

1-1-2013

## Bringing Jobs Back to the American People: The Need for a Recognized Labor Relations Privilege in the Aftermath of the Economic Recession

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### Recommended Citation

Muñiz, Christopher M. (2013) "Bringing Jobs Back to the American People: The Need for a Recognized Labor Relations Privilege in the Aftermath of the Economic Recession," *Hofstra Labor & Employment Law Journal*: Vol. 31: Iss. 1, Article 6.  
Available at: <http://scholarlycommons.law.hofstra.edu/hlelj/vol31/iss1/6>

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## NOTES

### BRINGING JOBS BACK TO THE AMERICAN PEOPLE: THE NEED FOR A RECOGNIZED LABOR RELATIONS PRIVILEGE IN THE AFTERMATH OF THE ECONOMIC RECESSION

“[A]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.”<sup>1</sup>

#### INTRODUCTION

Evidentiary privileges prevent against the disclosure of relevant and material evidence throughout the litigation process.<sup>2</sup> A labor relations privilege<sup>3</sup> protects against disclosure of confidential communications regarding labor relations information<sup>4</sup> between either a union member and union official or a management member and a management official. Protection against such disclosure has been recognized by the legislature with respect to parties in the employer-employee relationship under the

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1. *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981); Mitchel Rubinstein, *Is a Full Labor Relations Evidentiary Privilege Developing?*, 29 BERKELEY J. EMP. & LAB. L. 221, 221 (2008).

2. Michael Moberly, *Extending a Qualified Evidentiary Privilege to Confidential Communications Between Employees and Their Union Representatives*, 5 NEV. L.J. 508, 508 (2004-2005).

3. See Rubinstein, *supra* note 1, at 223. A labor relations privilege has also been referred to as a “labor official privilege” and a “union representation privilege.” See *id.* at 226 n.22; see also Leeann R. Grunwell Anderson, *Anglo American Agricultural Law Symposium: Part 2: Note: Turning the Key: Ensuring Evidentiary Privileges As Labor Counsel*, 45 DRAKE L. REV. 492, 492 (1997); Moberly, *supra* note 2, at 510. In this Note, the term “labor relations privilege” is used to refer to a full privilege as discussed in *infra* Part II.A.

4. See Rubinstein, *supra* note 1, at 223 (“The labor relations information might concern collective bargaining strategy, arbitration, union organizing plans, or information about an individual employee who is about to face discipline.”).



National Labor Relations Act (“NLRA”).<sup>5</sup> Recently, parties have tried extending a labor relations privilege to third parties outside the employer-employee relationship.<sup>6</sup> In this context, courts have issued conflicting decisions with respect to the recognition of such a privilege.<sup>7</sup>

Where courts seem to frequently deviate in their judgments appear to be in seeking a balance between the duty to disclose all relevant information in court with private interests and “the confidentiality of certain private communications.”<sup>8</sup> This balancing comes into play as a result of the different nature of evidentiary standards of federal and state courts as compared to those of labor arbitration proceedings and administrative adjudications.<sup>9</sup> This notable departure becomes “critically important because much of labor-management relations is conducted by non-attorneys who may be acting without advice from counsel.”<sup>10</sup> In fact, many non-attorneys represent parties to labor-management disputes in arbitration proceedings and in front of the National Labor Relations Board (“NLRB”).<sup>11</sup> Because these non-attorney representatives are not included under the attorney-client privilege,<sup>12</sup> the implementation of a labor relations privilege is essential in order to protect their confidential communications from being disclosed to third parties outside the employer-employee relationship.

Given that labor-management proceedings in the United States are “litigious, highly adversarial, and often outright hostile,”<sup>13</sup> there is surprisingly little case law that deals with the existence of a labor relations privilege.<sup>14</sup> In fact, the Supreme Court of the United States has

5. See David I. Goldman, *Union Discovery Privileges: Protecting Union Documents and Internal Information From Subpoena*, 17 LAB. LAW. 241, 245 (2001).

6. See, e.g., *Walker v. Huie*, 142 F.R.D. 497, 499 (D. Utah 1992); U.S. Dep’t of Justice v. F.L.R.A., 39 F.3d 361, 368 (D.C. Cir. 1994); *Peterson v. Alaska*, 280 P.3d 559, 559 (Alaska 2012).

7. See Rubinstein, *supra* note 1, at 223.

8. See Moberly, *supra* note 2, at 509.

9. See Goldman, *supra* note 5, at 247-48. The procedural and practical terrain changes substantially in federal and state courts. These courts have recognized a variety of qualified privileges applicable to the labor-management context, sometimes with, or without a nod to the NLRB’s restrictions on disclosure of collective bargaining and union activities. *Id.*

10. Rubinstein, *supra* note 1, at 223.

11. See *id.* at 223-24 nn. 7-8.

12. See *id.* at 224; see also *Walker v. Huie*, 142 F.R.D. 497, 500-501 (D. Utah 1992) (holding attorney-client privilege cannot extend to a union representative who is not an attorney); *Rawlings v. Police Dep’t of Jersey City*, 627 A.2d 602, 609 (N.J. 1992) (finding the attorney-client privilege does not apply because the union representative was not an attorney).

13. Rubinstein, *supra* note 1, at 226.

14. See Moberly, *supra* note 2, at 510.



yet to even address the issue.<sup>15</sup> Although some federal and state jurisdictions have recognized this privilege, others have declined to do so.<sup>16</sup> Additionally, only two state legislatures have codified a general labor relations privilege to date.<sup>17</sup> The lack of judicial and legislative action on this issue around the country is not, however, correlative to its level of importance in contemporary labor-management proceedings, and there have been recent developments in the area. In August 2012, The Supreme Court of Alaska recognized a labor relations privilege with its decision in *Peterson v. State of Alaska*.<sup>18</sup> This decision was followed shortly by Maryland Senate Bill 797, which went into effect recently in October 2012.<sup>19</sup>

Part II of this Note will examine the historical, political, and economic climate surrounding the passage of the NLRA. Part II.A outlines similar political and economic conditions in the aftermath of the 2007-2009 economic recession and subsequent recovery under the Obama Administration. Part II.B explores the economic and legal implications of job creation by American manufacturers. General principles that courts consider when deciding whether to recognize a new evidentiary privilege will be examined in Part III. Specific, judicial and administrative developments addressing the recognition of a labor relations privilege will be analyzed in Part III.A. Part III.B, documents the courts' struggles both in trying to fit labor-management disputes within the existing attorney-client framework and in determining the scope and applicability of the developing labor relations privilege. Finally, Part IV proposes that the federal legislature should recognize a labor relations privilege through the creation of a new privilege similar in nature to the attorney-client privilege.

Given the delicate and confidential nature of the labor-management relation, the importance of labor-management representation, combined with the job creation agenda under the Obama Administration, Congress should create a labor relations privilege. Such recognition by the Federal Government will not only assure uniformity in the application of such a privilege throughout the country, but will recognize what many federal and state administrative bodies already have, that labor-

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15. See Rubinstein, *supra* note 1, at 225.

16. See *id.* at 225.

17. See Act effective Jan. 1, 2006, Pub. L. No. 094-0022, 735 Ill. Comp. Stat. 5/8-803.5 (2006); MD. CODE ANN., CTS. & JUD. PROC. § 9-124 (West 2006 & Supp. 2011).

18. 280 P.3d 559, 559 (Alaska 2012).

19. See §9-124.



management representation deserves protection with similar effect as the attorney-client privilege. Given the political and economic conditions that America faces today, as well as President Obama's agenda to address those issues, a federally recognized labor relations privilege will be essential in protecting modern day collective bargaining materials much as the NLRA was in the aftermath of the Great Depression. Federal recognition is the only true viable method to a comprehensive solution as courts are inefficient and divided in recognizing a labor relations privilege and, as the Supreme Court has said, uncertain privileges are no better than having no privilege at all.<sup>20</sup>

### I. THE BIRTH OF THE NATIONAL LABOR RELATIONS ACT IN THE WAKE OF THE GREAT DEPRESSION

The Great Depression ushered in a decade that saw American workers become "victims of mass unemployment."<sup>21</sup> At the time, business and government leaders assured the public that the depression would not last long and that the economy was definitely on the road to recovery.<sup>22</sup> The statistics however, indicated otherwise—the auto industry by 1932-1933 was functioning at twenty-five percent of capacity, and the steel industry at a meager seventeen percent.<sup>23</sup>

By 1933, nationwide unemployment had skyrocketed to an estimated fifteen million people, which factored in to comprise of around thirty percent of the labor force and forty-four percent of non-farm workers.<sup>24</sup> In the same year, average wages for manufacturing workers as well as factory profits slid well below their pre-depression numbers.<sup>25</sup> Even the middle class suffered in 1933 with the collapse of the entire national banking system and the income of lawyers, dentists and doctors plummet drastically.<sup>26</sup>

In response, "[t]he federal government made equivocal, half-hearted gestures to stem the crisis, boosting public works spending and providing emergency loans to businesses and states."<sup>27</sup> However, despite

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20. *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981).

21. See STEVE BABSON, *THE UNFINISHED STRUGGLE: TURNING POINTS IN AMERICAN LABOR, 1877-PRESENT* 51 (1999).

22. See *id.* at 52.

23. See *id.* at 53.

24. See *id.*

25. See *id.* at 54.

26. See *id.* at 57.

27. *Id.* at 58.



the well-intended efforts of Congress, layoffs, foreclosures and evictions only further snowballed.<sup>28</sup> Franklin Delano Roosevelt (“FDR”) became President just as unemployed workers became the focal point of public attention and promised he would act swiftly in response to quell the devastating effects of the depression.<sup>29</sup>

While formulating New Deal policy and legislation, “most agreed that the depression was caused by an imbalance between the system’s accelerating capacity to produce goods and the faltering capacity of consumers to buy them.”<sup>30</sup> Moreover, in an effort to reduce costs, most industries assisted in diminishing consumer’s ability to meaningfully sustain their standard of living by slashing wages.<sup>31</sup> Since “[w]ages to labor were so poorly coordinated with returns to capital,” some opined that depressions and unemployment levels of this magnitude were inherently linked to similar collapses of consumer demand.<sup>32</sup> Almost immediately the government acted by passing the Federal Emergency Relief Act which sought to drive demand by increasing government spending.<sup>33</sup>

FDR, on the other hand, sought to promote industrial recovery by encouraging codes of fair competition between employers that inevitably led to the type of competition that typically resulted in overproduction of goods and lower wages.<sup>34</sup> Congressional liberals including Senator Robert Wagner<sup>35</sup> would only support such action with the insurance of

28. *See id.* at 60.

29. *See id.* at 66.

30. *Id.* at 68.

31. *See* EMANUEL STEIN ET AL., LABOR AND THE NEW DEAL 10 (1934).

32. BABSON, *supra* note 21, at 68-69.

33. *See id.* at 69.

34. *See id.* at 69. In a radio address in 1933, Senator Robert Wagner stated, [a]s profits rose faster than wages, the excess earnings were invested in more factories, turning out an ever-increasing volume of goods. The mass of consumers did not receive enough in wages to take these goods off the market, and we found ourselves suffering from what some people call “overproduction.” Depressions became unavoidable. Under the new law, every code of fair competition must recognize the right of labor to bargain collectively . . . In this way the production and consumption of goods will be coordinated.

Leon H. Keyserling, *Why the Wagner Act?*, in THE WAGNER ACT: AFTER TEN YEARS 5, 8 (Louis G. Silverberg ed., 1945).

35. As the Chairman of the Senate Banking and Currency Committee during the New Deal Era, one of Senator Robert Wagner’s most notable accomplishments was enacting into law the Wagner Act (NLRA). *See Robert Wagner: A Featured Biography*, SENATE.GOV, [http://www.senate.gov/artandhistory/history/common/generic/Featured\\_Bio\\_Wagner.htm](http://www.senate.gov/artandhistory/history/common/generic/Featured_Bio_Wagner.htm) (last visited Feb. 11, 2013).



protection for workers.<sup>36</sup> The result was the National Industrial Recovery Act (“NIRA”), which marked the first time in American history that “concerted activities for the purpose of collective bargaining or other mutual aid” became law.<sup>37</sup> It was the aim of NIRA ultimately to restore the economy to a “condition of prosperity” through collective bargaining between employers and workers with regard to codes of fair competition therefore minimizing government intervention.<sup>38</sup> Employer domination however effectively rendered NIRA ineffective.<sup>39</sup>

The ultimate blow for NIRA came in May of 1935 when the Supreme Court declared NIRA unconstitutional.<sup>40</sup> Three days before this decision was rendered, FDR threw his support behind Senator Wagner’s proposed NLRA.<sup>41</sup> The NLRA promised in its original preamble to “ensure a wise distribution of wealth between management and labor, to maintain a full flow of purchasing power, and to prevent recurrent depressions.”<sup>42</sup>

The NLRA was passed in 1935<sup>43</sup> and has been described as “essential for a democratic society” as well as the “indispensable complement of political democracy.”<sup>44</sup> As Senator Wagner put it himself, “[t]he right to bargain collectively is at the bottom of social justice for the worker, as well as the sensible conduct of business affairs. The denial or observance of this right means the difference between despotism and democracy.”<sup>45</sup> The major national labor policy that came out of the NLRA was the right of workers to organize and collectively bargain through freely chosen representatives.<sup>46</sup>

36. See BABSON, *supra* note 21, at 70.

37. See *id.* Taking the form of Section 7a of the National Industrial Recovery Act, employees were able to “organize and bargain collectively through representatives of their own choosing and shall be free from interference, restraint or coercion of employers.” The law, however, “did not require companies to agree to union terms, but it did require them to tolerate and even talk with union negotiations chosen by their employers.” See *id.*

38. See STEIN ET AL., *supra* note 31, at 10.

39. See BABSON, *supra* note 21, at 85.

40. See *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 550-51 (1935).

41. See BABSON, *supra* note 21, at 85.

42. *Id.*

43. *National Labor Relations Act*, NLRB.GOV, <http://www.nlrb.gov/national-labor-relations-act> (last visited Sept. 23, 2013).

44. HARRY A. MILLS & EMILY CLARK BROWN, FROM THE WAGNER ACT TO TAFT-HARTLEY 3 (1950).

45. *Id.*

46. See *id.*

[It is] declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these



In the midst of the unemployment, insecurity, and declining standards of living during the early years of the depression, many came to believe “that an increase in mass purchasing power was necessary to sustain both full production and employment . . . .”<sup>47</sup> In a nation of modern mass production, equality in bargaining power was seen as necessary to bridge the gap towards mass purchasing power.<sup>48</sup> The freedom to workers to self-organize and bargain collectively through representatives of their own choosing was seen as that bridge and the cornerstone principle that “Congress believed would promote a healthy economy.”<sup>49</sup>

The NLRA was designed to level the playing field between management and their workers.<sup>50</sup> Such an imbalance was seen as the major driving force that prevented the economy from enjoying the greatest use of “resources and . . . skills.”<sup>51</sup> It was Senator Wagner’s belief that collective bargaining was key in bridging this gap because it was at the core of preserving both “political as well as economic democracy in America.”<sup>52</sup> Not only was collective bargaining seen “as an essential attribute of free society,” but “as the only alternative to an intensely centralized economy in a modern industrial state.”<sup>53</sup>

Since collective bargaining could never stimulate the economy through the efforts of management and their workers alone, the government was tasked with protecting these rights.<sup>54</sup> Section 7 of the NLRA solidified this protection by guaranteeing employees’ rights to self-organize, bargain collectively through representatives of their own choosing, and engage in concerted activities for the purpose of collective

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obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

National Labor Relations (Wagner) Act, 29 U.S.C. § 151 (2006).

47. See MILLS & BROWN, *supra* note 44, at 20.

48. See *id.*

49. See *id.* at 129. The NLRA was “founded upon the proposition that the whole economy would prosper through a better distribution of the Nation’s goods.” Keyserling, *supra* note 34, at 12.

50. Keyserling, *supra* note 34, at 26.

51. *Id.*

52. See *id.* at 14; Robert F. Wagner, *The Ideal Industrial State – As Wagner Sees It*, N.Y. TIMES MAG., May 9, 1937, at 23.

53. See Keyserling, *supra* note 34, at 12.

54. See BABSON, *supra* note 21, at 85.



bargaining or other mutual aid or protection.<sup>55</sup> According to Senator Wagner, “organized human effort, and organized human cooperation, on a scale as vast as the problems with which we have to deal,” is the only way that America may avoid “devastating depressions.”<sup>56</sup>

Faced with a depression, the United States evolved a precedential national labor policy of collective bargaining for the first time in American industrial history that continued beyond the passing of the NLRA.<sup>57</sup> Although history is generally viewed through many lenses of scrutiny, Senator Wagner believed that the period in between the two world wars would be remembered for the cooperation between management and their workers towards contributing to “national needs.”<sup>58</sup> Likewise, he believed that the NLRA would be remembered for providing a “foundation of stability rooted in justice which made this cooperation possible.”<sup>59</sup>

### *A. The Obama Administration's Agenda in the Aftermath of the 2007-2009 Recession*

The recession that began in 2007 led to worldwide government budget deficits on both federal and local levels.<sup>60</sup> This crisis has been

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55. See National Labor Relations (Wagner) Act, 29 U.S.C. § 157 (2006). Determined not to forgo the labor policies first conceived of in Section 7a of NIRA, Senator Wagner in drafting the NLRA reinforced those principles in little more than two months after the Supreme Court ruled NIRA to be unconstitutional. These policies were guaranteed protection by the incorporation of a three-member National Labor Relations Board, which was given the “authority to settle representation questions and to prosecute violations of the unfair labor practice provisions of the [NLRA].” THEODORE J. ST. ANTOINE, CHARLES B. CRAVER & MARION G. CRAIN, *LABOR RELATIONS LAW: CASES AND MATERIALS* 13-14 (12th ed. 2011).

56. Sen. Robert F. Wagner, *Introduction* to KEYSERLING ET AL., *THE WAGNER ACT: AFTER TEN YEARS* 1, 2 (Louis G. Silverberg, ed., 1945).

57. Louis G. Silverberg, *Preface* to KEYSERLING ET AL., *THE WAGNER ACT: AFTER TEN YEARS* iii, iii (Louis G. Silverberg, ed., 1945).

If we are to act wisely and with insight in the construction and evolution of a national policy, surely we should be equipped with understanding of just what were the underlying assumptions and purposes of that statute and what it has wrought. For, as long as laws continue to reflect a concern for economic and group well-being in our society and Federal agencies are created to implement them and re-shuffle relationships, there will be the need to ask questions and evaluate experiences in order that our actions not plunge us into readily avoidable pitfalls.

*Id.*

58. See Wagner, *supra* note 56, at 3.

59. *Id.*

60. See Kenneth Glenn Dau-Schmidt & Winston Lin, *The Great Recession, The Resulting Budget Shortfalls, The 2010 Elections and the Attack on Public Sector Collective Bargaining in the*



argued to be the most devastating economic event since the Great Depression.<sup>61</sup> Unemployment rates domestically jumped from a rate of 4.6% in 2007 to 9.6% at the recession's end entering 2010.<sup>62</sup> Although the unemployment rate has been steadily decreasing slowly since 2010, the rate was still hovering around 8% at the end of 2012 and just crept under to 7.9% as of January 2013.<sup>63</sup> An even more staggering figure is the 4% of Americans that has been out of work for more than six months which has continued to climb.<sup>64</sup>

Even though the economy is currently growing again, job growth has not been as quick to turn around.<sup>65</sup> In line with unemployment, wages took a heavy blow as a result of the recession.<sup>66</sup> From 2007-2008 to 2009-2010, wage growth fell from 5.3% to -1.3% for men, and from 5.2% to 3.7% for women.<sup>67</sup> More recently, by the end of the third quarter of 2012 "after-tax corporate profits were a record share of the gross domestic product ("GDP")," while "wages were the smallest share of GDP they've ever been."<sup>68</sup> It has been reported that total wages have traditionally accounted for nearly half of America's GDP, but during the third quarter of 2012 that number had plunged to 43.5%, a record low.<sup>69</sup> Nonetheless, the financial crisis caused by the recession and the "resulting disintegration of aggregate demand and employment are eerily similar to the financial crisis and collapse that led to the Great Depression."<sup>70</sup>

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*United States*, 29 HOFSTRA LAB. & EMP. L.J. 407, 407 (2012); See Phil Oliff et al., *States Continue to Feel Recession's Impact*, CTR. ON BUDGET AND POL'Y PRIORITIES 1 (June 27, 2012), <http://www.cbpp.org/files/2-8-08sfp.pdf>.

61. See Dau-Schmidt & Lin, *supra* note 60, at 408.

62. See *Employment Status of the Civilian Noninstitutional Population, 1940s to Date*, BUREAU OF LAB. STAT., <http://www.bls.gov/cps/cpsaat01.pdf> (last visited Feb. 13, 2013).

63. See *Prior Years to Date Employment Status of the Civilian Noninstitutional Population 16 Years and Over, Prior Years to Date*, BUREAU OF LAB. STAT., <http://www.bls.gov/web/empstat/cpseea01.pdf> (last visited Feb. 13, 2013).

64. See Dau-Schmidt & Lin, *supra* note 60, at 409.

65. See *id.*

66. See *id.*

67. See *id.*; Lawrence Mishel & Heidi Shierholz, *Recession Hits Workers' Paychecks: Wage Growth Has Collapsed*, in STATE OF WORKING AMERICA, at 1, 1 (Econ. Policy Inst., Briefing Paper No. 277, 2010), available at [http://epi.3cdn.net/e5fad31427498e7540\\_bwm6b5ac1.pdf](http://epi.3cdn.net/e5fad31427498e7540_bwm6b5ac1.pdf).

68. See Laura Clawson, *Corporate Profits Are Highest-Ever Share of GDP, While Wages Are Lowest-Ever*, DAILY KOS (Dec. 3, 2012, 12:20 PM), <http://www.dailykos.com/story/2012/12/03/1166878/-Corporate-profits-are-highest-ever-share-of-GDP-while-wages-are-lowest-ever#>.

69. See *id.*

70. Dau-Schmidt & Lin, *supra* note 60, at 407.



Present Barack Obama stressed in his 2013 State of the Union Address that in the aftermath of the recession, corporate profits are at an all-time high but “wages and incomes have barely budged.”<sup>71</sup> According to President Obama, it is “[a] growing economy that creates good, middle-class jobs—that must be the North Star that guides our efforts” in restoring the economy back to full strength.<sup>72</sup> The economy, in his mind, is strongest when American workers are rewarded with wages that respectfully compensate them for their hard work.<sup>73</sup> Moreover, President Obama stressed that “working folks shouldn’t have to wait year after year for the minimum wage to go while CEO pay has never been higher.”<sup>74</sup> After two million manufacturing jobs were lost during the recession,<sup>75</sup> President Obama declared that America’s first priority is to bring those manufacturing jobs back abroad.<sup>76</sup>

President Obama noted that it was important to address fundamental questions such as how to entice employers to bring jobs back to the United States from overseas and how to ensure workers are paid decent wages.<sup>77</sup> A year ago Congress began answering some of these questions by implementing a portion of the Obama Administration’s agenda in creating a “manufacturing hub” in Youngstown, Ohio.<sup>78</sup> Furthermore, President Obama stated his desire to add “\$12 million for a program to promote foreign direct investment in the U.S.”<sup>79</sup> President Obama also pledged the creation of tax rewards for employers to either expand domestically or return from abroad, along with the elimination of any tax incentive for employers to outsource jobs.<sup>80</sup> Congress also passed the American Jobs Act, which economists believe will produce over a million new jobs.<sup>81</sup>

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71. See Barack Obama, President of the United States, State of the Union Address (Feb. 12, 2013), available at [http://www.nytimes.com/2013/02/13/us/politics/obamas-2013-state-of-the-union-address.html?\\_r=1&\[hereinafter “2013 State of the Union Address”\]](http://www.nytimes.com/2013/02/13/us/politics/obamas-2013-state-of-the-union-address.html?_r=1&[hereinafter%20%222013%20State%20of%20the%20Union%20Address%22]).

72. *Id.*

73. See *id.*

74. See *id.*

75. See Ina Damm Muri, *Big Manufacturers More Likely to Support “Made in USA”*, SMARTPLANET (Apr. 22, 2012, 11:16 AM), <http://www.smartplanet.com/blog/smart-takes/big-manufacturers-more-likely-to-support-8220made-in-usa-8221/25872>.

76. See *Obama’s 2013 State of the Union Address*, *supra* note 71.

77. See *id.*

78. See *id.*

79. See Roger Runningen, *Obama Proposes Tax Incentives for Returning Jobs to U.S.*, BLOOMBERG (Jan. 11, 2012), <http://www.bloomberg.com/news/2012-01-11/obama-to-propose-tax-incentives-for-companies-that-keep-jobs-in-the-u-s-.html>.

80. See *id.*

81. See 2013 State of the Union Address, *supra* note 71.



In continuing this progressive effort, President Obama announced the creation of three additional “manufacturing hubs” in areas that are lagging behind in economic growth and development.<sup>82</sup> This was followed by a plea to Congress for fifteen more of these hubs to be created in order to ensure “that the next revolution in manufacturing is Made in America.”<sup>83</sup> Most importantly, after nearly a decade of decline, there has been a resurgence in manufacturing jobs in the United States.<sup>84</sup> Moreover, major manufacturing giants such as Caterpillar and Intel are bringing jobs back to the U.S. from countries such as Mexico, Japan, and China.<sup>85</sup> Even technology giant Apple will once again manufacture its Macs in America in 2013.<sup>86</sup>

This trend of manufacturing jobs returning domestically is known as “reshoring” and has become an increasing phenomenon as of late.<sup>87</sup> Almost 48% of large manufacturing companies “with ten billion in sales or better . . . say that they’re planning to move, or have already moved, their production facilities back to the [United] States.”<sup>88</sup> Millions of new jobs stand to be created in the immediate future if this trend continues.<sup>89</sup> Over 50% of these large firms noted cheaper labor costs as their motive for reshoring.<sup>90</sup> Rising labor costs in China have also been theorized as a driving force for large firms to return to the United States.<sup>91</sup> It has also been estimated “that U.S. manufacturing workers on average produce about three times as much per hour as their Chinese counterparts

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82. See *id.*

83. See *id.*

84. See *id.*

85. See *id.*

86. See *id.*

87. See Arthur Herman, *Jobs Coming Home*, N.Y. POST (July 18, 2012, 10:18 PM), [http://www.nypost.com/p/news/opinion/opedcolumnists/jobs\\_coming\\_home\\_tNA6vg02psjwKEMcUFvrfN](http://www.nypost.com/p/news/opinion/opedcolumnists/jobs_coming_home_tNA6vg02psjwKEMcUFvrfN).

88. See *id.*

89. See Jennifer Booton, *Manufacturing Renaissance? Exports, Reshoring Could Bring 5M Jobs to U.S.*, FOX BUS. (Sept. 21, 2012), <http://www.foxbusiness.com/economy/2012/09/21/manufacturing-renaissance-exports-reshoring-could-bring-5m-jobs-to-us/> (citing *Rising U.S. Exports – Plus Reshoring – Could Help Create up to 5 Million Jobs by 2020*, BOS. CONSULTING GROUP (Sept. 21, 2012), <http://www.bcg.com/media/pressreleasedetails.aspx?id=tcn:12-116389>).

90. See Alexander Eichler, *Manufacturing Companies Considering Moving Jobs Back to U.S. From China, Survey Finds*, HUFFINGTON POST (Apr. 22, 2012, 5:11 PM), [http://www.huffingtonpost.com/2012/04/20/manufacturing-companies-move-us-china\\_n\\_1441587.html](http://www.huffingtonpost.com/2012/04/20/manufacturing-companies-move-us-china_n_1441587.html) (citing Press Release, More Than A Third of Large Manufacturers Are Considering Reshoring From China to U.S., Bos. Consulting Group (Sept. 21, 2012), available at <http://www.bcg.com/media/PressReleaseDetails.aspx?id=tcn:12-104216>).

91. See *id.*



because of greater use of automation and more efficient manufacturing processes.”<sup>92</sup>

Experts, however, favor various elements as the reason for the recent trend of reshoring.<sup>93</sup> Some of these factors include the recent recession, devaluation of the dollar “and freak events like the euro zone meltdown and the Japanese earthquake/tsunami . . . .”<sup>94</sup> Higher shipping costs have also contributed to the allure of reshoring due to the recent increase in oil prices.<sup>95</sup>

Large American manufacturing companies have seized upon these factors as evidenced by Siemens which, on November 16, 2011, opened a new gas turbine factory in Charlotte, North Carolina, which created 700 new jobs.<sup>96</sup> President and Chief Executive of Siemen’s U.S. subsidiary Eric Spiegel noted that “[a] lot of things that were offshored in the past were offshored because of lower-cost labor, but that’s no longer the most important factor.”<sup>97</sup> Spiegel further noted the reasons behind this move for Siemens was “the higher-skilled labor, access to the world’s best research and development, and good, sound infrastructure.”<sup>98</sup>

Other large manufactures have taken this cue to return from abroad such as General Electric who in 2012 moved a manufacturing plant from China to Kentucky.<sup>99</sup> As a result of labor contracts passed in 2007 and 2011, Ford has moved production of the 2013 Ford Fusion from Mexico to Detroit, Michigan, a move which stands to add 1,200 workers to the

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92. See James R. Hagerty, *Once Made in China: Jobs Trickle Back to U.S. Plants*, WALL ST. J. (May 21, 2012, 10:04 PM), <http://online.wsj.com/article/SB10001424052702304587704577333482423070376.html>.

93. See Michael Moran, *Analysis: After Decades of Outsourcing, Manufacturing Jobs Coming Home to US*, GLOBAL POST (May 6, 2012, 8:20 AM), <http://www.globalpost.com/dispatch/news/regions/americas/united-states/120504/american-manufacturing-jobs-returning-outsourcing-reshoring>.

94. See *id.*

95. See Hagerty, *supra* note 92.

96. See *Grand Opening of the Charlotte Gas Turbine Manufacturing Facility*, SIEMENS (Nov. 16, 2011), <http://www.siemens.com/press/en/events/2011/energy/2011-11-charlotte.php>.

97. Lori Montgomery, *Siemens Plant in Charlotte Offers Lessons as Obama, Romney Talk Job Creation*, WASH. POST (Sept. 4, 2012), [http://www.washingtonpost.com/business/economy/siemens-plant-in-charlotte-offers-lessons-as-obama-romney-talk-job-creation/2012/09/04/f52304fa-f30c-11e1-adc6-87dfa8eff430\\_story.html](http://www.washingtonpost.com/business/economy/siemens-plant-in-charlotte-offers-lessons-as-obama-romney-talk-job-creation/2012/09/04/f52304fa-f30c-11e1-adc6-87dfa8eff430_story.html).

98. See *id.*

99. See *A Growing Number of American Companies Are Moving Their Manufacturing Back to the United States*, ECONOMIST (Jan. 19, 2013), <http://www.economist.com/news/special-report/21569570-growing-number-american-companies-are-moving-their-manufacturing-back-united>.



Detroit factory.<sup>100</sup> If these large manufacturing companies are indicative of things to come, Americans can only expect to see more jobs created through this current trend of reshoring.

### B. *Economic and Legal Implications of Job Creation by American Manufacturers*

Even though reshoring stands to increase the number of jobs created in America, some expect manufacturers to open plants in right-to-work states “where labor isn’t stifled by union rules.”<sup>101</sup> Under right-to-work laws, employees in unionized workplaces are not required to pay union dues that go towards negotiation or enforcement of the contract bargained for by the union.<sup>102</sup> Although these employees are not required by law to pay union dues, the contract bargained for still governs the terms and conditions of their employment.<sup>103</sup> Right-to-work laws have been “broadly understood to erode the influence and power of organized labor” because “if unions have a harder time collecting money for the services they offer, they’ll have fewer resources to work with.”<sup>104</sup> Opponents to these laws believe that they merely create a “free-rider” problem where employees actively choose not to pay union dues because they will benefit from any collective bargaining agreement in place if they pay or not.<sup>105</sup>

Some have reported that states with right-to-work laws “have lower unemployment rates and faster job growth, but also lower wages.”<sup>106</sup> In a 2007 study, Lonnie Stevans, a Professor at Hofstra University, found that while right-to-work states do produce more business than non-right-to-work states, the same was not true with regard to wages.<sup>107</sup> Other

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100. See *Ford Brings Back Jobs to Michigan From Mexico*, AOL AUTOS (Sept. 10, 2012), <http://autos.aol.com/article/ford-brings-back-jobs-to-michigan-from-mexico/>.

101. Herman, *supra* note 87.

102. See Elise Gould & Heidi Shierholz, *The Compensation Penalty of Right-To-Work” Laws*, 1,1 ECON. POLICY INST. (Briefing Paper No. 299, 2011), available at <http://www.epi.org/page/-/old/briefingpapers/BriefingPaper299.pdf>.

103. See *id.*

104. See Brad Plumer, *What do ‘Right-to-Work’ Laws do to a State’s Economy?*, WASH. POST (Dec. 10, 2012, 3:00 PM), <http://www.washingtonpost.com/blogs/wonkblog/wp/2012/12/10/how-right-to-work-laws-could-reshape-michigans-economy/>.

105. See *id.*

106. See Ben Casselman, *Closer Look at Union vs. Nonunion Workers’ Wages*, WALL ST. J. (Dec. 17, 2012, 3:40 PM), <http://blogs.wsj.com/economics/2012/12/17/closer-look-at-union-vs-nonunion-workers-wages/>.

107. See Plumer, *supra* note 104.



studies have reported that “[w]ages in right-to-work states are 3.2% lower than those in non-[right-to-work] states.”<sup>108</sup> The U.S. Department of Labor (“USDOL”) reported in 2012 that full-time salaried union members earned \$943 on average per week, while their non-union counterparts earned only \$742-per week.<sup>109</sup> Factors other than union status did however affect this disparity, such as “variations in the distributions of union members and nonunion employees by occupation, industry, firm size, or geographic region.”<sup>110</sup>

Nonetheless, despite higher overall wages, union membership has declined substantially over the past year and has only seen an increase in fourteen states.<sup>111</sup> Interestingly, out of the twenty-four right-to-work states,<sup>112</sup> union numbers were up in 2012 in eight of those states including Georgia, Louisiana, Nevada, North Carolina, Oklahoma, South Dakota, Tennessee, and Texas according to the USDOL.<sup>113</sup> Even more striking is that while manufacturing jobs in right-to-work states have increased by 1.1% over non-right-to-work states in the last three years, manufacturing employees in right-to-work states were paid 7.4% less than in non-right-to-work states.<sup>114</sup>

Despite these figures, as the number of right-to-work states continues to rise,<sup>115</sup> expansion of factories into those states are expected to closely follow.<sup>116</sup> Major manufacturers such as Siemens (North Carolina), Ford (Michigan),<sup>117</sup> Michelin (South Carolina), and Volkswagen (Tennessee)<sup>118</sup> have all either opened new plants or added

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108. See Gould & Shierholz, *supra* note 102, at 1.

109. BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR NEWS RELEASE, USDOL-13-0105, UNION MEMBERS – 2012 2 (2013), available at <http://www.bls.gov/news.release/pdf/union2.pdf>.

110. See *id.*

111. See *id.*

112. See *Right to Work States*, NAT’L RIGHT TO WORK LEGAL DEF. FOUND. (2012), <http://www.nrtw.org/rtws.htm> [hereinafter *Right to Work States*].

113. See BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR ECONOMIC NEWS RELEASE, UNION AFFILIATION OF EMPLOYED WAGE AND SALARY BY STATE (2013), available at <http://www.bls.gov/news.release/union2.t05.htm>.

114. See Neil Shah & Ben Casselman, ‘Right to Work’ Economics: States that Bar Mandatory Union Dues Tend Toward More Jobs but Lower Wages, U.S. NEWS (Dec. 14, 2012, 6:51 PM), <http://online.wsj.com/article/SB10001424127887324296604578179603136860138.html>.

115. In December 2012, Michigan became the 24th right-to-work state. See William J. Bennett, *A Victory For Right-to-Work Laws*, CNN (Dec. 13, 2012, 9:52 AM), <http://www.cnn.com/2012/12/12/opinion/bennett-michigan-unions>.

116. See Herman, *supra* note 87.

117. See *supra* Part I.A.

118. See Herman, *supra* note 87.



workers to factories<sup>119</sup> in right-to-work states.<sup>120</sup> Most notably, in April 2011 Boeing made headlines when put in motion plans to build their new 787 Dreamliner in South Carolina, a right-to-work state.<sup>121</sup>

As a result, the National Labor Relations Board (“NLRB”) granted a preliminary restraining order against Boeing until it could be determined whether their “shift of production to a union-hostile state in order to avoid union activity constituted anti-union animus.”<sup>122</sup> This order originated from a complaint filed by the NLRB that sought “to force Boeing to bring [the 787 Dreamliner’s] production line back to its unionized facilities in Washington State.”<sup>123</sup> The NLRB cited Boeing’s malicious intent to punish workers at the factory in Washington State for both striking in the past and for any future strikes in support of filing their complaint.<sup>124</sup>

In spite of this order, Boeing opened their new assembly plant for the 787 Dreamliner in South Carolina in June 2011.<sup>125</sup> Nonetheless the NLRB stood by their pro-labor position<sup>126</sup> until December 2011 when the Board dropped its charge against Boeing.<sup>127</sup> The decision to drop the charge came after the worker’s union in Washington reached an agreement with Boeing “to raise wages and expand jet production in Washington.”<sup>128</sup>

Less than a year later in October of 2012, a union representing machinists and aerospace workers took its first steps in attempting to unionize the workers at Boeing’s South Carolina factory by holding

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119. *See id.*; *see also supra* Part I.A.

120. *See Right to Work States*, *supra* note 112.

121. M.S., *Boeing’s Labour Problems: Moving Factories to Flee Unions*, *ECONOMIST* (Apr. 25, 2011, 2:16 PM), [http://www.economist.com/blogs/democracyinamerica/2011/04/boeings\\_labour\\_problems](http://www.economist.com/blogs/democracyinamerica/2011/04/boeings_labour_problems).

122. *See id.* (internal quotation marks omitted).

123. *See* Steven Greenhouse, *Labor Board Tells Boeing New Factory Breaks Law*, *N.Y. TIMES* (Apr. 20, 2011), [http://www.nytimes.com/2011/04/21/business/21boeing.html?\\_r=0](http://www.nytimes.com/2011/04/21/business/21boeing.html?_r=0).

124. *See id.*

125. *See* Tim Devaney, *Boeing Opens \$750 Million Plant in South Carolina*, *WASH. TIMES* (June 10, 2011), <http://www.washingtontimes.com/news/2011/jun/10/boeing-opens-750-million-plant-south-carolina/>.

126. *See* Corey Hutchins, *Boeing’s Decision to Move to South Carolina Has Turned Into a Legal Nightmare*, *CHARLESTON CITY PAPER* (June 15, 2011), <http://www.charlestoncitypaper.com/charleston/boeings-decision-to-move-to-south-carolina-has-turned-into-a-legal-nightmare/Content?oid=3461150>.

127. *See* Steven Greenhouse, *Labor Board Drops Case Against Boeing After Union Reaches Accord*, *N.Y. TIMES* (Dec. 9, 2011), <http://www.nytimes.com/2011/12/10/business/labor-board-drops-case-against-boeing.html>.

128. *See id.*



informational meetings.<sup>129</sup> Union representatives from the International Association of Machinists and Aerospace Workers (“IAM”) who represent 45,000 current and former Boeing workers in Washington State noted there was “an awful lot of support” despite being previously voted out in 2009.<sup>130</sup> It has been speculated that the IAM is strategically positioning itself to unionize so that they can ultimately do so when the perfect opportunity presents itself.<sup>131</sup> An IAM representative felt strongly that the NLRB could administer a vote “within a year,” meaning there is favorable potential for the resurgence of Boeing’s largest union despite the controversy that surrounded the opening of the factory in the right-to-work state of South Carolina.<sup>132</sup> If the IAM were to gain recognition as the lawful representatives of the workers in South Carolina, it could have the effect of signaling to other unions that there is a possibility for greater success in unionizing workers in right-to-work states.

## II. RECOGNIZING NEW PRIVILEGES IN THE COURTS

Federal Rule of Civil Procedure 26(b)(1) expressly excludes certain privileged matters from discovery.<sup>133</sup> This does not mean, however, that just because information was communicated to another person in private, or in confidence, that it will be protected from disclosure.<sup>134</sup> In order for confidential communications and information to be exempt from disclosure, the legislature or the judiciary must first create applicable privileges.<sup>135</sup> Since privileges may be either oral or written, they “often . . . prevent the disclosure of relevant information.”<sup>136</sup>

Federal Rule of Evidence 501 (“Rule 501”) governs the creation of

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129. See Harriet McLeod, *Boeing Faces Union Drive at 787 Plant in South Carolina*, REUTERS (Oct. 17, 2012, 5:57 PM), <http://www.reuters.com/article/2012/10/17/boeing-union-charleston-idUSL1E8LHHLM20121017>.

130. In 2009, workers in the South Carolina factory voted the IAM out at a time when only fuselages were being produced at the location for Boeing. Ironically, it was this move that is alleged to have ensured the 787 Dreamliner production line at the factory. See *id.*

131. See Brendan Kearney, *Will Boeing South Carolina Ever Become A Union Shop? Time and Working Conditions Will Tell*, POST AND COURIER (Oct. 23, 2012, 2:41 PM), <http://www.postandcourier.com/article/20121021/PC05/121029901>.

132. *Id.*

133. See generally FED. R. CIV. P. 26(b)(1).

134. PRINCE, RICHARDSON ON EVIDENCE § 5-101 (Richard T. Farrell, ed., 11th ed. 1995).

135. See *id.*; see also Rubinstein, *supra* note 1, 228 n.27.

136. Rubinstein, *supra* note 1, at 228.



privileges.<sup>137</sup> Although not bound by the federal rules of evidence,<sup>138</sup> state courts, as well as federal and state administrative agencies, often turn to Rule 501 for guidance in determining whether to recognize a new privilege or not.<sup>139</sup> Rule 501 states in relevant part:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.<sup>140</sup>

Although this language does not expressly point to the existence of particular privileges, the United States Supreme Court has concluded that the rule is indicative of an affirmative intention of Congress “not to freeze the law of privilege.”<sup>141</sup> Thus, privileges are to be decided on a case-by-case basis<sup>142</sup> because it was the intent of Congress to “provide the courts with the flexibility to develop rules of privilege . . . and to leave the door open to change.”<sup>143</sup>

“The confidentiality protected [by the creation of a privilege], however, must be balanced with the search for truth; therefore, these exceptions to the demand for every man’s evidence are not lightly created nor expansively construed.”<sup>144</sup> In analyzing whether to recognize a new privilege or not, the United States Supreme Court holds to a steadfast principle that “the public . . . has a right to the evidence of everyone.”<sup>145</sup> This is because the public has such a “compelling interest” in preventing the suppression of evidence that would otherwise prevent the courts from being effective arbiters of truth and justice.<sup>146</sup>

137. See FED. R. EVID. 501.

138. See Moberly, *supra* note 2, at 530.

139. See, e.g., Peterson v. State, 280 P.3d 559, 562 (Alaska 2012) (determining “our authority to recognize new privileges is limited by Evidence Rule 501”); Moberly, *supra* note 3, at 530 n.185.

140. See FED. R. EVID. 501.

141. Univ. of Pa. v. EEOC, 493 U.S. 182, 189 (1990) (quoting Trammel v. United States, 445 U.S. 40, 47 (1980)).

142. Rubinstein, *supra* note 1, at 228.

143. Trammel v. United States, 445 U.S. 40, 47 (1990) (internal quotation marks and citations omitted).

144. Anderson, *supra* note 3, at 493 (citing United States v. Nixon, 418 U.S. 683, 710 (1974)) (internal quotation marks omitted).

145. Rubinstein, *supra* note 1, at 229 (quoting Jaffee v. Redmond, 518 U.S. 1, 9 (1996)).

146. “[P]ublic interest is so substantial that in an extreme case, it can override even a Constitutionally-based privilege such as the Presidential privilege.” See Edward J. Imwinkelreid,



However, privileges nonetheless exist to guard revered relationships between people that would otherwise be particularly vulnerable to deterioration if courts were to unjustly pierce their veil of privacy.<sup>147</sup>

Nonetheless, in a balanced search for truth the “exceptions to the demand for every man’s evidence are not lightly created nor expansively construed.”<sup>148</sup> Accordingly, the United States Supreme Court has asserted that privileges may only be created when they promote public policy.<sup>149</sup> However, “uncertain privileges are not beneficial to society because they can inhibit the truth and create enormous litigation costs and transaction expenses.”<sup>150</sup> When a privilege is established, it solely protects people and continues indefinitely unless it is waived.<sup>151</sup>

A number of courts have turned to four core conditions in determining whether to recognize a privilege or not.<sup>152</sup> These four factors, as first designed by Professor Wigmore<sup>153</sup> in his “highly regarded treatise on the law of evidence,”<sup>154</sup> provide that:

The communications must originate in a *confidence* that they will not be disclosed;

This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties;

The *relation* must be one which in the opinion of the community, ought to be sedulously *fostered*.

The *injury* that would inure to the relation by the disclosure of the communication must *be greater than the benefit* thereby gained for the

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*The Alienability of Evidentiary Privileges: Of Property, and Evidence, Burden and Benefit, Hearsay and Privilege*, 80 ST. JOHN’S L. REV. 497, 511 (2006).

147. See Anderson, *supra* note 3, at 493.

148. *Nixon*, 418 U.S. at 710.

149. See Rubinstein, *supra* note 1, at 230; “Exceptions from the general rule disfavoring testimonial privileges may be justified, however, by a public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth.” *Id.* at 230 n.42 (citing *Jaffee*, 518 U.S. at 9) (internal quotation marks omitted).

150. Rubinstein, *supra* note 1, at 230

151. See *id.*

152. See *id.* at 230 n.46.

153. Professor Wigmore is a “long acknowledged preeminent authority on the law of evidence in this country.” Moberly, *supra* note 2, at 511 n.21 (quoting *Ohio v. Sims*, 369 N.E.2d 24, 39 (Ohio Ct. C.P. Cuyahoga Cnty. 1977)).

154. Moberly, *supra* note 2, at 533 n.205.



correct disposal of litigation.<sup>155</sup>

Although recent United States Supreme Court precedent has not solely depended on Professor Wigmore's four factors,<sup>156</sup> they have been willing to recognize a new privilege only if it "promotes sufficiently important issues to outweigh the need for probative evidence."<sup>157</sup> One prominent scholar has even summarized that judicial examination of privileges is a "common law cost benefit analysis."<sup>158</sup> Regardless of the nomenclature used, scholars have generally maintained that public policy supports the recognition of a labor relations privilege.<sup>159</sup>

### A. *Judicial and Administrative Evolution: Addressing the Recognition of a Labor Relations Privilege*

There have been a number of courts and administrative agencies that have found unfair labor practices where employers seek confidential collective bargaining communications due to their "inherently coercive" nature.<sup>160</sup> This recognition of a labor relations privilege is established with respect to parties involved in a labor-management relationship.<sup>161</sup> In order for a labor relations privilege to apply to strangers outside this labor-management relationship, "the reach of these decisions would have to be extended beyond the scope of traditional labor law" recognizing this privilege under the confines of that relationship.<sup>162</sup> As mentioned in the Introduction,<sup>163</sup> where courts and administrative agencies have addressed the recognition of a labor relations privilege outside the labor-management relationship, there have been conflicting decisions.<sup>164</sup>

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155. See *id.* at 533 (citing 8 WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2285 (1961)).

156. See Rubinstein, *supra* note 1, at 230-31.

157. Univ. of Pa. v. EEOC, 493 U.S. 182, 189 (1990) (quoting Trammel v. United States, 445 U.S. 40, 51 (1980)); see also Dinnan v. Board of Regents, 661 F.2d 426, 429 (5th Cir. 1981) ("Privileges are based upon the idea that certain societal values are more important than the search for truth.").

158. Rubinstein, *supra* note 1, at 231 (quoting MERRICK T. ROSSEIN, EMPLOYMENT DISCRIMINATION LAW AND LITIGATION § 17.72 (2006)).

159. See generally Anderson, *supra* note 3; Moberly, *supra* note 2; Rubinstein, *supra* note 1.

160. See Rubinstein, *supra* note 1, at 237 & n.95.

161. See *id.* at 223.

162. See *id.* at 238. Professor Rubinstein defines this extension to strangers beyond the labor-management relationship as a "full labor relations privilege." *Id.* at 223.

163. See *supra* Introduction.

164. Rubinstein, *supra* note 1, at 224-25 n.13.



In 1977 the NLRB in *Berbiglia*<sup>165</sup> revoked a broad subpoena that allowed the employer to seek documents that revealed collective bargaining strategies.<sup>166</sup> The administrative law judge (“ALJ”) reasoned that the relevance of the documents to the dispute did not trump the union’s interest in the “essence of collective bargaining.”<sup>167</sup> Moreover, the ALJ noted that effective collective bargaining requires that the parties have the opportunity “to devise their strategies without fear of exposure.”<sup>168</sup> The ALJ went so far as to state “this necessity is so self-evident as apparently never to have been questioned.”<sup>169</sup>

In 1978, the United States Supreme Court held in *NLRB v. Robbins Tire*<sup>170</sup> that an employer could not use the Freedom Of Information Act (FOIA) to obtain union affidavits.<sup>171</sup> Allowing an employer to use FOIA provided too easy of an opportunity for the employer to coerce or intimidate its employees and could interfere with enforcement proceedings.<sup>172</sup> The Supreme Court’s ruling “was premised on the Court’s express recognition of the unique procedural and practical requirements of federal labor law.”<sup>173</sup>

In *City of Newburgh v. Newman*,<sup>174</sup> the appellate division of New York affirmed the Public Employment Relation Board’s (“PERB”)<sup>175</sup> decision that questioning a union official about discussions he had with an employee who came to him for advice “depriv[ed employees] of their rights to organize.”<sup>176</sup> *City of Newburgh* is considered a landmark decision in recognizing a labor relations privilege because it “recognized the important right of a bargaining unit member to consult with his union in a confidential manner without outside interference.”<sup>177</sup> In ruling that this sort of questioning may chill lawful union activity,<sup>178</sup> the Court explained that if permitted, it would seriously impede a union

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165. 233 N.L.R.B. 1476, 1479 (1977).

166. See *id.* at 1495.

167. *Id.*

168. *Id.*

169. *Id.*

170. 437 U.S. 214 (1978).

171. See *id.* at 236.

172. See *id.* at 239.

173. Goldman, *supra* note 5, at 249.

174. 421 N.Y.S.2d 673 (N.Y. App. Div. 1979).

175. See N.Y. CIV. SERV. LAW § 205 (McKinney 2012). The Public Employment Relations Board (PERB) is the public agency that administers New York’s Taylor Law. See § 205(1).

176. *Newburgh*, 421 N.Y.S.2d at 676.

177. See Rubinstein, *supra* note 1, at 238.

178. *Newburgh*, 421 N.Y.S.2d at 675-76.



member from engaging in protected concerted activity.<sup>179</sup> This sort of questioning would tend to deter union members from seeking advice and representation when faced with pending charges.<sup>180</sup> The Court, however, did limit the extent of this labor relations privilege with respect to confidential labor relations communications between a union and its members.<sup>181</sup>

In 1981, the NLRB in *Cook Paint and Varnishing Co.*<sup>182</sup> held that an employer commits an unfair labor practice when it questions a union representative about events to which he was not an eyewitness.<sup>183</sup> The NLRB narrowly decided that employers could not extract confidential labor relations communications from employees without creating a general labor relations privilege.<sup>184</sup> The Board reasoned that compelling disclosure under threat merely because of one's status as a union representative tends to have a "chilling effect over all of its employees and their stewards who seek to candidly communicate with each other over matters involving potential or actual discipline."<sup>185</sup>

In *Illinois Educational Labor Relations Board v. Homer Community Consolidated School District*,<sup>186</sup> the Supreme Court of Illinois ruled that in a labor dispute, certain employer information

179. *See id.*

180. *See id.* at 675.

181. *See id.* at 676.

182. 258 N.L.R.B. 1230 (1981).

183. *See id.*

184. *See id.* at 1232. The NLRB did not intend to create a

blanket rule, we wish to emphasize that our ruling in this case does not mean that all discussions between employees and stewards are confidential and protected by the [NLRA]. Nor does our decision hold that stewards are, in all instances, insulated from employer interrogation. We simply find herein that, because of [the steward's] representational status, the scope of [the employer's] questioning, and the impingement on protected union activities,

the employer's interview of the steward violated the NLRA. Rubinstein, *supra* note 1, at 240 n.110 (citing *Cook Paint & Varnishing Co.*, 258 N.L.R.B. at 1232).

185. *Cook Paint & Varnishing Co.*, 258 N.L.R.B. at 1232.

Such consultation between an employee potentially subject to discipline and his union steward constitutes protect activity in one of it's purest forms. To allow Respondent here to compel the disclosure of this type of information under threat of discipline manifestly restrains employees in their willingness to candidly discuss matters with their chosen statutory representatives.

Rubinstein, *supra* note 1, at 239 (citing *Cook Paint & Varnishing Co.*, 258 N.L.R.B. at 1232).

186. 547 N.E.2d 182 (Ill. 1989). This decision was reinforced by an Illinois statute recognizing a labor relations privilege that extends to parties outside the labor management relationship however is subject to a number of caveats. *See* 735 Ill. COMP. STAT. 5/8-803.5(b) (1993).



regarding bargaining was protected from disclosure to the union.<sup>187</sup> The Court recognized a labor relations privilege, but one that was nonetheless deemed to be qualified and could be overcome if the union could demonstrate necessity.<sup>188</sup> In doing so the Court reasoned that there is a “strong public policy” that stipulates the need to protect confidential bargaining information and strategies.<sup>189</sup>

In 1991, the Supreme Court of New York for New York County decided *Seelig v. Shepard*,<sup>190</sup> which has been perceived as “the most significant labor relations privilege case to date.”<sup>191</sup> In *Seelig*, the Court quashed a subpoena by a New York City Commissioner investigating a job action by a corrections officer, seeking to find out about the communications the president of the union had with union members.<sup>192</sup> In doing so, the court recognized a labor relations privilege that extended beyond the traditional labor-management relationship.<sup>193</sup>

The Court recognized that the freedom of union members to communicate with their lawfully elected representatives free from any intrusion by the government is a clear benefit to society.<sup>194</sup> Moreover, this freedom to communicate ensures that unions maintain their role as effective representatives of their members and is vital in guaranteeing that members will be assured that their communications will not be “pried out of the representatives by an overzealous governmental agency.”<sup>195</sup> Above all, it is most important to note “the court did not limit the application of this privilege to employers and employees even though a third-party was seeking confidential labor relations information.”<sup>196</sup>

In 1994, the D.C. Circuit in *U.S. Dep’t of Justice v. FLRA*<sup>197</sup> vacated an order of the Federal Labor Relations Authority (“FLRA”) holding that questioning an employee and his union representative about their “privileged conversations” was an unfair labor practice.<sup>198</sup>

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187. See *Homer*, 547 N.E.2d at 187.

188. See *id.* at 188.

189. See *id.* at 187.

190. 578 N.Y.S.2d 965 (N.Y. Sup. Ct. 1991).

191. Rubinstein, *supra* note 1, at 244.

192. See *Seelig*, 578 N.Y.S.2d at 966.

193. See Rubinstein, *supra* note 1, at 245 (“The court held that there is a full labor relations privilege that protects communications between labor relations officials and members.”).

194. See 578 N.Y.S.2d at 967.

195. *Id.*

196. See Rubinstein, *supra* note 1, at 245.

197. 39 F.3d 361 (D.C. Cir 1994).

198. See *id.* at 364.



Although the Court respected the FLRA's recognition of a labor relations privilege as between the labor-management relationship, their authority was nonetheless limited to federal labor relations matters.<sup>199</sup> As a result the Court refused to extend that authority as to protect such conversations from being disclosed in court, or before a grand jury.<sup>200</sup> This is because the privilege the FLRA recognized was not enforceable "against the world"<sup>201</sup> since the FLRA did not possess any jurisdiction pertaining to matters outside of labor-management proceedings.<sup>202</sup>

In 1998, the Eastern District of New York held in *In Re Grand Jury Subpoenas*<sup>203</sup> that union representatives who had engaged in conversations with members facing possible criminal charges could be subpoenaed to testify before a grand jury.<sup>204</sup> Here, the court found that the union failed to show that the labor-management relationship was held in such high esteem by society that it warranted the protection of such conversations at the cost of losing evidence deemed vital to the facilitation of justice.<sup>205</sup> The only support the court found that would warrant the recognition of a labor relations privilege were cases<sup>206</sup> in which only an "employer commits an unfair labor practice by questioning a union official about communications with a represented employee pertaining to internal disciplinary proceedings."<sup>207</sup>

The California Court of Appeals in 2003 decided *American Airlines, Inc. v. Superior Court*.<sup>208</sup> The Court ruled that the Railway Labor Act did not contain language warranting the creation of a labor relations privilege.<sup>209</sup> As a result, a union official was compelled to

199. *See id.* at 369.

200. *See id.*

201. *See id.* Inspector General's office "operates independently, his investigatory procedures are not a proper subject of collective bargaining, and he does not act on behalf of the employing agency." *Id.*

202. *See id.*

203. 995 F. Supp. 332 (E.D.N.Y. 1998).

204. *See id.* at 337.

205. *See id.* at 335.

206. *See id.* at 336 (citing *City of Newburgh v. Newman*, 421 N.Y.S.2d 673, 675-76 (N.Y. App. Div. 1979)); *Seelig*, 578 N.Y.S.2d at 967. Professor Rubenstein opined that the Court erred in its analysis of *Seelig* "in that the information was sought from union officials was not sought by *Seelig's* employer. Rather, a third-party conducted an investigation and issued a subpoena." Rubenstein, *supra* note 1, at 249.

207. Moberly, *supra* note 2, at 559 (citing *Grand Jury Subpoenas*, 995 F. Supp. at 336-37).

208. 8 Cal. Rptr. 3d 146 (Cal. Ct. App. 2003).

209. *See id.* at 153. The Court found that "there is no foundation from which to make the legal leap from the freedom of designation, self-organization and collective bargaining to an evidentiary privilege for communications between a union representative and a union member" (citing *Tanzola*



testify about confidential communications between he and non-affected union members regarding an alleged wrongful discharge of a member.<sup>210</sup> The Court reasoned that this sort of privilege had the potential to undermine the “statutory obligation” of labor and management to prevent discrimination by ensuring all claims are thoroughly investigated by obtaining all relevant information.<sup>211</sup> Even though the Court did acknowledge there may be policy reasons to support the recognition of a labor relations privilege in this context, it was nonetheless a job better suited for the legislature and not the courts.<sup>212</sup>

More recently in *Peterson v. State*, decided in August 2012, the Supreme Court of Alaska recognized a labor relations privilege in determining that a union representative could not be compelled to testify regarding communications made between he and a state employee.<sup>213</sup> The court stressed that in order to ensure that their statutory rights are upheld, union members and their representatives must feel that they are free to communicate without undue interference by an “overzealous government agency.”<sup>214</sup> Without such a privilege, any interference would “tend to deter members of the union from seeking advice and representation . . . thereby seriously impeding their participation in an employee organization.”<sup>215</sup> This sort of open, honest communication guarantees that employees will receive the best representation possible from their unions.<sup>216</sup>

### B. Reconciling a Labor Relations Privilege with the Attorney-Client Privilege

The unique nature of labor relations proceedings in the administrative context often calls for a labor official in his “legal or

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v. De Rita, 285 P.2d 897, 899 (Cal. 1955), which provides that “privileges preclude relevant evidence and thus should be strictly construed within the narrow limits of the statutes”; see also Rubinstein, *supra* note 1, at 250.

210. See *Am. Airline*, 8 Cal. Rptr. 3d at 158.

211. See *id.* at 153 (“To carry out its obligation to prevent discrimination by investigating claims, an employer likely will need to obtain information from a wrongdoer’s co-workers who were in a position to witness the misconduct and identify the wrongdoer.”).

212. See *id.* (“This is especially true in an area where the Legislature has declared the state’s public policy in such detail.”)

213. See *Peterson v. Alaska*, 280 P.3d 559, 565 (Alaska 2012).

214. *Id.* (citing *Seelig v. Shepard*, 578 N.Y.S.2d 965, 967 (N.Y. Sup. Ct. 1991)).

215. *Peterson*, 280 P.3d at 565 (citing *City of Newburg v. Newman*, 421 N.Y.S.2d 673, 675-76 (1979)).

216. See *Peterson*, 280 P.3d at 565.



quasi-legal” capacity to participate in negotiations, arbitrations, and mediations.<sup>217</sup> The federal Administrative Procedures Act permits representation in an administrative setting by a non-attorney where applicable as long as they are qualified.<sup>218</sup> The justification for this type of representation by non-attorneys is deeply rooted in public policy affording indignant claimants with the opportunity to be represented in administrative settings where legal counsel cannot be afforded or would not be practicable.<sup>219</sup> It has been argued that without protection of such representation from non-attorneys, the content of communications made between a claimant and his/her non-attorney representative could later be subject to discovery, which would impinge on the claimant’s freedom to select his/her own representation.<sup>220</sup>

Union representatives are in a unique and advantageous position to provide effective representation to union members because they are likely familiar with the existing collective bargaining agreement and disciplinary and grievance-arbitration procedures.<sup>221</sup> This premise is further strengthened by the fact that once a union is designated as the lawful representative of an employee bargaining unit, that union becomes tasked with handling all issues and concerns arising under any collective bargaining agreement in place.<sup>222</sup> The Supreme Court in *NLRB v. J. Weingarten, Inc.*<sup>223</sup> even affirmed the NLRB’s holding that an unfair labor practice was committed where an employer failed to comply with an employee’s request for their union representative to attend an investigatory interview the employee legitimately believed could conclude with disciplinary action being rendered.<sup>224</sup> Moreover, federal labor law generally seems to discourage attorney involvement in

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217. See Anderson, *supra* note 3, at 523 (citing Mitchell H. Rubinstein, *A New York Court Recognizes a Labor Union Evidentiary Privilege*, 9 LAB. LAW. 595, 600 (1993)).

218. 5 U.S.C. § 555(b) (2006). See, e.g., 37 C.F.R. § 1.31 (2006); 26 U.S.C. § 7521(c) (2006); 38 U.S.C. § 5904(a) (2006) (federal regulations and statutes permitting representation by non-attorneys).

219. See Jennifer Brodkey Kaufman, Comment, *Asserting Confidentiality: The Need for a Lay Representative-Claimant Privilege*, 15 PAC. L.J. 245, 247 (1983-1984).

220. See *id.* at 261.

221. See Camacho v. Ritz-Carlton Water Tower, 786 F.2d 242, 245 (7th Cir. 1983) (noting union representatives possess an exceptional understanding of collective bargaining agreements despite their lack of attorney skills); Moberly, *supra* note 2, at 575.

222. Moberly, *supra* note 2, at 577.

223. 420 U.S. 251 (1975).

224. See *id.* at 252-53, 252 n.1 (upholding NLRB finding that employers denial of members request violated § 8(a)(1) of the National Labor Relations Act “because it interfered with, restrained, and coerced the individual right of the member to engage in protected concerted activity for mutual aid and protection as protect by § 7 of the Act.”).



administrative settings because only representation by union representatives has been approved as protected concerted activity under the NLRA.<sup>225</sup>

With these principles in mind it has been reasoned that attorneys should “hold no monopoly on representation in labor matters.”<sup>226</sup> Protection of confidential documents and communications made between labor and management from being disclosed is well founded in public policy and is comparable to similar privileges protecting attorneys and their clients.<sup>227</sup> This beneficial public policy supports the principle that unions best serve their members when both are free to communicate without any undue interference or fear that such communications could be pried from their representatives.<sup>228</sup> To hold otherwise, as the California Supreme Court has reasoned, “would, in truth, be a trap by inducing confidential communications and then allowing them to be used against the claimant. We do not attribute such a sadistic intent to the Legislature.”<sup>229</sup>

Labor-management disputes have been known to be as contentious as court proceedings.<sup>230</sup> If a labor relations privilege is not recognized, it could temper open and honest communication between employees and their union representatives and would fail to serve the public interest in promoting judicial economy.<sup>231</sup> A labor relations privilege promotes the deeply rooted public policy established in the NLRA to advance industrial harmony by allowing employees to freely organize, bargain collectively and engage in protected concerted activity.<sup>232</sup>

In order for the collective bargaining process to continue functioning within the spirit of the NLRA, confidential collective bargaining documents and communications should be protected from

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225. See, e.g., *Johnson v. United Steelworkers of Am.*, 843 F. Supp. 944, 947 (M.D. Pa. 1994) (stating that union representatives are both favored and preferred over attorneys in administrative settings under federal law); *McLean Hosp.*, 264 N.L.R.B. 459, 472 (1982) (“Representation by private counsel is not tantamount to union representation within the rule of *Weingarten* nor does representation of an employee by his private counsel constitute concerted activity within the purview of the [National Labor Relations] Act.”).

226. Moberly, *supra* note 2, at 572 (citing Rubinstein, *supra* note 217, at 600).

227. *Ill. Educ. Labor Relations Bd. v. Homer Cmty. Consol. Dist. No. 208*, 547 N.E.2d 182, 187 (Ill. 1989).

228. See *Seelig v. Shepard*, 578 N.Y.S.2d 965, 967 (N.Y. Sup. Ct. 1991).

229. *Welfare Rights Org. v. Crisan*, 661 P.2d 1073, 1077 (Cal. 1983).

230. See Rubinstein, *supra* note 1, at 258.

231. See *Anderson*, *supra* note 3, at 524 (citing Rubinstein, *supra* note 217, at 601).

232. See *id.* (citing Rubinstein, *supra* note 217, at 601 & 29 U.S.C. § 151).



disclosure.<sup>233</sup> Effective collective bargaining requires the security that two independent parties can communicate without the fear of unintended disclosure.<sup>234</sup> Therefore, in order for this concept to become a reality, parties engaged in collective bargaining must be protected from being required to disclose their bargaining strategies.<sup>235</sup> It is also pertinent to note that this protection has also been afforded to management in addition to union representatives and union members.<sup>236</sup>

Opponents to a labor relations privilege have found that if any privilege should exist, it should be limited to the confines of the attorney-client privilege.<sup>237</sup> Although the *City of Newburgh* court recognized a labor relations privilege, it was careful not to equate it with the attorney-client privilege and strictly limited its application to communications between a union representative and its members.<sup>238</sup> In *Walker v. Huie*, a federal district court failed to recognize the creation of a labor relations privilege and held that a union president could be deposed about advice given to a member in connection with investigatory and disciplinary proceedings.<sup>239</sup> The court reasoned “[t]his is not the type of relationship such as attorney-client, husband-wife, or clergy-communicant that over time the common law has considered important enough to sustain as privileged.”<sup>240</sup> Moreover, the court found this privilege undeserving of distinct recognition among other special relationships in which the courts have failed to create a privilege.<sup>241</sup> In reinforcing this rationale, the court stated that it was simply not prepared to create a privilege that it could not strictly construe, and to do so here would misconstrue the “common law definition” of an attorney.<sup>242</sup>

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233. See *Patrick Cudahy, Inc.*, 288 N.L.R.B. 968, 971 (1988).

234. See *Berbiglia*, 233 N.L.R.B. 1489 (1977).

235. See Memorandum from Barry Kearney, Assoc. Gen. Counsel Div. of Advice, United Nurses Ass’n of Cal./Union of Health Care Professionals, to William Pate, Acting Reg’l Dir., Region 21 (Feb. 17, 2005).

236. See Rubinstein, *supra* note 1, at 242.

237. See *Taylor Lumber and Treating Inc.*, 326 N.L.R.B. 1298, 1300 n.11 (1998). The ALJ not only doubted the policy rationale set forth by the NLRB in *Berbiglia*, in which the NLRB upheld a labor relations privilege, but also questioned the NLRB’s own willingness to follow the same precedent when relying on the attorney-client privilege in deciding *Patrick Cudahy*. See *id.*; See also *Berbiglia*, 233 N.L.R.B. 1489; *Patrick Cudahy*, 288 N.L.R.B. 968.

238. See *City of Newburgh v. Newman*, 421 N.Y.S.2d 673, 676 (N.Y. App. Div. 1979).

239. See *Walker v. Huie*, 142 F.R.D 497, 501-02 (D. Utah 1992).

240. *Id.* at 500-01.

241. See *id.* at 501.

242. See *id.*



### III. FEDERALLY RECOGNIZING A LABOR RELATIONS PRIVILEGE

To date, recognition of a labor relations privilege has been met with a varying degree of uncertainty as courts have struggled to reconcile whether to protect confidential communications made in labor-management settings from disclosure, or risk losing potentially important evidence.<sup>243</sup> Given the delicacy and importance of both positions, as the court in *American Airlines v. Superior Court of Ca.*<sup>244</sup> noted, any formal recognition of a labor relations privilege is a task that would most likely best be decided by the legislature as opposed to the courts.<sup>245</sup> Combine this with the fact that only two states in the country have codified a labor relations privilege,<sup>246</sup> it is clear that without a uniform statute created by Congress, the future of recognizing this privilege is uncertain at best.<sup>247</sup>

#### A. *Proposed Labor Relations Privilege*

In order for a pure labor relations privilege to be recognized and applied systematically, the privilege cannot be confined to parties traditionally engaged within the collective bargaining context, but must extend to those outside that relationship as well. The following labor relations privilege seeks to propose a uniform solution to prior uncertainties with which courts have struggled. Its structure will seek to strike a balance between the historical and contemporary importance of union members' lawful right to engage in protected concerted activities for the purpose of collective bargaining or other mutual aid or protection through representatives of their own choosing and the flow of evidence deemed vital to the facilitation of justice.

Below is a draft of the proposed labor relations privilege which combines a commonly used definition of the attorney-client privilege in federal courts<sup>248</sup> with significant elements of the only two codified

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243. See *supra* Part II.A-B.

244. 8 Cal. Rptr.3d 146 (Cal. Ct. App. 2003).

245. See *id.* at 153.

246. See *supra* Introduction, at 3 n.17.

247. Because the Supreme Court has concluded that it was "the intent of Congress to leave the recognition of privileges in the hands of the courts," absent an affirmative Act of Congress as stated in Federal Rule of Evidence 501, it is highly unlikely that a uniform labor relations privilege will ever be recognized judicially given the varying decisions already seen. See *supra* Part II.A-B.

248. See *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 358-59 (D. Mass. 1950); *United States v. Wilson*, 798 F.2d 509, 512 (1st Cir. Mass. 1986) (stating that the four criteria set



statutes recognizing a labor relations privilege,<sup>249</sup> as well as pertinent portions of the NLRA.<sup>250</sup>

### Labor Relations Privilege

An ACT Concerning the Protection of Privileged Communications or Information Involving Labor Organizations in Courts and Judicial Proceedings

#### Section 1 – Definitions

**Employee** – For purposes of this ACT means an individual represented by a labor organization regardless of whether the individual is a member of the labor organization.

**Labor Organization** – For purposes of this ACT means an organization that represents or seeks to represent workers for the purposes of collective bargaining.

**Strangers** – For purposes of this ACT means any individual that is not an employee as defined in subsection A, or an organization that represents or seeks to represent workers for the purposes of collective bargaining.

**Germaine Collective Bargaining Information** – For purposes of this ACT includes but is not limited to collective bargaining strategies, arbitration proceedings, organizing plans, or any other lawful activity pertaining to an employee's right to select representatives of their own choosing, or engagement in protected concerted activities for the purposes of collective bargaining or other mutual aid or protection.

**Employee Grievance** – For purposes of this ACT means an employee is a subject matter of an investigation, a grievance proceeding, or a civil court, administrative, arbitration, or other civil proceeding.

#### Section 2 – Labor Relations Privilege

Except as provided in Section 3, this ACT applies only if the asserted

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forth in *United Shoe* must be met in order for the attorney-client privilege to attach).

249. 735 ILL. COMP. STAT. 5/8-803.5 (2012); MD. CODE ANN., LABOR §9-124 (West 2012)

250. See *supra* note 55 and accompanying text.



holder of the privilege is an employee and the communication was made to a labor organization or agent thereof. If this privilege has been claimed and is not waived, this ACT prohibits an employee, a labor organization or an agent of a labor organization from being compelled to disclose any communication or information the labor organization or agent received or acquired in confidence, without the presence of strangers, from an employee while the labor organization or agent thereof was acting in a representative capacity concerning germane collective bargaining information, or communications pertaining to actual or impending employee grievance.

An employees' privilege under this subsection continues after termination of the employment of the employee, or the representative relationship of the labor organization or its agent with the employee.

### Section 3 – Exceptions

A labor organization or its agent *shall* disclose to the employer as soon as possible any information or communications described in Section 2 A to the extent that the labor organization or its agent reasonably believes necessary to prevent certain death or substantial bodily harm.

A labor organization or its agent *may* disclose a communication or information described in Section 2 A to the extent that the labor organization or its agent reasonably believes necessary to:

To the extent the communication or information constitutes an admission that the employee has committed, or to prevent an employee from committing, a crime, fraud, or any act in violation of a collective bargaining agreement that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the employee has used or is using the services of the labor organization or its agent;

Secure legal advice about the compliance of the labor organization or its agent with the law or the terms of a collective bargaining agreement;

Establish a claim or defense on behalf of the labor organization or its agent in a controversy between the employee and the labor organization or its agent, to establish a defense to a criminal charge or civil claim against the labor organization or its agent based on conduct



in which the employee was involved, or to respond to allegations in any proceeding concerning the performance of professional duties by the labor organization or its agent on behalf of the employee;

Comply with the terms of a collective bargaining agreement;

Or, if the labor organization has obtained the written or oral consent of the employee;

Or, if the employee is deceased or has been adjudicated incompetent by a court of competent jurisdiction and the labor organization has obtained the written or oral consent of the personal representative of the employee's estate or of the employee's guardian.

#### *B. Policy Justifications for a Federally Recognized Labor Relations Privilege*

The justification for the structure of this draft labor relations privilege is deeply rooted in the policy of the NLRA. The NLRA itself declares it to be "the public policy of the United States to eliminate causes to the free flow of commerce" through encouraging collective bargaining and promoting the rights of workers to freely organize and choose their own representatives.<sup>251</sup> This policy is also again expressly stated in Section 7 of the NLRA, which guarantees workers the right of workers to "bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ."<sup>252</sup> Senator Robert Wagner, the drafter of the NLRA himself even stated that "[t]he right to bargain collectively is at the bottom of social justice for the worker."<sup>253</sup>

Given this unambiguous Congressional mandate in the form of an express policy of the United States, it is not illogical to see why non-attorneys frequently act as representatives in labor-management proceedings.<sup>254</sup> The federal Administrative Procedures Act even expressly permits this type of lay representation where permitted.<sup>255</sup> The

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251. See *supra* note 46 and accompanying text.

252. See National Labor Relations (Wagner) Act, 29 U.S.C. § 157 (2006).

253. See *supra* Part I.

254. See *supra* Introduction.

255. See *supra* Part II.B.



nature of labor-management proceedings also tends to be highly adversarial and litigious,<sup>256</sup> which adds even more importance to the role of non-attorney representation especially since legal representation has not been recognized as protected concerted activity under the NLRA.<sup>257</sup> Since these non-attorney representatives are not covered by the attorney client privilege,<sup>258</sup> a uniform federally created labor relations privilege is extremely vital in protecting the policy set forth in the NLRA when dealing with third parties outside the labor-management relationship in judicial proceedings.

Opponents to this position in the federal courts<sup>259</sup> have primarily taken the approach that privileges have the potential to suppress reliable, sometimes crucial evidence, and the public has a right to the evidence of everyone.<sup>260</sup> However, it is interesting to point out that the existence of privileges serve to protect revered relationships that would be particularly sensitive to “deterioration should their necessary component of privacy be continually disregarded by courts of law.”<sup>261</sup> The Supreme Court has noted that privileges should only be created when in furtherance of good public policy<sup>262</sup> and also that there is little difference between ambiguous or inconsistently applied privileges and the absence of a privilege all together.<sup>263</sup>

If it is not vital to continue furthering public policy codified in the NLRA, which has stood since 1935, it is difficult to imagine many other public policy interests in this area of greater importance worth advancing. Although the case precedent supporting a labor relations privilege has resulted in a variety of different outcomes, the reasoning provided by the courts tends to support the same policy implications that the NLRA and Section 7 are in place to protect.<sup>264</sup> Whether by subpoena, or compelling a party to disclose confidential collective bargaining material or communications, courts and administrative agencies supporting the creation of a labor relations privilege in any form have been generally consistent in pointing out that employees

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256. See *supra* Introduction.

257. See *supra* Part II.B.

258. See *supra* Introduction.

259. See *supra* Part II.A-B.

260. See *supra* Parts II, II.B.

261. Anderson, *supra* note 3 at 493; see *supra* Part II.

262. See *supra* Part II.

263. See *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981).

264. See *supra* Parts II.A, II.B.



rights need to be protected.<sup>265</sup> This is evidenced by decisions that have noted that unions operate most effectively when there are free flowing channels of communication between unions and their members free from any leaks to outside parties.<sup>266</sup>

The predominant point that almost all of these decisions seem to highlight is that compelling disclosure of confidential communications or material tends to have a chilling effect on open and honest communication between union representatives and members.<sup>267</sup> This chilling effect runs contrary to the advancement of the NLRA's public policy establishing employees' right to organize and bargain collectively through representation of their own choosing since disclosure creates a fear that employees may no longer confide in their lawful representatives.

These specific policy justifications in favor of a federally recognized labor relations privilege speak to the very deliberate structure of the proposed privilege. Sections 2 and 3 both have a foothold in protecting the fundamental essence of an employee's right to freely choose their own representation and to engage in protected concerted activity or other mutual aid and protection. Section 2 establishes the heart of the privilege by setting up an explicit protection against the type of disclosure to third parties outside the labor-management relationship that tends to have a chilling effect on communications between union representatives and members. Section 3 creates very limited exceptions where disclosure would be appropriate in circumstances where an employee has "forfeited" this protection either through crime, fraud, consent, or if the employee is deceased. Overall this proposed privilege creates a uniform protection of the public policy rooted in the NLRA while still creating circumstances where disclosure is permissible in certain contexts.

### *C. Why A Labor Relations Privilege Is Relevant Today*

Throughout this Note, arguments have been set forth in order to justify the recognition of a federally recognized labor relations privilege. However, that still leaves the imminent question of, "Why now?" The answer to this question is also rooted in the fundamental public policy

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265. See *supra* Parts II.A, II.B.

266. See *supra* Part II.A.

267. See *supra* Part II.A.



that was expressly codified in the passing of the NLRA, and whose effects are still relevant today given the Obama Administration's political response in the aftermath of the 2007-2009 recession.

Parts II and II.A of this Note navigate through two very intricate and strikingly similar economic periods while introducing a multitude of economic data to set up a very general picture of the distinct political response to each of the economic crises presented. Although there are seemingly endless amounts of data that could have been introduced or analyzed, it is far beyond the scope of this Note. What is important for purposes of this Note is not the actual figures, but what the figures represent in the abstract. By looking at the numbers through this specific lens, a very interesting parallel is drawn that makes a federally recognized labor relations privilege today so vital.

Beginning with the Great Depression, the raw economic data illustrates that the American people were victims of mass unemployment and a sharp decrease in wages.<sup>268</sup> Just as these unemployed workers and abysmal wages became the focal point of public attention, Democratic President Franklin D. Roosevelt took office and his administration immediately took action to combat these effects of the Great Depression.<sup>269</sup> The solution to these problems focused on putting money back in the pockets of the unemployed by getting them back to work and increasing their wages.<sup>270</sup> In throwing his support behind Senator Robert Wagner's NLRA, FDR helped ensure workers' rights to organize and collectively bargain through freely chosen representatives.<sup>271</sup> It was Senator Wagner's belief that collective bargaining was at the core of bridging the gap between mass purchasing power and sustaining full employment and production in order to preserve both political and economic democracy in America.<sup>272</sup>

The recession that occurred between 2007-2009 had the effect of creating comparably low unemployment rates and workers' wages in America.<sup>273</sup> In the aftermath, President Obama, also a Democrat, and his administration had a strikingly similar response to FDR and Senator Wagner in restoring the economy back to full strength by making it a priority to create new jobs and to make sure people were rewarded with

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268. See *supra* Part I.

269. See *supra* Part I.

270. See *supra* Part I.

271. See *supra* Part I.

272. See *supra* Part I.

273. See *supra* Part I.A.



honest wages.<sup>274</sup> In his 2013 State of the Union Address, President Obama made it clear that America would be a magnet for new jobs and manufacturing, and the effects of that agenda can be seen with the re-shoring of major manufacturing companies.<sup>275</sup> This re-shoring is also partially attributable to rising costs of labor abroad, higher skilled yet cheaper labor domestically, and new labor contracts being passed.<sup>276</sup>

In the wake of the Great Depression, the NLRA was passed in response to dire economic conditions with the belief that preserving the fundamental policy of workers' rights to freely organize, bargain collectively and engage in protected concerted activity was the only way to avoid devastating depressions.<sup>277</sup> Similarly, in the fallout from the recession of 2007-2009, these fundamental rights again will need to be protected, but in a different capacity. As jobs and wages are again at the forefront of the recovery effort, manufacturing companies that are aiding in creating these new jobs have been opening their factories in right-to-work states, which are feared to stifle unions.<sup>278</sup>

Despite this sentiment, union rates are up in eight of these states and the NLRB has proven that they are taking a firm stance against companies that may be moving to right-to-work states because of an anti-union animus.<sup>279</sup> As a result, unions, although not at the numbers they once were, are not going anywhere, and coupled with the number of new manufacturing jobs,<sup>280</sup> there is ample room for union numbers to increase and at the worst, be maintained. Given the highly litigious nature of labor-management proceedings, the odds are that the type of disclosure that has the potential for causing a chilling effect on Section 7 rights is not going to disappear anytime in the foreseeable future. Therefore, a federally recognized labor relations privilege will be vital in protecting modern day collective bargaining materials and communications much as the NLRA was when it was passed.

In turn, a federally recognized labor relations privilege will also serve to further the goals of the NLRA by creating a sense of security with employees in knowing that their Section 7 rights will be protected and not chilled with the disclosure of confidential collective bargaining

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274. *See supra* Part I.A.

275. *See supra* Part I.A.

276. *See supra* Part I.A.

277. *See supra* Part I.

278. *See supra* Part I.B.

279. *See supra* Part I.B.

280. *See supra* Part I.B.



materials to third parties outside the labor-management context.

### CONCLUSION

The limited and conflicting case law that deals with a labor relations privilege has undoubtedly been of little help, if at all, in creating any sort of privilege that would apply uniformly in the courts.<sup>281</sup> This is even more striking given the litigious and adversarial nature of labor-management proceedings where non-attorneys often act as the sole representatives of the parties involved.<sup>282</sup> Given the fact that Federal Rule of Evidence 501 has been interpreted to mean that the creation of privileges has been left to the courts,<sup>283</sup> absent a federally recognized labor relations privilege. The future of a uniform privilege is uncertain, and uncertain privileges and those that appear to be but are applied inconsistently are similar to having no privilege at all.<sup>284</sup>

The proposed labor relations privilege seeks to create this uniformity by protecting the vital public policy rooted in the NLRA, while still allowing for circumstances where disclosure would be permissible. Moreover, given the current political agenda of President Obama and his administration to create jobs, and the affirmative response of large American manufacturing companies aiding in this process, a federally recognized labor relations privilege is not only crucially needed, but needed immediately. This is because a federally created labor relations privilege promotes the goals of the NLRA by ensuring that confidential collective bargaining materials and communications are protected from disclosure to third parties outside the collective bargaining relationship.

*Christopher M. Muñiz \**

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281. See *supra* Part II.A

282. See *supra* Introduction.

283. See *supra* Part II.

284. *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981).

\* I would like to thank Professor Mitchell H. Rubinstein, whose many well-respected writings on the development of a labor relations privilege inspired and helped to lay the foundation for this Note. Also, a very special thank you to all of the Journal staff who assisted in the editing process, especially the Managing Board for the tremendous amount of time and effort they dedicate to the continued success of the Journal. To my family, Mom, Dad, Matt, Bill, Grandpa and Grandma, thank you for always believing that I was destined to do something special with my life and for the infinite amount of love and encouragement that you provide daily. And last, but certainly not least, to Stephanie. Thank you for always supporting me in reaching my true potential and for being a constant source of strength, love and optimism.