliferation and fragmentation of bargaining units, the legislation codifies the test used prior to *Specialty Healthcare.* Bargaining units are made up of employees that share a "sufficient community of interest." In determining whether employees share a "sufficient community of interest" the Board will weigh eight factors, including similarity of wages, working conditions and skills. The Board will not exclude employees from the unit unless the interests of the group sought are sufficiently distinct from those of included employees to warrant the establishment of a separate unit. (Section 2(1), starting on page 2 line 2, ending on page 3 line 1.)

[2] In *Wheeling Island Gaming*, Member Becker asserted that "litigation, often protracted litigation, over the scope of the unit occurs prior to almost every contested election." 355 NLRB No. 127, slip op. at 3. This is a cleverly worded but misleading statement, given that the overwhelming majority of Board elections are not contested. And, of that small minority of cases that are contested, many do not involve issues of unit scope. They frequently involve issues of unit composition (*e.g.*, exclusion of supervisors) and related issues.

- Bargaining Unit Challenges – To ensure employers can dispute union-proposed bargaining units, WDFA codifies the test used prior to *Specialty Healthcare*. Any party seeking to enlarge the proposed bargaining unit must demonstrate that employees in the larger unit share a "sufficient community of interest" with those in the proposed unit. (Section 2(1), starting on page 3 line 2, ending on page 3 line 11.)

B. The WDFA Would Protect Employees' Right to Make a Fully Informed Decision In an Election.

In addition to the *Specialty Healthcare* bargaining unit issue, the WDFA also addresses the election rules issues raised by the Board's recent rulemaking attempt to use "quickie" elections and other changes to the Representation Case (or "R-case") procedures in union campaigns. The NLRB's proposed R-case rules would place excessive burdens on all businesses covered under the Act and would be unfair to employees. The WDFA is intended to protect employees and employers alike from such harsh consequences.

Initially, it is highly inappropriate and ill-advised for the NLRB to propose new regulatory burdens on the backs of business at a time when the country is struggling to recover from economic recession, stimulate business investment and job growth, and reduce unemployment. The NLRB's proposed historic overhaul of its Representation-case rules flies in the face of President Obama's Executive Order 13563 and admonition to government agencies not to promulgate new regulations unless absolutely necessary, and to review existing regulations which would unduly and unnecessarily burden business, especially smaller businesses.

In fact, the new rule would impose significant cost burdens on smaller businesses forced to invest the time and resources necessary to prepare for Representation-case hearings within as little at seven calendar days notice (in reality 5 working days), prepare a much more detailed "Excelsior list" within two days thereafter, and prepare for an election within as little as ten days from the date of the petition, and then prepare for a post-election challenge to unit questions and voter eligibility. The employer is likely to be un-counseled and susceptible to inadvertent unfair labor practices.

All of the foregoing nearly eviscerates the ability of the employer to communicate with its employees and the ability of employees to obtain all the information necessary to make an informed decision. Just as union organizers are entitled to campaign among employees, employers have an equal right under the Act to express their opinion as to how unionization may affect the business, employees and customers. Absent sufficient time for employees to hear and discuss both sides of unionization with employers and fellow employees, the employees will not be adequately informed prior to voting, and thus will not have a meaningful opportunity to exercise their right under the Act to support or refrain from supporting a union.

Americans are not very familiar with unions. Most small businesses, indeed most employees, know very little if anything about unions, union organizing, and union elections. They are working hard, struggling to survive in a down economy and to compete in a global economy which threatens their jobs and their businesses. Until recently, when certain Board

actions elevated the agency in notoriety, most people had not heard of the NLRB, and gave little thought to unions, union organizing, and collective bargaining.

With "quickie" election rules in place, there will be little time to educate employees and prepare a response to a union organizing campaign so that employees will be fully and fairly informed prior to the election. This is especially true for employees of smaller businesses – the ones whom the NLRB Chairman now certifies as experiencing no significant economic impact. In fact, the real cost for small business - the real economic impact – is taking the time and resources away from productive endeavors and job creation, and diverting them to preparing for "quickie" elections and "quick snap" organizing campaigns even if they never come.

But the Board Majority simply chooses to ignore the economic impact of the rule or offer alternatives for small business under an Initial Regulatory Flexibility Act Analysis. Indeed, given the fast-moving train running on the current proposal one may wonder whether the final rule has already been written. The more the Board rushes to ram these rules through the process, the more one senses that the final rule, in the words of dissenting Board Member Brian Hayes, is a "fait accompli." As he said: "The sense of *fait accompli* is inescapable."

1. The Proposed Rules Are Excessive And Unfair

The proposed rules are not small changes merely adapting to "changing patterns of industrial life." 76 Fed. Reg. at 36816 (quoting *NLRB v. Weingarten*, 420 U.S. 251, 266 (1975)). As stated recently in the public hearings on the proposed Representation-case rule changes before the NLRB by former NLRB member Chuck Cohen, we know and to an extent expect each Board appointed by a newly-elected political Administration to push the envelope in deciding cases in one direction or another - liberal/conservative, pro-union/pro-management. But Mr. Cohen stated that the regulatory changes proposed here do not push the envelope - they blow up the envelope. Statement of Charles I. Cohen before the NLRB Public Meeting, June 18, 2011.

The Board's proposed rule focuses almost exclusively on the timing of the representation election process, referring frequently to "the expeditious resolution of the election process." (See, e.g., 76 Fed. Reg. at 36,812, 36,813, and 36,817). However, the proposed rule appears to be concerned primarily with how rapidly it can push the election timetable from the date of the filing of a petition to the election itself. It pays less attention to what the Board claims as its priority – the timing from the date of the petition until resolution, including post-election procedures. In many cases the time saved at one end of the process by deferring pre-election hearings on unit determination and voter eligibility will more than be made up for by delays at the other end in post-election litigation. The proposal's 20 percent rule and the rendering Board Review of Regional Director's Decisions discretionary invite mischief as well.

"Quickie election" proposals under the Act are not new. They have been sought by organized labor for years to bail out its declining union density. "Quickie elections" were a major part of the 1978 Labor Law Reform Act. Originally, labor sought time frames of 45 days. The bill as introduced in the House called for 15-25 days depending on complexity. The Senate bill provided for up to 21 days and the Senate substitute was 35 days. Barbara Townley, *Labor Law Reform in U.S. Industrial Relations*. Gower Publishing, 1986 at 124-125.

More recently organized labor sought to enact legislation that simply would have done away with secret ballot elections - there would have been no elections, only card check certification under the Employee Free Choice Act (EFCA). *See* S. 560, 111th Cong., 1st Sess. (2009); H.R. 1409, 111th Cong. 1st Sess. (2009). What unions could not achieve through Congress, either under the 1978 Labor Law Reform Bill and more recently through EFCA, they now seek to achieve through rulemaking with the help of reliable compatriots in the Administration and at the Board. As dissenting Board Member Hayes ruefully predicted, "by administrative fiat in lieu of Congressional action … (the proposed rules) will impose organized labor's much sought-after 'quickie election' option." 76 Fed. Reg. at 36,831.

An employer's free speech rights under Section 8(c) of the Act[3] only has meaning if there is a realistic opportunity to speak. The United States Supreme Court has characterized the Congressional policy as "favoring uninhibited, robust, and wide-open debate" of matters concerning union representation, so long as that does not include unlawful speech or conduct. *Chamber of Commerce v. Brown*, 554 U.S. 60, 67-68 (2008). Limiting the reasonable opportunity for such uninhibited, robust and wide-open speech is the equivalent of denying it altogether.

Allowing unions to control the timing of an election by campaigning for as long as it takes to get sufficient signatures on authorization cards from often harassed, brow-beaten employees, then springing an election petition on the employer giving the employer only 10–21 days (using dissenting Board Member Hayes's estimate) to respond is hardly labor law equality. Unions will argue that the employer has the ability to campaign against unionization from the employees' first days at work.[4] That ignores, however, the fact that what for many employees is only white noise when discussed in the abstract, suddenly becomes important when there is a particular union involved. Employees have many questions after that. They want to know the union's record of delivering on promises made during a campaign, its contracts negotiated with other employers, its record of fair treatment of members and its exercise of the duty of fair representation in arbitration, its record of corruption, embezzlement, money laundering, and the like, and its political contributions and other campaign support for political candidates, and so on.

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[3] 29 U.S.C. § 158 (c). Section 8(c) provides:

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

[4] The fact is, however, that most businesses, especially small businesses prefer to focus energy and resources on creating a strong working relationship with their employees and developing business opportunities. Moreover, these same employers are not sufficiently sophisticated in labor matters to be so forward thinking. In fact, it is more likely that small to mid-sized businesses will not know who the NLRB is and what union organizing means to their company until a petition for election is received.

2. "Quickie" Election Rules Are Unnecessary

The irony is that if the goal of the rule change is to give unions more opportunity to organize, which apparently it is, there is little empirical evidence the "quickie" election rules are even necessary given current record-setting election statistics both in terms of timing and results. The only studies linking election deadlines with union success are fundamentally flawed and self-serving drawing exclusively on statements from union organizers or ignoring other more credible sources.[5]

In fact, if speed were the only basis for determining fair elections, the Board is doing quite well, as demonstrated below and as noted in Board Member Hayes' dissent at 76 Fed. Reg. at 36,831 n.5. As stated in the proposed rule, over the past decade, Board supervised secret ballot union representation elections have taken place within the median time of 38 days from the date of the petition; in 2010 that statistic was 31 days, far fewer than the Board's target of 42 days. Contrast that with the record in 1960 when the median time was 82 days! *See* 76 Fed. Reg. at 36,813-36,814.

Unions won a majority of elections throughout that same period, with a 68.7 percent win rate in 2009 and 67.6 percent in 2010. *See* NLRB Election Report (Oct. 19, 2010) and Board Member Hayes's dissent at 76 Fed. Reg. at 36,832. It is not the function of the NLRB to assure union wins. The proposed rule states that it is "unwarranted" to assume that the rules changes are designed to "increase the election success rate of unions." 76 Fed. Reg. at 36,829. While the Board describes that goal as "unpredictable and immaterial" (76 Fed. Reg. at 36,829), clearly that is not what unions believe. They openly tout these rule changes, just as they touted EFCA, as a "game changer" whereby they will increase union density.

3. The WDFA Gives Employees and Employers their Rightful Voice in the Process

In recent years under both Democratic and Republican Majorities, the Board lost credibility simply by going too far. The Board's proposed Representation-case rules do much

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[5] *See*, e.g., two studies whose release in June 2011 appeared to be coordinated with the NLRB's proposed Representation-Case Rules which were published in the Federal Register as a NPRM on June 21. Kate Bronfenbrenner and Dorian Warren, *The Empirical Case for Streamlining the NLRB Certification Process: The Role of Date of Unfair Labor Practice Occurrence*, ISERP Working Paper Series 2011.01 (2011); John Logan, Erin Johansson, and Ryan Lamare, *New Data: NLRB Process Fails to Ensure a Fair Vote*, Univ. of Cal. Berkely Res. Brief (June 2011). *See also*, an earlier Bronfenbrenner study entitled *No Holds Barred – The Intensification of Employer Opposition to Organizing,* May 20, 2009, Economic policy Institute Briefing Paper #235, in which her questionable collection methodology relied as the primary source of anecdotal evidence interviews with the lead organizers involved in the organizing campaigns and elections studied. See, *Responding to Union Rhetoric: The Reality of the American Workplace – Union Studies on Employer Coercion Lack Credibility and Integrity*, U.S. Chamber of Commerce White Paper (2009).

more than push the envelope slightly in one direction or the other; they "blow up the envelope" entirely. The WDFA curbs this severe blow and addresses the issues highlighted above as follows:

- Voter Eligibility - To ensure employees know who will be in their bargaining unit, know whether the issue of representation affects them personally and avoid complications on eligibility, e.g., whether an employee is a supervisor, the Board shall determine the appropriate bargaining unit prior to an election. (Section 2(1), page 2 line 3.)

- Scheduling of Pre-Election Hearing – Employers would have at least 14 days to hire an attorney, identify issues, and prepare their case for pre-election hearing. Employers and unions would have the same 14 days to compromise and agree on election issues. (Section 2(2)(A), starting on page 3 line 14, ending on page 3 line 16.)

- Identifying Issues in Dispute – Employers and unions could independently raise any issue or assert any position at any time prior to the close of the hearing. Employers and unions would be free to raise issues as the hearing record develops, ensuring a fair and effective pre-election hearing. (Section 2(2)(B), starting on page 4 line 3, ending on page 4 line 5.)

- Pre-election Board Review – Employers and unions could file post-hearing appeals with the Board, ensuring uniformity in Board decisions and clarity prior to the election. (Section 2(2)(C)(i), starting on page 4 line 7, ending on page 4 line 9.)

- Timing of Election – The Board will conduct an election as soon as practicable, but no less than 35 calendar days following the filing of an election petition. Employers will have time to share their opinions with employees, and employees will have time to become educated so they may effectively judge whether or not they wish to be represented by a union. (Section 2(2)(C)(ii), starting on page 4 line 10, ending on page 4 line 14)

- Excelsior List – Rather than providing names and home addresses, employers will be required to provide the union with names and one additional piece of personal information of all employees on the final vote list seven days after the pre-election hearing. The additional piece of information, such as a personal phone number, email address, or home address, will be chosen in writing by employees. This will ensure employees can choose how to be contacted and protect employee privacy. (Section 2(2)(D), starting on page 4 line 15, ending on page 4 line 24.)

III. CONCLUSION AND RECOMMENDATION

Based on the foregoing, we support the Workforce Democracy and Fairness Act as a means by which Congress can protect the rights of all employees in a workplace to vote on unionization and their right to information from all sides before being forced to vote. The WDFA is also good for businesses, especially smaller businesses, because it would prevent fragmented workforces in which management would be forced to negotiate multiple contracts with multiple groups of employees or have fundamentally different sets of policies, pay, and practices for employees who are working side-by-side in their jobs. From a macroeconomic

perspective, the WDFA will also protect jobs because it will avoid the unnecessary costs arising from fragmented workforces.

Respectfully submitted this 10th day of October, 2011.

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10208250.1 (PERSONAL)

Phillip B. Russell
Shareholder
phillip.russell@ogletreedeakins.com
Location:
Tampa (Office: 813-289-1247, Fax: 813-289-6530)
Education:
J.D., Stetson University College of Law, 1995
M.S., (Economics) Georgia Institute of Technology, 1992
B.S., (Management) Georgia Institute of Technology, 1991
Practice Areas:
Traditional Labor Relations, Employment Law, Litigation, Workplace Safety and Health, Employee Unfair Competition and Trade Secrets

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Phillip's first job was bagging groceries and stocking shelves in his family's small grocery store business. As a young teenager, Phillip learned the value of hard work and small business. His grandfather took him to business meetings and Phillip saw first-hand the challenges his family's business faced—especially in managing employees. But, he also saw the true value in positive employee relations in the workplace. Now, Phillip represents and protects each of his clients, large or small, as if they were his family's grocery business—with enthusiasm, dedication, and a strong belief that lawsuits, government investigations, and unions are not good for business or employees.

- AV® Peer Review Rated by Martindale-Hubbell
- Employment Law SuperLawyer 2010 and 2011 (top 5%)
- Represents businesses in a wide range of labor and employment law related matters, including federal and state court lawsuits claiming discrimination, harassment, retaliation, or failure to pay minimum wage or overtime compensation
- Represents businesses facing government investigations by the U.S. EEOC, state and local EEO agencies, OSHA, Wage and Hour Division, the NLRB, and others
- Helps clients stay union-free through advice and counseling, supervisor and manager training, and campaigns
- Regularly advises and counsels clients on how to handle difficult workplace legal issues through his cost-effective Hotline service
- Protects businesses' investment in their people, trade secrets, and confidential information through employment agreements and litigation
- Reviews and revises employee handbooks, policies, and practices
- Trains supervisors and managers in understanding their legal roles and responsibilities
- Labor and Employment Counsel for various industry and human resource professional associations

Admitted to Practice:

Florida
Georgia
U.S. District Court, Middle, Northern and Southern Districts of Florida
U.S. District Court, Middle and Northern Districts of Georgia
U.S. Court of Appeals, Eleventh Circuit

Honors and Awards:

- AV® Peer Review Rated by Martindale-Hubbell
- *Super Lawyer* (2010 and 2011)

Experience:

- Obtained injunctions against a former employee and her new employer for a large national staffing company to enforce its non-solicitation and non-disclosure agreements
- Won a hard-fought union representation election for a nursing home allowing it to remain union-free
- Won summary judgment in a religious discrimination case that was affirmed on appeal
- Convinced OSHA to reduce proposed penalties by over 90% for a construction business
- On behalf of a large trade association, filed successful appeal to DOL's Administrative Review Board and convinced DOL to conduct a new wage survey for Georgia
- Submitted opposing comments to the DOL for a national trade association regarding proposed rulemaking for Project Labor Agreements

Professional Activities:

- HR Florida Council (Labor & Employment Counsel)
- Society for Human Resource Management (SHRM)
- HR Tampa
- Sarasota-Manatee Human Resources Association (SHRA)
- Big Bend Society for Human Resource Management (BBSHRM)
- Florida Transportation Builders Association (Labor & Employment Counsel)
- Independent Electrical Contractors (Labor & Employment Counsel)
- Florida Health Care Association (FHCA)
- American Bar Association (Labor & Employment and Litigation Sections)
- Florida Bar Association (Labor & Employment Section)
- Hillsborough County Bar Association (Labor & Employment Section Co-Chair, 2008-2009)
- Georgia Bar Association (Labor & Employment Section)
- Defense Research Institute (Employment Law Committee)

Speeches:

- Florida Transportation Builders Association (FTBA) Construction Conference - "Employment Laws and Federal Government Contracting" - Orlando - February 23, 2011
- Ogletree Deakins - Florida Transportation Builders Association (FTBA) Special Webinar Event - "E-Verify Requirements for Florida State Contractors" - webinar - January 13, 2011
- IEC National Convention & Electric Expo 2010 - "Davis-Bacon Act: Prevailing Wage Requirements for Electrical Contractors" - Phoenix - October 29, 2010
- International Foodservice Distributors Association (IDFA) - 2010 Distribution Solutions Conference - "Developing a Game Plan for Prevailing in Organizing Campaigns" - Tampa - October 27, 2010
- IDFA 2010 Distribution Solutions Conference - "Social Media from an HR Perspective" - Tampa - October 25, 2010
- WorkComp Advisory Group (WCAG) - Educational Emporium - Knowledge & Networking 2010 - "FMLA: The Second Wave of Litigation" - Chicago - September 16, 2010
- HR Florida 2010 Annual State Conference & Expo - "Staying Union-Free in a Pro-Union World" - Orlando - August 31, 2010
- Florida Health Care Association (FHCA) - 2010 Annual Conference & Trade Show 2010 - "When the Volcano Blows: What to Do If a Union or OSHA Shows Up" - Orlando - July 6, 2010
- Stahl & Associates Insurance - Client Seminar - "Employer Survival Guide for 2010 and Beyond: Navigating the Changing Environments; Avoiding Overtime Lawsuits; Best Practices for Exemptions and Timekeeping Systems; Staying Union-Free in a Pro-Union World:

- Clearwater - June 17, 2010

- IEC National Convention & Electric Expo 2009 - "Staying Union-Free in a Pro-Union World" - St. Louis - October 22, 2009
- Business and Legal Reports (BLR) - National Employment Law Update 2009 - "State of the Unions: EFCA and Beyond" - Las Vegas - October 21, 2009
- FHCA 2009 Annual Conference & Trade Show - "Staying Union-Free in a Pro-Union World" - Hollywood - August 12, 2009
- FTBA Special Webinar - "The Employee Free Choice Act and Your Business: A Special FTBA Members Only Webinar" - webinar - March 23, 2009
- IEC Central Texas Chapter - Labor & Employment Law Workshop - "Staying Union-Free in a Pro-Union World; Employment Law 101 for Contractors" - Austin - March 18, 2009
- Stahl & Associates Insurance - Client Seminar - "The New FMLA Regulations: New Leave Types, New Leave Terms, New Leave Trouble!" - Clearwater - February 26, 2009
- Association of Corporate Counsel (ACC) West Central Florida Chapter - Employment Law Program - "How the Election Will Affect Your Workplace: What New Laws to Expect" - Tampa - November 6, 2008
- HR Florida 2010 Annual State Conference & Expo - "Asserting Employer Rights - Take Back Your Workplace!" - Orlando - August 26, 2008
- Sarasota-Manatee Human Resources Management Association (SHRA) - Membership Meeting - "Workplace Violence Prevention for Human Resources Professionals" - Sarasota - March 21, 2008
- Big Bend Society for Human Resources (BBSHRM) - Monthly Meeting - "Effective Use of the New I-9 Form" - Tallahassee - February 13, 2008
- ASCnet TENCon 2007 - "Workplace Legal Issues for Independent Agencies" - Orlando - October 18, 2007

Media Quotes:

- March 2008 - The Conduit - ""IEC Member of the Month""
- Spring 2007 - Florida Transportation Builder - "Immigration Reform"
- July 3, 2006 - Tampa Bay Business Journal - "Law Rulings Could Affect Employer Practices in Florida"

Published works:

- July 2009 - Council on Education in Management - FMLA Hot Topics Handbook - "FMLA Recordkeeping Compliance and Leave Management"
- Winter 2008 - Florida Transportation Builder - "Overtime Lawsuits: Plaintiffs' Lawyers Targets Florida's Construction Industry"
- November 2008 - IEC Insights - "Big Labor's Fight for Survival – the Employee 'Forced' Choice Act"
- October 2008 - Hillsborough County Bar Association – The Lawyer Magazine - "Immigration Legislation Alert"
- September 2008 - Hillsborough County Bar Association – The Lawyer Magazine - "Florida's New 'Bring Your Gun to Work' Law"
- Fall 2008 - ASCnet Quarterly Magazine - "New ADA Amendments Act Expands Covered Disabilities"
- Summer 2008 - The ASCnet Quarterly - "Overtime Pay & Workplace Law"
- December 2007 - The Conduit - "Manager and Supervisor Training"
- November 2007 - IEC Insights - "Too Much SALT – Keeping Your Workplace Union-free!"
- Summer 2007 - Florida Transportation Builder - "Construction Worksite Immigration Violations – Who is Responsible?"

Harold P. Coxson, Jr.
Shareholder
hal.coxson@ogletreedeakins.com
Location:
Washington (Office: 202-887-0855, Fax: 202-887-0866)
Education:
J.D., American University Law School, 1972
B.A., Franklin & Marshall College, 1969
Practice Areas:
Governmental Affairs, Traditional Labor Relations, Employment Law

Hal Coxson is a nationally recognized lawyer with over 35 years experience in all aspects of labor and employment law in Washington, DC. He is highly respected for his experience and expertise in government relations and as an advocate on behalf of business clients before Congress, the Executive Branch and independent federal regulatory agencies. He chairs the Firm's Government Relations Practice Group and is a Principal in Ogletree Governmental Affairs, Inc., the Firm's wholly-owned subsidiary.

Mr. Coxson concentrates on traditional labor law and international labor relations. He has helped shape national labor policy through oral arguments and the filing of *amicus curiae* briefs on behalf of business clients in numerous landmark cases before the National Labor Relations Board and federal courts of appeals, including the U.S. Supreme Court. In addition, he has represented the U.S. Employer community before the International Labor Organization, and has defended clients in global corporate campaigns.

Admitted to Practice:

New Jersey
District of Columbia

Honors and Awards:

- Law Review Managing Editor
- College of Labor and Employment Lawyers
- *Best Lawyers in America*
- *Super Lawyers* of Washington

Experience:

In his government relations practice, Mr. Coxson represents individual corporations and national trade associations, as well as business coalitions which he has been responsible for organizing on a variety of the most important workplace issues over the past quarter century. He has testified on behalf of business clients and as an expert witness before federal administrative agencies and both Houses of Congress.

In addition, Hal has a close working relationship with many of the national trade associations in Washington. He is Executive Director of the First Tuesday Group, an informal organization of thirty-five national trade associations and professional organizations involved in workplace issues. He serves on the Boards and committees of many trade associations, including the Labor Relations Committee of the U.S. Chamber of Commerce where he co-chairs its International Perspectives Subcommittee.

Hal is a frequent speaker on labor and employment topics. He appears as a guest on radio and television talk shows and panels. In addition, he has written several noteworthy publications on workplace law, including most recently "The National Labor Relations Board in the Obama Administration: What Changes to Expect" (U.S. Chamber of Commerce, 2009) which has become required reading in several law schools throughout the country. Currently, he is co-editor of "NLRB*Insight*," published bi-monthly by the U.S. Chamber of Commerce and is on the Board of Trustees of HR Advisor.

Professional Activities:

- American Bar Association (Labor and Employment Law Section; International Law Section)

Speeches:

- Not Your Father's NLRB - "A One-Two Punch - Two Dramatic Regulations That Will Mark a Sea Change in Union Organizing" - New Orleans - October 27, 2011

Media Quotes:

- September 5, 2011 - ModernHealthcare.com - "Power Boost for Labor"
- August 26, 2011 - Law360 - "Congress May Cripple NLRB Post-Liebman, Becker"
- August 25, 2011 - Inside Counsel - "Handbook Hardball"
- August 2011 - Inside Counsel - "Pro-Union NLRB Alarms Employers"
- January 13, 2011 - Human Resources Executive Online - ""NLRB Offers Controversial Ruling""
- January 13, 2011 - Human Resources Executive Online - "NLRB Offers Controversial Ruling"
- September 24, 2010 - Law360 - "Contractors Brace for Fight Over High - Road Rules"
- June 7, 2010 - Workforce Management - "Labor Policy Set for Change as SEIU, NLRB Get New Blood"
- May 1, 2010 - Corporate Counsel Magazine - "Will the Supreme Court Force a Massive NLRB Do-Over?"
- March 31, 2010 - The New York Times - "Deadlock is Ending on Labor Board"
- March 30, 2010 - Law360 - "NLRB Appointments Clear Way for Pro-Union Change"
- November 17, 2008 - Workforce Management Magazine - "Obama: Boon for Labor?"
- November 14, 2008 - Law360 - "NLRB To Begin Process of Overturning Prior Board"
- October 27, 2008 - Transport Topics - "Teamsters' Pension Plans Seen Hit Hard By Economy, Poor Investment Returns"
- June 19, 2008 - BNA's Collective Bargaining Negotiations and Contracts - "Mandatory First Contract Arbitration Violates Constitution, Management Attorney Contends"
- June 11, 2008 - BNA's Daily Labor Report - "D.C. Circuit Affirms Bargaining Unit for Blue Man Crew Workers"
- February 1, 2008 - Inside Counsel - "Coming Home: Returning Troops Still Face USERRA Violations"
- December 1, 2006 - HR Magazine - "Unions May Use NLRB Decisions to Organize; National Labor Relations Board; Labor Relations at the Croft Metals Inc.; National Labor Relations Act"

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- October 18, 2006 - SHRM.org - "Unions May Try to Leverage NLRB Decisions to Organize"
- October 4, 2006 - BNA's Daily Labor Report - "NLRA: Long-Awaited Ruling on Supervisors Prompts Flood of Reaction From Unions, Management"
- September 1, 2006 - BNA's Daily Labor Report - "Labor Department: Bush Recess Appoints Paul DeCamp, Dodging Potential Block on Nomination"
- January 24, 2006 - HR News (SHRM) - "USERRA Retirement, Health Rules Require a Close Look"

Published works:

- July 13, 2011 - Ogletree Deakins Publication - "NLRB Issues Key New York New York Decision"
- February 7, 2011 - Ogletree Deakins Publication - "Reconstituted NLRB Moving Quickly To Enact Reform Agenda "
- August 18, 2010 - Ogletree Deakins Publication - "Organized Labor's Focus Shifts From EFCA To The NLRB "
- October 29, 2009 - Ogletree Deakins Publication - "Who Needs EFCA? - Expect Big Labor Law "Reforms" From the NLRB"
- September 2009 - U.S. Chamber of Commerce - "The National Labor Relations Board in the Obama Administration: What Changes to Expect"
- June 16, 2009 - Ogletree Deakins Publication - "After "Card Check" Expect an Explosion of Employment Law Legislation"
- June 1, 2007 - Ogletree Deakins Publication - "Congress Faces Heavy-Hitting Legislation - The Winners and Losers"

Matthew Levine
Associate
matthew.levine@ogletreedeakins.com
Location:
Chicago (Office: 312-558-1220, Fax: 312-807-3619)
Education:
J.D., Villanova University School of Law, 2007
B.A., Northwestern University, 2004
Practice Areas:
Traditional Labor Relations, Employment Law, Wage and Hour

Matthew Levine is an attorney in the Chicago office of Ogletree, Deakins, Nash, Smoak & Stewart, P.C., where he represents management in labor relations and employment matters. Assisting clients nation-wide in the traditional and construction labor arena from his roots in Chicago's richly unionized labor market, Matt also frequently handles employment matters under Title VII and the other federal discrimination statutes, the Fair Labor Standards Act, and the rapidly evolving practice of social media use in the workplace. A contributing editor to *The Developing Labor Law,* he also served as Editor-in-Chief of the *Villanova Sports and Entertainment Law Journal* and wrote "Despite His Antics, T.O. Has a Valid Point: Why NFL Players Deserve a Bigger Piece of the Pie," 13 VILL. SPORTS & ENT. L.J. 425 (2006). Matt won the book award "For Excellence in the Study of Labor and Employment Law" sponsored by the ABA's Section of Labor and Employment Law and the Bureau of National Affairs, Inc. Additionally, he has worked at the Region IV office of the National Labor Relations Board.

Admitted to Practice:

Illinois

Honors and Awards:

- Editor-in-Chief, *Villanova Sports and Entertainment Law Journal*

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Experience:

Matt's record in the traditional labor arena is almost unblemished, including:

- Obtaining an injunction against a union's violent and disruptive picket for a national chemical engineering firm
- Winning a precedent-setting arbitration for an international steel company in which the union sought to prevent the company from restructuring its workforce during the company's worst economic quarter in its history
- Convincing a Regional Director at the National Labor Relations Board to reverse his own decision and not issue a complaint against a company that had to lay off several employees after production dropped severely
- Successfully guiding both sellers and buyers through transactions by avoiding the potential obstacles that labor obligations can bring to any sale

In the employment arena, Matt played a critical role in a multi-year audit of an international telecommunications company's payroll practices under the FLSA. Matt has also successfully litigated claims under Title VII, the ADEA, the ADA, the FMLA, and OSHA, as well as defamation claims and trust fund audits.

Professional Activities:

- American Bar Association (Labor & Employment Law Section)
- Illinois State Bar Association (Labor & Employment Law Section)
- Chicago Bar Association (Labor & Employment Law Section, Young Lawyers Section, Sports and Entertainment Law Section)
- Coordinated Advice & Referral Program for Legal Services (Vice President of Associate Board)
- Big Brother Big Sister
- Illinois Coalition to Abolish the Death Penalty

Published works:

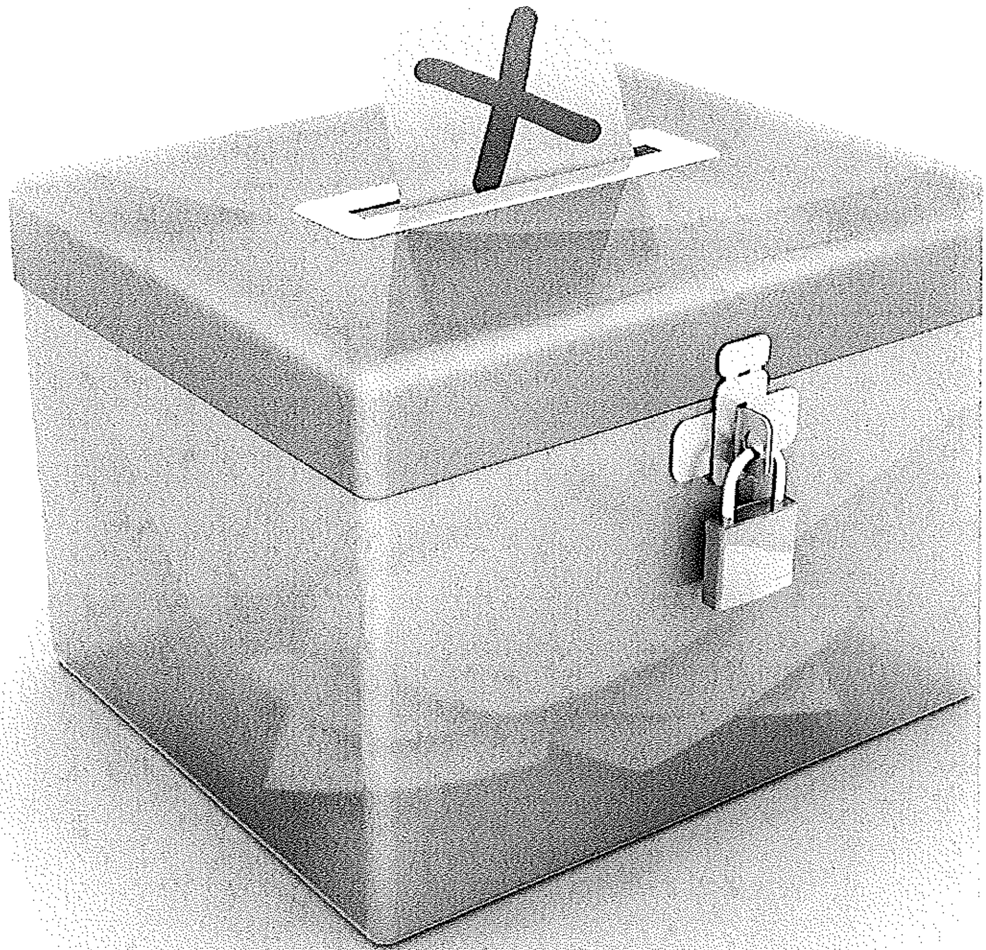
- 2006 - Villanova Sports & Entertainment Law Journal - "Despite His Antics, T.O. Has a Valid Point: Why NFL Players Deserve a Bigger Piece of the Pie"

Traditional Labor Relations

PRACTICE GROUP

OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.

- Maintaining Union Free Status
- Positive Employee Relations Strategies
- Corporate Campaign Strategies



Ogletree Deakins

Traditional Labor Relations

PRACTICE GROUP

Ogletree Deakins has extensive experience representing management in union representation campaigns. Since its inception in 1977, the firm has represented clients confronted with every form of union organizing activity. From union card signing activity and traditional union campaigns involving NLRB elections, to campaigns involving various levels of neutrality, to multi-site and even global attacks, to corporate campaigns, our attorneys have represented clients effectively, efficiently and successfully.

Our clients range from local single site employers to some of America's largest corporations in virtually every business and industry. The diversity of clients and unions trying to organize their employees has familiarized us with the broad spectrum of union organizing tactics. Our cumulative experiences enable us to provide effective legal counseling, which positions our clients to achieve successful outcomes.

A pioneer in developing strategies and practices that create positive employee relations.

Our national labor practice has included campaigns involving every major labor union.

POSITIVE EMPLOYEE RELATIONS STRATEGIES

Ogletree Deakins has been a pioneer in developing strategies and practices that create positive employee relations. Through these legal, thoughtful approaches, enlightened employers work to develop a trust relationship with employees, which minimizes the risk of unionization. From vulnerability assessments, to issue identification and resolution systems, to program development and related management training, Ogletree Deakins lawyers work closely with clients to achieve a positive workplace relationship.

NATIONAL AND MULTI-SITE UNION CAMPAIGNS

Ogletree Deakins has numerous attorneys with extensive traditional labor experience. Several large clients have selected the firm because of its ability to dispatch a team of 25 or more experienced lawyers to worksites throughout the country expeditiously. Our years of experience with multi-site, national campaigns have resulted in proven methods of coordinating management's response to widespread union activity. By harnessing technology, the firm's lawyers ensure that the client's management is a full participant in legal advice and strategies. The use of technology also maximizes the ability to communicate consistently and simultaneously, despite any geographic divides involved in a campaign.

Ogletree Deakins

CORPORATE CAMPAIGNS

In 1977, when Ogletree Deakins was founded, the firm represented a large textile client in what is reputed to be the first union corporate campaign. Since 1977, the firm has advised numerous clients, both in preparation for and during corporate campaign attacks. Strategies developed over the years involve the inclusive use of internal and external resources in the legal and public relations arena, along with corporate management to counter the multi-faceted approaches of unions and their allies.

NATIONAL LABOR RELATIONS BOARD

Ogletree Deakins has a reputation for effective, professional representation before the National Labor Relations Board. That reputation has been earned through decades of dealing with the Board with integrity. Our experience in representation proceedings, including unit determinations and election proceedings, objections hearings, and other unit and representation disputes is unrivaled.

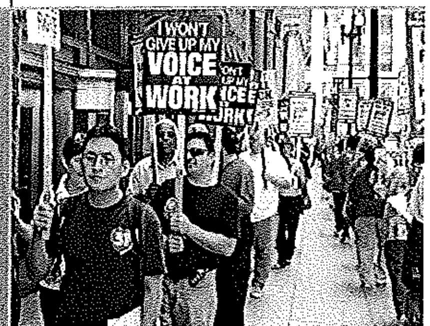
WHEN RESULTS MATTER

Ogletree Deakins' clients measure results in two important ways. Most firm clients go year-after-year without experiencing a union election. That is the ultimate result of a well-executed positive employee relations program. Other clients that are targeted by unions for campaigns measure results differently. With unions winning elections at historically high rates in the 60% range, a very high percentage of Ogletree Deakins clients' employees reject unionization. Moreover, these results are achieved lawfully and, in most cases, without further organizing attempts by the same union later.

With offices throughout the nation, the firm represents a diverse range of clients.

We operate efficiently on a national scale without compromising our commitment to service.

Ogletree Deakins is one of the nation's largest labor and employment law firms, representing management in all types of employment-related legal matters.



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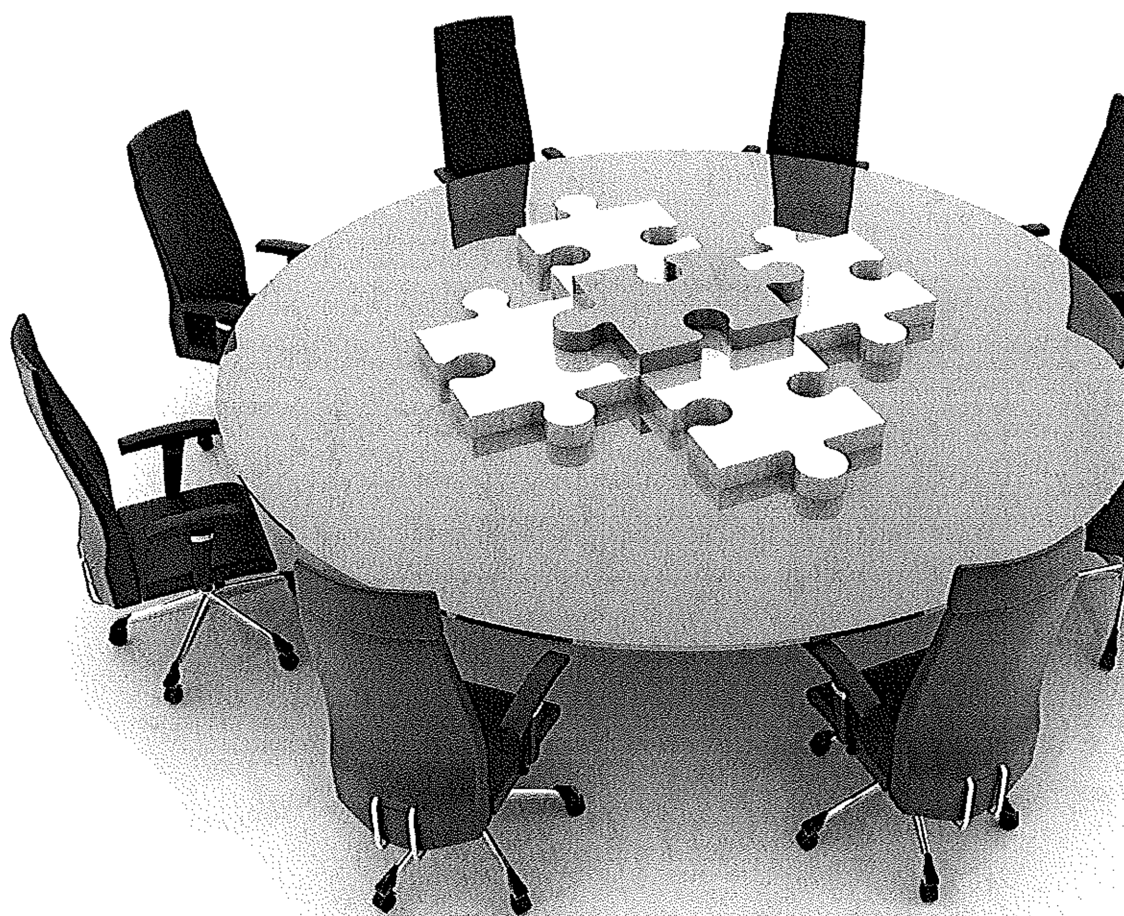
Deakins

OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.

Traditional Labor Relations

PRACTICE GROUP

- Collective Bargaining Negotiations
- Strike Preparations
- Labor Arbitrations
- NLRB Proceedings



Ogletree Deakins

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PRACTICE GROUP

When it comes to union-management relations, companies need counsel with proven experience. The attorneys in Ogletree Deakins' Traditional Labor Practice Group have vast experience in complex and sophisticated traditional labor law matters. This includes experience advising and representing employers of all sizes and across virtually all industries in connection with collective bargaining negotiations, strike preparations, labor arbitrations, and National Labor Relations Board proceedings.

We work closely with our clients to identify their goals for the bargaining table and map out a strategy to achieve those goals. Our mission is to help our clients anticipate all of the contingencies in the bargaining process and to accomplish the desired business objectives.

Preparation is crucial and can make all the difference in successfully meeting the challenge posed by a strike - both to protect the employer's needs today and to resist the pressure exerted by a strike, which can cause long term harm to the employer's competitive position in its industry.

COLLECTIVE BARGAINING

Ogletree Deakins' attorneys have represented clients with bargaining units of all sizes in countless collective bargaining negotiations, and with all major unions. Our attorneys' negotiating experience involves handling the numerous matters that comprise collective bargaining, including:

- Wage rates, including incentive compensation and merit-based wage structures;
- Health insurance, including cost containment and maintaining management flexibility;
- Retirement plans, including modifying or eliminating pension plans;
- Leave time, paid time off, and other benefit issues;
- Productivity, performance, attendance, discipline, and other accountability measures;
- Transfer of work, facility closure, subcontracting, and other management rights; and
- Promotion, transfer, and layoff and recall rights, including ensuring management authority to fill positions based on skills and qualifications.

STRIKE PREPARATIONS

Preparing for a strike or work stoppage is a task no company looks forward to undertaking, but is essential as part of the bargaining process and to ensure that (in the worst case) the company is protected. Ogletree Deakins' attorneys routinely work closely with our clients in making detailed preparations that are necessary in advance of a strike, and help them execute this strategy as needs require. Strike preparations include such critical issues as:

- Business operation planning, including consideration of all lawful alternatives in operating during a strike, such as use of management and non-unit employees, contractors, and replacement workers;
- Internal communications and communications with the community and media;
- Security matters, including ensuring ingress and egress for working employees, suppliers, and customers; and
- Legal proceedings, including obtaining injunctions against unlawful striker misconduct.

Ogletree Deakins

LABOR ARBITRATIONS

Ogletree Deakins routinely handles labor arbitrations for our clients with unionized workforces. Our lawyers have represented clients in labor arbitrations in virtually all industries and with all major unions. This experience includes:

- Discipline and discharge matters;
- Management rights disputes, including work relocations, subcontracting, layoffs, and work jurisdiction matters;
- Benefits disputes, including health and retirement benefit disputes; and
- Interest arbitration (used in the public sector and in the transit, utility and some other industries to set contract terms).

NLRB PROCEEDINGS

When traditional labor disputes end up before the National Labor Relations Board, our attorneys also have a wealth of experience, including:

- Defense of unfair labor practice charges against employers, including those alleging unlawful terminations, failure to bargain in good faith, and conduct interfering with employee rights;
- Prosecution of union unfair labor practice charges for unlawful picketing and boycott activities, failure to bargain in good faith, and other violations of the National Labor Relations Act; and
- Representation proceedings, including unit determination and election proceedings, objections hearings, decertifications, and other unit and representation disputes.

INDUSTRIES

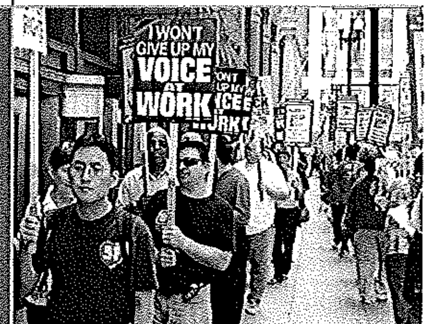
The industries in which our lawyers have collective bargaining, strike preparation and/or labor arbitration experience include:

- Aerospace
- Airlines
- Assembly
- Automobile
- Broadcasting
- Clothing
- Coal Mining
- Construction
- Energy/Utility
- Entertainment
- Food Processing
- Furniture
- Government Service Contracting
- Grocery
- Guard Services
- Health Care
- Hospitality
- Manufacturing
- Meat Packing
- Non-Profit
- Office Equipment
- Oil Field Equipment and Refining
- Pharmaceutical
- Printing
- Public Transit and Utilities
- Railroad Equipment
- Retail
- Rubber
- Steel
- Telecommunications
- Textile Garment and Apparel
- Transportation and Trucking
- Universities
- Warehousing
- Wholesale Distribution
- And Many More

With offices throughout the nation, the firm represents a diverse range of clients.

We operate efficiently on a national scale without compromising our commitment to service.

Ogletree Deakins is one of the nation's largest labor and employment law firms, representing management in all types of employment-related legal matters.



Ogletree
Deakins

COMMITTEE ON EDUCATION AND THE WORKFORCE
U.S. HOUSE OF REPRESENTATIVES

Truth in Testimony Disclosure Form

Clause 2(g) of rule XI of the Rules of the House of Representatives and the Rules of the Committee on Education and the Workforce require the disclosure of the following information by all witnesses appearing in a non-governmental capacity. A copy of this form should be attached to your written testimony and submitted to the Committee at least 48 hours prior to the hearing.

1. Your Name (Please Print):	**2. Organization(s) you are representing:**
Phillip B. Russell	☑ N/A

3. With respect to each of the entities listed in response to question 2, please briefly describe your position or representational capacity.
☐ N/A

4. Have you received any Federal grants or contracts (including any subgrants and subcontracts) since October 1, 2008, related to the subject on which you have been invited to testify?	**5. Have any of the entities you are representing received any Federal grants or contracts (including any subgrants and subcontracts) since October 1, 2008, related to the subject on which you have been invited to testify?**
☐ YES ☑ No	☐ YES ☐ No ☑ N/A

6. If you answered "yes" to either question 4 or 5, please list the amount and source (by agency and program) of each Federal grant or contract (including any subgrants and subcontracts), and indicate whether the recipient of such grant was you or the organization(s) you are representing. You may list additional grants or contracts on additional sheets.
☑ N/A

7. Signature: [signature]

8. Business Address and Telephone Number:

Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
100 North Tampa St, #3600
Tampa, FL 33602 (813) 221-7265

Please attach a copy of this form to your written testimony.