

# LABOR-MANAGEMENT RELATIONS DURING THE CLINTON ADMINISTRATION<sup>†</sup>

*Robert B. Moberly\**

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\* Dean Emeritus and Professor of Law, University of Arkansas; Professor of Law Emeritus, University of Florida. B.S., J.D., University of Wisconsin.

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## I. INTRODUCTION

This article stems from Hofstra University’s invitation to speak on “Labor-Management Relations During the Clinton Administration” during its 2005 conference on the Clinton presidency. The purpose of the article is to provide a broad-based overview of multiple labor-management issues that arose during the Clinton era, rather than an in-depth discussion of any single program or statute. The article discusses the administration’s achievements as well as disappointments with respect to labor-management initiatives. The article initially discusses the Family and Medical Leave Act, the first act signed into law by President Clinton, and continues by discussing his administration’s efforts in the areas of jobs and employer-union relations. Where appropriate, the article notes the impact of the 1994 elections, in which Republicans won control of Congress, thereby making labor-friendly initiatives difficult to pass.

## II. FAMILY MEDICAL LEAVE ACT OF 1993 (FMLA)

In February 2003, Clinton signed his first bill into law as President,<sup>1</sup> the Family and Medical Leave Act (FMLA).<sup>2</sup> In so doing, he fulfilled a campaign commitment.<sup>3</sup> President Bush, his predecessor, had vetoed it twice.<sup>4</sup>

The Congressionally-stated purpose of the FMLA is “to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity.”<sup>5</sup> Another purpose is “to protect the right to be free from gender-based discrimination in the workplace,” and to eliminate “stereotypes about the roles of male and female employees,” particularly stereotypes about women’s domestic roles.<sup>6</sup> The Act requires employers with fifty or more employees to grant an eligible employee up to a total of twelve workweeks of unpaid leave

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1. BILL CLINTON, MY LIFE 490 (2004).

2. 29 U.S.C. § 2601 (2000).

3. CLINTON, *supra* note 1, at 490.

4. *Id.*

5. Family and Medical Leave Act, 29 U.S.C. § 2601(b)(1) (2000).

6. Nev. Dep’t. of Human Res. v. Hibbs, 538 U.S. 721, 722, 734 (2003).

during any twelve-month period for one or more of the following reasons:

- (A) for the birth and care of a newborn child of the employee;
- (B) placement with the employee of a son or daughter for adoption or foster care;
- (C) to care for an immediate family member (spouse, child, or parent) with a serious health condition;
- (D) to take medical leave when a serious health condition prevents the employee from working.<sup>7</sup>

The Act also requires covered employers to maintain group health insurance benefits for employees on FMLA leave, and to restore employees to the same or equivalent positions upon return from FMLA leave.<sup>8</sup>

Because the FMLA applies only to organizations with fifty or more employees, it covers only five percent of U.S. businesses. However, that five percent of businesses employs more than fifty percent of the private sector workforce.<sup>9</sup> Further, the Act covers public employers as well.<sup>10</sup>

In his autobiography, Clinton reflected on his thoughts when he signed the FMLA into law:

The Rose firm gave Hillary four months of parental leave to get Chelsea off to a good start. Because I was the boss, I could control when I went to the office, so I arranged my work to be home a lot in those first few months. Hillary and I talked often about how fortunate we were to have had that critical time to bond with Chelsea. Hillary told me that most other advanced countries provided paid parental leave to all citizens, and we believed that other parents should have the same priceless opportunity we'd had. I thought about those first months with Chelsea in February 1993, when I signed my first bill into law as President, the Family and Medical Leave Act, which allows

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7. 29 U.S.C. § 2612(a)(1)(A)-(D); *see also* 29 C.F.R. pt. 825 (2005) (the Department of Labor's regulations implementing the Act).

8. 29 U.S.C. § 2614(a)(1)(A)-(B), (c)(1). For a detailed explanation of the Act, see YOORA PAK, ET AL., *THE FAMILY AND MEDICAL LEAVE ACT 225* (Michael J. Ossip et al. eds., 2006).

9. STEVEN L. WILLBORN ET AL., *EMPLOYMENT LAW CASES AND MATERIALS* 669 (3d ed. 2002).

10. 29 U.S.C. § 2617(a)(2).

most American workers three months off when a baby is born or a family member is ill. By the time I left office, more than thirty-five million Americans had taken advantage of the law. People still come up to me, tell me their stories, and thank me for it.<sup>11</sup>

Later in the book, Clinton commented:

With the Family and Medical Leave Act, the United States at last joined more than 150 other countries in guaranteeing workers some time off when a baby is born or a family member is sick. . . . I believed that family leave would be good for the economy. With most parents in the workforce, by choice or necessity, it is imperative that Americans be able to do well both on the job and at home. People who are worried about their infants or their sick parents are less productive than those who go to work knowing they've done right by their families.<sup>12</sup>

Clinton then describes two examples of Americans who took advantage of the Family and Medical Leave Act:

In the next eight years, and even after I left office, more people would mention [the FMLA] to me than any other bill I signed. Many of their stories were powerful. Early one Sunday morning, when I came in from my jog, I ran into a family touring the White House. One of the children, a teenage girl, was in a wheelchair and obviously very ill. I greeted them and said that if they'd wait for me to shower and get ready for church, I'd take them into the Oval Office for a picture. They waited and we had a good visit. I especially enjoyed my talk with the brave young girl. As I walked away, her father grabbed my arm and turned me around, saying, "My little girl is probably not going to make it. The last three weeks I've spent with her have been the most important of my life. I couldn't have done it without the family leave law."

In early 2001, when I took my first shuttle flight from New York to Washington as a private citizen, one of the flight attendants told me that both her parents had been desperately ill at the same time, one with cancer the other with Alzheimer's. She said there was no one to care for them in their last days except her and her sister, and they wouldn't have been able to do it without the family leave law. "You know, the Republicans are always talking about family values," she said, "but I think how your parents die is an important part of family

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11. CLINTON, *supra* note 1, at 273.

12. *Id.* at 490.

values.”<sup>13</sup>

What has been the impact of the law? Who is taking advantage, or not taking advantage, of the law? A comparison has been made between use by new parents versus use by employees for their own illness:

When the FMLA was originally passed, there was significant hope that the statute would ease the burdens of working parents, particularly in the context of providing leave for parents of newborn (or adopted) children. Several studies have shown that the statute has had only a limited effect, and indeed, the most frequent use of the statute has been by employees who take leave for their own illness (52.4% of leave takers in 2000 took leave because of their own illnesses). . . . [L]ess than 20% of the leave taken was in conjunction with the birth or adoption of a child.<sup>14</sup>

While the above statistics indeed indicate that the majority (52%) of the 2000 leave-takers were attending to their own health, it is important to note that a substantial minority (48%), or almost half of the 2000 leave-takers, were attending to the needs of other family members.

Another comparison is between the use of the FMLA by women versus men, as the Act provides leave to both:

[The inclusion of both men and women] was done in part to avoid constitutional challenges if the leave had only been provided to women, but it was also done in the hope that the statute would encourage men to take more leave for the care of their children. This aspiration, too, at least in the context of the FMLA, has not been realized, as women take substantially more leave than men under the statute, and there is little evidence that men are taking significantly more leave than they had prior to the passage of the Act. (58.1% of leave takers were women although they constituted 48.7% of surveyed workers).<sup>15</sup>

Another important factor limiting the use of the FMLA is that leave

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13. *Id.*

14. MARION G. CRAIN ET AL., *WORKLAW: CASES AND MATERIALS* 670 (2005) (citation omitted).

15. *Id.* (citation omitted). For further discussions on why men use the FMLA less than women, and suggestions to facilitate equitable usage, see generally Martin H. Malin, *Fathers and Parental Leave*, 72 *TEX. L. REV.* 1047 (1994) (discussing the FMLA as it pertains to men); Joanna L. Grossman, *Job Security Without Equality: The Family and Medical Leave Act of 1993*, 15 *WASH. U. J.L. & POL'Y* 17, 34-35 (2004) (explaining why men use the FMLA less than women); Michael Selmi, *Family Leave and the Gender Wage Gap*, 78 *N.C. L. REV.* 708, 711 (2000) (“[F]amily leave remains a woman’s issue.”).

under the Act is unpaid, and that:

[M]any workers are unable to afford unpaid leave. Instead, many women store up their vacation or sick leave in anticipation of the birth or adoption of a child and return to work shortly after their leave is exhausted. Some large employers also provide paid leave, often in the form of disability leave, that render FMLA leave unnecessary. No matter how one looks at it, the United States legislation pales in comparison to most other industrialized countries; indeed, the United States is one of only two (Australia is the other) such countries that do not offer some form of paid leave.<sup>16</sup>

Because the statute only provides for *unpaid* leave, the Act only benefits employees who are financially able to take time off without pay. Professor Hylton argues that since the Act imposes some costs on employers, it probably reduces job opportunities.<sup>17</sup> Therefore, the working poor may share in the cost of the Act, but they do not benefit because they cannot afford to take an unpaid leave.<sup>18</sup> A 1995 survey “supports Professor Hylton’s view that most unpaid leave is taken by financially well-off groups. It found that most leave-takers are between thirty-five and forty-nine years old, that most have had at least some college education, and that 75% are non-Hispanic whites.”<sup>19</sup> Professor Crain similarly observes:

[O]nly those who share expenses with a wage earner whose income is sufficient to support the family will be able to take advantage of the limited right to job security that the Act affords. From the perspective of single mothers and working class women whose wages are an essential part of the family income, the Act confers a hollow right. Most working class women will not be able to afford to take unpaid leave, whether or not they are part of a two-earner household, and many have no health benefits to extend during the leave. Moreover,

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16. CRAIN, *supra* note 14, at 671 (citation omitted). For further discussions of the family and medical policies of other countries, see Carol Daugherty Rasnic, *The United States’ 1993 Family and Medical Leave Act: How Does It Compare with Work Leave Laws in European Countries?*, 10 CONN. J. INT’L L. 105, 105-06 (1994) (comparing U.S. family leave policies with those of other countries); Samuel Issacharoff & Elyse Rosenblum, *Women and the Workplace: Accommodating the Demands of Pregnancy*, 94 COLUM. L. REV. 2154, 2202-04 (1994) (discussing the European Community’s seemingly more progressive Equal Treatment Directive, which helps protect pregnant women in the workplace as it strives to eliminate sexual discrimination).

17. See Maria O’Brien Hylton, “Parental” Leaves and Poor Women: Paying the Price for Time Off, 52 U. PITT. L. REV. 475, 476-77 (1991).

18. See *id.* at 476-77.

19. WILLBORN, *supra* note 9, at 680 (citing a survey of leave-takers conducted by the Survey Research Center of the University of Michigan).

part-time and temporary employees, who are disproportionately female, are not covered by the statute. Finally, the lack of wage replacement ensures that the statutory right is skewed disproportionately towards white women. Women of color are both more likely to be functioning as single heads-of-households and likely to derive a lesser economic benefit (relative to white women) from their associations with men because of the wage disparities between white men and men of color.<sup>20</sup>

Despite the above limitations, the Act has made a substantial difference in the lives of millions of working families. Ten years after its passage, more than 35 million employees had taken FMLA leaves.<sup>21</sup> This tangible benefit arguably outweighs the hypothetical possibility that the Act will lead to reduced wages. Moreover, concerns that leaves taken pursuant to the Act are being used for employees' own illnesses rather than by new parents; by women more than men; and by economically privileged citizens rather than the working poor, single parents and minorities, do not justify a conclusion that the Act is not worthwhile. Rather, the studies supporting these conclusions can also be read as providing compelling evidence that the Act can be improved by expanding coverage and providing paid leave.

Some might argue that the Act has not been a significant achievement in light of its limited coverage and the fact that it only provides for unpaid leave.<sup>22</sup> It might also be argued that the passage of the Act in 1993 made it difficult to obtain more favorable legislation in the future because it took the topic off the political "front burner."<sup>23</sup> These arguments presume that Congress would have accepted stronger legislation in 1993 with a stronger push, or that the political climate would change so as to make likely the passage of stronger legislation in the near future. However, there is no evidence that Congress would have accepted a stronger law in 1993; further, as noted elsewhere in this article, the change in political climate after Republicans gained control of Congress in 1994 did not improve prospects for a stronger employee-oriented law. Under these circumstances, perhaps it was fortunate for

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20. Marion Crain, *Confronting the Structural Character of Working Women's Economic Subordination: Collective Action vs. Individual Rights Strategies*, 3 KAN. J. L. & PUB. POL'Y 26, 27-28 (1994).

21. ROBERT BELTON ET AL., *EMPLOYMENT DISCRIMINATION LAW: CASES AND MATERIALS ON EQUALITY IN THE WORKPLACE* 346 (7th ed. 2004).

22. See, e.g., K. Nicole Harms, Note, *Caring for Mom and Dad: The Importance of Family-Provided Eldercare and the Positive Implications of California's New Paid Family Leave Law*, 10 WM. & MARY J. WOMEN & L. 69, 73 (2003).

23. See, e.g., Michael Selmi, *Is Something Better than Nothing? Critical Reflections on Ten Years of the FMLA*, 15 WASH. U. J.L. & POL'Y 65, 82-86 (2004).

family-leave proponents that Congress passed the current FMLA, and that FMLA proponents did not hold back the legislation in the hope that a future Congress might adopt a stronger version. The current FMLA provides a foundation upon which to build by adding increased coverage and benefits. Perhaps most importantly, the FMLA established the right to family leave for millions of employees and family members in need of care. All things considered, it is fair to conclude that the signing of the FMLA by President Clinton, a major campaign goal, was an early milestone achievement for him in the area of labor-management relations.

### III. JOBS: CREATION AND ENHANCEMENT

#### *A. Job Creation*

At the beginning of the Clinton administration, the unemployment rate was relatively high. Factors contributing to the high unemployment rate included a decline in manufacturing in the United States, as well as lagging development of new products and production systems when compared to international competition.<sup>24</sup>

Clinton had experience in job creation and preservation from his time as Governor of Arkansas. Further, he emphasized job issues when organizing the Commission on the Future of the South.<sup>25</sup> He also successfully persuaded companies with Arkansas plants to stay in the state, and persuaded other companies to come to Arkansas. A well-known example is when the Sanyo Company planned to close its television-assembly plant in the Arkansas Delta, an area with an unemployment rate above ten percent.<sup>26</sup> Clinton flew to Japan and asked the president of Sanyo if he would keep the plant open if Wal-Mart, the world's largest retailer, based in Bentonville, Arkansas, would sell Sanyo's televisions.<sup>27</sup> After the Sanyo president agreed, Clinton obtained Wal-Mart's help in the venture.<sup>28</sup> As a result, that plant has produced more than twenty million television sets for Wal-Mart, and remains the only plant in the United States still producing television

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24. John E. Ullmann, *The Clinton Administration: Labor and the New Economy*, Address at the Hofstra University 11th Presidential Conference: William Jefferson Clinton: The "New Democrat" from Hope (Nov. 11, 2005).

25. *Id.* at 5.

26. CLINTON, *supra* note 1, at 320-21.

27. *Id.* at 320.

28. *Id.* at 320-21.

sets.<sup>29</sup> Clinton was also actively involved in successful efforts to retain other plants in Arkansas, such as an International Paper mill in Camden and a shoe plant in Clarksville.<sup>30</sup>

Then-Governor Clinton also worked to bring new jobs to Arkansas by using state funds to underwrite the cost of high-tech ventures, encouraged universities to help start new businesses, sponsored trade and investment missions abroad, and supported expansion of existing Arkansas plants.<sup>31</sup> As a result, companies such as NUCOR Steel Company, Dana Company, Daiwa Steel Tube Industries and others provided additional jobs for Arkansans.<sup>32</sup>

During the 1992 presidential campaign, Clinton proposed a \$200 billion dollar public investment program in infrastructure improvement. After the election he appointed a well-published labor economist, Robert Reich, as Secretary of Labor.<sup>33</sup> However, over Reich's objections, the investment program died after internal cabinet debates and concerns arose over the deficit.<sup>34</sup> Professor John Ullmann criticizes this result, arguing that "instead of financing an investment program that might have met urgent needs and mitigated the recession, the Clinton budget surplus disappeared into the Great Bush Tax Cut."<sup>35</sup>

Clinton also favored ratification of the North American Free Trade Association Agreement (NAFTA) with Canada and Mexico. He argued that NAFTA's promotion of free trade would increase U.S. jobs and boost the economy, and in 1992 he campaigned on providing protections for labor in any agreement.<sup>36</sup> Congress ratified the pact during the Clinton administration, despite strong objections from the AFL-CIO.<sup>37</sup> The final NAFTA treaty contained a side agreement with labor standards (the North America Agreement on Labor Cooperation, or NAALC), and Mexico responded with a minimum wage increase.<sup>38</sup>

The Clinton administration then negotiated the U.S.-Jordan Fair

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29. *Id.* at 321.

30. *Id.* at 320.

31. *Id.* at 321.

32. *See id.* at 321-22 (discussing these efforts in more detail).

33. *Id.* at 452.

34. *See* ROBERT B. REICH, *LOCKED IN THE CABINET* 60-65 (1997).

35. Ullmann, *supra* note 24, at 15.

36. *See* WILLIAM B. GOULD IV, *LABORED RELATIONS: LAW, POLITICS, AND THE NLRB-A MEMOIR* 31-32 (2000).

37. *See id.* at 31-32. Professor Gould, then Clinton's nominee for Chairman of the NLRB, thinks that the AFL-CIO's efforts to defeat ratification distracted it from other initiatives important to labor. *Id.* at 32.

38. *See, e.g.,* Marley Weiss, *Two Steps Forward, One Step Back – Or Vice Versa: Labor Rights Under Free Trade Agreements from NAFTA, Through Jordan, via Chile, to Latin America and Beyond*, 37 U.S.F. L. REV. 689, 702 (2003).

Trade Agreement, the first trade agreement to include labor criteria in the main text rather than a side agreement.<sup>39</sup> The labor standards in this and similar trade agreements theoretically are subject to the same dispute settlement and enforcement processes as the commercial aspects of the agreement. The inclusion of labor rights in fair trade agreements is an improvement over previous trade agreements, and in this respect, such clauses reflect favorably on Clinton's labor agenda achievements. However, the enforcement of such clauses has been criticized. Professor Marley Weiss, former Chair of the U.S. National Advisory Committee to the U.S. National Administrative Office for NAFTA, concludes that enforcement of labor rights is so ineffective that their inclusion is "a form of false advertising."<sup>40</sup>

Another Clinton job initiative, the Americorps program, placed young people in nonprofit organizations and public agencies to meet needs in education, public safety, health and the environment.<sup>41</sup> By the end of his presidency, 150,000 young people had served in Americorps.<sup>42</sup> Today more than 400,000 people have worked with Americorps, in more than 2,000 organizations.<sup>43</sup>

The Clinton administration also viewed welfare reform as an effort to provide additional jobs. When Clinton signed into law the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, the goal was to reform the welfare system by moving people from welfare to work.<sup>44</sup> The Clinton administration took credit for achieving the lowest percentage of people on welfare in thirty-five years, reducing the number of people on welfare by half, and increasing the percentage of employed welfare recipients by nearly fivefold.<sup>45</sup> However, William Fletcher Jr., President and CEO of TransAfrica Forum, argues that this Act amounted to welfare repeal, not reform, and that it created quasi-indentured servants.<sup>46</sup> Another commentator, Scott Miller, notes that

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39. *See id.* at 713-14.

40. Marley Weiss, *Architectural Digest for International Trade and Labor Law: Regional Free Trade Agreements and Minimum Criteria for Enforceable Social Clauses*, Univ. of Md. Legal Studies Research Paper No. 2006-2 at 17 (2005), available at <http://ssrn.com/abstract=879743>.

41. *See* Americorps, <http://www.americorps.gov/about/ac/index.asp> (last visited Nov. 17, 2006).

42. CLINTON, *supra* note 1, at 891.

43. *See* Americorps, *supra* note 41.

44. Professional Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 401, 110 Stat. 2105 (1996).

45. The Clinton-Gore Administration: A Record of Progress, <http://clinton4.nara.gov/WH/Accomplishments/additional.html> (last visited Nov. 17, 2006).

46. William Fletcher, Jr., President and CEO, TransAfrica Forum, Address at the Hofstra University 11th Presidential Conference: William Jefferson Clinton: The "New Democrat" from Hope (Nov. 11, 2005).

welfare recipients became more likely to be forced into minimum-wage jobs, thus further justifying the need for a minimum wage increase.<sup>47</sup>

In 1998 Clinton signed the Workforce Investment Act (WIA), which provides the framework for a national employment and training system and funds services to employers and job seekers throughout the country.<sup>48</sup> It replaced the Reagan Administration's Job Training Partnership Act of 1982.<sup>49</sup> The WIA created a one-stop approach to employment, education and training, with a single point of contact (One-Stop Career Centers) for employers and employees with several federal agencies.<sup>50</sup> All fifty states participate, and by 2000 there were 1,200 One-Stop centers existed nationwide.<sup>51</sup>

Finally, near the end of his term, Clinton announced an "Equal Pay Initiative."<sup>52</sup> This initiative provided additional funds to help the Equal Employment Opportunity Commission (EEOC) reduce its backlog of employment discrimination cases and otherwise combat wage discrimination.<sup>53</sup> It also provided additional funds to the Labor Department to train women in high-wage jobs where women were underrepresented.<sup>54</sup> As an example of the need for such funds, Clinton notes that "in most hi-tech occupations, men outnumbered women by more than two to one."<sup>55</sup>

Clinton expressed satisfaction with the results of his efforts to increase jobs. He points out that by the end of his presidency, more than twenty million new jobs were created, and the country had its lowest unemployment rate (less than 5%) and smallest welfare rolls in thirty years.<sup>56</sup>

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47. See Scott D. Miller, *The Fair Labor Standards Act: Work / Life Balance and the White-Collar Employee Under the FLSA* (pts. 2 & 3), 7 *Emp. Rts. & Emp. Pol'y J.* 5, 12 (2003). See also *infra* Part III.B.1 (discussing minimum wage).

48. See Workforce Investment Act of 1998, Pub. L. No. 105-220, 112 Stat. 936 (1998) (lays the foundation for the funding of education and employment services).

49. Job Training Partnership Act of 1982, Pub. L. No. 97-300, 96 Stat. 1322 (1982), *repealed by* Workforce Investment Act of 1998, Pub. L. 105-220, 112 Stat. 936 (1998).

50. Workforce Investment Act § 121.

51. The Clinton-Gore Administration: A Record of Progress, *supra* note 45.

52. See Press Release, Office of the Press Secretary, President Clinton Announces New Equal Pay Initiative and Urges Passage of Paycheck Fairness Act (Jan. 24, 2000), *available at* <http://clinton4.nara.gov/WH/New/html/20000124.html>.

53. CLINTON, *supra* note 1, at 890; see also Press Release, Office of the Press Secretary, *supra* note 52 ("The initiative includes \$10 million for the [EEOC] to . . . bolster the ability of the EEOC to identify and respond to wage discrimination . . .").

54. CLINTON, *supra* note 1, at 890; see also Press Release, Office of the Press Secretary, *supra* note 52 ("The initiative also provides \$17 million for DOL to: train women in non-traditional jobs – for instances, in the high technology industry . . .").

55. CLINTON, *supra* note 1, at 890.

56. *Id.* at 891.

### B. Job Enhancements

Clinton endeavored to enhance the quality of jobs as well their creation. This section discusses three significant administration initiatives intended to increase the quality of jobs in the United States: (1) increasing the minimum wage; (2) increasing the Earned Income Tax Credit, and (3) establishing Occupational Safety and Health Administration (OSHA) safety standards.

#### (1) Minimum Wage

A major enhancement to job quality achieved by the Clinton administration was to raise the minimum wage that employers must pay their covered employees. The minimum wage was raised from \$4.25 to \$4.75 effective in 1996, and to \$5.15 beginning in 1997.<sup>57</sup> An exception was made for employees under twenty years old.<sup>58</sup> Employers may pay those employees \$4.25 for the first ninety days of employment, but must not discharge another employee to hire someone at this “youth opportunity” wage.<sup>59</sup> Clinton later proposed an increase in the minimum wage to \$6.15, without success.<sup>60</sup>

Historically, the purpose of the minimum wage standard “is to maintain a minimum standard of living, lessen the need for government aid to families, and prevent disputes between employers and organized labor.”<sup>61</sup> However, at the time of this writing in 2006, almost ten years have passed since the federal minimum wage was last increased in 1997. Thus “[t]he minimum wage has failed to keep pace with increasing prices, poverty thresholds, and average wages” and “[t]he inflation-adjusted (real) value of the minimum wage has dropped steadily from its peak in the late 1960s to its current real value . . . .”<sup>62</sup> While most employees earn more than the minimum wage, many states have enacted a higher minimum wage.<sup>63</sup> In fact, a majority of Americans now live in

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57. Fair Labor Standards Act of 1938, 29 U.S.C. § 206(a)(1) (2000); *see also* U.S. Department of Labor, History of Changes to the Minimum Wage Law, <http://www.dol.gov/esa/minwage/coverage.htm> (last visited Nov. 17, 2006).

58. 29 U.S.C. § 206(g).

59. *Id.*

60. The Clinton-Gore Administration: A Record of Progress, *supra* note 45.

61. Scott D. Miller, *Revitalizing the FLSA*, 19 HOFSTRA LAB. & EMP. L.J. 1, 26 (2001).

62. *Id.* at 28; *see also* William Quigley, *Full-Time Workers Should not be Poor: The Living Wage Movement*, 70 MISS. L.J. 889, 914-15 (2001) (noting that in 2001, the minimum wage was worth 65% of the 1968 minimum wage).

63. *See* U.S. Dep’t of Labor, Minimum Wage Laws in the States (Apr. 3, 2006), <http://www.dol.gov/esa/minwage/america.htm>.

states that have enacted wage minimums above the federal floor.<sup>64</sup> Twenty states and the District of Columbia require minimum wages higher than the federal minimum, and ten states have set the minimum wage at \$7.15 or higher.<sup>65</sup> Numerous cities have also adopted higher minimum wages, sometimes in conjunction with the living-wage movement.<sup>66</sup> On the other hand, other states have adopted “maximum minimum” laws, which prevent localities from adopting a higher minimum wage than the state-imposed minimum.<sup>67</sup>

Clinton’s success in obtaining two increases in the minimum wage can be considered a significant achievement of his administration. The fact that he did not achieve a third increase detracts only slightly, particularly in light of the minimum wage stagnation at the federal level since he left office.<sup>68</sup>

## (2) Earned Income Tax Credit

The Clinton administration obtained another financial enhancement for low-income workers by doubling the Earned Income Tax Credit (EITC),<sup>69</sup> which serves as a tax cut for lower-income working families. Professor Shaviro describes the credit and its effect as follows:

[The EITC is] a transfer program for low-income workers that is administered through the income tax via refundable credits. Under the EITC, low-income status depends on total annual earnings and other household income, rather than on hourly wages as under the minimum wage; benefits are mainly restricted to households with children. The EITC’s income-testing and reliance on general revenues make it a far better tool than the minimum wage both for making market work a more viable long-term option and for progressive redistribution.<sup>70</sup>

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64. Michael Dimock, *Maximum Support for Raising the Minimum: Most Americans Now Live in States That Have Raised the Wage Floor*, PEW RES. CTR., Apr. 19, 2006, <http://pewresearch.org/assets/obdeck/pdf/18.pdf>.

65. *Id.*

66. See, e.g., Living Wage Resource Center, Introduction to ACORN’s Living Wage Web Site, <http://www.livingwagecampaign.org/index.php?id=1961> (last visited Nov. 17, 2006).

67. Quigley, *supra* note 62, at 937-38.

68. Dimock, *supra* note 64.

69. Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 13131, 107 Stat. 312, 433-435 (amending I.R.C. § 32 (1990)).

70. Daniel Shaviro, *The Minimum Wage, the Earned Income Tax Credit, and Optimal Subsidy Policy*, 64 U. CHI. L. REV. 405, 408 (1997). But see Anne L. Alstott, *Work vs. Freedom: A Liberal Challenge to Employment Subsidies*, 108 YALE L.J. 967, 971-72 (1999) (arguing that, in comparison to employment subsidies, cash grants would be easier to administer and provide more freedom for recipients).

The details of the EITC appear below:

[I]ndividuals with low earnings receive tax credits for each dollar they earn. If the tax credits exceed tax liability, the credits are treated as overpayments so they can be received in cash as a refund. Under current law, the tax credit can be as high as \$3,556 – an individual with two or more children may receive a 40% tax credit on earnings up to \$8,890. At higher income levels, the tax credit phases out – for the individual with two children, the credit is reduced by 21 cents for every dollar earned over \$11,610 so that it is completely phased out when the individual earns \$28,495. (These amounts vary depending on family size; amounts are indexed for inflation.)<sup>71</sup>

In 2000, the Clinton administration reported that “[i]n 1999, the EITC lifted 4.1 million people out of poverty—nearly double the number lifted out of poverty by the EITC in 1993.”<sup>72</sup>

### (3) OSHA and Ergonomics Standards

Workers in certain types of jobs frequently suffer from carpal tunnel syndrome and other musculoskeletal injuries caused by repetitive motions on the job.<sup>73</sup> Ergonomic methods and designs often can eliminate or alleviate such injuries.<sup>74</sup> The Clinton administration’s OSHA attempted to adopt ergonomics standards, but encountered numerous obstacles<sup>75</sup>:

Under the Clinton administration, OSHA originally committed to issuing a proposed standard by September 30, 1994, but failed to meet that deadline. Thereafter, the Republican-controlled Congress sought to prevent OSHA from issuing an ergonomics standard, and on several occasions attempted to withhold OSHA’s budget if the agency issued a standard. It was not until February 1999, nine years after the process began, that OSHA released its draft proposed ergonomics standard and public hearings were concluded the following year (during which more than 1,000 witnesses testified). In November 2000, towards the end of the Clinton Administration, OSHA issued a final ergonomics standard . . . OSHA estimated that it would cost businesses approximately \$4.5 billion in the first year to comply with its regulation, but at a savings of almost \$9 billion a year in workers’ compensation costs and lost work

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71. WILLBORN, *supra* note 9, at 633.

72. The Clinton-Gore Administration: A Record of Progress, *supra* note 45.

73. CRAIN, *supra* note 14, at 926.

74. *Id.*

75. *Id.* at 926-27.

days. Business groups countered that the regulation would cost more than \$6 billion in the first year, with costs eventually rising to total more than \$100 billion with far lower projected savings. The rule took effect on January 16, 2001. Less than two months after it was issued, President Bush rescinded the standard . . . .<sup>76</sup>

Like examples discussed *infra*,<sup>77</sup> here the Clinton administration failed to achieve its labor goals as a result of the loss of Democratic control of Congress in the 1994 elections.<sup>78</sup>

#### IV. EMPLOYER-UNION RELATIONS

Several important matters regarding employer-union relations arose during the Clinton years, including: (1) employee participation programs and the TEAM act; (2) the appointment of the Commission on the Future of Worker-Management Relations; (3) attempts to prohibit companies from permanently replacing striking employees; and (4) other issues regarding the National Labor Relations Act.

##### *A. Labor-Management Cooperation and Worker Participation*

The 1970s through the 1990s witnessed considerable implementation and scholarship related to worker participation in the enterprise, such as labor-management cooperation and joint committees.<sup>79</sup> However, a conundrum soon developed with regard to whether employer efforts to promote worker satisfaction, productivity, quality and efficiency collided with the prohibitions against company unions and other employer-assisted labor organizations contained in section 8(a)(2) of the National Labor Relations Act.<sup>80</sup> In 1992, this tension came to a head when the National Labor Relations Board held in

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76. *Id.*

77. See, e.g., *infra* Part IV.B (discussing the failure of the Clinton administration to implement several of the Dunlop Commission's recommendations due to the shift to Republican control of Congress).

78. However, the Clinton administration did achieve some success in a steel erection standard. For a discussion of this and a needlestick standard, see WILLBORN, *supra* note 9, at 1073-74.

79. See Robert B. Moberly, *New Directions in Worker Participation and Collective Bargaining*, 87 W. VA. L. REV. 765, 765 (1985); Marley S. Weiss, *Innovations in Collective Bargaining: NUMMI-Driven to Excellence*, 13 HOFSTRA LAB. & EMP. L.J. 433, 435 (1996).

80. National Labor Relations Act, 29 U.S.C. § 158(a)(2) (2000). For further discussion of the conundrum, see Robert B. Moberly, *The Worker Participation Conundrum: Does Prohibiting Employer-Assisted Labor Organizations Prevent Labor-Management Cooperation?*, 69 WASH. L. REV. 331, 332 (1994).

*Electromation*<sup>81</sup> that certain “action committees” established by the company constituted labor organizations under section 2(5), and that the employer, Electromation, interfered with the committees in violation of section 8(a)(2).<sup>82</sup> The Board was careful not to condemn all employee participation committees, but rather, as I have stated elsewhere in a more detailed analysis of this case:

The Board concluded that the action committees functioned solely to address employee dissatisfaction by creating a bilateral process to reach bilateral solutions on the basis of employee proposals. The company did not limit the purpose of the action committees to achieving quality or efficiency, and did not design the committees solely as a communication device. Thus the majority opinion did not address the question of whether an employer-initiated committee existing solely for quality, efficiency, or communication purposes may constitute a labor organization under section 2(5).<sup>83</sup>

After deciding that the action committees constituted labor organizations, the Board then considered whether Electromation dominated or interfered with them in violation of section 8(a)(2). The applicable standard, derived from a prior Supreme Court decision,<sup>84</sup> was that when the purpose of an organization is to deal with the employer concerning conditions of employment, a finding of domination is proper “when the impetus behind the formation of an organization of employees emanates from an employer and the organization has no effective existence independent of the employer’s active involvement.”<sup>85</sup> Because Electromation formed and unilaterally directed the action committees, determined their composition, appointed management representatives, and paid committee members for their activities conducted on company time, the Board found domination and interference.<sup>86</sup> As stated by the Board:

[T]his case presents a situation in which an employer alters conditions of employment and, as a result, is confronted with a work force that is

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81. *Electromation, Inc.*, 309 N.L.R.B. 990 (1992).

82. *Id.* at 990; *see also* *E.I. du Pont de Nemours & Co.*, 311 N.L.R.B. 893, 893 (1993) (*Electromation’s* unionized sister case).

83. Robert B. Moberly, *The Story of Electromation: Are Employee Participation Programs a Competitive Necessity or a Wolf in Sheep’s Clothing?*, in *LABOR LAW STORIES* 315, 337 (Laura J. Cooper & Catherine L. Fisk eds., 2005).

84. *See* *NLRB v. Cabot Carbon Co.*, 360 U.S. 203, 213 (1959).

85. *Electromation, Inc.*, 309 N.L.R.B. 990, 996 (1992).

86. *Id.* at 992, 997-98.

discontented with its new employment environment. The employer responds to that discontent by devising and imposing on the employees an organized Committee mechanism composed of managers and employees instructed to “represent” fellow employees. The purpose of the Action committees was, as the record demonstrates, not to enable management and employees to cooperate to improve “quality” or “efficiency,” but to create in employees the impression that their disagreements with management had been resolved *bilaterally*. By creating the Action Committees the Respondent imposed on employees its own *unilateral* form of bargaining or dealing and they violated Section 8(a)(2) and (1) as alleged.<sup>87</sup>

Management representatives strongly criticized the decision, while union and board representatives supported it.<sup>88</sup> The decision also was criticized by some Congressional Republicans, including Wisconsin Representative Steve Gunderson and Kansas Senator Nancy Kassebaum. Three months after the Board’s decision, Gunderson and Kassebaum introduced the Teamwork for Employee and Managers (TEAM) Act of 1993.<sup>89</sup> Briefly stated, the TEAM Act proposed that section 8(a)(2) allow employers to establish or assist employee organizations that address matters of mutual interest, including terms and conditions of employment, but which do not seek to negotiate or amend collective bargaining agreements.<sup>90</sup>

Partly in response to the proposed TEAM Act, the Clinton administration appointed the Commission on the Future of Worker–Management Relations, chaired by John T. Dunlop, Professor Emeritus at Harvard and former Labor Secretary during the Ford administration.<sup>91</sup> The Administration asked the Commission to evaluate the current legal labor framework and bargaining procedures, as well as provide proposals to affect workplace productivity, employee participation, and labor-management cooperation.<sup>92</sup> After numerous hearings and meetings, the Commission issued its Fact Finding and Final Reports in 1994.<sup>93</sup> With respect to *Electromation* and section 8(a)(2), the

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87. *Id.* at 998. Two years later, the Seventh Circuit Court of Appeals affirmed the Board’s decision. *Electromation, Inc. v. NLRB*, 35 F.3d 1148, 1171 (7th Cir. 1994).

88. *See, e.g., Moberly, supra* note 83, at 342-43.

89. *Id.* at 343 (citing H.R. 1529, 103d Cong. (1993); S. 669, 103d Cong. (1993)).

90. H.R. 1529, 103d Cong. § 3 (1993); S. 669, 103d Cong. § 3 (1993).

91. Samuel Estreicher, *The Dunlop Report and the Future of Labor Law Reform*, 12 LAB. LAW. 117, 120 (1996).

92. *Id.*

93. COMM’N ON THE FUTURE OF WORKER-MGMT. RELATIONS, U.S. DEP’T OF LABOR AND COMMERCE, FACT FINDING REPORT (1994) [hereinafter FACT FINDING REPORT]; COMM’N ON THE FUTURE OF WORKER-MGMT. RELATIONS, U.S. DEP’T OF LABOR AND COMMERCE, FINAL REPORT

Commission concluded that section 8(a)(2) should be retained, but that Congress should “clarify” its meaning to ensure that employee participation plans would not be unlawful where “discussion [of working conditions] is incidental to the broad purposes of these programs,” the employer’s purpose is not to frustrate employee efforts to obtain independent representation, and employees are protected from retaliation for communicating their views and seeking outside expertise.<sup>94</sup>

The Dunlop Commission reports did not stop Congressional efforts to pass the TEAM Act<sup>95</sup> – an act that was favored by employer groups but opposed by unions as an attempt to return to the company unions prevalent in the 1930s.<sup>96</sup> After Republicans gained control of Congress in the 1994 elections, both Houses passed the TEAM Act in votes split largely along party lines.<sup>97</sup> However, President Clinton vetoed the bill,<sup>98</sup> stating:

This legislation, rather than promoting genuine teamwork, would undermine the system of collective bargaining that has served this country so well for many decades. It would do this by allowing employers to establish company unions where no union currently exists and permitting company-dominated unions where employees are in the process of determining whether to be represented by a union. Rather than encouraging true workplace cooperation, this bill would abolish protections that ensure independent and democratic representation in the workplace.<sup>99</sup>

President Clinton’s veto of the TEAM Act demonstrates the ability of a president to impact policy by use of his veto power. The veto, as well as the failure of Congress to overturn the veto, represents a success in terms of Clinton’s labor-management policies and goals. The veto prevented the possible revival of employer domination of employee organizations. Moreover, the veto did not result in a lessening of worker participation programs, which remain a vital part of American industry and continue unabated as long as they address product quality, productivity, or matters such as customer relations, rather than working conditions.<sup>100</sup> Further, the fact that the TEAM Act has not reemerged

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(1994) [hereinafter FINAL REPORT].

94. FINAL REPORT, *supra* note 93, at 8-9.

95. H.R. 743, 104th Cong. (1996).

96. Moberly, *supra* note 83, at 345.

97. *Id.*

98. *See* H.R. 743, 104th Cong. (1996).

99. Moberly, *supra* note 83, at 345.

100. *See, e.g., id.* at 348.

despite Republican control of both the Congress and the Presidency since 2000 may indicate that such a measure is not necessary to maintain a strong and productive American economy.

*B. The Commission on the Future of Worker-Management Relations  
(Dunlop Commission)*

The establishment of the Dunlop Commission was discussed briefly in the previous section. Although established in early 1993, the Commission did not complete its report until December 1994.<sup>101</sup> This was one month after the November 1994 elections, which resulted in a shift to Republican control of the Congress.<sup>102</sup> Because the Congressional political dynamic had changed considerably since its formation, the Commission's recommendations were "dead on arrival" for all practical purposes. Even the Commission's recommendation to modify section 8(a)(2), discussed above, went unheeded. To date, there has also been no action taken on the Commission's recommendations including the following:

- update and tighten the definitions of supervisor and manager;
- conduct representation elections within two weeks of an election petition, delaying challenges to bargaining units and other legal disputes until after elections;
- allow employees access to union organizers in privately-owned but publicly-used spaces such as shopping malls;
- provide prompt statutory injunctions to remedy instances of discrimination during an organizing campaign or negotiations for a new contract;
- empower a tripartite advisory board to assist in negotiating first contracts;
- adopt a single definition of employer for all workplace laws, and develop a doctrine governing joint employers that would prevent subterfuge for avoiding labor laws;

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101. *Id.* at 344; see FINAL REPORT, *supra* note 93, at 3.

102. Moberly, *supra* note 83, at 345.

- adopt a single definition of employee for all workplace laws, paying special attention to the definition of independent contractor and contingent workers; and
- create a National Forum on the Workplace and a national Labor-Management Committee to discuss workplace issues and policies.<sup>103</sup>

Regardless of one's opinion of the recommendations, the Commission, comprised of outstanding representatives of employers, unions and academics, worked conscientiously for twenty months to formulate its proposals.<sup>104</sup> The Commission issued its final recommendations in December 1994, just one month after the 1994 elections.<sup>105</sup> Those elections resulted in a changed political environment, which made the passage of any changes in labor legislation difficult. The failure to implement the Commission's recommendations can primarily be attributed to unfortunate timing, rather than any fault of the Commission itself. Nonetheless, in assessing the labor-management successes and failures of the Clinton administration, the inability to implement the Dunlop Commission's recommendations must be counted as a failure.

### C. Striker Replacements

In *NLRB v. Mackay Radio & Telegraph Co.*,<sup>106</sup> a 1938 case, the Supreme Court stated in dictum that an employer may permanently replace economic strikers.<sup>107</sup> Professors Getman and Kohler note that the doctrine "effectively hollows out the protections the Act affords strikers . . . . To most contemporary observers, the doctrine undermines the right to strike, a right given special acknowledgment in the Act . . . . Critics also point out that by weakening the right to strike, *Mackay* inadvertently undermines the institution of collective bargaining."<sup>108</sup>

The striker replacement issue became more prominent after President Reagan's very public termination of 11,000 air traffic

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103. FINAL REPORT, *supra* note 93, at 9-10, 12-13.

104. *See id.* at 7, 111-12.

105. *See id.* at 3, 7; Moberly, *supra* note 83, at 344-45.

106. 304 U.S. 333 (1938).

107. *Id.* at 345-46.

108. Julius G. Getman & Thomas C. Kohler, *The Story of NLRB v. Mackay Radio & Telegraph Co.: The High Cost of Solidarity*, in *LABOR LAW STORIES* 13, 14 (Laura J. Cooper & Catherine L. Fisk eds., 2005).

controllers who engaged in an unlawful strike against the federal government in 1981.<sup>109</sup> Since that time, private sector employers have become less reluctant to replace striking workers.<sup>110</sup> In 1993, the House of Representatives, still controlled by Democrats, passed the Cesar Chavez Workplace Fairness Act, which would have designated the acts of hiring or threatening to hire permanent replacements as an unfair labor practice.<sup>111</sup> However, the Senate dropped its companion bill in July 1994 in response to a threatened filibuster.<sup>112</sup> When Republicans took control of the House and Senate following the November 1994 elections, the bill did not resurface.<sup>113</sup>

The Clinton administration, however, did not drop the issue of striker replacements. In March of 1995 the President issued an Executive Order authorizing the Secretary of Labor to terminate federal contracts, and bar future contracts, with companies that permanently replaced economic strikers.<sup>114</sup> However, business organizations challenged the Executive Order and the Court of Appeals overturned it on preemption grounds, since the NLRA allows employers to permanently replace economic strikers as a countermeasure to the employees' right to strike.<sup>115</sup>

In summary, another Clinton policy pertaining to labor-management relations, that of preventing the permanent replacement of economic strikers, was frustrated, first by Congressional inaction following the loss of Democratic majorities, and second by judicial decision. Thus, efforts to prevent the permanent replacement of economic strikers represent another failure in the assessment of the successes and failures of the labor-management policies and goals of the Clinton administration.

#### *D. National Labor Relations Board*

The National Labor Relations Act of 1935 (NLRA) states that

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109. Charles B. Craver, *The National Labor Relations Act Must Be Revised to Preserve Industrial Democracy*, 34 ARIZ. L. REV. 397, 421 (1992).

110. For example, an AFL-CIO study found that about 11% of 243,300 strikers in 1990 were permanently replaced. *Id.*

111. H.R. 5, 103d Cong. § 2 (1993).

112. See S. 55, 103d Cong. (1993); Samuel Estreicher, *Collective Bargaining or "Collective Begging"?: Reflections on Antistrikebreaker Legislation*, 93 MICH. L. REV. 577, 578-79 (1994) (discussing the fate of S. 55 and similar bills in the early 1990s).

113. Estreicher, *supra* note 112, at 579.

114. Exec. Order No. 12,954, 60 Fed. Reg. 13,023 (Mar. 8, 1995).

115. Chamber of Commerce of the U.S. v. Reich, 74 F.3d 1322, 1339 (D.C. Cir. 1996).

collective bargaining is the public policy of the United States.<sup>116</sup> The National Labor Relations Board (NLRB or Board) administers the Act.<sup>117</sup> The Act sets forth certain “unfair labor practices” by companies and unions, and also provides for elections to determine whether employees wish to be represented by a union.<sup>118</sup>

The NLRB has two parts: a General Counsel and the Board itself.<sup>119</sup> The General Counsel, an independent presidential appointee, prosecutes cases, and the Board adjudicates cases brought by the General Counsel.<sup>120</sup> The Board is comprised of a Chair and four members, all presidential nominees, who serve staggered five-year terms.<sup>121</sup> By tradition (not statute) the Board is divided 3-2 between members of the President’s party and that of the opposition.<sup>122</sup>

In June 1993, President Clinton nominated his first appointee to the Board, Professor William B. Gould IV, as Chairman.<sup>123</sup> Gould was the Charles A. Beardsley Professor of Law at Stanford Law School, as well as a respected academic and labor arbitrator who was well-known in the labor-management community. His term on the Board was not without difficulty, beginning with the confirmation process, which he describes as “tortuous and protracted.”<sup>124</sup> Then “from January 1995 onward, when Republicans took control of both houses, there would be conflict between the Board and Congress.”<sup>125</sup> Gould states that “this political environment and its destabilizing impact. . . first manifested itself vividly during debate about my confirmation as chairman; it continued to intensify until my very last day in office, August 27, 1998.”<sup>126</sup>

By April 1994, President Clinton had appointed enough members of the Board to change its composition from a 3-2 Republican majority to a 3-2 Democratic majority. He also had appointed the Board’s General Counsel. Thus, through these appointments, the “Clinton Board” was created, just as previous shifts due to presidential appointments resulted in what practitioners often refer to as the

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116. National Labor Relations Act of 1935, 29 U.S.C. § 151 (2000).

117. 29 U.S.C. § 153.

118. 29 U.S.C. §§ 158, 159.

119. 29 U.S.C. § 153.

120. *Id.*

121. 29 U.S.C. § 153(a).

122. GOULD, *supra* note 36, at 54.

123. *See id.* at xi.

124. *Id.* The Senate vote confirming the appointment did not take place until March 2004. *See id.* at 48. The vote was fifty-eight in favor and thirty-eight opposed, the most “No” votes received for any Clinton nominee up to that time. *Id.* at 49.

125. *Id.* at xxii.

126. *Id.*

“Reagan-Bush Board,” the “Carter Board,” the “Nixon Board,” the “Kennedy-Johnson Board,” etc.<sup>127</sup>

Early on, the “Clinton Board” implemented a number of initiatives, including Gould’s creation of labor-management advisory panels to advance and react to ideas;<sup>128</sup> the use of bench decisions by administrative law judges;<sup>129</sup> the development of settlement judges;<sup>130</sup> postal ballots;<sup>131</sup> and greater use of injunctions under Section 10(j) of the Act.<sup>132</sup> The Board also significantly reduced the backlog of cases during its first two years, although the backlog increased thereafter.<sup>133</sup> Additionally, Professor Gould advocated for more oral arguments and rulemaking, but Congressional opposition stymied these goals via appropriations riders.<sup>134</sup>

In March 1995, the Board voted to seek an injunction to end the 1994-1995 Major League Baseball strike before the start of the 1995 season.<sup>135</sup> The Board sought temporary injunctive relief “to restore the status quo ante in the employment relationship which had been altered by virtue of the owners discontinuance of the free agency and salary arbitration system.”<sup>136</sup> Federal District Judge Sonia Sotomayor granted the injunction on April 3, 1995, stating: “Issuing the injunction before Opening Day is important to ensure that the symbolic value of that day is not tainted by an unfair labor practice and the NLRB’s inability to take effective steps against its perpetuation.”<sup>137</sup>

The injunction “induced the players to return to the field; and the owners . . . accepted them because of the potential liability for large sums in back pay.”<sup>138</sup> In September 1995, the Court of Appeals affirmed the decision of the District Court, stating:

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127. Such terminology should not be construed as meaning that Board membership was static during these presidential terms, or that Board and General Counsel appointees from the same party always worked in concert. *See, e.g., id.* at 54-58, 88-89.

128. *See* Press Release, William B. Gould IV, Chairman, National Labor Relations Board, Labor-Management Cooperation and NLRB Administrative Reforms (June 11, 1997), available at <http://www.nlr.gov/nrb/press/releases/r2227.asp>; Gould, *supra* note 36, at 298.

129. *See* GOULD, *supra* note 36, at 298.

130. *See id.*

131. *See id.* at 120.

132. *See id.* at 298.

133. *See id.* at 287.

134. *See id.* at 298.

135. *Id.* app. F at 358.

136. *Id.*; *see also id.* at 102-20, app. F at 353-60 (providing detailed descriptions of these events).

137. *Silverman v. Major League Baseball Player Relations Comm., Inc.*, 880 F. Supp. 246, 259 (S.D.N.Y. 1995).

138. GOULD, *supra* note 36, at 118.

Given the short careers of professional athletes and the deterioration of physical abilities through aging, the irreparable harm requirement has been met. The unilateral elimination of free agency and salary arbitration followed by just three days a promise to restore the status quo. The PRC [the owners' "Players' Relations Committee"] [was] . . . embarking on a course of action based on a fallacious view of the duty to bargain. We see no reason to relieve it of the consequences of that course.<sup>139</sup>

Gould noted that as a result of the injunction, Major League Baseball completed the 1995 season and the parties reached a new agreement after the 1996 season.<sup>140</sup> He concluded:

The Board's injunction had created the environment necessary to negotiation of a contract—exactly what an order curing a refusal to bargain is supposed to do! This was one of those instances in which the Board was able to do good, to achieve the important goal of restoring the nation's pastime, and, simultaneously, to act in accordance with the parameters of the National Labor Relations Act in a way the public could clearly understand.<sup>141</sup>

In addition to the procedural and processual improvements, the Clinton Board also issued significant substantive decisions and opinions in controversial labor cases. During the same period, the Supreme Court also ruled on important NLRA-related cases during the Clinton years. Some of the more important cases addressed during this period involved (1) organization and representation; (2) interference and discrimination; (3) the duty to bargain collectively in good faith; (4) remedies; and (5) union security. As noted below, several of the "Clinton Board" decisions have been overruled by the current "George W. Bush Board."

#### (1) Organization and Representation

- ***Mail Ballots.*** The Board adopted a new standard for using mail ballots to maximize opportunities for employees to vote in representation elections.<sup>142</sup>
- ***Interns, Residents, Fellows and Graduate Assistants.*** The Clinton Board held that such persons were covered employees,<sup>143</sup> overruling

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139. *Silverman v. Major League Baseball Player Relations Comm., Inc.*, 67 F.3d 1054, 1062 (2d Cir. 1995).

140. GOULD, *supra* note 36, at 119.

141. *Id.*

142. *San Diego Gas & Elec.*, 325 N.L.R.B. 1143, 1145-46 (1998).

143. *Boston Med. Ctr. Corp.*, 330 N.L.R.B. 152, 152 (1999) (holding that interns, residents and

contrary cases. In 2004, however, the Board overruled its decision regarding graduate assistants, on the grounds that they are primarily students rather than employees covered by the Act.<sup>144</sup>

- **Employee/Independent Contractor Distinction.** The Board developed criteria to determine the controversial question of whether workers were “employees” covered by the Act, or “independent contractors,” who are not covered by the Act.<sup>145</sup>
- **Nurses as Supervisors.** Charge nurses were held not to be supervisors, since their directions were routine and did not require independent judgment.<sup>146</sup> However, the Supreme Court subsequently held in *Kentucky River*<sup>147</sup> that the Board erred in interpreting independent judgment, and that professional judgment is included under independent judgment.<sup>148</sup> Additionally, in response to *Kentucky River*, the Board recently issued three significant cases setting forth new guidelines for determining supervisory status of charge nurses and others.<sup>149</sup>
- **Work Release Employees.** The Board held that work-release employees may vote in representation elections if they have a sufficient community of interest with unit employees.<sup>150</sup>
- **Organizer Access.** The Board balances the employees’ right to organize against the private property interest of the employer when deciding the right of non-employee union organizers to access an employer’s property. In *Farm Fresh*, the Board concluded that the

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fellows are “employees” within the meaning of § 2(3) of the Act); N.Y. Univ., 332 N.L.R.B. 1205, 1209 (2000) (holding that most graduate assistants are considered employees, despite the fact that they are simultaneously enrolled as students).

144. Brown Univ., 342 N.L.R.B. 483, 483 (2004).

145. Dial-A-Mattress Operating Corp., 326 N.L.R.B. 884, 891-93 (1998); Roadway Package Sys., Inc., 326 N.L.R.B. 842, 849-50 (1998).

146. Providence Hosp., 320 N.L.R.B. 717, 733 (1996), *enforced sub nom.* Providence Alaska Med. Ctr. v. NLRB, 121 F.3d 548 (9th Cir. 1997); Nymed, Inc., 320 N.L.R.B. 806, 810, 813 (1996).

147. NLRB v. Ky. River Cmty. Care, Inc., 532 U.S. 706 (2001).

148. *Id.* at 720-22; *see also* Marley S. Weiss, *Kentucky River at the Intersection of Professional and Supervisor Status: Fertile Delta or Bermuda Triangle?*, in *LABOR LAW STORIES* 353, 354 (Laura J. Cooper & Catherine L. Fisk, eds., 2005) (stating that the Supreme Court overturned an NLRB ruling which had decided that “professionals are not supervisors if the only form of authority they exercise is to use judgment based on their professional training in directing less skilled coworkers in the delivery of services, pursuant to standards set by the employer.”); Marion Crain, *The Transformation of the Professional Workforce*, *CHL-KENT L. REV.* 543, 608-09 (2004) (stating that “nurses who use independent judgment to responsibly direct aides in matters of patient care” are supervisors).

149. The new guidelines are sufficiently complex that they are worthy of a separate article, and so will not be discussed in detail here. *See* Golden Crest Healthcare Ctr., 348 N.L.R.B. No. 39 (Sept. 29, 2006); Croft Metals, Inc., 348 N.L.R.B. No. 38 (Sept. 29, 2006); Oakwood Healthcare, Inc., 348 N.L.R.B. No. 37 (Sept. 29, 2006).

150. Speedrack Prods. Group, 325 N.L.R.B. 609, 609 (1998).

company's property interest prevailed to allow ejection of nonemployee organizers from a grocery store snack bar.<sup>151</sup> It also found that the company had a sufficient property interest to exclude nonemployee organizers from parts of sidewalks in front of a few of its stores, but insufficient property interest to remove them from other stores.<sup>152</sup>

- **Benefits.** Monetary payments by employers or unions that reward employees for coming to an election (other than travel expenses) constitute a "benefit" that interferes with the outcome of an election (overruling precedent).<sup>153</sup> The Board also held that union litigation for organizing employees is not such a benefit.<sup>154</sup> However, two circuit courts have held that such litigation is an unlawful benefit if it occurs during an organizing campaign, since it may affect the outcome of the election.<sup>155</sup>
- **Last-Minute Campaign Tactics.** The Board prohibited various forms of last-minute campaign tactics, such as paycheck changes, because they disturb the laboratory conditions for an election and do not have a legitimate business reason unrelated to the election.<sup>156</sup>
- **Distribution of Literature.** The Board held that supervisors can distribute anti-union literature in areas where employees are prohibited from distributing literature.<sup>157</sup> However, Chairman Gould dissented on grounds that this constituted disparate treatment of the no-distribution rule.<sup>158</sup>
- **Weingarten Right for Nonunion Employees.** In *Epilepsy Foundation of Northeast Ohio*<sup>159</sup>, the Clinton Board held that nonunion employees have a right to have coworkers accompany them to investigatory interviews that they reasonably believe may result in discipline.<sup>160</sup> *Epilepsy Foundation* overturned a previous decision, which in turn overturned the first decision on the topic;

151. Farm Fresh, Inc., 326 N.L.R.B. 997, 1001-02 (1998).

152. *Id.*

153. Broward County Health Corp., 320 N.L.R.B. 212, 212-13 (1995).

154. Novotel New York, 321 N.L.R.B. 624, 634 (1996).

155. Freund Baking Co. v. NLRB, 165 F.3d 928, 935 (D.C. Cir. 1999); Nestle Ice Cream Co. v. NLRB, 46 F.3d 578, 584 (6th Cir. 1995). These cases have been criticized as being too restrictive of union activity. See, e.g., Catherine L. Fisk, *Union Lawyers and Employment Law*, 23 BERKELEY J. EMP. & LAB. L. 57, 79 (2002); Michael Carlin, Note, *Are Union-Financed Legal Services Provided Prior to a Representation Election an Impermissible Grant of Benefit?: An Analysis of Nestle, Novotel, and Freund*, 79 N.C. L. REV. 551, 571-72 (2001).

156. Kalin Constr. Co., Inc., 321 N.L.R.B. 649, 652 (1996).

157. Hale Nani Rehab. & Nursing Ctr., 326 N.L.R.B. 335, 336 (1998).

158. *Id.* at 364-65 (Gould, W., dissenting).

159. Epilepsy Found. of Ne. Ohio v. NLRB, 331 N.L.R.B. 676 (2000).

160. *Id.* at 678.

recently, in keeping with the see-saw results of this issue, the Board overturned *Epilepsy Foundation* and again held that nonunion employees do not have a right to coworker representation.<sup>161</sup>

- **Contingent Workers.** The Clinton Board held that unions may organize contingent employees and include them in employee units without employer consent.<sup>162</sup> However, in 2004 the Board overruled this result, holding that leased employees cannot be included in the same bargaining unit with core employees without the consent of both employers.<sup>163</sup>

## (2) Interference and Discrimination

- **Caterpillar Strike.** In a lengthy and well-publicized strike involving the Caterpillar Company, the Board held that the company violated sections 8(a)(1) and (3) by prohibiting union slogans such as “Permanently Replace Fites.”<sup>164</sup> The word “Fites” referred to Donald Fites, the company’s Chief Executive Officer at the time of the strike.<sup>165</sup> The Board agreed with the trial examiner that such a slogan was protected as a response to the employer’s permanent replacement policy.<sup>166</sup> The Board further stated that the conduct would be protected even if it was an attempt to remove Fites.<sup>167</sup>
- **Salting.** The Supreme Court ruled that paid union organizers hired by employers (“salting”) are “employees” under the Act and protected against discharge or discipline for protected activities.<sup>168</sup>

## (3) Duty to Bargain Collectively in Good Faith

- **Regressive Bargaining.** The Board held that regressive bargaining (where one party claims that if their offer is not accepted, the offer will be worse after impasse) was not bargaining in bad faith, where it was not done to frustrate the possibility of agreement, and where it was a bona fide proposal rather than an ultimatum or “club” to

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161. IBM Corp., 341 N.L.R.B. 1288, 1289 (2004).

162. See M.B. Sturgis, Inc., 331 N.L.R.B. 1298, 1304 (2000); see also Michael J. Hely, *The Impact of Sturgis on Bargaining Power for Contingent Workers in the U.S. Labor Market*, 11 WASH. U. J. L. & POL’Y 295, 295-96 (2003).

163. Oakwood Care Ctr., 343 N.L.R.B. No. 76, at \*5 (2004).

164. Caterpillar, Inc., 321 N.L.R.B. 1178, 1182-83 (1996).

165. *Id.* at 1178.

166. *Id.*

167. *Id.* at 1179.

168. NLRB v. Town & Country Elec., Inc., 516 U.S. 85, 87 (1995).

force acceptance of the company's final offer.<sup>169</sup>

- **Proposals After Impasse.** An employer cannot unilaterally implement merit pay proposals after impasse, because such behavior would be “inherently destructive” to collective bargaining.<sup>170</sup>
- **Professional Football and Antitrust.** The Supreme Court emphasized its policy of deference to the NLRB, as well as the Board's important role in accommodating the NLRA and antitrust laws, in holding that the NLRA, rather than antitrust law, governs the unilateral action taken by professional football owners after a bargaining impasse.<sup>171</sup>
- **Detroit Newspaper Strike.** In another lengthy strike that received national attention, the Board held that it was not an unfair labor practice for the employer to withdraw from multi-union joint bargaining or to propose that non-unit employees be assigned work traditionally performed by unit employees.<sup>172</sup> The Board held, however, that the employer violated the Act by refusing to furnish relevant information, and by its proposals on merit pay and television assignments.<sup>173</sup>
- **Loss of Majority Status.** The Supreme Court affirmed the Board's judgment that when a company and union have a collective bargaining agreement, the company may not refuse to bargain on grounds that the union has lost majority status.<sup>174</sup>
- **Employer Polling.** The Supreme Court sustained the Board's “good-faith reasonable doubt” standard for determining whether an employer may poll employees to determine whether a majority still supports the union (5-4).<sup>175</sup> However, the Court reversed the Board's finding that the employer in this case lacked good-faith reasonable doubt (5-4).<sup>176</sup>

#### (4) Remedies

- **Rights of Undocumented Workers.** The Board ruled that

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169. Telescope Casual Furniture, Inc., 326 N.L.R.B. 588, 589 (1998).

170. See McClatchy Newspapers, Inc., 321 N.L.R.B. 1386, 1390-91 (1996), *enforced*, 131 F.3d 1026 (D.C. Cir. 1997).

171. Brown v. Pro Football Inc., 518 U.S. 231, 233-34 (1996).

172. Detroit Newspapers (*Detroit Newspapers I*), 326 N.L.R.B. 700, 702-03, 705 (1998).

173. *Id.* at 706.

174. Auciello Iron Works, Inc. v. NLRB, 517 U.S. 781, 782-83 (1996).

175. Allentown Mack Sales & Serv., Inc. v. NLRB, 522 U.S. 359, 360, 364-65 (1998).

176. *Id.* at 360, 380.

undocumented workers are eligible for back pay in unfair labor practice cases.<sup>177</sup> However, the Supreme Court later held that an employer is not liable for backpay if the employee lacks authorization and the employer gains knowledge of this status only after the illegal discharge.<sup>178</sup>

- ***Outrageous Unfair Labor Practices.*** Special notice and access remedies, including union access to non-work areas during non-work time and the right to deliver a speech to employees on working time, may be imposed to dissipate the coercive effect of “numerous, pervasive, and outrageous” unfair labor practices.<sup>179</sup> Other possible remedies for serious violations of the duty to bargain include a company being required to pay for a union’s negotiating and unfair labor practice strike costs.<sup>180</sup>

### (5) Union Security

In several cases, the Board articulated the duties of unions toward members and non-members of their rights under union security clauses.<sup>181</sup>

Despite the Board and court activities noted above, the percentage of the unionized work force continued its downward trend (by two percent) during the eight years of the Clinton presidency.<sup>182</sup> Nonetheless, as noted by Professor Gould:

[T]he Unions still need the law and the provisions of the National Labor Relations Act, even though its weaknesses, as well as other considerations, made it impossible for the Clinton Board to arrest the

177. A.P.R.A. Fuel Oil Buyers Group, Inc., 320 N.L.R.B. 408, 408 (1995), *enforced*, 134 F.3d 50 (2d Cir. 1997).

178. Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 149-52 (2002). For critical commentary on this case, see generally Catherine L. Fisk & Michael J. Wishnie, *The Story of Hoffman Plastic Compounds, Inc. v. NLRB: Labor Rights Without Remedies for Undocumented Immigrants*, in LABOR LAW STORIES 399 (Laura J. Cooper & Catherine L. Fisk eds., 2005) (criticizing the decision as inviting exploitation of unauthorized immigrants).

179. Fieldcrest Cannon, Inc., 318 N.L.R.B. 470, 473 (1995), *enforced in part*, 97 F.3d 65 (4th Cir. 1996).

180. Alwin Mfg. Co., Inc., 326 N.L.R.B. 646, 646-47 (1998), *enforced*, 192 F.3d 133 (D.C. Cir. 1999).

181. See, e.g., Marquez v. Screen Actors Guild, Inc., 525 U.S. 33, 37-38, 43-44 (1998); Chevron Chem. Co., 326 N.L.R.B. 301, 301 (1998); Monson Trucking, Inc., 324 N.L.R.B. 933, 934 (1997); Paperworkers Local 1033 (Weyerhaeuser Paper Co.), 320 N.L.R.B. 349, 349 (1995); Saw & Knife Works, 320 N.L.R.B. 224, 224-25 (1995).

182. Gregory Defreitas, Address at the Hofstra University 11th Presidential Conference: William Jefferson Clinton: The “New Democrat” from Hope (Nov. 11, 2005).

decline in collective bargaining and the dwindling number of workers who feel confident enough to express support for unionization.<sup>183</sup>

## V. CONCLUSION

The Clinton administration achieved a number of its labor-management goals, and also suffered a number of setbacks. A major success, the Family and Medical Leave Act, continues to benefit millions of working families in America.

Other Clinton goals which came to fruition include the negotiation of trade agreements; establishment of AmeriCorps; welfare reform that resulted in more jobs; the Workforce Investment Act of 1998; and funding to combat discrimination and train women for higher-paying jobs. Further, the Clinton years witnessed the creation of more than twenty million jobs, and significant reductions in the unemployment rate and welfare rolls.

The Clinton administration also successfully spearheaded efforts to raise the minimum wage, although not to the level that it would have liked. Further, an increase in the Earned Income Tax Credit provided tax relief to lower-income working families. The administration experienced less success, however, in adopting OSHA job safety standards.

Clinton's initiatives in employer-union relations faced difficulties, primarily due to the hostility of the Republican Congress. With his veto, President Clinton blocked the TEAM act, which was strongly opposed by unions. However, the recommendations of Clinton's Commission on the Future of Worker-Management Relations lay dormant practically from their issuance. Further, Clinton's attempts to protect striking employees from permanent replacement were denied, first by Congressional failure to pass the Workplace Fairness Act, and then by the judiciary striking down his executive order.

President Clinton was able to appoint a democratic majority to the National Labor Relations Board. The Clinton Board implemented a number of positive procedural and processual changes. However, the Board was stymied in other areas, such as rule making, by a hostile Congress, among other factors. Union membership continued its decades-long decline during the Clinton administration, but NLRA litigation before the Board and courts continued apace. The Clinton Board issued a number of important decisions, many of which were viewed favorably by labor. However, decisions by the "Bush Board," as

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183. GOULD, *supra* note 36, at 298.

well as the courts, have overruled or limited some of these decisions.

The above analysis reveals a mixed legacy in the area of labor-management relations for the Clinton administration. There were creative initiatives, such as the FMLA, as well as reinforcement of past policies, such as increases in the minimum wage and the FICT. Although the administration considered itself a friend of workers and unions, many of its policies, such as trade agreements, welfare reform and training programs, also benefited employers. Not all of Clinton's initiatives succeeded; failures including the OSHA ergonomics standard, the recommendations of the Commission on the Future of Work-Management Relations, and the proposals to prohibit striker replacements. On balance, however, especially considering the increase in jobs and reduced unemployment, one can reasonably conclude that the gains from Clinton's labor-management policies outweighed losses.