January 1988

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Link to publisher version (DOI)
https://doi.org/10.15779/Z38GP8R

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Labor Legislation Before the
100th Congress

The Honorable Howard Berman†

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INTRODUCTION

As I looked at the subjects at the Symposium, I marveled at how
different the topics would have been at a comparable program sixteen
years ago when I was still practicing labor law. A body of wrongful
discharge law, totally separate from written employment contracts or
collective bargaining agreements or statutorily created rights, just did not
exist then. The need to dwell on employment and labor law conse-
quences flowing from merger mania or hostile takeovers and Chapter 11
bankruptcies would have been viewed as somewhat arcane and of little
relevance to most labor law practitioners in those days.

I should first indicate that I do not want to inflate the attention
which members of Congress are giving to the labor law agenda in the
100th Congress. Arms sales to Iran, diversions to the contras, budget
deficits, trade deficits, arms control, the 1988 presidential race are the
issues which occupy congressional interest most intensely at this time.
There is, however, a labor law agenda in the 100th Congress.

I

THE IMMIGRATION REFORM AND CONTROL ACT OF 1986

The Immigration Reform and Control Act of 1986,1 passed by the
last Congress, has to be one of the more far-reaching pieces of social
legislation enacted in the past decade. As a backdrop to the concerns
which many have about the implementation of employer sanctions and
the effect of those provisions, it must be pointed out that adoption by

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Congress of employer sanctions was rooted in certain fundamental perceptions. It is a generally held view and certainly a cardinal principle of the labor movement that illegal immigration has displaced hundreds of thousands if not millions of Americans from jobs. For many years organized labor has endorsed and fought for employer sanctions as the most effective method for deterring illegal immigration.

Seen in this light, of course, labor's position implicitly has meant advocating job security and wage protection for documented workers at the expense of the broader universe of workers in the U.S. who are seeking jobs. But the interesting thing about labor's position during these battles last year, and a most admirable facet of its position, has been that labor's leadership has always insisted that a general amnesty or legalization program was an essential component of any immigration reform bill. By taking millions of undocumented workers out of the shadows, legalization will certainly increase competition for the more desirable jobs, particularly in the construction and industrial sectors. Yet it also provides labor with a new basis for enterprising and energetic organizing and, to the extent that employer sanctions really do create a universe of legal workers, removes a roadblock in the way of unionization, by legalizing and authorizing for employment people who in the past have had all the incentives in the world not to organize, not to challenge employers.

It is my hope that, in implementing this immigration bill, employers and unions alike will try to assist all those who are eligible for legalization and that society as a whole will benefit when recourse can no longer be had to a vulnerable, undocumented work force afraid to exercise the worker rights guaranteed under our laws.

In the agricultural area, it is interesting to note a very extraordinary phenomenon. The Western Growers, the California Farm Bureau, the Grape and Tree Fruit League—conservative organizations that have never been thought of as ballyhooing and investing anything in the plight or future of their work force—put up millions of dollars to set up legalization programs for the heavily undocumented portion of their work force that will be eligible for legalization when that portion of the bill goes into effect June 1.

It is important to review those May 1, 1987, Immigration and Naturalization Service ("INS") regulations regarding the legalization process. The INS issued supplementary information along with the May 1 regulations, which stated that it expected "that these guidelines will prove sufficiently flexible so that employers and others required to comply with statutory and regulatory procedures will be able to do so in ways
that suit current personnel hiring, recruiting, and referring practices with minimal disruption."

Such flexible implementation of employer sanctions, taking into account the prevailing practices of particular industries, is in the interest of both employers and employees. It was not the intent of Congress that a draconian interpretation of the verification requirements put entire industries out of business. It was most assuredly congressional intent that regulations be promulgated with sufficient clarity that employers would be fully apprised of their obligations and defenses and would thus have no incentive to decline to hire persons based on a mere supposition that they were not authorized to work in the United States.

The final regulations on employer sanctions contain a number of important improvements in this regard. Recruiters and referral agencies which conduct their business by telephone and are thus unable to perform face-to-face verification have been given assurance that verification can be undertaken by their agents, including employers who hire the referred individuals. The motion picture production industry's use of the Contract Services Administration trust fund for the hiring of stagecraft employees, central casting companies for the hiring of extras, and music contractors for the hiring of musicians can, according to discussions with the INS, be accommodated by the final regulations. These central clearinghouses can undertake verification of work authorization on behalf of the producers.

Last, as an example of the improvements in the final regulations, INS has ruled that union hiring halls do not constitute a form of recruitment or referral for a fee, a conclusion which is compelled by the statute and the underlying congressional intent.

As a member of the Judiciary Subcommittee on Immigration Refugees and International Law, I had a chance to play a role in the successful resolution of some of these questions. Both through our formal subcommittee oversight hearings and in my own private efforts, I intend to see that the immigration reform legislation is as fairly and humanely implemented as it can be, given the compromises that we were forced to make in the course of the bill's proceeding through the legislative process. If in your practice you find specific problems in the employment area and in the implementation of this law that need adjusting, please contact me. As a member of the immigration subcommittee and having a high level of interest in this law and its implementation, I may be in a position to provide some help in trying to clarify issues which are left in

3. Id. at 16,217.
4. Id. at 16,218, 16,222 (to be codified at 8 C.F.R. § 274a.2(b)(1)(iv)).
5. Id. at 16,221 (to be codified at 8 C.F.R. § 274a.1(d)-(e)).
doubt or to change policies which are clearly contrary to our intent in passing the legislation.

II

LABOR BILLS BEFORE CONGRESS

Moving to some of the other issues that are now before the 100th Congress, six bills comprise a major part of the labor agenda. Encouraged by the new Democratic majority in the Senate after long years where nothing much passed Congress, organized labor has seized the initiative and has placed these six bills before Congress. Interests allied with the Chamber of Commerce have their own agenda: repeal of the Davis-Bacon Act, subminimum wage for teenagers, Hobbs Act amendments, and a number of the old chestnuts that they have been pushing for years. Basically, no one thinks that the Chamber of Commerce agenda will be seriously considered by this Congress, and much more attention is being focused on the agenda of organized labor.

The Chamber and others argue that anything that passes Congress in these areas will be vetoed by the President. However, there are ways of putting issues that the President might not like in bills that he does like, and compromising in certain areas. No one should automatically assume that nothing is going to happen simply because of the President’s historic opposition in some of these areas.

The bill that is going to be considered first is the so-called double-breasting bill.\(^6\) That legislation would curtail the practice of double-breasting—the simultaneous operation of union and nonunion businesses by a single person or entity. This is the major issue for the construction trades. The bill would essentially provide that two or more related business entities in the construction industry having substantial common ownership, management or control would be deemed a single employer, and that a labor agreement entered into by such an employer would cover all operations of the employer within the geographic area specified in the agreement. The bill would also require that all prehire agreements have the same binding effect as other collective bargaining agreements. That was recently inserted to deal with the recent NLRB case.\(^7\) By way of clarification, the bill has been amended to provide that the existence of


a contractor or subcontractor relationship between any two or more business entities working at a construction site shall not by itself be deemed to create a single employer or be considered as evidence of direct or indirect common management or control.

This bill is the subject of a most intensive lobbying campaign against it by the construction industry. It is developing to a level of pitch that occurred at the time of the labor law reform and common situs picketing legislation of the late 1970s. It did pass the House last year by fifty-six votes. There is a new Senate. The Senate leadership is committed to it. It is more likely than not that that bill will pass Congress. What happens to it after that and what is worked out with the administration remains to be seen.

Another piece of legislation that is going to soon come up on the House floor is the Economic Dislocation and Worker Adjustment Assistance Act. The bill has several parts. It establishes a dislocated worker unit at the Department of Labor. It authorizes funding for retraining and job-search assistance. The plant-closing provisions have given the bill its prominence. It is, of course, a skeleton of what some would urge Congress to do in the area of plant closures.

This bill would require employers to give between three and six months' notice of intent to permanently lay off workers, depending on the size of the layoff. During the notice period the employer must, if requested, meet with and discuss the decision to close with representatives of employees and local government. However, the employer is not required to alter its decision or reach any agreement with its employees or local government.

This bill was defeated in the House last year, but its sponsors have amended it and made some changes. Secretary Brock's own report, which was used as the basis for the bill's defeat last year, has come out, interestingly enough and quite surprisingly, on the side of bolstering the case for a legislative response to plant closings and worker dislocation.

Both the House and Senate labor subcommittees dealing with this issue have passed High-Risk Occupational Disease Notification and Prevention legislation. This creates a program for identifying worker

8. In the 99th Congress, the legislation passed the House on April 17, 1986 by a vote of 229-173. 132 CONG. REC. H 1970-71 (Roll No. 87) (Apr. 17, 1986). In the Republican Senate, the bill was stalled in the Committee on Labor and Human Resources.


populations at high risk of occupational disease. A risk assessment board is set up in the Department of Health and Human Services which would identify workplace health hazards and seek to notify individual workers in the high-risk category. This legislation did not reach the floor last year, but is again being given priority status this year.

Another bill on the agenda is the Family and Medical Leave Act.11 The legislation draws upon and expands the rights afforded California workers under the pregnancy disability law,12 which I authored when I was Majority Leader of the California Assembly. The Supreme Court recently upheld this law in California Federal Savings & Loan v. Guerra.13 The House version of this bill requires up to eighteen weeks of unpaid leave to care for children or seriously ill parents, and up to twenty-six weeks of unpaid leave in the event of the employee's own serious disability. There may be some compromise regarding the duration of the required leave or exemptions.14 However, there is also strong bipartisan interest in this issue due to the pro-family aspect of the bill. An unusual coalition has been formed between feminist organizations and groups that have been passionately opposed to abortion, to promote child rearing and birthing through this legislation. This will become a major battle as well this year.

Another bill is the polygraph testing bill.15 It simply and straightforwardly prohibits the use of lie-detectors by employers involved in interstate commerce. It is the top priority of the United Food and Commercial Workers.

The final item on the list is a bill to raise the minimum wage.16 The

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14. H.R. 925; see supra note 11. Indeed, when approved by the full Education and Labor Committee, the bill provided for only 10 weeks of family leave and 15 weeks of disability leave. 133 CONG. REC. D 1517 (daily ed. Nov. 17, 1987).


16. A number of minimum wage bills have been introduced. H.R. 1834, introduced by Rep. Hawkins, Chairman of the House Education and Labor Committee, is strongly supported by organized labor. 133 CONG. REC. H 1601 (daily ed. Mar. 26, 1987). Its counterpart is S. 837, introduced
legislation before Congress now contains incremental increases of fifty cents, forty cents, and a final forty cents over three years, and then permanently indexes the minimum wage to fifty percent of the average hourly wage, preventing the necessity of constantly revisiting this issue in Congress. Whether these increases will be achievable in this Congress remains to be seen. Of course, the business community and economists are making strong assertions about the consequences of raising the minimum wage, relating it to the competitiveness of American businesses in world markets.

The notion that keeping a minimum wage which is significantly below the poverty level, and significantly below the average income level for the last fifteen years, is critical to American competitiveness in the 1990s and beyond is a pretty depressing statement about where the country is headed. There is a growing recognition that the present schedule fails to meet its statutory purpose: that of providing a minimum standard of living for the working poor. A situation in which it makes no economic sense to a low-income parent to work in turn makes no sense to me as a legislator.

III
NEW DIRECTIONS IN LABOR LEGISLATION

There’s a growing perception among the members of Congress and among those who lobby Congress that, insofar as the National Labor Relations Act was intended to assure that all employees who wanted to bargain collectively would have relatively equal power with their employers, the Act has failed. At the very least, given the relatively small percentage of the work force that is now organized, the Act has become increasingly insignificant. As a result, workers in a variety of situations are demonstrably unable to influence their employers and their employment relationship.

Congress’ response is to substitute new mechanisms or new labor standards to deal with particularly compelling problems. The polygraph, high-risk notification, and family and medical leave bills are in line with a growing trend to regulate the employment relationship directly rather than to have these subjects treated as individual choices. The minimum wage has, from its inception, been viewed in that light. Double-breasting legislation recognizes the reality that the National Labor Relations Board has never been able to figure out a way to test the majority senti-

by Sen. Kennedy, Chairman of the Senate Labor and Human Resources Committee. 133 CONG. REC. S 3847 (daily ed. Mar. 25, 1987). Both bills are pending in committee and have been the subject of hearings. 133 CONG. REC. D 505 (daily ed. Apr. 9, 1987); 133 CONG. REC. D 796-97 (daily ed. June 10, 1987).

ment in the shifting, short-lived relationships that characterize the construction industry. Plant-closing legislation acknowledges, in the wake of the Supreme Court's 1981 opinion in the First National Maintenance case, that the NLRA is not providing means for employees who are subject to a managerial decision to close a plant to protect themselves effectively through collective bargaining.

As a result, we are going to see a period of experimentation in the times ahead. There is a growing realization in Congress that some of the old fights, and the old ideological breakdowns which have dominated those fights over the last fifty years—Democrats and Republicans, liberals and conservatives, union-oriented representatives and management-oriented representatives—may be less important and less meaningful than some of the new issues. The nature of the American economy is changing in relationship to the world economy, the nature of the work force, and the movement of capital around the world. There is a growing perception that these kinds of fights may not be at the fundamental heart of what Congress needs to be doing. However, while Congress is figuring out what it needs to do, it is going to keep doing what it has done in the past.

It is fair to say that these bills are not the highest priority on organized labor's agenda. Their massive weight is being thrown behind trade legislation and efforts to restrict the flight of capital. Even under the Reagan Administration, which believes in the government-that-governs-least-governs-best philosophy, proposals are being developed for direct governmental intervention in the semiconductor industry as a meaningful and perhaps almost desperate effort to maintain, retain, or regain this country's superiority in high-technology areas.

There are more and more discussions about the impact of new technologies. At the General Motors plant in the 26th Congressional District, the bargaining unit is splitting bitterly on this whole question of whether to go to the team concept. The people from the joint venture up in Fremont, California, come to Congress to talk about trade legislation, and praise that whole joint venture, and point out that labor/management strife has been relieved and productivity has increased and that they produced, perhaps, the highest quality U.S.-made car in the country without eroding worker standards. More and more people in and outside Congress are listening to these ideas, and perhaps the agendas that we have been seeing for the last few decades will start shifting.