Chapter 2

LABOR LAW, ECONOMIC RECOVERY, AND SHARED PROSPERITY*

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I am delighted to join you here in Chicago, the birthplace of the National Academy of Arbitrators. It seems appropriate to do so because it is time for all of us in our labor management relations profession—neutrals, managers, labor representatives, government officials, and academics—to go back to basic principles and ask how we can meet the challenges facing the nation and our profession. As one of your founders put it way back in the 1940s, it is time for all of us to "accept the mantle of responsibility" for making collective bargaining and labor management relations better meet the needs of workers, employers, the economy, and society.

I hardly need to point out the challenges facing the nation in general and the labor management relations profession in particular. We meet in the midst of the worse economic crisis since the 1930s. Unemployment is now at 8.9 percent and rising; the economy has lost more than 6 million jobs since this recession began. More than 15 percent of our work force is either out of work or underemployed, and our young graduates face the worst job market in memory. This all comes on the heels of two decades in which wages of average workers stagnated; income inequality grew to unsustainable levels; and companies steadily shifted pension risks to employees by either terminating or transforming defined benefit to defined contribution or 401k savings plans, and shifted more of the costs of health care to employees and retirees in the vain search for ways to deal with this broken system.

In past times of crisis, leaders of our labor management profession have risen to the occasion and worked together to meet

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the challenges of their day. But unfortunately, today we find labor and management deeply divided over whether and, if so, how to fix America's broken labor law. Moreover, to date there is little connection between the debate over how to fix our labor law and how to fix our economy. I think this is a serious mistake because I believe fixing labor law is absolutely essential to the success of the economic recovery initiatives being put in place and to transforming our labor management relations system so that it can once again help achieve an era of sustained and broadly shared prosperity.

So I want to use this occasion to do three things:

1. Outline why I see labor law reform as essential to achieving a sustained economic recovery.
2. Suggest a way forward with labor law reform that will both restore worker rights and transform labor management relations in ways needed to support economic recovery efforts.
3. Challenge all of us in the labor management profession to do our part to implement a new law in ways needed to achieve these objectives.

The Need for a New Labor Law

Let's start by examining why a new labor law is essential to economic recovery and a return to a sustained and broadly shared prosperity. Three bodies of research document the contributions collective bargaining has made to the nation's economy and, if renewed, can make again.

First, collective bargaining has served as the strongest and most consistent institution for achieving gradual improvements in worker wages and for reducing income inequality within and across industries and occupations. The wage formulas that ushered in the post-war social contract came out of collective bargaining. From the mid-1940s through the 1970s, wages grew roughly in tandem with productivity growth. As union membership declined precipitously after 1980, this social contract broke down. Productivity grew but ordinary workers' wages stagnated and income inequality worsened.[1] Restoring workers' ability to organize is the

[1]Frank Levy and Peter Temin, *Institutions and Wages in Post-World War II America*, Working Paper, MIT Department of Economics, 2008.

first step in getting wages and productivity moving together again in a way that will return the economy to an era of sustained and shared prosperity.

Second, when unions and employers work together in partnerships that foster worker engagement, teamwork, and coordination, they have demonstrated their ability to solve difficult problems and achieve world class levels of productivity and service quality.[2] This is precisely what is needed today to realize the full return on the investment of public resources the nation is making in infrastructure, renewable energy, health care, and other industries. However, these innovative workplace practices and the improvements in productivity and service quality they generate cannot be achieved if, as is the case today, conflicts, tensions, and resistance dominate in organizing processes and bargaining relationships. Fixing the basics in labor law and following this up with industry-specific initiatives to put these innovative practices to work are essential to getting the full return on the investment of these public resources.

A third stream of research shows that many of the core workplace standards in the United States—from health and safety and wage and hour regulations to family medical leave practices—are most fully implemented in workplaces where there are unions.[3] Workplaces with unions also tend to foster more innovative methods that ensure that policy objectives like improving health and safety are achieved in ways that make firms more competitive. Economic recovery and adherence to core workplace standards can go hand in hand. Once the basics of labor law are fixed, government regulators can work with progressive employers and unions in new, more flexible ways to achieve the joint gains in performance and employment standards we know are possible.

A Failed Labor Law

This is why I believe a renewed, modern collective bargaining system is essential to both economic recovery in the short run and sustained and broadly shared prosperity in the long run. But we have a problem. American labor law is so badly broken that workers today lack the ability to join a union and establish an ongoing

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[2]Eileen Appelbaum, Jody Hoffer Gittell, and Carrie Leana, *High Performance Work Practices and Economic Recovery* (Nov. 23, 2008), *available at* www.lerablog.org.

[3]*See, e.g.*, David Weil, *Enforcing OSHA: The Role of Unions*, Indus. Rel., Vol. 30, No.1 (2008), 20–36.

collective bargaining relationship. The failures of labor law have been documented as far back as the Dunlop Commission report in the 1990s.[4] I won't repeat all that evidence here but instead will just summarize the newest, and I believe most compelling, evidence documenting the failure of the current law. It comes from John-Paul Ferguson's MIT dissertation. He managed to assemble data from the National Labor Relations Board (NLRB) and the Federal Mediation and Conciliation Service (FMCS) to track 22,000 organizing drives from 1999 to 2004, something never before done.[5] His results, summarized in the following four points, are both clear and sobering:

1. **Few bargaining units make it from initial petition to a first contract.** Only 20 percent, or one in five, of all cases that filed a petition for an election after showing substantial and very likely majority support for representation reached a first contract. Only 12.9 percent reached a first contract within one year of certification, during the National Labor Relations Act's (NLRA's) contract bar.
2. **Unfair Labor Practice (ULP) Charges reduce the chances of getting a contract.** The presence of a ULP charge reduced the likelihood of completing the process by 30 percent. That is, fewer than one in ten cases involving a ULP charge reached a first contract within a year of certification.
3. **ULPs reduce chances of getting to an election.** Unfair labor practice charges had their biggest effects in the initial stages of the organizing process, after a majority of workers have indicated a desire for representation, by reducing the probability of getting to an election by 25 percent.
4. **Even after a majority votes for a union, many units fail to get a contract.** Only 56 percent of units in which a majority of employees voted for a union and were certified for bargaining by the NLRB were successful in reaching a first contract. Only 38 percent of such units reached a contract within one year.

These data reinforce the conclusion reached by the Dunlop Commission 15 years ago that the nation's labor law is failing to provide

[4]U.S. Departments of Labor and Commerce, *Fact Finding Report: Commission on the Future of Worker Management Relations* (Washington, DC: May 1994).

[5]John-Paul Ferguson, *The Eyes of the Needles: A Sequential Model of Union Organizing Drives, 1999–2004*, Indus. & Lab. Rel. Rev., Vol. 62, No. 1 (Oct. 2008), 3–21.

workers an effective right to gain representation and a collective bargaining contract. Moreover, these results indicate that it will take a *systemic* solution—one that addresses the failures of the law in the initial stage of organizing prior to an election, during the election or certification period, and through the first contract negotiation process—to fix the law and restore the ability of workers to gain access to collective bargaining.

How to Fix Labor Law

The immediate locus of debate over how to reform labor law is the Employee Free Choice Act (EFCA), a bill passed by the House of Representatives last year and that had majority but not filibuster-proof support in the Senate. The elements in the bill address the weaknesses in the law that have been documented in the organizing and the first contract negotiation process by providing for card check recognition, increasing the penalties for labor law violations, and providing for arbitration of first contracts if the parties are unable to reach a negotiated agreement.

To date, debate over this bill has been dominated by partisan rhetoric, attack, and counter-attack, largely as if the economic crisis and challenges facing the country don't exist. It is business and labor locked in their traditional ideological battles with little regard for their larger responsibilities to the nation. This is a serious mistake, given what we know about the role that a modern collective bargaining and labor management relations system could make to the economy.

So how can we fix our broken labor law in a way that launches a new era of labor management relations that supports current economic recovery efforts and puts us on a track toward an era of sustained and broadly shared prosperity? Here is how I suggest doing so.

Reframe the Objectives

First, we should reframe the objectives of the law by linking it directly to the needs of the work force and the economy. Specifically, the preamble to the bill should state explicitly that its objectives are threefold:

1. To restore workers' rights to join a union and gain access to collective bargaining.

2. To transform labor management relations in ways that contribute to economic recovery and shared prosperity.
3. To encourage cooperation, innovation, and improvements in labor management relations.

A Systemic Approach

Second, it is time to move beyond rhetoric and get down to the specifics of what is needed in the bill and what can be enacted into law. As the Ferguson data suggest, a systemic approach is needed to fix each phase of the organizing and first contract negotiations process.

The Ferguson study demonstrates that something needs to be done to fix the pre-election process, since his data show this is the phase of the process where employer resistance through ULPs have their biggest effects by reducing the chance of even getting to an election by about 25 percent. The EFCA solution to this problem is to allow for union recognition upon a showing that a majority of the workers in the proposed bargaining unit have signed authorization cards. But reliance on card checks rather than elections to certify unions has provided opponents an easy rhetorical argument: "You mean to say you are against democratic elections?" Although not abandoning support for card check, there is now open discussion, led by Senators generally supportive of labor law reform, of alternatives to the card check provisions in the current bill. One option that has been suggested would give workers the choice when signing a card to check off whether they authorize representation or want to hold an election if 50 percent of their peers also sign. A second option is to mail in signed cards to the NLRB or a neutral third party.

A third proposed option would turn the debate over who is against democracy on its head. Elections would continue to be the normal process but the NLRB would be instructed to certify a union on the basis of majority card authorization if the employer engages in any ULPs in the initial stages of organizing prior to an election. This would essentially say that society supports fair elections but employers that violate worker rights forfeit their opportunity to require an election. In turn, any union that is shown to violate the law by intimidating or pressuring workers to sign authorization cards might also forfeit its right to certification on the basis of card check.

I am sure other options will surface as the bill is debated. Whatever approach is chosen, it must be powerful enough to deter unlawful behavior in the earliest stage of the organizing process so that workers have a fair and unimpeded means of demonstrating majority support for union representation.

Others have focused on ways to improve the administration of the election process. The most common proposal is to require that elections be held in a timely manner with objections to the bargaining unit or other appeals heard only after the election results have been tallied. This, along with the stiffer penalties for violating the law that are included in the present bill, should address the problems with the middle stages of the organizing process.

This leaves us with what to do about the fact that even once a union has been certified it faces a 40 percent or so chance of not getting a first contract, and an employer intent on resisting to impasse can reduce the likelihood of getting a contract by about another 13 percent. The EFCA addresses this problem by calling for first contract arbitration; but the current draft of the bill does not spell out how the arbitration system would actually work.

The sparse wording of the bill has made it an easy target for opponents to argue that *everyone* will end up having a contract imposed by "government arbitrators" who know nothing about business or labor issues. These critiques belie the experiences accumulated in more than 30 years of arbitration in the public sector and similarly long experience with first contract arbitration in Canada. So it is time to get serious and put an end to these ungrounded misconceptions about how arbitration would actually work.

Anticipating that this day would come, Arnold Zack, a past President of the National Academy of Arbitrators, and I worked together with several other experts to review the accumulated evidence with interest arbitration. We used this evidence to spell out a set of design features that are consistent with the objectives and general framework of the EFCA and that address each of the arguments against arbitration put forward by critics of the bill.

Here's a brief description of how the system would work:[6]

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[6]For the details, see Arnold Zack, *Arbitration of First Contracts: Issues and Design Features*, *available at* www.lerablog.org.

1. The FMCS would assign a mediator as soon as a new unit is certified and provide the full range of mediation, education, and facilitation services needed to help the parties reach a voluntary agreement and start their relationship off on a positive footing. The vast majority of cases are likely to be resolved in negotiations and mediation. In fact, settlements are reached more than *90 percent* of the time in public sector jurisdictions that provide for arbitration. The same has been true for first contract bargaining in the provinces of Canada that provide for first contract arbitration. So, contrary to those who argue that every case will go to arbitration, *the presence of arbitration encourages and enhances the ability of the parties to reach voluntary agreements in negotiation and mediation,* and incidentally does so without employees or employers having to bear the risks and costs of a strike to get a contract.
2. If an agreement is not reached in negotiation or mediation, then FMCS would provide the parties with a list of experienced arbitrators who had previously been vetted and judged by a panel of business and labor representatives to be qualified to serve as neutral arbitrators. Note these will *not* be "government arbitrators" or individuals appointed at the whim of the FMCS as some critics have suggested. To get on this panel, arbitrators would have to meet the standards of experience, expertise, and mutual credibility as determined by business and labor leaders.
3. The employer and union in a particular case would then choose their neutral arbitrator from this list.
4. The employer and union would appoint their own arbitrators to join the neutral in a tripartite structure, thereby building more opportunities for input and mediation in the process and giving the parties another way to inform the neutral arbitrator about how different decision options would affect the business and the work force. Experience shows that these tripartite deliberations often produce either an agreement or a unanimous decision.
5. The scope of issues to be considered would be limited to wages, hours, and working conditions—the same issues that currently are mandatory subjects of bargaining. So once again this guards against critics' worry that an arbitrator would somehow intrude on so-called "management rights" to run the employer's business.

6. The arbitrators would be required to consider standard criteria in reaching their decisions, including the financial and competitive situation of the employer and common practices within the occupation and industry.
7. Further opportunities for mediation and negotiation would be built into the tripartite process during, and even after, a draft award has been written.

Experience, reinforced by evidence from econometric studies, demonstrates that the results of this type of arbitration system mirror negotiated settlements in comparable bargaining units in their industry and occupation. Moreover, arbitrators are inherently conservative and are reluctant to impose new ideas of their own that might turn out to be unworkable. The presence of employer and union arbitrators in the tripartite structure and deliberations provides further protection against such a possibility. So there is no factual basis for claims by critics that arbitrators will either inflate labor costs or impose decisions that are harmful to employers or workers.

This is the real world of collective bargaining under arbitration, not some made-up doomsday scenario painted by those who oppose designing a proven, fair system for resolving first contracts if one or both parties are unwilling to negotiate an agreement on their own. Most importantly, it would ensure that an agreement will be achieved, something that has been out of reach under the current failed law for more than 40 percent of employee groups that vote for representation.

Finally, I would add one more provision to this bill to ensure that the new law is used as a foundation for building the types of innovative and productive labor management relations that the modern work force wants and the economy needs. A National Council on Workplace Relations should be created and charged with three tasks:

1. To engage labor and management leaders in key industries to work toward continuous improvements in workplace practices, relationships, and performance.
2. To monitor and evaluate the new law and progress toward improved labor management relations and report its findings back to Congress and the Administration on a periodic basis.

3. To suggest any further changes in labor law and policy that may be needed.

Adding this provision would both hold labor policy to the same standards of evaluation and performance as other aspects of economic and social policy and make it clear that fixing these basics in labor law is only the first step in revitalizing our labor management relations system and putting it back on a more productive course.

A Renewed Role for Neutral, Labor, and Management Professionals

Let's assume a new law along these lines is enacted. Then the "mantle of responsibility" for making it work shifts directly to agency administrators, business and labor leaders, and neutrals.

The FMCS will obviously play a key role. However, it currently lacks the staffing resources needed to meet the increased demand for mediation, facilitation, and administration of arbitration services. That is why, in our Transition Report[7] for FMCS, Nancy Peace and I called for supplementing the FMCS staff with a panel of dispute resolution professionals—individuals capable of carrying out the full range of services needed to build the next generation labor management relationships. This includes mediation of traditional and interest-based negotiations, facilitation of ongoing labor management partnerships, and the conduct of tripartite arbitration and mediation-arbitration processes. Moreover, all neutrals will need to demonstrate a deep knowledge of the changing economic and organizational issues and challenges facing labor and management today. This, in turn, will require a renewed commitment to continuing education for all current and future third-party neutrals. And, clearly, it will require considerable expansion in the number and the diversity of well-trained neutrals.

Likewise, both business and labor organizations will need to invest in and develop the next generation of leaders and representatives and equip them with the skills required to build and sustain innovative and productive labor management relations. The long-term decline in union membership has left the nation

[7]Thomas A. Kochan and Nancy E. Peace, Transition Report of the FMCS, prepared by the Presidential Transition Team, 2009 (unpublished).

with a shortage of both management and labor professionals with the skills and experience needed to do this. This is also something that the National Council called for above could profitably address.

If I am right, we are about to enter an era of increasing demand for a new generation of labor relations and dispute resolution professionals equipped to mix and match these skills and processes as needed. This is as historic a need and an opportunity for the Academy as was envisioned by its founders when they first gathered here in Chicago in 1947. I hope that the members of the Academy, and indeed the entire labor management relations profession, are prepared to roll up their sleeves and get on with the task.