
Article

Compliance of the United States with International Labor Law

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INTRODUCTION

The United States is one of 185 member states of the International Labour Organization (ILO).¹ Despite holding a permanent seat on the ILO Governing Body, the United States is a party to only 14 of the 189 labor conventions² and two of

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1. *Alphabetical List of ILO Member Countries*, ILO, <http://www.ilo.org/public/english/standards/relm/country/htm> (last visited Apr. 1, 2014).

2. These include ILO Convention (No. 53) Concerning the Minimum Requirement of Professional Capacity for Masters and Officers on Board Merchant Ships (as modified by the Final Articles Revision Convention), Oct. 24, 1936, 40 U.N.T.S. 154; Convention (No. 54) Concerning Annual Holidays with Pay for Seamen (as modified by the Final Articles Revision Convention), Oct. 24, 1936, 7 Wiktor 297; Convention (No. 55) Concerning the Liability of the Shipowner in Case of Sickness, Injury or Death of Seamen (as modified by the Final Articles Revision Convention), Oct. 24, 1936, 40 U.N.T.S. 171; Convention (No. 57) Concerning Hours of Work on Board Ship and Manning (as modified by the Final Articles Revision Convention), Oct. 24, 1936, 7 Manley Ottmer Hudson et al. *International A Collection of the Texts of Multipartite Instruments of General Interest Beginning with the League of Nations* 470; Convention (No. 58) Fixing the Minimum Age for the Admission of Children to Employment at Sea (as modified by the Final Articles Revision Convention), Oct. 24, 1936, 40 U.N.T.S. 206; Convention (No. 74) Concerning the Certification of Able Seamen (as modified by the Final Articles Revision Convention), June 29, 1946, 94 U.N.T.S. 11; Convention (No. 80) Final Articles Revision Convention, Oct. 9, 1946, 38 U.N.T.S. 3; Convention (No. 144) Concerning Tripartite Consultations to Promote the Implementation of International Labour Standards, June 21, 1976, 1089 U.N.T.S. 354; Convention (No. 147) Concerning Minimum Standards in Merchant Ships, Oct. 29, 1976, 1259 U.N.T.S. 335; Convention (No. 150) Concerning Labour Administration: Role, Functions and Organisation, June 26, 1978, 1201 U.N.T.S. 179; Convention (No. 160) Concerning Labour Statistics, June 25, 1985, 1505 U.N.T.S. 39. See *Ratifications for United States*, ILO, <https://www.ilo.org/dyn/normlex/en/f?p=>

eight core conventions.³ The United States Department of Labor declares that U.S. laws and practices “meet or exceed many ILO conventions.”⁴ There are, however, significant reasons to doubt that self-serving U.S. comment. This article examines the level of U.S. compliance with ILO standards, particularly in regard to the right to organize, the right to bargain collectively, the right to strike, treatment of public employees, rights of noncitizen workers, treatment of children, anti-union discrimination, treatment of women, and complaint procedures.

I. ILO FRAMEWORK

The ILO is dedicated to promoting four main objectives: These objectives are to advance (1) fundamental principles of rights at work, (2) greater opportunities for obtaining employment meeting those conditions, (3) enhanced coverage and effectiveness of social protection for all, and (4) tripartism (involving governments, employers, and workers) and social dialogue in labor relations.⁵ The ILO achieves these objectives through its Constitution⁶ and the related Declaration of Philadelphia (1944),⁷ 189 labor conventions,⁸ 202 recommendations,⁹ the 1998 Declaration of Fundamental Principles and Rights at Work (1998 Declaration),¹⁰ and mechanisms for member state

NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:102871 (last visited Apr. 1, 2014).

3. These are ILO Convention (No. 105) Concerning the Abolition of Forced Labour, June 25, 1957, 320 U.N.T.S. 291 and Convention (No. 182) Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, June 17, 1999, 2133 U.N.T.S. 161 [hereinafter ILO Convention No. 182].

4. *ILO Standards*, BUREAU INT’L LAB. AFF., <http://www.dol.gov/ilab/programs/oir/PC-ILO-page2.htm> (last visited Apr. 1, 2014).

5. *Missions and Objectives*, ILO, <http://www.ilo.org/global/about-the-ilo/mission-and-objectives/lang-en/index.htm> (last visited Apr. 1, 2014).

6. ILO, *Constitution of the ILO* (Apr. 1, 1919), <http://www.ilo.org/public/english/bureau/leg/download/constitution.pdf> [hereinafter ILO, *Constitution*].

7. ILO, *Declaration Concerning the Aims and Purposes of the International Labour Organisation (Declaration of Philadelphia)* (May 10, 1944), http://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2453907:NO#declaration [hereinafter *Declaration of Philadelphia*].

8. NORMLEX INFO. SYS. ON INT’L LABOUR STANDARDS, *Conventions*, <http://www.ilo.org/dyn/normlex/en/f?p=1000:12000:0::NO::> (last visited Apr. 1, 2014).

9. NORMLEX INFO. SYS. ON INT’L LABOUR STANDARDS, *Recommendations*, <http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12010:0::NO::> (last visited Apr. 1, 2014).

10. NORMLEX INFO SYS. ON INT’L LABOUR STANDARDS, *1998 Declaration on Fundamental Principles and Rights at Work*, <http://www.ilo.org/dyn/>

reporting and monitoring compliance with the conventions and recommendations including the Committee on Freedom of Association.¹¹ Aside from the Constitution and the 1998 Declaration, the most significant ILO instruments are eight core labor conventions, addressing forced labor,¹² freedom of association,¹³ organization and collective bargaining,¹⁴ equal remuneration,¹⁵ discrimination,¹⁶ and child labor.¹⁷

II. UNITED STATES FRAMEWORK

In order to compare U.S. labor law and ILO standards, it is important to understand the main statute and administrative body that governs U.S. labor law. The National Labor Relations Act (NLRA, Wagner Act) of 1935¹⁸ protects the rights of U.S. employees and their employers in the private sector, including

normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2453911:NO (last visited Apr. 1, 2014) [hereinafter 1998 Declaration]; see also ILO, *Declaration on Social Justice for a Fair Globalization* (June 10, 2008), http://www.ilo.org/wcmsp5/groups/public/---dgreports/---cabinet/documents/genericdocument/wcms_099766.pdf (representing the third major statement of principles adopted by the ILO since the Constitution, which builds upon and reaffirms the Declaration of Philadelphia and the 1998 Declaration in the context of globalization).

11. *Committee on Freedom of Association*, ILO, <http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/committee-on-freedom-of-association/lang--en/index.htm> (last visited on Apr. 1, 2014).

12. ILO, Convention (No. 29) Concerning Forced or Compulsory Labour, June 28, 1930, 39 U.N.T.S. 55; ILO, Convention (No. 105) Concerning the Abolition of Forced Labour, June 25, 1957, 320 U.N.T.S. 291 (ratified by the United States).

13. ILO, Convention (No. 87) Concerning Freedom of Association and Protection of the Right to Organise, July 9, 1948, 68 U.N.T.S. 17 [hereinafter ILO Convention No. 87].

14. ILO, Convention (No. 98) Concerning the Application of the Principles of the Right to Organize and to Bargain Collectively, July 1, 1949, 96 U.N.T.S. 257 [hereinafter ILO Convention No. 98].

15. ILO, Convention (No. 100) Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value, June 29, 1951, 165 U.N.T.S. 303 [hereinafter ILO Convention No. 100].

16. ILO, Convention (No. 111) Concerning Discrimination in Respect of Employment and Occupation, June 25, 1958, 362 U.N.T.S. 31 [hereinafter ILO Convention No. 111].

17. ILO, Convention (No. 138) Concerning Minimum Age for Admission to Employment, June 26, 1973, 1015 U.N.T.S. 297 [hereinafter ILO Convention No. 138]; ILO, Convention (No. 182) Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, June 17, 1999, 2133 U.N.T.S. 161 [hereinafter ILO Convention No. 182] (ratified by the United States).

18. See National Labor Relations Act, 29 U.S.C. §§ 151–169 (2012) [hereinafter NLRA].

employee rights to organize and bargain collectively,¹⁹ and defines certain unfair labor practices,²⁰ procedures for union representation and elections,²¹ and judicial review.²² The National Labor Relations Board (NLRB) is the administrative agency charged with implementing the NLRA.²³ In 1947, Congress enacted the Labor Management Relations Act (“LMRA” or “Taft-Hartley Act”) to amend the NLRA by defining several unfair labor practices of unions and clarifying the rights of employees to refrain from joining unions.²⁴ In 1959, the Labor Management Reporting and Disclosure Act (LMRDA) addressed the problems of internal union corruption and undemocratic conduct of internal union affairs.²⁵ The LMRDA amended the NLRA by instituting union financial reporting requirements, creating a bill of rights for union members, and imposing new restrictions on union activity.²⁶

III. COMPLIANCE OF THE UNITED STATES WITH INTERNATIONAL LABOR LAW

The principles and rights established in the ILO Constitution and 14 ILO conventions ratified by the U.S. apply to federal and state labor law.²⁷ The United States, however, has only ratified two of the eight core ILO conventions, including the convention on the abolition of forced labor (ILO Convention No. 105) and on the worst forms of child labor (ILO Convention No. 182).²⁸ Only five other ILO member states have ratified two or

19. *Id.* § 151.

20. *Id.* § 158.

21. *Id.* § 159.

22. *Id.* § 160.

23. *Id.* § 153.

24. *See* Labor Management Relations (Taft-Hartley) Act of 1947, 29 U.S.C. §§ 141–197 (2012).

25. *See* Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. §§ 401–531 (2012).

26. *See id.* (placing new restrictions on the right to strike, including more substantial limitations on picketing for representative rights and further limitations on secondary activity).

27. *See* ILO, *Constitution*, *supra* note 6, at art. 19; *Declaration of Philadelphia*, *supra* note 7; 1998 *Declaration*, *supra* note 10; *see also* Steve Charnovitz, *The ILO Convention on Freedom of Association and Its Future in the United States*, 102 AM. J. INT’L L. 90, 99 (2008) (noting that as of yet the United States has only ratified fourteen ILO Conventions).

28. *Ratification of Fundamental Conventions by Country*, ILO, https://www.ilo.org/dyn/normlex/en/f?p=1000:10011:0::NO:10011:P10011_DISPLAY_BY,P10011_CONVENTION_TYPE_CODE:1,F (last visited Apr. 1, 2014). The United States has never ratified the ILO Convention No. 87 (Concerning

less core conventions.²⁹ Myanmar and Brunei Darussalam have, like the U.S., only ratified two core conventions, and Marshall Islands, Palau, and Tuvalu have ratified none of the core conventions.³⁰ The vast majority of ILO member states, including all the European nations with which the U.S. ordinarily compares itself, have ratified at least four of the core conventions, and 138 ILO member states have ratified all eight core conventions.³¹ The 1998 Declaration also applies to the United States, in providing that all member states must respect, promote, and realize the fundamental principles and rights established therein—regardless of which conventions they have ratified.³² The ILO Constitution says that member states are not bound by the 202 ILO recommendations but are guided by their principles.³³

Both the ILO and the United States recognize, but take varying positions, on the right to organize, the right to bargain collectively, the right to strike, treatment of public employees, rights of noncitizen workers, treatment of children, anti-union discrimination, and treatment of women.³⁴

Freedom of Association and Protection of the Right to Organize) and ILO Convention No. 98 (Concerning the Application of the Principles of the Right to Organize and to Bargain Collectively). *Id.*

29. *Id.*

30. *Id.*

31. The twenty-eight European Union nations have ratified all eight core conventions. *Id.*

32. 1998 Declaration, *supra* note 10 (including principles of freedom of association and the right to collective bargaining, abolition of forced labor, elimination of discrimination in employment, and elimination of child labor). It is particularly important that the eight core conventions are summarized into four core labor standards mentioned above (freedom of association and collective bargaining, no compulsory labor, discrimination, and child labor) and are considered to underpin these principles. E-mail from César F. Rosado Marzán, Assistant Professor of Law, Chi.-Kent Coll. of Law, to authors (Nov. 2013) [hereinafter Marzán E-mail] (on file with author). From this viewpoint, the Constitution, 1998 Declaration, and core conventions interrelate with one another. *See* 1998 Declaration, *supra* note 10.

33. *See Conventions and Recommendations*, ILO, <http://ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm> (last visited Apr. 1, 2014) (stating that recommendations are often designed to supplement a particular convention, and are meant to provide member states with guidance on legislative development, labor policy, and management practice).

34. *Cf.* Complaint Against the Government of the United States Presented by the United Electrical, Radio, and Machine Workers of America, supported by Public Services International, Report No. 344, Case No. 2460, ¶ 991 (holding that South Carolina labor laws result in the banning of certain trade unions and therefore violate Conventions 87 and 98 of the ILO), *cited by*

A. THE RIGHT TO ORGANIZE

The ILO considers the right to organize to be a freedom that member states must establish and protect, without interference or previous authorization from public authorities or administrative agencies.³⁵ As a result, ILO standards provide greater protection of the right to organize than the analogous U.S. provisions.³⁶ This greater level of protection is particularly visible in the types of workers entitled to organize, election procedures, interference with the right to organize, and treatment of public employees.

1. Workers Entitled to the Right to Organize

ILO Convention No. 87 states that workers “without distinction whatsoever, shall have the right to establish and . . . join organisations of their own choosing without prior authorisation.”³⁷ Likewise, the NLRA provides workers the right to form, join, or assist labor organizations.³⁸ The NLRA only extends this right, however, to statutorily defined employees.³⁹

Charnovitz, *supra* note 27, at 104; Steve Charnovitz, *The U.S. International Labor Relations Act*, 26 ABA J. LAB. & EMP. L. 311, 318 (2011) (noting that there is a substantial record of U.S. non-compliance with ILO standards).

35. ILO, FREEDOM OF ASSOCIATION: DIGEST OF DECISIONS AND PRINCIPLES OF THE FREEDOM OF ASSOCIATION COMMITTEE OF THE GOVERNING BODY OF THE ILO, paras. 272–74, 309 (2006) [hereinafter ILO DIGEST], available at http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_090632.pdf (stating that freedom of association principles would be dead letter if required to get previous authorization). Previous authorization includes authorizing the right to association, the establishment of an organization, and the need to obtain approval of an organization’s constitution or rules. *Id.* ¶ 272.

36. *Cf.* NLRA, 29 U.S.C. § 157 (2012) (containing no mention of without interference or previous authorization). While ILO norms condemn any employer anti-union speech as interfering with freedom of association rights even if such speech is devoid of explicit threats, the NLRA permits employers to express their opinions regarding unionizing so long as there is no explicit “threat of reprisal or force or promise of benefit.” *Id.* § 158(c); Marzán E-mail, *supra* note 32. As long as a U.S. employer’s speech contains no explicit threats, such anti-union free speech rights may amount to what the ILO considers “interference.” *Id.* Arguably, U.S. law recognizes employee rights to engage in protected activity without interference, so the question becomes what qualifies as “interference” under the separate ILO and U.S. norms. *Id.*

37. ILO Convention No. 87, *supra* note 13, art. 2. ILO standards protect a greater number of employees than under U.S. standards. *Compare id.* (using the key language of “without distinction”), with NLRA § 157 (using no analogous language).

38. *See* NLRA § 157.

39. *Id.* § 152. Additionally, the NLRA unfair labor practices provision only applies to statutorily defined employers. *Id.*

ILO standards provide greater employee coverage because nearly all public employees are included.⁴⁰ By contrast, the NLRA excludes all federal and public employees in addition to independent contractors and agricultural workers.⁴¹ U.S. ratification of ILO Convention No. 87 would broaden the class of employees currently covered under U.S. law to include most federal, state, and municipal employees.⁴²

Differences also exist in the treatment of managers and supervisors. The ILO definition of manager or supervisor is quite narrow, whereas the NLRA broadly defines supervisors.⁴³ The Supreme Court has interpreted the NLRA to exclude supervisors and managerial employees from coverage.⁴⁴ Under the NLRA a supervisor may join a union consisting of rank-and-file employees, or other supervisors, but has no legal right to organize and bargain collectively.⁴⁵ The ILO does not exclude supervisors and managerial employees from coverage and protection.

40. ILO DIGEST, *supra* note 35, ¶ 218 (stating that a distinction in union matters between public and private employees is inequitable). The two narrow exclusions from ILO coverage are public employees directly engaged in the administration of the state and officials acting as supporting elements, and essential public services. *See id.* ¶ 887.

41. *See* NLRA § 152; *see also National Labor Relations Act*, NAT'L LAB. REL. BOARD, <http://www.nlr.gov/national-labor-relations-act> (last visited Apr. 1, 2014) (excluding "any individual employed as an agricultural laborer" and "any individual having the status of an independent contractor" from the statutory definition of employee); Rep. of the Human Rights Comm., 107th Sess. Mar. 11–28, 2013, U.N. Doc, *available at* <http://archive.constantcontact.com/fs128/1102969153793/archive/1112745186592.html> (finding that the United States is in violation of the International Covenant on Civil and Political Rights for failing to extend the right to organize to all individuals, including non-statutorily defined employees such as agricultural workers).

42. As of 2010, only 37.4% of public workers in the United States were unionized. Mark Schneider, Ellen Bronchetti & Trent Sutton, *The Financial Crisis: Ruin or Restoration of the Labor Movement?*, 2 EMP. & INDUS. REL. L. NEWSL. 18 (2010).

43. *Compare* ILO DIGEST, *supra* note 35, ¶ 248 (stating that the definition of supervisors "should be limited to cover only those persons who genuinely represent the interests of employers"), *with* NLRA § 152 (stating that any individual with authority, in the employer's interest, "to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action" when doing so is "not of a merely routine or clerical nature").

44. *See, e.g.,* NLRB v. Hearst Publ'ns, 322 U.S. 111 (1944); Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941); *see also* NLRA § 152.

45. *See* ROBERT A. GORMAN & MATTHEW W. FINKIN, LABOR LAW ANALYSIS AND ADVOCACY 42–44 (2013).

Furthermore, such employees have the right to join a union consisting of rank-and-file workers.⁴⁶

2. Elections

ILO standards for selecting a bargaining representative provide full freedom to establish and join unions.⁴⁷ U.S. labor law mandates a system of exclusive representation, in conformity with ILO standards.⁴⁸ The ILO requires that minority unions are allowed to function, speak on behalf of their members, and represent members regarding individual grievances.⁴⁹ U.S. minority unions do not have such extensive rights, since the ability to represent and speak on behalf of their members may undermine the U.S. principle of exclusive representation.⁵⁰ The ILO states that minority unions in the U.S. do not need to be recognized if an exclusive representative has been legitimately selected or certified.⁵¹ In the absence of a majority union, however, the ILO states that a minority union must be recognized.⁵²

The NLRB, following a representation election, may either formally certify exclusive representation in the United States or a union may be informally recognized by an employer.⁵³ Both formal and informal certification is permissible under ILO standards so long as an independent and impartial body (such as the NLRB) verifies the union's majority status.⁵⁴ A U.S. em-

46. See ILO DIGEST, *supra* note 35, ¶ 247.

47. See *id.* ¶ 309.

48. NLRA § 159; see ILO DIGEST, *supra* note 35, ¶ 950. A system for determining the exclusive representative must be based on precise and objective pre-established criteria. See *id.* ¶ 962.

49. ILO DIGEST, *supra* note 35, ¶¶ 359, 974. Minority unions are those in an exclusive representation system that failed to gain enough votes to become the exclusive representative. *Id.* ILO standards protect workers involved that wish to belong to a minority union, and allow the employees to be represented by the minority union during grievance proceedings. See *id.* ¶ 975.

50. See GORMAN & FINKIN, *supra* note 45, at 330–34. A majority union may allow an employer to process a grievance with a minority union, but if the employer proceeds to adjust a grievance without the majority union's permission it is considered a violation of NLRA § 8(a)(5). See *id.* at 331–32.

51. See César F. Rosado Marzán, *Labor's Soft Means and Hard Challenges: Fundamental Discrepancies and the Promise of Non-Binding Arbitration for International Framework Agreements*, 98 MINN. L. REV. 1749 (2014).

52. *Id.* (stating that the U.S. system of exclusive representation arguably does not violate ILO norms favoring minority unions).

53. See GORMAN & FINKIN, *supra* note 45, at 76–80.

54. ILO DIGEST, *supra* note 35, ¶ 351 (“Verification of the representative character of a union should a priori be carried out by an independent and impartial body.”); see also *id.* ¶¶ 925, 952–53 (citing the principle of free and vol-

ployee or union may file a petition for a representation election upon a showing that 30% of the employees in the unit desire representation.⁵⁵ A union must receive a majority of the votes cast by eligible voters in the bargaining unit during a secret ballot election.⁵⁶ Under the ILO, showing of interest requirements, secret ballot elections, and a 30% threshold are all permissible procedures.⁵⁷

The selection of an appropriate bargaining unit under the NLRA significantly affects union power. U.S. employers tend to prefer large units that include numerous trades and occupations, while unions often prefer smaller, more manageable units when seeking NLRB certification.⁵⁸ The NLRB determines the appropriateness of the unit using a community of interest standard and places greater limitations on multi-employer units than under ILO standards.⁵⁹ The ILO is flexible in determining an appropriate bargaining unit, essentially granting the union free determination of their structure and

untary negotiation, and that employers should recognize the organization as representative of the employees).

55. NLRA, 29 U.S.C. § 159 (2012). An employer may insist on an election despite a majority showing (generally accomplished by signed authorization cards). See GORMAN & FINKIN, *supra* note 45, at 55.

56. NLRA § 159. The NLRA provides for an election bar where no election may be conducted when a valid election had been held within the preceding twelve-month period. *Id.* Additionally, a contract-bar exists in the U.S. where the NLRB will dismiss an election petition filed during the term of a CBA that has a duration of less than three years. See GORMAN & FINKIN, *supra* note 45, at 72; ILO DIGEST, *supra* note 35, ¶ 969 (stating that election bars are consistent with ILO standards).

57. See ILO DIGEST, *supra* note 35, ¶¶ 349, 356, 961, 969.

58. See GORMAN & FINKIN, *supra* note 45, at 97–98 (arguing that smaller units facilitate increased organization and effectiveness of the union in conducting its activities, while larger units are more diversified, making conflicts of interest more likely, and additionally carrying a greater danger of a more massive work stoppage). Unions, however, currently prefer to seek voluntary recognition from an employer to NLRB certification. Marzán E-mail, *supra* note 32. Unions tend to prefer larger bargaining units when seeking such voluntary recognition. See *id.* (stating that while unions tend to prefer big units, it becomes harder to win an election with such units).

59. GORMAN & FINKIN, *supra* note 45, at 102–03; see ILO DIGEST, *supra* note 35, ¶ 333 (establishing the freedom of choice of union structure). See also *Issue Analysis: U.S. Ratification of ILO Core Labour Standards*, U.S. COUNCIL FOR INT'L BUS. at 6 (Apr. 2007), http://www.uscib.org/docs/ilo_conventions_us_ratification.pdf [hereinafter USCIB] (arguing that ratification of ILO Convention No. 87 would remove limitations on the formation of multiemployer units).

composition.⁶⁰ Greater regulation and oversight surround the NLRA process for selecting a bargaining representative.⁶¹ The NLRB handles challenges to union elections under the NLRA, and only employers can seek indirect judicial review.⁶² ILO standards, however, provide that judicial authority should examine challenges.⁶³

3. Interference with the Right to Organize

International labor law emphasizes the principle of non-interference with the right to organize.⁶⁴ ILO Convention No. 98 calls for union freedom from employer and rival union interference in pursuing their activities.⁶⁵ In violation of this principle, U.S. labor law imposes considerable limitations on union campaigning, solicitation, distribution of union material, and access to company property.⁶⁶ Unless U.S. employees live on the property, an employer may deny union access to the work-

60. See ILO DIGEST, *supra* note 35, ¶ 333 (“The free exercise of the right to establish and join unions implies the free determination of the structure and composition of unions.”).

61. Compare *id.* ¶ 333 (citing the principle of free determination of the structure of unions), with NLRA § 159 (granting the NLRB power to determine and approve an appropriate bargaining unit).

62. See GORMAN & FINKIN, *supra* note 45, at 91 (stating that the NLRA does not contain an express provision for direct judicial review of NLRB representation proceeding decisions—a review of representation proceedings may only arise from an unfair labor practice charge).

63. ILO DIGEST, *supra* note 35, ¶ 440 (arguing that challenges to union elections should be examined by judicial authorities).

64. *Id.* ¶ 855.

65. See ILO Convention No. 98, *supra* note 14, at art. 2; ILO DIGEST, *supra* note 35, ¶¶ 855, 858 (including interference during the organization process). One area where the United States is in compliance with ILO standards is employee privacy rights—both the ILO and the United States protect and limit employer disclosure of information on union membership and activities. See *id.* ¶¶ 177, 478 (expressing concern that keeping a register with data regarding union members disrespects privacy rights); Alvin L. Goldman & Roberto L. Corrada, *United States of America*, in INTERNATIONAL ENCYCLOPAEDIA FOR LABOUR LAW AND INDUSTRIAL RELATIONS 146–48 (Jan. 2010), available at www.kluwerlawonline.com/toc.php?pubcode=IELL (explaining state privacy law limitations on employer’s concerning their employees).

66. See GORMAN & FINKIN, *supra* note 45, at 275, 279, 291–96 (discussing an employer’s ability to prohibit union solicitation during work time, “no-distribution” rules in working areas, and communication imbalances in favor of the employer in that denial of “equal time” to unions is presumed lawful and that a union lacks the ability to conduct a “captive audience speech”); see also Goldman & Corrada, *supra* note 65, at 252–56 (discussing and providing examples of solicitation, distribution, campaign, and access restrictions).

place.⁶⁷ Under ILO standards, unions generally have access to the workplace.⁶⁸ U.S. employers may also restrict union solicitation during work time, as well as distribution of union material in the workplace.⁶⁹

Due to the amount of employer interference allowable under U.S. law, U.S. employers enjoy significantly more opportunities to communicate with workers about the consequences of unionization as compared with unions campaigning about the benefits of collective representation.⁷⁰ The U.S. communication imbalance violates ILO standards and provides U.S. employers with an advantage throughout the organization process.⁷¹

Anti-union campaigns during an organization effort are the most visible example of interference allowed by the NLRA.⁷² By permitting anti-union campaigns, U.S. law does not comply with ILO freedom of association and non-interference principles.⁷³ The United States is exceptional among ILO member states in permitting anti-union campaigns.⁷⁴ If the United

67. See Goldman & Corrada, *supra* note 65, at 254–55 (describing the U.S. standard for union access to the workplace as whether reasonable efforts permit union access to workers in another fashion, or off premises access to the employees is nearly impossible).

68. ILO DIGEST, *supra* note 35, ¶¶ 1102–04. The ILO standard for union access to company property: union access may not impair efficient operation of the employer, and must observe due respect for property and management rights. *Id.* ¶¶ 1103, 1109.

69. See Goldman & Corrada, *supra* note 65, at 254–55.

70. NLRA, 29 U.S.C. § 158(c) (2012); see *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969) (holding that employers can communicate general views on collective bargaining, but are not free to threaten employers or promise benefits); GORMAN & FINKIN, *supra* note 45, at 175; Goldman & Corrada, *supra* note 65, at 223–25.

71. See ILO Committee on Freedom of Association, Complaint Against the United States, Case No. 1523, Report No. 284 (1992); Int'l Trade Union Confederation, *Free Speech and Freedom of Association: Finding the Balance*, at 9–10 (June 2013) [hereinafter ITUC, *Free Speech*] (arguing that the extent of U.S. employer free speech rights that interfere with organization, but are lawful per the NLRA, violate ILO standards); see also File No. 25476-09-12 National Labour Court of Israel (Histadrut), *Pelephone Communications LTD* (2013), cited by Int'l Trade Union Confederation, *Free Speech and Freedom of Association: Finding the Balance*, at 9–10 (June 2013) (providing a potential middle ground solution for respecting both employer free speech and employee freedom of association rights, distinguishing between employer speech while workers are attempting to organize a union, and the period after workers have gained collective bargaining rights).

72. See also ITUC, *Free Speech*, *supra* note 71 (discussing the anti-union campaign tactics permitted by U.S. labor law).

73. *Id.* at 9–10.

74. *Id.* at 116.

States were to ratify ILO Convention No. 87, the results would be significant; employer free speech provisions and employer rights to oppose unions would be substantially curtailed.⁷⁵

The ILO recognizes employer freedom of expression but holds that such expression cannot interfere with employees' freedom-of-association rights.⁷⁶ The rights of employer freedom of expression and employee freedom of association are meant to be complementary, and not in conflict with one another.⁷⁷ Currently, U.S. labor law allows various forms of employer interference rarely seen in other ILO member states, such as captive audience meetings and one-on-one meetings with supervisors.⁷⁸ A recent dispute that arose from an attempt by Delta flight at-

75. *See id.* at 9–10 (discussing how the USCIB concedes that U.S. law permitting anti-union campaigning violates ILO Convention No. 87's principle of non-interference); *see also* USCIB, *supra* note 59, at 5–6 (arguing that ratification would conflict with NLRA § 8(e) hot cargo agreement restrictions, limit restrictions on the right to strike, and prohibit virtually all acts of employer interference in organizing). Arguably, the United States is bound by the principles of ILO Convention No. 87 due to its membership in the ILO and the duties imposed by the 1998 Declaration. *See* Marzán E-mail, *supra* note 32. While the U.S. may not be bound to the same procedures as member states that have ratified ILO Convention No. 87, the United States must still meet certain reporting requirements. *See id.*

76. *See* ILO Committee on Freedom of Association, Complaint Against the United States, Report in Which the Committee Requests to be Kept Informed of Development, Report No. 357, Case No. 2683, ¶ 584 (June 2010) [hereinafter Delta] (stating that employer freedom of expression may not be aimed at eliminating an employee's freedom of association rights and ability to exercise their free choice during a union campaign); ITUC, *Free Speech*, *supra* note 71, at 19 (“[E]mployers have freedom of speech, but they cannot abuse freedom of speech in ways that interfere with workers' freedom of association and organising.”).

77. ITUC, *Free Speech*, *supra* note 71, at 19. An example of expression crossing the line can be seen in ILO CFA Case No. 1852 (U.K.), stating that persuasion crosses the line into interference when it unduly influences, and that posting of notice suggesting to employees not to get involved in a rally could be understood as a threat that amounts to undue influence. *See* ILO Committee on Freedom of Association, Report in Which the Committee Requests to be Kept Informed of Development, Report No. 309, Case No. 1852, ¶ 340 (July 1998) (holding that the CFA considers the posting of notice at work by an employer suggesting employees stay out of a rally “could be understood as a threat . . . not to exercise their trade union rights” and constitutes undue influence).

78. *See* ITUC, *Free Speech*, *supra* note 71, at 1619 (arguing that captive-audience meetings are unheard of in most countries, and are viewed as an affront to workers' privacy, dignity, and autonomy); *see also id.* at 14–16 (providing an example of Deutsche Telekom and T-Mobile urging managers to immediately launch anti-union campaigns whenever union organizers attempted to communicate with employees, and utilizing anti-campaign tactics such as mandatory meetings, supervisor meetings, and spying on union activity).

tendants to unionize demonstrates the inconsistency between U.S. and ILO standards.⁷⁹ Delta utilized aggressive anti-union tactics to prevent unionization, as permitted under the Railway Labor Act.⁸⁰ After the union complained to the ILO, the Committee on Freedom of Association (CFA)⁸¹ expressed concern over Delta's active campaigning to prevent unionization, particularly through the distribution of "shred-it" buttons and flyers.⁸² According to the CFA, active interference with any employee exercising free choice violates the principle of freedom of association.⁸³

4. Approach to Public Employees

Under ILO standards, public employees are treated the same as private employees, with few exceptions.⁸⁴ The ILO guarantees the right to freedom of association without discrimination of any kind to public service employees, firefighters, and teachers, as well as agricultural and plantation workers, and temporary workers.⁸⁵ Furthermore, ILO standards permit

79. Delta, *supra* note 76; see ITUC, *Free Speech*, *supra* note 71, at 5–7 ("American management-style anti-union tactics are not in conformity with ILO jurisprudence.").

80. Railway Labor Act, 45 U.S.C. §§ 151–52 (2012); see also Delta, *supra* note 76, ¶ 590 (requesting the United States to review the RLA in light of the issues raised in the Delta case).

81. Formed in 1951, the Committee on Freedom of Association (CFA) examines complaints alleging freedom of association infringement. Complaints are examined regardless of whether the relevant member states have ratified the convention(s) at issue. The CFA may recommend to the Governing Body that the Governing Body should draw the attention of the government at issue to the problems presented in the complaint. The CFA has a mandate to improve working conditions, contribute to the effectiveness and principles of freedom of association, and to promote the freedom of association. Additionally, the CFA determines member state compliance with principles of freedom of association as laid out in the ILO Constitution and conventions. *Committee on Freedom of Association*, ILO, <http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/committee-on-freedom-of-association/lang--en/index.htm> (last visited Apr. 1, 2014).

82. Delta management encouraged employees to shred their ballots. Due to the RLA election procedures at the time, a non-vote counted as a no vote. Delta, *supra* note 76, ¶¶ 438, 582.

83. *Id.* ¶ 584.

84. ILO DIGEST, *supra* note 35, ¶ 218 (considering the denial of freedom to organize to public servants as inequitable). The main narrow exception to ILO public employee coverage is public employees directly engaged in the administration of the state and officials acting as supporting elements. *Id.* ¶ 887.

85. *Id.* The key language that distinguishes ILO treatment from U.S. treatment (in allowing the inclusion of public service employees) is "without discrimination of any kind." See *id.* ¶ 209.

public employee organizations to affiliate with federations and confederations of workers in the private sector.⁸⁶

In the United States, public employees are excluded from NLRA coverage.⁸⁷ State and federal laws, however, can protect public employees. The Civil Service Reform Act of 1978 governs federal workers.⁸⁸ The Civil Service Reform Act protects employee rights to join unions, regulates election procedures, and establishes the Federal Labor Relations Authority (FLRA).⁸⁹ Federal laws exclude supervisors and managers, while reserving the right of management to select, direct, and discipline its workforce.⁹⁰ Unlike the NLRA, federal administrative agencies are not required to provide the FLRA with the names and addresses of all employees eligible to vote in the bargaining unit—thus inhibiting efforts to organize the workers.⁹¹

Most government employees were not permitted to organize until the late 1960s.⁹² Now, 36 states and Washington D.C. permit at least some public employee collective representation, often based on the NLRA model of exclusive representation.⁹³ Many states, however, limit the right to collectively organize and bargain to particular groups of public employees and particular subject matters.⁹⁴ Moreover, a few states have either ex-

86. *Id.* ¶ 725 (permitting affiliation if private sector rules and regulations allow it).

87. NLRA, 29 U.S.C. § 152 (2012).

88. Civil Service Reform Act of 1978, 5 U.S.C. §§ 7101–7106, 7111–7123, 7131–7135 (2012). *See* Goldman & Corrada, *supra* note 65, at 341 (discussing how the Reform Act protects the rights of federal government employees).

89. Goldman & Corrada, *supra* note 65, at 341. The Federal Labor Relations Authority (FLRA) determines whether a union should be established on an agency, plant, installation, functional or other basis. *Id.* at 353. Additionally, the FLRA determines whether a bargaining unit ensures the fullest freedom in exercising employee rights, and whether a unit will ensure a clear and identifiable community of interest. The FLRA is charged with implementing the rights and responsibilities created by the act. *Id.* at 341, 353.

90. *Id.* at 341–42.

91. *See id.* at 341 (explaining that “Privacy Act exceptions to the Freedom of Information Act” prevent federal agencies from providing the “home addresses of the employees in the bargaining unit”). Under the NLRA, an employer must provide this information to the regional director within seven days after an election date is determined. GORMAN & FINKIN, *supra* note 45, at 69 (describing the Excelsior List of Eligible Voters).

92. Goldman & Corrada, *supra* note 65, at 338.

93. *Id.*

94. *See, e.g.*, Indiana Senate Enrolled Act No. 575 (2011) (limiting the scope of bargaining for teachers to wages and benefits); S.B. 98 §§ 5–6, 2011 Leg., 76th Sess. (Nev. 2011) (reducing the number of public employee supervisors able to collectively bargain).

pressly prohibited the collective organization of public employees, or have no statute either granting or denying such rights.⁹⁵ Separate labor laws govern a number of different occupations. Federal postal workers are governed by the Postal Reorganization Act of 1970;⁹⁶ and teachers, police, and firefighters may be covered by separate state labor laws.⁹⁷

Of the total amount of state and local employees in the United States, over one-third are covered by collective bargaining agreements (CBA).⁹⁸ Bargaining unit boundaries for state and local employees tend to be imposed by statute and some by government structural design—both inconsistent with ILO standards.⁹⁹ States take diverse approaches to the organizational rights of their employees, which in itself is an obstacle for U.S. labor law to comply with ILO standards.¹⁰⁰

B. THE RIGHT TO BARGAIN COLLECTIVELY

The ILO views the right to bargain freely with employers to address conditions of work as an essential element of freedom of association.¹⁰¹ ILO standards tend to provide greater protection of the right to bargain collectively than U.S. labor

95. See, e.g., VA. CODE ANN. §§ 40.1–57.2 (2010) (prohibiting a public employer from entering into a collective bargaining agreement).

96. Postal Reorganization Act of 1970, 39 U.S.C. §§ 1004, 1201–1209 (2012). Those without management or supervisory functions have the same organizational rights as those in the private sector. Goldman & Corrada, *supra* note 65, at 340.

97. Goldman & Corrada, *supra* note 65, at 353.

98. *Id.* at 338 (stating that over three times the amount of employees are covered than in the private sector).

99. See *id.* at 352–53 (discussing bargaining unit boundaries for state and local employees). Under ILO standards, employees have the right to free determination of the structure and composition of their union. Imposing bargaining unit boundaries runs against the ILO free determination principle. See ILO DIGEST, *supra* note 35, ¶ 333 (“The free exercise of the right to establish and join unions implies the free determination of the structure and composition of unions.”).

100. The United States is concerned that ratification of ILO Convention No. 98 would infringe on a state’s Tenth Amendment right to determine the terms and conditions of employment for their employees. USCIB, *supra* note 59, at 7.

101. Following the lead of the ILO, the European Court on Human Rights recently held that the right to bargain collectively is inherent in the right to freedom of association guaranteed by Article 11 of the European Convention of Human Rights. *Demir & Baykara v. Turkey*, No. 34503/97, §§ 153–54 (Nov. 12, 2008), discussed by Antoine Jacobs, *Article 11 ECHR: The Right to Bargain Collectively*, in *THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE EMPLOYMENT RELATION* 309, 312, 315–17 (Filip Dorssemont et al. eds., 2013).

law.¹⁰² Noticeable differences exist concerning the duty to bargain in good faith, mandatory and non-mandatory subjects covered by a CBA, and treatment of public employees.¹⁰³

1. Duty to Bargain in Good Faith

ILO and U.S. standards provide for a duty to bargain in good faith.¹⁰⁴ Employer economic inducements to give up bargaining rights, employer dominated unions, and employer assistance to unions (financial or otherwise) violate the duty to bargain in good faith under U.S. and ILO standards.¹⁰⁵ Both the ILO and United States permit unions to bring representatives from other unions or bargaining units to CBA negotiations.¹⁰⁶

Under ILO standards, failure to implement a CBA violates the duty to bargain in good faith and the right to bargain collectively.¹⁰⁷ By contrast, U.S. employers are only obligated to meet and confer in good faith but are not required to come to an agreement.¹⁰⁸ Additionally, labor law does not prohibit a U.S. employer from unilaterally cancelling non-mandatory subjects during a current bargaining agreement—although such changes may violate the parties' collective bargaining agreement.¹⁰⁹

102. Jacobs, *supra* note 101, at 318.

103. *Id.* at 326–28.

104. NLRA, 29 U.S.C. § 158(d) (2012); ILO DIGEST, *supra* note 35, ¶¶ 934–43. Absent union representation, U.S. employers have broad discretion to discharge employees due to the at-will doctrine. See Goldman & Corrada, *supra* note 65, at 98–108 (discussing the at-will employment doctrine and the few limitations that apply to employers). All other ILO member states only permit dismissal of employees for just cause. See ITUC, *Free Speech*, *supra* note 71, at 14 (“In every other country in the world, including Anglo-Saxon countries with similar legal traditions, employers must demonstrate ‘just cause’ to dismiss an employee.”). Several European states, including France, Luxembourg, the Slovak Republic, and Bulgaria, also obligate employers to bargain with unions. Jacobs, *supra* note 101, at 326.

105. See GORMAN & FINKIN, *supra* note 45, at 196–206; ILO DIGEST, *supra* note 35, ¶¶ 858, 1058.

106. GORMAN & FINKIN, *supra* note 45, at 539–40; ILO DIGEST, *supra* note 35, ¶¶ 984–87.

107. ILO DIGEST, *supra* note 35, ¶ 943; see Marzán E-mail, *supra* note 32. It is important to note that while neither the United States nor the ILO technically compel parties to come to a collective bargaining agreement, failure to reach an agreement under ILO standards may be considered a violation of the duty to bargain in good faith. More information would be needed to determine whether there was a lack of good faith and on the part of whom. Failure to reach an agreement under U.S. law is not generally considered a violation. *Id.*

108. NLRA § 158(d).

109. See *Allied Chem. v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 187–88 (1971) (holding that while a mid-term unilateral modification by an employer

The ILO prohibits employers from unilaterally canceling any bargaining agreement rights—mandatory or not.¹¹⁰ In the United States, an employer may elect to go out of business instead of dealing with a union, as long as the motivation behind the closure is not to chill unionization elsewhere.¹¹¹ Unlike the United States, closure of a business does not in itself result in the extinction of existing CBA obligations under the ILO.¹¹²

ILO standards emphasize the principle of free and voluntary negotiations and the autonomy of bargaining partners.¹¹³ As a result, less outside interference occurs during the bargaining process than in the United States.¹¹⁴ The ILO stresses that any unjustified delay by an employer in holding negotiations should be avoided.¹¹⁵ U.S. employers, however, often delay bar-

may amount to a breach of contract, such modification only violates 8(a)(5) if the provision is a mandatory subject of bargaining); Goldman & Corrada, *supra* note 65, at 328 (“If a topic is a permissive subject of bargaining, a unilateral change can be made with regard to that subject without committing an unfair labor practice.”).

110. See ILO DIGEST, *supra* note 35, ¶ 942 (“A legal provision which allows the employer to modify unilaterally the content of signed collective agreements, or to require that they be renegotiated, is contrary to the principles of collective bargaining.”).

111. See Goldman & Corrada, *supra* note 65, at 232 (stating that the Supreme Court views the choice to go out of business as a property right, and employers may go out of business “to avoid having to deal with” unionization); see also *Textile Workers Union of Am. v. Darlington Mfg. Co.*, 380 U.S. 263, 275 (1965) (holding that a partial closing only amounts to an unfair labor practice if motivated by a desire to “chill unionism in any of the remaining plants of the single employer”).

112. See ILO DIGEST, *supra* note 35, ¶ 1059 (“The closing of an enterprise should not in itself result in the extinction of the obligations resulting from the collective agreement.”).

113. ILO Convention No. 98, *supra* note 14; ILO DIGEST, *supra* note 35, ¶¶ 881, 925.

114. For example, ILO standards only allow member states to implement rules to facilitate negotiations and promote collective bargaining. Intervention during an impasse is only permitted if both parties approve, and the ILO is against imposing compulsory arbitration if no CBA has been reached. See ILO DIGEST, *supra* note 35, ¶¶ 933, 992–97. By contrast, in the United States the NLRB has the power to issue bargaining orders. See GORMAN & FINKIN, *supra* note 45, at 135–36 (citing *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969)) (describing the NLRB’s broad discretion to issue a bargaining order when a cease and desist order may not suffice). Additionally, U.S. labor law permits the use of economic weapons in the bargaining context. Goldman & Corrada, *supra* note 65, at 328; see GORMAN & FINKIN, *supra* note 45, at 585 (discussing the Supreme Court’s endorsement of the “lesser” pressure of reduced pay as par of economic pressure exerted outside of formal bargaining).

115. ILO DIGEST, *supra* note 35, ¶ 937.

gaining in an effort to avoid unionization.¹¹⁶ While a union or employee may file a refusal to bargain charge with the NLRB, the economic incentives for U.S. employers to delay bargaining arguably outweigh the costs.¹¹⁷ Because the complaint procedure takes an extensive amount of time, employee support for unionization may substantially decrease throughout the process.¹¹⁸ Absent a make-whole or punitive remedy, U.S. employers face no significant deterrent from delaying the bargaining process.¹¹⁹

Under U.S. law, unions retain a rebuttable presumption of majority status.¹²⁰ A number of ways exist for employers and

116. See *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 318 (2000) (holding that an employer who engages in a lockout during the bargaining process does not engage in an unfair labor practice); *Horsehead Res. Dev. Co. v. NLRB*, 154 F.3d 328, 339–40 (6th Cir. 1998) (reversing the NLRB by holding that an employer’s tactic of delaying meetings and “wage offer” until near the end of an expiring agreement are allowable as “hard bargaining”).

117. A refusal to bargain charge may be filed per 8(a)(5) under the NLRA by either a union or an employee in the bargaining unit seeking recognition. NLRA, 29 U.S.C. §§ 158(a)(5), 160(b) (2012). The eventual court enforcement of an NLRB cease and desist or bargaining order is unlikely to deter employers determined to delay the bargaining process in order to avoid the costs of unionization due to the lengthy NLRB and subsequent court review process, a loss of employee support for unionization may occur, making unionization following the review process less likely to occur. See William B. Gould IV, *The Employee Free Choice Act of 2009, Labor Law Reform, and What Can Be Done About the Broken System of Labor-Management Relations Law in the United States*, 43 U.S.F. L. REV. 291, 298–99 (2008) (discussing how employer can exploit delays in NLRB proceedings, in part due to ineffective remedies, during which employees may lose interest in unionization and the bargaining process); see also *Ex-Cell-O Corp.*, 185 N.L.R.B. 107, 108 (1970) (holding that the NLRA does not provide for lost compensation attributable to an employer’s delay during the NLRB process).

118. Gould, *supra* note 117, at 298–99, 306 (discussing how it is less costly for employers to delay, rather than negotiate, when employee support for unionization wanes).

119. See *id.* (citing a “remedy crisis,” in that the current available remedies only affect the individual, “as opposed to the collective interests of union representation”). The CFA has said that when reinstatement is not possible, the dismissed employees should be given a make-whole remedy. ILO DIGEST, *supra* note 35, ¶ 843. Employees should be adequately compensated and such compensation should take into account both the damage incurred and the need to prevent the repetition of such situations in the future. See *id.* ¶ 844.

120. *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 778 (1990); see also *GORMAN & FINKIN*, *supra* note 45, at 152–59 (discussing three scenarios where the incumbent union maintains a conclusive presumption of majority support, including one year after certification, for a reasonable time after a union secures bargaining rights through informal employer recognition, and during a labor agreement); *Goldman & Corrada*, *supra* note 65, at 442 (stating that when dealing with an incumbent union, an employer must show by objec-

rival unions to challenge the incumbent's representative status, including filing a decertification petition,¹²¹ an election petition,¹²² or an employer refusal to bargain.¹²³ The loss of recognition as the exclusive union representative may result from an NLRB decision. ILO standards for exclusive representation permit administrative authorities to evaluate the representative status of an incumbent union on the basis of "objective and pre-established criteria."¹²⁴ Nonetheless, the ILO prefers a determination on the loss of recognition as an exclusive representative to come from the judiciary.¹²⁵

2. Subjects Covered by a Collective Bargaining Agreement

The ILO defines subjects covered by collective bargaining as "matters . . . primarily or essentially . . . relating to conditions of employment" including wages, benefits, hours, and

tive evidence that it is uncertain the incumbent continues to enjoy majority support).

121. See GORMAN & FINKIN, *supra* note 45, at 78–81 (stating that employees in the union may file a petition seeking to decertify the existing union upon a 30% showing of interest (the process is nearly identical to a normal representation election)).

122. See *id.* at 63–66 (stating that the Wagner Act extended the right to employers to file an election petition if there is uncertainty that the union still has majority support).

123. Since representation petitions are not subject to direct judicial review, employers often refuse to bargain in order to instigate an 8(a)(5) refusal to bargain charge. See GORMAN & FINKIN, *supra* note 45, at 73–78 (discussing how an employer seeking judicial review of a NLRB determination on an election matter will simply refuse to bargain, and attempt to have the inevitable unfair labor practice determination set aside due to "error in the representation proceeding"). The NLRA provides for judicial review of unfair labor practices orders, and under this procedure employers are allowed to challenge representation issues. See NLRA, 29 U.S.C. § 160 (2006).

124. ILO DIGEST, *supra* note 35, ¶ 347.

125. See *id.* ¶ 440 (discussing how measures taken by administrative agencies regarding challenged election results "run the risk of being arbitrary" and that "matters of this kind should be examined by the judicial authorities"); *cf. id.* ¶ 687 ("Cancellation of a trade union's registration should only be possible through judicial channels."). In the United States, NLRB certification is only required for a union to compel an employer to bargain in good faith, but certification is not required for the union to bargain on a voluntary basis or enjoy other types of legal recognition. See Marzán E-Mail, *supra* note 32. In certain other ILO member states, judicial registration is necessary for any type of legal recognition. See *id.* Hence, a judicial role for certification in the United States remains unnecessary. *Id.* If U.S. courts were required to certify unions, it would take a significant amount of time for new unions to become certified. *Id.* The current U.S. policy of keeping recognition within the province of the NLRB helps to facilitate speedy union organization. *Id.*

leaves.¹²⁶ Unlike U.S. law, ILO standards do not distinguish between mandatory and non-mandatory subjects of bargaining because of the right of unions freely to negotiate their working conditions with the employer.¹²⁷

The NLRA requires U.S. employers to bargain over mandatory subjects of employment, including wages, hours, and other conditions of employment that are almost exclusively an aspect of the employer-employee relationship.¹²⁸ When a subject is non-mandatory either party can refuse to discuss the matter, and the other party may not insist upon bargaining over it.¹²⁹ Non-mandatory subjects typically fall into two groups: (1) subjects that deal with an employer's relationship to third parties and are "normally regarded as within the prerogative of management," and (2) subjects that deal with the union and employee relationship and are "normally regarded as within the internal control of the union."¹³⁰

3. Approach to Public Employees

Public employees under the ILO have essentially the same collective bargaining rights as private sector workers.¹³¹ Two narrow categories of ILO employees do not have the same collective bargaining rights: public employees directly engaged in the administration of the state and officials acting as support-

126. ILO DIGEST, *supra* note 35, ¶¶ 913, 920.

127. Compare ILO DIGEST, *supra* note 35, ¶¶ 912–24 (making no mention of a mandatory and non-mandatory distinction), with NLRA §§ 158(a)(5), (d), 159(a) (providing that rates of pay, wages, hours, and conditions of employment are mandatory subjects of bargaining and that an employer's refusal to bargain on these subjects constitutes an unfair labor practice), and GORMAN & FINKIN, *supra* note 45, at 770 (explaining that mandatory subjects usually "regulate the relations between the employer and the employees"). The Supreme Court in *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958), divided bargaining proposals into three categories: (1) illegal provisions, which may not be incorporated into a CBA, (2) mandatory provisions, which both parties must bargain in good faith over, and (3) non-mandatory, where either party may propose such a provision, but neither party is obligated to discuss it and neither party may insist upon the provision's incorporation to a point of impasse. GORMAN & FINKIN, *supra* note 45, at 771.

128. NLRA §§ 158(a)(5), (d), 159(a); see also GORMAN & FINKIN, *supra* note 45, at 771–74 (stating that the Supreme Court utilizes a balancing test to make the "mandatory-permissive distinction").

129. GORMAN & FINKIN, *supra* note 45, at 771.

130. *Id.* at 808.

131. See ILO DIGEST, *supra* note 35, ¶¶ 881, 885–86 (discussing that ILO Convention No. 98 applies to public employees, and that the right to bargain freely makes up an "essential element in freedom of association").

ing elements, and those providing essential public services.¹³² The ILO precludes dismissal of employees within these two categories for union activity.¹³³ Additionally, under ILO standards public employers are afforded greater flexibility in bargaining than private employers.¹³⁴

The Civil Service Reform Act of 1978, governing federal employees,¹³⁵ protects federal public employee job rights, and generally covers grounds for hiring and firing.¹³⁶ Federal employees, however, cannot bargain about basic rights, including wages.¹³⁷ The Act also defines the “bargaining and contract administrative processes” for executive branch employees.¹³⁸ The Federal Service Impasses Panel assists in solving bargaining impasse disputes, conducts hearings, and imposes resolutions.¹³⁹ As a result, U.S. federal employees and unions face greater outside interference by administrative agencies than their ILO counterparts.

Collective bargaining agreements of U.S. federal employees generally provide substantive and procedural safeguards for employment.¹⁴⁰ Tensions exist between U.S. civil service laws

132. *Id.* ¶ 887.

133. *See id.* ¶ 792 (“[T]he exercise of the right to freely remove public employees from their posts should in no instance be motivated by the trade union functions or activities of the persons . . .”).

134. *See id.* ¶ 1042 (explaining that while the “principle of the autonomy” in collective bargaining remains valid in the public sector, public employers should be afforded “a certain degree of flexibility”).

135. Civil Service Reform Act of 1978, 5 U.S.C. §§ 7101–7106, 7111–7123, 7131–7135 (2012); Goldman & Corrada, *supra* note 65, at 341. Contrary to ILO standards, the Civil Service Reform Act of 1978 mandates that a CBA include “a grievance procedure with binding arbitration as a final step” that can be invoked by either party. Goldman & Corrada, *supra* note 65, at 489.

136. Goldman & Corrada, *supra* note 65 at 341–43 (protecting the right of federal employees to organize and bargain collectively, implementing a system of exclusive representation, and providing representation in grievance and disciplinary proceedings).

137. *Id.* at 342.

138. *Id.* at 341.

139. *See id.* at 488 (explaining that the Federal Service Impasses Panel is an administrative agency created by the Civil Service Reform Act that occupies a similar role as the NLRB). Unlike the NLRB, however, the Federal Service Impasses Panel’s resolutions are only advisory, not binding. *Id.*

140. The Federal Service Impasses Panel investigates unresolved impasse disputes, recommends procedures to resolve the dispute, and may assist the parties in resolution. *Id.* The Civil Service Reform Act of 1978 requires collective bargaining agreements to include grievance procedures providing for binding arbitration. *Id.* at 489. The Act, however, prohibits work stoppages. *Id.* at 488.

and federal collective bargaining agreements. For example, bargaining by federal sector unions cannot affect wages.¹⁴¹ Wage rates for most federal employees are established by statutory schedule.¹⁴² To comply with ILO standards, the ability for Congress to institute wage-price controls would be reduced.¹⁴³ The ILO permits wage-price controls only if done for “compelling” national economic interests.¹⁴⁴ The institution of such controls for a prolonged period of time or over successive time periods violates ILO standards.¹⁴⁵

U.S. adoption of the ILO approach to public employee collective bargaining rights would essentially invalidate state and federal collective bargaining statutes.¹⁴⁶ Additionally, the scope of bargaining would expand in federal and other U.S. public sectors.¹⁴⁷ The United States has expressed concern that compliance with ILO standards would infringe the right of states to determine the terms and conditions of employment for their employees.¹⁴⁸

C. THE RIGHT TO STRIKE

The ILO considers the right to strike to be a fundamental union right, while U.S. labor law may restrict, or prohibit altogether, the right to strike.¹⁴⁹ Appreciable differences exist be-

141. *Id.* at 342.

142. *See id.* (“Because wage rates for most federal employees are established by statutory schedules, bargaining cannot affect wages.”).

143. *See* USCIB, *supra* note 59, at 7. (“Convention 98 would prevent Congress or the President from instituting wage-price controls for a prolonged period of time or over successive periods of time.”).

144. *See id.* (“While the ILO’s supervisory bodies have allowed wage and price controls if they are established for compelling national economic interests . . .”).

145. *Id.*

146. *See id.* at 5 (arguing that ratification of ILO Convention No. 87 can be construed as requiring the “eliminati[on of] state and federal collective bargaining statutes for public employees”).

147. *Id.* at 7 (claiming that ratification of ILO Convention No. 98 would “expand the scope of bargaining in the federal sector and other public sector jurisdictions”).

148. *Id.*

149. ILO DIGEST, *supra* note 35, ¶ 520 (regarding the right to strike as a fundamental right of employees and unions, but only when used to defend their economic and social interests); *see also* NLRA, 29 U.S.C. § 158(b) (2012) (limiting a union’s ability to strike and classifying most secondary union activity as an unfair labor practice); Goldman & Corrada, *supra* note 65, at 401 (“Unlike many other legal systems, American law does not constitutionally protect the right to engage in a work stoppage. Rather, that right is established by statute and is less than complete.”). Taking account of ILO practice,

tween the ILO and U.S. approaches, particularly in regard to protected strikes, picketing, replacement workers, limitations on the right to strike, and public employee work stoppages.

1. Protected Strikes

The ILO protects the right to strike as a way to defend union and employee occupational, social, and economic interests.¹⁵⁰ Under ILO standards, “an acute national emergency” is the only time a blanket ban on strikes can be instituted.¹⁵¹ Unlike the United States, the ILO does not restrict sympathy and recognition strikes.¹⁵² U.S. labor law protects unfair labor practice strikes,¹⁵³ the majority of private sector economic strikes,¹⁵⁴ work preservation strikes,¹⁵⁵ and certain organizational strikes.¹⁵⁶

the European Court of Human Rights has recently held that a “clear-cut prohibition of strikes” violates Article 11, as the right to strike is a “corollary right not to be dissociated from freedom of association.” Filip Dorssemont, *The Right to Take Collective Action Under Article 11 ECHR*, in *THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE EMPLOYMENT RELATION* 333, 364 (Filip Dorssemont et al. eds., 2013) (construing *Enerji Yapi-Yol Sen v. Turkey*, App. No. 68959/01 (Apr. 21, 2009)).

150. ILO DIGEST, *supra* note 35, ¶ 526.

151. *Id.* ¶ 570 (“A general prohibition of strikes can only be justified in the event of an acute national emergency and for a limited period of time.”).

152. ILO standards permit sympathy strikes so long as the initial strike the workers are supporting is lawful. *Id.* ¶ 534. ILO standards view recognition strikes as “a legitimate interest which may be defended by workers and their organizations,” and consider a ban on such strikes to be “not in conformity with the principles of freedom of association.” *Id.* ¶¶ 535–36. Sympathy strikes are strikes in support of another bargaining unit or union on strike, while recognition strikes are strikes carried out by employees demanding recognition of a union. *See generally* GORMAN & FINKIN, *supra* note 45, at 355–79 (explaining that, in the United States, strikes with an objective of recognition or sympathy are considered an unfair labor practice if certain conditions are present).

153. *See* Goldman & Corrada, *supra* note 65, at 259 (engaging in a strike to protest an unfair labor practice does not violate NLRA § 158(b)(7)).

154. Economic strikes are strikes over economic issues, like wages and benefits, and U.S. employers are permitted to permanently replace workers who engage in economic strikes. Lance Compa & Fred Feinstein, *Enforcing European Corporate Commitments to Freedom of Association by Legal and Industrial Action in the United States: Enforcement by Industrial Action*, 33 COMP. LAB. L. & POL’Y J. 635, 636 (2012).

155. Work preservation strikes are done to preserve work currently being carried out by the employees in the bargaining unit, and are considered lawful. *See* Note, *A Rational Approach to Secondary Boycotts and Work Preservation*, 57 VA. L. REV. 1280, 1280 (1971).

156. NLRA, 29 U.S.C. § 158(b)(7) (2012). Organizational strikes can become an unfair labor practice if: an employer has lawfully recognized another

Noticeable differences exist concerning the treatment of secondary union activity. ILO standards generally permit all forms of secondary activity and boycotts.¹⁵⁷ The United States allows only a minimal amount of secondary union activity.¹⁵⁸ Peaceful, non-coercive requests to a U.S. secondary employer or employees thereof to stop dealing with the goods and services of the primary employer are permitted.¹⁵⁹ In addition, a U.S. union may appeal to consumers to withhold purchasing the primary employer's products or services.¹⁶⁰ The NLRA largely prohibits all other forms of secondary union activity.¹⁶¹

2. Picketing

The ILO takes a more permissive approach to picketing than the United States, since its standards permit prohibitions only if the picketing "ceases to be peaceful."¹⁶² In order to remain peaceful under ILO standards, picketing cannot "disturb[] public order and threaten[] workers who continued work."¹⁶³ Picketing in the United States, even if it remains peaceful, may

union; a rival union strikes within the election bar period; the strike is done without an election petition being filed within a reasonable time; and the strike is against an already certified union. See Goldman & Corrada, *supra* note 65, at 257–58.

157. The CFA holds that legislation should not restrict the inclusion of secondary boycott clauses in collective bargaining agreements. ILO DIGEST, *supra* note 35, ¶ 915. Additionally, ILO standards provide that a ban on strikes unrelated to a dispute that employees or a union are not a party to (secondary union activity) violate the principles of freedom of association. See *id.* ¶ 538.

158. See NLRA § 158; GORMAN & FINKIN, *supra* note 45, at 382 (considering secondary boycotts to be an unfair labor practice under the NLRA). Secondary boycotts occur when a union applies economic pressure on a third-party employer that the union has no dispute with regarding its own terms of employment in order to induce the third-party employer to stop doing business with another employer with whom the union does have such a dispute. *Id.* at 381.

159. See Goldman & Corrada, *supra* note 65, at 267. The primary employer being the employer the union is striking against. Restrictions on this type of secondary activity still exist (Related Work Doctrine, *Moore-Drydock* test). See GORMAN & FINKIN, *supra* note 45, at 399–402 (discussing the *Moore-Drydock* test).

160. Goldman & Corrada, *supra* note 65, at 267. A union's appeal to consumers may not disrupt the secondary employer's business. *Id.*

161. Generally, NLRA § 158(b)(4) allows direct economic pressure from a union against an employer that the union has a dispute with, but does not allow a union to put economic pressure on other employers. *Id.* at 266.

162. See ILO DIGEST, *supra* note 35, ¶ 649.

163. *Id.* ¶ 650.

be enjoined to effectuate public policy.¹⁶⁴ Under the ILO, member states can require that pickets only be located near an employer—generally the only place permitted by U.S. labor law.¹⁶⁵

The United States views picketing as a free speech right protected by the Constitution—as a result, blanket bans on picketing are prohibited.¹⁶⁶ The NLRA does, however, prohibit some recognitional picketing.¹⁶⁷ U.S. labor law does permit picketing for economic and area standards purposes.¹⁶⁸ While U.S. labor law prohibits picketing for publicity purposes against a neutral party, other concerted employee action for such purposes are considered legal.¹⁶⁹

164. See Goldman & Corrada, *supra* note 65, at 264 (citing *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949)).

165. ILO DIGEST, *supra* note 35, ¶ 653; see GORMAN & FINKIN, *supra* note 45, at 387–88 (picketing on the property of the primary employer is considered the most appropriate place for appeals to primary employees to carry out a work stoppage). Picketing at a secondary site is usually prohibited by the NLRA, except where the secondary employer is considered an ally of the primary under the “ally doctrine,” or when the primary employer is working at the secondary employer’s business. GORMAN & FINKIN, *supra* note 45, at 388–99.

166. See GORMAN & FINKIN, *supra* note 45, at 345 (discussing how labor picketing is viewed as “speech plus” for constitutional purposes since it involves more than pure discourse); Goldman & Corrada, *supra* note 65, at 262, 264 (stating that the Supreme Court has held that labor picketing is not constitutionally protected under all circumstances, and that restraints on picketing are often permitted by the Court despite the constitutional protections of freedom of expression, peaceful assembly, and speech).

167. NLRA, 29 U.S.C. § 158(b)(7) (2012).

168. Area standards picketing involves a union demanding an employer to pay employees comparable wages to other unions in the same area involved in a similar line of work. Goldman & Corrada, *supra* note 65, at 259.

169. See Marzán E-mail, *supra* note 32. The Publicity Proviso, NLRA § 158(b)(4), permits employees to appeal to the public to stop doing business with a neutral employer in order to get that employer to stop doing business with a primary employer with whom the employees have a labor dispute. See Goldman & Corrada, *supra* note 65, at 268. Concerted employee action for publicity purposes, although legal, must be done through means other than picketing. See *id.* (explaining that the Publicity Proviso only permits public appeals “through means other than picketing”). For example, a union may distribute handbills outside of the site of a neutral employer requesting customers to refrain from purchasing the primary employer’s goods that are sold by the neutral employer. *Id.* at 267–68. Additionally, the Supreme Court has held that a union may ask a neutral employer in business with the primary employer to “cease doing such business for the duration of the labor-management dispute.” *Id.* at 267.

3. Replacement Workers

Under ILO standards, when permanently replacing workers exercising their right to strike, employers risk the relaxation of the right to strike and affect the exercise of union rights.¹⁷⁰ ILO standards state that hiring replacement workers may inhibit the right to strike and freedom of association, and employers may not dismiss employees who choose to exercise their right to strike.¹⁷¹ Under U.S. law, employers may not permanently replace employees exercising their right to strike when the strike is protesting employer unfair labor practices.¹⁷² U.S. employers may, however, hire permanent replacements and only offer reinstatement to former strikers as vacancies arise.¹⁷³ Both the ILO and United States proscribe employers from granting benefits to strike replacements and employees who return to work.¹⁷⁴

U.S. employees face a considerable risk when striking for economic purposes. While U.S. employers may not discharge employees engaged in an economic strike, the employers may hire replacement workers with no guarantee that the striking employees' jobs will be available when the strike ends.¹⁷⁵ Furthermore, a U.S. employer may, under certain circumstances, permanently replace an employee honoring a picket line in order to preserve the efficient operation of business.¹⁷⁶ Contrary to ILO standards, U.S. employers have the right to inform em-

170. ILO DIGEST, *supra* note 35, ¶ 633; *see also* BERNARD GERNIGON ET AL., ILO PRINCIPLES CONCERNING THE RIGHT TO STRIKE 46 (ILO ed., 2000) (explaining that the CFA believes hiring replacement workers is only justified under two circumstances: (1) during an illegal strike in an essential public service and (2) during acute national emergency). Additionally, the CFA considers hiring permanent replacement workers to be a serious impairment of the right to strike. *Id.* at 47.

171. *See* ILO DIGEST, *supra* note 35, ¶¶ 661, 663.

172. Goldman & Corrada, *supra* note 65, at 406.

173. *Id.*

174. *See* ILO DIGEST, *supra* note 35, ¶ 675 (discussing discrimination in favor of non-strikers); GORMAN & FINKIN, *supra* note 45, at 544–63 (reviewing the unlawful discrimination that results from disparate treatment of strikers and nonstrikers).

175. *See* GORMAN & FINKIN, *supra* note 45, at 532–33 (citing NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938) (holding that an employer can lawfully and permanently replace an employee engaged in an economic strike)).

176. The NLRB tends to treat an employee who refuses to cross a picket line similarly to an economic striker. *See* GORMAN & FINKIN, *supra* note 45, at 355–80. An employee's right to refuse to cross a "stranger's" picket line, however, would be protected under the NLRA. *See* Marzán E-mail, *supra* note 32.

ployees during the bargaining process that if a union forces a strike, the employer will hire permanent replacements.¹⁷⁷

4. Limitations on the Right to Strike

ILO Convention No. 87 prohibits nearly all restrictions on the right to strike.¹⁷⁸ ILO standards only permit member states to restrict strikes (1) of a purely political nature,¹⁷⁹ (2) by workers in essential service areas,¹⁸⁰ (3) by public workers exercising authority in the name of a state,¹⁸¹ (4) during “an acute national emergency,”¹⁸² and (5) affecting minimum safety and occupational services.¹⁸³

Collective bargaining agreements in the United States generally contain some form of a no-strike clause.¹⁸⁴ Moreover, when a collective bargaining agreement does not include a no-strike clause, one may be inferred for bargaining subjects covered by compulsory arbitration.¹⁸⁵ Under the NLRA, a U.S. court may enjoin a strike when the strike is over a grievance

177. ITUC, *Free Speech*, *supra* note 71, at 12.

178. ILO Convention No. 87, *supra* note 13. While neither Convention No. 87 nor No. 98 mentions or guarantees a right to strike, the CFA stated as early as 1952 that the right to strike is an essential union right and that a general prohibition on the right to strike runs counter to Convention No. 87. *See, e.g.*, Janice R. Bellace, *The ILO Declaration of Fundamental Principles and Rights at Work*, 17 INT’L J. COMP. LAB. L. & INDUS. REL. 269, 276 (2001); *see also* ILO DIGEST, *supra* note 35, ¶ 523.

179. ILO DIGEST, *supra* note 35, ¶ 528.

180. *Id.* ¶ 581 (providing that in order to be considered an essential service area, “the existence of a clear and imminent threat to the life, personal safety or health of the whole or part of the population” must be established).

181. *Id.* ¶ 574.

182. *Id.* ¶ 570.

183. *Id.* ¶ 606 (establishing minimum services during a strike action should be limited to services where the interruption would “endanger the life, personal safety or health of the whole or part of the population,” nonessential services that may result in an acute national crisis as a result of the extent and duration of the strike, or “public services of fundamental importance”).

184. *See* Goldman & Corrada, *supra* note 65, at 414 (giving the employer the ability to lawfully fire an employee for breaching a no-strike clause). Most collective bargaining agreements contain a clause that prevents work stoppages and economic pressure during the existence of the CBA, and most of the collective bargaining agreements that do not include no-strike clauses only permit strikes under limited circumstances. *Id.* at 388.

185. *See id.* at 414 (“However, a peace provision will also be found by implication to the extent that there is an express undertaking to resort to arbitration . . . as the exclusive means for resolving disputes.”). Express and implicit no-strike clauses are acceptable in collective agreements under the ILO so long as the collective agreement had been freely negotiated. *See* ILO DIGEST, *supra* note 35, ¶¶ 533, 881.

the parties are bound to arbitrate.¹⁸⁶ U.S. labor laws also restrict most recognitional strikes, strikes that occur during the insulated period prior to the expiration of a CBA, and hot cargo agreements.¹⁸⁷ By contrast, ILO standards view the right to strike as a natural “corollary to the right to organize.”¹⁸⁸

If the United States were to ratify ILO Convention No. 87, most of the restrictions on secondary union activity would be prohibited.¹⁸⁹ Currently, the United States prohibits secondary strikes that induce or encourage a strike or other refusal to handle goods.¹⁹⁰ In addition, U.S. laws prohibit strikes that threaten, coerce, or restrain any person.¹⁹¹ U.S. labor laws ban strikes to achieve secondary boycotts.¹⁹²

The ILO does not comment on the permissibility of lockouts; some member states permit lockouts, while others prohibit lockouts.¹⁹³ In the United States, lockouts are permissible absent proof of an unlawful motive.¹⁹⁴ A lockout in the United

186. See generally Goldman & Corrada, *supra* note 65, at 390–92 (discussing grievance procedure and arbitration).

187. NLRA, 29 U.S.C. § 158(b) (2012). The insulated period is the 60 day window before the expiration of a CBA. Goldman & Corrada, *supra* note 65, at 411. A strike that occurs during the insulated period causes employees to lose their protected status under the NLRA, and may in turn be dismissed by employers without violating § 158(a)(3). *Id.* Hot cargo agreements are prohibited by § 158(e) of the NLRA. NLRA § 158(e). Hot cargo agreements essentially are clauses with an employer not to handle goods produced by another employer with whom the union has a dispute, or that the union will refuse to handle non-union material. See Goldman & Corrada, *supra* note 65, at 273.

188. ILO DIGEST, *supra* note 35, ¶ 523. ILO Convention No. 98 “prohibits nearly all restrictions on the right to strike,” including many limitations and restrictions allowable under U.S. labor law. USCIB, *supra* note 59, at 7.

189. See USCIB, *supra* note 59, at 5–7 (including restrictions on hot-cargo agreements and secondary boycotts).

190. NLRA § 158(e).

191. NLRA § 158(b)(4).

192. NLRA § 158(b).

193. E.g. Igor Chernyshev, *Decent Work Statistical Indicators: Strikes and Lockouts Statistics in the International Context*, ILO 8–10 (June 1, 2003), <http://www.ilo.org/public/english/bureau/stat/download/articles/2003-3.pdf> (displaying strikes and lockouts statistics for ILO nations). While the right to strike derives from ILO Convention No. 87 through Article 3 (establishing the right of unions to “organize their administration and activities and to formulate their programmes”) and Article 10 (establishing the right of unions to pursue aims that work toward “furthering and defending the interests of workers or of employers”), no convention establishes a similar right to conduct a lockout. GERNIGON ET AL., *supra* note 170, at 8

194. The NLRA permits both offensive (when an employer and union are at a bargaining impasse) and defensive (threat to enhance the employer’s bargaining power) lockouts. See Goldman & Corrada, *supra* note 65, at 330; see

States must also have a “business or bargaining justification” and must not be “designed to destroy the union.”¹⁹⁵

5. Public Employee Work Stoppages

The ILO extends the fundamental right to strike, with few limitations, to public employees.¹⁹⁶ Public workers in essential services¹⁹⁷ and public servants exercising authority in the name of the state¹⁹⁸ may be prohibited from work stoppages. The ILO allows a minimum safety service limitation “to the extent necessary to comply with statutory safety requirements.”¹⁹⁹ In addition, the ILO permits a minimum operation service limitation for public services of fundamental importance, as well as for non-essential services where the extent and duration of a work stoppage might result in an acute national emergency.²⁰⁰ If the United States were to comply with ILO standards, federal and state governments would face a reduced ability to restrict public employees’ right to strike.²⁰¹ While the ILO provides compensation to those whose right to strike may be restricted, the United States does not generally offer any such compensation.²⁰²

also id. at 388 (arguing that contractual prohibitions against employer lock-outs are, however, nearly as common as no-strike clauses).

195. *Id.* at 330.

196. ILO DIGEST, *supra* note 35, ¶¶ 574, 576.

197. *Id.* ¶ 576. Compare *id.* ¶ 606 (defining minimum services as services where “the interruption of which would endanger the life, personal safety or health of the whole or part of the population”), with GORMAN & FINKIN, *supra* note 45, at 589–95 (discussing how an injunction may be issued if a strike, “affecting an entire industry or a substantial part of an industry engaged in interstate commerce, endangers or will endanger the national health or safety”). ILO standards disapprove of defining essential services as those that interfere with commerce since a “broad range of legitimate strike action could be impeded.” ILO DIGEST, *supra* note 35, ¶ 592.

198. ILO DIGEST, *supra* note 35, ¶¶ 574, 576. Employees in state-owned commercial and industrial enterprises retain their right to strike. *Id.* ¶ 577.

199. *Id.* ¶ 604.

200. *Id.* ¶ 606. An impartial and independent body settles disagreements on what is considered essential for purposes of minimum operation service limitations. *Id.* ¶ 613. This approach is similar to the NLRA.

201. See USCIB, *supra* note 59, at 7.

202. See ILO DIGEST, *supra* note 35, ¶¶ 596, 600 (providing that compensation generally includes a corresponding denial of an employer’s right to lock-out, and adequate, impartial, and speedy arbitration proceedings).

Currently, most public employee work stoppages are prohibited in the United States.²⁰³ A number of alternatives do exist for U.S. state and local employees. In most states, either party can call for intervention by way of state mediation.²⁰⁴ At a bargaining impasse, most states allow either side to initiate a fact-finding procedure to help resolve a dispute.²⁰⁵ The majority of U.S. public strikes result from municipal or school district employees.²⁰⁶

U.S. federal law imposes greater penalties for illegal public work stoppages than international labor law. For example, a union can be decertified if it encourages workers to participate in a prohibited work stoppage.²⁰⁷ Additionally, employees may be prosecuted, a court may issue an injunction, and employees can become disqualified from further federal employment for an indefinite period of time.²⁰⁸ Under ILO standards, decertification should only be possible through judicial channels.²⁰⁹ The difference in treatment of public employee work stoppages creates a gulf between U.S. labor law and ILO standards.

D. PROTECTION AGAINST DISCRIMINATION IN THE WORKPLACE

While the ILO and the United States provide similar levels of protection against anti-union discrimination, ILO standards afford greater protection for women, children, and noncitizen employees.

1. Protection Against Anti-Union Discrimination

The ILO considers anti-union discrimination to be one of the most serious violations of freedom of association principles.²¹⁰ Under the ILO, the CFA makes sure the anti-union discrimination standards set by member states are in accordance

203. See Goldman & Corrada, *supra* note 65, at 405 (“In the minority of states that permit public employee strikes, the right to strike is not extended to all government workers.”).

204. *Id.* at 338.

205. *Id.*

206. *Id.* at 404. In 1981, President Reagan attempted to enforce prohibitions of public employee work stoppages by dismissing 11,000 air traffic controllers. *Id.* at 405.

207. *Id.* at 405.

208. *Id.*

209. See ILO DIGEST, *supra* note 35, ¶ 687.

210. *Id.* ¶ 769 (maintaining that anti-union discrimination “may jeopardize the very existence of trade unions”).

with freedom of association principles.²¹¹ ILO Convention No. 98 provides that employees are protected against discrimination during hiring, employment, and dismissal.²¹² U.S. labor laws provide similar protection as the ILO, but exclude more employees from coverage.²¹³ In order to amount to an anti-discrimination violation under the NLRA, an employee must show that (1) the discrimination occurred “because of union activity or affiliation,” (2) the discrimination resulted in “adverse or favored treatment,” and (3) the treatment “tended to encourage or discourage union membership or activity.”²¹⁴ Additionally, ILO and U.S. remedies for anti-union discrimination are the same—a combination of reinstatement and back pay.²¹⁵

Furthermore, the ILO emphasizes increased anti-discrimination protection for union representatives and leaders.²¹⁶ The few situations where ILO standards do not protect union representatives and leaders from dismissal include the performance of union activities on employer time, the use of an employer’s personnel for union purposes, and the use of one’s business position to put improper pressure on another employee.²¹⁷ U.S. labor laws provide union officials with some level of special employment protections during their tenure in office.²¹⁸

211. *Id.* ¶ 774.

212. ILO Convention No. 98, *supra* note 14, at 258–61.

213. NLRA, 29 U.S.C. §§ 157–158 (2012) (forbidding discrimination due to union activity in hiring, firing, and other means of employment, and providing an analogous level of coverage to the right to organize); *see also* NLRA § 152(3) (defining who constitutes an employee for NLRA purposes).

214. Goldman & Corrada, *supra* note 65, at 230.

215. *See* GORMAN & FINKIN, *supra* note 45, at 187, 192 (stating that NLRA § 10(c) grants the NLRB the ability to require reinstatement and backpay for NLRA § 8(a)(3) anti-union discrimination violations); ILO DIGEST, *supra* note 35, ¶¶ 837, 841, 843 (providing, furthermore, that if reinstatement is not possible, the victim should be wholly compensated).

216. “[A]dditional measures should be taken to ensure fuller protection for leaders of all organizations . . . against any discriminatory acts.” ILO DIGEST, *supra* note 35, ¶ 773; *see also id.* ¶¶ 799–801 (emphasizing that worker representatives are entitled to “effective protection against any act prejudicial to them . . . based on their status or activities as workers’ representatives”).

217. *Id.* ¶ 809. The performance of union activities on employer time and the use of an employer’s personnel for union purposes may, however, be protected against anti-union discrimination if an agreement, between the union officers and the employer, allowing such activities is in place. *See id.* ¶¶ 800, 809.

218. U.S. employers may give special benefits to union representatives with responsibilities in administering the CBA. *See* Goldman & Corrada, *supra* note 65, at 236. For example, a CBA often gives special seniority to union representatives to protect them “from layoff and grant them early recall” as

2. Protection Against Discrimination

The 1998 Declaration considers the elimination of discrimination in employment to be a fundamental principle and right at work.²¹⁹ As an ILO member state, the United States must respect, promote, and realize the fundamental principles and rights established in the 1998 Declaration.²²⁰ The ILO (through Convention No. 111) and the United States (through Title VII of the Civil Rights Act of 1964) both prohibit discrimination on the basis of race, color, sex, religion, or national origin.²²¹ Additionally, ILO standards and U.S. labor laws grant certain employers a bona fide occupational qualification during the hiring process, allowing them to take into account otherwise prohibited employee characteristics.²²² In the United States, occupational qualifications must apply to the essence of an employer's business and must be reasonably necessary for the normal operation of business.²²³

Under the Civil Rights Act of 1964, a U.S. employer may not retaliate against an employee who has made a charge, assisted with, or participated in a Title VII investigation.²²⁴ The two most common Title VII violations are disparate treatment violations (which require an intent to discriminate) and disparate impact violations (no intent to discriminate necessary).²²⁵

long as the benefited representatives “need to be available in the workplace to perform their responsibilities administering the collective agreement.” *Id.* The NLRA prohibits granting special benefits “that are unrelated to facilitating the union representative’s ability to counsel and speak for the workers.” *Id.* at 237.

219. See 1998 Declaration, *supra* note 10, at art. 2(d).

220. *Id.* at art. 2.

221. See Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17 (2012); ILO Convention No. 111, *supra* note 16, at 32–37. In addition, ILO Convention No. 111 provides for the right to pursue economic well-being in conditions of freedom, dignity, and economic security. *Id.* at 32–33.

222. See ILO Convention No. 111, *supra* note 16, at 32 (“Any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination.”); Goldman & Corrada, *supra* note 65, at 193–94 (discussing how the Supreme Court takes a narrow approach to what constitutes a bona fide occupational qualification).

223. See Goldman & Corrada, *supra* note 65, at 194. The burden lies with the employer to show that a bona fide occupational qualification exists. *Id.*

224. Title VII, 42 U.S.C. § 2000e-3(a). To be considered employer retaliation, an employer’s actions must be materially adverse enough “to dissuade a reasonable employee from making or supporting a charge of discrimination.” Goldman & Corrada, *supra* note 65, at 204.

225. For a disparate treatment violation, establishing a *McDonnell Douglas* prima facie case creates an inference of unlawful intent. To do this, the plaintiff must show four elements—that the employee is a member of a pro-

Affirmative action remains a relatively unique concept to U.S. labor law, and continues to be a controversial issue.²²⁶ The Supreme Court upheld the use of affirmative action when adopted for remedial purposes and developed a two-part test.²²⁷ Affirmative action programs must be aimed at correcting a “manifest imbalance” in a traditionally segregated job category,²²⁸ and must not “unduly” trample on the interests of majority group members.²²⁹ Furthermore, affirmative action programs may not be used to maintain a racially balanced workforce but rather only to obtain one.²³⁰

3. Women in the Workplace—Equal Pay for Equal Work

The ILO Constitution’s Preamble and ILO Convention No. 100 establish the principle of “equal remuneration for work of equal value.”²³¹ U.S. labor law protects women’s wages through

tected class, was qualified for the position, and suffered adverse action, and that the employer treated persons outside the protected class differently. Gorman & Corrada, *supra* note 65, at 192; *see also id.* at 192–97 (discussing the application of disparate treatment law). Disparate impact violations are practices that may be fair in form but are discriminatory in operation. *Id.* at 197; *see also id.* at 197–98.

226. *See id.* at 194–96 (stating that the lawfulness of affirmative action is one of the most controversial issues in U.S. labor law); *see also* ILO DIGEST, *supra* note 35 (making no mention of affirmative action).

227. *See* *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 208–09 (1979); Goldman & Corrada, *supra* note 65, at 194–97 (explaining that affirmative action plans must be remedial and satisfy a two-part test); *see also* 42 U.S.C. § 2000e-2 (prohibiting certain forms of discrimination in the workplace); 29 C.F.R. § 1608.1 (2013) (stating that an employer who takes voluntary action to “improve opportunities for minorities and women” in order to “overcome the effects of past or present . . . barriers to equal employment opportunity” is insulated from the unlawful employment practices named in Title VII).

228. Goldman & Corrada, *supra* note 65, at 195 (internal quotation marks omitted) (adding that a showing of disparity between the minority or women workers and those in the labor pool is required to demonstrate a manifest imbalance).

229. *See United Steelworkers*, 443 U.S. at 208 (stating that the affirmative action plan at issue does not “unnecessarily trammel” the interests of the majority group members); Goldman & Corrada, *supra* note 65, at 195 (discussing what “unnecessarily trammel” means).

230. *See* Goldman & Corrada, *supra* note 65, at 195 (“Moreover, an affirmative action plan may be used only to attain, and not to maintain, a racially balanced workforce.”). The Supreme Court thus far has only considered the lawfulness of affirmative action plans “when a remedial purpose was put forward to justify the plan.” *Id.*

231. ILO, *Constitution*, *supra* note 6, at 40 (emphasis omitted); *accord* ILO Convention No. 100, *supra* note 15, at 36.

the Equal Pay Act,²³² which prohibits discrimination in wages paid for “equal work on jobs the performance of which requires equal skill, effort and responsibility and which are performed under similar working conditions.”²³³ Accordingly, the general U.S. standard under The Equal Pay Act provides for equal pay for substantially equal work,²³⁴ whereas the ILO standard provides for equal pay for “comparable work,”²³⁵ or work of “comparable worth.”²³⁶ Due to this difference in the standard—equal work versus comparable work—U.S. labor law provides weaker protection against wage discrimination than ILO standards.²³⁷

4. Treatment of Child Workers

ILO Convention No. 138 allows member states to set internal minimum age standards but requires that the minimum age of child employment be no lower than the age of completion of compulsory schooling.²³⁸ Additionally, ILO Convention No. 138 requires a minimum age of eighteen for work “likely to jeopardise the health, safety, or morals.”²³⁹ While U.S. labor law conforms to many requirements of ILO Convention No. 138,

232. See The Equal Pay Act, 29 U.S.C. § 206 (2012) (prohibiting wage discrimination on the basis of sex); Goldman & Corrada, *supra* note 65, at 214–16 (stating that the Equal Pay Act covers all employees covered by the Fair Labor Standards Act (in addition to executive, administrative, and professional employees), and claiming that the Equal Pay Act is aimed solely at the elimination of unequal pay based on sex).

233. 29 U.S.C. § 206(d)(1) (internal quotation marks omitted); see also Goldman & Corrada, *supra* note 65, at 215 (explaining that a prima facie violation of the Equal Pay Act arises when there exists unequal pay for equal work at the same place of business due to sex).

234. See 29 C.F.R. § 1620.13 (2013) (“The equal work standard does not require that compared jobs be identical, only that they be substantially equal.”).

235. See Edward E. Potter, *The Growing Significance of International Labor Standards on the Global Economy*, 28 SUFFOLK TRANSNAT’L L. REV. 243, 258 (2005).

236. See, e.g., Christopher McCrudden, *Comparable Worth: A Common Dilemma*, 11 YALE J. INT’L L. 396, 402 (1986) (internal quotation marks omitted) (discussing the history of the concept of equal pay for work of “comparable worth”).

237. Compare 29 C.F.R. § 1620.13 (providing substantially equal work standard), and Goldman & Corrada, *supra* note 65, at 215 (“[W]ithout unequal pay for equal work, there is no Equal Pay Act violation, even if a woman is being paid less because she is a woman.”), with ILO Convention No. 100, *supra* note 15, at 304–07 (providing an equal pay for equal work standard).

238. The ILO sets the minimum age of child employment at fifteen, with the possibility of fourteen for insufficiently developed countries. ILO Convention No. 138, *supra* note 17, at 298–301.

239. *Id.* at 300. Types of employment considered to be “likely to jeopardise the health, safety, or morals” are determined at the national level. *Id.*

conflicts exist in areas of youth employment that are exempt from the Fair Labor Standards Act (FLSA) and state child labor laws.²⁴⁰ The FLSA protects child workers in the United States by prohibiting most employment of children under fourteen and by restricting the types of employment, hours, and conditions of children under eighteen.²⁴¹

The United States has ratified ILO Convention No. 182, which seeks to eliminate the worst forms of child labor.²⁴² ILO Convention No. 182 applies to all child workers under eighteen.²⁴³ The Convention also prohibits the use of children in slavery or similar practices, in pornography, in work likely to harm the child's health, safety, or morals, and the procuring or offering of a child for illicit activities'.²⁴⁴ In addition, ILO Convention No. 182 requires member states to take effective measures to promote the education of children—in particular, children who have been exposed to the worst forms of child labor.²⁴⁵

5. Rights of Noncitizen Employees

ILO standards provide that, once employed, everyone is entitled to protection against anti-union discrimination without regard to citizenship status.²⁴⁶ The ILO provides greater protection of noncitizen employees and criticizes the U.S. approach for not providing adequate protection to undocumented workers

240. Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. §§ 201–219 (2012). The FLSA prohibits all employment of children under fourteen when the enterprise “ships goods in interstate commerce.” Goldman & Corrada, *supra* note 65, at 93. Children age fourteen and fifteen may not be employed in manufacturing and mining. Additional FLSA limits apply to children ages sixteen and seventeen across various industries. *Id.* State child labor laws often provide additional limits to child employment. *See id.* at 93–94; USCIB, *supra* note 59, at 8 (arguing that U.S. compliance with ILO Convention No. 138 would be difficult due to “widely varied” state child labor laws).

241. *See supra* note 240.

242. ILO Convention No. 182, *supra* note 3, at 163–64. The ILO intended ILO Convention No. 182 to complement ILO Convention 138. *See id.*

243. *Id.* at 164–65.

244. *Id.*

245. *Id.* at 165–66.

246. *See* David Weissbrodt, *Remedies for Undocumented Noncitizens in the Workplace: Using International Law to Narrow the Holding of Hoffman Plastic Compounds, Inc. v. NLRB*, 92 MINN. L. REV. 1424, 1430 (2008) (stating that the Inter-American Court of Human Rights has held that once the employment relationship has begun, the noncitizen worker “acquires rights as a worker . . . irrespective of his regular or irregular status in the State of employment”).

who choose to exercise their freedom of association rights.²⁴⁷ In *Hoffman Plastic Compounds, Inc. v. NLRB*, an undocumented employee distributed authorization cards as part of a unionization effort, and his employer subsequently terminated him.²⁴⁸ The NLRB found that the employer had illegally fired the undocumented employee and ordered back pay as relief.²⁴⁹ The Supreme Court, citing conflict with public policy goals of the Immigration Reform and Control Act of 1986 (IRCA), vacated the NLRB's award of back pay.²⁵⁰ The Court reasoned that the undocumented employee should not be able to recover back pay since he was a noncitizen and fraudulently obtained employment.²⁵¹ As a result, the only available remedies to protect undocumented employees who exercise their freedom of association rights are the issuance of a cease and desist order and posting of notice at the employer's business.²⁵²

The CFA issued a decision regarding *Hoffman* and expressed concern that removing back pay as a viable remedy for noncitizens could harm worker safety and well-being.²⁵³ In fact, the CFA found the Supreme Court's decision in *Hoffman* to violate the fundamental principles behind the ILO constitution, as the *Hoffman* decision functionally denied noncitizen employees the freedom to associate and join unions.²⁵⁴ The CFA criticized the Supreme Court's weighing of the policy goals of the IRCA against the available remedies under the NLRA, stating that

247. See ILO, Report in Which the Committee Requests to Be Kept Informed of Development ¶¶ 555, 559–68, 610 (Nov. 2003), http://www.ilo.org/dyn/normlex/en/f?p=1000:50002:P50002_COMPLAINT_TEXT_ID:2907332 [hereinafter CFA Case No. 2227] (concluding that the NLRB's remedial measures are "inadequate to ensure effective protection against acts of anti-union discrimination").

248. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 140 (2001).

249. *Id.* at 140–41.

250. See *id.* at 140. The undocumented employee had fraudulently obtained employment. The Supreme Court declined to address whether back pay may be an appropriate remedy in instances where the employer knowingly hired an undocumented worker in violation of the IRCA. See Weissbrodt, *supra* note 246, at 1426–27.

251. See *Hoffman*, 535 U.S. at 150–51. In the years since the *Hoffman* decision, U.S. courts remain confused about the scope of *Hoffman* and what employment remedies under the NLRA are unavailable to undocumented workers. Weissbrodt, *supra* note 246, at 1445.

252. CFA Case No. 2227, *supra* note 247, ¶ 609.

253. See *id.* ¶ 565; Weissbrodt, *supra* note 246, at 1431.

254. See Weissbrodt, *supra* note 246, at 1431.

human rights must always have priority over public policy goals.²⁵⁵

Additionally, the CFA criticized the available remedies for undocumented employees under U.S. labor law—the U.S. remedies for undocumented workers serve only as possible deterrents for future employer discriminatory acts, though they do not sanction the actual discriminatory act committed by the employer.²⁵⁶ As of November 2011, the CFA still considers the United States to be in violation of ILO standards pertaining to the rights of undocumented employees.²⁵⁷

CONCLUSION

The United States and the ILO take varying approaches to the right to organize, the right to bargain collectively, the right to strike, treatment of public employees, the rights of noncitizen workers, treatment of children, anti-union discrimination, and treatment of women. Despite being bound to respect and promote the principles and rights established in the ILO Constitution and the principle of freedom of association, the United States tends to provide lower levels of coverage and protection for employees than required by ILO standards. The lower level of protection and coverage for U.S. employees remains especially visible in the right to strike, treatment of public employees, and rights of noncitizen workers. To achieve a higher level of compliance with ILO standards, the United States would need to ratify a greater number of conventions (particularly the core conventions) and accept more recommendations.

255. *See id.*

256. CFA Case No. 2227, *supra* note 247, ¶ 609.

257. *See* ILO, Effect Given to the Recommendations of the Committee and the Governing Body ¶ 52 (Nov. 2011), http://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:2907354.