

*The Dunlop Commission  
on the  
Future of Worker-Management Relations*

**Final Report**

**The Dunlop Commission On the Future of Worker-Management Relations: Final Report**

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## **Preface**

### **The Commission on the Future of Worker-Management Relations**

was announced by Secretary of Labor Robert B. Reich and Secretary of Commerce Ronald H. Brown on March 24, 1993 to report on the following questions:

1. What (if any) new methods or institutions should be encouraged, or required, to enhance work-place productivity through labor-management cooperation and employee participation?
2. What (if any) changes should be made in the present legal framework and practices of collective bargaining to enhance cooperative behavior, improve productivity, and reduce conflict and delay?
3. What (if anything) should be done to increase the extent to which work-place problems are directly resolved by the parties themselves, rather than through recourse to state and federal courts and government regulatory bodies?"

On June 2, 1994 the Secretaries of Labor and Commerce released the Fact Finding Report of the Commission and an Executive Summary.

After release of the Fact Finding Report, the Commission consulted widely through public hearings, working parties comprised of several members of the Commission, and it received a variety of views in correspondence, studies and articles from representatives of business groups, labor organizations, professional associations, academics, women's organizations, civil rights and other interested groups, and individuals. This material is included in the public record of the Commission which was closed on November 14, 1994 by notice in the Federal Register. By this consultative process the Commission has sought to receive the widest possible comments on its Fact Finding Report as well as proposals for its conclusions and recommendations for this, its final report.

The Commission held four additional national hearings after the issuance of its Fact Finding Report in Washington, D.C., making a total of 21 public hearings, including the 11 national and six public hearings in various cities around the country held previously. In the four most recent public hearings, the Commission followed the practices developed in its regional hearings to encourage representatives of organizations or individuals to volunteer to make

presentations or to file written statements, should adequate time for all not be available. The agenda of each of these four sessions and a listing of those who testified and their affiliations are presented in Appendix B.

The Commission appreciates the assistance of the various organizations and individuals that helped to organize and make presentations to the Commission and its working parties.

A total of 57 persons testified before the Commission in its four hearings in July to September 1994, making a total of 411 witnesses in the 21 public hearings.

The transcripts of the four hearings after the Fact Finding report run to 823 pages, making a total of 4,681 pages for all public hearings before the Commission.

The Commission has received since May 1994 a number of studies and presentations outside of public hearings that provide additional information to its fact-finding phase. More than 160 statements have been received since the Fact Finding Report that have been entered in the public record of the Commission. Among these items are the following:

- (1) United States General Accounting Office, Workplace Regulations, Information on Selected Employer and Union Experiences, Vols. I and II, June 1994.
- (2) Industrial Relations Counselors, Inc., Report on the IRC Survey of Employee Involvement, August 1994, and Results of the ORC Survey on the Use of Alternative Dispute Resolution (ADR) in Employment Related Disputes, November 1994.
- (3) Princeton Survey Research Associates, Worker Representation and Participation Survey, Top-Line Results, October, 1994.
- (4) U.S. Department of Labor, Report on the American Workforce, 1994; Women's Bureau, Working Women Count, A Report to the Nation, 1994.
- (5) American Civil Liberties Union, The Private Arbitration of Employment Disputes, November 1994.

A working party of the Commission has continued to meet with a designated committee of the Small Business Council of the Chamber of Commerce to receive views and perspectives on the Fact Finding Report. Another working party met with

representatives of ten organizations reflecting the interests of low-wage workers and received a statement of potential Administrative and Regulatory Initiatives to Protect Contingent Workers, October 1994.

A further working party of the Commission met on several occasions to receive the further views of a group of women's organizations that had also testified before the Commission. Representatives of labor and management organizations under the Railway Labor Act have met on occasions with still another working party of the Commission. Meetings have also been held with a number of representatives of the civil rights community.

The Chair of the Commission had held a series of meetings with the Enforcement Council of the Department of Labor and a number of its component agencies to secure data on staffing, and on the flow and volume of investigations, complaints, cases and litigation in the administration of employment laws within the purview of these agencies with reference to the third mission statement of the Commission.

The National Labor Relations Board and its General Counsel has provided similar data. Discussions have been held also with the Chairman of the Equal Employment Opportunity Commission and the EEOC ADR Task Force. The cooperation of these agencies is appreciated.

The Commission has received a further letter from the Republican members of the House Committee on Education and Labor dated September 29, 1994. (See p. 111, note 5, of the Fact Finding Report for reference to the first letter.)

The Commission deliberated on all the above information from a variety of perspectives, the Commission reached broad agreement on the issues it was charged to address. A separate perspective by Commissioner Fraser on some aspects of employee involvement is included in Section II.

This report of the Commission is focused on the three questions of its Mission Statement, considering each question separately but also recognizing that these issues and the Commission's recommendations constitute a highly interdependent whole.

In making its legislative recommendations, the Commission has not proposed explicit statutory language. Similarly, in recommendations to administrative agencies and to private parties it has proposed specific approaches rather than the language of a regulation.

A number of more specialized issues were raised in testimony and statements to the Commission that it has not had the time nor specialized information to consider fully. These are significant issues to the workers and managers involved and deserve more detailed attention and conclusions than the Commission has had the time or resources to provide. Among these questions are the status of agricultural workers under the National Labor Relations Act, as amended, and the system of labor-management relations in the building and construction industry under these statutes and subsequent NLRB and court decisions. Further, the Commission has considered only in Section VII some of the issues raised by worker-management relations in a few types of relationships among those popularly designated as contingent. The Commission reports this unfinished business that deserves further and ongoing consideration.

The Commission has sought the views of a wide range of employers and employer associations, representatives of unions, professional associations, women's groups, civil rights organizations and academics regarding how to deal with the problems and challenges of the modern workplace.

In addition, the Commission believes it is also significant to hear how workers themselves and their supervisors view their workplace beyond the reports of their attitudes from managers or unions. Thus, the Commission welcomes the findings of the Worker Representation and Participation Survey. This survey provides a detailed and in-depth analysis of workplace practices and the attitudes and views in workplaces on many issues pertinent to the Commission's charges. Appendix A presents a brief summary of the survey procedures and highlights of its findings.

The Department of Commerce provided assistance to the Commission through Under Secretary for Economic Affairs Everett Ehrlich. Within the Department of Labor, Roland Droitsch, Deputy Assistant Secretary, Office of Policy and Budget, coordinated a portion of the Commission's work.

Assistance was also provided by Seth Harris, Executive Director of the Department's Enforcement Council, on matters related to this area. Legal research support was given to the Commission by Andrew Levin and Janet Herold. The Commission received comprehensive administrative and related support from staff of the Office of Small Business and Minority Affairs. Ms. Artrella Mack and Mrs. Betty Cooper-Gibson provided effective service in the technical preparation of this report. The Commission is deeply appreciative.

## **Report and Recommendations: Executive Summary**

The Commission on the Future of Worker-Management Relations was appointed by Secretary of Commerce Ronald H. Brown and Secretary of Labor Robert B. Reich to address three questions:

- 1.** What (if any) new methods or institutions should be encouraged, or required, to enhance work-place productivity through labor-management cooperation and employee participation?
- 2.** What (if any) changes should be made in the present legal framework and practices of collective bargaining to enhance cooperative behavior, improve productivity, and reduce conflict and delay?
- 3.** What (if anything) should be done to increase the extent to which work-place problems are directly resolved by the parties themselves, rather than through recourse to state and federal courts and governmental bodies?"

Over its twenty months of work, the Commission heard testimony and evaluated the experiences of many employers and employees, and received advice for answering its charge from many groups and individuals. This testimony, and various survey and other evidence, guides the recommendations and suggestions that we offer to the Secretaries, and to the nation.

As reported in the Commission's May 1994 Fact-Finding Report, there is a solid base of experience on which to build more cooperative and productive workplace relations in the United States -- the innovative partnerships in collective bargaining and the array of employee involvement programs operating in many workplaces across the country. There are also disconcerting patterns -- increased earning inequality, difficulties for contingent workers, increased litigation, rigid and complex regulations, and conflict in union organizing campaigns.

Our recommendations build on the positive experiences with productive and cooperative worker-management relations, support their adoption in additional employment settings, and encourage further experimentation and learning. At the same time we face squarely and propose remedies for the problems of too much conflict, litigation, inequality, and regulatory complexity.

We take an integrated approach to modernizing American labor and employment law and administration for the future. Taken together, these recommendations give workers and managers the tools and flexibility to do what they say they want to do and are capable of doing to improve workplace performance. We recommend flexibility in employee participation while insuring respect for workers' rights to choose unions, if desired. We encourage the development and use of fair systems for resolving disputes quickly closest to their source without going to court or to a government agency. We propose to modernize labor law to deliver through a prompt and simplified process what the law promises: a free choice for workers on whether or not to join a union of their choosing. Our proposals define employees and employers in ways consistent with economic reality. We encourage continued learning and dialogue among private and public sector leaders to improve the quality of policy making on employment issues.

The Commission could not address all the problems or proposed solutions presented to us. This does not imply that those left out are unimportant or not valid. Instead, some need to be left to other groups and to further discussion. Moreover, the recommendations we offer here are presented as starting points for improving the workplace experiences and results for all Americans.

The full set of recommendations are contained in the separate sections of this report. Here we present fifteen key conclusions and recommendations as they relate to each of our three charges.

## **1. New Methods or Institutions to Enhance Workplace Productivity**

The evidence presented to the Commission is overwhelming that employee participation and labor-management partnerships are good for workers, firms, and the national economy. All parties want to encourage expansion and growth of these developments. To do so requires removing the legal uncertainties affecting some forms of employee participation while safeguarding and strengthening employees' rights to choose whether or not they wish to be represented at the workplace by a union or professional organization. Accordingly we recommend:

**(1)** Clarifying the National Labor Relations Act (NLRA) and its interpretation by the National Labor Relations Board (NLRB) to insure nonunion employee participation programs are not found to be unlawful simply because they involve



discussion of "terms and conditions" of work or compensation as long as such discussion is incidental to the broad purposes of these programs. At the same time, the Commission reaffirms the basic principle that these programs are not a substitute for independent unions. The law should continue to make it illegal to set up or operate company-dominated forms of employee representation.

(2) Updating the definitions of supervisor and manager to insure that only those with full supervisory or managerial authority and responsibility are excluded from coverage of the law. We further recommend that no individual or group of individuals should be excluded from coverage under the statute because of participation in joint problem-solving teams, self-managing work groups, or internal self-governance or dispute resolution processes.

(3) Reaffirming and extending protections of individuals against discrimination for participating in employee involvement processes and for joining or drawing on the services of an outside labor or professional organization.

These recommendations are linked to those that follow in important ways. In addition to eliminating the legal uncertainties associated with many of the forms of employee participation underway today, these changes allow and encourage use of worker-management participation in applying government regulations to the workplace and resolving disputes through private resolution procedures. Moreover, these changes remove the threat that workers might lose the protections of collective bargaining by taking on supervisory or managerial responsibilities. These changes, therefore, should open up workplaces to a variety of new experiments with employee participation and labor-management partnerships and bring the benefits of these innovations to more workers and workplaces.

## **2. Changes in Collective Bargaining to Enhance Cooperation and Reduce Conflict and Delay**

The evidence reviewed by the Commission demonstrated conclusively that current labor law is not achieving its stated intent of encouraging collective bargaining and protecting workers' rights to choose whether or not to be represented at their workplace. Rectifying this situation is important to insure that these rights are realized for the workers who wish to exercise them, to de-escalate workplace conflicts, and to create an overall climate of trust and cooperation at the workplace and in the broader

labor and management community. Accordingly, the Commission recommends:

**(4)** Providing for prompt elections after the NLRB determines that sufficient employees have expressed a desire to be represented by a union. Such elections should generally be held within two weeks. To accomplish this objective we propose that challenges to bargaining units and other legal disputes be resolved after the elections are held.

Beyond the reversal of the Supreme Court's decision in *Lechmere* so that employees may have access to union organizers in privately-owned but publicly-used spaces such as shopping malls, access questions are best left to the NLRB. The Commission urges the Board to strive to afford employees the most equal and democratic dialogue possible.

**(5)** Requiring by statute that the NLRB obtain prompt injunctions to remedy discriminatory actions against employees that occur during an organizing campaign or negotiations for a first contract.

**(6)** Assisting employers and newly certified unions in achieving first contracts through an upgraded dispute resolution system which provides for mediation and empowers a tripartite advisory board to use a variety of options to resolve disputes ranging from self-help (strike or lockout) to binding arbitration for relatively few disputes.

**(7)** Encouraging railroad and airline labor and management representatives to implement their stated willingness to seek their own solutions for improving the performance of collective bargaining in their industries.

These changes are essential to de-escalating the level of conflict, fear, and delays that now too often surround the process by which workers decide whether or not to be represented on their jobs. We distilled our recommendations down to these basic and simplified changes in the law and procedures from an extensive array of proposals offered to the Commission in this area. Therefore, it is vitally important to monitor the effects of these recommendations over time to see if they are adequate to achieve the goals stated in our national labor law and shared by the American public.

### **3. Increase the Extent to which Workplace Problems are Resolved by the Parties.**

The Commission's findings and recommendations regarding workplace regulations, litigation, and dispute resolution fall into three categories: (1) encouraging development of high quality private dispute resolution procedures, (2) encouraging experimentation with workplace self-regulation procedures in general and with specific reference to workplace safety and health, and (3) protecting the employment rights and standards of contingent workers.

The Commission endorses and encourages the development of high quality alternative dispute resolution (ADR) systems to promote fair, speedy, and efficient resolution of workplace disputes. These systems must be based on the voluntary acceptance of the parties involved. The courts and regulatory agencies should hold these systems accountable for meeting high quality standards for fairness, due process, and accountability to the goals and remedies established in the relevant law. The Commission also encourages experimentation with internal responsibility systems for adapting workplace regulations to fit different work settings. Accordingly, we recommend:

**(8)** Encouraging regulatory agencies to expand the use of negotiated rule making, mediation, and alternative dispute resolution (ADR) procedures for resolving cases that would otherwise require formal adjudication by the agency and/or the courts.

**(9)** Encouraging experimentation and use of private dispute resolution systems that meet high quality standards for fairness, provided these are not imposed unilaterally by employers as a condition of employment.

**(10)** Encouraging individual regulatory agencies (e.g., OSHA, Wage and Hour Division, EEOC, etc.) to develop guidelines for internal responsibility systems in which parties at the workplace are allowed to apply regulations to their circumstances.

America's workplaces must be made safer and more healthful and workers' compensation costs need to be reduced.

Workplace safety and health is an ideal starting point for experimenting with internal responsibility systems for meeting public policy objectives, given the long-standing and widespread experience with employee participation and labor-management committees in safety and health matters and the shared interests all parties have in improving safety

and health outcomes. Evidence presented to the Commission shows that properly structured joint committees and participation plans can significantly improve safety and health protection. Accordingly, we recommend:

**(11)** Developing safety and health programs in each workplace that provide for employee participation. Those workplaces that demonstrate such a program is in place with a record of high safety and health performance would receive preferential status in OSHA's inspection and enforcement activities.

The growth of various forms of contingent work poses opportunities for good job matches between workers with differing labor force attachments and employers needing flexibility in response to changing market conditions. At the same time, some contingent work arrangements relegate workers to a second class status of low wages, inadequate fringe benefits, lack of training and, most importantly, loss of protection of labor and employment laws and standards. This is a very complex set of developments for which adequate data are not yet available to do more than address the most obvious problems. Our recommendations are therefore cautious in this area, recognizing the need to continue to monitor and evaluate the labor market experiences of all forms of contingent work and to derive policy recommendations as these data and analyses become available. Accordingly, we recommend:

**(12)** Adopting a single definition of employer for all workplace laws based on the economic realities of the employment relationship. Furthermore, we encourage the NLRB to use its rule-making authority to develop an appropriate doctrine governing joint employers in settings where the use of contract arrangements might otherwise serve as a subterfuge for avoiding collective bargaining or evading other responsibilities under labor law.

**(13)** Adopting a single definition of employee for all workplace laws based on the economic realities of the employment relationship. The law should confer independent contractor status only on those for whom it is appropriate -  
- entrepreneurs who bear the risk of loss, serve multiple clients, hold themselves out to the public as an independent business, and so forth. The law should not provide incentives for misclassification of employees as independent contractors, which costs federal and state treasuries large sums in uncollected social security, unemployment, personal income, and other taxes.

Implementing the recommendations in this report would open up employment policy and practice to a period of experimentation and opportunities for further learning. To channel this learning into constructive policy making we recommend:

**(14)** Creating a National Forum on the Workplace involving leaders of business, labor, women's, and civil rights groups to continue discussing workplace issues and public policies. In addition, we recommend establishment of a national Labor-Management Committee to discuss issues of special concern to the future of collective bargaining and worker-management relations. We encourage development of similar forums in communities, states, and industries to further promote grass roots experimentation and learning.

**(15)** Improving the data base for policy analysis of workplace developments, evaluation of labor-management experiments in the private sector, and for assessment of the economic condition of contingent workers. This requires amalgamation of existing data sets within the NLRB and Department of Labor, and among these and other agencies as well as coordination of research on workplace topics for the National Forum and other interested parties.

### **The Challenges Ahead**

From the views presented to us emerged a vision of the Workplace of the 21st Century that is shared widely across all sectors of society and the workforce. These goals appear at the end of this Executive Summary. Achieving some of them requires updating and modernizing labor and employment law; others can be addressed through changes in administrative processes to give more power and flexibility to the parties at the workplace to govern their relationships and solve problems closest to the source. All will require leadership and sustained commitment to learning and experimentation on the part of individual workers and the labor and management leaders who shape employment practices. We urge that progress toward achievement of these goals be assessed systematically on a continuous basis and the results shared widely with the American public.

We can summarize the challenges facing America to improve the quality and performance of workplace relations quite simply. They are to sustain the momentum underway in the most innovative workplaces, to bring these innovations to and share their benefits among more workers and managers,

and to overcome the countervailing forces that stand in the way of achieving the goals of the 21st Century workplace. We see three such countervailing forces, two of which are reflected directly in the charges to this Commission and in our recommendations.

The first of these countervailing forces is the high level of conflict and tension surrounding the process by which workers decide whether or not to be represented by a union for the purpose of collective bargaining. Our recommendations should result in a significant de-escalation of these conflicts and a restoration of workers' promised rights in this area, and thereby improve the overall climate for cooperative labor-management relations.

The second countervailing force is the frustration that managers experience in trying to respond to complex workplace regulations and mounting litigation, and that workers experience in trying to enforce their legal rights on the job. Our recommendations provide workers and managers with the tools and flexibility to replace the command and control system of regulation and the litigious system for enforcing rights with opportunities for greater self-governance and private, high quality, dispute resolution.

The third force limiting the momentum toward higher quality workplaces was highlighted in our Fact Finding Report but its solution lies well beyond the mandate of this Commission. We refer here to the widening earnings inequality and stagnant real earnings that have characterized the American labor market over the past ten to fifteen years. While the Commission makes no direct recommendations focused on this serious problem, a number of our recommendations should contribute to reducing this growing disparity. Among these recommendations are our support for increased training at the workplace; increased opportunities for employee participation to enhance productivity, quality, and worker development; protections against the use of contractors or contingent workers to evade responsibilities under labor and employment law; and changes to provide workers the opportunity for representation and collective bargaining if they want it.

The recommendations of this Report are designed to contribute to the achievement of the goals and relationships required for the 21st Century workplace.

## **Goals for the 21<sup>st</sup> Century Workplace**

1. Expand coverage of employee participation and labor-management partnerships to more workers and more workplaces and to a broader array of decisions.
2. Provide workers an uncoerced opportunity to choose, or not to choose, a bargaining representative and to engage in collective bargaining.
3. Improve resolution of violations of workplace rights.
4. Decentralize and internalize responsibility for workplace regulations.
5. Improve workplace safety and health .
6. Enhance the growth of productivity in the economy as a whole.
7. Increase training and learning at the workplace and related institutions.
8. Reduce inequality by raising the earnings and benefits of workers in the lower part of the wage distribution.
9. Upgrade the economic position of contingent workers.
10. Increase dialogue and learning at the national and local levels.

# I. Introduction: The Workplace and Society

## 1. SOCIETAL DEMANDS ON THE WORKPLACE

The workplace has become the central institution in American society. A higher proportion of the population than ever before is in the workplace, as women have taken jobs to support their families as principal breadwinners or as part of dual-earner households. Workplaces reflect the racial and ethnic diversity of the population more than any other institution. The workplace distributes earned income to most of the population. In contrast with many other advanced countries, where the state provides benefits for citizens paid from general taxation, the U.S. relies on private decision-making in the workplace to furnish a disparate range of benefits, most notably health insurance and vacations with pay. The U.S. also places on the workplace the obligation to provide an increasing list of individual rights enforceable in the courts. Americans spend more time at the workplace than the citizens of any other advanced country, save for Japan. Far more Americans work than vote.

***Economic Performance.*** The workplace is a centerpiece of the nation's economic performance, concern with productivity, quality, and competitiveness. Our main national asset is a skilled and hard-working workforce. In an ever more global economy, the quality of the workplace affects not only the individual enterprise and its employees, but also national economic growth and productivity performance.

***Training.*** The workplace is also the locus of vital training of the workforce and even of considerable formal educational programs, illustrated by instruction in math, language and basic skills, apprenticeship, military programs, interns and residents in the medical profession, and executive training. Continuous learning on the job and in teamwork with multiple job tasks characterizes our most productive work environments. This training is often best provided on the job, learning from peers as needed or in new delivery modes that enable a self-paced learning such as interactive media.

Training in health and safety, quality, and problem-solving are critical for the workplace to fulfill its social role.

In the world of the future, the significance of training and education in the workplace may be expected to be even greater than at present.<Footnote: See, Workforce Training and Development for U.S. Competitiveness, The Business Roundtable, August 1993; Labor's Key Role in Training, AFL-



CIO Report of Training, September 1994.>

***New Forms of Work Organization.*** As these societal demands on the workplace increase, a number of changes in the nature and location of work, and in relations among workers and supervisors, make the attainment of these objectives more complex and difficult. Indeed, the traditional distinctions between worker and supervisor are often without meaning in many current workplaces. New forms of organizing work, new workplaces (including work at home), new work relations (including with customers), new work hours, and new legal forms have emerged and become more common in which there is ambiguity and often no clear responsibility for training, health and safety, benefits, legal obligations, and the other societal demands on the workplace.<Footnote: Reflecting the surrounding community, moreover, the workplace now reports an increased incidence of homicide, violence, and verbal abuse destructive of morale, quality, and productivity. Drug and alcohol abuse also create problems at work. One in six violent crimes -- almost a million a year -- occur at the workplace. In 1992 more than 500,000 employees were victims of violent crime at their workplace.> These new and more diverse relations raise questions about the definitions of employee and employer, supervisor and professional used in labor relations and employment law.

***Workplace Regulations.*** Starting in the early 1900s, with concern over accidents, a vastly expanded array of standards has been required of workplaces by the political process. The old common law covering worker-management relations has been replaced in many areas by state and federal regulations that give workers an increasing body of legal entitlements and rights enforceable against the employer in the courts that largely places obligations on the employer. Legislation in Democratic and Republican administrations alike as well as court decisions regulate the terms of employment in the workplace, and many states have specified their own rules and definitions.<Footnote: The Commission facilitated the first comprehensive survey of the vast complex of legal statutes and regulations and the reactions of employers and union representatives to the regulations and to the regulatory and enforcement processes. General Accounting Office, Workplace Regulation, Information on Selected Employer and Union Experiences, Vols. I and II. June 1994. See, Fact Finding Report, pp. 129-133.>

Some federal interventions have been designed, as in the case of statutes dealing with discrimination and harassment,

to change the mores or customs prevailing in many workplaces apart from providing redress to affected individuals.

One of the earliest pieces of New Deal era legislation was the Wagner Act (modified by 1947 and 1959 statutes) that sought to assure workers the right to choose freely whether or not to join a union and to encourage the practice of collective bargaining over terms and conditions of employment. The procedures were designed to ascertain whether or not workers wanted democratically chosen representation at the workplace. It is to be observed that the labor movement often provided the impetus and political support for many of the workplace entitlements enacted by regulatory legislation for all workers. In recent years civil rights groups, women's groups, and religious groups have also played a role in expanding the protection provided for workers. At their volition or through collective bargaining, companies have also introduced numerous policies designed to improve worker well-being as well as to raise workplace efficiency. For instance, most large firms now have employee assistance programs to help employees with alcohol, drug, mental health or other problems.

***The Need for Cooperation.*** An increasing number of employers and unions have found that the best way to compete in the marketplace and secure both profits for the firm and good jobs for workers is through cooperative worker-management relations. As Americans obtain more education, and with the changing nature of some work, employers increasingly find it appropriate to rearrange responsibilities and tasks to employees, who work sometimes as teams and other times as individuals. For their part, more highly educated employees express greater desire to participate in workplace decisions and have the knowledge and competence to undertake more tasks at the workplace. It is clearer now than in the past that creating value at the workplace is the joint responsibility of management and labor.

The Commission also recognizes that there is great diversity in the seven million workplaces in the country -- variations by industry, community, number of employees, demographic mix of workers, and union status, with a correspondingly wide disparity in relations among workers and management that ranges from hostility to open collaborative partnerships.

The ability of workplaces to carry out their critical social and economic functions is, however, diminished by the continuing conflict that exists in some workplaces between employees who seek independent representation and to engage

in collective bargaining and some employers who seek to prevent this outcome. The polarization between employees and management in union representation campaigns, and the unfair labor practices committed in some of these campaigns, poison the attitudes in many other workplaces and detract from the attainment of cooperative arrangements and the rational assessment of workplace problems and mutually beneficial solutions.

The achievement of prescribed standards of protection and regulation -- in health and safety at workplaces, freedom from discrimination or sexual harassment, payment of minimum wages -- all too often is equally confrontational and litigious in many workplaces. Our courts and regulatory agencies are burdened with employment disputes that would better be resolved at the workplace. Many workers who lack the resources to go to court and many firms who fear the expense of lawsuits do not get the just resolution of workplace problems that they deserve. Hence, the attention to improved methods of dispute resolution.

It is time to turn down the decibel count, the adversarial and hostility quotient that all too often mars discussion of worker-management relations. We must -come and reason together- to devise the best ways to assure that workers have their legislatively proscribed and socially agreed upon rights and employment norms, without burdening the economy with excessive litigation and extended administrative proceedings. We must develop institutions and practices that will allow employees and firms to cooperate at the workplace in ways that will contribute optimally to economic growth and competitive performance and to the fulfillment of social norms.

The Commission recognizes, of course, that the interests of workers and management are not identical: they will differ in some areas. In a market economy buyers and sellers have different perspectives on the terms of sale. But there are numerous ways to resolve disputes cooperatively, or, if need be, through limited conflict such as strikes or lockouts rather than open warfare. And there are many leaders in business and in the labor movement to provide advice and role models for dealing with disagreements by finding efficacious solutions to problems.

In Chapter I of its Fact Finding Report, the Commission documented places in which the American economy has not successfully met the challenge of recent economic developments -- the rise in income inequality and fall in earnings for many less skilled workers that threatens to

turn a predominantly middle-class society into a two-tier society; sluggish growth in productivity outside of manufacturing; the inability of the job market to offer many employees work that pays more than crime -- as well as areas where we have outperformed other advanced nations. To improve our national economic performance in the areas in which we have problems and to maintain into the 21st century our success in the areas in which we have done well requires that we modernize our labor-management relations, bringing the best practices to more and more firms and workers.

The workplaces that we have inherited are far too adversarial in tone and substance for the good of the American economy. Changes must be made in the way firms, employees, and unions interact, and in workplace laws and regulations, to enable them to carry out successfully the vital tasks society places on them.

This Report specifies some of those changes in the form of suggestions and recommendations. They are a starting point on a necessary road to adjusting the workplace to the realities of a changing social and economic environment and to the vision of a better future. The future of the American economy and society is vitally dependent on the American workplace. It is important that we begin the task of making the workplace a better and more productive place for firms and employees alike.

## **2. GOALS FOR THE 21<sup>st</sup> CENTURY AMERICAN WORKPLACE**

Given the changing role of the workplace in society, and the views expressed to the Commission by managers, employees, union leaders, and other experts, we believe it is essential to state a vision and a set of goals for the workplace of the future. We present ten integrated objectives that, taken together, position the American workforce and the economy for the 21st Century.

**(1)** Expand coverage of employee participation and labor-management partnerships to more workers, more workplaces, and to more issues and decisions.

Employee participation and labor-management partnerships are essential to improved productivity, enhanced quality and economic performance, and an increased voice and higher living standards for American workers. It is in the national interest to see participation and partnerships sustained and expanded to cover a larger proportion of the

American workforce and workplaces, and to address the full range of issues critical to improving workplace performance and advancing workers - economic positions and quality of working lives. It is also in the national interest to experiment with alternative forms of participation and cooperative labor-management relations to meet workers - varied needs and circumstances.

Provide workers with a readily accessible opportunity to choose, or not to choose, union representation and to engage in collective bargaining.

Reduced hostility is essential in the full process -- from initial expression of interest to the signing of a first agreement -- if workers are to have a free and accessible choice about whether or not to be represented by a union, so that those who want collective bargaining can exercise that right and so that managers do not feel they are under attack whenever employees decide union representation is in their best interest.

**(3) Improve resolution of disputes about workplace rights.**

All American workers need to achieve the promised objectives of freedom from discrimination, unfair treatment, and fulfillment of their statutory rights.

All those who feel they have been unjustly treated should have access to rapid resolution processes that are inexpensive, fair, and that serve as effective deterrents to unfair behavior or employment practices.

**(4) Decentralize and internalize responsibility for workplace regulations.**

Command and control- government regulations at the workplace should be reduced in favor of greater internal responsibility systems and private resolution of disputes by firms and workers themselves, with the assistance of neutrals when necessary. Regulatory resources could then be focused on the more serious miscreants and on encouragement of work-level dispute resolution.

**(5) Improve workplace safety and health.**

America's workplaces must be made safer, reducing workers - injury and occupational disease and workers - compensation costs. Each workplace must be encouraged to develop an

appropriate system to improve safety and health. Regulatory bodies should help in the process and provide workers and firms with advanced scientific knowledge on safety and health. The most dangerous worksites should be targeted for particular attention.

**(6)** Enhance the growth of productivity in the economy as a whole.

It is critical for the well-being of the American people that productivity grow at a sufficiently fast pace to improve the living standards of all citizens. Labor-management relation's policies and practices should contribute to this goal.

**(7)** Increase training and learning at the workplace and in related institutions.

Additional training and opportunities for learning on-the-job are needed to enhance the performance of enterprises, improve the rate of productivity growth, and permit higher wages and benefits. Workers in the service sector need particular attention since this sector has experienced a slow rate of productivity growth, and it employs the largest number of low-skilled young workers with inadequate education and access to training opportunities.

**(8)** Reduce inequality that has increased in the American labor market over the past ten to fifteen years by raising the earnings and benefits of workers in the lower part of the wage distribution.

A number of recommendations of the Commission should make a contribution toward the goal of reducing growing earnings disparities -- in particular the emphasis on training, employee participation to enhance worker development, productivity and quality, and, if workers choose, the opportunity for representation and collective bargaining.

**(9)** Upgrade the economic position of contingent workers.

A variety of arrangements are required to assist low-wage workers in temporary or contingent employment relationships to receive the protections of labor relations and employment laws. The country needs to arrest the growing disparity between the labor conditions of full-time workers in stable career-oriented jobs and those of contingent workers who desire but are not able to obtain these types of jobs,

earnings and benefits.

**(10)** Increase dialogue at the national level and local level.

Arrangements need to be developed for regular dialogue among the leaders of business, labor, civil rights and women's organizations, and the government. In a dynamic market economy, workplace problems and solutions continually change, and it is important for national, sectoral and local leaders to monitor these changes to learn systematically from experience, and quickly to develop strategies and policies that meet new challenges at the workplace.

We now turn our attention to the changes in public policy and private practice that are needed if we are to achieve the goals for the workplace of the 21st century.

## **II. Employee Involvement**

### **1. INTRODUCTION**

The Commission's Fact Finding Report noted (pp. 29-61) that a variety of employee participation processes and committees have been established in America's workplaces. Many larger firms report using some form of employee participation in their organizations. Information received by the Commission since the Report confirms the diffusion of employee involvement. Fifty-two percent of employees in the Workplace Representation and Participation Survey reported that some form of employee participation program operates in their workplace and 31 percent indicate that they participate in an employee involvement program.

Employee involvement programs have diverse forms, ranging from teams that deal with specific problems for short periods to groups that meet for more extended periods. Many employers and union leaders testified before the Commission that the programs enhance productivity, though their effectiveness surely differs in different settings. Thirty-two percent of workers involved in these programs view them as very effective while 55 percent view them as somewhat effective. Seventy-nine percent report that the programs have given them greater say in their jobs. By a two-to-one majority, employees at workplaces without employee involvement programs say they would like a program of this sort at their workplace.

On the basis of the evidence, the Commission believes that it is in the national interest to promote expansion of employee participation in a variety of forms provided it does not impede employee choice of whether or not to be represented by an independent labor organization. At its best, employee involvement makes industry more productive and improves the working lives of employees.

The evidence presented also shows that as practiced today some employee participation programs may be in violation of Section 8(a)(2) of the NLRA. The problem is that some programs designed to improve productivity and quality also end up discussing interrelated issues of working conditions and of how to share the gains produced by employee involvement. A related problem is that some programs blur the traditional distinction between supervisors or managers and workers, raising questions about the coverage of employees under the NLRA. Indicative of the extent of this blurring of traditional boss/worker lines, in the Workplace



Representation and Participation Survey 35 percent of workers said they perform some supervisory duties as an official part of their job.

In view of the role of employee involvement plans in American industry, the Commission supports some clarification of Section 8(a)(2) so that employee involvement programs such as those relating to production, quality, safety and health, training or voluntary dispute resolution are legal as long as they do not allow for a rebirth of the company unions the section was designed to outlaw. We want workers and managers participating in these programs to be able to do so effectively, with gains for both, without skirting or breaking the law.

In light of the increased supervisory and managerial role of employees in American industry, the Commission also supports reducing the exclusion of supervisors and managers from the coverage and protection of the NLRA. We want to guarantee that workers engaged in collective bargaining or considering unionization do not lose the protection of the law for their union activity because of their involvement in supervisory or managerial activities.

These considerations motivate the recommendations in this section.

## **2. RECOMMENDATIONS**

### **(1) Facilitate the Growth of Employee Involvement**

The Commission recommends that nonunion employee participation programs should not be unlawful simply because they involve discussion of terms and conditions of work or compensation where such discussion is incidental to the broad purposes of these programs.

We believe that programs of the types referred to above, which are proliferating in the U.S. today, do not violate the basic purposes of Section 8(a)(2). Therefore we recommend that Congress clarify Section 8(a)(2) and that the NLRB interpret it in such a way that employee participation programs operating in this fashion are legal.

The Commission is concerned that in encouraging employee participation in nonunion settings, it does not adversely affect employees' ability to select union representation, if they so desire.

Thus, the Commission reaffirms the basic principle that

employer-sponsored programs should not substitute for independent unions. Employee participation programs are a means for employees to be involved in some workplace issues.

They are not a form of independent representation for employees, and thus should not be legally permitted to deal with the full scope of issues normally covered by collective bargaining. <Footnote: The law should continue to prohibit committees like the one Polaroid Corp. disbanded in June, 1992 after the Labor Department suggested that it was -labor organization.- Such joint groups are representative in character and count among their primary functions handling employee grievances and advising senior management about pay, work rules and benefits. They so well beyond incidental involvement in issues traditionally reserved to independent labor organizations. See Fact Finding Report, pp. 42, 60>

## **(2) Continue to Ban Company Unions**

The law should continue to prohibit companies from setting up company dominated labor organizations. It should be an unfair labor practice under NLRA Section 8(a)(1) for an employer to establish a new participation program or to use or manipulate an existing one with the purpose of frustrating employee efforts to obtain independent representation.

We believe this recommendation is consistent with current law.<Footnote: See NLRB v. Exchange Parts Co., 375 U.S. 405 (1964).>

Employees involved in employee participation committees or processes should have the same protections in law from retaliation for expressing their opinions on workplace issues as workers involved in union activity under the NLRA.

They should have the right to communicate their views to employers or co-workers and be able to seek outside expertise on issues, if they so desire. The Commission believes that current law provides protection against reprisals for such -concerted activities for the purpose of ... mutual aid or protection-, as the NLRA calls it.<Footnote: See NLRB v. Washington Aluminum Co., 370 U.S. 9 (1962).> But to the extent that doubts exist about its scope, the Commission believes this protection should cover a worker's activities related to an employee participation program.

Employee involvement systems are somewhat more frequent under collective bargaining than in other settings. In the Workplace Representation and Participation Survey, 33

percent of unionized employees reported that they were involved in a participation program, compared to 28 percent of nonunion employees. In its Fact Finding phase, the Commission heard testimony that employee participation is most effective in a union setting when union and management work together as joint partners. All who testified agreed that it is important for union and management representatives to continue to work together in this fashion to extend the scope, coverage, and effectiveness of employee participation in the future.

In view of this experience, in organized workplaces it is important that employers not be permitted to bypass collective bargaining representatives to institute employee involvement committees or processes. Issues normally dealt with in collective bargaining should not be discussed in employee involvement programs without the consent of the elected labor organization. The Commission recommends that it should be an unfair labor practice under NLRA Section 8(a)(1) for an employer to bypass the union or to introduce or manipulate an employee participation program to subvert the collective bargaining process. We believe this recommendation is consistent with current law.

The recommendations clarifying Section 8(a)(2), the distinction between employee involvement programs and unions, the protections afforded workers in participation programs, and the functions of these programs compared to unions will by themselves improve the climate for these programs to proliferate. The safeguards against company-dominated unions under Section 8(a)(2), and the recommendations obtained in Section III for reducing conflict and delay in establishing unions where employees so desire should mutually reinforce one another, so that the law eases the creation of employee involvement programs without harming employee freedom to unionize. This balance is essential.

### **(3) Reduce the Scope of the Supervisory and Managerial Exclusions**

Congress should simplify and restrict the supervisory and managerial employee exclusions of the NLRA to ensure that the vast numbers of professionals and other workers who wish to participate in decision-making at work are not stripped of their right to do so through collective bargaining if they so choose.

Each of the two exclusions embodies a core principle that must be preserved. Employees whose primary function is to

carry out the employer's labor relations policy by hiring, firing, and disciplining employees are clearly supervisors and should continue to be excluded from the Act. Employees near the top of the firm's managerial structure who have substantial, individual discretion to set major company policy and whose primary function is to develop such policy are clearly managerial employees and should also continue to be excluded.

These two principles should be incorporated into a single, simplified -managerial employee- definition that includes statutory supervisors and managers but not (1) members of work teams and joint committees to whom managerial and/or personnel decision-making authority is delegated or (2) professionals and para-professionals who direct their less skilled co-workers.

One aspect of employee involvement is the diffusion of supervisory and managerial decision-making power throughout the workforce. Both work teams and joint committees often decide matters traditionally left to full-time supervisors or managers. The Commission believes that this development should be encouraged.

Unfortunately, the labor law has not accommodated this change in the real world of work. The law continues to draw rigid distinctions between supervisors and managers on the one hand, and -employees- covered by the NLRA on the other. Supreme Court jurisprudence has contributed to this problem.<Footnote: See NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974); NLRB v. Yeshiva University, 444 U.S. 672 (1980); NLRB v. Health Care & Retirement Corp. of America, 114 S.Ct. 1778 (1994).>

The Court created the managerial employee exclusion, which is not found in the Act itself, and applied it not only to senior managers but also to buyers of parts and materials. <Footnote: NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974)> Then, in NLRB v. Yeshiva University, <Footnote: 44 U.S. 672, (1980)> the Court greatly expanded the scope of this managerial employee exclusion by holding that the faculty of Yeshiva University could not be an appropriate bargaining unit because the professors (or at least the bulk of them who participated in faculty decisions) were all managers. Since, like many university and college faculties, they voted on matters such as curriculum, class size, and academic standards, the professors exercised -authority which in any other context unquestionably would be managerial.- <Footnote:444 U.S. at 686.> The case means that rank and file employees who participate in work teams or joint

committees can lose their right to form an independent union. Indeed, the NLRB interpreted *Yeshiva* so as to strip union members of their collective bargaining rights and their union because they negotiated an employee participation agreement with their employer.

<Footnote:College of Osteopathic Medicine & Surgery, 265 N.L.R.B. 295 (1982).>

More recently, in *NLRB v. Health Care & Retirement Corp. of America*, <Footnote:\_\_\_ U.S. \_\_\_, 114 S.Ct. 1778 (1994).> the Supreme Court expanded the statute's supervisory employee exclusion. The Court effectively read out of the Act a requirement that, in order to be deemed a supervisor, an employee must carry out one of several functions -in the interest of the employer.- The NLRB had used the statute's -in the interest of the employer- test to separate out workers who direct others based on superior skill, experience and the like from true supervisors those whose main function is to direct the work of others (or hire, fire, and so forth) for the employer. The Court declared that all -acts within the scope of employment or on the authorized business of the employer are in the interest of the employer.- <Footnote: 114 S.Ct. at 1782.> In practice, this could mean that any employee who responsibly directs co-workers is a supervisor denied protection of the labor law.

The *Health Care* case could adversely affect professionals in particular. Congress has specified that professionals are to enjoy the protections of the NLRA. Yet, as Judge Richard Posner has pointed out, -most professionals have some supervisory responsibilities in the sense of directing another's work þ the lawyer his secretary, the teacher his teacher's aide, the doctor his nurses, the registered nurse her nurse's aide, and so on..- <Footnote:NLRB v. Res-Care, Inc., 705 F.2d 1461, 1465 (7th Cir. 1983).> In the Supreme Court's view, incidental direction of co-workers would appear to make one a -supervisor- who lacks collective bargaining rights. As Justice Ginsburg noted in dissent, - [i]f any person who may use independent judgment to assign tasks to others or direct their work is a supervisor, then few professionals employed by organizations subject to the Act will receive its protections.-<Footnote:114 U.S. at 1792-93.>

These Supreme Court cases fail to take into account the degree to which supervisory and managerial tasks have been diffused throughout the workforce in many American firms.

As a result of the Court's interpretations, thousands of rank-and-file employees have lost or may lose their

collective bargaining rights. The Commission believes the law can and should accommodate the desires of professionals and other employees to participate at work p whether they desire to do so via independent representation or otherwise.

<Footnote: The Commission also advocates relaxing the restrictions placed on the ability of plant guards to participate in collective bargaining by Section 9(b)(3) of the NLRA, which precludes guards or a local union of guards from affiliating -directly or indirectly with an organization which admits to membership ... employees other than guards.- While separate bargaining units and locals are appropriate, preventing affiliation with an established international union or federation of unions is an unnecessary limitation.

Another problem is that the scope of the -guard- definition has grown in NLRB jurisprudence over the years, to the point that elevator operators, concierges, and doormen are often held to be guards.>

#### **( 4) Authorize Pre-hire Agreements**

When an employer wants to move or open new operations, it should be allowed to negotiate a contract with a union interested in representing those who will work at the new operations, as long as the negotiations are conducted at arm's length. The employer should be allowed to recognize the union. In order to ensure that the employees covered under the new agreement support it, the union should be required to demonstrate majority support by the end of the first year of the new operations, or else the agreement and the union's status as representative would expire at that time. The parties would be allowed to verify the union's majority status either by card check or representation election. The agreement should not serve as a contract bar.

Section 8(a)(2) continues to serve the vital function of precluding -sweetheart- deals between employers and unions that do not represent a majority of employees. Such deals frustrate employee free choice by taking out of workers' hands the decision about whether to have independent representation. The policy of generally disallowing employer recognition and support of non-majority unions remains valid.

However, the Commission is concerned that this policy may operate in an unduly mechanical way. The problem is that the rule against employer support of non-majority unions limits the ability of an employer and a union to cooperate

when the employer plans to move or open new operations. The occasion of new or relocated operations often presents an opportunity for innovative cooperation between employers and unions around issues of work organization, employee compensation and productive efficiency.

Such agreements not only improve labor-management relations, they also help all of us by facilitating the diffusion of high-performance work techniques. In addition, advance negotiations can increase rather than decrease the quality of employee choice about collective bargaining. In effect, a pre-negotiated contract between the employer and an independent union gives the employees an opportunity to try out the union's representation before voting on whether to accept or reject it.

Unfortunately, this kind of cooperative advance planning is severely restricted by Section 8(a)(2). The NLRB has interpreted the measure as prohibiting employer recognition of a union as part of prospective bargaining in most circumstances. What is more, the Board's interpretation forbids advance negotiation of contract terms altogether even without recognition if the employer and union have no previous relationship.<Footnote: Majestic Weaving Co. of N.Y., 147 N.L.R.B. 859 (1964).> We urge the Board to reconsider its approach here, and we recommend that Congress address this issue as part of its next effort to reform our labor laws.

### **3. CONCLUSION**

Employee participation will have to expand to more workplaces if the American economy is to be competitive at high standards of living in the 21st century. Participation must also expand to include more workers and a broader array of issues if it is to meet the expectations and address the vital concerns of the nation's work force. The recommendations presented in this section could modernize labor law to encourage continued innovation in employee participation.

While the proposals in this Section and those that follow are needed in their own right, they are also closely interrelated. This is because the increased flexibility for employee participation proposed here poses both new risks and new opportunities for workers and employers. The risks of reducing employee opportunity to choose independent representation are addressed by the changes presented in Section III. The increased flexibility for employee participation should be accompanied by corresponding changes in the law needed to ensure that workers have ready access

to independent representation and collective bargaining. Expanding the issues open to employee participation also opens possibilities for greater experimentation with employee involvement in alternative dispute resolution and self-governance processes on issues now subject to -command and control- regulation and court litigation. We turn, then, to these issues.

## **STATEMENT OF DOUGLAS A. FRASER**

Section 8(a)(2) stands as a bulwark against forms of representation which are inherently illegitimate because they deny workers the right to a voice through the independent representatives of their own choosing and put the employer on -both sides of the table,- to quote Senator Wagner's words from 1935.\* Thus, I place great importance on the fact that the Commission has not proposed any wholesale revision or exemption to Section 8(a)(2).

Nonetheless, I cannot join the majority's recommendation that -Congress clarify Section 8(a)(2)- by somehow providing that -employee participation programs should not be unlawful simply because they involve discussion of terms and conditions of work or compensation where such discussion is incidental to the broad purposes of these program.-

The prudent course would be to allow the administrative and judicial processes to address the issue of -incidental discussion- in the first instance. If problems were to develop if, in fact, the law in practice were shown to substantially interfere with the kind of incidental discussions the majority seeks to protect ¶ Congress could then take up the subject against a far clearer legal and factual background.

In dissenting from the recommendation to amend Section 8(a)(2), I wish to make clear that I do not minimize the value of encouraging -employee participation- and -labor-management cooperation.- But to my mind, the kind of - participation- and -cooperation- that should be encouraged is democratic participation and cooperation between equals. I agree with Peter Pestillo, the Executive Vice President of Ford Motor Company, that -A strong alliance requires two strong members. There should be no quibbling about that.- And I likewise agree with Morton Bahr, the President of the Communication Workers of America, that:

to effectively participate in workplace decision-making, front-line workers must first have their own organizations,



educated leadership, and significant resources in order to have the confidence and preparation to participate as equals and without fear. {Sept. 15, 1993 Tr. at 63}

Because I am deeply committed to the principal of work place democracy, I cannot join in any statement that proclaims that you can have fully effective worker management cooperation programs without having a truly equal partnership based upon workers having an independent voice. I must therefore dissent.

### **DISSENTING OPINION OF DOUGLAS A. FRASER**

(January 3, 1995)

Section 8(a)(2) stands as a bulwark against forms of representation which are inherently illegitimate because they deny workers the right to a voice through the independent representatives of their own choosing and put the employer on -both sides of the table,- to quote Senator Wagner's words from 1935.\* Thus, I cannot join in the majority's recommendation that "Congress clarify Section 8(a)(2)" by somehow providing that "employee participation programs should not be unlawful simply because they involve discussion of terms and conditions of work or compensation where such discussion is incidental to the broad purposes of these programs."

Given the legal and factual uncertainties that exist as to the scope of 8(a)(2), and the danger that any statutorily-created exception would be an invitation to abuse, at the very least the prudent course would be to allow the administrative and judicial processes to address the issue of "incidental discussion" in the first instance. If problems were to develop -- if, in fact, the law in practice were shown to substantially interfere with incidental discussions of terms of employment -- Congress could then take up the subject against a far clearer legal and factual background.

In no event, should employer-dominated employee representation plans be permitted merely because they are limited to dealing with specified subjects such as safety and health or training. Employer-dominated representation is undemocratic regardless of the particular subjects with which the employer-controlled representative deals.

In dissenting from the recommendation to amend Section 8(a)(2), I wish to make clear that I do not minimize the value of encouraging -employee participation- and -labor-management cooperation.- But to my mind, the kind of -

participation- and -cooperation- that should be encouraged is democratic participation and cooperation between equals.

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Because I am deeply committed to the principal of work place democracy, I cannot join in any statement that proclaims that you can have fully effective worker management cooperation programs without having a truly equal partnership based upon workers having an independent voice. I must therefore dissent.

### **III. Worker Representation and Collective Bargaining**

#### **1. GENERAL OBSERVATIONS**

##### **(1) The Role of Unions in Society**

The preamble to the National Labor Relations Act declares it to be the policy of the United States to `encourage the practices and procedure of collective bargaining and [to] protect ... the exercise by workers of full freedom of association, self-organization and designation of representatives of their own choosing, for the purpose of negotiating the terms and condition of their employment or other mutual aid or protection.'

The Collective Bargaining Forum, a group of leading corporate chief executives and national labor leaders, reflecting on this policy, has stated:

"The institution of collective bargaining is an integral part of American economic life and has proved capable of helping our society adjust through periods of prosperity and recession. A democratic society must provide workers with effective rights to join and be represented by unions of their own choosing."<Footnote: New Directions for Labor and Management, The Collective Bargaining Forum, Washington, D.C.: U.S. Department of Labor, 1988.>

Unions contribute to the economic health of the nation by `leveling the field between labor and management,' as Senator Orrin Hatch has stated. `If you didn't have unions,' Senator Hatch continued," it would be very difficult for even enlightened employers to not take advantage of workers on wages and working conditions because of rivals."<Footnote: Business Week, May 23, 1994, p.70.>

Indeed, as we noted in the Fact Finding Report, and as the President's Council of Economic Advisors also has concluded, the recent decline in the proportion of workers represented by unions has `contributed to the rise in inequality' in the United States.

Unions likewise contribute to the political health of the nation by providing a legitimate and consistent voice to working people in the broader society. As former Secretary of State George P. Shultz has stated, `free societies and free trade unions go together.' Societies that lack a vibrant labor movement which will `really get up on its hind legs and fight about freedom' are sorely wanting.<Footnote: Quoted in Leonard Silk, New York Times, Dec. 13, 1992, p.

D2. >

The import of the worst features of political campaigns into the workplaces by managers and unions creates confrontation and is not conducive to achieving the goals outlined in Section I. The Commission remains persuaded that, as we said in our Fact Finding Report, 'All participants -- employees, management, and unions - would benefit from reduction in illegal activity and de-escalation of a conflictual process that seems out of place with the demands of many modern workplaces and the need of workers, their unions, and their employers.' (p. 141)

The Commission cannot hope to do more than propose first steps on the necessary road to achieving a new direction and approach to labor-management relations. The process of change will require a long, sustained effort. But we believe that American society -- management, labor, and the general public -- does support the principle that workers have the right to make a free, uncoerced and informed choice as to whether to join a union and to engage in collective bargaining. Our recommendations seek to, as we said at the outset, 'turn down the decibel count' and to effectuate this fundamental principle of our democracy.

## **(2) Established Collective Bargaining Relationships**

Not all aspects of collective bargaining are in need of repair. The Fact Finding Report concluded that 'In most workplaces with collective bargaining, the system of labor-management negotiations works well' (p.64). Mr. Howard Knicely, speaking for the Labor Policy Association, would elevate this observation to a principal finding: 'collective bargaining where it exists, is working very well.'

The majority of managers and workers with experience under collective bargaining agree with this assessment. Both the Worker Representation and Participation Survey and others before it report that about 90 percent of union members would vote to retain their membership if asked. Approximately 70 percent rate their experience with their union as good or very good. Sixty-four percent of the managers surveyed agreed that the union in their companies makes the work lives of its members better. When asked how the union relationship affects their companies, managers' views vary considerably. Twenty-seven percent believe the union helps their company's performance; 38 percent believe it hurts performance, and 29 percent believe the union neither helps nor hurts organizational performance. By a

two to one margin (32 to 16 percent) managers report that in recent years their relations with unions have become more cooperative rather than confrontational.

In general, though there are notable exceptions, collective bargaining appears to be adapting to its changing economic and social setting. Work stoppages have declined significantly, many grievance procedures are experiencing more settlements through informal discussions or mediation without resort to arbitration. The AFL-CIO's February 1994 report, *The New American Workplace: A Labor Perspective*,<sup><Footnote: The New American Workplace: A Labor Perspective, AFL-CIO, Washington, D.C., February, 1994.></sup> is a significant statement endorsing workplace cooperation and labor-management partnerships.

A number of collective bargaining agreements in 1994 extend the frontiers of labor-management partnerships to new issues, new levels of decision-making, and new workers. Among the more notable recent examples are the Levi-Strauss and Amalgamated Clothing and Textile Worker agreement governing manufacturing innovations in union and non-union facilities, the Bath Iron Works and International Association of Machinists agreement providing for significant restructuring of jobs, training, and pay systems among multiple trades, and the NYNEX and Communications Workers of America agreement that provides for voluntary procedures governing the organizing of new work units and the negotiation and arbitration of initial contracts.

Innovations such as these need to be encouraged and extended to more bargaining relationships. But additional changes will be needed in the attitudes and policies of many labor organizations and managers if the goals of the workplace of the future outlined in Section I are to be achieved. One area in need of greater focus is the responsiveness of workplace practices to the needs of working women. A large scale survey of working women published by the Women's Bureau of the Department of Labor in October 1994 reported that, while most women are breadwinners and many are the sole support of their households, `they are not getting the pay and benefits commensurate with the work they do, the level of responsibility they hold, or the societal contribution they make.'<sup><Footnote: Working Women Count, The Women's Bureau, U.S. Department of Labor, 1994, p. 5. See, the testimony of Susan Bianchi-Sands and associates on July 25, 1994, and Judith L. Lichtman and a panel of women's organizations and Gloria Johnson for the AFL-CIO and the Coalition of Union Women on September 29, 1994.></sup>

Collective bargaining will need to continue to evolve and adapt in the future as the diversity of the workforce increases in terms of gender, race, ethnic background, education, and location of work. The Women's Bureau Survey, the Worker Representation and Participation Survey, and many others document the desire of workers for more say over a wide range of workplace issues as well as a desire for cooperative rather than conflictual processes for addressing their concerns.

It is in the national interest to encourage continued growth in the range of issues and workplaces governed by cooperative labor-management partnerships. The Commission believes that existing collective bargaining relationships are progressing in this direction, and considers it important that new bargaining relationships achieve this same level of cooperation and effectiveness as soon as possible.

**(3) New Collective Bargaining Relationships**<Footnote: For the detailed policy proposals of representatives of labor organizations and managements, see the transcript of September 8, 1994 including the statement, 'Recommendations of the AFL-CIO to the Commission on the Future of Worker-Management Relations Concerning Changes in the National Labor Relations Act and Related Laws,' (28 pages).>

The Fact Finding Report of the Commission documented the findings of the Commission (pp. 77-79) with respect to new organizing situations.

1. American society -- management, labor, and the general public -- supports the principle that workers have the right to join a union and to engage in collective bargaining if a majority of workers so desire.
2. Representation elections as currently constituted are highly conflictual for workers, unions, and firms. This means that many new collective bargaining relationships start off in an environment that is highly adversarial.
3. The probability that a worker will be discharged or otherwise unfairly discriminated against for exercising legal rights under the NLRA has increased over time. Unions as well as firms have engaged in unfair labor practices under the NLRA. The bulk of meritorious charges are for employer unfair practices.
4. Consistent with other surveys reported earlier, the

Worker Representation and Participation Survey found that 32 percent of unorganized workers would vote to join a union if an election were held at their workplace. Eighty-two percent of those favoring unionization (and 33 percent of all non-union workers) believe a majority of their fellow employees would vote to unionize.

**5.** Roughly a third of workplaces that vote to be represented by a union do not obtain a collective bargaining contract with their employer.

Together these facts document the need to improve the process by which workers decide whether or not to be represented at the workplace and engage in collective bargaining.<Footnote: The Commission considered a proposal to increase the NLRA's jurisdictional floors in view of the substantial increase in wages and prices since the floors were set in the statute in 1959. The Commission raised this issue by letter with each major business organization and the AFL-CIO. Most of the organizations that responded opposed increasing the jurisdictional amounts.>

## **2. RECOMMENDATIONS**

The Commission believes that several revisions in the laws governing the representation process will render employee decisions about whether to engage in collective bargaining simpler, more timely, and less conflictual, thus making this institution more accessible to those employees who want it. Here is what we recommend:

- 1.** Representation elections should be held before rather than after legal hearings about issues such as the scope of the bargaining unit. The elections should be conducted as promptly as administratively feasible, typically within two weeks.
- 2.** The injunctions provided for in section 10(l) of the Act should be used to remedy discriminatory actions against employees that occur in organizing campaigns and first contract negotiations.
- 3.** Employers and newly certified unions should be assisted in achieving first contracts by a substantially upgraded dispute resolution program. The program should feature mediation and a tripartite advisory board empowered to implement options ranging from self-help (strikes or lockouts) to binding arbitration for the relatively few disputes that warrant it.

## (1) Prompt Certification Elections

The Commission's Fact Finding Report confirmed that the process by which workers decide whether or not to engage in collective bargaining is among the most contentious aspects of American labor relations. In order to have a union certified as their representative, American workers must seek an NLRB election to determine whether a majority of an appropriate bargaining unit wishes to be represented by the union. Before holding an election, the Board must address legal issues raised by the employer and union, most importantly, the scope of the bargaining unit, and inclusion or exclusion of particular employees therein. Either party has a right to a formal hearing on these matters, which causes a substantial delay. NLRB General Counsel Frederick Feinstein told the Commission that the automatic availability of such hearing procedures means that a party seeking delay 'can safely assume' that it will be able to push an election back three to six months. In practice, it takes an average of seven weeks for workers to secure a vote from the time their petition is filed.

During this time, the union and employer typically face off in a heated campaign. The government has been hesitant to regulate the two sides too closely during these contests in order to preserve the parties' freedom of speech. Both sides often hurl allegations, distortions, and promises that poison the relationship and make it difficult to achieve a collective bargaining agreement in cases where the workers vote to unionize. The Fact Finding Report revealed that in recent decades employer unfair labor practices during these campaigns have risen: both in terms of the ratio of unfair labor practice charges against employers to the number of elections and the percentage of such charges found to have merit. In particular, discharges of union activists are up: the data show that improper dismissals occur in one of every four elections. American workers are afraid of this prospect: 79 percent say it is likely that employees who seek union representation will lose their jobs, and 41 percent of nonunion workers say they think they might lose their own jobs if they tried to organize. This fear is no doubt one cause of the persistent unsatisfied demand for union representation on the part of a substantial minority of American workers. The Worker Representation and Participation Survey reported that 32 percent of nonunion workers would vote for a union and think their co-workers would too.



The Commission believes the NLRB should conduct representation elections as promptly as administratively feasible. A lengthy, political-style election campaign serves no useful purpose in the labor-management context.

Each side would continue to have ample time to express its views if the process were much shorter. Furthermore, much of the conflict that mars the election process would be eliminated if the process was shortened, which would set the stage for a more cooperative employer-union relationship if the employees voted in favor of collective bargaining.

The requirement that the Board hold pre-election legal hearings prevents it from expediting the election process in a significant way. General Counsel Feinstein, who has initiated a major effort to conduct elections more promptly, testified that the best he can hope for under current law is to hold most elections within seven weeks and all elections within eight weeks. The Commission considers this inadequate. We conclude that the Board should conduct elections as promptly as administratively feasible, typically no later than two weeks after a petition is filed.

To accomplish this, the Board must hold inquiries and hearings on contested issues after the election (with any disputed ballots sealed in the interim). The Commission has been assured by the NLRB that it would be perfectly feasible as a logistical matter to conduct the vast majority of elections in less than two weeks, as long as the appropriate changes are made in the governing law and the Board reorganizes its staff and resources to undertake this important task.<Footnote: The NLRB is in the process of deciding whether it may conduct pre-hearing elections on its own authority. The Commission takes no position on this legal question of the Board's authority.>

Such a change would not only facilitate prompt elections and eliminate a major locus of labor-management conflict, it would also afford substantial administrative savings.

Currently, many Board hearings are held despite the absence of significant legal issues, simply because one of the parties seeks a tactical advantage. There are two principal tactical reasons why parties demand hearings. The first is to give one party an advantage in the election by excluding or including particular employees based on how they are likely to vote. The need for such hearings would be reduced under our proposal because a party that would seek a pre-vote hearing under the current system in order to gain a bargaining unit more likely to vote its way would not be interested in a post-election hearing as long as it either (1) won the election or (2) lost it by a margin greater than the number of disputed voters it had hoped to include.

The second tactical reason parties seek hearings is to delay the election in order to increase their chances of a favorable outcome. The Commission believes that a system is poorly designed if it gives parties an incentive and opportunity to seek delay for its own sake. Hearings motivated by a desire to delay the election would obviously be eliminated altogether in a system that allowed hearings only after the election had taken place.

The simple design change of holding prompt elections, before rather than after certification hearings, is pivotal to our recommendations for improving the representation process.

In addition to reducing delay and conflict, this reform would diminish the need for government regulation of the labor-management relationship and make the government more customer-friendly. The NLRB would be more customer-friendly because employees seeking elections would get them quickly, without a spate of confusing litigation, and usually with much less conflict between the union and the employer. As for regulation, in addition to eliminating the need for many hearings, as described above, pre-hearing elections would reduce the need for oversight of the parties' conduct during the election campaign. Such regulation has always been extremely controversial because it involves property and speech rights. The need for it is diminished to the extent that a protracted election campaign and concomitant pitched battle between the antagonists are cut down to a reasonable size.

We encourage employers and unions who desire a cooperative relationship to agree to determine the employees' majority preference via a 'card check.' Card checks are particularly appropriate vehicles for enhancing worker-management cooperation when a union already represents part of an employer's workforce and the parties seek a non-conflictual way to determine whether additional employees want that same form of representation. Card check agreements build trust between union and employer and avoid expending public and private resources on unnecessary election campaigns. Such agreements are a classic example of potential or former adversaries creating a win-win situation for themselves. The opportunity to gain representation rights via a simple majority sign-up gives the union an incentive to cooperate with the employer to make the workplace more efficient. In return, the employer gains the cooperation of the employee representative as partner in efforts to improve productivity and flexibility, and often improved morale and reduced turnover as well.

## **(2) Timely Injunctive Relief for Discriminatory Actions**

The Fact Finding Report identified several areas of concern about the tools available to the NLRB to remedy violations of the Act. The Board can obtain injunctions against unions (for organizational or secondary boycotts) far more easily and swiftly than it can against employers, particularly for discriminatory discharges of union supporters. In general, the remedies the Board may prescribe against employers are remedial and reparative rather than deterrent, and the sanctions against employers for violating labor law are far weaker than analogous penalties for breaking other federal employment statutes. The increase in discriminatory discharges documented in the Fact Finding Report indicates that the remedies available to the Board do not provide a strong enough disincentive to deter unfair labor practices of some employers during certification elections and first contract campaigns.

The Commission believes expedited injunctive relief offers a first step toward improving compliance with the Act. In our judgment, this is not only the most effective, least litigious, and least costly path, it will also complement the holding of representation elections as promptly as administratively feasible. The combination of prompt elections and immediate injunctive relief against discriminatory actions would eliminate much of the incentive for engaging in discriminatory behavior. An injunction not only undoes the harm caused by the illegal act, but also weakens the position of the discriminator by making it look bad and the other side look effective in the eyes of the employees. The Commission believes this 'backfire' effect would provide the greatest disincentive for wrongdoing.

Under current law the Board has two principal sources of authority for seeking injunctions: NLRA sections 10(j) and (l). Only the slower and weaker of these two provisions, section 10(j), is available to remedy the general range of employer and union unfair labor practices. The swift, automatic, and thus more effective section 10(l) applies only to certain union-side violations. Section 10(l) is the more powerful instrument for two principal reasons: (1) it is mandatory, whereas section 10(j) is discretionary; (2) it is faster, both because it is triggered by an unfair labor practice charge whereas section 10(j) requires a formal unfair labor practice complaint, and because the Board must give section 10(l) cases 'priority over all other cases.' As a result of these differences, NLRB General Counsel Feinstein told the Commission that section 10(l) cases take the Board five days to process, whereas section 10(j) cases

take 65 days or more just to get into court, let alone to secure an injunction from the judge.

The Commission recommends that Congress make section 10(l) injunctive relief available not only to employers harmed by union secondary boycotts, but also to employees who are victims of employer discriminatory actions from the beginning of an organizing effort to the signing of a first contract. The timely use of injunctions in these situations will help abate many of the problems the Commission was instructed to address. Most obviously, injunctions that can be obtained within days rather than months will reduce delay. Quick resolution of unfair labor practice charges during the crucial election and first contract period will also increase labor-management cooperation by preventing disputes from starting and then festering. Prompt injunctive relief will remove the coercive effect on employee free choice. The increased efficacy of this remedy will deter discriminatory behavior as well as rectify it, and will increase respect for the NLRB among the general public and its primary constituency -- American workers.

### **(3) Resolution of First Contract Disputes**

The Commission believes that once a majority of workers has voted for independent union representation for purposes of collective bargaining, the debate about whether a bargaining relationship is to be established should be over. At this point, the parties' energies and the public's resources should turn to creating an effective ongoing relationship that is suited to the needs of their workplace. Every effort should be made to ensure that a satisfactory agreement is concluded and that the process used to reach that agreement leads to the development of a cooperative bargaining relationship.

The Fact Finding Report noted that one-third or more of certified units fail to reach a first contract, and that strikes taking place in first contract negotiations tend to be longer and to result in fewer settlements than strikes occurring in established bargaining relationships.

Moreover, evidence from studies presented to the Commission document that the probability of achieving a first contract is reduced in settings where unfair labor practices or other hard bargaining tactics are carried over from the election campaign into the contract negotiation process. Clearly, improvements in the effectiveness of the first contract negotiation process are called for.

However, in developing a proposal one must guard against

reducing the parties' incentives to negotiate a realistic agreement. Care should be taken to avoid any chance that unworkable or harmful terms are imposed on the parties by a neutral who is uninformed about the issues or unaccountable to the parties or the public. Several witnesses pointed out to the Commission that negotiations sometimes fail because one side or the other holds out for numerous, unrealistic proposals. The process must encourage parties to reach their own agreements, accept the possibility that a strike or lockout may be the most appropriate way to address unrealistic expectations or demands, and allow for the use of arbitration if in the judgment of experienced and respected professionals this is the best way to assure that an initial agreement will be achieved.

The Commission received a number of proposals for improving the first contract negotiation process. Some witnesses suggested that arbitration be required of all first contract disputes that remain unresolved after a specified period of time. Others proposed requiring arbitration if the NLRB finds one of the parties to be bargaining in bad faith or engaged in other unfair labor practices. The Commission finds both of these options unsatisfactory. The first would reduce the incentives of the parties to negotiate on their own. The second suffers from severe administrative difficulties, because NLRB procedures for determining whether or not bad faith bargaining has occurred are already time consuming and would be newly taxed if arbitration became available as a remedy. Moreover, it is often difficult to determine whether a violation of good faith bargaining law has occurred, as opposed to permissible hard bargaining about the issues. Most important, the Commission believes that if worker-management cooperation is to be increased, the focus must shift from determining blame and assessing punishment to facilitating agreement wherever possible.

The Commission offers the following as a first contract dispute resolution system that meets the above objectives.

An employer and newly certified union would have early access to the services of the Federal Mediation and Conciliation Service or private mediation. A tripartite First Contract Advisory Board would be established to review disputes not settled by negotiations or mediation. The Advisory Board would be empowered to use a wide range of options to resolve disputes, including referring them back to the parties to negotiate with the right to strike or lockout, further mediation or fact finding, or use of arbitration in the form that is judged to be best suited to the circumstances of the particular case. The

`certification year' (in which the union's majority status is presumed) would begin when the Advisory Board decides which course to take.

Making arbitration available in first contract cases is crucial to the overall representation system. The Commission believes it will be necessary to invoke arbitration only rarely, but the prospect of its use in situations where one side or the other has been recalcitrant in negotiations will motivate the parties to reach mutually acceptable compromises. Maximizing the number of such voluntary agreements is the goal of any dispute resolution system, and is vitally important at this stage in the development of an enduring and cooperative labor-management relationship.

#### **(4) Employee Access to Employer and Union Views on Independent Representation**

The Commission received many proposals to modify current rules governing employee access to employer and union views on collective bargaining. We affirm the important role such access plays in employee decision-making about collective bargaining. It is a central tenet of U.S. labor policy that employees should be free to make an informed and uncoerced choice as to whether or not they wish independent representation at work. The `effectiveness' of that right, as the Supreme Court has stated, `depends in some measure on the ability of employees to learn the advantages and disadvantages of organization from others.'"<Footnote: Central Hardware Co. v. NLRB, 407 U.S. 539, 543 (1972).>

The Commission is aware that there is an imbalance in this area. The ability of employers to present their views to employees is assured at the workplace. Employers have daily contact with employees and are free to express their views from the date of hire. Employers may distribute written material to their employees and post materials in the workplace. Employers also may require employee attendance at so called `captive audience' meetings to hear the employer's point of view. In addition, the employer may devote as much work time as it desires to supervisory activity advising employees about the employer's position, including one-on-one or small group meetings between supervisors and employees. Indeed, supervisors who refuse to participate in the company's campaign against union representation for the employees may be discharged for their refusal.

By contrast, employees have little access to the union at

work -- the one place where employees naturally congregate. Union representatives are typically excluded from the worksite altogether and are all but uniformly excluded from the meetings held by the employer. Even non-working areas which are accessible to the general public -- such as parking lots or cafeterias -- are off-limits to the union organizer.

In order to make up for these restrictions, the union is given a list of employee names and addresses so it can contact workers at home. But the names of the constituents the union seeks to represent become available only if the union is able to achieve the 30 percent level of support necessary to secure an election, and then only 10-20 days before the election (in what typically is a fifty-day campaign). Efforts to communicate with workers when they leave the worksite and disperse into the community are far more costly and far less likely to succeed in reaching the workforce than worksite communications. As the Supreme Court has stated, the workplace is 'a particularly appropriate place' for work-related communications 'because it is the place where employees clearly share common interest and where they additionally seek to persuade fellow workers in matters affecting their union organizational life and other matters related to their status as employees.'  
<Footnote: Eastex, Inc. v. NLRB, 437 U.S. 556, 574 (1978).>

The Commission has come to the conclusion that, as Professor Matthew Finkin testified, 'the law should allow the widest practicable dissemination to employees of their statutory rights and of the availability of representation. It does not.' However, we are also cognizant of the difficulty of regulating the access issue.

As a first step, Congress should reverse the Supreme Court's decision in *Lechmere v. NLRB* <Footnote: 112 S.Ct. 841 (1992).> so that employees may have access to union organizers in privately-owned but publicly-used spaces such as shopping malls. It runs counter to our democratic traditions to bar advocates of independent union representation from these areas. What is more, in practice *Lechmere* harms not only advocates for unions but also those of other causes, because of the way this decision interacts with the other legal requirement that the employer can not have discriminatory solicitation rules. This means that, in order to keep union representatives from having contact with employees, many mall owners have barred groups like the Salvation Army and the Girl Scouts as well. Congress should make it clear that labor groups and others have a right of

access to this form of `public-private' space, which has taken over the role of Main Street in so many American communities.

Further revisions of the rules relating to access are best left to the considered judgment of the NLRB. We note that the Board has significant leeway in this area, and has not visited it in a fundamental way in three decades.<Footnote: See General Electric Co., 156 N.L.R.B. 1222 (1966).> We encourage the Board to examine its current practice carefully to determine the extent to which it provides employees a fair opportunity to hear a balanced discussion of the relevant issues. Should the prompt election system we recommend be enacted, the Board may need to tailor the access rules to fit new circumstances. In any event, we urge the Board to strive to afford employees the most equal and democratic dialogue possible.

## **(5) Conclusion**

Employee freedom of choice about whether to have independent union representation for purposes of collective bargaining remains one of the cornerstones of a flexible system of worker-management cooperation in our democratic society, whatever portion of the workforce decides to avail itself of this form of participation. A labor relations environment marked by prompt, pre-hearing elections, effective injunctive relief for discriminatory reprisals in the representation process, and flexible dispute resolution of first contract negotiations, including arbitration where necessary, will provide American workers greater freedom to choose collective bargaining if that is what they want.

Taking these steps is an integral part of an effort to reduce conflictual relations and to reform the regime governing workplace participation. Employee free choice about independent union representation serves both as guarantor of the integrity of employee involvement plans in non-union facilities and as a voluntary worker-management alternative to direct federal regulation of the employment relationship.



## **IV. Employment Litigation and Dispute Resolution**

### **1. INTRODUCTION**

Chapter IV of the Fact Finding Report detailed two distinct problems in contemporary employment law. The first is a steep rise in administrative regulation of the workplace, whose overlapping mandates (both federal and state) impose significant costs on employers and employees. The second is the explosion of litigation under laws that rely in whole or in part on individual lawsuits for enforcement. Primary examples of such privately enforced laws are the Fair Labor Standards Act, Title VII of the Civil Rights Act, the Americans with Disabilities Act, and the Age Discrimination in Employment Act.

As the origin and form of these two problems differ in many respects, the Commission will deal with each separately. -This section will focus on the employment litigation crisis and the variety of alternative forms of dispute resolution that have been suggested to the Commission as potential reform measures. Section VI will address the distinct problem raised by administrative regulation.

As the Fact Finding Report discussed in detail, employment litigation has spiraled in the last two decades. The expansion of federal and state discrimination laws and the growth in common law and statutory protection against wrongful dismissal have provided employees with a broader array of tools with which to challenge employer behavior in court. In the federal courts alone, the number of suits filed concerning employment grievances grew over 400 percent in the last two decades. -Complaints lodged with administrative agencies have risen at a similar rate:

for example, in 1993, the EEOC received nearly 90,000 discrimination complaints from employees across the country.

Employment litigation is a costly option for both employers and employees. -For every dollar paid to employees through litigation, at least another dollar is paid to attorneys involved in handling both meritorious and non-meritorious claims. -Moreover, aside from the direct costs of litigation, employers often dedicate significant sums to designing defensive personnel practices (with the help of lawyers) to minimize their litigation exposure. -These costs tend to affect compensation: -as the firm's employment law expenses grow, less resources are available to provide wage and benefits to workers.

Further, while the prospective costs of court awards do serve to deter employers from illegal actions, it is not clear that

litigation protects all kinds of employees equally well. Most employment discrimination suits are brought by employees who have already left the job where the discrimination took place. Further, those ex-employees who bring suit tend to come from the ranks of managers and professionals rather than from lower-level workers.

Finally, even for those employees properly situated to file suit, the pursuit of a legal claim through litigation often proves stressful and unsatisfying. Overburdened federal and state judicial dockets mean that years often pass before an aggrieved employee is able to present his or her claim in court.<Footnote: In the very last stages of the Commission's deliberations, a panel of nine federal judges commissioned by the Judicial Conference of the U.S. released a draft report of the "impending crisis" in the federal court system growing out of the huge increases in the case load on federal dockets. -The panel detailed the upward trend in federal court litigation and underlined the wave of new federal legislation — such as the 1994 Crime Bill — which grants federal jurisdiction to a whole new range of crimes. This increase in criminal cases on the federal docket, the panel emphasized, will further slow the already torpid rate of processing civil complaints in the federal court: -since criminal cases are given priority over civil cases, the expansion of federal penalties for violent crimes will only move civil claims further back on the list of cases awaiting trial. To help alleviate the burden on federal courts, the panel recommended restricting access -for several classes of disputes -- including anti-discrimination claims brought under federal employment laws. -The panel encouraged Congress to bar employee complainants from bringing claims in federal court unless the EEOC had thoroughly investigated the complaint and found it to be of merit. -These recommendations underline the diminishing opportunities for employees to vindicate public employment rights through the court system. -Administrative Office of the U.S. Courts, Proposed Long Range Plan for the Federal Courts, Dec. 1994; Robert Pear "Judges Proposing to Narrow Access to Federal Court," New York Times, Dec. 5, 1995, p. A1. > -The combative nature of litigation tends to push the employee to the sidelines in this legal struggle, though occasionally subjecting employees to detailed investigation of their personal histories and character.<Footnote: Recent trends in sexual harassment litigation reveal that aggressive defense attorneys have begun to interrogate the complaining employee intensely about her sexual history, personal relationships, or history of child molestation or venereal disease, in order to discredit her character and credibility. -The Bedroom Ploy: -Plaintiffs' Sex Lives Are Being Laid Bare in Harassment Cases," Wall Street Journal, Sept. 19, 1994, p. A1.>

These problems with the legislative model have led many employers, employee groups, and lawmakers to seek alternatives. -In fact, in both the Americans with Disabilities Act of 1990 and the Civil Rights Act of 1991, Congress specifically encouraged alternative methods of resolving discrimination disputes "where appropriate and to the extent authorized by the law."

Alternative dispute resolution (ADR) as a generic concept connotes the entire class of mechanisms which facilitate private resolution of disputes. -Such private dispute resolution can take three different forms. First, the parties may try to resolve their dispute through direct, in-house negotiations. -Second, the parties may avail themselves of a mediation system sponsored by the courts or other government agency responsible for that class of disputes. The goal of these first two mechanisms is securing a solution both parties will accept voluntarily. When such efforts at voluntary resolution fail, however, a third type of private mechanism -- arbitration -- is needed to produce a binding disposition of the case. -Private arbitration serves as an alternative to the court system or administrative tribunal normally charged with adjudicating such disputes.

In 1991, the United States Supreme Court showed itself receptive to the arbitration model of binding ADR mechanisms. -In its Gilmer decision, reviewed in detail in the Fact Finding Report, (pp. 117-118) the Court enforced a securities dealer's agreement to arbitrate all disputes, including employment disputes arising under public laws (there, age discrimination). It is important to note, however, that the Supreme Court in Gilmer did not specifically address whether employers generally could require arbitration under the employment contract. -The Commission also underlines that the Court's decision rested on an interpretation of the Federal Arbitration Act (FAA) -- a statute enacted in 1920, more than forty years before modern employment rights were created.

The Supreme Court also assumed in Gilmer that arbitration agreements were enforceable only if the arbitration system satisfied minimum standards of quality. The court did not, however, conduct a systematic appraisal of the problems posed by integrating arbitration into the employment setting, nor did it issue any specific guidelines for judicial review of arbitral design.

Testimony before the Commission indicated that recent employer experimentation with arbitration has produced programs that range from serious and fair alternatives to litigation, to mechanisms that appear to be of dubious merit for enforcing the public

values embedded in our laws. <Footnote: A Wall Street Journal article ("More Law Firms Seek Arbitration for Internal Disputes," Sept. 26, 1994, p. B 13) describes how a number of large law firms are establishing ADR programs in the wake of a \$7 million jury verdict against a firm for sexual harassment by one of its partners. -One of the programs mentioned was troubling: -the arbitrator for an employee's dispute had to be selected from a pool composed of partners in law firms with 50 lawyers or more.> --The challenge, then, is how to encourage the creative potential of alternatives to standard court litigation, while ensuring that the legal needs and priorities of a diverse American work force are fairly satisfied.

### **(1) Private Parties Should be Encouraged to Adopt In-House ADR Systems**

The Commission strongly supports the expansion and development of alternative workplace dispute resolution mechanisms, including both in-house settlement procedures and voluntary arbitration systems that meet specified standards of fairness. -In the near-term, the formation of such high-quality, low-cost alternatives to litigation would greatly increase the accessibility of public law protections to low wage workers.

### **(2) Private Arbitration Systems Should Meet Quality Standards for Fairness**

The Commission proposes that private arbitration systems meet six key quality standards. -These standards, the Commission believes, will assure employees participating in private systems a fair and full airing of their complaints, and a full range of relief for the real victims of employment discrimination. -At the same time, these standards leave ample room for employers to experiment with a variety of private arbitration systems which will help insulate employers from the high costs of defending meritless but expensive employee suits in court.

We develop this recommendation further at the end of this Section, where we break it down into two recommendations.

## **2. IN-HOUSE DISPUTE RESOLUTION**

Efforts to resolve disputes early and amicably depend heavily on employee participation in creating and running the dispute resolution mechanism, whatever particular form it takes. -One of the most commonly cited effects of employee participation is that it can reduce both the number of formal grievances filed and the percentage taken to higher steps of the procedure or to arbitration. -Effective procedures for communication and

workplace problem solving help to build the trust needed to solve problems before they escalate into complaints - especially if the employee participation process is empowered to handle the issues of critical concern to employees. -Thus, the Commission sees successful implementation of its recommendations concerning employee participation and worker representation as essential if ADR systems are to be encouraged and promoted as a part of national policy.

Effective dispute resolution systems rest on a foundation of workplace practices that stress respect for individual and collective rights and that engender a climate of trust at the workplace. -Education about and communication of policies for resolving disputes is another essential building block for an effective system. -In recent years, for example, heightened awareness of sexual harassment concerns has led many organizations to strengthen their policies and procedures for dealing with harassment and for communicating these policies to members of the organization and educating them about this issue.<Footnote: Johns Hopkins University, for example, made extensive use of faculty and staff advisory committees to communicate with and obtain input from its university community in developing a system for handling sexual harassment and related problems. -So did the Massachusetts Institute of Technology and other organizations.>

Dispute resolution systems experts stress the importance of providing multiple options for handling workplace problems that do occur. -The options most often included in these systems are direct negotiations among the disputants, counseling and assistance by a trained facilitator, mediation, fact-finding, peer review, and finally formal procedures for issuing a decision. Multiple options are needed both because of a variety of issues that can arise and because some employees will prefer informal and confidential procedures while others will prefer more formal alternatives.<Footnote: The Brown & Root Corporation provided the Commission a description of a multi-option system implemented in their corporation in February, 1993. -Their program includes four steps: -(1) an open door policy whereby an employee can go to a manager at a higher level than the one with whom he or she has a dispute; (2) a conference in which an employee meets with a company representative and a staff person from the dispute resolution system to discuss options for resolving the issue; (3) mediation with an outside mediator supplied by the American Arbitration Association (AAA); and (4) arbitration with an outside arbitrator also supplied by the AAA. Individual employees have the right to be represented by an attorney of their choice and the company pays up to \$2,500 of the employee's legal fees (although so far none of the employees who have pursued cases to arbitration have taken advantage of this offer).

-The employee pays the first \$50 for the outside mediation or arbitration service and the company pays the rest. -The company says almost 500 employees have used the system, 75 percent of the cases were resolved within four weeks, and there have been 25 outside mediations and four arbitrations. -The annualized cost of the program is substantially less than what one large court case would cost the two sides. Brown & Root requires participation in the plan -- including foregoing litigation for arbitration or mediation -- as a condition of employment for all of its non-union employees in the U.S. The company has, however, reserved the right to terminate the plan at its will.>

Most experts agree that it is important to involve a wide cross-section of the workforce in the design and administration of workplace dispute resolution systems.<Footnote: See, testimony to the Commission of the Labor Policy Association presented by Mr. Joseph F. Vella, Vice President, Federated Department Stores, Sept. 29, 1994, p. 15.> -Practice varies considerably, however, on this issue. -In unionized settings, employees have input into the design and/or modification of the system through contract negotiations and through their shop --stewards and/or grievance committee representatives. -In non-union settings procedures vary more widely. A long-standing system in place at Donnelly Corporation in Michigan involves employees through elected representative committees that have authority to make binding decisions to resolve grievances or complaints. -As noted in the Fact Finding Report (p.59), this is part of a broader system of employee participation in the company. -However, few other companies have as much employee participation built into their systems as Donnelly.<Footnote: In particular, very few ADR systems presently involve employee representatives directly in the oversight or evaluation of the system. Brown & Root's dispute resolution system, for example, reports to a Dispute Resolution Policy Committee composed of senior executives of the company. -Submission of Mr. Joe Stevens, p.12.> -

Employee advocates see the need for a strong and informed role for employee representatives in ADR systems. -Some believe that no system of employee involvement can overcome the power imbalances inherent in employment relationships if employees lack independent representation, either through a union or some other organization not controlled by management. -Ms. Judith Lichtman, President of the Women's Legal Defense Fund, emphasized this point in testimony to the Commission:

We remain very concerned about the potential for abuse of ADR created by the imbalance of power between employer and employee, and the resulting unfairness to employees who, voluntarily or otherwise, submit their disputes to ADR. -These concerns are

obvious if the process is controlled unilaterally by employers, such as when employees are required to sign mandatory arbitration clauses as a condition of employment; union representation may greatly reduce this disparity.<Footnote: Oral Statement of Judith L. Lichtman, President, Women's Legal Defense Fund, September 29, 1994.> -

This view was echoed by representatives of other women's and worker advocacy groups.<Footnote: See, e.g., Sept. 29, 1994 testimony of Mr. Nelson Carrasquillo, Executive Director, Farmworkers Support Committee.> -Yet women's groups also recognize that, if properly designed and used to supplement government and court enforcement of workers' rights, ADR systems can be useful in resolving disputes.<Footnote: Testimony of Ms. Judith Lichtman, Sept. 29, 1994. See also the Sept. 29, 1994 testimony of Ms. Martha Burk, President, Center for the Advancement of Public Policy, speaking for a coalition of 20 women's organizations.>

The Commission sees the development of private systems for prevention or informal resolution of disputes, tailored appropriately to fit different employment settings, as essential to the effectiveness of the more formal arbitration procedures discussed in the next section. -The Commission also believes there is considerable scope for future innovation in these systems. -For example, unions, professional associations, and other worker advocacy groups may wish to market their services in representing individuals in these processes and providing technical advice and services in the design and oversight of these systems. -The Commission encourages experimentation with and evaluation of current ADR systems and those that may evolve in the future.

### **3. BINDING ARBITRATION FOR PUBLIC LAW DISPUTES**

As a practical matter, the Commission recognizes that not all workplace disputes can be resolved through in-house, voluntary dispute-resolution procedures. Rather, when voluntary procedures fail, the parties must resort to a system which can provide a final and binding decision. -Currently, as the Commission discussed in the Fact Finding Report, the dominant mechanism for securing binding adjudication of employees' public law grievances is litigation in the federal and state court system.

The Commission acknowledges that court litigation has become a less-than-ideal method of resolving employees' public law claims.

As spelled out in the Fact Finding Report, employees bringing public law claims in court must endure long waiting periods as governing agencies and the overburdened court system struggle to find time to properly investigate and hear the complaint.

-Moreover, the average profile of employee litigants -- detailed in the Fact Finding Report -- indicates that lower-wage workers may not fare as well as higher-wage professionals in the litigation system; lower-wage workers are less able to afford the time required to pursue a court complaint, and are less likely to receive large monetary relief from juries. Finally, the litigation model of dispute resolution seems to be dominated by "ex-employee" complainants, indicating that the litigation system is less useful to employees who need redress for legitimate complaints, but also wish to remain in their current jobs.

For these reasons, the Commission believes that development of private arbitration alternatives for workplace disputes must be encouraged. -High-quality alternatives to litigation hold the promise of expanding access to public law rights for lower-wage workers. -Private arbitration may also allow even the most contentious disputes to be resolved in a manner which permits the complaining employee to raise the dispute without permanently fracturing the employee's working relationship with the employer.

In light of the important social values embodied in public employment law and regulation, however, the Commission believes that a shift to private alternatives must proceed carefully. -Significant quality standards should be met by the private arbitration mechanisms developed by individual firms and their employees, to enhance the contributions they make to insuring both protection of and respect for America's workforce.

### **(1) Quality Standards**

During the Commission's deliberations and hearings on workplace arbitration, the Commission principally focused its attention on the following question: what forms and methods of private arbitration provide high-quality, fair and accurate results?

-In response to this inquiry, the Commission was pleased to see a high degree of consensus,<Footnote: Sept. 29, 1994 Testimony of Mr. Arnold M. Zack, President, National Academy of Arbitrators and Professor Samuel Estreicher.> -including among employer groups,<Footnote: Testimony of the Labor Policy Association, September 29, 1994.> regarding the quality standards necessary to ensure effective protection of employees' substantive legal rights.

-In fact, both employers and employees agree that if private arbitration is to serve as a legitimate form of private enforcement of public employment law, these systems must provide:

neutral arbitrator who knows the laws ---in question and understands the concerns of the parties;

a fair and simple method by which the employee can secure the necessary information to present his or her claim;



a fair method of cost-sharing between the employer and employee to ensure affordable access to the system for all employees;

the right to independent representation if the employee wants it;

a range of remedies equal to those available through litigation;

a written opinion by the arbitrator explaining the rationale for the result; and

sufficient judicial review to ensure that the result is consistent with the governing laws.

At the same time, most commentators agreed that the imposition of quality standards must not turn arbitration into a second court system. -For arbitration to achieve its potential for providing better and cheaper access to enforcement of employment protections, costly and time-consuming legal mandates must be avoided. -Moreover, if arbitration systems are to provide a dispute resolution process more tailored to the specific needs of a given worksite, quality standards must not require rigid procedures that preclude continued experimentation with arbitration design.

The Commission endorses this general consensus. -Meaningful quality standards coupled with space for flexible experimentation with low-cost procedures should guide employers designing workplace arbitration systems. -In specific terms, the Commission recommends the following guide posts for ensuring quality in private arbitration:

Selection of Arbitrator. -The selection process should allow both the employer and the affected employee(s) to participate. -The arbitrator should be selected from a roster of qualified arbitrators who have training and experience in the area of law disputed and are certified by professional associations specializing in such dispute resolution.<Footnote: The Commission encourages the various governing agencies responsible for overseeing the processing of public law claims, such as the EEOC or OSHA, to implement training programs for public law arbitrators and to adopt standard training requirements to be satisfied by arbitrators marketing their services for public law dispute resolution.> Attention should be paid to ensuring that professional rosters include women and minorities in significant numbers. -Neither party should be able to limit the roster unilaterally so as to risk the possibility that the arbitrator finally selected will be biased in favor of that side.

Procedures. -Aggrieved employees should have the opportunity to gather the relevant information they need to support their legal claims. -Employees pursuing a claim, for example, should be granted access to their personnel files. -Broader access to personnel files should also be available for workers bringing disparate impact or treatment claims. -Workplace arbitration systems might also consider allowing a complaining employee at least one deposition, or official interview, of a company official of the employee's choosing. -The arbitrator should be empowered to expand discovery to include any material he or she finds valuable for resolving the dispute.

Payment of Arbitrator. -To ensure impartiality of the arbitrator, both the employee and the employer should contribute to the arbitrator's fee. -Ideally, the employee contribution should be capped in proportion to the employee's pay, so as to avoid discouraging claims by lower-wage workers.

Awards and Remedies. The introduction of a workplace arbitration system should not curb substantive employee protections. -This means that private arbitration must offer employees the same array of remedies available to them through litigation in court. -Public law arbitrators should be empowered to award whatever relief -- including reinstatement, back pay, additional economic damages, punitive awards, injunctive relief, and attorney's fees --that would be available in court under the law in question.

Final Arbitrator Ruling. -The arbitrator should issue a written opinion spelling out the findings of fact and reasons which led to the decision. -This opinion need not correspond in style or length to a court opinion. -However, it should set out in understandable terms the basis for the arbitrator's ruling.

Court Review. -Judicial review of arbitrator rulings must ensure that the arbitration decision reflects an appropriate understanding and interpretation of the relevant legal doctrines. -While a reviewing court should defer to an arbitrator's fact findings as long as they have substantial evidentiary basis, the reviewing court's authoritative interpretation of the law should bind arbitrators as much it now binds administrative agencies and lower courts. -For example, if an arbitration decision in regard to a sexual harassment claim fails to grasp and apply the standard set for such claims by the Supreme Court, <Footnote: Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986).> the reviewing court must overturn the arbitration decision as inconsistent with current law.

## **(2) Employee Participation in Workplace Arbitration**

Having set out the key requirements for high-quality arbitration, the Commission now turns to the question of whether -- with respect to an arbitration system which satisfies the quality standards listed above -- an employee's agreement to arbitrate an employment law claim should be legally enforceable. Growing out of the Gilmer decision, the Commission recognizes, is a major debate over whether an employee may agree, as a condition of employment, to be bound by an employer's arbitration system.

Testimony before the Commission indicated that a number of employers have begun to implement private arbitration systems into their employment contracts. In other words, employers offering arbitration systems are often asking their employees to agree to participate in the system — and thereby waive their right to pursue a claim in court — when the employee agrees to accept the job. -A number of lower courts have upheld these types of arrangements on the basis of the Supreme Court's decision in Gilmer.

The public rights embodied in state and federal employment law — such as freedom from discrimination in the workplace and minimum wage and overtime standards — are an important part of the social and economic protections of the nation. -Employees required to accept binding arbitration of such disputes would face what for many would be an inappropriate choice: give up your right to go to court, or give up your job. -Private arbitration systems, which we believe can work well if properly administered, will have to prove themselves through experience before the nation is in a position to decide whether employers should be allowed to require their employees to use them as a condition of employment. -We urge employers to experiment broadly with voluntary programs so the nation can gain experience with this potentially valuable tool.

## **(3) -Forbid Making Agreement to Arbitrate Public Law Claims a Condition of Employment at This Time**

-Binding arbitration agreements should not be enforceable as a condition of employment. -The Commission believes the courts should interpret the Federal Arbitration Act in this fashion. -If they fail to do, Congress should pass legislation making it clear that any choice between available methods for enforcing statutory employment rights should be left to the individual who feels wronged rather than dictated by his or her employment contract.<Footnote: With respect to the securities industry, the Commission believes employees of securities firms should not be required as a condition of employment to arbitrate

disputes arising under federal or state employment laws.  
-However, the Commission does not oppose traditional industry requirements that employees agree to arbitrate other disputes, such as those involving customers.> -At some time in the future, as the nation gains experience with private arbitration systems, it may wish to reevaluate the situation.

### **Encourage Employees to Consider Binding Arbitration of Claims After They Have Arisen**

The Commission encourages employees whose employers offer arbitration programs that meet the standards outlined above to consider their use when a dispute occurs. -Employees who decide to use a private arbitration system instead of going to court after a dispute over a legal right has arisen should be bound by the results of the arbitration decision subject to the limited court review we specified above.

In the longer run, the best way to ensure the acceptability to workers of binding arbitration of their public law claims is to afford employees an independent -voice in the design and implementation of such programs. -For the present moment, the Commission underlines its support for continuing experimentation by private parties and government agencies with low-cost, high-quality alternatives to the court-based litigation system.

Indeed, the Commission predicts that as workplace arbitration systems evolve and expand, both workers and employers will gain experience and trust in such systems and in the mutually valuable gains achieved through them. -The costs and time involved in enforcing public employment rights through the court system are increasingly denying a broader slice of American workers meaningful access to employment law protections. -High-quality private arbitration, the Commission believes, can provide both workers and their employers with an attractive alternative.

## V. Contingent Workers

### 1. GENERAL OBSERVATIONS

As employers seek new ways to make the employment relationship more flexible, they have increasingly relied on a variety of arrangements popularly known as "contingent work." The use of independent contractors and part-time, temporary, seasonal, and leased workers has expanded tremendously in recent years. The Commission views this change both as a healthy development and a cause for concern.

On the positive side, contingent employment relationships are in many respects a sensible response to today's competitive global marketplace. The benefits are clear that various forms of contingent work can offer to both some management and some workers. Contingent arrangements allow some firms to maximize workforce flexibility in the face of seasonal and cyclical forces and the demands of modern methods such as just-in-time production. This same flexibility helps some workers, more of whom must balance the demands of family and work as the numbers of dual-earner and single-parent households rise. Workers benefit when a diversity of employment relationships is available. For example, temporary work provides a mechanism for transitions between jobs, affording employers and workers an opportunity to size each other up before deciding to enter into a more stable employment relationship. Manpower Incorporated CEO Mitchell S. Fromstein told the Commission that his firm transitioned approximately 150,000 "temps" into permanent jobs with client companies in 1993 alone.<Footnote: Statement of July 25, 1994, at 3.>

On the negative side, as the Fact Finding Report noted, contingent arrangements may be introduced simply to reduce the amount of compensation paid by the firm for the same amount and value of work, which raises some serious social questions. This is particularly true because contingent workers are drawn disproportionately from the most vulnerable sectors of the workforce. They often receive less pay and benefits than traditional full-time or "permanent" workers, and they are less likely to benefit from the protections of labor and employment laws. A large percentage of workers who hold part-time or temporary positions do so involuntarily. The expansion of contingent work has contributed to the increasing gap between high and low wage workers and to the increasing sense of insecurity among workers noted in the Fact Finding Report, (pp. 93-94).

Unfortunately, current tax, labor and employment law gives employers and employees incentives to create contingent relationships not for the sake of flexibility or efficiency but in order to evade their legal obligations. For example, an employer and a worker may see advantages wholly unrelated to efficiency or flexibility in treating the worker as an independent contractor rather than an employee. The employer will not have to make contributions to Social Security, unemployment insurance, workers' compensation, and health insurance, will save the administrative expense of withholding, and will be relieved of responsibility to the worker under labor and employment laws. The worker will lose the protection of those laws and benefits and the employer's contribution to Social Security, but may accept the arrangement nonetheless because it gives him or her an opportunity for immediate and even illegitimate financial gains through underpayment of taxes. Many low-wage workers have no practical choice in the matter. The federal government loses billions of dollars to underpayment of taxes by workers misclassified as independent contractors. A 1989 GAO study found that 38 percent of the employers examined misclassified employees as independent contractors.

<Footnote: GAO/GGD-89-107 Misclassification of Workers, 2. See Committee on Government Operations, U.S. House of Representatives, "The Administration and Enforcement of Employment Taxes--A Status Report on Ideas for Change," 1994. Also see, Advisory Council on Unemployment Compensation, Misclassification of Workers as Independent Contractors, November 1994.> A June 1994 study conducted by the accounting firm Coopers & Lybrand estimates that revenue loss due to misclassification will total \$3.3 billion annually by 1996.<Footnote: "Projection of the Loss in Federal Tax Revenues due to Misclassification of Workers," submitted July 25, 1994 by the Coalition for Fair Worker Classification.>

The Commission does not believe these problems render contingent forms of work inherently illegitimate. On the contrary, we affirm the valuable role contingent arrangements can play in diversifying the forms of employment relationship available to meet the needs of American companies and workers. The goal of public policy should be to remove incentives to use them for illegitimate purposes.

We believe the changes in labor and employment law discussed below will make a contribution toward achieving this goal.

## **2. RECOMMENDATIONS**

In light of the considerations discussed above, we make recommendations regarding contingent workers in two areas:

(1) The definition of employee in labor, employment, and tax law should be modernized, simplified, and standardized.

Instead of the control test borrowed from the old common law of master and servant, the definition should be based on the economic realities underlying the relationship between the worker and the party benefiting from the worker's services.

(2) The definition of employer should also be standardized and grounded in the economic realities of the employment relationship. Congress and the NLRB should remove the incentives that now exist for firms to use variations in corporate form to avoid responsibility for the people who do their work.

The Commission received a number of other proposals about contingent work, many of which merit serious attention. We devoted a hearing to the subject on July 25, 1994. A working group of the Commission held a round table discussion with ten groups representing low wage workers on October 7, 1994. On both occasions, we heard testimony about the plight of people on the lowest rungs of the employment ladder. More workers now find themselves in contingent employment relationships than ever before.

Among the ideas advanced in these forums and in written submissions to the Commission were expanding the coverage of various statutes to seasonal workers; affording farm workers the protections of the NLRA; mandating equal pay for equal work as well as equal benefits on a pro-rata basis for part-time employees; giving employees of contractors a right of first refusal when they are displaced because their employer loses a contract for ongoing services; and putting a time limit on temporary positions, so that they would convert to regular employee positions with the client firm after a specified time period.

The Commission takes no position on these proposals.

Frankly, it is beyond our means to recommend a full policy program in this emerging area of concern. However, we wish to emphasize the importance of a comprehensive study <Footnote: The Bureau of Labor Statistics announced on December 9, 1994 its first comprehensive survey of the contingent workforce as a supplement to the current population survey, the results to be available in June 1995.> to develop a balanced public policy to mediate the

concerns of flexibility and productivity on the one hand and economic security and fairness on the other.

## **1. The Definition of Employee**

The single most important factor in determining which workers are covered by employment and labor statutes is the way the line is drawn between employees and independent contractors. Each labor and employment law statute covers only those it defines as employees. The statutes do not protect others, notably independent contractors. When one thinks of an independent contractor relationship, one normally thinks of one firm hiring a second firm--with its own staff, equipment, and resources-- to do certain work, instead of having its own employees do it. The problems arise when the first firm hires not another firm but a single or several individuals to do work, and then wishes to treat those individuals as independent contractors rather than as employees. There are two major problems with the definition of employee in current labor and employment law: (1) each statute makes the distinction in its own way, presenting employers with an unnecessarily complicated regulatory maze; (2) in substance, the law is based on a nineteenth century concept whose purposes are wholly unrelated to contemporary employment policy.

The NLRA, the Civil Rights Act, the Fair Labor Standards Act, the Employee Retirement Income Security Act -- each major labor and employment statute -- has its own definition of employee and its own way of drawing the line between employees and independent contractors. Many of these definitions appear to be quite similar. But they were created over a period of a half century, and their language is often vague or circular, leaving them open to a broad range of interpretations. As a result, the line has been drawn differently in the different statutes, depending on the inclinations of the agency at the time or Supreme Court doing the drawing. These differences in interpretation mean that a worker might be deemed an employee for purposes of the FLSA but an independent contractor for purposes of the NLRA, without any apparent policy justification for the disparity of treatment. The Commission finds no principled justification for this regulatory morass.

As for the substance of the definition of employee, the legal debate has been framed from the beginning by the common law distinction between an employee and independent contractor. This nineteenth century concept was created by judges for purposes such as determining when a "master"



should be held liable for torts committed by a "servant."

The doctrine emphasizes the degree of control the master has over the servant, on the theory that a person with little control over the actions of another should not be liable for them. Over the years, the doctrine has grown highly formalistic, to the point that the IRS, which uses a version of it for determining tax liability, employs 20 factors in drawing the employee/independent contractor line.<Footnote: Internal Revenue Manual, 4600 Employment Tax Procedure, Exhibit 4640-1.> Given the proliferation of factors making up the test, its application often yields inconsistent results. What is more, its formalism provides employers and workers with a means and incentive to circumvent the employment policies of the nation. Whatever the actual nature of their relationship, an employer and worker can structure it on paper to give the latter independent contractor rather than employee status.

While some statutes, notably the FLSA,<Footnote: See U.S. v. Silk, 331 U.S. 704 (1947).> have diverged from the traditional independent contractor test, others, such as the NLRA,<Footnote: NLRB v. United Insurance Company of America, 390 U.S. 256 (1968).> follow it closely. Two years ago, the Supreme Court gave the test new life in the case of Nationwide Mutual Insurance Company v. Darden.<Footnote: 112 S.Ct. 1344 (1992).> The Darden Court concluded that ERISA's definition of employee was meaningless. To solve this problem, the Court held that when Congress fails to define a term that has a settled meaning at common law, courts should infer that Congress meant to adopt the common law definition. Thus, under ERISA an employee means a worker under the direct control of the employer p i.e., one who is not a common law independent contractor. Darden has already begun to reverberate in the employment law field well beyond ERISA.<Footnote: Some lower courts have decided they must apply the common law test to Title VII as well as ERISA. See, e.g., Lattanzio v. Security National Bank, 825 F.Supp. 86 (E.D.Pa. 1993) (expressly disregarding the Third Circuit's previous reliance on another test).>

### **(1) Streamline and Modernize the Definition of Employee**

The Commission concludes that the ancient doctrine of master and servant provides a poor vehicle for delivering federal employment policy into the twenty-first century. The law in this area should be modernized and streamlined: there is no need for every federal employment and labor statute to have its own definition of employee. We recommend that Congress adopt a single, coherent concept of employee and apply it

across the board in employment and labor law.

## (2) Use an Economic Realities Test to Determine Who is an Employee

The determination of whether a worker is an employee protected by federal labor and employment law should not be based on the degree of immediate control the employer exercises over the worker, but rather on the underlying economic realities of the relationship. Workers should be treated as independent contractors if they are truly independent entrepreneurs performing services for clients  $\beta$  i.e., if they present themselves to the general public as an established business presence, have a number of clients, bear the economic risk of loss from their work, and the like.

Workers who are economically dependent on the entity for whom they perform services generally should be treated as employees. Factors such as low wages, low skill levels, and having one or few employers should all militate against treatment as an independent contractor. A revised test based on the economic realities of the work relationship will eliminate the incentives to use the independent contractor form to evade the obligations of national workplace policy while leaving it fully available where its use is truly appropriate.

In order to create a consistent and rational policy on the definition of employees, Congress should change the tax law as well. Even if the definition of employee is simplified and standardized across employment and labor law, tax law will continue to present a significant incentive for misclassification if it goes unchanged. Two reforms are necessary in this area. First, Congress should apply an economic realities test for determining who is an employee to the Internal Revenue Code as well as to employment and labor law. Second, Congress should strengthen the IRS's ability to make sure employers and workers draw the line properly, whatever the test.

Currently, employers decide whether their workers are employees or independent contractors with little scrutiny from the IRS. Section 530 of the Revenue Act of 1978 ties the IRS's hands in attempting to deter misclassification.

Section 530 prevents the IRS from collecting back taxes from an employer who misclassified its employees as independent contractors  $\beta$  or even from requiring the employer to reclassify the workers as employees  $\beta$  if any of three conditions are met: the employer's classification

follows judicial precedent or IRS rulings; the classification is based on long-standing industry practice; or the employer has been audited by the IRS in the past without being assessed for the misclassification.

The past audit rule is indefensible as a matter of policy, because there is no requirement that the past audit looked into employment taxation. Thus, even if the employer was audited for something totally unrelated to the classification question, and the other two justifications for providing a safe harbor do not apply, the employer is free to misclassify employees indefinitely and avoid paying taxes it properly owes without penalty.

### **(3) Eliminate the "Past Audit" Safe Harbor for Misclassification of Employees as Independent Contractors**

Congress should reform Section 530 to permit the IRS to require an employer to reclassify an employee for the future any time the agency discovers an improper classification, regardless of past audits, if the employer's classification cannot be justified on the basis of accepted industry practice or tax law precedent. In addition, the IRS should be able to reclassify the employee for a limited period, such as up to three years into the past, if the agency has not audited the employer on the classification issue during that period.

## **2. The Definition of Employer**

The definition of employer plays a role similar to the definition of employee in labor and employment law. Each statute sets out a definition of the employer concept which limits the scope of the statute's coverage by determining which entities are liable as employers and which are not.

As with the employee concept, the employer definition varies from statute to statute. We believe it should be standardized and modernized in order to allow free play for mutually rewarding contingent relationships while eliminating incentives to create contingent relationships merely to evade legal obligations.

As a general rule, the definitions of employer are premised on a model of employment relations in which one set of employees is engaged in a continuing relationship with one enterprise. Thus, many federal statutes limit employer status to those parties responsible for hiring or firing, setting schedules, or actually issuing the worker's paycheck. This model of the employment relationship is badly out of date, not least because it fails to account for

the extent to which contingent work arrangements have become commonplace rather than marginal in our society. Many thousands of workers are now employed by one firm but actually provide services for another as temporary, leased, or contract employees, and these relationships are often of short duration. Federal law should welcome this change, while ensuring that contingent relationships are established for the purposes of efficiency and flexibility, not to evade workplace standards.

As the law now stands, the narrow definition of employer found in most employment and labor statutes gives firms incentives to create contingent relationships not for the sake of flexibility and efficiency, but to reduce the number of workers with access to collective bargaining and protections as to the minimum wage, overtime, pensions, benefits and the like. For example, Corporation A can create a subsidiary, Corporation B, and transfer to it work formerly done by Corporation A employees merely to avoid a collective bargaining agreement, as long as Corp. B has separate management and control over labor relations.

The incentives to use contingent forms to cut corners lead to harmful outcomes for American employers, workers, and society at large. Law abiding employers are undercut by contractors who can offer cheap services by avoiding minimum wage, Social Security, un-employment insurance, and other obligations. The economic security of workers is eroded, because the number of temporary and contract jobs is artificially inflated by socially harmful "cost savings."

Many workers at the bottom of the employment ladder suffer under conditions that violate national standards of decency.

For example, the GAO recently reported that sweatshops continue to be a major problem in the garment industry.<Footnote: United States General Accounting Office, Garment Industry: Efforts to Address the Prevalence and Conditions of Sweatshops, Nov. 1994 (GAO/HEHS-95-29).>

The incentives to use contingent arrangements to avoid employment obligations create an unnecessary enforcement burden that state and federal governments are unable to bear and for which taxpayers should not have to pay.

The Commission believes the solution to this problem is not to reduce the ability of the buyers and sellers of labor to experiment with all manner of contingent relationships, but rather to remove the incentives to use those arrangements in ways that undercut national employment standards. In light of this policy, we make the following recommendations.

#### **(4) Modernize and Standardize the Definition of Employer**

## **Based on Economic Realities**

The definition of employer in statutes across the employment and labor law spectrum should be changed and made uniform in a way that reflects the economic realities of the relationship between providers and recipients of services.

### **(5) Expand "Single Employer" Doctrine**

"Single employer" doctrine should be expanded so that firms do not have incentives to use variations in the corporate form to avoid workplace responsibilities. In general, a grouping of parent, subsidiary, sibling, and spin-off entities should be considered a single employer of their respective employees.<Footnote: One illustration of the single employer problem arising under labor law is the "double-breasted" contractor arrangement in the construction industry. A unionized contractor may establish a related or subsidiary contractor to do essentially the same kind of construction work but to do it nonunion, even though the firm was bound by a collective agreement through the original corporate entity. The Supreme Court has concluded that the current definition of employer under the NLRA is broad enough for the NLRB to hold the two corporate entities to be a single employer. *South Prairie Construction Co. v. Operating Engineers Local 627*, 425 U.S. 800 (1976).

However, the Board generally has continued to treat the operations of related corporate entities in the construction field as separate bargaining units, with the unit designated by the firm as nonunion not having to meet the employment standards called for in the collective bargaining agreement.

The Commission received extensive submissions on this issue. We recommend that the Board revisit the question of whether its policy continues to be appropriate in light of the Commission's broader judgments about the single employer doctrine.> In this area, the Internal Revenue Code can serve as a model for labor and employment law.<Footnote: See 26 U.S.C. \_414.>

### **(6) Expand "Joint Employer" Doctrine as to Safety and Health and Client Cancellation of Contracts**

"Joint employer" doctrine should also be expanded, but not in a way that makes clients responsible for the actions of contractors over whose operations and employees they have little control. In client-provider relationships, the client firm should be liable to the provider firm's employees in two particular areas. First, because of the crucial importance of occupational safety and health, the client should be responsible for ensuring that its

contractors meet the relevant legal standards regarding unsafe conditions or practices to which the workers may be exposed. Second, the client should be liable if its own decisions or actions with respect to the contract serve to deny the workers their legal rights under labor-relations law. <Footnote: Thus, it should be a violation of the labor law for a client whose contractor's employees vote to unionize to terminate the contract as a result, since the client has effectively eliminated the employees' ability to choose collective bargaining. Indeed, the prospect of such a contract termination by an anti-union client þ the risk of which the contractor can draw to the attention of its employees during the representation campaign þ may prove a significant deterrent to the contractor's employees exercising their legal right to bargain collectively.>

The Commission also encourages the NLRB to use its rule making and adjudication processes to establish a fair doctrine governing joint-employer situations.

## **VI. Regulatory Overview: Employment Law Programs**

### **1. INTRODUCTION**

The Fact Finding Report, in Chapter IV (pp. 105-137) presents an account of the rapid growth of federal and state employment legislation, creating individual rights for workers. In some cases, employment law has also created forms of collective rights at the workplace, such as rights to a safe and healthy workplace or to freedom from an atmosphere of sexual harassment. These rights relate to the situation confronting a group of workers rather than an individual worker.

At the same time, many state courts have transformed their traditional hands-off posture towards employment at will into a measure of legal protection against wrongful dismissal.

Enforcement of these employment laws against non-complying employers requires litigation in federal or state courts or administrative proceedings before regulatory agencies.

Employment law cases filed in the federal district courts in the two decades 1971-1991 increased more than four-fold, and there was also a rapid expansion of suits in the state courts seeking redress for wrongful dismissal or discrimination.

There has seldom, if ever, been a systematic overview of this statutory structure and the resulting detailed regulations and court interpretations that flow from employment law. Congress and its committees have considered the legislation piecemeal. Administrative agencies generally consider regulatory, interpretive and procedural issues separately, even in the case of similar issues that arise in different agencies of the same Department. Courts review individual cases. Labor organizations tend to focus on those regulations that affect their members in separate workplaces. Employers in different sectors, of different sizes, and with different problems are affected in quite different ways, although employers and their organizations probably have the broadest overview. The whole field has become far too large and complex for independent researchers who tend to specialize in single issues or agencies.<Footnote:United States General Accounting Office, Workplace Regulation, Information on Selected Employer and Union Experiences, Vol. I and II, Washington, D.C., June, 1994. The study was requested by the House Committee on Education and Labor, both the majority and minority

members.>

## **2. SIGNIFICANT PROBLEMS WITH THE PRESENT SYSTEM**

The Commission heard a variety of complaints about the present system of enforcement of employment law through litigation in federal or state courts or administrative proceedings before regulatory agencies. Among these problems are the following:

(1) Despite the fact that a number of recent statutes have encouraged alternative methods of dispute resolution in federal employment statutes, both administrative and judicial backlogs have sharply risen.<Footnote:See, for example, the Age Discrimination in Employment Act of 1967; the Americans with Disabilities Act of 1990; the Administrative Dispute Resolution Act of 1990; the Judicial Improvement Act of 1990, Title I; the Civil Rights Reform Act of 1991; and the Family and Medical Leave Act of 1993.>

The EEOC, for instance, reports an inventory of nearly 97,000 complaints in FY 1994 pending charges. This figure represents a backlog of 18.8 months, a sharp increase from the prior year's 12.2 months.<Footnote:Data supplied to the Commission by the Equal Employment Opportunity Commission, from the Office of Communication and Legislative Affairs, from EEOC's Charges Data System's (CDS) Automated District Office Report, November 1994.> Such large backlogs and delays frustrate the purposes of the legislation for all parties.

(2) The access to protections for low wage employees is particularly constrained by the high costs of litigation. Employment litigation tends to be much more utilized by managerial and other higher paid employees as compared to low-wage employees, creating significant inequities.

(3) In highly competitive sectors, particularly those with high labor costs, lack of compliance with employment standards prescribed by law results in uneven treatment of workers and unfair competitive advantages for violators who undermine the socially determined standards.<Footnote:The minimum wage and overtime pay provisions of the FLSA enacted in the 1930s were in large measure designed to level the playing field on which manufacturers in different parts of the country could compete fairly and equitably. Inadequate enforcement and uneven compliance had undermined this basic social and economic purpose of the legislation. See, U.S. General Accounting Office, Garment Industry, Efforts to



Address the Prevalence and Conditions of Sweatshops,  
November 1994.>

(4) The compliance officer and investigator staff of the Department of Labor's regulatory agencies have declined, as measured by full-time equivalents (FTEs), over the past 15 years, at the same time as statutory requirements have expanded and the cases have increased. Projections for future enforcement staff are likely to show further declines as agencies implement their "streamlining" plans, which call for a reduction of 12 percent in FTE levels for FY 1999.

Similarly, the EEOC, since 1990, has seen its investigators decline in the face of a substantial increase in caseloads.

As a result the average caseload per EEOC investigator has increased from 51.3 in FY 1990 to 122.0 in FY 1994.<Footnote:See footnote 3 above.>

The attached table reports changes in the investigative staffs for various Department of Labor agencies, the Equal Employment Opportunity Commission, and the National Labor Relations Board for the years 1980, 1990 and 1994.

(5) A number of employer-based dispute resolution systems are being established by some employers in nonunion workplaces p often as a condition of employment p to respond to the expansion in litigation and costs. Many of these unilaterally established systems do not meet the test of fairness in one or more respects. It is essential at this stage in the development of such workplace-based dispute resolution systems to define structures that are inherently fair and thus can gain wide acceptance among employees and the general public.(see Section IV above.)

Neither the existing administrative and litigation routes nor the early ventures into private workplace-based dispute systems seem to provide what is really needed. To be effective, a system for resolving disputes about labor standards must settle claims fairly, close to the workplace, at an early stage, in a manner consistent with law and public policy, and with direct involvement of the disputing parties rather than through litigation much later with legal representation, and with higher transaction costs. In particular, disputing parties need to achieve early and direct settlement if they are to continue to work together productively. Absent an effective dispute resolution system, litigation tends to lead to the departure of the employee, regardless of the legal verdict.

### **3. DOL AGENCY CASE MANAGEMENT AND ADJUDICATION PROCEDURES**

The Department of Labor is responsible for administering approximately 180 statutes. These statutes have been enacted over many years, beginning in the 1930s with the Davis-Bacon (DBA), Walsh-Healey (PCA), and Fair Labor Standards Acts (FLSA). Over the years, new statutory responsibilities were added, including the Service Contract Act (SCA), the Mine Safety and Health Act (MSHA), the Occupational Safety and Health Act (OSHA), the Employee Retirement Income Security Act (ERISA) and the Family and Medical Leave Act (FMLA), to name some of the major laws.

With enactment of these statutes, Congress typically mandated different enforcement and penalty structures, thus requiring the Department to establish different case handling and adjudication procedures to administer different statutes. Currently, there are approximately 20 major adjudication procedures and a considerable number of minor procedures in operation at the Department.

The procedures for OSHA are illustrative of the administration of a major labor statute. (Unlike the Wage and Hour Act, however, individual employees are not authorized to institute court cases under OSHA.) In FY 1993, OSHA initiated 39,723 inspections and investigations. These were either programmed (selected in advance using a system targeting) or unprogrammed (due to imminent danger, fatality, catastrophe, referrals of a follow-up inspection).<Footnote:An employer can refuse the OSHA compliance officer entry. If refused entry, OSHA must get an inspection warrant through the U.S. District Court.> As a result of these inspections, which took an average of 48 days, OSHA issued 29,189 citations.

Upon receipt of the citation, the employer may request an informal conference with the Area Director within 15 days of receipt, and then enter into an "informal settlement agreement." In FY 1993, OSHA entered into 15,697 informal settlements with employers. Alternatively, the employer may contest the citation within 15 working days by filing a "Notice of Contest." In FY 1993, 2,974 such Notices were filed.

Following the Notice of Contest, any subsequent settlement agreement that OSHA enters into with the employer is a "Formal Settlement Agreement." Such agreements may be negotiated at any point following the Notice of Contest and may even be concluded during the litigation process.<Footnote:OSHA (and other DOL agencies) at this

point in the process may also enter into a "Corporate-Wide Settlement Agreement" with an employer, which would include in the settlement worksites other than the one actually inspected.> Typically, between 80 to 85 percent of contested cases are resolved by formal settlement agreements.

If the parties fail to resolve the case through a Formal Settlement Agreement, the case proceeds to an Administrative Law Judge (ALJ) for Hearing. The Notice of Contest is also transmitted to the Occupational Safety and Health Review Commission (OSHRC), which awaits the outcome of the ALJ hearing. In FY 1993, 191 cases proceeded to the ALJ hearing stage. Following the hearing before the ALJ, which takes an average of 12 months from assignment to completion, the Judge will issue a decision and file it with the Commission.

Once the ALJ decision has been filed with the Commission there is a 30-day period during which any aggrieved party may request a review of the Judge's decision by the Review Commission. During FY 1993, 77 cases were directed for review, taking an average of 15.5 months to complete.

Following a decision by the Review Commission, parties may appeal to the U.S. Court of Appeals within 60 days. There were 31 appeals requested in FY 1993, with judicial review taking an average of nine months. An aggrieved party may seek further review by the U.S. Supreme Court within 90 days after the entry of mandate by the lower court.

This OSHA administrative and adjudication process provides one illustration of the procedures used by DOL in the administration of labor statutes. There are, however, a number of other major statutes administered by the Department, most with their own processes for dispute resolution. For example, the Employment Standards Administration (ESA) lists different procedures for each of its 12 "significant areas" in which the Wage and Hour Division has labor standards enforcement responsibility. These are: (1) FLSA minimum wage and overtime; (2) FLSA child labor; (3) Wage and debarment provisions of Davis Bacon and Related Acts (4) Wage and debarment provisions of SCA and Walsh-Healey; (5) Family and Medical Leave Act; (6) Migrant and Seasonal Agricultural Worker Protection Act (7) Immigration Reform and Control Act (IRCA) H-1A (alien registered nurses); (8) IRCA-H-1B (professionals and fashion models "of particular merit"); (9) IRCA H-2A (temporary foreign agricultural workers); (10) IRCA D-1 (alien crew members performing longshore work in U.S. ports); (11) IRCA F-1 (foreign students working off-campus); and (12) seven

environmental whistle blower protection statutes.

In addition to OSHA and ESA, there are three other major DOL regulatory agencies that have administrative procedures unique to their statutes:

(a) The Mine Safety and Health Administration (MSHA) has procedures that, in many ways, are similar to those of OSHA, including a review commission that hears appeals from ALJ decisions. MSHA's procedures, however, have many distinctive features and handle a much higher caseload of approximately 160,000 citations and 16,000 contested actions annually.

(b) The Pension and Welfare Benefits Administration (PWBA) which administers the Employee Retirement Income Security Act, conducted approximately 3500 investigations in FY 1994, leading to roughly 650 cases involving violations. Of this number, 128 were referred for litigation. It is noteworthy that PWBA cases tend to be larger, more complex, and more costly to litigate than cases from other DOL agencies.

(c) The Office of Federal Contract Compliance, which administers anti-discrimination cases arising from Executive Order 11246, Section 503 of the Rehabilitation Act, and the Veterans' Reemployment Rights Act, also has its own sets of administrative and adjudicatory procedures.

The number and complexity of statutes, regulations and procedures administered by the Department is striking. These diverse administrative procedures may themselves be a contributing factor to the complexity of workplace dispute resolution.

#### **4. RECOMMENDATIONS FOR REDUCING AND RESOLVING REGULATORY DISPUTES IN THE DEPARTMENT OF LABOR PROGRAMS**

The enormity of the regulatory task and the limited resources available to the Department raise a fundamental question. Either these agencies need to be provided additional funding to meet the standards and methods of compliance prescribed when the statutes were enacted, or the scope of those expectations and the reach of the regulations be reduced, as well as new methods of regulation and compliance be developed. Until these basic choices of national policy are more generally determined, the following are areas in which the Commission makes recommendations as to directions that can be implemented in the near term.

## **(1) Expand the Use of Negotiated Rulemaking**

A first step in avoiding litigation is to develop better regulations. Negotiated rulemaking (or "reg-neg") is a process that brings together those who would be significantly affected by a rule, including the Government, to reach consensus on some or all of its provisions before the rule is published as a proposal for public comment. The process is voluntary, and the participants establish their own rules of procedure. An impartial mediator is used to facilitate intensive discussion among the participants, whose committee hearings are open to the public. Agreements that emerge from this process tend to be more technically accurate, clear and specific, and less likely to be challenged in litigation than are rules produced without such interaction. Reg-neg offers DOL an opportunity to avoid conflicts and disputes in the labor standards area long before they arise as compliance problems.

Reg-neg requires certain up front costs (for travel, mediation, etc.) and may be perceived as a slower process than traditional notice and comment. The end results, however, can improve the effectiveness of the rulemaking process. In addition to saving time and money that might otherwise be spent in litigation, regulations developed through the active participation of all interested parties are generally easier to administer and enforce. The use of reg-neg in the development of regulations, or in their review and revision, can make a significant contribution to reducing litigation.

Through the Negotiated Rulemaking Act of 1990 (Public Law 101-648) Congress has fully authorized and endorsed this process. Despite the encouragement of this statute to reduce recourse to the administrative agencies and the courts, these procedures have been used rarely with respect to employment law. (Fact Finding Report pp. 124-125.)

The Department of Labor reports that since the early development of these procedures in 1975-1976, there have been only two attempts at negotiated rulemaking and a third is now in process. These three efforts all concern OSHA standards.<Footnote:See letter of October 31, 1994 from Secretary Reich to the Administrative Conference of the United States, Attachment 7.> The first of these efforts in 1983 to 1984 regarding the benzene standard was not successful. The second, on MDA (Methylenedianiline), began in 1985 and resulted in a published rule in 1992. This rule is one of the few OSHA rules not to be seriously challenged in the courts: in fact, the industry began to comply

voluntarily years before the final standard was published.

In December 1992, OSHA announced a negotiated rulemaking process concerning safety requirements for the erection of steel structures in construction. That reg-neg process is currently underway.<Footnote:The Department should consider whether the current organizational structure for reg-neg is the most efficient. Currently, the Assistant Secretary for Policy and Budget has the lead on the use of mediation and other forms of alternative dispute resolution (ADR), while the Solicitor of Labor has the lead on negotiated rulemaking. ADR and reg-neg are closely related programs that seek to avoid and solve disputes on an informal basis, without resorting to litigation.>

As the Fact Finding Report (pp. 124-125) noted, greater use of negotiated rulemaking will require different attitudes and skills from both interested parties and the agency staff than the traditional adversarial processes that tend to end in the courts, with delays and far greater expense to the government, the regulated community and other interested parties.

There have been sections of employment law that have been hotly contested for years that would benefit even now from negotiated rulemaking. For example, the unsuccessful efforts of the Wage and Hour Division since the 1970s to update its regulations governing the minimum wage and overtime pay exemption for executive, administrative and professional staff (29 CFR Part 541) b in particular, changes to the salary "docking" rule b have resulted in the current state of conflict and confusion among both private employers and municipal officials. This issue was specifically referred to on a number of occasions in testimony and presentations to the Commission. It has also arisen in the Task Force on Excellence in State and Local Government. The problems are clearly appropriate for prompt resort to forms of negotiated rulemaking.<Footnote:See, 1994 Regulatory Plan for the Department of Labor, Federal Register, November 14, 1994. It is estimated that 23 million workers are within the scope of these regulations.> The Commission recommends that the Secretary consider application of reg-neg to this long-standing and critical regulatory issue.

The Commission is pleased to learn from the October 31, 1994 letter of Secretary Reich to the Administrative Conference of the United States that the Department's policy is that "Negotiated rulemaking shall be actively considered for use by all of the Department's agencies." This policy needs to be implemented and reinforced even within existing budgets.

To do so, the Department first needs to establish negotiated rulemaking as the standard process for drafting regulations that are significant, controversial and complex, and then implement internal regulatory procedures that institutionalize this approach.<Footnote: Substantial support for this approach is found in Recommendation REG03 "Encouraging Consensus-Based Rulemaking" of the National Performance Review report, pp. 29-33.>

The Department should also work with the Administrative Conference of the United States in developing appropriate changes to the Negotiated Rulemaking Act to make it easier for regulatory agencies to use reg-neg. The current law sunsets in 1996, and any legislative amendments in a reauthorization could have a significant impact on the ability of DOL and the other regulatory agencies to make expanded use of this technique.<Footnote: For example, the current law requires that all reg-neg committees be chartered under the Federal Advisory Committee Act (FACA).

This provision creates significant and time-consuming administrative tasks for agencies that choose to use reg-neg. The statutes should be amended to eliminate this requirements, while retaining the important public safeguards that are intended by application of FACA.

Similarly, changes are needed to streamline the lengthy task for agencies of procuring the services of facilitators.>

## **(2) Improve Information and Compliance Assistance**

A second major step to avoiding labor standards disputes is to insure that employers and employees are fully informed of what is required under existing regulations and what constitutes acceptable compliance. The GAO, in its Report on Workplace Regulation, found that even the larger employers they surveyed were not confident that they knew all of the rules that applied to their business operations. Likewise, union officials noted their own lack of knowledge about some regulatory areas and indicated that all too often workers were unaware of their rights.<Footnote:See GAO Report on Workplace Regulation June 1994, Vol. 1, p. 57.>

The Department needs to provide clearer guidance as to what is required and how one might best comply. Such guidance is particularly important since so many business establishments are small or medium sized (employing fewer than 250 employees) with limited resources to follow the complexities of federal regulations. The Commission believes that a major step that DOL can take to promote compliance and reduce regulatory disputes is to provide the business and

labor communities, as well as the general public, with clear and comprehensive information on regulatory requirements.

The Commission specifically recommends that the Department establish electronic regulatory information and compliance assistance systems. Such systems would provide interested parties with greatly improved access to information on all applicable statutes, regulations, case law, or opinion letters. The technology now exists to make such information "user friendly"; and even to tailor such information to the needs of individual users.<Footnote: The rapid growth in technology with respect to "expert systems" illustrates this point. Such systems are now available in such complex areas as tax preparation. Indeed, OSHA has developed an "expert system" in conjunction with its Cadmium Standard, which includes a number of complex requirements.> The Commission recognizes that some modest groundwork has begun. It applauds such efforts as OSHA's Computerized Information System (OCIS). It also notes that the Department is already operating a public information "bulletin board" that provides some regulatory compliance assistance information p such as the text of MSHA's regulations and its Program Policy Manual. What is required, however, is a comprehensive system that provides complete information on the Department's most generally applicable regulatory requirements, follow on interpretations, and the availability of compliance assistance materials.

### **(3) Promote Self-Regulation**

Further, the Department needs to focus its attention on assisting the development of processes that provide workplace-based dispute resolution programs that are consistent with law and public policy, inexpensive, effective and fair to all parties. In the 1960s and 1970s, the Department's Wage and Hour Division operated a voluntary self-audit program named "Compliance Utilizing Education" or the "CUE" program. Approximately 100 large firms participated in this program under which DOL conducted training seminars for personnel officials of the company who then audited their firm's compliance with wage and hour regulations.

Employers participated in the CUE program because they sought to avoid unintentional systemic violations that might create liabilities for the firm. Employees were offered an informal workplace-based forum for resolving complaints, while retaining the option of raising their complaint directly to Wage and Hour on a confidential basis. CUE firms generally were not scheduled for investigation absent



employee complaints.<Footnote: Some labor standards do not lend themselves to employer-employee informal settlements because the legal standard or public policy may not fit the interests of either party. For example, if a 17-year old is employed illegally as a driver delivering pizza, neither the employer nor employee may have an interest in seeing the law enforced. These situations are limited to a relatively small number of DOL regulations..>

Despite its success, the CUE program was terminated because of the perception that the Wage and Hour Division was abandoning its enforcement obligations. The underlying principle of the program was that employers and employees should directly resolve wage and hour regulatory issues among themselves, with the Department providing employees a higher level of appeals.

The Commission would endorse efforts by the Department to assist employers, workers, and unions with training and technical assistance that will allow them to establish workplace-based systems to resolve regulatory disputes. The Commission also believes that the Department should remain as an avenue of appeal for workplace disputes that leave problems unsolved.

The clear benefit of such a system is that it will resolve more regulatory disputes in the workplace itself, while still providing the employee with recourse to a neutral agency where satisfactory resolution of the problem on the job is not forthcoming. To the degree direct settlements are reached, the Department benefits by increasing compliance without using scarce enforcement resources.

#### **(4) Expand the Use of ADR**

Following enactment of the ADR Act in November 1990, the Department of Labor took a number of small but significant steps to implement informal processes of resolving disputes. For example, the Office of Administrative Law Judges issued regulations that established a voluntary "settlement judge" process for cases referred to ALJs. The Employment and Training Administration started a pilot project using mediation to resolve grant and contract debt collection cases. The Office of Civil Rights initiated an ADR pilot test for EEO complaints by DOL employees.

Most importantly, in 1992 DOL experimented with the use of in-house mediators in cases involving OSHA and Wage-Hour violations in the Philadelphia Region.<Footnote: The Philadelphia ADR pilot test is documented in Report to the Secretary of Labor on the Philadelphia ADR Pilot Project,

(October 1992) and Marilyn L. Schuyler, A Cost Analysis of the Department of Labor's Philadelphia ADR Pilot Project, (August 1993). It is also cited in the National Performance Review as a significant accomplishment and recommended expansion of the process to all DOL regions.> In this pilot, 27 cases referred to litigation were selected for mediation. Of these cases, 22 (81% ) were settled, most at a single mediation session. Some of the cases were very complex and would have cost DOL and the outside party substantial time and resources had they been brought to trial. It is noteworthy that all the parties to these settlements expressed satisfaction with the outcomes.

The Commission applauds the work that the Department has done to date, but strongly urges that it substantially expand these efforts. Specifically, the Department should take immediate steps to expand the 1992 Philadelphia project to the remaining nine regions. The mix of cases should also be enlarged to include a wider range of litigation, especially ERISA, MSHA, LMRDA and OFFCP cases.

The Department should also explore the use of different forms of ADR, including mini trials, early neutral evaluation, and arbitration to determine which processes are most effective for different kinds of cases. The Commission recommends that the Department take a more systematic approach to ADR implementation. To date, the efforts have been relatively ad hoc, and experimentation has had to rely on the support and knowledge of a few individuals. Just in the case of negotiated rulemaking, the techniques used in ADR are substantive, and a cadre with expertise needs to be developed, maintained and promoted for all the regulatory agencies in the Department.

The Department should work closely with the Administrative Conference of the United States (ACUS) in developing the necessary changes to the ADR Act, which sunsets in October of 1995. As an active participant in this government-wide effort to improve the ADR Act, the Department can both provide leadership and potentially reap the benefits of an improved statutory framework to allow for the use of a wider range of ADR techniques.

#### **(5) Improve the Training of DOL Employees in Dispute Resolution**

As noted earlier, the vast majority of cases that DOL initiates as a result of an investigation that produces a citation are resolved without litigation. A significant number of cases are resolved directly when the employer does

not contest the citation or fine. Of those contested, agency procedures typically seek to resolve the cases without litigation. Attempts to resolve a case are typically made at the agency level and subsequently by the Solicitor of Labor after the case has been referred for legal action. The Commission applauds the efforts by agencies and SOL to achieve voluntary compliance or negotiated settlements without litigation.

A few years ago, the Congress significantly increased the penalties that OSHA, MSHA and ESA could assess. As these agencies began assessing higher fines, the rate at which firms contest these assessments has risen. For example, for more than a decade mine operators contested approximately three percent of their citations. Beginning in 1989, the contest rate rose to its current level of ten percent.

Recently, MSHA and SOL instituted the Alternative Case Resolution Initiative (ACRI) to help resolve disputes in routine cases, both before and after contests are filed, without formally referring these cases for legal action. Eighteen representatives have been provided with special training including administrative law and negotiating skills by the Federal Mediation and Conciliation Service (FMCS). Eventually, these representatives are expected to handle approximately 20 percent of the contested MSHA cases.

The Commission believes that DOL employees who are charged with case resolution should be provided formal training in mediation and negotiating skills. While some individuals have acquired such skills on their own, or by being mentored by someone already skilled in such techniques, few actually have had training in these areas. The Department would be well served by ensuring that such employees receive training, because this would lead to more timely resolution of cases and reduced litigation. The Commission recommends that DOL explore appropriate training plans.

#### **(6) Coordinations of DOL Procedures**

The various employment statutes administered by the Department were enacted and amended in piecemeal fashion over the past 60 years. For example, penalty structures established at different times have not been reviewed to determine whether they are equitable for comparable violations of different laws.<Footnote: See particularly the GAO Report Workplace Regulation, Vol. I, pp. 41-45> More importantly, the administration of these statutes has resulted in the growth (most often by statute) of complex, slow, and expensive adjudicatory structures. No

comprehensive analysis has been done to determine the effects of amendments to one labor standard on the enactment or amendments to another.

For example, the penalty structures of OSHA and MSHA have developed quite differently, notwithstanding the similarities of many workplace safety issues. The criteria for debarment under the Service Contract Act differ significantly from those under the Davis-Bacon Act, notwithstanding strong similarities in the objectives of these government contract labor statutes. Some of these differences may be based on public policy considerations, but many are the result of historical accident. Whatever the reasons, such differing legal structures appear to add complexity to their administration and contribute to disputes.

Similarly, the adjudication process of the Department is in need of review, streamlining and greater standardization. The Department of Labor is relatively unique in that it litigates the majority of its own civil cases, instead of relying on the Department of Justice to handle such litigation. Again, due to the variety of statutory constructs, cases are adjudicated in a variety of different forums, including federal district courts, the Office of the Administrative Law Judges, the OSHA and MSHA Review Commissions, the Wage Appeals Board, and others. As noted above, the processes for litigating disputes are very different, depending on the particular statute. Some processes appear unduly lengthy and complex, given the amount and nature of the penalty. The use of such different forums and procedures is cumbersome for employers, employees, and the Department, contributing to disputes rooted in the administration of the law rather than the merits of a case.

## **5. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AND ALTERNATIVE DISPUTE RESOLUTION**

From its inception in 1964, the EEOC has engaged in alternative dispute resolution. In the beginning, the EEOC had the authority only to conciliate all investigated charges on which it found cause to believe discrimination had occurred. Even after Congress, in 1972, conferred litigation authority on the EEOC, the EEOC was required to attempt conciliation of all charges on which cause had been found as a condition precedent to litigation. To the extent ADR is defined as a mechanism to resolve disputes short of litigation, the EEOC, in engaging in conciliation, has performed its law enforcement mission by utilizing, in part,

ADR.

Formal conciliation under the Commission's statutory procedure occurs after a charge has been investigated and a cause determination issued. The Commission recently decided to experiment with pre-investigation ADR when it embarked upon a one-year pilot project at four of its district offices: Philadelphia, Washington, New Orleans and Houston. This ADR program, which was developed and conducted by the Center for Dispute Settlement and Commission personnel, involved voluntary mediation of certain subject matter charges.

The pilot was completed in the Spring of 1994, and the Center for Dispute Settlement issued its evaluation of the program on December 1, 1994. In the pilot project, mediation was offered to 920 charging parties, of whom 87 percent accepted the offer. Thirty-nine (39) percent of respondent employers agreed to participate. The four district offices completed mediation of 267 charges; settlements were reached in 139 of the cases (52 percent). Smaller employers (15-100 employees) reached agreement in 60 percent of the cases, while large employers (500+ employees) settled 38 percent of their cases.. The average time for completion of the mediation process was 67 days. This compares with 247 days under the standard investigatory process.

A comparison of the ADR pilot project settlement with 251 settlements reached by the Commission under its regular charge resolution techniques revealed no "major differences" between the two, although monetary benefits tended to be slightly higher under the agency's standard negotiated settlement process.

In confidential exit evaluations, 92 percent of the parties rated the mediation experience as "very fair" or "fair". Eighty percent stated they would try mediation again if the need arose. This high degree of user satisfaction existed even when settlement was not reached.

In December 1994, Chairman Gilbert F. Casellas announced the formation of an Alternative Dispute Resolution Task Force, co-chaired by Commissioners R. Gaull Silberman and Paul Steven Miller, to recommend to the Commission appropriate forms of ADR for Commission use. The work of the Task Force will be guided by two overarching principles: one, that ASDR is a core element of the agency's mission to enforce the civil rights laws of the United States; and two, that ADR will not, in and of itself, solve the problem of the

mounting number of cases with which the agency must deal. Rather, ADR should be viewed as an integral part of the Commission's case management system.

The Task Force recognizes that no one approach will suffice. The final recommendation will take into account the need for flexibility. The Task Force anticipates developing a list of EEOC-sanctioned projects and allowing the local offices to choose those programs most appropriate to its needs and caseload.

The Task Force plans to deliver its report to the Chairman of the EEOC during the Spring of 1995.

## **6. LONG-TERM CODIFICATION OF EMPLOYMENT LAW**

Finally, there is a long-term need to review, codify and consolidate employment law and its administration. This is a task beyond the assignment and capacity of the present Commission. The task needs to include experts drawn from business, labor organizations, administrative agencies, academic experts and the relevant committees of the Congress. For the same purposes, the relationship of federal statutes and regulations to those of the states needs to be considered.

## **VII. Safety and Health Programs and Employee Involvement**

### **1. GENERAL OBSERVATIONS**

The Fact Finding Report (pp. 22-23 and 121-23) reported that America's occupational safety and health record has not improved (save for fatalities) with the result that work injuries and illness are producing rising costs to workers, enterprises and the economy. At the same time joint safety and health committees are the most common form of employee participation program aimed at employee concerns about conditions of work. A 1993 National Safety Council Report found that such joint committees exist in 75 percent of establishments with 50 or more employees, and in 31 percent with less than 50 employees. Moreover, ten or so states now require by law such a committee, or other forms of employee involvement in this area. The Report observed that in many of these states the joint committees were legislated with trade-offs involving other workers' compensation and disability provisions.

Additional legislation and further studies have come to the attention of the Commission. At least three states [California, Massachusetts and Florida] have authorized parties under collective bargaining agreements in the construction industry to provide for a jointly agreed upon panel of doctors and to provide for alternative dispute resolution (arbitration) of disputes over the application of workers' compensation benefits administered by state agencies.<Footnote: Among studies, see Wayne Lewchuk, A. Leslie Robb, and Vivienne Walters, *The Effectiveness of Joint safety and health Committees in Reducing Injuries and Illness in the Workplace: The Case of Ontario, July 1944*, (McMaster University, Canada).>

There is a wide consensus that the safety and health performance of the American workplace can be substantially improved with more management commitment and more worker involvement. But there has been little consensus as to how best to achieve this common objective. Further, there is uncertainty in the business community, in nonunion establishments, as well as in regulatory agencies, whether safety and health committees or other forms of employee involvement in such establishments are legal under Section 8(a)(2) of the National Labor Relations Act. (See Section II of this Report.)

The Commission suggests that the following approach to safety and health programs be implemented in appropriate

regulatory or legislative language.

Employee participation and management commitment are essential ingredients of a successful workplace safety and health program intended to identify, prevent and control recognized hazards. Every workplace should be required to have a program for preventing accidents and illness. The nature of the program may be expected to vary by size and type of workplace, the nature of the hazards and other factors.

Experience has shown that there are certain basic requirements that are present in any good safety and health program regardless of size or type of workplace or nature of the hazards. The program should be stated in written form, except that the smallest enterprises outside of those in designated hazardous sectors, may be excused from the written requirement.

The basic elements of a safety and health program are set forth in 2 and 3 below:

## **2. Program Elements**

### **1. Designation of responsibility**

The personnel responsible for each aspect of the program need to be clearly designated.

### **2. Identification of hazards**

The hazards currently or potentially existing in the workplace can be identified from an examination of past accidents or occupational illnesses, the accident history at other similar facilities, employee suggestions or complaints, the measurement of various exposure levels, and from other sources. A plan should be included to remedy existing hazards that violate OSHA standards.

### **3. Setting priorities**

Once hazards are identified, priorities need to be established so that resources can be assigned to the areas of greatest need. Nonconformance with federal and state standards should be corrected.

### **4. Safety rules and procedures**

Based on hazards that have been identified and the controls that are deemed to be necessary, specific rules should be



developed governing the conduct of all personnel in the workplace.

### **5. Periodic internal inspection**

A plan of periodic facility inspections should be developed. The purposes of such periodic self-inspection should be made clear, such as, assuring safety rules are followed, checking that preventive measures and devices are working properly, or identifying new hazards.

### **6. Accident investigation**

All lost-time accidents and "near misses" need to be thoroughly investigated. The primary purpose of the investigation is to assure that reasonable measures are taken to help prevent recurrence.

### **7. Safety and health training and communications**

Safety and health training should be provided to all personnel, including supervisors and managers, at the time of hire and at least annually thereafter. It is vital that a procedure be established for regular communication of safety-related information to all personnel.

### **8. Accident recordkeeping**

A process for recordkeeping that conforms with state and federal requirements should be in place. All accidents and occupational illnesses should be recorded. Periodic statistical analysis should determine the most prevalent sources of accidents and illness; this information should be made available to all personnel.

### **9. First aid and medical care**

Procedures should be developed for assuring that proper medical care is provided to any injured or ill employee.

### **10. Emergency preparedness care**

Plans are required to protect personnel in the event of emergencies such as fire, earthquake, leakage of toxic material, etc. Plans include provisions for employee personal protection, life safety, orderly evacuation, etc.

### **3. Employee Involvement**

Experience has shown that a further basic requirement of any good safety and health program regardless of size or type of workplace is to ensure employee participation in the design and operation of the program. The plan may involve a number of different structures for achieving employee participation—for instance, a safety committee, designation of key employees for various functions, ad hoc working groups, or assignments within teams.

Employee participation means that employees are encouraged to participate fully in the program, including the review and investigation of injuries and illnesses; periodic workplace inspections and regular safety and health meetings; and recommendations to the employer with respect to the administration of the program elements.

Effective employee involvement includes the right of employees to seek outside opinion and information on safety and health questions related to the workplace. In accordance with the statute, workers are assured that they are not to be penalized for exercising their rights under workplace safety and health programs.

**(1)** In the workplaces governed by collective bargaining agreements, the safety and health program and forms of employee participation are to be worked out by the parties to the agreement or their designees at the workplace.

**(2)** In workplaces without collective bargaining, the safety and health program, including the Program Elements identified in section 2 above and the form of worker selection in the design and administration of the program, should be developed by management in full consultation with the employees.

The Commission is advised that OSHA is in the process of developing a workplace safety and health program standard, not unlike the basic elements of the safety and health program outlined in section 2 above. The Commission is supportive of this effort and urges OSHA to seek the broadest possible consensus from employer and employee organizations.

The Commission suggests that OSHA explore, in consultation with employer and employee organizations, the use of appropriate third party organizations such as some casualty insurance companies, professional organizations of safety engineers, industrial hygienists, or other groups with special expertise and capabilities in safety and health.

These bodies could advise and verify as to an appropriate degree of employee involvement in the program design and administration of the safety and health program at a workplace.

In situations in which OSHA is satisfied, with the assistance of such outside expert judgment, that there is substantial worker participation in the design and administration of the safety and health program, and that it has a good record of performance, we encourage the agency to provide appropriate forms of preferential status in the inspections and administration of standards as it has done in some programs, such as by a secondary inspection list, penalty reduction, and limited inspection except with regard to principal hazards in the type of workplace.

The Commission believes that such incentives and encouragement of effective employee involvement in safety and health programs with a record of effective performance would significantly promote an internal responsibility system for safety and health in the workplace, reduce costs and promote productivity.<Footnote: With respect to the status of safety and health employee involvement plans under the National Labor Relations Act, the recommendations set forth in Section II of this Report provide the applicable principles. The Commission has sought to clarify in Section V(6) the responsibility for safety and health in cases involving client-contractor relationships

## VIII. Railway Labor Act

The Fact Finding Report (pp. 98-103) concluded, on the basis of the October 20, 1993 hearing and subsequent statements to the Commission, that there have been significant changes in the railroad and airline sectors since the 1926 Railway Labor Act was made law and extended to airlines in 1936.

Both industries are now substantially governed by collective bargaining agreements. Both industries have been substantially deregulated as to rates and fares. Airline employment has continued to expand while railroad carriers have consolidated and had declines in employment. Coverage under the Act, once of no legal moment, is now a contested issue. A number of problems were identified, including: the inordinate time required to resolve major and minor disputes; the scope of coverage under the Act; the impact of the class and craft units on smaller carriers; the overall operations of the grievance procedures; and the use of mediation in major disputes. In addition, Congressional Representatives reported to the Commission their dissatisfaction with having to interfere with complex labor-management disputes on short notice.

After the issuance of the Fact Finding Report, a working party of the Commission met with representatives of both the airline and railroad industries, jointly and separately, to receive their reactions to the Fact Finding Report and their responses to the questions the Commission posed. The Commission explored with the parties a variety of potential recommendations ranging from legislation to change the Act's jurisdiction, to revision of the class and craft units, to strict time limits for processing major disputes. Other parties presented their comments in writing.

Despite differences of interest and experience, the major representatives of labor and management governed by the Railway Labor Act responded unanimously that this Commission should not recommend any changes to the Act.

This unified reaction from the parties results not from a failure to recognize their problems, but rather, from a common concern as to the solution to those problems. Unlike the National Labor Relations Act, which was enacted through substantial labor-management and political conflict, the 1926 Railway Labor Act was made law with the full agreement of railroad labor and management, and later amended to include the airline industry after discussion with the parties. These parties regard the Railway Labor Act as their creation, achieved through a bi-partite process, and

they are justly proud of their role in the enactment of the statute. They wish to preserve and improve the processes under the Act through joint discussion and negotiations, rather than to have solutions imposed upon them by third parties.

Based on this history, the parties have convinced the Commission that it should issue no specific recommendations for legislative change at this time. Instead, the parties should be permitted jointly to seek their own solutions to make collective bargaining operate more effectively. In adopting the parties' requests, the Commission directs and expects them to proceed as follows:

The parties shall commit to a series of conferences and meetings designed to seek consensus and agreement on changes to the Act and/or changes in the National Mediation Board's procedures, as well as their own approaches to bargaining dispute resolution.

The Commission recommends that these meetings be organized through two Committees, one made up of representatives of the railroads and their labor organizations, and one made up of representatives of the airlines and their labor organizations. The Chairperson of each Committee shall be an experienced neutral recommended by the Secretary of Labor from a pool of neutrals suggested by the National Mediation Board, and agreed to by the parties. In addition to chairing and facilitating the meetings, the Chairpersons will act as intermediaries between the Committees and the Secretary of Labor and the National Mediation Board. To assist this process, the Secretary of Labor and National Mediation Board should provide the necessary support. If needed, the Committees may also seek mediation from the National Mediation Board or some other neutral.

The Committees are expected to make specific recommendations for change which would improve the processes and performance of collective bargaining in the resolution of "major" and "minor" disputes. The recommendations may call for legislation, rule making or other action by the National Mediation Board and/or the parties. The recommendations should address, in addition to whatever other issues the Committees deem appropriate, the following issues:

What changes are needed to shorten the time periods for resolving major disputes?

What steps are needed to encourage or compel the parties to resolve these disputes through negotiation (including

mediation), rather than self-help or Congressional action?

What changes are needed to resolve the Railway Labor Act jurisdictional issues raised by including one entity while excluding another entity which is engaged in a similar business?

What changes are needed to avoid the growing trend of litigation over what constitutes "major" and "minor" disputes?

How can the Act be made less burdensome on the short line and commuter railroads, and the commuter airlines, i.e., through redefining jurisdiction or changing unit composition for these smaller carriers?

What steps are necessary to decrease the number of minor disputes that go to arbitration and/or shorten the grievance and arbitration process?

By March 31, 1996, each Committee should issue its recommendations in a report to the National Mediation Board. The National Mediation Board will then issue a report (a) concurring or objecting to the recommendations, and (b) indicating what relevant changes the National Mediation Board had implemented or planned to implement. Both reports will be forwarded to the Secretary of Labor no later than 60 days after being received by the NMB for any further action deemed appropriate.

## **IX. The Future of the American Workforce**

### **1. NATIONAL AND LOCAL FORUMS**

The Commission recommends the creation of a private-public forum for continuing discourse on issues of national concern related to the Future of the American Workforce and within that forum a separate national Labor-Management Committee treating labor-management and workplace issues.

#### ***The Forum***

The Forum shall be comprised of representatives drawn from business, labor organizations, women's groups and civil rights organizations and the executive and legislative branches of the federal government. This forum may hold public meetings and public hearings, or it may meet for discourse in private.

Among the issues suggested for the Forum are the following: the growing disparity in income in the workforce including the status of low-wage workers and their families, the interests of working women, government regulations of the workplace; impacts of the global economy; and job creation.

#### ***Labor-Management Committee***

A separate labor-management committee comprised of business and labor organization; members of the Forum, with government representatives to be determined, shall meet periodically and autonomously to consider issues of employee involvement, cooperation and performance at the workplace, health and safety, conflict and dispute resolution, training measures and other issues of mutual concern.

The Forum and the Labor-Management Committee are authorized to make recommendations as to private policies, executive action or legislative proposals. The discussion of those two groups should be informed by the results of studies prepared by the public-private research group described in Section IX.2.

Similar forums and labor-management committees may be established in localities or sectors of industry.

### **2. LEARNING FROM EXPERIENCE**

The country is in the process of developing and experimenting with a number of features of the workplace in many enterprises. The Commission's suggestions and

recommendation propose additional changes and new directions. It is essential to learn more systematically than we have to date the ongoing experimentation for future private and public policy making. The process of understanding and appraising the outcomes of new experiences is vital in view of the wide diversity among the nation's seven million workplaces. The innovations occurring at the workplace level need to inform systematically the policy making process at the national level.

Accordingly, the Commission proposes the creation of a coordinated public-private research group to report and analyze these developments. There are a large number of non-profit research institutions, some with business support, some with labor support, some in government and others among academic institutions that provide research results and papers on aspects of the changing workplace. A coordination board with some government funding might well develop more systematic basic data collection and reports on a continuing basis with a much higher degree of acceptance of the published results, with much less duplication, and a higher degree of professional competence.

The Labor-Management Committee and the Forum, proposed in Section IX.1, should suggest topics for study for the public-private research group and receive reports of its work for purposes of private and public policy discussion.

Among the priority areas of study, research and evaluation are the following:

1. The employment experience of various categories of contingent workers.
2. Representation elections and initial contract negotiations.
3. The processes and results of various types of employee participation plans and labor-management partnerships.
5. The views of workers and supervisors as to various issues of worker representation and participation and their attitudes at the workplace.
6. The effects of workplace practices on American families.
7. The effects of different types of workplace training.



**8.** The results of various forms of health and safety and related employee involvement programs at the workplace.

## **Appendix A: The Worker Representation and Participation Survey**

The Worker Representation and Participation Survey is a national survey of American employees, directed by Richard Freeman and Joel Rogers and conducted by Princeton Survey Research Associates in the fall of 1994.<Footnote: This study was funded by private foundations and received technical assistance from members of the business and labor communities.>

This study is a detailed and in-depth analysis of workplace practices and of the attitudes and views of workers on workplace issues.<Footnote: Where questions overlap, the Worker Representation and Participation Survey findings are consistent with those of earlier surveys, such as the 1976 Quality of Employment Survey sponsored by the U.S. Department of Labor conducted by the University of Michigan; the Penn and Shoen survey conducted by the LPA; the Harris Poll conducted for the AFL-CIO; Industrial Relations Counselors, Inc., Report on the IRC Survey of Employee Involvement, August 1994, among others. > It presents the views of a representative sample of over 2,400 employees in privately owned firms with greater than 25 workers. It identifies separately workers and supervisors, current union members, prior members and non-members, as well as the diverse demographic groups that make up the American workforce. The survey questions were prepared through consultation with staff of managements and unions experienced in survey work and included variations in wording to minimize the possible dependence of responses on the precise way a question was phrased. While there have been several opinion polls of employees in the past, and while some management organizations and some unions regularly survey their employees or members, in the Commission's view this survey provides the best current indicator of how American employees see some of the workplace issues facing the country. As a representative sample, the views expressed do not, of course, characterize any particular workplace or workforce. Future studies and analyses may be expected to perfect this information.

The major findings of the Survey may be briefly summarized in the following single paragraph:

American workers want more involvement and greater say in their jobs, they would like this involvement to take the form of joint committees with management and would prefer to elect members of those committees rather than have managers

select them. They prefer cooperative committees to potentially conflictual organized relationships. A sizable minority are in workplaces where they and their fellow workers want to be represented by unions or union-like organizations.

Some of the more detailed responses to the Survey are summarized below:

(1) The new forms of work and work relations about which the Commission heard considerable testimony are part of the working lives of many American employees. The distinction between supervisors and non-supervisors is eroding: 35 percent of non-managers report supervising others as part of their official job. Nearly a quarter of the workers view their jobs as something they would probably leave, rather than as part of a career; and only one-third were confident they could quickly get another job at about the same pay, without having to move. One-third (32 percent) of employees report being involved with self-directed work teams, total quality management, quality circles or other forms of employee involvement programs, and over half report such programs existing at their firms.

(2) A substantial number of employees are unhappy about their work lives and workplaces. While two-thirds of all workers report that they look forward to going to work on the average day, 33 percent do not look forward to work. One-fourth say they "wish (they) didn't have to go" to work and another eight percent don't care one way or the other about their job. Among workers making \$200 - \$399 a week, the percent dissatisfied reaches 41 percent; among black workers, 42 percent. Similarly, just 18 percent report that employee-management relations are excellent at their workplace; 49 percent report that relations are good; and nearly a third report relations to be only fair (22 percent) or poor (10 percent). Again, the proportion reporting only fair or poor relations is higher among the low paid and among minorities. Five percent reported going to court or a government agency for a violation of their workplace rights, while another nine percent report having thought about going to court or to an agency but having decided not to do so.

(3) Workers generally report feeling loyal to their company, but perceive a lack of company loyalty to them. Among all employees, 64 percent report feeling a "lot of loyalty toward their company, but only 38 percent trust their company a lot -to keep its promises to them. Across non-managerial employees by supervisory and non-supervisory by

high loyalty to the company averaged 53 percent, high trust was 35 percent. Among managers 24 percent reported trusting their company -only a little or -not at all, even higher than the 19 percent of non-supervisory employees that provided the same response.

(4) Most employees want more influence or decision-making power in their job, and believe this would improve company productivity as well as their working lives. Sixty-three percent of employees said they wanted more influence, compared to 35 percent who were content with things as they were. Among the areas in which employees said they wanted more influence were: deciding what kinds of benefits are offered, awarding raises for those in the work group, deciding what training is needed.

(5) Workers generally have favorable attitudes toward employee involvement plans, but believe the plans would be better if rank and file employees had more power in them. Thirty-one percent of workers who participate in programs viewed them as very effective, 55 percent as somewhat effective, and 11 percent as not too effective. In the majority of programs, management recruits participants by asking for volunteers (47 percent) or simply picking people (27 percent), rather than by having employees elect or otherwise select their peers. The vast majority of employees (82 percent) believe that -if employees, as a group, had more say in how these programs are run they would be more effective than at present.

(6) Many employees would prefer raising problems with their employers as part of a group and most believe that workplace problems could be resolved better if employees had a greater say in their resolution. Between 43 and 57 percent of employees (the proportion varies with the wording of the question) say they would feel more comfortable raising work problems through an employee association or with the help of fellow employees, rather than as an individual. Seventy-six percent believe that if employees had more say in resolving workplace problems, their company's system would be more effective than at present.

(7) Some 71 percent of current union members report their experience with the organization as -good or -very good; only seven percent consider it bad; and 90 percent would vote to keep the union in a new representation election. Among former union members, however, feelings are less positive, with 24 percent ranking the experience as bad. One-third (32 percent) of nonunion employees say they would

vote for a union today, while 55 percent of nonunion employees say that they would vote against a union, and 13 percent were undecided. In workplaces where employees believe management opposes unions, twelve percent of nonunion workers who say they are against a union drive report that they would change their vote if management did not oppose the union; in nonunion workplaces where employees believe management does not oppose the union; eight percent of union supporters said they would vote against the union if management opposed the union.

**(8)** Managers in unionized workplaces have ambivalent attitudes toward unions. By a two to one margin (32 percent versus 16 percent), managers in unionized workplaces report that in recent years unions have become more cooperative rather than more confrontational, and 69 percent report that the company accepts the union as a partner. Twenty-seven percent of managers believe that unions help the companies performance, while 38 percent believe that they hurt the company's performance. Two-thirds (64 percent) believe unions help their members. Among managers in nonunion workplaces, 53 percent of nonunion managers report that they would oppose a union drive at their facility; 32 percent report that it would hurt their career advancement if the employees they manage successfully formed a union.

**(9)** Asked about the sort of workplace organization they would like to have, employee's voice fairly clear preferences for joint committees that would work cooperatively with management, but which have some independence from management, through, among other things, employee election of members and outside referees to resolve disagreements. But employees want any organization to enjoy cooperative relations with management. They prefer (52-34 percent) an organization drawing on company budget and staff to one relying only on its own budget and staff, and almost universally (86-9 percent) prefer an organization -run jointly by employees and management to one run by - employees alone.<Footnote: The Commission observes that unilateral reductions in wages or benefits, or increases in work assignments or discharges and layoffs deemed unfair by workers have on occasions historically changed preferences for employee organizations rapidly and precipitated a union.>

**(10)** The vast majority of workers believe that the key to a successful workplace organization is management cooperation with the organization; by 78-17 percent, employees believe - employee organization ... can only be effective if

management cooperates" with them. The interest in management cooperation dominates preferences on organizational form. Asked to choose between an employee organization that management cooperated with in discussing issues, but had no power to make decisions"; and one -that had more power, but management opposed, 63 percent of employees prefer the weak organization to the strong. For their part, 36 percent of managers report that they definitely would be willing to work with an employee organization to solve workplace problems, while 47 percent report they probably would be willing to do so.

## **Appendix B: National Meetings - Washington, D.C.**

### **COMMISSIONERS**

John T. Dunlop, Chair  
Paul A. Allaire  
Douglas A. Fraser  
Richard B. Freeman  
Thomas A. Kochan  
Juanita M. Kreps  
F. Ray Marshall  
Kathryn C. Turner  
W. J. Usery, Jr.  
Paula B. Voos

Paul C. Weiler  
Counsel to the Commission

June M. Robinson,  
Designated Federal Official

### **JULY 25, 1994**

#### **FOCUS : Appropriate Coverage Regarding:**

- 1) Contingent Workers and the  
Dividing Line Between Employee and  
Independent Contractor and
- 2) The Proper Scope of Exclusion of  
Managers, Supervisors and Salaried  
Employees

### **PRESENTATIONS**

#### ***Views of Labor***

Laurence Gold,  
General Counsel,  
American Federation of Labor and  
Congress of Industrial Organizations  
(AFL-CIO)

Jay Mazur,  
President,  
International Ladies - Garment Workers - Union

Jonathan P. Hiatt,  
General Counsel,  
Service Employees International Union

Kim A. Roberts,  
Counsel, Assistant National Director  
American Federation of Television  
and Radio Artists

Virginia L. duRivage,  
Research Fellow, Institute for the  
Study of Labor Organizations  
George Meany Center for Labor Studies

***Views of Management***

Thomas B. Moorhead  
Vice President, Human Resources  
Carter-Wallace, Inc.

Mitchell S. Fromstein  
Chair, President and CEO  
Manpower, Inc.

Marshall B. Babson  
Partner  
Ogletree, Deakins, Nash, Smoak & Stewart

Pay Equity and Related Issues

Susan Bianchi-Sand  
Executive Director  
National Committee on Pay Equity

Audrey Tayse Haynes  
Executive Director  
Business and Professional Woman/USA

Cindy Morano  
Executive Director  
Wider Opportunities for Women

Gwendylon Johnson, RN  
Board of Directors  
American Nurses Association

Dr. Lenora Cole Alexander  
Board Member  
Black Women United for Action



Dr. Francine Moccio  
Director  
Institute for Women and Work  
Cornell University

***Additional Presentations***

Terry G. Bumpers  
Executive Director  
Construction Industry Labor- Management Trust Fund  
National Alliance for Fair Contracting

Laurence E. Norton, II  
Central Pennsylvania Legal Services  
Representing:  
Texas Rural Legal Aid, Farmworker Division

Harvey Shulman  
General Counsel  
National Association of Computer Consultant Businesses

**AUGUST 10, 1994**

**FOCUS:** Employee Participation in the Workplace

**PRESENTATIONS**

***Views of Management***

Dan Rainville  
President  
Universal Dynamics, Inc.

Steve M. Darien  
Vice President, Human Resources  
Merck & Company, Inc.

Rosemary Collyer  
Partner  
Crowell & Moring and Former General Counsel  
National Labor Relations Board

Accompanied by:  
Charles F. Nielson  
Vice President, Human Resources  
Texas Instruments  
and

Mary Harrington  
Director, Corporate Labor Relations  
Eastman Kodak Company

Chester McCammon  
Member, Self-Directed Team  
Universal Dynamics, Inc.

***Views of Labor***

David M. Silberman  
Director  
AFL-CIO Task Force  
on Labor Law

Richard Bensinger  
Executive Director  
AFL-CIO Organizing Institute

**PRESENTATION**

Arnold E. Perl  
Attorney and President  
Young and Perl, P.C.

***Additional Presentations***

Kenneth McLennan  
President  
Manufacturers Alliance for Productivity and Innovation, Inc.

Dr. James E. Perley  
President  
American Association of University Professors

and

Dr. Mary Burgan  
General Secretary  
American Association of University Professors

**SEPTEMBER 8, 1994**

**FOCUS: Present Legal Framework and Practices of Collective Bargaining**

## **PRESENTATIONS**

### ***Views of Labor***

Thomas R. Donahue  
Secretary-Treasurer  
AFL-CIO

Accompanied by:  
Laurence Gold  
General Counsel  
AFL-CIO

### ***Views of Management***

John C. Read  
Chairman  
Employee Relations Committee  
National Association of Manufacturers

Howard V. Knicely  
Executive Vice President  
TRW, Inc.

Accompanied by:  
Rex Adams  
Vice President, Administration  
Mobil Corporation

Edward B. Miller  
Seyfarth, Shaw, Fairweather & Geraldson,  
and Former Chairman  
National Labor Relations Board

Andrew M. Kramer  
Partner  
Jones, Day, Reavis and Pogue

Amy Isaacs  
National Director  
Americans for Democratic Action  
On behalf of:  
U.S. Representative John Lewis, (D GA)  
for the Citizens Committee on Employee Rights

Lewis Maltby  
Director  
National Task Force on Civil Liberties in the Workplace  
American Civil Liberties Union

## **COMMENTS**

Monsignor George G. Higgins  
Department of Theology  
Catholic University of America  
Former Director, Special Research Office  
National Conference of Catholic Bishops

## **ADDITIONAL PRESENTATIONS**

Dr. Herbert R. Northrup  
Professor Emeritus of Management  
The Wharton School of the University of Pennsylvania

Ellis Boal  
Counsel  
Labor Notes

David S. Smith  
Partner  
Smith, Heenan and Althen  
On behalf of:  
The Free Work Place Alliance

## **SEPTEMBER 29, 1994**

**FOCUS: Alternative Forms of Dispute Resolution at the Workplace and in the Application of Employment Laws**

## **PRESENTATIONS**

Martha Burk  
President  
Center for Advancement of Public Policy  
with  
Judith L. Lichtman  
President  
Women's Legal Defense Fund

Nancy Kreiter  
Research Director  
Women Employed Institute

***Views of Management***

Joseph F. Vella  
Vice President, Employee Relations  
Federated Department Stores

Douglas S. McDowell  
Partner  
McGuinness & Williams

Lawrence Z. Lorber, Esq.  
Partner, Lipfert, Bernhard, McPherson and Hand  
On behalf of:  
The National Association of Manufacturers

***Views of Labor***

Gloria Johnson  
Vice President  
AFL-CIO and President,  
Coalition of Labor Union Women

Accompanied by:  
Beth Shulman  
Vice President  
United Food and Commercial Workers International Union

**PRESENTATION**

Professor Samuel Estreicher  
School of Law  
New York University

**PRESENTATION**

Arnold M. Zack  
President  
National Academy of Arbitrators

**PRESENTATIONS**

Nelson Carrasquillo  
Executive Director  
Farmworkers Support Committee  
El Comite de Apoyo a los Trabajadores Agrícolas (C.A.T.A.)

Accompanied by:  
Arthur N. Read  
General Counsel  
Friends of Farmworkers, Inc.

## **PRESENTATIONS**

William B. Gould IV  
Chairman  
National Labor Relations Board

Frederick L. Feinstein  
General Counsel  
National Labor Relations Board

## **Commission on the Future of Worker-Management Relations**

### **APPOINTED BY:**

**Secretary of Labor Robert B. Reich**

**Secretary of Commerce Ronald H. Brown**

Paul A. Allaire  
Chairman and CEO  
Xerox Corporation

John T. Dunlop, Chairman  
Former Secretary of Labor (1975-1976)  
Lamont University Professor Emeritus  
Harvard University

Douglas A. Fraser  
Former President, United Auto Workers  
Professor of Labor Studies  
Wayne State University

Richard B. Freeman  
Herbert Ascherman Professor of Economics  
Harvard University Program  
Director for Labor Studies  
National Bureau of Economic Research.

William B. Gould \*  
Professor of Law  
Stanford University

F. Ray Marshall  
Former Secretary of Labor (1976-1981)  
Audre and Bernard Rapoport  
Centennial Chair in Economics and Public Affairs  
L.B.J. School of Public Affairs  
University of Texas at Austin

Thomas A. Kochan  
George M. Bunker Professor of Management  
and Leaders for Manufacturing  
Professor Massachusetts Institute of Technology

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Former Secretary of Commerce (1977-1979)  
James B. Duke Professor of Economics and Vice President Emeritus  
Duke University

Kathryn C. Turner\*\*  
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Standard Technology Inc.

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President Bill Usery Associates, Inc.

Paula B. Voos  
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Paul C. Weiler  
Henry J. Friendly Professor of Law  
Harvard University  
(Counsel to the Commission)

June M. Robinson  
Designated Federal Official  
for the Commission  
U.S. Department of Labor



## CHART: DOL/EEOC/NLRB Investigative Staff

	1980	1990	1994
DOL			
OSHA . . . . .	1,388.	1,271.	1,128
MSHA . . . . .	1,522.	1,080.	1,128
Wage & Hour. . . .	1,098.	961.	727
OFCCP. . . . .	780.	564.	488
PWBP . . . . .	235.	320.	322
OLMS . . . . .	--	294.	249
EEOC. . . . .	892.	762.	732
NLRB. . . . .	1,122	833.	783

### NOTE:

The agencies represented in this table are the National Labor Relations Board, the Equal Employment Opportunity Commission, and the following agencies of the Department of Labor: Occupational Safety and Health Administration; Mine Safety and Health Administration; the Employment Standards Administration's Wage and Hour Division and Office of Federal Contract Compliance Programs; Pension and Welfare Benefits Administration; and Office of Labor-Management Standards.

The table reports each agency's level of professional staffing in full-time equivalents (FTEs) by fiscal year (FY). Data for 1980 represent the best estimates of FTEs (rather than actual FTE figures) for some agencies because the government did not use FTEs as a standard measure until 1982.

The workloads of the agencies reported generally increased during this period, even as staffing levels declines. For example, at the NLRB a drop in election cases was more than offset by a rise in unfair labor practice (ULP) cases, which are more labor intensive. The Board reports that there were 4794 ULP "situations" pending preliminary investigation at the end of FY 1994 compared with 3673 at the end of FY 1980, a rise of 31 percent.