

## The National Labor Relations Act and Flexible Work Arrangements: An Overview of Existing Law and Proposals for Reform

The scheduling of work hours is important to employers and employees alike. Employers must ensure sufficient staffing to meet workload demands; employees must balance work with other aspects of their lives. Over the past several years, the tendency to view these needs as mutually exclusive has slowly given way to increased discussion of and experimentation with flexible work arrangements as an effective way to balance work-life demands. While these workplace flexibility initiatives take many forms, the majority of them require collaboration between employers and employees regarding work hours and conditions.<sup>1</sup>

As employers and employees explore these new ways of working, they do so against a backdrop of existing laws that may support or impede their efforts. The National Labor Relations Act (NLRA) is one such law. Under Section 8(a)(2) of the NLRA, an employer commits an unfair labor practice when it dominates or supports a labor organization. Because the Act's definition of labor organization broadly includes any employee-participant organization that deals with an employer on certain issues, including hours and conditions of work, the NLRA necessarily affects how employers and employees can work together to increase flexible work arrangements. This memo examines that interplay, with a particular focus on how the NLRA supports or impedes employer-employee workplace flexibility initiatives.

Section I of the memo sets out relevant NLRA provisions and explains how these provisions impact workplace teams by placing certain limits on team structure, function, and level of employer involvement. To operate within these limits, a workplace team must exercise actual managerial authority; a team that engages in a back-and-forth process with management and generates proposals for management consideration must be independent of management control.

Dissatisfaction with how these limits impact employer-employee collaboration and concerns over possible uncertainty in their application to any given workplace team has spurred vigorous debate and discussion. Section II reviews various arguments and proposals for reform of existing law, including calls for increased NLRB clarity regarding permissible workplace teams and substantial efforts to amend the NLRA. These proposed NLRA amendments would allow employers greater freedom to discuss "matters of mutual interest" with employees and have generated strong opposition and support, with both sides claiming that their solution strikes the appropriate balance for employer-employee collaboration. In the meantime, employers and employees continue to navigate existing law, with many employers creating workplace flexibility teams.

### I. The NLRA and Workplace Flexibility Arrangements: Application of Section 8(a)(2) and Section 2(5) to Workplace Teams

The National Labor Relations Act of 1935, commonly known as the Wagner Act, seeks to remedy the inequality of bargaining power between employees and employers by strengthening the right of employees to organize and bargain collectively with employers.<sup>2</sup> The Act contains several provisions aimed at reducing employer interference with employee organizing efforts, including Section 8(a)(2):

29 U.S.C. §158 [§8(a)(2)]. Unfair labor practices

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer –

\* \* \*

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it \* \* \*

The primary purpose of Section 8(a)(2) is the elimination of sham or company unions and other management-controlled employee groups that might substitute for or interfere with an independent bargaining agent.<sup>3</sup> From Senator Wagner's perspective in the 1930s, "[t]he development of the company-dominated union has been one of the great obstacles to genuine freedom of self-organization."<sup>4</sup> He therefore intentionally proposed – and Congress adopted – a broad definition of labor organization in Section 2 of the Act that would reach a wide range of employee-involvement structures:

29 U.S.C. §152 [§2]. Definitions.

When used in this subchapter –

\* \* \*

(5) The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

Under these two provisions, determining whether a workplace team violates the NLRA requires a two-step analysis:

(1) is the team a "labor organization" under Section 2(5); and if so

(2) has the employer dominated or interfered with the formation of the team or contributed financial or other support to it in violation of Section 8(a)(2).<sup>5</sup>

An employer cannot commit an unfair labor practice unless it is first determined that a workplace flexibility team constitutes a "labor organization." If a particular team is not a labor organization, then there can be no unlawful domination or support within the meaning of Section 8(a)(2). Conversely, if a team is a labor organization, an employer violates the law only if its conduct vis-à-vis the team constitutes unlawful domination, interference, or support.

### A. Is the Team a "Labor Organization" under Section 2(5)?

In analyzing the definition of "labor organization" contained in Section 2(5), the National Labor Relations Board (NLRB) has explained that an "entity is a labor organization if

- (1) employees participate,
- (2) the organization exists, at least in part, for the purpose of 'dealing with' employers, and
- (3) these dealings concern 'conditions of work,' grievances, labor disputes, wages, rates of pay, or hours of employment."<sup>6</sup>

The first and third conditions — employee participation concerning hours of employment and conditions of work — are met by any workplace flexibility team. Employees participate in these teams along with management. The teams exist, at least in part, for the purpose of scheduling work hours, considering job redesign, job-sharing, or telecommuting — i.e., the hours and conditions of work.

Thus, the critical question for any of these teams is whether the team meets the second condition — is it "dealing with" the employer?

As set out in greater detail below, the NLRB and the courts have consistently interpreted the meaning of "dealing with" along two broad lines. First, teams that share information or stand in the shoes of management by exercising actual managerial control are not "dealing with" employers. Second, teams that engage in back-and-forth discussions and generate proposals for consideration by management are "dealing with" employers.

#### 1. SHARED MANAGEMENT TEAMS ARE NOT "DEALING WITH" THE EMPLOYER.

In a line of cases dating back to the mid 1970s, the NLRB and the courts have consistently identified a limited number of scenarios that do not involve employee organizations "dealing with" an employer, including

- "brainstorming" groups formed to develop ideas but not make concrete proposals to management;
- "information sharing" groups formed to provide information but not make any proposals to management;
- "suggestion box" procedures for allowing individual employees to make proposals to management; and
- shared management teams created by the employer to exercise managerial authority with power "to decide matters for [themselves], rather than simply make proposals to management."<sup>7</sup>

Of these, only the last structure — shared management teams — is relevant to modern workplace flexibility teams. These teams go beyond brainstorming, information sharing, individual employee suggestions, or con-

sideration of pure production issues. Workplace flexibility teams engage in discussions and decisions regarding works hours and other conditions of employment (e.g., possible job redesign with reallocation of responsibilities or working from home). Determining whether these teams constitute "labor organizations" under the Act therefore turns on whether they exercise managerial authority. Two NLRB decisions – *General Foods Corp.*, 231 NLRB 1232 (1977) and *Crown Cork & Seal, Inc.*, 334 NLRB 699 (2001) – set out the guiding principles for making this determination.

In *General Foods*, the employer divided its employees into four work teams. "In theory if not always in practice, each team, acting by a consensus of its members, makes job assignments to individual team members, assigns job rotations, and schedules overtime among team members."<sup>8</sup> The employer also created committees to perform certain job functions, including interviewing job applicants and performing plant safety inspections. These committees consisted of members from each of the employer's four work teams. Employees acting within the various teams or committees set their own starting and quitting times within limits set by the employer. Based on these facts, the NLRB concluded that "[t]hese are managerial functions being flatly delegated to employees and do not involve any dealing with the employer on a group basis within the meaning of Section 2(5), however expansively that term is applied."<sup>9</sup> Because the teams and committees were not "dealing with" the employer, they were not labor organizations under the NLRA. Because these teams were not labor organizations within the meaning of section 2(5), it was perfectly legitimate for the employer to be active in creating these teams and participating in them.

The employer in *Crown Cork* also created work production teams and smaller committees. Every plant employee participated in one of the work production teams along with at least one member of management. Reaching decision by consensus, with members abstaining if unable to agree with the consensus view, Crown Cork's work production teams were found to "'decide and do' on a wide variety of workplace issues, 'including production, quality, training, attendance, safety, maintenance, and discipline short of suspension or discharge.'"<sup>10</sup> Crown Cork's committees, which were comprised of two employees from each work production team and some members of management, made recommendations on plant policy, safety, and worker skill issues. A management team and the plant manager reviewed committee recommendations but rarely, if ever, overruled the committees.<sup>11</sup>

On these facts, the NLRB found that "[a]s in *General Foods*, management has delegated to the committees ... the authority to operate the plant within certain parameters."<sup>12</sup> Because the teams actually performed the functions that a manager would perform at that same level, they acted *as* management. It was also not a problem that upper management reviewed the decisions of the team. As the Board explained, subjecting the recommendations of these managerial teams to upper management review was the "familiar process of a managerial recommendation making its way up the chain of command" and not unlawful "dealing with" the employer.<sup>13</sup>

Under the NLRB's guidance in *General Foods* and *Crown Cork*, the NLRA permits workplace flexibility teams characterized by the following factors:

- lack of management veto power: where teams consist of management and non-management employees, the teams do not use a decision making process that effectively permits a management

veto of team decisions (e.g., a permissible team might use majority rule with management members constituting a minority of the members); *and*

- real decision making power: teams exercise the same level and type of supervisory authority and responsibility that a supervisor would have at that same level within the company hierarchy; *and*
- appropriately limited oversight: the employer treats decisions of the team in the same way that it would treat decisions of a supervisor at that same level within the company hierarchy.

Workplace flexibility teams with these characteristics are not "dealing with" employers but are acting as part of the management structure. As management bodies and not "labor organizations" under the NLRA, these teams exercise managerial authority but may be subject to appropriate oversight by upper management. An employer who is willing to operate its teams within these limits may create and otherwise participate actively in such workplace flexibility teams under the NLRA.

## 2. WORKPLACE TEAMS THAT LACK MANAGERIAL AUTHORITY AND ENGAGE IN A BILATERAL PROCESS WITH MANAGEMENT ARE "DEALING WITH" THE EMPLOYER.

In contrast to the above cases, and starting with the Supreme Court's decision in 1959 in *Cabot Carbon v. NLRB*,<sup>14</sup> the NLRB and the courts consistently have found that teams that engage in back-and-forth discussions with management, and generate proposals for consideration by management, "deal with" employers under the NLRA. Unlike teams that exercise actual managerial authority and stand in the shoes of a manager, these teams constitute "labor organizations" by virtue of their "dealing with" employers over certain issues, including hours or conditions of work.

In *Cabot Carbon*, the Supreme Court held that committees created by the employer to allow employees to discuss "ideas and problems of mutual interest" with management were labor organizations.<sup>15</sup> Among other things, the Cabot Carbon committees made proposals regarding overtime, scheduling, and sick leave.<sup>16</sup> Management was free to accept or reject these proposals.<sup>17</sup> The Supreme Court rejected an interpretation of "dealing with" as requiring collective bargaining with an employer, finding that the committees' proposals and management consideration of those proposals "establish that the Committees were 'dealing with' [the employers] ... within the meaning of § 2(5)."<sup>18</sup> The Supreme Court noted that Congress clearly intended labor organizations to be broader than an official or established collective bargaining agent.

Building on the Supreme Court's approach in *Cabot Carbon*, the NLRB has concluded that teams or committees are "dealing" with employers whenever the teams lack actual or final decision making power. In *Electromation*, for example, the employer established workplace committees to respond to low employee morale and concerns regarding newly implemented workplace policies. These committees included management and non-management employees who discussed and voted on proposals but could not decide on or implement those policy ideas without upper management approval.<sup>19</sup> Within the teams themselves, the management members set meeting agendas, had power to reject team decisions, and ultimately decided what, if any, team proposals were presented for consideration by upper management. The Board observed that this back-and-forth between employees and management within and outside of the teams "in order to reach bilateral solutions on the basis

of employee-initiated proposals ... is the essence of 'dealing with' within the meaning of Section 2(5)."<sup>20</sup>

Shortly after *Electromation*, in *E. I. Du Pont de Nemours & Co.*, the Board summarized its own decisions on impermissible "dealing with," focusing on the fact that while "bargaining" connotes a process for compromise, "dealing" does not.<sup>21</sup> "Dealing" requires only a "bilateral mechanism between two parties" through which employees make proposals and management responds, but "compromise is not required."<sup>22</sup>

Two years following *E.I. Du Pont*, the Board again concluded that a committee was dealing with an employer. In this case, *Keeler Brass Co.*, the committee consisted only of employees and appeared to exercise decision making authority within the committee. But the committee's lack of final decision making authority, combined with management oversight of committee decisions, led the Board to conclude that the committee was "dealing with" management. The committee at issue, a grievance committee, had ruled in an employee's favor on a grievance and had recommended rehire of an employee. The company disagreed and had sent the recommendation for rehire back to the committee for reconsideration in light of past practice within the company. The committee heard additional testimony on the past-practice issue and, based on that testimony, reversed itself and denied the grievance. On these facts, the Board found that statutory "dealing" was present because the committee and the company "went back and forth explaining themselves until an acceptable result was achieved."<sup>23</sup>

Under the guidance from the NLRB provided through these cases, the NLRA could impede workplace flexibility teams that lack decision making power and, instead, work with employers to develop or increase flexible work arrangements through back-and-forth discussion and recommendations or proposals. Because these teams "deal with" the employer on work hours and other conditions of work (including, for example, job redesign, job shares, or telecommuting) they are "labor organizations" under the Act. The question then becomes whether these workplace flexibility teams are *employer-dominated* within the meaning of Section 8(a)(2). That latter question must be answered in the affirmative for an unfair labor practice to occur.

#### **A. Has the Employer Dominated or Interfered with the Workplace Team or Otherwise Contributed Support Under Section 8(a)(2)?**

In considering unlawful domination, the NLRB and the courts generally follow the criteria set out in the Supreme Court's 1939 decision in *Newport News*.<sup>24</sup> In that case, the Court concluded that a team that is initiated and structured by the employer is employer-dominated regardless of the employees' satisfaction with the team or the employer's intent in creating it.<sup>25</sup>

In *Newport News*, the employer had created committees to allow employees to voice concerns over work conditions and to provide a procedure for adjustment of employer-employee disputes.<sup>26</sup> The vast majority of employees expressed satisfaction with and supported continuation of the committees.<sup>27</sup> Finding the success of the committees and the employer's motives "immaterial," the Court concluded that the employer had violated Section 8(a)(2) because it created and maintained control over the structure of the committees.<sup>28</sup>

The NLRB has followed the Supreme Court's lead in *Newport News*, often concluding that "a labor organization

that is the creation of management, whose structure and function are essentially determined by management, and whose continued existence depends on the whim of management, is one whose formation or administration has been dominated under Section 8(a)(2)."<sup>29</sup> Under this approach, teams that lack structural independence from the employer likely will be found to be employer dominated or supported within the meaning of Section 8(a)(2).

Many workplace flexibility teams may well lack structural independence from the employer.<sup>30</sup> If the employer – not the employees – creates and introduces the basic team structure, provides general limits on the relative number of management and non-management participants in the team, sets out the team responsibilities, and retains the right to continue or abolish a team as necessary or appropriate, such a team will not be structurally independent from the employer.<sup>31</sup>

Thus, as a practical matter today, the lawfulness of workplace flexibility teams under current law turns on whether the team is a "labor organization." If the answer is yes (i.e., the workplace team falls short of shared managerial control and, instead, "deals with" the employer), the employer will be subject to an unfair labor practice charge. This is true even if employee participation is voluntary and the overwhelming majority of employees want such teams.

## II. Proposals for Reform

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How and whether federal labor law strikes the appropriate balance in protecting employee choice and reducing the inequality of bargaining power while allowing and encouraging employer-employee collaboration has generated vigorous discussion and debate. Critics of the balance struck by existing law generally have rallied around the NLRB's *Electromotion* decision, arguing that the case marked a turning point from earlier NLRB decisions, which evidenced a more flexible approach to employer-employee teams, and that reform is necessary to save the vast majority of modern employee-involvement programs.<sup>32</sup> Supporters of existing law have responded that "the so-called *Electromotion* problem ... is [a] myth. It is indeed possible to have effective [employee involvement] programs ... without the necessity of any changes in current law."<sup>33</sup>

In deciding *Electromotion*, the NLRB made clear that it was deciding only whether the particular employer-initiated committees at issue in that case violated the NLRA and leaving broader issues regarding limits on modern workplace teams alone. However, three of the four-member NLRB panel wrote separate concurrences, with Members Devaney and Oviatt writing to stress the broad range of employee teams currently permitted under the Act.<sup>34</sup> Member Raudabaugh concluded otherwise, writing that most workplace teams currently violate the Act and that "Section 2(5) will have to be changed legislatively unless Section 8(a)(2) can be reinterpreted so as to accommodate such programs."<sup>35</sup>

On appeal of the NLRB's *Electromotion* decision, several *amici* urged the Court of Appeals to consider the broader application of the Act to modern workplace teams. As had the NLRB, the Seventh Circuit declined this invitation, making clear that it was addressing only the particular committees at issue in the case.<sup>36</sup> In so doing, the court noted the policy arguments for reconsideration of the NLRA:

There are some serious policy arguments that suggest that today's evolving industrial environment may require reconsideration of Section 8(a)(2) of the Act, or at least its interpretation and application to certain modern employee organizations. However, this case fails to provide the proper forum for such re-analysis and re-interpretation. In any event, any substantial changes should more properly be considered by Congress.<sup>37</sup>

These two primary avenues for reforming existing law — additional NLRB guidance or legislative amendment — have been advanced by commentators, agency officials, and lawmakers.

### A. Additional NLRB Guidance and Flexibility in Interpreting the NLRA

Those arguing that the appropriate avenue for any reform of existing law is through NLRB guidance and case law generally take the position that major reform is not necessary and that the goal of encouraging and supporting modern workplace teams can be achieved under the Act as currently written.<sup>38</sup> They find the primary advantages of this route to include: the NLRB's experience and expertise in labor law; its familiarity with how workplace teams operate and the appropriate balance of labor-management rights and interests; and the ability for the agency to make change through case-by-case adjudication, which allows for considered and appropriate resolution based on concrete facts.<sup>39</sup> As even supporters of this route acknowledge, however, "building law by declaring what is not legal rather than comprehensively outlining what is lawful ... can produce rather ad hoc changes, and this method of proceeding can be frustrating to companies looking for guidance about the permissible parameters of experimentation."<sup>40</sup> And despite calls for the agency to do so,<sup>41</sup> the NLRB has not issued affirmative guidance on workplace teams. Moreover, commentators acknowledge that, as a politically appointed body, the NLRB may weigh management or labor interests differently under different administrations with a resulting risk of inconsistency and uncertainty.<sup>42</sup>

For those advocating reform through NLRB guidance, their specific substantive avenues for change focus on the Board's authority to: (1) place greater weight on whether an organization actual represents employees in the Section 2(5) labor organization analysis; or (2) relax the strict limits on employer involvement in workplace teams under Section 8(a)(2).

#### 1. NLRB REINTERPRETATION OF SECTION 2(5)

Member Devaney, concurring in *Electromation*, made the argument that actual representation or advocacy must be found before an organization can be considered a "labor organization" within the meaning of Section 2(5).<sup>43</sup> Reviewing the legislative history and focusing on descriptions of "employee representation plans" — a "term of art" used to describe organizations initiated by employers to act as the exclusive, in-house employee representative — Member Devaney concluded that Congress sought to outlaw representation plans but to allow other types of employer-employee structures:

My reading of the legislative history fully supports the judge's conclusion in *General Foods* that a "labor organization" purports to be, first and foremost, an agent or advocate for employees, and should be a loyal and exclusive agent. Where an employee committee does not act as the agent or

advocate of other employees, an employer's dealings with the committee will not cause the harm Section 8(a)(2) is intended to correct: the usurpation by the employer of the employees' right to choose their own bargaining representative and the concomitant frustration of their fundamental freedom of choice and action guaranteed by Section 7. In determining whether an employee organization functioned as a representative of employees, I would look to the organization's authority: have the employees, the employer, or both empowered this group to speak for other employees?<sup>44</sup>

In a memorandum written after this decision, the General Counsel of the NLRB noted that whether employee representation is an essential element for finding a Section 2(5) "labor organization" remains an open question.<sup>45</sup> Others have argued that the plain language of the statute – defining "labor organization" to "mean any organization of any kind, or ... employee representation committee or plan" – as well as legislative history and case precedent foreclose this interpretation of Section 2(5).<sup>46</sup>

## 2. NLRB REINTERPRETATION OF SECTION 8(A)(2)

Various NLRB members have argued for relaxation of the Section 8(a)(2) limits on employer involvement with workplace teams. In his *Electromation* concurrence, Member Raudabaugh argued that the NLRB had authority to reinterpret Section 8(a)(2) and suggested a four-factor analysis that would not rely as heavily on the formal structure of the team but would assess whether employee rights actually were infringed.<sup>47</sup> Former NLRB Chairman Gould, in his *Keeler Brass* concurrence, similarly argued against undue reliance on employer initiation of or involvement in a team as a *per se* indicator of unlawful domination and urged that the "focus should, instead, be on whether the organization allows for employee action and choice."<sup>48</sup> Chairman Gould recommended assessment of whether employees ultimately controlled the structure and function of teams, whether employee participation was voluntary, and whether the employer had created the team in response to employee organizing efforts.<sup>49</sup>

In setting out this approach, Chairman Gould noted that because prior cases dealt with the extremes of employer involvement,<sup>50</sup> the additional guidelines provided in his concurrence were necessary to clarify permissible employer involvement for the majority of workplace teams. In later comments, Chairman Gould acknowledged that "a majority of the Board has not yet subscribed to the views that I have expressed on employer initiatives," and cited this as a reason that he would support a "clarifying amendment" of the NLRA to simplify the requirements of existing law and allow employer initiatives that met his test for safeguarding employee rights.<sup>51</sup>

### B. Efforts to Amend the NLRA

Congress has made two serious efforts to amend the NLRA. An amendment proposed as part of the 1947 Taft-Hartley Act passed the House but was removed during conference with the Senate.<sup>52</sup> The TEAM Act passed both houses of Congress in 1996 before being vetoed by President Clinton.<sup>53</sup> The aim of these amendments is strikingly similar, as shown and discussed below, with both allowing employers to discuss "matters of mutual interest" with their employees.

#### 1. THE 1947 PROPOSAL TO AMEND SECTION 8'S UNFAIR LABOR PRACTICES

The Wagner Act was first amended in 1947 by the Labor-Management Relations Act, commonly known as the Taft-Hartley Act, which attempted to prevent "industrial strife" by further defining the rights of employees and employers.<sup>54</sup> The House version of the bill proposed a new section 8(d)(3),<sup>55</sup> which would have amended Section 8's unfair labor practices with the following proviso:

(d) Notwithstanding any other provision of this section, the following shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act:

\* \* \*

(3) Forming or maintaining by an employer of a committee of employees and discussing with it matters of mutual interest, including grievances, wages, hours of employment, and other working conditions, if the Board has not certified or the employer has not recognized a representative as their representative under section 9.

This amendment would have permitted employers in non-union workplaces to set up employee committees to discuss matters typically reserved for collective bargaining.<sup>56</sup>

The Senate version of the bill contained no corresponding provision and Section 8(d)(3) was eliminated in conference.<sup>57</sup> The two reasons given for the elimination were that the NLRA "by its terms" already permitted employees and employers to meet and the fact that a Senate amendment to Section 9(a) (which was accepted in conference) explicitly permitted employers to hear and address employee grievances within a certain framework.<sup>58</sup> The Supreme Court interpreted Congress' rejection of Section 8(d)(3) as evidence of its intent to allow certain grievance adjustments but to maintain existing prohibitions on dealings with employer-dominated labor organizations.<sup>59</sup>

#### 2. TEAMWORK FOR EMPLOYEES AND MANAGERS (TEAM) ACT

The intervening years brought several cases analyzing the text of Section 8(a)(2) and Section 2(5), but the 1992 NLRB decision in *Electromation* was the first that spurred another proposed amendment to the NLRA's treatment of employee teams.<sup>60</sup> The stated purpose of the Teamwork for Employees and Managers (TEAM) Act, first proposed in 1993 and then re-introduced in 1995 and 1997, was to foster cooperative labor-management

relations and clarify the legality of employee involvement groups.<sup>61</sup> The legislation was a direct response to the *Electromation* decision.<sup>62</sup>

The bill sought to amend Section 8(a)(2) by adding the following proviso (change shown by italics):<sup>63</sup>

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer —

\* \* \*

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it; ... *Provided further, That it shall not constitute or be evidence of an unfair labor practice under this paragraph for an employer to establish, assist, maintain, or participate in any organization or entity of any kind, in which employees who participate to at least the same extent practicable as representatives of management participate, to address matters of mutual interest, including, but not limited to, issues of quality, productivity, efficiency, safety and health, and which does not have, claim, or seek authority to be the exclusive bargaining representative of the employees or to negotiate or enter into collective bargaining agreements with the employer or to amend existing collective bargaining agreements between the employer and any labor organization, except that in a case in which a labor organization is the representative of such employees as provided in section 9(a), this proviso shall not apply.*

Support or opposition to the Act has generally fallen along party lines.<sup>64</sup>

Republican supporters of the Act have been joined by the National Chamber of Commerce, the TEAM Coalition (a group of employers who supported the Act), and the heads of several large companies, including IBM, Kodak, and Motorola. Democrats, who generally oppose the Act, have been supported by the AFL-CIO and a number of labor law scholars.<sup>65</sup>

a. Arguments for the TEAM Act

Supporters of the TEAM Act generally argue: (1) the basic premise of the NLRA — that the relationship between employers and employees is necessarily adversarial — is outdated and that the law should be amended to reflect the shift to greater collaboration between employers and employees; (2) modern workplace teams benefit employees and employers but the majority of these teams are unlawful under existing law; and (3) the proposed amendment would not result in the return of company or sham unions. Specific arguments of the primary proponents include:

- Sen. Nancy Kassebaum (R-KS), sponsor of the TEAM Act: The needs of the global economy require companies to develop a cooperative atmosphere in the workplace. The NLRB's interpretation of the NLRA prevents companies from utilizing at least one method of cooperation — workplace teams. The

TEAM Act removes the barriers in federal law that prevent workers and employers from meeting in committees to discuss workplace issues.<sup>66</sup>

- Rep. Steve Gunderson (R-WI), sponsor of the TEAM Act: Section 8(a)(2) makes employee involvement in nonunion settings illegal. Yet employers and employees would prefer to communicate with each other through cooperation rather than through unions. The TEAM Act's goals are only to remove the restrictions on this cooperation, which is in the best interests of companies, workers, and the country's global competitive ability.<sup>67</sup>
- House and Senate Committee Reports: The TEAM Act would not reinstate company unions, but it would allow companies to adapt to a global information economy that was significantly different from the manufacturing-heavy environment present when the NLRA was passed. To ensure against the reinstatement of company unions while still utilizing workplace teams, the bill guarantees that employees remain free to choose collective bargaining representatives if they wish, and employers would still violate the Act if they attempted to use teams as an end-run around the employees' chosen representative. Additionally, the organizations do not have the authority to enter into collective bargaining agreements on behalf of the employees, guaranteeing that they will not become company-dominated unions.<sup>68</sup>
- U.S. Chamber of Commerce/TEAM Coalition/Business Interests: Employees benefit from employee involvement plans because they have real decision-making authority through these teams. Management has an interest in limiting its exercise of authority over these teams when, in return, the workforce is more productive and satisfied.<sup>69</sup> These groups also echo the arguments from other supporters of the Act, stating that the TEAM Act is necessary to clarify the law.<sup>70</sup>

### b. Arguments Against the TEAM Act

Opponents of the Act generally argue: (1) the TEAM Act is unnecessary because a wide range of employer-employee teams are currently allowed under the NLRA; (2) *Electromotion* only reaffirms that employer-created and employer-controlled teams are illegal, which strikes the right balance between promoting cooperation and preventing domination of employees; and (3) the Team Act would inappropriately allow companies to establish company-dominated unions. The arguments of specific opponents include:

- Robert Reich, Secretary of Labor: Under the NLRA, many employee-employer groups which discuss issues of quality, productivity, and efficiency are legal; thus, there is no need for the TEAM Act. Two changes will result from the passage of the Act: 1) employers would be permitted to form company unions, and 2) employers in unionized workplaces would be able to establish an alternative, company-dominated organization.<sup>71</sup>
- NLRB Chairman William B. Gould: While Chairman Gould generally agreed that "there are pitfalls and ambiguities in Section 8(a)(2) which make its amendment desirable ... . [t]he Republican Party's answer to this problem — the so-called "TEAM Act" — however, is classic overkill of a kind which could promote the discredited company unions which the National Labor Relations Act was designed to repress."<sup>72</sup> Chairman Gould endorsed, instead, a more limited amendment of the NLRA to allow employer-assisted committees to meet and discuss any subject "so long as employee autonomy is

protected and respected" and noted, with approval, Representative Sawyer's amendment in the nature of a substitute for the TEAM Act for taking this approach.<sup>73</sup> (The Sawyer amendment failed on a party-line vote of 204-221.)

- House Committee Minority Report: The *Electromotion* decision does not eliminate employer-employee cooperation programs. It only reaffirms the invalidation of employer-created and employer-controlled programs. These programs are exactly the kinds of groups the NLRA should prohibit because they create a semblance of joint decision-making without actually giving employees any power over final decisions. The NLRA's current provisions require some authority to be delegated to employees in these groups; the TEAM Act's changes would eliminate this requirement and would allow employers to keep significant power over employees under the guise of including them in the process.<sup>74</sup>
- AFL-CIO/Unions: The NLRA already permits employers to "transfer decision-making power to the workers" and to "involv[e] employees intellectually in the business"; *Electromotion* does not change the ability of employees to form legitimate employee involvement plans to achieve these goals. The only reason to pass the TEAM Act would be to create "puppet" governments which would rubber-stamp management policies.<sup>75</sup>

#### c. Proposed Amendments to the TEAM Act

During both House and Senate consideration of the Team Act, Democratic Members offered substitute amendments to the NLRA in lieu of the TEAM Act proposal. For the most part, these Democratic amendments to the NLRA explicitly sanctioned teams that were already lawful under existing law — for example, brainstorming or information sharing groups and productivity teams. These substitute amendments, however, also clarified that certain work teams, in which both employees and supervisors participated, were permitted. Finally, these substitute amendments added some additional protections for employee rights.

The House alternative was offered by Representative Thomas Sawyer (D-OH) and the Senate alternative was offered by Senator Byron Dorgan (D-ND). There were some slight differences between the Sawyer and Dorgan substitutes in describing the permissible teams (see below). Both amendments, however, were defeated. The Sawyer Amendment failed by a vote of 204-221.<sup>76</sup> The Dorgan Amendment failed by a vote of 36 to 63.<sup>77</sup>

- Sawyer Amendment: Representative Sawyer's amendment would have amended Section 8(a)(2) to provide that it is not an unfair labor practice for an employer "to establish, assist, maintain, or participate" in three types of teams, described as follows:
  - "(i) a method of work organization based upon employee-managed work units, notwithstanding the fact that such work units may hold periodic meetings in which all employees assigned to the unit discuss and, subject to agreement with the exclusive bargaining representative, if any, decide upon conditions of work within the work unit;
  - (ii) a method of work organization based upon supervisor-managed work units, notwithstanding the fact that such work units may hold periodic meetings of all employees and supervisors assigned to the unit to discuss the unit's work responsibilities and in the course of such meetings on occasion discuss conditions of work within the work unit; or

(iii) committees created to recommend or to decide upon means of improving the design, quality, or method of producing, distributing, or selling the employer's product of service, notwithstanding the fact that such committees on isolated occasions, in considering design quality, or production issues, may discuss directly related issues concerning conditions of work."

The Sawyer amendment further provided that the proviso (i.e., allowing these three types of teams as an exception to Section 8(a)(2)) would not apply where an employer infringed on employee rights by, for example, interfering with or coercing an employee because of his or her participation or non-participation in a team.<sup>78</sup>

NLRB Chairman William B. Gould IV noted the Sawyer amendment with approval, characterizing it as a "constructive approach" that "was designed to encourage productivity and quality teams without opening the door to sham unions."<sup>79</sup>

- Dorgan Amendment: Senator Dorgan's amendment also permitted certain employer-employee meetings and teams. Instead of amending Section 8(a)(2) to allow specific teams, however, Senator Dorgan added a new subsection to Section 8 providing that it would "not constitute or be evidence of an unfair labor practice" for an employer to:
  - "(A)... meet with the employees as a group, or to meet with each of the employees individually, to share information, to brainstorm, or receive suggestions or opinions from individual employees, with respect to matters of mutual interest, including matters relating to working conditions.
  - (B) ... assign employees to work units and to hold regular meetings of the employees assigned to a work unit to discuss matters relating to the work responsibilities of the unit. The meetings, may, on occasion, include discussions with respect to the conditions of work of the employees assigned to the unit.
  - (C) ... establish a committee composed of employees of the employer to make recommendations or determinations on ways of improving the quality of, or method of producing and distributing, the employer's product or service and to hold regular meetings of the committee to discuss matters relating to the committee. The meetings may, on occasion, include discussions with respect to any directly related issues concerning conditions of work of the employees."

The Dorgan amendment contained the same protection for employees as the Sawyer amendment, prohibiting resort to the proviso where the employer infringed on employee rights under the NLRA.<sup>80</sup>

#### d. President Clinton's Veto

The TEAM Act was first introduced in the House and the Senate in 1993, after the NLRB's *Electromation* decision, but it was referred to the respective committees without any other action taken.<sup>81</sup> Reintroduced in 1995, it passed both the House and Senate by slim majorities (221-202 and 53-46, respectively) along mainly party-line votes.<sup>82</sup> President Clinton vetoed it in July 1996, and it was sent back to Congress,<sup>83</sup> with the following message explaining his reasons for rejecting this change to existing law:

- Current law provides for a wide variety of cooperative workplace efforts, particularly efforts that delegate a significant amount of managerial responsibility to the team.
- The Act would undermine collective bargaining by allowing companies to establish company-dominated unions where no union currently exists.
- To the extent that the NLRA has fostered uncertainty as to the status of employee involvement plans, the proper avenue for addressing the issue is guidance from the NLRB instead of legislation.<sup>84</sup>

### Conclusion

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While the TEAM Act was reintroduced the following year, it failed to gain significant momentum and has not been reintroduced since.<sup>85</sup> Meanwhile, the NLRB's subsequent decision in *Crown Cork & Seal*<sup>86</sup> has been heralded by some as "an important step forward in the evolution of the Board's approach regarding employee-participation committees"<sup>87</sup> and characterized by others as doing "little to alter the existing landscape in this area of NLRB law."<sup>88</sup> Though disagreeing on whether *Crown Cork* reforms existing law, both sides agree that workplace teams that fall within its guidelines — shared management teams, as discussed above — are permitted.<sup>89</sup> Of course, to the degree that dissatisfaction remains with these limits or any uncertainty in their application to particular teams, calls for reform through more affirmative NLRB guidance or legislation undoubtedly will recur.<sup>90</sup>

### (Endnotes)

<sup>1</sup> For further description of the "team approach" to workplace flexibility, see Workplace Flexibility 2010's memo: "Flexible Work Arrangements: The Overview Memo." <http://www.law.georgetown.edu/workplaceflexibility2010/definition/policy.cfm>

<sup>2</sup> See National Labor Relations Act, 29 U.S.C. § 151 (2006) (stating that the policy of the United States is to "encourag[e] the practice and procedure of collective bargaining and ... protect[] the exercise by workers of ... self-organization"); 79 Cong. Rec. 2368 (1935) (statement of Sen. Robert F. Wagner), *reprinted in* 1 LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 1311 (1949) [hereinafter 1 LEG. HISTORY 1935]; *Hearings on S.2926: Hearings before Senate Committee on Education and Labor*, 73d Cong. (1949) (statement of Edwin E. Witte, Prof. of Economics, Univ. of Wisconsin), *reprinted in* 1 LEG. HISTORY 1935, at 270-71 ("the essential provisions of the bill are just three: Recognition of collective bargaining, and the corresponding duty of the employers to try to arrive at agreements; second, the employers are not to interfere with labor in self-organization; and, finally, it sets up machinery for the interpretation and enforcement of these provisions").

<sup>3</sup> A number of companies created unions in the wake of the National Industrial Recovery Act, passed by Congress in 1933 to promote the formation of trade and industrial associations and encourage coordinated action between labor and management. See National Industrial Recovery Act, H.R. 5755, 73rd Cong., 48 Stat. 195 (1933). While the NIRA successfully resulted in the creation of unions and trade organizations, many were dominated or controlled by employers and interfered with employee independence. See, e.g., David W. Orlandini, *Employee Participation Programs: How to Make Them Work Today and in The Twenty-First Century*, 24 CAP. U. L. REV. 597 (1995); *Hearings Before the Committee on Education and Labor of the United States Senate*, 74th Cong. (1949) (statement of Sen. Robert F. Wagner), *reprinted in* 1 LEG. HISTORY 1935, at 1415-17.

<sup>4</sup> *Hearings Before the Committee on Education and Labor of the United States Senate*, 74th Cong. (1949) (statement of Sen. Robert F. Wagner), *reprinted in* 1 LEG. HISTORY 1935, at 1416.

<sup>5</sup> See, e.g., *Electromation, Inc. v. N.L.R.B.*, 35 F.3d 1148, 1157-58 (7th Cir. 1994) (setting out two-part analysis and affirming NLRB finding that action committees were employer-dominated labor organizations).

<sup>6</sup> *E.I. Du Pont de Nemours & Co.*, 311 N.L.R.B. 893, 894 (1993); see also *Electromation, Inc.*, 309 N.L.R.B. 990, 994 (1992), *enforced*, 35 F.3d 1148 (7th Cir. 1994).

<sup>7</sup> *E.I. Du Pont de Nemours & Co.*, 311 N.L.R.B. 893, 895 (1993); see also *Electromation, Inc.*, 309 N.L.R.B. 990, 995 (1992) (a team "whose purpose is limited to performing essentially a managerial or adjudicative function is not a labor organization under Section 2(5)"); *General Foods Corp.*, 231 N.L.R.B. 1232 (1977); *Mercy-Memorial Hospital Corp.*, 231 N.L.R.B. 1108 (1977) (a grievance committee with authority to resolve employee grievances is not a labor organization despite isolated instances where the committee made broader policy recommendations to management); *John Ascuaga's Nuggett*, 230 N.L.R.B. 275, 276 (1977) (a grievance committee with authority to resolve grievances "perform[s] functions for management" and is not a labor organization); *Crown Cork & Seal Co.*, 334 N.L.R.B. 699 (2001).

<sup>8</sup> *General Foods Corp.*, 231 N.L.R.B. at 1233.

<sup>9</sup> *Id.* at 1235.

<sup>10</sup> *Crown Cork & Seal Co.*, 334 N.L.R.B. at 699.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 701 (formatting added).

<sup>13</sup> *Id.*

<sup>14</sup> 360 U.S. 203 (1959).

<sup>15</sup> *Id.* at 205.

<sup>16</sup> *Id.* at 207.

<sup>17</sup> *Id.* at 208.

<sup>18</sup> *Id.* at 214.

<sup>19</sup> *Electromation, Inc.*, 309 N.L.R.B. at 997.

<sup>20</sup> *Id.*, *enforced*, 35 F.3d 1148, 1157-58 (1994). On appeal, the Seventh Circuit enforced the NLRB's decision, agreeing that the committees at issue in the case were employer-dominated labor organizations.

<sup>21</sup> *E.I. Du Pont de Nemours & Co.*, 311 N.L.R.B. at 894 (finding that six safety committees and one fitness committee were employer-dominated labor organizations).

<sup>22</sup> *Id.* The NLRB also distinguished isolated instances where a team might make proposals to management as lacking a necessary "pattern or practice" of bilateral conduct that marks "dealing with" an employer. *Id.*

- <sup>23</sup> Keeler Brass Co., 317 N.L.R.B. 1110, 1114 (1995).
- <sup>24</sup> See N.L.R.B. v. Newport News Shipping and Dry Dock Co., 308 U.S. 241 (1939).
- <sup>25</sup> See *id.*; see also Electromation, Inc., 309 N.L.R.B. at 998.
- <sup>26</sup> Newport News, 308 U.S. at 244.
- <sup>27</sup> *Id.* at 251.
- <sup>28</sup> *Id.* at 249 (finding employer domination where the committee plan could not be amended without company approval).
- <sup>29</sup> Keeler Brass Co., 317 N.L.R.B. at 1114 (citing Electromation, Inc., 35 F.3d at 1169-70, *enforcing* 309 N.L.R.B. 990); see also E.I. Du Pont de Nemours & Co., 311 N.L.R.B. at 896 (domination found where the company retained veto power over the actions of the committee, controlled how many employees served on each committee, selected the employee representatives, and could change or abolish the committee).
- <sup>30</sup> In cases where a workplace team is structurally independent from the employer, an employer's cooperation or assistance with the team will not constitute unlawful support or domination under 8(a)(2) unless, from the employees' perspective, the employer exerts actual control over the workplace team. See *Chicago Rawhide Mfg. Co. v. N.L.R.B.*, 221 F.2d 165 (7th Cir. 1955). The court in *Chicago Rawhide* stressed that the idea for the team in that case came from the employees, not the employer, and based on that and on the team's structural independence from the employer, the team was held not to be dominated or supported by the employer.
- <sup>31</sup> JOHN THOMAS DUNLOP, FACT FINDING REPORT: COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS 51-52 (1994) (finding that many such teams have these characteristics).
- <sup>32</sup> Gerald L. Pauling & M. Andrew McGuire, *The Implications of Crown Cork & Seal Co. for Employee Involvement Committees as Labor Organizations Under the NLRA: What Constitutes "Dealing With" Pursuant to Section 2(5) of the Act Since Electromation, Inc?*, 18 LAB. LAW. 215, 219-220 (2002).
- <sup>33</sup> 141 Cong. Rec. H9530 (daily ed. Sept. 27, 1995) (quoting a letter from NLRB Chairman Edward Miller).
- <sup>34</sup> Member Devaney concluded that legislative history and precedent "provide significant latitude to employers seeking to involve employees in the workplace" and that the specific form of employer conduct prohibited by Sections 8(a)(2) and 2(5) is the creation of "employee representation plans" – employer-initiated employee groups that meet with management on behalf of all employees and discuss the subjects included in Section 2(5). Electromation, 309 NLRB at 999-1000. Member Oviatt wrote separately "to stress the wide range of lawful activities which [he] view[s] as untouched by this decision," primarily employer-employee teams that meet to discuss production methods and product quality ("quality circles"). *Id.* at 1004-05.
- <sup>35</sup> Member Raudabaugh concluded that employer willingness to delegate managerial authority was "atypical" and that, as a result, most modern employee participation plans dealt with employers on the issues enumerated in Section 2(5) ("conditions of work" or "hours of employment"). Because most teams are not structurally independent from the employer, most are also employer dominated or supported within the meaning of Section 8(a)(2). *Id.* at 1008-09. But Member Raudabaugh argued that the NLRB had the authority and latitude to reinterpret section 8(a)(2) to save most workplace teams and suggested a four-factor analysis that would weigh employer perception and independent choice along with employer involvement and motives in establishing the team. *Id.* at 1013.
- <sup>36</sup> The Seventh Circuit enforced the NLRB's decision, agreeing that the committees at issue in the case were employer-dominated labor organizations. Electromation, 35 F.3d at 1157-58.
- <sup>37</sup> *Id.* at 1157 (citing the introduction of the TEAM Act).
- <sup>38</sup> See, e.g., A.B. Cochran, *We Participate, They Decide: The Real Stakes in Revising Section 8(a)(2) of the National Labor Relations Act*, 16 BERKELEY J. EMP. & LAB. L. 458 (1995); Orlandini, *supra* note 2.
- <sup>39</sup> Cochran, *supra* note 38, at 512.
- <sup>40</sup> *Id.*
- <sup>41</sup> In his veto message to Congress, President Clinton urged that "to the extent that recent National Labor Relations Board (NLRB) decisions have created uncertainty as to the scope of permissible cooperation, the NLRB, in the exercise of its independent authority, should provide guidance to clarify the broad legal boundaries of the labor-management teamwork." Statement of Pres. William J. Clinton, 142 Cong. Rec. H8816 (daily ed. July 30, 1996).

- <sup>42</sup> Matthew T. Mitchell, *Employee Involvement Programs: The Time Has Come to Amend Section 8(a)(2) of the NLRA*, 34 CUMB. L. REV. 503, 528 (2003-04) (noting the fact that "all five of the current Board members are Bush appointees who are likely to take a pro-management stance" as a "distinct advantage in using Board reinterpretation to legalize modern [employee involvement programs.]").
- <sup>43</sup> Electromation, 309 N.L.R.B. at 1002.
- <sup>44</sup> *Id.* at 1002. "Employee representation plans" worked with employers to adjust grievances, bargain over hours and other conditions of work, and to share information and proposals to address matters of mutual concern to employers and employees. *Id.* at 1000.
- <sup>45</sup> Memorandum from Jerry Hunter, General Counsel of the NLRB, 10-11 (April 15, 1999); see also Electromation, 309 N.L.R.B. at 1007 n.13 (Raudabaugh concurring) (concluding that this interpretation of Section 2(5) was unpersuasive because the term "representation" does not modify the other entities mentioned (such as "any organization") and does not appear in the latter part of the definition with "participation" and "dealing with").
- <sup>46</sup> Shaun G. Clarke, *Rethinking the Adversarial Model in Labor Relations: An Argument for Repeal of Section 8(a)(2)*, 96 YALE L.J. 2021, 2034 (1985) (arguing that while courts can revise Section 8(a)(2) to allow a greater range of employer-employee structures, these efforts contradict Congress' intent in passing the NLRA and that changes in the American workplace require Congressional repeal of Section 8(a)(2)).
- <sup>47</sup> 309 N.L.R.B. at 1013. Member Raudabaugh's proposed test to determine if employee's Section 7 rights had been infringed included the following four factors: "(1) the extent of the employer's involvement in the structure and operation of the committees; (2) whether the employees, from an objective standpoint, reasonably perceive the EPP [Employee Participation Programs] as a substitute for full collective bargaining through a traditional union; (3) whether employees have been assured of their Section 7 right to choose to be represented by a traditional union under a system of full collective bargaining, and (4) the employer's motives in establishing the EPP."
- <sup>48</sup> Keeler Brass, 317 N.L.R.B. at 1119 (endorsing the approach taken in *Chicago Rawhide Manufacturing Co. v. NLRB*, 221 F.2d 165 (7th Cir. 1955)).
- <sup>49</sup> *Id.*
- <sup>50</sup> Chairman Gould made this statement with regard to *Chicago Rawhide* and *Electromation*, which he characterized as representing the "extremes" of employer involvement, with a "minimal amount" present in *Chicago Rawhide* and a "high degree" in *Electromation*. Keeler Brass, 317 N.L.R.B. at 1118.
- <sup>51</sup> William B. Gould IV, *Employee Participation and Labor Policy: Why the TEAM Act Should Be Defeated and the National Labor Relations Act Amended*, 30 CREIGHTON L. REV. 3, 11 (1996).
- <sup>52</sup> H.R. 3020, 80th Cong. 1st Sess. (1947), reprinted in LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT 1947, at 183 [hereinafter LEG. HISTORY 1947].
- <sup>53</sup> TEAM Act of 1995, H.R. 743, 104th Cong. (1996); 141 Cong. Rec. H9556 (daily ed. Sept. 27, 1995) (House vote on the TEAM Act); 142 Cong. Rec. S7619 (daily ed. July 10, 1996) (Senate vote on the TEAM Act); 142 Cong. Rec. H8816 (daily ed. July 30, 1996) (President Clinton's message to Congress accompanying his veto of the TEAM Act).
- <sup>54</sup> H.R. REP. NO. 245, at 3-4 (1947), reprinted in LEG. HISTORY 1947, at 294-95.
- <sup>55</sup> H.R. 3020, 80th Cong. 1st Sess. (1947), reprinted in LEG. HISTORY 1947, at 183.
- <sup>56</sup> See H. REP. NO. 245, *supra* note 54, at 324.
- <sup>57</sup> S. 1126, 80th Cong., 1st Sess. (1947), reprinted in LEG. HISTORY 1947, at 99. The Senate bill, however, had included the following amendment to Section 9(a), which was accepted in conference:
- Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, so long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given an opportunity to be present at such adjustment.
- <sup>58</sup> H.R. CON. REP. NO. 510, 80th Cong., 1st Sess., reprinted in LEG. HISTORY 1947, at 549.
- <sup>59</sup> NLRB v. Cabot Carbon, 360 U.S. 203, 217-18 (1959).
- <sup>60</sup> See *id.*; General Foods Corp., 231 N.L.R.B. 1232 (1977); Electromation, Inc., 309 N.L.R.B. 990 (1992); E.I. Du Pont de Nemours & Co., 311 N.L.R.B. 893 (1993); Electromation, Inc. v. NLRB, 35 F.3d 1148 (7th Cir. 1994); Keeler Brass, 317 N.L.R.B. 1110 (1995); Crown Cork & Seal Co., Inc., 334 N.L.R.B. 699 (2001).

- <sup>61</sup> H.R. REP. NO. 104-248, at 4 (1995); S. REP. NO. 104-259, at 3 (1996).
- <sup>62</sup> Senator Kassebaum (R-KS) introduced the TEAM Act just over three months after the NLRB issued its decision in *Electromation*. 139 Cong. Rec. S9436-37 (daily ed. July 26, 1993) (calling on Congress to amend the Act in light of the NLRB decisions in *Electromation* and *DuPont* which "jeopardized all [employee involvement programs]."); see also S. REP. NO. 104-259, at 10 (1996) ("The breadth of the relevant provisions of the NLRA left employers and employees in a legal never-never land. Furthermore, since the *Electromation* decision, the NLRB has considered charges involving the employee involvement efforts ... and has consistently questioned the legality of these efforts.").
- <sup>63</sup> TEAM Act of 1995, H.R. 743, 104th Cong. (1996).
- <sup>64</sup> See Johanna Oreskovic, *Capturing Volition Itself: Employee Involvement and the TEAM Act*, 19 BERKELEY J. EMP. & LAB. L. 229, 276-77 (1998); Helen Dewar, *Senate Passes Bill Altering Employer-Employee Talks; National Right-to-Work Measure Is Rejected*, WASH. POST, July 11, 1996, at A08 ("The ... [TEAM] Act was approved by a largely part-line vote."); 142 Cong. Rec. S7619 (daily ed. July 10, 1996) (roll call vote in the Senate); 141 Cong. Rec. H9556 (daily ed. Sept. 27, 1995) (roll call vote in the House).
- <sup>65</sup> See Oreskovic, *supra* note 64, at 276-77 (1998).
- <sup>66</sup> 142 Cong. Rec. S7469 (daily ed. July 9, 1996).
- <sup>67</sup> 141 Cong. Rec. E1483 (daily ed. July 20, 1995).
- <sup>68</sup> S. REP. NO. 104-259, at 19-20 (1996); H.R. REP. NO. 104-248, at 18-20 (1995). Defenders of the 1947 amendment, particularly sponsor Rep. Fred Hartley, utilized a similar argument, asserting that the changes would not result in company-dominated unions. H.R. REP. NO. 245, at 33 (1974), reprinted in LEG. HISTORY 1947, at 324.
- <sup>69</sup> See *Teamwork for Employees and Managers Act of 1997: Hearing of the Committee on Labor and Human Resources United States Senate on S. 295*, 105th Cong., at 8 (1997) (statement of William D. Bundinger, Chairman & CEO, Rodel, Inc.) ("If my company adopted an abusive management style, our employees would begin to focus their attention on protecting themselves instead of producing top quality products.").
- <sup>70</sup> See Elizabeth Walpole-Hofmeister, *Employee Participation: Panel Hears from Labor, Business on Passage of TEAM Act*, DAILY LAB. REP. (BNA) No. 30, Feb. 13, 1997 ("We don't like being put in the position of skirting up to the edge of the law," [J. Thomas] Bouchard [IBM senior vice president for human resources] said.)
- <sup>71</sup> Letter of Robert E. Reich, Sec. of Labor, 142 Cong. Rec. S4788 (daily ed. May 7, 1996).
- <sup>72</sup> Gould, *supra* note 51, at 8.
- <sup>73</sup> *Id.* Chairman Gould argued that the distinction in existing law between permissible and impermissible teams based on the subjects being discussed "simply does not make sense" because of the difficulty determining when, for example, a permissible discussion about work quality crosses over into an impermissible discussion of work. He therefore agreed with some amendment of the Act to remedy this subject matter distinction and relax limits on employer assistance but argued strenuously for meaningful means of protecting employee choice, which he found lacking in the TEAM Act.
- <sup>74</sup> H.R. REP. NO. 104-248, at 29 (1995).
- <sup>75</sup> *Hearing on H.R. 743, The Teamwork for Employees and Managers Act: Hearing Before the Committee on Economic and Educational Opportunities House of Representatives*, 104th Cong., at 35-36 (statement of David M. Silberman, Director, AFL-CIO Task Force on Labor Law); *The TEAM Act: Legal Problems with Employee Involvement Programs: Hearings on S. 295 Before the Senate Comm. on Labor and Human Resources*, 104th Cong., at 65 (1996) (statement of Alan Reuther, Legislative Director, International Union AUW).
- <sup>76</sup> 141 Cong. Rec. H9546 (daily ed. Sept. 27, 1995) (roll call vote on the Sawyer Amendment).
- <sup>77</sup> 142 Cong. Rec. S7484 (daily ed. July 9, 1996); 142 Cong. Rec. S7618 (daily ed. July 10, 1996) (roll call vote on the Dorgan Amendment).
- <sup>78</sup> *Id.*
- <sup>79</sup> William B. Gould IV, Chairman of NLRB, *Cooperative Teams in the Workplace*, available at 142 Cong. Rec. E616 (Apr. 24, 2006).
- <sup>80</sup> 142 Cong. Rec. 16,339 (1996).
- <sup>81</sup> TEAM Act of 1993, H.R. 1529, 103d Cong. (1993); TEAM Act of 1993, S. 669, 103d Cong. (1993).

<sup>82</sup> 142 Cong. Rec. S7619 (daily ed. July 10, 1996) (roll call vote in the Senate); 141 Cong. Rec. H9556 (daily ed. Sept. 27, 1995) (roll call vote in the House).

<sup>83</sup> 142 Cong. Rec. H8816 (daily ed. July 30, 1996).

<sup>84</sup> Statement of Pres. William J. Clinton, 142 Cong. Rec. H8816 (daily ed. July 30, 1996).

<sup>85</sup> TEAM Act of 1997, S. 295, 105th Cong. (1997) (reported out of committee and placed on the Senate calendar; no vote taken); TEAM Act of 1997, H.R. 634, 105th Cong. (1997) (referred to committee and field hearings held; not reported out of committee).

<sup>86</sup> Crown Cork & Seal, Co., 332 NLRB 699 (2001), discussed *supra*, Section I.

<sup>87</sup> G. Roger King, New Guidelines from the National Labor Relations Board Regarding Participative Management Initiatives and Employee Committees, SHRM Legal Report (Aug. 2001), *available through* <http://www.shrm.org>.

<sup>88</sup> Pauling & McGuire, *supra* note 32, at 231.

<sup>89</sup> *Id.* at 232-33 (providing guidance to employers on creating permissible workplace teams); King, *supra* note 87 (same).

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