

ESSAY

Worker Centers and Labor Law Protections: Why Aren't They Having Their Cake?

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INTRODUCTION

As private sector labor union membership in the United States dwindles, the number of worker centers continues to grow. In 1985, there were just five worker centers in the United States.¹ Today there are more than 200 such centers.² Worker centers are often broadly defined as

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1. JANICE FINE, WORKER CENTERS: ORGANIZING COMMUNITIES AT THE EDGE OF THE DREAM 10 (2006).

2. Janice Fine, *How Innovative Worker Centers Help America's Most Vulnerable Wage Earners*, SCHOLARS STRATEGY NETWORK 1 (Aug. 2014), <http://www.scholarsstrategynetwork.org/sites/default/>

“community-based mediating institutions that organize, advocate, and provide direct support to low-wage workers.”³ Given worker centers’ focus on low-wage workers largely engaged in service sectors of our post-industrial economy and their relatively recent entrance into the field of United States labor relations,⁴ scholars and commentators are increasingly debating the applicability of the eighty-year-old National Labor Relations Act⁵ (NLRA) to the worker organizing activities of these emerging organizations.

As Part I will elaborate upon, until now, those who have examined the applicability of the NLRA to worker centers have focused on whether the NLRA’s *restrictions* on “labor organizations” apply to worker centers.⁶ These analyses inform our understanding of how the eighty-year-old NLRA maps onto contemporary worker center activity, but they overlook a central feature of the NLRA—the NLRA’s section 7 *protections* of collective activity among “employees.”

Part II considers the extent to which NLRA protections have been helpful to worker center organizing efforts to date. The law on the books indisputably supports the idea that the NLRA regime could protect employees from some forms of employer retaliation in response to their worker center organizing activity.⁷ The NLRA’s section 7 protections, which were at the heart of the NLRA as originally enacted in 1935, restrict employers from taking adverse employment actions against employees who

files/ssn_key_findings_fine_on_the_benefits_of_worker_centers.pdf.

3. Janice Fine, *New Forms to Settle Old Scores: Updating the Worker Centre Story in the United States*, 66 INDUS. REL. 604, 605-06 (2011); see also Josh Eidelson, *Who Should Fund Alt-Labor?*, THE NATION (July 17, 2013, 9:17 AM), <http://www.thenation.com/blog/175313/who-should-fund-alt-labor#>; U.S. CHAMBER OF COMMERCE, *THE NEW MODEL OF REPRESENTATION: AN OVERVIEW OF LEADING WORKER CENTERS 1-2* (2014) (distinguishing between worker centers that are “community-based organizations” and worker centers that have become the “new face of traditional labor unions”).

4. The paper considers the contemporary period. Some argue that worker centers look similar to organizations that existed before the New Deal period. See, e.g., David Rosenfeld, *Worker Centers: Emerging Labor Organizations—Until They Confront the National Labor Relations Act*, 27 BERKELEY J. EMP. & LAB. L. 469, 472-74 (2006).

5. 29 U.S.C. §§ 151-169 (2012).

6. See, e.g., Michael C. Duff, *ALT-Labor, Secondary Boycotts, and Toward a Labor Organization Bargain*, 63 CATH. U. L. REV. 837, 853-60 (2014); Eli Naduris-Weissman, *The Worker Center Movement and Traditional Labor Law: A Contextual Analysis*, 30 BERKELEY J. EMP. & LAB. L. 232, 334-35 (2009); Rosenfeld, *supra* note 4, at 472-74; Alan Hyde, *New Institutions for Worker Representation in the United States: Theoretical Issues*, 50 N.Y.L. SCH. L. REV. 385 (2006).

7. Indeed, existing law contains significant protections for non-union workers. See, e.g., Kati L. Griffith, *The NLRA Defamation Defense: Doomed Dinosaur or Diamond in the Rough?*, 59 AM. U. L. REV. 1, 6 (2009) (describing how the NLRA can be used by worker centers to require a heightened standard of proof in defamation cases brought by employers during a “labor dispute”); Cynthia L. Estlund, *Free Speech and Due Process in the Workplace*, 71 IND. L.J. 101, 118-19 (1995) (“The NLRA is rarely used by and is largely unfamiliar to nonunion employees outside the organizing context. But [NLRA] section 7 is a potentially significant source of free speech rights in the workplace on issues of concern to workers; it protects speech about unionization or other forms of employee representation, discussion of work-related grievances, and petitioning for their redress.”).

engage in protected concerted activity, regardless of whether they are members of a union, involved in a worker center's organizing campaign, or acting independently of any organization.⁸

Nonetheless, as Part II will illustrate, the NLRA's section 7 protections for collective activity have not been very meaningful to worker centers in practice. This observation is perplexing in light of the breadth of NLRA section 7 protection and the fact that the few worker centers that have sought NLRA protection for their members were successful in their efforts.

Part III proposes several theories to explain why worker centers have not turned to the NLRA's protections more proactively. In conclusion, the essay proposes a framework for future empirical work in this area. Given the focus on the applicability of labor law legal strategies, the essay centers its analysis on the subset of worker centers that organize workers in an attempt to improve their wages and working conditions and sometimes employ legal strategies in conjunction with their organizing activity.⁹

I. WORKER CENTERS AND NLRA RESTRICTIONS

As mentioned in the introduction, to date, those who have examined the applicability of the federal labor law to worker centers have focused on whether worker centers fall within the NLRA's definition of a "labor organization." This question is, of course, relevant to any discussion of the NLRA and worker centers because labor organization status would subject worker centers to the restrictive aspects of the NLRA.

For instance, if a worker center is an NLRA "labor organization," the NLRA's section 8(b) provisions, which emerged as part of the NLRA's Taft-Hartley amendments in 1946, could restrict the kinds of secondary boycott activity that some worker centers commonly engage in during campaigns.¹⁰ Moreover, in some circumstances, labor organization status could lead to NLRA charges against worker centers under NLRA section 8(b)(1) for allegedly restraining or coercing employees in the exercise of their section 7 rights to engage or disengage in collective activities with their fellow employees.

8. 29 U.S.C. § 157 (2012). In *NLRB v. Washington Aluminum*, the U.S. Supreme Court confirmed the NLRA's coverage of collective action among employees who were not engaged in union organizing. 370 U.S. 9, 14-15 (1962).

9. Worker centers are highly diverse. Some centers, for instance, organize workers by industry while others organize by community or geographic area. See generally FINE, *supra* note 1; see, e.g., NEW ORLEANS WORKERS' CENTER FOR RACIAL JUSTICE, <http://nowcrj.org/about-2/> (last visited Apr. 2, 2015) ("In the aftermath of Hurricane Katrina, African American workers were locked out of the reconstruction, while immigrant workers were locked in"); U.S. CHAMBER OF COMMERCE, *supra* note 3; Naduris-Weissman, *supra* note 6; FINE, *supra* note 1.

10. See 29 U.S.C. § 158(b)(4) (2012).

Labor organization status under the definition contained in the NLRA's Landrum-Griffin amendments of 1959 would place significant restraints on worker centers by mandating certain organizational structures, election procedures, membership privileges, and more burdensome reporting requirements to the federal government.¹¹

The labor organization debate does tell us something about the NLRA's relevance to worker centers. It highlights a mismatch between the aspects of the NLRA that promote and regulate collective bargaining and the current state of worker center activity. Because worker centers often do not explicitly intend to help workers enter into ongoing contractual agreements with their employers, aspects of the NLRA that relate to "labor organizations" and assume a collective bargaining model often do not fit.¹² Only when worker centers start engaging in a "bilateral mechanism" which enables employees and a particular employer to go back and forth on issues relating to employees' wages and working conditions, would the NLRA's labor organization restrictions become applicable.¹³

Instead of seeking ongoing contractual relationships with employers, worker centers that organize workers and pursue legal strategies often seek change through high-publicity lawsuits and campaigns to enforce and/or raise minimum labor standards. Many of these worker centers target particular employers that they believe are the worst offenders with respect

11. See, e.g., 29 U.S.C. § 411(a)(1) (2012) ("Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections . . . to attend membership meetings and to participate in the deliberations and voting upon the business of such meetings . . ."). Currently, there is significant variation in what it means to be a "member" of a worker center and rarely does it mean that a member has a right to run for office to become a leader of the organization. Workers at some day labor centers, for example, are expected to be present for a certain amount of time each day and to complete certain tasks to keep their placement in the order of employment allocation. See generally Naduris-Weissman, *supra* note 6, at 241-55; see also Fine, *New Forms to Settle Old Scores*, *supra* note 3, at 606-07, 609-10; Janice Fine, *A Marriage Made in Heaven? Mismatches and Misunderstandings between Worker Centres and Unions*, 45 BRIT. J. INDUS. REL. 335, 338, 342 (2007).

12. The Restaurant Opportunities Center of New York (ROC-NY), for instance, states that it "seeks improved working conditions for restaurant workers citywide . . . assists restaurant workers seeking legal redress against employers who violate their employment rights . . . [and] does not seek to represent the workers or be recognized as a collective bargaining agent of the workers at this restaurant." DIGNITY AT DARDEN, <http://www.dignityatdarden.org/> (last visited Apr. 2, 2015). Day-labor worker centers complicate this story somewhat, as they do often act as quasi-intermediaries between employers and day laborers. But while day-labor worker centers may make significant "minimum" demands of employers (minimum wages, minimum number of hours hired), the "contracts" are informal and most aspects are settled without the intrusion of the center. See generally Nik Theodore, Abel Valenzuela, Jr., & Edwin Meléndez, *Worker Centers: Defending Labor Standards for Migrant Workers in the Informal Economy*, 30 INT'L J. MANPOWER 422 (2009).

13. The labor organization debate has centered on the issue of whether the worker center "exists for the purpose, in whole or in part, of dealing with employers" regarding wages and working conditions. 29 U.S.C. § 152(5) (2012). See *Electromation, Inc.*, 309 N.L.R.B. 990, 995 (1992), *enforced sub nom. Electromation, Inc. v. NLRB*, 35 F.3d 1148 (7th Cir. 1994); *Crown Cork & Seal Co., Inc.*, 334 N.L.R.B. 699, 701-02 (2001).

to flouting basic labor protections, such as minimum wage and overtime requirements under the Fair Labor Standards Act (“FLSA”)¹⁴ and its state equivalents, health and safety laws, and protections against employment discrimination.¹⁵ Worker centers sometimes gain significant publicity for these cases, which they hope will serve as a deterrent for other employers and will help to educate government officials about much-needed improvements in labor standards and protections.¹⁶

Thus, unlike the traditional collective bargaining model of labor unions in the United States, worker centers do not principally intend to establish contractual agreements in particular workplaces as the way to bring employees’ wages, benefits, and working conditions above the minimum standards required by law.¹⁷ Currently, worker centers largely do not actively seek to be part of the long-term, day-to-day relationship between employers and employees in particular workplaces. While informative, the “labor organization” debate overlooks the applicability of the NLRA’s section 7 protection of collective activity among employees regardless of their involvement with a “labor organization.”

II. WORKER CENTERS AND NLRA PROTECTIONS

Because the NLRA broadly permits any “person” to file an unfair labor practice charge, worker centers *could* assist their constituents in filing a charge or file one on their behalf. Nonetheless, while there are a few exceptions, worker centers that organize workers and sometimes pursue

14. 29 U.S.C. §§ 201 *et seq.* (2012).

15. See Naduris-Weissman, *supra* note 6, at 240 (“In part, worker centers are a response to the increasing numbers of vulnerable immigrants working in industries that are abusive or fail to meet minimum employment standards set by law.”). See generally Benjamin I. Sachs, *Employment Law as Labor Law*, 29 CARDOZO L. REV. 2685, 2744 (2008) (arguing that FLSA and Title VII have the potential to facilitate collective worker action, especially compared with the NLRA); Benjamin I. Sachs, *Labor Law Renewal*, 1 HARV. L. & POL’Y REV. 375, 375 (2007) (claiming that the NLRA was designed to override other federal- and state-level labor statutes, but that the current regime is dysfunctional because it fails to protect workers’ right to organize).

16. See, e.g., Adam B. Ellick, *Boulud Settling Suit Alleging Bias at a French Restaurant*, N.Y. TIMES, July 31, 2007, at B3, available at <http://www.nytimes.com/2007/07/31/nyregion/31daniel.html>.

17. See Naduris-Weissman, *supra* note 6, at 238 (stating that worker centers do not intend to become the majority bargaining representative of employees in order to negotiate with employers); Richard B. Freeman, *What Can Labor Organizations Do for U.S. Workers When Unions Can’t Do What Unions Used to Do?*, in *What Works for Workers?: Public Policies and Innovative Strategies for Low-Wage Workers* 50, 64 (Stephanie Luce et al. eds., 2014) (same). Labor unions are experimenting with other models as well. See, e.g., Steve Early, Op-Ed., *What North American Unions Can Learn From Labor Organizations Abroad*, teleSUR (Oct. 5, 2014), <http://www.telesurtv.net/english/opinion/What-North-American-Unions-Can-Learn-From-Labor-Organizers-Abroad-20141006-0003.html> (reporting that AFL-CIO president Richard Trumka has stated that the “system of workplace representation is failing to meet the needs of America’s workers” and has recommended “new models for organizing workers” such as minority unions and other models besides collective bargaining on behalf of the majority of employees).

legal strategies generally have not utilized the NLRA as part of their efforts to protect workers that they believe were retaliated against based on their organizing activity. A search of Lexis Legal and the NLRB's online database has identified only seven worker centers that have assisted workers in the filing of twelve different NLRB charges.¹⁸ The author searched both sources using the names of the 137 worker centers listed in Janice Fine's seminal treatise on worker centers.¹⁹ All of these complaints alleged employer retaliation in response to concerted activity among employees who had been involved in worker center organizing efforts.²⁰

Admittedly, this search strategy is likely to have undercounted the total number of worker centers that have turned to the NLRB and the total number of NLRB cases that have emerged from worker center organizing efforts.²¹ Some worker centers have emerged after Fine's study and would

18. See NLRB, <http://www.nlr.gov/search/all> (use "Search" tool).

19. See FINE, *supra* note 1, at 271-82..

20. Chinese Staff and Workers Association has assisted in the preparation of at least five NLRA charges that were the basis of complaints issued by the General Counsel. See E. Vill. Grand Sichuan (*Grand Sichuan*), Case 02-CA-086946, 2013 NLRB LEXIS 688, at *1 (Nov. 6, 2013), *adopted by* Grand Sichuan, 2014 NLRB LEXIS 161 (Feb. 27, 2014) (cease and desist order); 47 Old Country, Inc. (*Babi D*), Case 29-CA-030247, 358 N.L.R.B. No. 148, slip op. at 2 (Sept. 26, 2012); Always is Nails, Case Nos. 29-CA-28950, 29-CA-29109, 29-CA-29201, 29-CA-29232; JD(NY)-28-10, 2010 NLRB LEXIS 193, at *1 (July 26, 2010); The Imperial Buffet & Rest., Inc. (*Majestic Rest. & Buffet*), Case 22-CA-27468, 2009 NLRB LEXIS 277, at *1-2 (Sept. 4, 2009); U Ocean Palace Pavilion, Inc., 345 N.L.R.B. 1162, 1164 (2005). The Comité de Trabajadores de Santa Fe Tortilla, which emerged from a specific organizing effort, filed an NLRA charge on behalf of a group of workers at a tortilla-making facility. See SFTC, LLC (*Santa Fe Tortilla Co.*), Case 28-CA-087842 & 28-CA-095332, 360 N.L.R.B. No. 130, slip op. at 1-2 (June 13, 2014). The Heartland Worker Center filed an NLRA charge alleging that employer retaliated against meat processing workers because they protested the increased speed of the conveyor belt, among other things. See Greater Omaha Packing Co., Inc., Cases 17-CA-085735, 17-CA-085736, & 17-CA-085737, 360 N.L.R.B. No. 62, slip op. at 1 (Mar. 12, 2014). Korean Immigrant Workers Advocates (KIWA) filed an NLRA charge on behalf of employees of a Korean Language newspaper. See Dong-A Daily N. Am., Inc., 332 N.L.R.B. 15, 15 (2000), *enforced*, 337 N.L.R.B. No. 111 (June 27, 2002) (enforcing the backpay due to the petitioner). Restaurant Opportunities Center (ROC) helped employees gain counsel to file NLRA charges against a restaurant employer. See Fiskardo Estiatorio, Inc., Cases 2-CA-38990, 2-CA-39002, 2-CA-39012, 2-CA-39017, & 2-CA-39157, 356 N.L.R.B. No. 129, slip op. at 10 (Mar. 31, 2011). Voces de la Frontera filed an NLRA petition on behalf of furniture assemblers. See Ashley Furniture Indus., Inc., 353 N.L.R.B. 649, 649 (2008), *invalidated due to lack of quorum by* New Process Steel, L.P. v. NLRB, 560 U.S. 674 (2010). Voces de la Frontera also filed an NLRA petition on behalf of other workers in Esperanza Unida, Inc., Case 30-CA-18996, 2011 NLRB LEXIS 768, at *1 (Dec. 30, 2011). The Western North Carolina Worker Center filed an NLRA charge against a poultry processing employer. See Case Farms of N.C., Inc., S. 11-CA-21378, 2007 NLRB LEXIS 448, at *1 (Sept. 28, 2007); Case Farms of N.C., Inc., Cases 11-CA-21378 and 11-CA-21379, 353 N.L.R.B. No. 26, slip op. at 1 (Sept. 30, 2008), *invalidated due to lack of quorum by* New Process Steel, L.P. v. NLRB, 560 U.S. 674 (2010); *see also* Kawa Sushi Rest., Case 02-CA-039736, 359 N.L.R.B. No. 70, slip op. at 1 (Feb. 28, 2013) (union filed complaint but underlying facts also involved the worker center's activities); Century Rest. & Buffet, Inc., Case 22-CA-029242, 358 N.L.R.B. No. 23, slip op. at 1 (Mar. 27, 2012) (same).

21. For instance, existing literature makes reference to cases that I did not find through electronically-available sources. See Naduris-Weissman, *supra* note 6 at 253 n.80 ("ROC has also successfully made claims with the NLRB, despite the lengthy and imperfect process, when workers were retaliated against for organizing activity."); FINE, *supra* note 1, at 160 (contending that some worker

not be incorporated.²² Charges that were initially dismissed, withdrawn, or settled are not publically available through these sources. This is significant—ninety-seven percent of unfair labor practice charges are resolved through dismissals for lack of merit, withdrawals or settlements between the parties.²³

Moreover, charges where the worker center was not the charging party, or was not otherwise mentioned in the description of the facts, would not have surfaced. The available information solely relates to cases that resulted in either a General Counsel Memorandum or a decision by an Administrative Law Judge or the Board itself. Despite these limitations, however, the available information paints a picture that is widely confirmed by other accounts of worker center activity: the NLRB has been largely irrelevant to worker center strategies.²⁴

Despite this seeming irrelevance, when worker centers have turned to the Board and the cases have resulted in reported decisions (rather than settlements, dismissals or withdrawals), the employees involved have largely prevailed. In eleven out of the twelve cases, the NLRB concluded that the employer unlawfully retaliated against employees who were organizing in conjunction with a worker center.²⁵ In the other reported case, the parties settled and the NLRB issued a cease and desist order, notice posting, and other remedies.²⁶ The Board has treated these cases like all of its other cases alleging employer retaliation, making no note of the

centers make use of the NLRA framework but that it “has become significantly less effective in protecting the right to organize”).

22. See, e.g., *Gates & Sons Barbeque of Mo., Inc.*, 14-CA-110229, 2014 NLRB LEXIS 713, at *4 (June 17, 2014) (concluding, in a case initiated by a worker center unfair labor practice charge, that a restaurant employer violated NLRA section 8(a)(1) by removing employees’ meal benefit due to their participation in a fast-food strike).

23. See *Disposition of Unfair Labor Practice Charges in FY13*, NAT’L LAB. REL. BD., <http://www.nlr.gov/news-outreach/graphs-data/charges-and-complaints/disposition-unfair-labor-practice-charges> (last visited Mar. 30, 2015).

24. See *Naduris-Weissman*, *supra* note 6, at 238 (stating that worker centers “have for the most part shied away from using NLRB processes to protect worker rights”); *Freeman*, *supra* note 17, at 64 (noting that worker centers do not turn to the NLRA/NLRB because it is “dysfunctional”); see also JENNIFER GORDON, *SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS* 89-90 (2005); *FINE*, *supra* note 1, at 160.

25. See *Grand Sichuan*, 2013 NLRB LEXIS 688, at *32-33; *Santa Fe Tortilla Co.*, 360 N.L.R.B. No. 130, slip op. at 4; *Greater Omaha Packing Co., Inc.*, 360 N.L.R.B. No. 62, slip op. at 11; *Babi I*, 358 N.L.R.B. No. 148, slip op. at 7; *Fiskardo Estiatorio Inc.*, 356 N.L.R.B. No. 129, slip op. at 40-41; *Always is Nails*, 2010 NLRB LEXIS 193, at *16-17; *Majestic Rest. & Buffet*, 2009 NLRB LEXIS 277, at *264-66; *Ashley Furniture Indus., Inc.*, 2008 NLRB LEXIS 307, at *12-13; *Case Farms of N. Carolina, Inc.*, 2007 NLRB LEXIS 448, at *22-23; *U Ocean Palace Pavilion, Inc.*, 345 N.L.R.B. at 1175; *Dong-A Daily N. Am., Inc.*, 332 N.L.R.B. at 17. In each case, it was found that the employer violated the NLRA.

26. See *Esperanza Unida, Inc.*, Case 30-CA-18996, 2011 NLRB LEXIS 768, at *1 (Dec. 30, 2011) (settlement and order).

fact that the protected concerted activity was instigated by a “worker center,” rather than a labor organization.

Yet, even though employees involved in worker center organizing have generally fared well at the NLRB, turning to the NLRB is overwhelmingly the exception, not the rule. Why don’t worker centers turn to the NLRB more often? In the following subparts, this essay advances a number of reasons why worker centers, even those that organize workers and sometimes pursue legal strategies to support the workers that they organize, may not be utilizing the NLRA proactively to support their organizing efforts.

A. Constituencies

Worker centers often serve constituencies that (i) they believe have access to more expedient,²⁷ and robust, legal alternatives than federal labor law when their participants experience employer retaliation in response to collective activity; and either (ii) do not have NLRA rights or (iii) have NLRA rights, but do not have access to NLRA remedies when those rights are violated.

1. Low-wage Workers Who Experience Employment Law Violations

Worker centers that facilitate legal cases on behalf of their constituents may prefer taking advantage of the anti-retaliation protections of other statutes, rather than the NLRA’s retaliation protections. Because worker centers often organize low-wage workers who have relatively unstable, or “precarious,”²⁸ working conditions due to factors such as high turnover rates and workplace rights violations, they often bring claims under non-NLRA statutes, such as the FLSA²⁹ and Title VII of the Civil Rights Act (“Title VII”).³⁰ Both statutes and their state corollaries include provisions that protect workers from employer retaliation due to their participation in complaints or lawsuits.

27. Delays have served as formidable obstacles for cases as they move through the NLRB process. See, e.g., Samuel Estreicher & Matthew T. Bodie, *Review Essay—Administrative Delay at the NLRB: Some Modest Proposals*, 23 J. LAB. RES. 87, 88-92 (2002).

28. See generally NEW LABOR IN NEW YORK: PRECARIOUS WORKERS AND THE FUTURE OF THE LABOR MOVEMENT (Ruth Milkman & Ed Ott eds., 2014) (describing the lack of employment security and poor working conditions that low-wage workers often encounter); DAVID WEIL, THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT (2014) (explaining that recent business strategies have resulted in stagnating wages, benefits, and a standard of living for workers); GUY STANDING, THE PRECARIAT: THE NEW DANGEROUS CLASS (2011) (illustrating the circumstances of the precariat, a working class with a lack of stability).

29. 29 U.S.C. §§ 201 *et seq.* (2012).

30. 42 U.S.C. §§ 2000e *et seq.* (2012). Indeed, Professor Benjamin Sachs has elaborated the ways that both the FLSA and Title VII often have more robust and efficient protections against retaliation as compared to the NLRA. Sachs, *Employment Law as Labor Law*, *supra* note 15, at 2694 (referring to the NLRA’s “deeply inadequate remedial regime”).

Unlike the NLRA, both statutes allow employees to bring private rights of action against employers in federal court. In the FLSA context, a plaintiff can bring a case directly to court without interacting with any federal agency.³¹ Similarly, in the Title VII context a plaintiff can pursue a federal court case after the Equal Employment Opportunity Commission issues a right to sue letter.³² Conversely, under the NLRA, the NLRB General Counsel, not the employee, is the plaintiff in the case.³³ The lack of a private right of action can sometimes cause delay, as well as other strategic problems for worker centers, stemming from the loss of control over the legal process.

Title VII and FLSA also arguably have comparative advantages over the NLRA when it comes to remedies for retaliation.³⁴ The NLRA's reinstatement and backpay (payment for the salary the employee would have received if he or she had not been illegally fired in response to protected concerted activity) remedies are compensatory remedies³⁵ that pale in comparison to FLSA's awards of liquidated damages (and punitive damages in some circuits)³⁶ and Title VII's compensatory and punitive damages in intentional discrimination cases.³⁷

While access to private rights of action and more robust remedies under FLSA or Title VII may dissuade some worker centers from turning to the NLRA/NLRB for relief, some worker centers appear to view NLRA remedies as beneficial enough to continue to pursue that strategy.³⁸ For instance, in *Babi I*, 358 N.L.R.B. No. 148 (2012), the Chinese Staff and Workers' Association ("Chinese Staff"), a worker center in New York City, filed NLRA charges on behalf of nail lacquerers who alleged that their nail salon employer retaliated against them because they jointly filed a FLSA lawsuit against their employer. Specifically, the complaint alleged that the employer violated NLRA section 8(a)(1) by issuing disciplinary warnings,

31. 29 U.S.C. § 216(b) (2012).

32. See 42 U.S.C. § 1981 (2012).

33. 29 U.S.C. § 153(d) (2012). If the General Counsel pursues the unfair labor practice charge, the charging party can participate in the process to some extent.

34. Injunctions are also easier to attain under these statutes. See Sachs, *Employment Law as Labor Law*, *supra* note 15, at 2707 (recounting a FLSA case and stating that "[t]he speed of the injunction—which comes nine days after the discharge and thus nearly two years faster than an NLRB order might have issued—constitutes a significant and potentially dispositive improvement over the NLRA.").

35. 29 U.S.C. § 160(c) (2012).

36. 29 U.S.C. § 216(b) (2012). Compare *Travis v. Gary Cmty. Mental Health Ctr., Inc.*, 921 F.2d 108, 112 (7th Cir. 1990) (punitive damages are available in FLSA retaliation cases), with *Snapp v. Unltd. Concepts, Inc.*, 208 F.3d 928, 933-39 (11th Cir. 2000) (punitive damages are unavailable).

37. 42 U.S.C. § 1981a(b)(3) (2012). Damages caps vary based on the number of people an employer employs. An employee of a small employer can receive up to \$50,000, while an employee of an employer with more than 500 employees can receive up to \$300,000. *Id.*

38. See, e.g., *Always is Nails*, 2010 WL 3285352, at *32-33 (N.L.R.B. Div. of Judges July 26, 2010) (holding that employer violated the NLRA).

threatening to close the business, discharging employees, and keeping the employees' concerted activities under surveillance.³⁹ Through an NLRB-supervised settlement, the employer reinstated three of the four terminated workers before the resolution of the FLSA case.⁴⁰ When the employer did not reinstate the fourth worker, as required in the NLRB settlement agreement, the NLRB entered a default judgment and ruled in favor of all the employees' NLRA section 8(a)(1) claims.⁴¹ In this case the NLRB proved to be an effective mechanism for the workers.

Moreover, the NLRB process may have enhanced relevance when FLSA and Title VII retaliation protections do not apply to the factual circumstances of the case. For instance, the NLRB process could be relevant in worker center cases involving an employer's allegedly retaliatory act in response to collective activity that does not relate to the FLSA or Title VII lawsuit or government complaint. The NLRA's section 7 retaliation protections related to organizing "for mutual aid or protection" is much broader than collective activity related to a specific wage lawsuit. In *Grand Sichuan*, for example, Chinese Staff filed an NLRA section 8(a)(1) charge against a restaurant employer. The Board concluded that the employer's termination and reprimand of employees were in response to employee discussions of their wages and *potential* legal claims and actions related to minimum wage law.⁴² In this context, FLSA's anti-retaliation provisions may not have been accessible because the employees had not made an actual complaint before the time of retaliation.⁴³ The NLRA's protection of concerted activity covers a significantly broader set of circumstances than FLSA and Title VII's retaliation protections.

Furthermore, in some cases, the NLRB's jurisdictional requirements and prosecutorial power can serve as a benefit as compared to FLSA and Title VII. Unlike FLSA, for instance, the NLRB can bring cases against non-retail employers that do less than \$500,000 annual gross volume of business.⁴⁴ Similarly, unlike Title VII, the NLRB is not limited to

39. *Babi I*, 358 N.L.R.B. No. 148, at 3 (Sept. 26, 2012).

40. See Sarah Maslin Nir, *Saying Court Win Helps, Nail Salon Workers Rally*, N.Y. TIMES, Apr. 10, 2012, at A20, available at <http://www.nytimes.com/2012/04/11/nyregion/new-york-nail-salon-workers-uniting-against-job-abuses.html>.

41. *Babi I*, 358 N.L.R.B. No. 148, at 23-24.

42. *Grand Sichuan*, 2013 NLRB LEXIS 688, at *5-7, *32-33 (Nov. 6, 2013), adopted by *Grand Sichuan*, 2014 NLRB LEXIS 161 (Feb. 27, 2014) (cease and desist order).

43. See 29 U.S.C. § 215(a)(3) (2012) (stating that it is unlawful for an employer "to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this [Act], or has testified or is about to testify in any such proceeding . . ."); see also *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325 (2011) (clarifying that FLSA's anti-retaliation provision is applicable with respect to both oral and written complaints).

44. See 29 U.S.C. § 203(s)(1)(A)(ii) (2012) (establishing an exception for retail industries). For retail companies, the Board has a minimum requirement of \$500,000 annual gross volume of business.

employers with fifteen or more employees.⁴⁵ Even though the lack of a private right of action can be a limitation in some circumstances, it could be a benefit in others. In the NLRA context, the Board, when it pursues a case, will investigate and prosecute the case on the employees' behalf at no charge. This would alleviate challenges to gaining access to private legal representation.⁴⁶

2. *Workers Without NLRA Rights*

A number of worker centers organize workers who are in occupations that are explicitly excluded from the NLRA. Indeed, Janice Fine's survey of worker centers in the United States illustrates that 56 percent of worker centers primarily organize workers along industry lines (rather than along geographic or ethnic lines).⁴⁷ Of that 56 percent, a majority of the workers fall within one of the NLRA-excluded categories of workers.⁴⁸ For worker centers in these industries, the NLRA has little relevance. Moreover, worker centers have also organized workers who labor in liminal occupations that make it difficult to determine whether they are explicitly excluded from the NLRA.⁴⁹

When Congress enacted the NLRA in 1935, it explicitly excluded farmworkers and domestic workers from its protections.⁵⁰ Almost thirty percent of industry-based worker centers organize these two excluded

For nonretail companies, the Board's minimum requirement is that they have \$50,000 annual outflow or inflow, direct or indirect. See Michael C. Harper, Samuel Estreicher & Kati L. Griffith, *LABOR LAW: CASES, MATERIALS, & PROBLEMS* 76 (8 ed., 2015) ("Direct outflow refers to goods shipped or services furnished directly by the employer to entities outside the state, and direct inflow to goods or services furnished directly to the employer from entities outside the state. Indirect outflow includes sales within the state to entities who subsequently sell the goods or services outside the state. Indirect inflow refers to the purchase of goods or services which originated outside the employer's state but which it purchased from a seller within the state."). Even though there may be state law equivalents that do not have these jurisdictional limitations, it is important to note the NLRA's coverage of smaller employers as compared to other federal labor and employment statutes.

45. 42 U.S.C. § 2000e(b) (2012).

46. See Aaron Halegua, *Legal Representation for New York City's Chinese Immigrant Workers: The Role of Intermediate Institutions*, in *BEYOND ELITE LAW: ACCESS TO CIVIL JUSTICE FOR AMERICANS OF AVERAGE MEANS* (forthcoming) (discussing challenges to access to justice and how worker centers facilitate access to legal services).

47. FINE, *supra* note 1, at 23.

48. See *id.* Twenty-five percent of workers work in the day labor/construction industry, while another 16 percent work in agriculture, and another 13 percent work as domestic workers. The remaining workers work for hotels/restaurants/casinos (19 percent), in healthcare (6 percent), manufacturing (6 percent), poultry (6 percent), workfare/welfare (3 percent), or are temporary workers (6 percent).

49. For further discussion of inhibitors to worker center use of the NLRA regime, see Julie Yates Rivchin, *Building Power Among Low-Wage Immigrant Workers: Some Legal Considerations for Organizing Structures and Strategies*, 28 N.Y.U. REV. L. & SOC. CHANGE 397 (2004).

50. 29 U.S.C. § 152(3) (2012).

categories of workers.⁵¹ Thus, groups like the National Domestic Workers Alliance (NDWA) and its state affiliates simply cannot turn to the NLRB for relief when one of its domestic worker members is retaliated against for engaging in organizing activities.⁵² In fact, one aspect of the NDWA's legislative agenda is to gain similar state-level protections for domestic workers to engage in collective activity.⁵³

Another deterrent to accessing federal labor protections for worker centers is that some of them organize workers that fall within the legally gray area between "employee" and "independent contractor" status under the NLRA. Through the Taft-Hartley Amendments in 1946, Congress excluded "independent contractors" from the NLRA's protections.⁵⁴ Twenty-five percent of the industry-based worker centers identified in Fine's study organize day laborer/construction workers.⁵⁵ Organizers for the National Day Labor Organizing Network (NDLON) and its affiliates cannot assume that day laborers—individuals who generally perform work for various employers on a day-to-day basis—are protected by the NLRA. In day-laborer cases, the NLRB is likely to apply a multi-factored, highly fact-dependent test⁵⁶ to determine whether the particular day laborers that allege employer retaliation fall within the NLRA's coverage.

This kind of legal uncertainty could slow down the NLRB process considerably, making the process unattractive to worker centers that want to find timely recourse for employer retaliation in response to their day-laborer organizing efforts. The number of low-wage workers that fall within this legal gray area continues to grow in the United States. Several scholars have convincingly illustrated that as U.S. companies increasingly decentralize production and decision-making,⁵⁷ the use of low-wage

51. FINE, *supra* note 1, at 23. Sixteen percent work in agriculture, and the remaining 13 percent work as domestic workers.

52. See Matthew Cunningham-Cook, *Domestic Workers Look to Extend Gains*, NAT'L DOMESTIC WORKERS ALLIANCE (Mar. 15, 2012), <http://www.domesticworkers.org/news/2012/domestic-workers-look-extend-gains> (referring to the NLRA and stating that "Southern representatives insisted that two groups who were then a majority African American be left out: farmworkers and domestic workers.").

53. See Leon Neyfakh, *Not Your Grandpa's Labor Union; As 'Employee' and 'Employer' Become Hazy Categories, Experiments in Worker Advocacy Are Replacing Unions As We've Known Them*, THE BOSTON GLOBE, Apr. 6, 2014, at K1, available at <http://www.bostonglobe.com/ideas/2014/04/05/how-labor-advocacy-changing/QKULXuazXGHMW7EBBe6IKJ/story.html> ("[A]s other states consider adopting similar laws [to NY's Domestic Workers' Bill of Rights], the organization [NDWA] faces the task of devising a system that would allow its members to make collective demands of their employers, even though they all work for different people.").

54. 29 U.S.C. § 152(3) (2012).

55. FINE, *supra* note 1, at 23.

56. See, e.g., FedEx Home Delivery, 361 N.L.R.B. No. 55, at 1 (Sept. 30, 2014).

57. See Katherine V.W. Stone, *Legal Protections for Atypical Employees: Employment Law for Workers without Workplaces and Employees without Employers*, 27 BERKELEY J. EMP. & LAB. L. 251, 253 (2006) ("Vertical disintegration and production decentralization have enabled firms in both the

“dependent independent-contractors” has also increased.⁵⁸ In cases involving only one employer that is a small fly-by-night business⁵⁹ worker centers may be dissuaded from pursuing an NLRB strategy because it may be more difficult to collect through a drawn-out legal process. In sum, this problem of legal uncertainty threatens to challenge worker centers for years to come.

The electronically-available NLRB cases involving worker centers involved employees who were clearly included in the statutory definition of “employee,” including meat and poultry processing workers, food preparers, restaurant workers, nail salon lacquerers, and furniture assemblers. These exceptions notwithstanding, worker centers often organize categories of workers that are either explicitly excluded from the NLRA’s protections or excluded in practice due to their proper classification or misclassification as “independent contractors.” The NLRA’s definition of independent contractor is broader than the FLSA’s,⁶⁰ which may dissuade worker centers from using the NLRA even when they pursue other legal claims through FLSA and state wage and hour protections.

3. *Workers Without Access to NLRA Remedies*

The NLRA also has reduced relevance for worker centers that organize unauthorized immigrant workers. Even though unauthorized immigrant employees have NLRA rights, they do not have access to the NLRA’s backpay and reinstatement remedies.⁶¹ A central feature of the vast majority of worker centers is that they organize low-wage immigrants regardless of immigration status.⁶² When worker centers are organizing unauthorized immigrant workers, and those workers are fired in retaliation

manufacturing and service sectors to make their operations leaner, more flexible, less top-heavy, and better adapted to global competition.”)

58. Professor Katherine Stone refers to these workers as “dependent independent contractors” because they are low-wage workers, often highly dependent on a contractor, but they sometimes have been given some discretion over the work they perform. *Id.* at 281-82. David Weil’s recent book, *THE FISSURED WORKPLACE*, *supra* note 28, illustrates the growth of the use of independent contractors and independent contractor misclassification.

59. See Halegua, *supra* note 46 (“Countless small, family-owned businesses have managed to avoid paying court judgments by engaging in a variety of tactics, including declaring bankruptcy, transferring ownership of the business, or closing the business (and sometimes reopening it under a different name and with different nominal owners). Although employers are personally liable under federal and state labor laws, an employer seeking to evade liability may file for personal bankruptcy or find other ways to shelter his or her assets.”).

60. Compare *Zheng v. Liberty Apparel Co.*, 355 F.3d 61 (2d Cir. 2003), with *CNN Am., Inc.*, 361 N.L.R.B. No. 47 (Sept. 15, 2014).

61. For more thorough treatment of the NLRA and unauthorized immigrants, see Michael C. Harper et al., *supra* note 44, “Chapter 14: Labor Law and Immigration,” in *LABOR LAW: CASES, MATERIALS, & PROBLEMS* (8th ed. 2015).

62. See *FINE*, *supra* note 1, at 18, 29-30.

for engaging in protected concerted activities in the workplace, some worker centers may view the NLRB process as having little to offer.

The NLRA's reinstatement remedy is not available to unauthorized immigrant employees because federal immigration law prohibits employers from knowingly employing an employee who lacks immigration status.⁶³ Moreover, a 2002 Supreme Court case limited unauthorized employees' access to the NLRA's backpay remedy. In this 2002 case, *Hoffman Plastic Compounds v. NLRB*, the Supreme Court concluded that an unauthorized employee who had violated the Immigration Reform and Control Act, and who had been illegally fired by his employer due to union organizing activity, did not have access to the NLRA's backpay and reinstatement remedies.⁶⁴

Although the NLRB may determine that there was a violation of the NLRA in cases involving concerted activity among unauthorized workers,⁶⁵ the remedies available do not provide relief directly to the individual worker. A notice-posting and cease and desist order are likely to be the only remedies available at the end of the Board's sometimes lengthy process.⁶⁶ Thus, for worker centers that organize immigrant workers regardless of immigration status, the NLRB process holds little promise to protect employees who engage in concerted activity from employer retaliation.

There are a few exceptions, however, that are worth noting. In the majority of electronically available NLRB cases involving worker centers, immigration status was not reported as an issue in the proceedings. Nonetheless, in one of the cases, the NLRB mentioned the immigration status of employees because a question was raised about the availability of backpay.⁶⁷ These allegedly unauthorized employees found it worthwhile to pursue an NLRB strategy, despite questions that were raised about their immigration status.⁶⁸

While immigration status is relevant to the NLRB's backpay and reinstatement remedies, the Board has committed to keep immigration status out of the merits stage of an unfair labor practice case.⁶⁹ In *Flaum Appetizing Corp.*, the Board clarified that when employers raise an immigration status affirmative defense to certain remedies it has the burden

63. 8 U.S.C. § 1324a(a)(1)(A) (2012).

64. 535 U.S. 137, 151-52 (2002).

65. See *Tuv Taam Corp.*, 340 N.L.R.B. 756, 759-60 (2003) (clarifying that immigration status is not relevant during the liability stage of the case).

66. See *Hoffman Plastic Compounds* 535 U.S. at 152.

67. *Majestic Rest. & Buffet*, 2009 NLRB LEXIS 277, at *42-64 (Sept. 4, 2009).

68. See *id.* at *264-66.

69. See *Tuv Taam Corp.*, 340 N.L.R.B. at 759-60..

to plead specific facts about immigration status and is foreclosed from engaging in an immigration status “fishing expedition.”⁷⁰

Further, it is possible that in the future the NLRB will fashion new types of remedies in cases involving unauthorized employees. In the Board’s 2011 *Mezonos Maven Bakery* case, for instance, two concurring Board Members stated:

It is arguable, for example, that a remedy that requires payment by the employer of backpay equivalent to what it would have owed to an undocumented discriminatee would not only be consistent with *Hoffman*, but would advance Federal labor and immigration policy objectives. Such backpay could be paid, for example, into a fund to make whole discriminatees whose backpay the Board had been unable to collect. [W]e would be willing to consider in a future case any remedy within our statutory powers that would prevent an employer that discriminates against undocumented workers because of their protected activity from being unjustly enriched by its unlawful conduct.⁷¹

On February 27, 2015 a General Counsel memorandum signaled the Board’s willingness to consider additional remedies such as reimbursement of organizing and bargaining expenses and consequential damages, in cases involving NLRA violations against unauthorized employees.⁷²

Moreover, in some exceptional cases, the NLRB will assist unauthorized workers by certifying them for a U visa due to their assistance in enforcing a serious labor violation. This U visa certification, if ultimately approved by federal immigration authorities, can help unauthorized workers gain immigration status.⁷³ For example, a 2011 NLRB Associate Counsel Memorandum stated that these visas are sometimes available when employers engage in “egregious conduct” like “interfering with protected activity through illegal threats of retaliation such as threats to call immigration authorities.”⁷⁴ At least one worker center has

70. 357 N.L.R.B. No. 162, at 5 (Dec. 30, 2011); *see also* Memorandum OM 12-55 from Anne Purcell, Assoc. Gen. Counsel to All Reg’l Dirs., Officers-in-Charge, and Resident Officers 3 (May 4, 2012), available at <http://apps.nlr.gov/link/document.aspx/09031d458099b423> (“[R]egions may consider whether a charged party commits an independent violation of Section 8(a)(1) where, without evidence of an employee’s disabling status, it issues Board subpoenas for the employee’s work authorization documents for purposes of harassing the employee”).

71. 357 N.L.R.B. No. 47, at 9 (Aug. 9, 2011) (Members Liebman and Pearce, concurring); *see also* *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 193 (1941) (stating that the Board “does not exist for the adjudication of private rights; it acts in a public capacity to give effect to the declared public policy of the Act”) (internal quotation marks omitted).

72. Memorandum GC-15-03 from Richard F. Griffin, Jr., Gen. Counsel to All Reg’l Dirs., Officers-in-Charge, and Resident Officers 2-3 (Feb. 27, 2015), available at <http://apps.nlr.gov/link/document.aspx/09031d4581b1d428>.

73. *See* 8 U.S.C. § 1184(p) (2012).

74. Memorandum OM 11-62 from Richard A. Siegel, Assoc. Gen. Counsel to All Reg’l Dirs., Officers-in-Charge, and Resident Officers 4 (June 7, 2011), available at <http://apps.nlr.gov/link/document.aspx/09031d45818801f9>.

facilitated NLRB approval for U visas on behalf of unauthorized workers who faced NLRA violations.⁷⁵

Despite these potential exceptions, for the vast majority of worker centers that organize and advocate for workers regardless of immigration status, the fear that immigration status might become an issue during NLRB proceedings is a formidable deterrent to using the NLRB legal process to seek relief from employer retaliation.

B. *Lack of Knowledge and Organizational Resources*

For a variety of reasons related to their organizational and funding structures, worker centers who organize workers and pursue legal strategies may be unfamiliar with, or fear, turning to the NLRB for relief. Worker centers rarely have lawyers on staff or on retainer.⁷⁶ Worker centers' lack of stable legal assistance flows from the fact that their organizational and funding structures are often fluid and somewhat unpredictable from year to year.⁷⁷ Worker centers tend to be nonprofit organizations that vary greatly in size.⁷⁸ On the whole, however, worker centers generally have relatively small budgets and few paid staff.⁷⁹

Funding for worker centers is not comprehensively documented to date. The information available, however, reveals that worker centers tend to have diverse and unstable funding sources, including grants from foundations, charitable donations from individuals, and grants from government agencies to allow worker centers to assist in enforcing employment laws.⁸⁰ For those few worker centers that have members and

75. *E.g.*, *Trabajadores Indocumentados Pudieran Recibir U-Visa Por Ser Maltratados*, NAT'L DAY LAB. ORG. NETWORK, <http://www.ndlon.org/en/news-all/116-migrant-rights-news/2005-trabajadores-indocumentados-pudieran-recibir-u-visa-por-ser-maltratados> (last visited Apr. 2, 2015).

76. *See* Gowri J. Krishna, *Worker Cooperative Creation as Progressive Lawyering? Moving Beyond the One-Person, One-Vote Floor*, 34 BERKELEY J. EMP. & LAB. L. 65, 76 (2013) (referring to the Urban Justice Center and stating that "lawyers represent members from a number of worker centers using a 'resource ally' model of lawyering in which lawyers support community organizing through legal representation of members of external grassroots organizations") (internal quotation marks omitted); Naduris-Weissman, *supra* note 6, at 248-49 (noting that Young Workers United "does not have any attorneys on its staff").

77. *See* Fine, *A Marriage Made in Heaven?*, *supra* note 11, at 341.

78. *See* FINE, *supra* note 1, at 217-18; N. AM. ALLIANCE FAIR EMP., STRATEGY SERIES, WORKER CENTER STRATEGIES, WORKING PAPER ONE 20 (2002) available at <http://www.fairjobs.org/archive/sites/default/files/WP1.pdf>.

79. *See* FINE, *supra* note 1, at 214, 217-18.

80. *See* Chesa Boudin & Rebecca Scholtz, *Strategic Options for Development of a Worker Center*, 13 HARV. LATINO L. REV. 91, 98 n.35, 103, 109 (2010); Janice Fine, *Worker Centers: Entering a New Stage of Growth and Development*, 20 NEW LAB. F. 44, 46 (2011); Janice Fine et al., *Building a Future Together: Worker Centers and Construction Unions*, 33 LAB. STUD. J. 27 (2008); *see also* *Capital Campaign*, CASA LATINA, <http://casa-latina.org/capital-campaign> (last visited Apr. 5, 2015); *Donate*, MALIBU LAB. EXCHANGE, <http://www.malibucommunitylaborexchange.org/#!/donate/cu9p> (last visited Apr. 5, 2015); *Funding*, VOZ WORKERS RTS. EDUC. PROJECT, <http://portlandvoz.org/what-is-voz/funding/> (last visited Apr. 5, 2015). The Department of Labor has the yearly Susan Harwood Grants

require dues from them, dues money tends to constitute a small minority of overall funding.⁸¹ Despite the diversity of worker centers' funding sources, many reports suggest that grants and donations from charitable foundations represent a key stream of funding for worker centers.⁸²

These meager and fluctuating budgets limit worker centers' abilities to hire specialized legal staff or to spend valuable staff time learning and strategizing about the variety of legal options available to support their worker organizing efforts. Thus, some worker centers may not turn to the NLRB because they simply do not know enough about what this legal route has to offer or how to navigate it effectively. Indeed, one scholar has referred to the NLRA's protection of non-union concerted activity among employees as "one of the best-kept secrets of labor law."⁸³

Another disincentive for worker centers' proactive use of federal labor protections is that they may fear, either explicitly or implicitly, that doing so would threaten their current organizational strategies and structures in important ways. Attempting to access NLRA remedies may result in employers bringing NLRB section 8(b) counterclaims against them for engaging in picketing or boycotting activity. In addition, proactively using the NLRB process could mean that worker centers would be subject to additional reporting requirements to the U.S. Department of Labor and could mean that they would need to follow specified election procedures to select the organization's leaders that do not fit with their organizational culture. Worker centers often view themselves as social movements, rather than as organizations that Congress intended to regulate due to the industrial strife and high profile union corruption cases of the past.⁸⁴

to build capacity among community groups to help inform workers about their rights under OSHA; many of these grants go to worker centers. *Susan Hardwood Training Grant Program Award Announcements*, U.S. DEP'T. LAB, https://www.osha.gov/dte/sharwood/grant_awards.html (last visited Apr. 5, 2015).

81. There is disagreement among worker centers about collecting dues. Since many members are low-wage workers, some centers do not want to add to these workers' financial burden. On the other hand, one leader from the Restaurant Opportunities Center United suggested it was paternalistic to assume low-wage workers could not afford dues. Josh Eidelson, *Who Should Fund Alt-Labor?*, THE NATION (July 17, 2013, 9:17 AM), <http://www.thenation.com/blog/175313/who-should-fund-alt-labor#>.

82. See, e.g., Steven Greenhouse, *Advocates for Workers Raise the Ire of Business*, N.Y. TIMES, Jan. 16, 2014, at B1, available at <http://www.nytimes.com/2014/01/17/business/as-worker-advocacy-groups-gain-momentum-businesses-fight-back.html> (stating that according to U.S. Commerce report, "millions of dollars have flowed to worker centers from [twenty-one] foundations").

83. William R. Corbett, *Waiting for the Labor Law of the Twenty-First Century: Everything Old is New Again*, 23 BERKELEY J. EMP. & LAB. L. 259, 267 (2002). The phrase was later quoted in Wilma B. Liebman, *Decline and Disenchantment: Reflections on the Aging of the National Labor Relations Board*, 28 BERKELEY J. EMP. & LAB. L. 569, 583 (2007).

84. These two amendments to the NLRA have separate definitions of "labor organization." An organization's status as a labor organization under one is not determinative of its status as a labor organization under the other. See Naduris-Weissman, *supra* note 6, at 335.

From a doctrinal perspective, a worker center's use of the NLRA's section 7 protection should not have a direct effect on whether they are "labor organizations" under the Taft Hartley and Landrum Griffin Amendments.⁸⁵ As mentioned above, the NLRA's section 7 protections are given to employees regardless of their connection to a "labor organization" as defined by the Act. Nonetheless, the lack of clarity about the applicability of the NLRA's restrictive aspects could be a formidable disincentive for some worker centers.

Given the wide variety of worker centers, the labor organization debate is likely to continue to unfold on a case-by-case basis. It is beyond the scope of this essay to elaborate the intricacies of the entire debate here, but the existing literature on the issue illustrates that this is an unsettled area of law. Scholars have marshaled arguments for and against labor organization status for worker centers.⁸⁶ The NLRB General Counsel, in a case involving the Restaurant Opportunities Center, concluded that it was not a "labor organization," but based its conclusions on the nature of the lawsuit settlement and other specific facts of the case.⁸⁷ Even those who have extensively argued that worker centers are not NLRA labor organizations have suggested that the more they access the NLRB's remedies, the more the agency might start to see them as "labor organizations" that are engaged in the kinds of industrial strife intended to be regulated by the Act.⁸⁸ This would change the kinds of strategies worker centers could pursue and change the relationship they have to their constituencies. There are no indications that the NLRB is likely to do this in the future, but the concern is understandable.

CONCLUSION

By illustrating why the NLRA has largely lacked relevance for this new breed of worker organization to date, this essay raises a broader question about the NLRA's relevance to workplace disputes in the United States' post-industrial economy. Utilizing the framework developed here, further empirical work through surveys and in-depth interviews could help to further specify why worker centers have not turned to the NLRB more proactively to support their organizing efforts.

This essay points to some central inquiries that could illuminate why the NLRB is underutilized by worker centers. Is it a lack of knowledge about NLRA protections, which the Board could help overcome with more

85. *See id.*

86. *See, e.g., id.*; Rosenfeld, *supra* note 4, at 513; Hyde, *supra* note 6.

87. *See* Rest. Opportunities Ctr. of NY, 2006 NLRB GCM LEXIS 52 (Nov. 30, 2006).

88. *See* Naduris-Weissman, *supra* note 6, at 335 ("Reaping the benefits of labor law protections without suffering the negative consequences may strike some as an unfair or 'strategic' use of the law, and a sense of equity may influence adjudicators to avoid this result.").

outreach? Is it the worker center's inexperience with NLRB processes, which could be solved by greater involvement by worker centers in the process of filing and pursuing charges on behalf of their constituents? Is it resistance to the NLRB process because of immigration status concerns, the sometimes elusive independent contractor exemptions or a concern that utilizing the NLRB's protections would ultimately lead to subjecting worker centers to the NLRB's restrictions on labor organizations? Do worker centers know about the NLRB, but simply prefer the retaliation protections of other statutory regimes?

Answers to these questions will help identify how to address, if at all, worker centers' underutilization of the Board's process.⁸⁹ The NLRA's 80th anniversary this year serves as an opportunity to consider how to enhance the Board's ability to fulfill its statutory purpose to protect collective activity among employees, especially those marginal workers currently served by worker centers. Doing so will ensure that the Act will remain salient in the modern era, rather than simply becoming a New Deal "relic".⁹⁰

89. Professor Michael Duff has argued that a narrowing of the labor organization definition may satisfy advocates of worker centers, as well as employer advocates, who want to create more room for employee-management work teams and committees. See Duff, *supra* note 6, at 843, 875-76.

90. See Wilma B. Liebman, *The Revival of American Labor Law*, 34 WASH. U. J.L. & POL'Y 291, 301, 308 (2010) (noting that "American labor law is derided by some as a relic of the Depression and New Deal era" but that she is "cautiously hopeful about the revitalization of labor law").