RECENT CASES

Golden Gate Restaurant Ass’n v. City & County of San Francisco: The Ninth Circuit Limits ERISA Preemption, Expands Pay-or-Play Options

Can a state or local government compel employers to spend money on healthcare? The Employee Retirement Income and Security Act ("ERISA") preempts any state law that would force employers to provide health care benefit plans to their employees.\(^1\) Legislatures have attempted to circumvent ERISA preemption through "pay-or-play" statutes, which require employers to spend a certain amount on employee healthcare or pay that amount to the government, usually into a healthcare fund.\(^2\) The Fourth Circuit’s 2007 decision in Retail Industry Leaders Ass’n v. Fielder\(^3\) appeared to foreclose the pay-or-play option, since the court held that ERISA preempted a Maryland statute requiring employers to make certain healthcare expenditures or pay into a state medical fund.\(^4\) But in Golden Gate Restaurant Ass’n v. City & County of San Francisco,\(^5\) the Ninth Circuit Court of Appeals re-opened the pay-or-play question by upholding San Francisco’s Health Care Security Ordinance.\(^6\) The Ninth Circuit decision narrows the traditionally broad scope of ERISA preemption, and gives state and local lawmakers more flexibility to expand employer participation in healthcare. Though the court did not suggest an amendment to ERISA’s preemption clause, the potential circuit split and the multitude of pay-or-play laws in the pipeline\(^7\) could lead to Congressional action or a ruling on pay-or-play by the Supreme Court.

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3. 475 F.3d 180 (4th Cir. 2007).
4. Id. at 197.
5. 546 F.3d 639 (9th Cir. 2008).
6. Id. at 661.
BACKGROUND

On July 18, 2006, the San Francisco Board of Supervisors unanimously passed the San Francisco Health Care Security Ordinance ("Ordinance"). The Ordinance contains two separate but related pieces of legislation. It establishes the Health Access Plan ("HAP"), a City-run health care network for low- and moderate-income residents, and it institutes an Employer Spending Requirement ("ESR") that obligates all covered employers to make certain health care expenditures. The HAP is available to any San Francisco resident. Under the ESR, "covered employees" are people who work in the city of San Francisco at least ten hours per week, have worked for their employer for at least ninety days, and are not excluded from coverage by the Ordinance’s other provisions. "Covered employers" are employers that engage in business within the City and employ greater than twenty employees, with a fifty-worker threshold for non-profits. The required expenditures are determined by taking the number of hours paid to covered employees and multiplying by a "health care expenditure rate," defined in the Ordinance. Employers have the option of making payments directly to employees, to a third party on behalf of the employees, or to the City HAP funds ("City-payment option"). "Medium-sized Businesses" (twenty to ninety-nine employees) pay at a lower rate than "Large Businesses" (100+ employees), and an employer choosing the City-payment option is only obligated to pay the difference between the health care expenditures it already makes (if any) and the Ordinance’s required rate.

"Health care expenditures" include payments to a health savings account, reimbursement of employee medical expenses, payments to a third party on behalf of the employee, costs of providing health care services directly, and payments to the City on behalf of the employee. Payments made under the City-payment option go either towards a discount on HAP services or a City-managed medical reimbursement account. The Ordinance also requires employers to maintain records of hours worked and

9. HAP has since been renamed Healthy San Francisco. See 546 F.3d at 643 n.1.
11. Id. § 14.2(c).
12. Id. § 14.1(b)(2).
13. Id. § 14.1(b)(3), (11), (12).
18. Id.; ESR Reg. 4.2(a).
health care expenditures made pursuant to the ESR.\textsuperscript{19}

In November 2006, the Golden Gate Restaurant Association (GGRA) filed a complaint against the City in the District Court for the Northern District of California, challenging the ESR.\textsuperscript{20} Arguing that the Ordinance is preempted by ERISA, the GGRA sought a declaration of preemption and a permanent injunction against the ESR provisions.\textsuperscript{21} The District Court granted the GGRA's motion for summary judgment and issued a preliminary injunction, on the grounds that the Ordinance made an impermissible reference to ERISA plans and would destroy ERISA's uniform system of regulation.\textsuperscript{22} In so holding, the District Court followed a line of decisions striking down state and local statutes based on a broad interpretation of ERISA preemption. The City applied for a stay of judgment pending appeal, which the Ninth Circuit granted.\textsuperscript{23} As a result, the employer spending requirement went into effect on January 9, 2008.

**THE NINTH CIRCUIT'S ANALYSIS**

Before turning to the legal questions at issue, the Ninth Circuit framed its analysis by making a number of preliminary observations. First, the court categorized the different kinds of covered employer under the Ordinance, so as to gauge the impact of the ESR on ERISA plans. The categories include employers that have: 1) no ERISA plans, 2) ERISA plans benefiting every covered employee, with expenditures already at or above the required rate (Full High Coverage Employers), 3) ERISA plans benefiting only some of the covered employees, with expenditures on those employees at or above the required rate (Selective High Coverage Employers), 4) ERISA plans benefiting every covered employee, with expenditures below the required rate (Full Low Coverage Employers), and 5) ERISA plans benefiting only some of the covered employees, with expenditures below the required rate (Selective Low Coverage Employers).\textsuperscript{24}

The court then concluded that regardless of category, "the Ordinance does not require employers to establish their own ERISA plans or to make any changes to any existing ERISA plans."\textsuperscript{25} The table below summarizes

\textsuperscript{19} S.F., CAL., ADMIN. CODE § 14.3(b)(i) (2006).
\textsuperscript{20} Golden Gate Rest. Ass'n v. City & County of San Francisco, 535 F. Supp. 2d 968, 970 (N.D. Cal. 2007).
\textsuperscript{21} Id. at 971.
\textsuperscript{22} Id. at 979.
\textsuperscript{23} Golden Gate Rest. Ass'n v. City & County of San Francisco, 512 F.3d 1112, 1114 (9th Cir. 2008).
\textsuperscript{24} Golden Gate Rest. Ass'n v. City & County of San Francisco, 546 F.3d 639, 645-46 (9th Cir. 2008).
\textsuperscript{25} Id. at 646.
the court’s reasoning.\textsuperscript{26}

<table>
<thead>
<tr>
<th>TYPE</th>
<th>COMPLIANCE OPTIONS</th>
<th>NOTES</th>
</tr>
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<tbody>
<tr>
<td>No Coverage</td>
<td>1) Continue with no plan and pay the City; 2) establish ERISA plan, pay into it at required level; 3) establish ERISA plan, pay into it below required level, make up the difference in payments to the City.</td>
<td>No obligation to establish new ERISA plan. If new plan established, Ordinance contains no obligations as to eligibility or benefits.</td>
</tr>
<tr>
<td>Full High Coverage</td>
<td>Leave ERISA plan intact.</td>
<td>No action of any kind required to comply with the Ordinance.</td>
</tr>
<tr>
<td>Selective High Coverage</td>
<td>Leave ERISA plan intact and pay to the City for non-enrolled employees.</td>
<td>Can comply without changing ERISA plan.</td>
</tr>
<tr>
<td>Full Low Coverage</td>
<td>Leave ERISA plan intact and pay to the City the difference for each covered employee.</td>
<td>Can comply without changing ERISA plan.</td>
</tr>
<tr>
<td>Selective Low Coverage</td>
<td>Leave ERISA plan intact and pay to the City a) the difference for enrolled employees, and b) the entire required expenditure for non-enrolled employees.</td>
<td>Can comply without changing ERISA plan.</td>
</tr>
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After determining that the Ordinance does not compel employers to establish new ERISA plans or alter existing plans, the Ninth Circuit made the related observation that the Ordinance never mandates any specific benefits or level of coverage.\textsuperscript{27} According to the court, “the Ordinance does not look beyond the dollar amount spent,” and employers can meet their obligations in a wide variety of ways, including but not limited to ERISA plans.\textsuperscript{28} Finally, the court noted that laws clearly operating “in the traditional domain of the states” enjoy a presumption against preemption.\textsuperscript{29}

\textsuperscript{26} Id. at 645-46.
\textsuperscript{27} Id. at 647.
\textsuperscript{28} Id.
\textsuperscript{29} Id. (citing Boggs v. Boggs, 520 U.S. 833, 840 (1997)).
In *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, the Supreme Court found that Congress did not intend ERISA to displace state control of “general healthcare regulation.” Applying *Travelers*, the Ninth Circuit concluded that a municipal law aimed at providing health care to low- and moderate-income residents fell into the area of general healthcare regulation, traditionally a concern of state and local governments. For that reason, the Ordinance enjoyed a presumption against ERISA preemption.

These observations paved the way for the Ninth Circuit’s preemption analysis, which differed substantially from that undertaken in the District Court. The court began by identifying the two primary purposes of ERISA: to safeguard employee benefit plan participants against abuse and mismanagement, and to establish a uniform system of regulation of employee benefit plans.

ERISA will preempt “any and all State laws insofar as they may now or hereafter relate to any employee benefit plan.” The Supreme Court set the basic standard for preemption analysis in *Shaw v. Delta Air Lines*, holding that a law “relates to” an employee benefit plan if it has “a connection with or reference to such a plan.” An “employee benefit plan” under ERISA is “any plan, fund, or program which... is... established or maintained by an employer or by an employee organization... for the purpose of providing for its participants... through the purchase of insurance or otherwise... medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment.” The GGRA argued that the City-payment option creates a “plan” for two reasons: 1) it imposes an administrative burden on covered employers, and 2) its benefits, beneficiaries, financing, and structure are reasonably ascertainable.

The United States Secretary of Labor went further, claiming in an amicus brief that the HAP itself constitutes an employee benefit plan. The GGRA also contended that if the City-payment option does not create a “plan” under ERISA, the Ordinance still “has a connection with or a reference to” employee benefit plans, and thus should be subject to preemption under the common law test set out in

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31. *Golden Gate Rest. Ass'n v. City & County of San Francisco*, 546 F.3d 639, 648 (9th Cir. 2008).
32. *Id.*
33. *Id. at 647.*
37. *Golden Gate Rest. Ass'n v. City & County of San Francisco*, 546 F.3d 639, 648 (9th Cir. 2008) (citing *Donovan v. Dillingham*, 688 F.2d 1367, 1370-73 (11th Cir. 1982)).
38. *Id.*
The Ninth Circuit rejected each of these arguments in turn.

**ESR DOES NOT CREATE AN ERISA PLAN**

The court referred to *Fort Halifax Packing Co. v. Coyne*[^39] and *Massachusetts v. Morash,*[^41] to demonstrate that a law can require employers to pay benefits according to the number of hours worked without necessarily creating an ERISA “plan.”[^42] *Fort Halifax* upheld a Maine statute that required employers closing a plant to pay terminated employees a lump-sum, consisting of one week’s pay for every year worked.[^43] The *Fort Halifax* court distinguished between simple employer-provided “benefits” and the kind of administered “benefit plans” covered by ERISA.[^44] Because the termination benefit “require[d] no administrative scheme whatsoever to meet the employer’s obligation,” it did not create an ERISA “plan.”[^45] Similarly, the statute under consideration in *Morash* required employers to pay out all accrued wages and benefits, including vacation pay, on the day of discharge.[^46] The *Morash* court found that the statute did not create an ERISA plan because these particular benefits were accrued on an hourly basis and paid out of the employer’s general assets.[^47] Thus, they were closer to wages than benefits, and not likely the intended subject of ERISA regulation.[^48]

The decisions in both *Fort Halifax* and *Morash* use the first purpose of ERISA – to protect employee benefit plan participants against abuse and mismanagement of benefit plan funds – as a measuring stick. If a law would potentially expose employees to the kind of risks Congress aimed to minimize through ERISA regulation, then that law intrudes on ERISA and should be subject to preemption. “[O]nly ‘plans’ involve administrative activity potentially subject to employer abuse.”[^49] Where the risk to an employee’s benefits “is no different from the danger of defeated expectations of wages for services performed,” there is no benefit plan.[^50]

The Ninth Circuit found that under the Ordinance, covered employers who elect the City-payment option make payments out of general assets,

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[^39]: Shaw, 463 U.S. at 96-97.
[^40]: 482 U.S. 1, 16 (1987).
[^42]: 546 F.3d at 649-50.
[^43]: 482 U.S. at 4.
[^44]: Id. at 12.
[^45]: Id. at 16.
[^46]: 490 U.S. at 109.
[^48]: Id.
[^49]: Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 16 (1987).
[^50]: Morash, 490 U.S. at 115.
based on hours worked.\textsuperscript{51} Like the statutes in \textit{Morash} and \textit{Fort Halifax}, the City-payment option was judged not to amount to an ERISA plan.\textsuperscript{52} In fact, the court pointed out that if employers were to pay employees directly, instead of paying the City, "there would be little to differentiate those payments from wages."\textsuperscript{53}

The court also viewed the City-payment option as minimizing the administrative burden placed on employers.\textsuperscript{54} "Under the Ordinance, an employer has no responsibility other than to make the required payments for covered employees, and to retain records to show that is has done so."\textsuperscript{55} The ESR does not obligate employers to ensure that the payments go towards health care for their employees, or to determine employees’ eligibility for HAP. According to the court, the duties that the GGRA characterized as a significant administrative burden—tracking which employees perform qualifying work, how many hours they work, and what health care expenditures are made to whom—do not raise the ESR to the level of an ERISA plan.\textsuperscript{56} Rather, they resemble the administrative obligations imposed by other non-preempted state and local laws, such as minimum wage statutes.\textsuperscript{57} The court cited its decision in \textit{Bogue v. Ampex Corp.},\textsuperscript{58} which established that a true ERISA plan must involve "enough ongoing, particularized, administrative, discretionary analysis."\textsuperscript{59} Without possessing "some modicum of discretion" an employer would not be in a position to abuse or mismanage funds, and the employer’s actions would properly fall outside ERISA preemption.\textsuperscript{60}

Regarding the GGRA’s assertion that the City-payment option creates a plan under \textit{Donovan v. Dillingham}, the Ninth Circuit found no case law to suggest that the \textit{Donovan} test applies to statutory laws.\textsuperscript{61} \textit{Donovan} provided that a plan exists where its benefits, beneficiaries, financing, and structure are reasonably ascertainable.\textsuperscript{62} In the past, the Ninth Circuit had adopted the \textit{Donovan} test to determine whether an informal or de facto benefit plan arose from promises made by employers to employees, not whether a plan could arise under statute.\textsuperscript{63} However, the court held that,
even if the Donovan test did apply, the City-payment option would fail, because neither the benefits nor the beneficiaries are reasonably ascertainable.64 Once an employer makes a payment to the City, it discharges its expenditure obligation. The City, not the employer, determines what benefits to offer, and to whom.65

As for the Secretary of Labor’s contention that the HAP itself constitutes an ERISA plan, the court concluded that the HAP is not an ERISA plan but a government entitlement program serving low- and moderate-income residents, funded primarily by taxpayer dollars.66 The HAP is available to San Francisco residents regardless of where, or whether, they are employed.67 Moreover, the HAP is not “established or maintained by an employer or an employee organization,” but by the City.68 Pursuant to the Ordinance, the HAP exists to provide medical service whether or not employers make contributions through the City-payment option. Employers have no control over which employees are eligible for the HAP, what benefits are offered at what rates, or when those benefits or rates can change. Unlike in a traditional third-party ERISA plan, the employer has not contracted with the City to administer a plan that provides a certain level of coverage at a particular rate to a specified group of eligible employees. For these reasons, the court held that the HAP does not itself constitute an ERISA plan.69

ESR DOES NOT “RELATE TO” ERISA PLANS

Having determined that the Ordinance does not create an ERISA plan, the court turned to the question of whether it “relates to” such a plan. A law “relates to” an ERISA plan if it “has a connection with or a reference to such a plan.”70 The court relied on three key cases for guidance on what constitutes a “connection with” an ERISA plan. The Supreme Court struck down a Washington statute in Egelhoff v. Egelhoff because it bound employers to a certain set of rules in designating beneficiaries.71 In Shaw v. Delta Air Lines, the Supreme Court held that ERISA preempts laws that require employers to structure plans in a particular manner and provide specific benefits.72 In Standard Oil Co. v. Agsalud, the Ninth Circuit

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64. Id.
65. Id.
66. Id. at 653.
69. Golden Gate Rest. Ass’n v. City & County of San Francisco, 546 F.3d 639, 653-54 (9th Cir. 2008).
72. 463 U.S. at 97-100.
invalidated a Hawaii statute that compelled employers to provide a plan, with specific benefits, and included reporting requirements inconsistent with ERISA's.\textsuperscript{73}

The court took these statutes as examples of impermissible connection, then distinguished them from the ESR on the grounds that the ESR does not mandate a particular set of rules, structure, or benefits.\textsuperscript{74} Nor does the ESR obligate employers to create an ERISA plan or change an existing plan.\textsuperscript{75} The court acknowledged the possibility that the Ordinance might encourage some employers to create or change an ERISA plan, but maintained that indirect economic influence is permissible because it does not function as a regulation or preclude uniform administration of ERISA plans.\textsuperscript{76} Furthermore, the administrative burdens created by the ESR apply to every employer regardless of whether that employer offers an ERISA plan. The court concluded that the burden of the ESR is actually on the employer, not the plan, and as such presents no conflict with ERISA's purposes.\textsuperscript{77}

Finding no impermissible "connection with" ERISA plans, the court then considered whether the ESR makes an impermissible "reference to" ERISA plans. In California Division of Labor Standards Enforcement v. Dillingham Construction, N.A., Inc., the Supreme Court established that a law makes an impermissible reference where it "acts immediately or exclusively" on ERISA plans, or where "the existence of ERISA plans is essential to the law's operation."\textsuperscript{78} Mackey v. Lanier Collection Agency & Service, Inc.\textsuperscript{79} informed the Ninth Circuit's treatment of the "immediately and exclusively" part of the test. The Supreme Court in Mackey struck down part of a statute that exempted ERISA plans because the statute singled out and regulated those plans in violation of ERISA's preemption clause.\textsuperscript{80} However, the Mackey court upheld the parts of the statute that did not single out ERISA plans, despite the likelihood that those sections would still impose "substantial administrative burdens and costs" on ERISA plans.\textsuperscript{81} The Ninth Circuit recognized that while the Ordinance might impose its own similar burdens, it "does not act on ERISA plans at all, let alone immediately and exclusively."\textsuperscript{82}

\textsuperscript{73} 633 F.2d 760, 763 (9th Cir. 1980), aff'd mem., 454 U.S. 801 (1981).
\textsuperscript{74} 546 F.3d at 655-56.
\textsuperscript{75} Golden Gate Rest. Ass'n v. City & County of San Francisco, 546 F.3d 639, 655-56 (9th Cir. 2008).
\textsuperscript{76} Id. at 656 (citing N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 659-60 (1995)).
\textsuperscript{77} Id. at 657.
\textsuperscript{78} 519 U.S. 316, 325 (1997).
\textsuperscript{79} 486 U.S. 825 (1988).
\textsuperscript{80} Id. at 829-30.
\textsuperscript{81} Id. at 831.
\textsuperscript{82} Golden Gate Rest. Ass'n v. City & County of San Francisco, 546 F.3d 639, 657 (9th Cir. 2008).
As to whether the existence of ERISA plans is essential to the operation of the Ordinance, the court juxtaposed the statutes in *Ingersoll-Rand Co. v. McClendon* \(^{83}\) and *District of Columbia v. Greater Washington Board of Trade* \(^{84}\), both held to be preempted by ERISA, against the non-preempted statute in *WSB Elec. Co. v. Curry*. \(^{85}\) The impermissible reference in *Ingersoll-Rand* arose from the fact that an ERISA plan had to exist for a plaintiff to bring a claim under the preempted statute. \(^{86}\) In *Greater Washington*, the preempted statute required employers to provide workers compensation benefits relative to existing benefit plans, "at the same level of benefits." \(^{87}\) The Supreme Court found an impermissible reference in the *Greater Washington* statute because of the statute's contingency on ERISA benefit levels. \(^{88}\)

The Ninth Circuit held that the existence of ERISA plans is not essential to operation of the ESR. \(^{89}\) The Ordinance does not require employers to establish or change ERISA plans, and it would have its full effect even if not a single covered employer ran an ERISA benefit plan. \(^{90}\) Challenging the District Court's reliance on *Greater Washington*, the Ninth Circuit pointed out that the Ordinance measures employer obligations in terms of payments, not benefit levels, so the impermissible reference that proved fatal to the *Greater Washington* statute does not apply. \(^{91}\) According to the Ninth Circuit, the Ordinance more closely resembles the non-preempted statute in *WSB Electric*, a prevailing wage law that capped the amount of benefit payments creditable to the statute's required wage expenditure. \(^{92}\) Since the *WSB Electric* statute did not obligate employers to make the benefit payments specifically to an ERISA plan, the *WSB Electric* court found no ERISA preemption. \(^{93}\) Similarly, the Ninth Circuit found no requirement in the Ordinance that employers pay into an ERISA plan: "Where a law is fully functional even in the absence of a single ERISA plan... it does not make an impermissible reference to ERISA plans." \(^{94}\)

85. 88 F.3d 788, 793-94 (9th Cir. 1996).
86. 498 U.S. at 140.
87. 506 U.S. at 130.
88. *Id.*
89. *Golden Gate Rest. Ass’n v. City & County of San Francisco*, 546 F.3d 639, 659 (9th Cir. 2008).
90. *Id.* at 657.
91. *Id.* at 658.
92. *Id.* at 659; *WSB Elec. Co. v. Curry*, 88 F.3d 788 (9th Cir. 1996). The statute under review in *WSB Electric* required certain employers to pay a prevailing wage, which could consist of a mixture of wages and benefits. However, the statute set a minimum wage level as well, thereby capping the amount of health care spending a covered employer could apply to reach the prevailing wage. *See WSB Elec.*, 88 F.3d at 790.
93. 88 F.3d at 796.
94. 546 F.3d at 659.
Finally, the court addressed the recent Fourth Circuit decision in Retail Industry Leaders Ass’n v. Fielder. In striking down the ESR provisions of the Ordinance, the District Court had relied heavily on Fielder’s preemption analysis of the Maryland Fair Share Health Care Fund Act (“Fair Share Act”). This Maryland statute required employers with more than 10,000 employees in the state to spend 8% of total payroll costs on employee health insurance or pay the shortfall to a State healthcare fund. On its face, the Fair Share Act resembled the Ordinance in that it offered employers the choice of complying with the law through ERISA plans or through payments to the government. However, the Fourth Circuit held that the statute did not in fact present employers with “meaningful alternatives,” because no “reasonable employer” would pay the State instead of increasing employee benefits. Thus, the Fair Share Act left employers “no rational choice” but “to structure their ERISA healthcare benefit plans so as to meet the minimum spending threshold.” The Fourth Circuit based its conclusions on the presumption that, because paying the State would not result in any reward for the employer or its employees, the only real choice was to comply by re-structuring ERISA plans.

The Ninth Circuit neither accepted nor rejected the Fielder analysis, but did find a “stark contrast” between the Ordinance and the Fair Share Act. When employers under the Ordinance choose the City-payment option, their covered employees receive either discounted HAP services or City-managed medical reimbursement accounts. This tangible reward, according to the court, makes the City-payment option a “meaningful alternative,” distinguishable from the Fair Share Act’s State-payment option. The court described the City-payment option as a “legitimate,” “realistic” alternative for employers, and also noted that as of May 1, 2008, 734 employers had chosen the City-payment option. With that in mind, the court held that even under the Fielder analysis the Ordinance is

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95. 475 F.3d 180 (4th Cir. 2007).
98. 475 F.3d at 193, 196.
99. Id. at 193.
100. Id.
101. Golden Gate Rest. Ass’n v. City & County of San Francisco, 546 F.3d 639, 660 (9th Cir. 2008).
102. S.F., CAL., ADMIN. CODE § 14.1(b)(7) (2006); ESR Reg. 4.2(a).
103. 546 F.3d at 660.
104. Id.
not preempted by ERISA.\textsuperscript{106}

\section*{CRITICISM AND CONSEQUENCES}

The Ninth Circuit’s decision generated significant controversy. In a press release, the ERISA Industry Committee accused the court of having “rejected thirty years of settled law.”\textsuperscript{107} Professor Edward Zelinsky published an article soon after the ruling that presented a series of legal and political criticisms.\textsuperscript{108} Zelinsky argues that the distinction made by the Ninth Circuit between the San Francisco ordinance and the Maryland Fair Share Act actually pushes the Ordinance towards preemption, not away from it.\textsuperscript{109} If employers make payments to the City, and their employees receive a healthcare benefit – in the form of discounted services or reimbursement accounts – Zelinsky contends that those employers are essentially purchasing an ERISA benefit plan.\textsuperscript{110} He also criticizes the court for putting forward a largely false distinction between benefits and benefit plans, arguing that the legal threshold to create a “plan” is low enough that virtually any continuous employer-paid healthcare expenditure would properly constitute a plan under ERISA.\textsuperscript{111}

Despite the Ninth Circuit’s efforts to smooth over any disagreement among the Circuits, the incongruities between its decision and Fielder suggest at least some ambiguity surrounding “pay-or-play” legislation and ERISA preemption. Noticing the ambiguity, a representative for the GGRA called the case “ripe for the Supreme Court.”\textsuperscript{112} On October 21, 2008 the GGRA filed a petition for rehearing by the Ninth Circuit \textit{en banc}, which is under review at the time of this writing.\textsuperscript{113}

The potential circuit split may expose a deeper division in the federal courts’ conception of ERISA’s purpose(s). In Fielder, the Fourth Circuit treated uniform regulation as the only ERISA goal relevant to a preemption analysis, never mentioning ERISA’s objective of protecting employees

\begin{footnotesize}
106. 546 F.3d at 659.
110. \textit{Id.}
111. \textit{Id.} at 19.
113. See Appellee Golden Gate Rest. Ass’n, Petition for Rehearing En Banc, Golden Gate Rest. Ass’n v. City & County of San Francisco, No. 07-17370 (9th Cir. Oct. 21, 2008).
\end{footnotesize}
from fund abuse and mismanagement. The District Court in *Golden Gate Rest. Ass'n* took an identical approach, ignoring the employee protection issue entirely. On the other hand, the Ninth Circuit focused on employee protection in separating simple, employer-provided benefits from ERISA benefit plans. Though the Ninth Circuit viewed its decision as conforming to *Fielder*, the opinions still appear somewhat in conflict. *Golden Gate Rest. Ass'n* significantly narrows the scope of preemption and allows states much more leeway in crafting pay-or-play legislation. It also calls into question the Fourth Circuit’s definitions of “reasonable employer,” “rational choice,” and “meaningful alternative.”

Proponents of universal health care might argue that this decision does more harm than good, because it relieves some of the pressure on Congress to amend ERISA’s preemption clause. Others may hope that a legal controversy will push Congress to act—either by amending ERISA or improving federal healthcare programs. In any case, *Golden Gate Restaurant Ass'n* sets the stage for a robust national debate on ERISA preemption and the health care priorities of federal, state, and local governments.

Alek Felstiner, J.D. 2011 (UC Berkeley)

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114. See *Retail Industry Leaders Ass'n v. Fielder*, 475 F.3d 180, 191 (4th Cir. 2007).
116. See *Golden Gate Rest. Ass'n v. City & County of San Francisco*, 546 F.3d 639, 647, 649, 650 (9th Cir. 2008).
117. *Id.* at 660; see *Fielder*, 475 F.3d at 193, 196.
Guard Publishing Co.: Work E-mail and the Battle over Where Employers Can Draw the Line on Employees' E-mail Use

Is it permissible for an employer to prohibit employees from using work e-mail for union purposes, while allowing personal e-mails? According to the National Labor Relations Board ("NLRB"), the answer is "yes," as long as employers draw a line on work e-mail use that does not specifically discriminate against or between unions.¹ In Guard Publishing Co., the NLRB adopted the Seventh Circuit's reasoning² that "discrimination means the unequal treatment of equals," and therefore held that discrimination occurs only when similar "activities or communications" are treated differently "because of their union or other Section 7-protected status."³ For example, an employer cannot draw a line that facially discriminates against unions, such as allowing employees to send solicitations for one union and not another, or allowing all e-mails except union-related e-mails.⁴ However, an employer can effectively prohibit employees from sending union-related e-mails by drawing a non-union specific line on e-mail use, such as banning all "noncharitable solicitations," which bans solicitations regarding Avon as well as unions, while still allowing personal e-mails.⁵ The NLRB's decision was in response to a contentious battle between a union which advocated for employees' communication rights and an employer who argued that work

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¹ Guard Publ'g Co. (Guard II), 2007 NLRB LEXIS 499, at *37-38 (N.L.R.B. Dec. 16, 2007).
² The NLRB majority chose to bypass existing Board precedent and instead followed the Seventh Circuit's reasoning as seen in Fleming Co. v. NLRB, 349 F.3d 968 (7th Cir. 2003) (denying enforcement against an employer who prohibited union literature on a work bulletin board even though personal announcements were allowed) and Guardian Indus. Corp. v. NLRB, 49 F.3d 317 (7th Cir. 1995) (denying enforcement against an employer who allowed employees to post personal notices while prohibiting union and group postings). Id. at *33-37.
⁴ Guard II, 2007 NLRB LEXIS 499, at *37-38. Employers are still free to send antiunion messages using work e-mail: "[A]n employer may use its own equipment to send antiunion messages, and still deny employees the opportunity to use that equipment for prounion messages...employees are not entitled to use a certain method of communication just because the employer is using it." Id. at *38 n.17.
⁵ Id. at *38.
e-mail systems are part of an employer’s property and therefore subject to the employer’s control. In a 3-2 decision, the NLRB held for the employer, finding that employees have no right to use e-mail for union purposes and that a work communication policy is discriminatory only if it draws distinctions based on union-specific lines.

FACTUAL BACKGROUND

On May 4, 2000, Suzi Prozanski sent a union-related e-mail from work to her coworkers at the Register-Guard, a newspaper publisher in Eugene, Oregon. Prozanski, a copy editor and president of the Eugene Newspaper Guild, CWA Local 37194, wanted to clarify some misinformation regarding an earlier union rally. On May 5, Prozanski’s managing editor issued her a written warning for violating the Register-Guard’s Communications Systems Policy (“CSP”). This policy prohibited employees from using communication systems, including e-mail, “to solicit or proselytize for commercial ventures, religious or political causes, outside organizations, or other non-job-related solicitations.” Subsequently, Prozanski sent two more union-related e-mails to her co-workers’ work e-mail accounts, using a computer in the union office, instead of her work computer, to send the e-mails. Prozanski’s employer warned her that these communications also violated the CSP. While employees regularly used their work e-mail for personal matters, including “baby announcements, party invitations, and the occasional offer of sports tickets or request for services such as dog walking,” the use of work e-mail for union-related business prompted the Register-Guard to warn Prozanski for violating the prohibition against “non-job-related solicitations.”

In October 2000, not long after Prozanski sent her three union-related e-mails, the Register-Guard and the Union entered into bargaining over the renewal of their contract. During the bargaining, the Register-Guard presented counterproposal 26, which stated: “The electronic communications systems are the property of the Employer and are provided for business use only. They may not be used for union business.”

8. Id. at *8-9.
9. Id. at *7-9, *106.
10. Id. at *9.
11. Id. at *6-7.
12. Id. at *10.
15. Id. at *10-11.
16. Id.
the Union viewed the counterproposal as violating employees’ statutory right to join and participate in labor organizations, the Union filed unfair labor practice charges against the Register-Guard.

The administrative law judge held that while the CSP was not a violation of the law, the Register-Guard could not enforce its limitations on the use of business property in a discriminatory fashion. The judge found that the Register-Guard had discriminated by enforcing the CSP against Prozanski, since it allowed e-mail use for a “wide variety of non-business purposes” but prohibited e-mails regarding union activity. The judge found counterproposal 26 to be “an unlawful codification of a discriminatory policy” and concluded that the Register-Guard’s refusal to withdraw the proposal was a violation of NLRA Section 8(a)(5), which requires employers to bargain collectively with employees’ representatives. The Register-Guard and the Union both appealed the decision to the Board.

ARGUMENTS OF THE PARTIES AND AMICI ON APPEAL

The Register-Guard and amici briefs filed in its support emphasized the property interest that the employer has in work e-mail systems. The Register-Guard stressed that e-mail is an integral part of its computer system, which is employer-owned equipment, to be used for business purposes. The Register-Guard noted that Board precedent has upheld the right of employers to restrict the use of its equipment to business only. Amici in support of the Register-Guard, the Employers Group and the United States Chamber of Commerce, argued that it is within the scope of labor law for an employer to allow personal use of work e-mail while at the same time imposing “reasonable, nondiscriminatory limits.”

The Union and amici briefs filed in its support stressed the right of employees to communicate regarding organization and union activity. The Union argued that where an employer grants employees the right to use work e-mail to communicate regarding nonbusiness matters, “the

20. Id. at *21-22, *28.
21. Id. at *27; see also 29 U.S.C. § 158.
23. Id. at *16, *18.
24. Id. at *16.
25. Id.; see Union Carbide Corp v. NLRB, 714 F.2d 657, 663-64 (6th Cir. 1983) (upholding an employer’s “basic property right” to “regulate and restrict employee use of company property”).
27. Id. at *15-18.
employees are already rightfully on the employer's property," and therefore any restrictions on e-mail use must be based on the employer's management interests rather than its property interests. 28 The Union advocated for a standard that would require additional restrictions beyond a nondiscriminatory e-mail policy to "further substantial management interests." 29 In support of the Union, the National Employment Lawyers Association analogized work e-mail systems to "lunchrooms or breakrooms," where employees have a statutory right to talk about union matters. 30 The General Counsel argued that "e-mail cannot neatly be characterized," and in today's world, e-mail is a widely used "gathering place" for employees to communicate regarding both work and non-work subjects. 31

MAJORITY OPINION OF THE NATIONAL LABOR RELATIONS BOARD

In a decision favorable to the Register-Guard, the majority, composed of Chairman Battista, and Members Schaumber and Kirsanow, ruled in favor of employers drawing their own line on what is permissible regarding employees' work e-mail use, as long as the line is not drawn on union grounds. 32 The NLRB considered three main issues regarding employees using their employer's work e-mail for union purposes: 1) the Register-Guard's prohibition in its CSP on e-mail use "for all 'non-job-related solicitations';" 2) the Register-Guard's enforcement of its policy against union e-mails while allowing personal e-mails; and 3) the Register-Guard's insistence, in counterproposal 26, on explicitly prohibiting employees from using e-mail for "union business." 33 The majority held that Register-Guard employees had no entitlement to use work e-mail for union purposes. 34 As for discriminatory enforcement of e-mail policies, the Board modified its approach, "to clarify that discrimination under the Act means drawing a distinction along Section 7 lines." 35 According to the majority, even though the Register-Guard allowed personal e-mails such as jokes and invitations, it was significant that the Register-Guard did not allow anyone "to use e-mail to solicit support for or participation in any outside cause or organization other than the United Way." 36 Under the Seventh Circuit's principle of "unequal treatment of equals," the Register-Guard would

29.  *Id.*
30.  *Id.* at *17.
31.  *Id.* at *13.
32.  *Id.* at *37-38.
33.  *Id.* at *1-2.
35.  *Id.*
36.  *Id.* at *33.
clearly “violate the [law] if it permitted employees to use e-mail to solicit for one union but not another, or it permitted solicitation by antiunion employees but not by prounion employees,” which would be drawing a line on Section 7 grounds.\(^\text{37}\) However, the majority found that it was not discriminatory, for example, to draw the line at prohibiting all noncharitable solicitations, even though this rule would allow solicitations for the Salvation Army and not a union.\(^\text{38}\) The majority gave several examples of permissible ways of drawing the line on e-mail use, such as between: “solicitations of a personal nature (e.g., a car for sale) and solicitations for the commercial sale of a product (e.g., Avon products), between invitations for an organization and invitations of a personal nature, between solicitations and mere talk.”\(^\text{39}\) Even though union solicitation would fall into the prohibited category in each of these examples, the majority declared that these methods of drawing the line do not equal discrimination “along Section 7 lines.”\(^\text{40}\)

The majority held that in regards to Prozanski’s first e-mail, the Register-Guard did treat her in a discriminatory manner since her e-mail was not a solicitation for the union, but rather was simply a clarification of some facts about a union rally.\(^\text{41}\) Since Prozanski’s second and third e-mails were both direct solicitations for the union, the majority found that the Register-Guard did not violate Section 8(a)(1) by enforcing the CSP against her.\(^\text{42}\) For the final issue, the majority did not find that the Register-Guard had insisted on counterproposal 26, which explicitly prohibited e-mails regarding unions, and therefore dismissed the allegation that they were in violation of the rules of collective bargaining.\(^\text{43}\)

**DISSENT BY MEMBERS LIEBMAN AND WALSH**

The dissent, composed of Members Liebman and Walsh, took issue with the majority’s unwillingness to see e-mail as “a primary means of workplace communication,” and with the majority’s standard on discrimination which grants employers almost “unlimited discretion” to exclude communications regarding unions.\(^\text{44}\) Beginning with a biting

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\(^{37}\) Id. at *37.

\(^{38}\) Id. at *38. The majority did point out that if there were evidence that an employer drew a “neutral” line with an antiunion motivation, this would be unlawful, but no such evidence was found regarding the Register-Guard. Id. at *39 n.18.

\(^{39}\) Id. at *38.


\(^{41}\) Id. at *46.

\(^{42}\) Id. at *44-45.

\(^{43}\) Id. at *2.

\(^{44}\) Id. at *104-05 (Liebman and Walsh, dissenting).
critique of the NLRB majority, the dissent writes: "Only a Board that has been asleep for the past 20 years could fail to recognize that e-mail has revolutionized communication both within and outside the workplace." E-mail is a new form of communication, the dissent argues, different from "bulletin boards, telephones, and pieces of scrap paper," and has in part taken the place of face-to-face conversation, replacing conversations at the water cooler. While the use of a phone or bulletin board for union business may mean reduced usage for business purposes, the unique properties of e-mail allow for simultaneous use by both employees and management.

The dissent criticized the majority's rule as allowing employers to draw their own lines on employee use of work e-mail, so long as the lines are not drawn on union grounds, finding it a "license to permit almost anything but union communications, so long as the employer does not expressly say so." Pointing out that an employer could "prohibit all nonwork-related solicitations by membership organizations," the dissent illustrated how an employer could draw a line that would allow employees to send solicitations regarding almost anything except unions while drawing a line that would be facially neutral towards unions. In the words of the dissent: "Such a result stands labor law on its head." The dissent further noted that employees have a long-standing right to communicate regarding union matters while on their employer's property, which has been recognized by both the NLRB and the courts. The dissent makes a strong statement of support for employees' communication rights, stating that labor policy should reflect our technological advances, and that employers should not prohibit employees with regular access to work e-mail from sending non-work-related solicitations.

CONCLUSION AND IMPACT OF GUARD PUBLISHING CO.

The majority's opinion in this case favors employers by recognizing work e-mail as part of an employer's equipment system, instead of favoring an increase in employees' communication abilities regarding unions. The

45. Id. at *54.
47. Id. at *72-73.
48. Id. at *98.
49. Id. at *98 n.26.
50. Id.
51. Id. at *68. One of the main cases cited by the dissent is Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945), where the Supreme Court affirmed the Board's "presumption that restricting oral solicitation [by employees] on nonworking time was unlawful, absent special circumstances." Id. at *64-66.
53. Id. at *20-21 (majority opinion).
majority does suggest that if e-mail ever became so pervasive as to render break room discussions and oral communications "useless," employees’ rights might be expanded to include the use of e-mail for union purposes. 54 The majority pointed out that there was "no contention in this case that the [Register-Guard’s] employees rarely or never see each other in person or that they communicate with each other solely by electronic means." 55 The hardships for union organizers trying to reach employees who are not available for conversations in the lunch room or at the water cooler raise the question of whether employees who telecommute or work from regional offices should be accessible for union communication through work e-mail. In an ever-changing world of increasing reliance on technology, it is likely that the issue of whether an employee can send union-related e-mails through an employer’s work e-mail system will arise again in litigation.

Caryn F. Horner, J.D. 2010 (UC Berkeley)

54. Id. at *29-30.
55. Id. at *30.
Are They or Aren’t They?

*Agri Processor* Revisits Undocumented Workers’ Employee Status Under the NLRA

In yet another example of post-*Hoffman* judicial fracture, the Circuit Court of Appeals for the District of Columbia ("D.C. Circuit") recently divided in *Agri Processor Co.* v. *NLRB* over whether undocumented workers are employees for purposes of the National Labor Relations Act ("NLRA").

The majority held that the Supreme Court’s ruling in *Sure-Tan Inc.* v. *NLRB* controlled despite the enactment of the Immigration Reform and Control Act of 1986 ("IRCA") and that undocumented workers are employees for purposes of the NLRA.

Prior to IRCA, the Supreme Court’s decision in *Sure-Tan* seemed to have definitively settled that undocumented workers are ‘employees’ as defined by the NLRA. In *Sure-Tan*, the Court held:

> [T]he [NLRA] squarely applies to “any employee.” The only limitations are specific exemptions for agricultural laborers, domestic workers, individuals employed by their spouses or parents, individuals employed as independent contractors or supervisors, and individuals employed by a person who is not an employer under the NLRA. Since undocumented aliens are not among the few groups of workers expressly exempted by Congress, they plainly come within the broad statutory definition of “employee.”

However, the law became less clear when IRCA was enacted because it expressly made it illegal to employ undocumented workers. Muddying the waters further, the Supreme Court held in *Hoffman Plastic Compounds Inc.* v. *NLRB* that IRCA limited the National Labor Relations Board’s ("NLRB" or "Board") authority to grant remedies to undocumented...
workers, specifically back pay. Thus, an employer could violate the rights of undocumented workers without fear of having to reinstate them or make good on back pay. The Hoffman decision also invited employers to re-visit whether undocumented workers had any protection under the NLRA post-IRCA.

FACTUAL BACKGROUND

In September 2005, workers at Agri Processor, a New York-based wholesale kosher meat products company, voted to join the United Food and Commercial Workers Union. In an effort to avoid bargaining with the newly-elected union, the employer ran employees' Social Security numbers through the Social Security Administration’s online database. The employer claimed many of the Social Security numbers came back as belonging to different individuals or as non-existent. The employer interpreted the results as evidence that the employees in question were undocumented. Reasoning that undocumented workers are prohibited from unionizing because they are not employees as defined by the NLRA, the employer argued it did not have a duty to bargain with the union because the election was invalid. The union filed an unfair labor practice charge under sections 8 (a)(1) and (5) of the NLRA, which makes it illegal for an employer to “interfere with, restrain, or coerce employees on the exercise of the rights guaranteed in” the Act or “refuse to bargain collectively with the representatives of his employees,” respectively.

The Administrative Law Judge, relying on Board precedent in Concrete Form Walls, Inc., found the employer in violation of the NLRA and ordered Agri Processor to bargain with the union. After the Board affirmed these findings the employer petitioned the D.C. Circuit for review, arguing that undocumented workers were not employees under the NLRA because IRCA made it illegal to employ them. The employer

10. Agri Processor Co., 514 F.3d at 2.
11. Id.
12. Id.
13. Id.
16. 346 N.L.R.B. No. 80 (Apr. 13, 2006) (holding that undocumented workers are statutory employees under the NLRA, the Supreme Court’s decision in Hoffman Plastic notwithstanding).
17. Agri Processor Co., 514 F.3d at 2.
18. See Agri Processor Co., Inc. and Local 342, United Food and Commercial Workers Union (Local 342), 347 N.L.R.B. No. 107, at 3 (2006).
19. Agri Processor Co, 514 F.3d. at 2-3.
argued in the alternative that undocumented workers could not be in the same bargaining unit as documented workers. Therefore, the bargaining unit created in the election was improper and the employer was not required to bargain with the union. The Board cross-petitioned for enforcement.

The employer's argument suggested that IRCA, passed after Sure-Tan was decided, implicitly amended the definition of an employee under the NLRA to exclude undocumented workers. It also suggested the Supreme Court's decision in Hoffman Plastic overruled Sure-Tan's inclusion of undocumented workers under the NLRA.

The Majority Opinion

In an opinion authored by Judge Tatel, the majority disagreed with the Agri Processor. Relying on the plain language of the NLRA and the Supreme Court's decision in Sure-Tan, the majority held that undocumented workers are employees as defined by the NLRA. In so ruling, the majority concurred with previous rulings by the Seventh, Ninth, and Eleventh Circuits.

IRCA did not expressly amend the definition of "employee" under the NLRA. The text of IRCA made it illegal for employers to hire undocumented workers; it did not bar statutory protections for the same workers. This, the D.C. Circuit stated, was not contradictory because:

[A]plication of the NLRA to [illegal aliens] helps to assure that the wages and employment conditions of lawful residents are not adversely affected by the competition of illegal alien employees who are not subject to the standard terms of employment. [I]f an employer realizes that there will be no advantage under the NLRA in preferring illegal aliens to legal resident workers, any incentive to hire such illegal aliens is correspondingly lessened.

Thus, the inclusion of undocumented workers as "employees" under the NLRA lessens the incentive for employers to hire undocumented
workers.

Nor did the text of the IRCA implicitly amend the definition of "employee" under the NLRA.\textsuperscript{29} The majority noted that implied repeal is disfavored and will only be found where Congressional intent to repeal or amend is "clear and manifest."\textsuperscript{30} Here, the legislative history of IRCA expressed the opposite: a clear intent not to limit the scope of the term "employee" under the NLRA.\textsuperscript{31} Therefore, the court found that the "NLRA's plain language, as applied by the Supreme Court in Sure-Tan, continues to control after IRCA."\textsuperscript{32}

The majority distinguished \textit{Hoffman Plastic} by drawing a clear distinction between the rights and protections provided by the NLRA and the remedies for violations of the statute's provisions.

Nowhere in \textit{Hoffman Plastic} did the Court hold that IRCA leaves undocumented aliens altogether unprotected by the NLRA. Indeed, the Court explicitly declined to revisit \textit{Sure-Tan}'s holding that undocumented aliens are employees under the NLRA and said that remedies other than backpay—such as cease and desist orders—can still be imposed for NLRA violations committed against undocumented aliens.\textsuperscript{33}

The court held that even if it was unclear whether the NLRA's definition of "employee" included undocumented workers, the Board's decision to include them in \textit{Sure-Tan} was entitled to "considerable deference" since "the task of defining the term 'employee' is one that 'has been assigned primarily to the [Board]."\textsuperscript{34} Furthermore, a court should uphold "any interpretation that is reasonably defensible."\textsuperscript{35} Including undocumented workers within the scope of the term "employee" is reasonable because "extending the coverage of the [NLRA] to such workers is consistent with the Act's avowed purpose of encouraging and protecting the collective bargaining process."\textsuperscript{36} Conversely, leaving undocumented workers without the NLRA's protections "would create a subclass of workers without a comparable stake in the collective goals of their legally resident co-workers, thereby eroding the unity of all the employees and impeding effective collective bargaining."\textsuperscript{37}

\textsuperscript{29} \textit{Id}. at 5-6.
\textsuperscript{30} \textit{Id}. (citing Rodriguez v. United States, 480 U.S. 522, 524 (1987)).
\textsuperscript{32} \textit{Agri Processor Co.}, 514 F.3d at 5.
\textsuperscript{33} \textit{Id}. at 7-8 (citing \textit{Hoffman Plastic Compounds Inc. v. NLRB}, 535 U.S. 137, 149 n.4, 152 (2002)) (internal citations omitted).
\textsuperscript{34} \textit{Id} at 8 (citing \textit{Sure-Tan Inc. v. NLRB}, 467 U.S. 883, 891 (1984)).
\textsuperscript{35} \textit{Id}.
\textsuperscript{36} \textit{Id}. (citing \textit{Sure-Tan}, 467 U.S. at 892).
\textsuperscript{37} \textit{Id}. 

To the employer’s final suggestion that the court should rule in its favor, even where precedent and statute did not so require, because of recent policy trends toward illegal immigration, the court responded that it is the prerogative of Congress to enact legislative change, not the courts.  

The majority also dismissed the company’s argument that undocumented workers could not be in the same bargaining unit as documented workers. The court stated that the NLRA vests the authority to determine appropriate bargaining units with the Board and the Board’s decisions are accorded particular deference. In determining the appropriate bargaining unit, the Board’s focus is on whether the employees share a “community of interests” as employees. Here, the Board concluded that undocumented workers’ wages, benefits, skills, duties, working conditions, and supervisors are identical to those of documented workers. The mere fact that undocumented workers fear being detected and losing their jobs does not alter these basic shared interests as employees.

JUDGE KAVANAUGH’S DISSENT

Judge Kavanaugh’s dissent opens with an example that assumes an innocent employer: “[t]heir immigration status apparently unbeknownst to their employer, illegal immigrant workers voted in a union election” and tainted the result. This seems like chosen naiveté on the part of the employer. Why should it suddenly occur to the employer, post-election, that it should ensure its compliance with IRCA by verifying whether employees’ names and Social Security numbers match the Social Security Administration’s records?

Stressing a changed legal landscape since the Supreme Court’s decision in Sure-Tan, the dissent argued that, in the wake of IRCA and the Supreme Court’s decision in Hoffman Plastic, undocumented workers are no longer employees as defined by the NLRA. As a result, Judge Kavanaugh recommended remanding the case to the Board to decide how a party can challenge a union election tainted by the votes of undocumented employees.

The dissent maintained that the term “employee” in the NLRA is not a free-standing concept and must be interpreted in conjunction with the

38. *Agri Processor Co.*, 514 F.3d at 5.
39. *Id.* at 8-9.
40. *Id.*
41. *Id.* (emphasis added).
42. *Id.* at 9.
43. *Id.*
44. *Agri Processor Co.*, 514 F.3d at 10 (Kavanaugh, J., dissenting) (emphasis added).
45. *Id.* at 10, 12.
immigration laws.\textsuperscript{46} When \textit{Sure-Tan} was decided, it was not illegal for an undocumented worker to be employed in the United States. The \textit{Sure-Tan} Court stated: “Since the employment relationship between an employer and an undocumented alien is hence not illegal under the [Immigration and Nationality Act ("INA")], there is no reason to conclude that application of the NLRA to employment practices affecting such aliens would necessarily conflict with the terms of the INA.”\textsuperscript{47} Therefore, it was logical to include such workers in the definition of employee under the NLRA. According to the dissent this meant “if federal law does not prohibit employment of illegal immigrant workers, then the workers can be ‘employees’ under the NLRA.”\textsuperscript{48} The dissent reasoned that the reverse was also true: “if federal law prohibits employment of illegal immigrant workers, then the workers are not ‘employees’ under the NLRA.”\textsuperscript{49} However, denying the antecedent merely permits the assumption that immigration laws and labor laws \textit{may} be in conflict; it does not determine if they are \textit{in fact} in conflict and if so, how that conflict should be resolved. While the dissent acknowledges this error in reasoning, it defends its reading as “far and away the better interpretation of \textit{Sure-Tan}” given that the Court was aware of pending immigration legislation (IRCA) when it decided the case.\textsuperscript{50}

The dissent dismisses the majority’s implied repeal analysis as a “sideshow.” Kavanaugh argues that \textit{Sure-Tan} made the NLRA’s definition of “employee” dependent upon current immigration law. Kavanaugh also suggests that Congress has since expressly repealed the inclusive definition of “employee” under the NLRA by enacting IRCA.\textsuperscript{51} Yet, the dissent does not point to the text of IRCA or any legislative history to support an intention by Congress to repeal the inclusive definition of “employee” under the NLRA.

Instead, the dissent attempts to distinguish the only legislative materials directly relevant to the applicability of the NLRA to undocumented workers. According to the dissent, “where legislative materials attempt to preserve a prior judicial precedent that would require the Court to abandon altogether the text of the statute as a guide in the

\textsuperscript{46} \textit{Id.} (Sure-Tan Inc. v. NLRB, 467 U.S. 883, 892-93 (1984)).
\textsuperscript{47} \textit{Id.} at 10-11 (citing Sure-Tan, 467 U.S. at 892-93).
\textsuperscript{48} \textit{Id.} Judge Kavanaugh explained that “[t]he \textit{Sure-Tan} majority reasoned . . . that a congressional prohibition on employment of illegal immigrants was necessary in order to conclude that illegal immigrant workers were not ‘employees’ under the NLRA. As a result of passage of the Immigration Reform and Control Act in 1986, of course, such a prohibition now exists.” \textit{Id.} at 11 n.1.
\textsuperscript{49} \textit{Id.}
\textsuperscript{50} \textit{Agri Processor Co.}, 514 F.3d at 11-13 (arguing that the majority’s reliance on “a logic textbook” to contend “that \textit{Sure-Tan} is not as clear as it could have been on how the NLRA’s coverage of ‘employees’ would be affected by a change in the immigration laws” is not the “better reading of \textit{Sure-Tan} . . .”)
\textsuperscript{51} \textit{Id.} at 13 n.3.
interpretive process,” the Supreme Court has flatly rejected such material. But here, the legislative materials do not require the court to abandon the text of IRCA. As the majority noted, the statutes are not necessarily in conflict. IRCA can prohibit the employment of undocumented workers without removing the protection of the NLRA from the same workers. Conversely, denying undocumented workers statutory protections simultaneously undermines immigration and labor policy by giving employers an incentive to hire exploitable labor and inhibiting collective bargaining.

Finally, the dissent asserts that Hoffman Plastic “made clear that, in the wake of IRCA, illegal immigrant workers are not entitled to any remedies under the NLRA... even when unfair labor practices are committed against them.” Therefore, Hoffman Plastic is more consistent with a conclusion that undocumented workers are not employees under the NLRA. However, while the Hoffman Plastic decision is largely unfavorable to undocumented workers, the dissent’s interpretation overstates its effect. In the opinion the Supreme Court expressly stated it was not revisiting the definition of “employee” under the NLRA and that some remedies for unfair labor practices under the NLRA remained available to undocumented workers.

**LEGACY OF AGRI PROCESSOR**

Agri Processor highlights the judicial confusion over the interplay between current immigration law and the scope of the Supreme Court’s decision in Hoffman Plastic. In balancing national immigration and labor policies and goals, it is important not to uncritically concede the needs of labor as secondary to other national policies.

Agri Processor maintains the statutory rights of undocumented workers under the NLRA, which, although diminished by Hoffman Plastic’s limitations on remedies, remain vital to national labor and immigration policy. Equally important, Agri Processor makes clear that employers cannot use their employees’ immigration status to challenge legally elected unions.

Other circuit courts that have decided this issue have also followed Sure-Tan in holding that undocumented workers are employees under the

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52. *Id.* at 14 (internal citations omitted).
53. *Id.* at 5 (majority opinion).
54. *Id.*
56. *Agri Processor Co.*, 514 F.3d at 12-13 (Kavanaugh, J., dissenting).
58. *Id.* at 152.
However, employers, emboldened by the *Hoffman Plastic* decision, are likely to continue challenging their employees' immigration status and their employment claims under the NLRA and other labor statutes. It remains for the Supreme Court or Congress to clarify what, if any, statutory protections apply to undocumented workers post-IRCA and, in the wake of *Hoffman Plastic*, what remedies remain where an employer violates such protections.

Billie Pierce, J.D. 2010 (UC Berkeley)

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59. *See NLRB v. Concrete Form Walls, Inc.*, 225 Fed. App'x 837 (11th Cir. 2007) (holding that undocumented workers are still employees under the NLRA after IRCA); *NLRB v. Kolka*, 170 F.3d 937, 941 (9th Cir. 1999) (holding that the NLRA still defines undocumented workers as employees after IRCA); *Del Rey Tortilleria, Inc. v. NLRB*, 976 F. 2d 1115, 1121 (7th Cir. 1992) (holding that undocumented workers are still defined as employees under the NLRA after IRCA).
INTRODUCTION

Friendly Cab Company and its affiliates ("Friendly") own and operate a fleet of eighty taxicabs in the San Francisco Bay Area. Although Friendly attempted to classify its drivers as independent contractors in their lease agreements, the Court of Appeals for the Ninth Circuit recently ruled that Friendly's drivers are in fact employees within the meaning of the National Labor Relations Act\(^1\) ("NLRA" or "the Act").\(^2\) Interestingly, the court emphasized Friendly drivers' lack of entrepreneurial freedom as a weighty factor favoring employee status.\(^3\) This Summary will discuss the conclusions made in Friendly Cab as well as its legal background and potential implications.

LEGAL BACKGROUND

Under the NLRA, employees enjoy the rights to self-organize, participate in labor organizations, and engage in collective bargaining with employers.\(^4\) In 1947, the Taft-Hartley Act\(^5\) amended the NLRA to exclude independent contractors from the definition of employees.\(^6\) The exclusion created an out for employers: to avoid obligations to recognize worker unions and engage in collective bargaining, they may retain independent contractors rather than employees. The National Labor Relations Board ("NLRB") and courts rely on a fact-specific inquiry based on common law agency principles to determine whether a given set of workers are

\(2\) NLRB v. Friendly Cab Co., 512 F.3d 1090, 1103 (9th Cir. 2008).  
\(3\) Id. at 1098-99.  
\(6\) 29 U.S.C. § 152(3).
employees or independent contractors; only employees are entitled to NLRA rights and protections.\footnote{7}

Congress enacted the NLRA in 1935 in order to protect individuals over whom employers had disproportionately high bargaining power and to ensure “the free flow of commerce” by “encouraging . . . collective bargaining and by protecting 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 conditions of their employment or other mutual aid or protection.”\footnote{8} The Supreme Court first addressed the original Act’s definition of employee, which did not specifically exclude independent contractors,\footnote{9} in \textit{NLRB v. Hearst Publications, Inc.}\footnote{10} The Court upheld the NLRB’s broad construction of the term, reasoning that the Act is meant to protect some individuals who fall somewhere outside the “traditional legal distinctions” between employees and independent contractors.\footnote{11}

In response, Congress amended the Act by specifically excluding independent contractors from its definition of employee, limiting the Court’s conclusions in \textit{Hearst}.\footnote{12} The Court responded to the change by invoking fact-based, totality-of-the-circumstances inquiries based on common law principles of agency that define the line between independent contractor and employee status,\footnote{13} appealing to the very same “traditional legal distinctions” between employees and independent contractors which the \textit{Hearst} Court deemed slightly inappropriate in the context of the NLRA.\footnote{14}

The common law of agency focuses on the extent of control an employer has a right to exercise over an individual, especially with respect to the details of the work.\footnote{15} The Restatement (Second) of Agency outlines factors which may indicate control, including the extent to which an employer may control “the details of the work” and “whether or not the one employed is engaged in a distinct occupation or business.”\footnote{16} The Courts of

\footnote{7. Friendly Cab, 512 F.3d at 1096 (citing NLRB v. United Ins. Co. of Am., 390 U.S. 254, 256 (1968); Merchants Home Delivery Serv., Inc. v. NLRB, 580 F.2d 966, 972-73 (9th Cir. 1978); \textit{RESTATEMENT (SECOND) OF AGENCY} § 220 (1957)).}
\footnote{8. 29 U.S.C. § 151.}
\footnote{10. 322 U.S. 111 (1944).}
\footnote{11. \textit{Id.} at 126, 130 (deferring to the NLRB’s analysis).}
\footnote{13. NLRB v. United Ins. Co. of Am., 390 U.S. 254, 256 (1968).}
\footnote{14. See Hearst, 322 U.S. at 126.}
\footnote{15. NLRB v. Friendly Cab Co., 512 F.3d 1090, 1096-97 (9th Cir. 2008).}
\footnote{16. \textit{RESTATEMENT (SECOND) OF AGENCY} § 220 (1958). Although the Restatement (Third) of Agency was published in 2006, it leaves the term “independent contractor” behind, asserting that it is “equivocal in meaning and confusing in usage because some termed independent contractors are agents while others are nonagent service providers.” \textit{RESTATEMENT (THIRD) OF AGENCY} § 1.01 cmt. c (2006).}
Appeals for the Ninth Circuit and the District of Columbia have called attention to the amount of entrepreneurial freedom allocated to delivery and taxicab drivers by their alleged employers; entrepreneurial freedom may be construed as its own factor indicating control or lack thereof, or may be inherent in the "distinct occupation or business" factor in the Restatement (Second) of Agency.  

FACTUAL BACKGROUND OF FRIENDLY CAB

Friendly operates out of Oakland, California. Most drivers hold automatically renewing seven-day leases, allowing for six days of driving and one day for maintenance. Drivers may designate for which of Friendly's affiliates they prefer to work, but Friendly ultimately assigns them to a company depending on cab availability. 

As part of their leases, drivers agree to abide by Friendly's policy manual and standard operating procedures ("SOP"). A number of the SOP's terms regulate Friendly's control over its drivers; of great importance to the case at issue is the SOP's restriction on outside business opportunities for drivers. It requires that "all calls for service . . . be conducted over an Employer provided communication system; drivers may not provide individual business cards or phone numbers to customers or develop their own independent relationship with individuals or businesses." Drivers are ostensibly entitled to refuse any dispatch, but they generally accept because Friendly's dispatchers will subsequently ignore or bypass those who previously refused a dispatch. 

In addition, the SOP regulates a number of the conditions and details of drivers' work, including their driving practices, dress code, on-the-job

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Courts therefore cannot utilize the newer Restatement with respect to the independent contractor/employee distinction, as the NLRA and judicial precedent maintain the term "independent contractor" and its common law meaning.

17. See Corporate Express Delivery Sys. v. NLRB, 292 F.3d 777, 780 (D.C. Cir. 2002) (citing Restatement (Second) of Agency § 220); Merchants Home Delivery Serv., Inc. v. NLRB, 580 F.2d 966, 973 (9th Cir. 1978) (citing Brown v. NLRB, 462 F.2d 699 (9th Cir. 1972); Restatement (Second) of Agency § 220). Merchants and Corporate Express interpret section 220 and its comments to concede that an inquiry into a putative employer's control over the details of work is not always helpful in drawing the line between independent contractor and employee status; instead, the courts favored an inquiry into the entrepreneurial characteristics of the work, a factor which may stand on its own or be read into the section 220 factors based on the opinions. See Merchants, 580 F.2d at 973; Corporate Express, 292 F.3d at 780.

19. Id.
20. Id.
21. Id.
22. NLRB v. Friendly Cab Co., 512 F.3d 1090, 1094 (9th Cir. 2008).
23. Friendly Cab, 341 N.L.R.B. at 722.
24. Id. at 722-23.
25. 512 F.3d at 1094. Specifically, the SOP regulates drivers' manner of acceleration and
behavior, and appearance of taxicabs. Friendly’s road manager monitors drivers’ adherence to the SOP, and a violation of Friendly’s policies may result in termination of the driver’s lease.

Friendly’s policies regarding drivers’ pay, hours, and fees owed to Friendly under their leases were also relevant in determining the employment status of the drivers. Under their leases, drivers pay a weekly “gate” fee that varies among drivers, ranging from $450 to $600; the fee amount depends on the cab model and the driver’s driving record, driving ability, and number of accidents. The determination of gate fees is made entirely at Friendly’s discretion; particularly cumbersome to drivers is the policy that gate fee increases can be made unilaterally, and drivers must submit to any changes or else cease employment with Friendly. Drivers must pay the gate fee whether or not their cab is available (for example, when a cab is unavailable due to maintenance) and regardless of whether a driver is unable to work due to illness or vacation, yet they are not permitted to sublease their taxicabs under any circumstance. Drivers charge customers based on a meter that calculates charges using mileage, and although they must complete and turn in waybills for each shift, “drivers apparently do not account to [Friendly] for the number of passengers or amount of fares collected.” Drivers also pay for gasoline independently. Regarding hours, Friendly does not require drivers to work a particular number of hours and adheres to statutory maximum hour restrictions. Friendly does not withhold Social Security or state or federal taxes from drivers’ pay, nor does it provide Workers’ Compensation insurance.

deacceleration, drivers are prohibited from stopping “next to puddles or in front of obstacles such as signs, trees or hydrants,” and they must “stop either right next to curb[s] or out away from . . . curb[s].” Id.

26. Id. The Ninth Circuit deemed the dress code “extensive,” as it requires “collared shirts with sleeves, slacks or knee-high skirts, [and] closed shoes with socks or hose.” Id. at 1094, 1101; 341 N.L.R.B. at 722.

27. The road manager also monitors drivers’ behavior in an effort to avoid conflicts between Friendly and regulatory agencies. 341 N.L.R.B. at 723.

28. Drivers must display the name and logo of the entity that Friendly designates for each cab as well as the advertisements Friendly places on taxicab roofs. Drivers receive no revenue from the advertisements and have no option but to be idle (and lose potential fares) while Friendly changes the advertisements. NLRB v. Friendly Cab Co., 512 F.3d 1090, 1100 (9th Cir. 2008).

29. Id. at 1095.

30. Id. at 1097.

31. 341 N.L.R.B. at 722.

32. Id. On at least one occasion, Friendly increased a driver’s fee by fifty dollars simply because the driver questioned Mrs. Singh about a change in the terms of his lease. Id. at 725 n.1.

33. Id. at 723.

34. 512 F.3d at 1094-95.

35. 341 N.L.R.B. at 723, 725 n.2.

36. Id. at 723.

37. Id. at 724.

38. Id. at 722, 724.
Friendly has contracts with Friendly Transportation, UPS, Federal Express, and Union Pacific. Based on its obligations to those companies, Friendly requires its drivers to transport passengers and deliver packages, separate from normal taxicab service calls, whenever Friendly Transportation has insufficient drivers or vehicles to perform the work. In these situations, drivers are paid by vouchers which they turn in to Friendly for payment, although Friendly retains a percentage of the total amount, based on distance traveled. Drivers must also accept city-issued scrip from elderly passengers and other eligible individuals, pursuant to Friendly's contracts with the cities of Oakland and Emeryville.

**Ninth Circuit Holding and Reasoning**

Affirming the NLRB panel, the Ninth Circuit held Friendly's taxicab drivers to be employees within the meaning of the Act. The court conducted a fact-based, "totality of the circumstances" analysis using common law agency principles, weighing factors supporting employee status against factors supporting independent contractor status. No single factor is dispositive, but judicial review of this issue focuses on the extent of control a putative employer exercises over its workers. More control favors employee status whereas less control favors independent contractor status, with "control" primarily referring to "the amount of supervision that the putative employer has a right to exercise over the individual, particularly regarding the details of the work."  

**(A) Evidence of Independent Contractor Status**

Some indicators of independent contractor status included drivers'
freedom to choose their hours (within statutory limits), Friendly's refusal to provide any benefits to its drivers, and Friendly's practice of not withholding Social Security or other taxes from drivers' pay. Additionally, the fact that drivers' lease agreements provide that they are independent contractors weighed in favor of independent contractor status.

The court also noted that, because drivers pay a fixed rental rate and retain their fares without accounting to Friendly, an employer like Friendly would normally be entitled to a strong inference that it "does not exert control over the means and manner of the drivers' performance." The NLRB allowed the inference, but the Ninth Circuit held it "was generous to give it," as the rental rates are not actually fixed; rather, rates depend on factors open to Friendly's discretion: cab model, driving record, driving ability, and prior accidents. The court actually construed the factor in favor of employee status by noting that the discretionary factors determining rental rates actually "reflect some control over the drivers' performance."

(B) EVIDENCE OF EMPLOYEE STATUS

The factors indicating Friendly's control over drivers, i.e., drivers' employee status, were more significant and numerous than those supporting independent contractor status. Following circuit precedent, the court placed substantial importance on Friendly's prohibition on drivers participating in independent, taxi-service-related entrepreneurial activities. Previous Ninth Circuit cases determining taxicab and delivery truck drivers' status under the Act held in favor of independent contractor status based, in large part, on the entrepreneurial opportunities available to the drivers at issue. In this case, however, Friendly bars drivers from using their cabs to operate independent businesses by limiting use of their cabs to responding

47. Id. at 1097-98.
48. Id. at 1098.
49. Id. at 1097. "The rationale behind this 'strong inference' is that the employer does not have an incentive to control the means and manner of the drivers' performance when the employer makes the same amount of money irrespective of the fares received by the drivers." Id.
51. 512 F.3d at 1097.
52. Id.
53. Id. at 1098-1101.
54. Id. at 1098.
55. Id. at 1098 (citing SIDA of Hawaii, Inc. v. NLRB, 512 F.2d 354, 357-58 (9th Cir. 1975) (taxicab drivers); Merchants Home Delivery Serv., Inc. v. NLRB, 580 F.2d 966, 974-75 (9th Cir. 1978) (delivery truck drivers)). The court also noted that the Court of Appeals for the District of Columbia has placed similar emphasis on the existence of entrepreneurial opportunities for drivers. Id. (citing Corporate Express Delivery Sys. v. NLRB, 292 F.3d 777, 780 (D.C. Cir. 2002); C.C. Eastern, Inc. v. NLRB, 60 F.3d 855, 860 (D.C. Cir. 1995)).
to Friendly's dispatches, "prohibit[ing] drivers from soliciting customers," requiring them to carry Friendly business cards, and prohibiting distribution of private cards or numbers.\(^\text{56}\) Also, "[d]rivers cannot accept calls for service on personal cellular telephones and, in fact, cannot even use cellular telephones while driving."\(^\text{57}\) Therefore, the court reasoned, Friendly's drivers cannot be true independent contractors, who are generally free "to develop their own business interests."\(^\text{58}\) Furthermore, the drivers do not maintain a substantial investment of property and cannot employ others or even sublease their taxicabs; that is, they lack other typical entrepreneurial characteristics.\(^\text{59}\) The court used those facts to distinguish the case from \textit{SIDA} and \textit{Merchants}, where it determined that taxicab and delivery truck drivers were independent contractors.\(^\text{60}\)

In addition to emphasizing Friendly drivers' lack of entrepreneurial opportunities, the court stressed that Friendly imposes other forms of control over the means and manner of drivers' job performance. Notably, Friendly directly controls actual driving performance by demanding drivers adhere to specific driving practices (when and where to stop, manner of acceleration and deceleration, and how to operate their taxicabs generally).\(^\text{61}\) It also exercises direct control over drivers via its discretion to assign cab models, its decisions regarding for which entity a driver will work and whether an individual will be allowed to drive an airport cab.\(^\text{62}\)

Another significant means of control over drivers is Friendly's disciplinary practice. The court held that its "strict disciplinary regime," which includes imposing discipline for refusing or arriving late to a dispatch, noncompliance with Friendly's policies, and disagreeing with management, favors employee status.\(^\text{63}\) Friendly disciplines its drivers by

\[^{56}\mathrm{Id.}\]
\[^{57}\mathrm{Id.}\]
\[^{58}\mathrm{Id.}\]
\[^{59}\mathrm{Id.}\text{ at 1099}.\text{ Drivers might be able to employ others if they could sublease the cabs, but Friendly strictly prohibits subleasing.}\text{ Id. at 1094-95}.\]
\[^{60}\mathrm{Id.}\text{ at 1098-99}.\text{ In SIDA, the court focused on the taxicab drivers' independence in their operations: they were free to work for individuals or companies other than SIDA of Hawaii and develop business relationships and goodwill with their own clients. SIDA of Hawaii, Inc. v. NLRB, 512 F.2d 354, 357-58 (9th Cir. 1975). In Merchants, the delivery truck drivers operated as corporations or partnerships independent from Merchants Home Delivery; some made deliveries for companies other than Merchants, some owned their trucks, all could employ others to assist them in making deliveries, and all retained the responsibility to "fuel, maintain, insure and generally keep up to Merchants' standards—and their own standards." Merchants, 580 F.2d at 974-75. Thus, the Friendly Cab court was correct to distinguish SIDA and Merchants from Friendly's method of operations, as Friendly explicitly prohibits drivers from enjoying the forms of business independence highlighted in those cases. See Friendly Cab, 512 F.3d at 1098, 1099.}\]
\[^{61}\mathrm{512 F.3d at 1099.}\]
\[^{62}\mathrm{Id.}\]
\[^{63}\mathrm{Id.}\text{ at 1099-1100 (citing C.C. Eastern, Inc. v. NLRB, 60 F.3d 855, 860 (D.C. Cir. 1995); NLRB v. O'Hare-Midway Limousine Serv., 924 F.2d 692, 695 (7th Cir. 1991); Yellow Taxi Co. of Minneapolis v. NLRB, 721 F.2d 366 (D.C. Cir. 1983); City Cab Co. of Orlando, Inc. v. NLRB, 628 F.2d 261 (D.C. Cir. 1980); Stamford Taxi, Inc., 332 N.L.R.B. 1372, 1384 (2000)).}\]
suspensing, modifying, or terminating leases and by imposing fines, all of which ultimately reduce income.\(^\text{64}\)

The court noted that further evidence of Friendly’s control arises out of its discretion to change taxicab advertisements without notice or drivers’ approval of the new sign, as the time it takes to change the advertisement causes drivers to lose potential fares.\(^\text{65}\) Finally, the court regarded Friendly’s requirement that drivers accept vouchers, its “extensive, mandatory dress code,” and its training policy (which goes beyond the training required by government regulations) as other less significant but relevant indicia of Friendly’s control over drivers.\(^\text{66}\) Based on the lack of significant evidence of independent contractor status and the overabundant evidence of control, the court concluded that Friendly’s drivers are employees under the Act.\(^\text{67}\)

CONCLUSIONS AND POTENTIAL IMPLICATIONS OF FRIENDLY CAB

An interesting result of this case is that, although the individuals at issue do not receive compensation from Friendly and actually pay Friendly in order to continue their business relationship, Friendly is their employer.\(^\text{68}\) That is, although Friendly receives gate fees, i.e. rent, from drivers and does not require them to report their fares to the company (nor does it ever get hold of those fares), because gate fee determinations are made at Friendly’s discretion, the factor flips in favor of employee status.\(^\text{69}\)

Furthermore, the NLRB and others who seek to prove employee status in the Ninth Circuit now have an incentive to look for a new type of “smoking-gun” document (in this case, the SOP might qualify) or statement they might not have previously looked for, and, in turn, employers have even more incentive to keep certain facets of their relationships with workers undocumented. Based on Friendly Cab, an explicit written or oral prohibition of essentially entrepreneurial activities provides strong evidence in favor of employee status and all of the rights and protections that status

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\(^{64}\) Id. at 1100.

\(^{65}\) Id. at 1100. To come to this conclusion, the court distinguished \textit{Carnation Co. v. NLRB}, 429 F.2d 1130 (9th Cir. 1970) (holding that a requirement to maintain advertisements on work vehicles is not evidence of employee status), \textit{NLRB v. Associated Diamond Cabs, Inc.}, 702 F.2d 912, 921 (11th Cir. 1983) (holding the employer’s income through advertisements on taxicabs to be irrelevant to the issue of control over driver-lessees), and \textit{City Cab Co. of Orlando, Inc.}, 285 N.L.R.B. 1191, 1206 (1987) (finding the company’s requirement that drivers return to its facility to have the taxicab’s decal with the company telephone number changed did not favor employee status). \textit{Id.} It considered Friendly’s practice distinguishable because it “constitutes significantly greater control” and “represents a form of control that inures to the benefit of Friendly at the financial expense of the drivers.” \textit{Id.}

\(^{66}\) Id. at 1100-01.

\(^{67}\) Id. at 1103.

\(^{68}\) See id. at 1097.

\(^{69}\) Id.
Before *Friendly Cab*, an employer might have safeguarded its workers' independent contractor status by engaging in practices which, as the *Friendly Cab* court points out, obviously discount any attempt to prove employee status, such as not withholding taxes and Social Security, not providing benefits, allowing workers to determine their own hours or schedule, and not requiring workers to report their business (i.e. monetary) successes or setbacks. However, *Friendly Cab* places significant emphasis on an employer's explicit ban on its drivers' participation in independent, taxi-service-related businesses – so much emphasis that, with the help of a few other factors that would not normally be given much weight (e.g., dress code, training policy, voucher and credit card systems), one can prove employee status. If a party can find "smoking-gun" evidence of an explicit policy preventing entrepreneurial activities, employee status immediately becomes more easily arguable than it would have been otherwise.

With its decision in *Friendly Cab*, the Ninth Circuit recognizes that the essence of being an independent contractor is the opportunity to engage in entrepreneurial enterprise and develop one's own business interests. Although taxicab drivers seem less likely than most to be deemed employees because of the nature of their work, the Ninth Circuit recognizes the possibility, so long as the facts and circumstances lead to that conclusion.

Clara Seymour, J.D. 2010 (UC Berkeley)

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70. *Id.* at 1098.
71. *Id.* at 1097-98.
72. *Id.* at 1098-1101.
73. *Id.* at 1098 ("These limitations do not allow Friendly's drivers the entrepreneurial freedom to develop their own business interests like true independent contractors.")
74. See *id.*