Employer Supported Child Care as a Mandatory Subject of Collective Bargaining

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NOTES

EMPLOYER SUPPORTED CHILD CARE AS A MANDATORY SUBJECT OF COLLECTIVE BARGAINING

I. INTRODUCTION

Child care is a vital, emerging issue in the workplace with vast implications on the well-being of employees, as well as on America's economy. The demand for child care stems largely from the change in the traditional American family, which no longer consists of the father as the sole breadwinner and the mother as the sole caretaker of the child. In most families today, both parents work outside the home. Recently, there has been a great increase in the number of

1. For example, participation in the workforce has become the norm for most women today. WOMEN & WORK, U.S. DEP'T OF LABOR, 7 OUT OF 10 WOMEN IN 25-54 AGE GROUP IN LABOR FORCE TODAY, ECONOMIST SAYS (1988). This is demonstrated in the present pattern of labor activity as compared to that of 15 years ago. Id. According to one economist, in the mid 1970's, women's labor force participation dropped during the "main child bearing years of 25 to 34." Id. However, this pattern has shifted, and now women's workforce participation patterns by age are similar to those of men. Id. 65% of all women between the ages of 16 and 64 are presently working, compared with 54% in 1975 and 8.6% in 1940. M. FRIED, BABIES AND BARGAINING: WORKING PARENTS TAKE ACTION 40 (1987).

2. See WOMEN'S BUREAU, OFFICE OF THE SECRETARY, U.S. DEP'T OF LABOR, EMPLOYERS AND CHILD CARE; BENEFITING WORK AND FAMILY 1 (1989) [hereinafter EMPLOYERS AND CHILD CARE] (comparing the dramatic increase in the number of mothers in the workforce with children under six years old, from 12% in 1950 to 54% in 1985); see also FRIED, supra note 1, at 40 (stating that 68% of married women and 76% of all single women with children between the ages 6 and 17 are working).

3. See EMPLOYERS AND CHILD CARE, supra note 2, at 1 (explaining that most mothers and fathers work outside the home because "[f]amilies have had to substantially increase their incomes over the last 10 years in order to preserve their standard of living."); see also infra
households headed by single mothers, thus increasing the need for employer supported child care.

Since employer supported day care is so desperately needed by our society, it should be construed as a mandatory subject of collective bargaining, as defined in the National Labor Relations Act (hereinafter “NLRA” or “Act”). Section 8(d) of the NLRA requires an employer to “bargain collectively” with the employees’ representative, concerning “wages, hours and other terms and conditions of employment.” Subjects falling within the statutory language of section 8(d) of the Act are regarded as mandatory subjects of collective bargaining, meaning that an employer and union must bargain and upon which either party may insist to the point of impasse. If the matter concerns a permissive rather than a mandatory bargaining subject, the parties are not required to bargain about it. To ensure that the Act would adapt to changing circumstances, Congress gave no further definition as to which subjects should be mandatory. As a result, the Supreme Court has concluded that Congress rejected a narrow limitation on mandatory bargaining subjects, and instead, left broad discretion to the National Labor Rela-

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4. See EMPLOYERS AND CHILD CARE, supra note 2, at 1. “In 1985, 21% of all households with children under 18 years old were headed by a single mother and 2% were headed by a single father. The number has increased significantly since 1960 when only 9% of households were headed by a single parent.” Id.

5. This need for child care is expected to increase even further. It is not at all likely that women will decrease their labor force participation and return to the home. EMPLOYERS AND CHILD CARE supra note 2, at 1. In fact, projected trends indicate that six out of ten new entries in the labor force between the years 1988 and 2000 will be women. WOMEN & WORK, U.S. DEP’T OF LABOR, 6 IN TEN NEW LABOR FORCE ENTRANTS WILL BE WOMEN (1988).

6. Section 8(d) of the Act defines collective bargaining as follows: For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party to agree to a proposal or require the making of a concession.


7. NLRA § 8(d), 29 U.S.C. § 158(d).

8. “Read together, these provisions [section 8(a)(5), defining an unfair labor practice for employers, and section 8(d), defining collective bargaining] establish the obligation of the employer and the representative of its employees to bargain with each other in good faith with respect to ‘wages, hours and other terms and conditions of employment.’” NLRB v. Borg-Warner Corp., 356 U.S. 342, 349 (1958).


10. See infra notes 122-26 and accompanying text.
In 1969, Congress recognized the need for employer supported child care.\textsuperscript{12} Congress amended section 302 of the Labor Management Relations Act (hereinafter "LMRA") to allow this type of employer contribution to act as an exception to the general prohibition of employers' payments to employees.\textsuperscript{18} However, this amendment was enacted pursuant to the provision that the payment be a permissive subject of collective bargaining.\textsuperscript{14} This proviso is inconsistent with prior case law and the legislative history of the NLRA, which gives the Board broad discretion to interpret the classification of bargaining subjects.\textsuperscript{15}

This Note explores the need to redact the statutory proviso of section 302 of the LMRA, which states that child care benefits cannot be a mandatory subject of collective bargaining. Congress' goal in enacting this amendment was for employers to provide child care

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  \item \textsuperscript{11} See, e.g., Ford Motor Co. v. NLRB, 441 U.S. 488, 496 (1979) (stating that Congress made a conscious decision when it delegated to the Board the primary responsibility of construing the statutory language of the Act).
  \item \textsuperscript{13} 29 U.S.C. § 186(c)(7) (1947), which states the general prohibition on financial transactions, explains that:
    \begin{itemize}
      \item (a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, any money or other thing of value-
        \begin{itemize}
          \item (1) to any representative of any of his employees who are employed in an industry affecting commerce; or
          \item (2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or
          \item (3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or
          \item (4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions or duties as a representative of employees or as such officer or employee of such labor organization.
        \end{itemize}
    \end{itemize}
  \item \textsuperscript{14} 29 U.S.C. § 186(a) (1947). In 1969, Congress amended this general restriction and stated that the provisions of this section shall not be applicable "with respect to money or other thing of value paid by any employer to a pooled or individual trust fund established for the purpose of child care centers for preschool and school age dependents of employees." 29 U.S.C. § 186(c)(7) (1969).
  \item \textsuperscript{15} See infra notes 122-26 and accompanying text.
\end{itemize}
support to meet the needs of working mothers. However, since the enactment of this amendment, there has been a great change in the workforce, creating more demands for alternatives to the traditional work schedules. This change in demographics, coupled with an in-substantial result in employer-supported day care have frustrated Congress’ intent. Therefore, a viable solution to foster Congress’ primary goal in passing the amendment would be to construe employer supported child care as a mandatory bargaining subject, thereby redacting the proviso which prohibits this classification.

In Part II, this Note considers the social and economic changes in our society that have increased the demand for child care. Several employers and labor organizations have engaged in supporting employees with different forms of child care, and the effects have been favorable. Part III discusses the development of the distinction between mandatory and permissive bargaining subjects, which is traced through the legislative history of the Act, as well as Supreme Court decisions. These decisions indicate that the responsibility for defining the area of bargaining should be left to the Board, subject to judicial review. Part IV explains the congressional effort to meet the demand of child care, which led to the amendment of section 302 of the LMRA. Since this amendment contains a provision precluding the classification of employer supported child care as a mandatory bargaining subject, it is inconsistent with Congress’ original intent of the Act. Congress intentionally gave the Board great discretion in determining which topics are mandatory bargaining subjects, in light of changing circumstances in the labor industry. Therefore, in con-

16. EDUCATION AND LABOR COMMITTEE, LABOR MANAGEMENT RELATIONS ACT OF 1947, H.R. REP. NO. 286, 91st Cong., 1st Sess., reprinted in 1969 U.S. CODE CONG. & ADMIN. NEWS 1159. The amendment allowing employers to provide employees with child care services was intended to confront a national and pressing need because it sought to “enlist the wealth and creativity of our private enterprise system in providing . . . child care centers, by permitting employers and labor organizations to establish through the collective bargaining process joint funds for [this purpose].” Id. at 1160.

17. For instance, in families where both parents work, the “inflation-adjusted family income dropped 3.1 percent between 1973 and 1984.” EMPLOYERS AND CHILD CARE, supra note 2, at 1. If women assumed their traditional role and remained home to care for the children, the income would have been even lower. Id. In fact, “[i]f the mothers had not increased their earnings during that period, the family income would have dropped 9.5 percent.” Id.

18. See infra note 37.
19. See infra notes 59-113 and accompanying text (describing the various forms of employer supported child care).
20. See infra notes 118-55 and accompanying text.
21. See infra notes 181-91 and accompanying text.
22. See infra notes 153-54, 161 and accompanying text.
clusion, this Note argues that the Board should use its broad discretion to construe employer supported day care as a mandatory bargaining subject, in order to meet our nation’s critical need for child care.

II. THE DEMAND FOR CHILD CARE

A. Problems Caused by the Lack of Affordable Child Care

There is a direct link between child care and employment, because parents are unable to work if they have no one to take care of their young children. As a result, finding affordable, high quality child care poses a vast problem for parents, particularly women, regardless of their socioeconomic status. Conflicts arise when personal problems and responsibilities affect employees during the workday. In fact, the Congressional Office of Technology Assessment has stated that “personal problems cost U.S. industry $137.6 billion a year.” A significant portion of employees’ personal problems is most likely due to child care dilemmas that affect many working parents. The rigid schedules that workers face, combined with the

23. Child care is a problem that affects blue collar and clerical workers, as well as managers and professionals. Nussbaum, Issues for Working Families, 35 LAB. L.J. 465, 466 (1984) (stating that 75% of working women are the sole supporters of their children or are married to husbands who cannot meet the family’s financial needs alone). Therefore, nearly all mothers worry about finding affordable child care that will coincide with their work schedules. Id.

24. “Conflicts arise between work and family responsibilities because our system of child care services does not provide the needed reliable care and because work requirements often do not allow the flexibility that parents need to provide care and emotional support for their children.” EMPLOYERS AND CHILD CARE, supra note 2, at 8.

25. Id. at 7. The Department of Labor stated that a “recent trend in companies is the development of employee assistance programs (EAPs) to address employees’ personal problems through counseling and referrals to appropriate assistance agencies, but child care counseling and assistance are not yet included in the typical EAP.” Id.

26. For instance, a sample survey conducted by the Bank Street College of Education and Gallup of 400 men and women with children under the age of 12, reported that child care problems were the “most significant predictors of absenteeism and unproductive time at work.” EMPLOYERS AND CHILD CARE, supra note 2, at 7. Another survey of five companies with a total of 5,000 employees reported that “77 percent of women and 73 percent of men with children under 18 dealt with family issues during work hours.” Id. This same survey also stated that “approximately 57 percent of women and 33 percent of men with children under 6 years old . . . spent unproductive time at work because of child care concerns.” Id.

27. Rigid work schedules developed at a time when it was customary for fathers to devote their lives to work in order to earn money to support their families, while mothers stayed home to take care of family responsibilities. Id. Since men were free of family responsibilities at home, fathers were able to work long hours or overtime to meet the companies’ needs. Id. Although society has changed and many women work outside the home, companies still adhere to the rigid work schedules and force parents to act as if they have no family responsibilities during the work day. Id.
lack of affordable child care, often result in employee stress, lower productivity and increased absenteeism, as parents attempt to balance work and child care responsibilities.\textsuperscript{28}

Since child care can become quite costly,\textsuperscript{29} families with working women spend a substantial part of their salaries on day care.\textsuperscript{30} This expenditure does not make it conducive for mothers to work.\textsuperscript{31} According to the Census Bureau’s 1982 Current Population Survey, twenty-six percent of nonworking mothers with preschoolers would look for work if affordable child care were available, thus adding a potential 1.7 million workers to the labor force.\textsuperscript{32} Furthermore, the Survey reports that “[thirteen percent] of employed women with preschoolers (about 700,000 workers) said they would work longer hours if additional or better child care were available.”\textsuperscript{33} An increase in employer supported child care, especially in light of recent labor shortages,\textsuperscript{34} will undoubtedly induce more women to work.

The provision of employer supported child care is also an essential requirement for achieving equality of opportunity in the work-
Lack of flexible, high quality child care is a barrier to advancement and other opportunities for parents, because without it, they cannot fully participate in activities which could allow them to advance or obtain better jobs.\textsuperscript{38} Quite often, unequal employment opportunities affect women more than men, due to the aversion at the workplace towards employees who take leaves.\textsuperscript{37} Since women are the bearers of children, they must temporarily leave work in order to fulfill this role. Therefore, women face barriers to employment because they are "perceived as having more irregular labor force participation, higher rates of turnover, higher absentee rates than men have and are believed to be less willing and less able than men to sacrifice their family life for career advancement."\textsuperscript{39} These attitudes, coupled with society's view that women are the primary caretakers of children, have created a situation where the demands of child care fall almost exclusively on the mother.\textsuperscript{39} In turn, these demands naturally affect the

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\item[(1)] to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . . ; or
\item[(2)] to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . sex.
\end{itemize}


36. See \textit{Coalition of Labor Union Women, Bargaining for Child Care} 29 (1985) [hereinafter \textit{Coalition of Labor Union Women}] (stating that a woman's solution to child care is often part-time work, but that disadvantages result, such as decreased earnings, fewer benefits, as well as rare job security or the right to promotional opportunities).

37. See \textit{Quade, Parents at Work: YLD Looks at On-Site Day Care}, 14 Barrister 32 (Winter 1987) (explaining how American corporations are suffering a female "brain drain" because women are leaving their careers because "inhospitable" male executives have failed to respond to their needs).

38. Fisk, supra note 35, at 91.

39. Women are primarily responsible for the care of children and this role as the "primary child caretaker handicaps women in the labor market." Fisk, supra note 35, at 92. "Child care responsibilities prevent women from receiving equal education necessary to get
mother's employment.

In order for equal opportunity for women to be achieved, the conflict between workforce and parenting demands must be resolved. Without child care support from employers, "[t]he most sensible option for many women is part-time work, if they can even find it." However, a disadvantage of working part-time is that part-time employees receive poorer compensation due to the decrease in work hours per week, and their benefits, if any, are less than with full-time work. Therefore, part-time employment is only a viable option for employees who have the economic flexibility to earn a partial income. Employer supported child care as a mandatory bargaining subject is the best solution to the dilemma of women's unequal employment opportunities.

B. Benefits Resulting from Employer Supported Child Care

Although employer supported child care is growing at a steady and rapid pace, in 1985 only 2,500 out of 6 million U.S. businesses of all sizes provided their employees with child care assistance. Cost is a major factor that may dissuade employers from providing day care. Full-time child care, outside of family and friends, may cost parents from $1,500 to $6,000 or more per year. The Center for Public Advocacy Research, Inc., reported that in 1985, the yearly estimated cost for the care of one child was $4,680 for New York City and $3,740 for upstate New York. Before employers decide to support workers with child care, they often want to determine that productivity will sufficiently be increased as a result. Upon consideration, most employers recognize the many advantages de-

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41. See Coalition of Labor Union Women, supra note 36; see also infra notes 103-104 and accompanying text.
42. Fried, supra note 1, at 12.
43. See Nat'l Commission on Working Women, Child Care Fact Sheet, Working Mothers and Children (undated) [hereinafter Nat'l Commission on Working Women] (stating that even though employers' support for child care is a minority, when compared to the mere 110 employers who offered assistance in 1978, the present number is a great improvement).
44. See Fried, supra note 1, at 25; see also Hayghe, Employers and Child Care: What Roles Do They Play? Monthly Lab. Rev. 38, 40 (Sept. 1988) (stating that the employer has to be able to make a determination that a day-care center will increase productivity sufficiently - by, for example, reducing absenteeism, boosting morale, or improving recruitment and retention - to offset its cost).
45. See Employers and Child Care, supra note 2, at 6.
46. Id.
47. Hayghe, supra note 44, at 40.
Employer-Supported Child Care

According to a 1980 survey conducted by the Women's Bureau of the United States Department of Labor (hereinafter "Women's Bureau"), many benefits have resulted from the provision of child care services.48 Those mentioned by the employers surveyed included: greater ability of the company to attract and keep good employees, less employee absenteeism, a lower job turnover rate, improved employee morale, favorable publicity for the employer and improved community relations.49 These same benefits have also been detected in controlled research studies of employer supported child care. For example, the Women's Bureau stated that one study has shown that parents with children enrolled in an employer supported child care center in Minnesota had a lower absenteeism rate than other parents working at the company who did not utilize the child care center.50

Another research study was performed by Dawson, et al, which compared companies that provided employer supported day care centers, information and referral services or no child care services at all.51 The research findings reported that in sixteen out of seventeen companies with employer supported child care centers, the annual turnover rate of employees who used the center was substantially lower when compared to all other company employees.52 In fact, at fifty-three percent of the companies, the turnover rate for the employees who used the day care center was zero.53 Dawson's study also revealed that the seventeen companies with child care centers experienced heightened recruitment results because employees were more likely to accept employment due to the employer supported child care.54 Furthermore, employees at companies with child care centers reported a more positive effect on their job performance than at companies that only provided child care information and referral services.55 Given the advantages experienced by employers when

48. Women's Bureau, Office of the Secretary, U.S. Dep't of Labor, Child Care Centers Sponsored by Employers and Labor Unions in the United States 2-8 (1980).
49. See id.; see also Nussbaum, supra note 23, at 468 (demonstrating that in a 1984 survey conducted for the American Management Association, more than three-fourths of employers reported that an employer's costs in providing child care programs are far outweighed by the benefits received).
50. Employers and Child Care, supra note 2, at 9.
51. Id.
52. Id.
53. Id.
54. Id.
55. Id.
child care is provided and tighter labor supplies, it is likely that more employers will offer child care benefits to help meet the demand of their employees.

C. Types of Employer Supported Child Care

At present, an estimated 3,300 employers nationwide provide some form of child care assistance to their employees. These employers participate in a broad range of program options, including direct services and financial assistance. Direct services include on-site centers, where employers operate or provide care at or near the workplace. These child care centers are advantageous to employees because reliable child care is available to them near work and the hours of the center accommodate the employees' work schedules. Because the children are near their parents, and are therefore easily accessible, parents feel more at ease because they can visit their children and respond quickly should any emergency arise. One disadvantage of child care centers is that one center may only serve a portion of the parents if employees of the company are located at different sites which are a distance from the center. Another disadvantage is that in small companies, there may only be a small number of workers interested in child care services. As a result, the employer may feel that establishing a child care center is not practical without a greater showing of interested employees.

Child care centers are organized and funded in a variety of ways. For instance, a child care center that is organized as part of the sponsoring organization is known as an in-house program. The

56. Jacobs, supra note 30, at 22.
57. See Child Care Action Campaign, Information Guide No. 11, Employer Supported Child Care; Current Options and Trends, Information Guide #11 (undated) [hereinafter TRENDS]. The Child Care Action Campaign is a coalition of leaders from a wide range of American organizations, whose goal is to set in place a national system of quality, affordable child care, using all existing resources, both public and private. Child Care Action Campaign, 99 Hudson Street, New York, NY 10013.
58. Id.
59. Id.
60. On-site child care is advantageous because it is quite convenient for working parents to bring their children to the program and also visit them during the day. Fried, supra note 1, at 19. Furthermore, because child care workers can be members of the same union as other workers, they have the same range of salary and benefits, which may offset a high staff turnover rate. Id.
61. Id.
62. Id.
63. Id.
64. Id.
65. Id.
employer retains control over the quality and functioning of the center because the center is part of the company. However, the employer is also liable for the child care center and responsible for its operation. In addition to in-house programs, there are also parent-run centers. These child care centers are located at or near the workplace and are run by a parent organization rather than the company. Some advantages of parent-run centers are the company’s ability to avoid program management problems and the reduction of company liability. A company can also contract the services of a child care management business or a child care chain of centers to operate the center for its workers. Child care professionals are hired to develop and operate the program using their management skills, thereby allowing the companies to avoid daily management problems. Because the child care workers are professionals, companies can avoid including them as employees on the company’s wage and benefit schedule.

Another form of direct child care services is a consortium center, in which several employers join together to form a not-for-profit corporation, which funds a day care center conveniently located to the companies contributing to the consortium.

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66. For example, in 1986, Dominion Bankshares Corp. in Roanoke, Virginia, opened a center as part of the Division of Human Resources, and the center was filled to its licensed capacity of 70 in 6 months. "The Dominion center serves children 6 weeks to 5 years of age at low rates and is open to a work force that is 70 percent female and includes 950 employees at the main office and an additional 450 in the [Roanoke] valley area." Id.

67. Id. at 15.

68. For example, according to the Department of Labor, Merck Pharmaceuticals, located in Rahway, New Jersey, provided a parent-run, not-for-profit center with startup funding and operating subsidies for three years. EMPLOYERS AND CHILD CARE, supra note 2, at 15. The parent-run center serves 65 children, where 90% of the children have parents working at Merck. Id. In 1986, federal agencies provided space to parents in order to develop a not-for-profit child care center in North Carolina to serve employees in the Environmental Protection Agency and the National Institute of Environmental Health Services. Id. These parent-run programs in federal agencies were made possible by an amendment to Public Law 99-190 which was passed in December 1985. Id. This amendment "permits federal agencies to provide rent-free space and utilities to provide child care services if space is available, if at least 50 percent of the children have a parent employed by the Federal Government and if priority enrollment is given to federal employees." Id. A board of directors established by the parent-employees pay for all expenses except for the rent-free space and utilities provided by the agency. Id.

69. See EMPLOYERS AND CHILD CARE, supra note 2, at 15.

70. For example, Resources for Child Care Management was hired by Campbell Soup in Camden, New Jersey to run its child care center for 120 children. Id.

71. Id.

72. See TRENDS, supra note 57. For example, the Garment and Industry Day Care Center is a consortium model established in New York City’s Chinatown. FRIED, supra note 1, at 22. The center opened in 1983 and currently provides care for 80 children from ages two to
centers are often established because many employers do not have enough employees who want a child care center, and as a result, there are not enough children to fill the center each day. Therefore, companies prefer to join with other companies and form a consortium, which has lower costs and fewer management problems than a company center. However, consortium centers generate less publicity to the company than on-site child care centers. An on-site child care center is highly valuable to the company's public image because it conveys a message that this particular company has pioneered in sponsoring child care services.

Direct services also include family day care networks, which are formed when employers contract with local agencies to recruit, train and assist people to become licensed child care providers in their own homes. The family day care providers receive training and support services such as newsletters, monthly workshops and access to a toy lending library. A family day care network can be formed more quickly than a child care center and the startup costs are less. However, one disadvantage for the company is that it does not have much control over the child care provided in the homes, thus increasing the company's degree of liability.

Some companies provide for school-age child care, which includes caring for children before and after school and during school vacations while their parents are at work. A lack of transportation between the school and the company center may make school-age

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5. Id. This center is jointly funded by the City and by a consortium which includes the International Ladies Garment Workers Union (ILGWU), as well as the Greater Blouse, Skirt and Undergarment Association, which represents 650 employers in the garment industry. Id. Nearly half of the operating costs are paid by the City, while employers pay for an additional 40%. SERVICE EMPLOYEES INTERNATIONAL UNION PUBLIC POLICY DEP'T, SUMMARY OF UNION CHILD CARE ACTIVITIES (1988). Parents are charged on a sliding scale based upon their income, with many paying no more than $10 per child each week. Id.

73. See EMPLOYERS AND CHILD CARE, supra note 2, at 16.

74. Id. In order to form a consortium center, a “catalyst” employer or agency initiates discussion with other companies to interest them in developing a program. Id. For example, in December 1985, Rich's Department Store in Georgia contacted four other companies interested in a consortium center, and they developed the Atlanta Downtown Child Development Center. Id. “Each of the five companies shared equally in the space renovation and startup costs and is allotted 20 slots in the center.” Id.

75. Id.

76. See TRENDS, supra note 57; FRIED, supra note 1, at 22.

77. See EMPLOYERS AND CHILD CARE, supra note 2, at 19.

78. Id.

79. Id.

80. Id. at 18. Partnerships between employers and schools have resulted in school-age child care at the schools. Id. “Projects by the Houston Committee Private Sector Initiative and donations by the Irvine Company in California have sparked school-age programs.” Id.
care problematic. In most communities, however, the school is located close enough to the center so that the school bus can transport the children. Direct services also include summer day camps, which are company-sponsored summer recreational and educational programs for school-age children during their summer vacations. Finally, emergency services such as sick child infirmaries, family day care homes and health workers who go to the child's home may be provided for by employers.

In addition to direct services, employers also provide financial assistance to help parents pay for their child care expenses. Financial assistance enables a parent to choose a more expensive form of child care which provides reliability and a higher quality of care. Employers may furnish their staff with subsidies or vouchers which they can redeem at a center or at the child care provider of their choice.

Employers may provide a flat amount or subsidize a percentage of the child care expenses for all of the employees or only for the lower

81. Id.
82. Id.
83. Id.
84. See TRENDS, supra note 57. The trend to begin emergency day care for employees' children was initiated in October 1986, by Wilmer, Cutler & Pickering, a law firm in Washington D.C.. Blodgett, Legal Child Care, A.B.A. J., June 1, 1987, at 23. The center was set up in order to provide care for children, so parents would not have to miss work if their normal day care plans fell through. Frankel, When Law Firms Become Backup Babysitters, THE AM. LAW CAREER GUIDE (Fall 1989). The success of this program is indicated in the number of billable attorney hours, 1500 in its first year, which is directly attributable to the center. Id. The center has also resulted in reduced absenteeism and increased productivity. See Blodgett at 23. Recently, seven large companies including Home Box Office, Colgate-Palmolive, Consolidated Edison, National Westminster Bank, the Time Inc. Magazine Company, as well as the accounting firm, Ernst & Young and New York City's largest law firm, Skadden, Arps, Slate, Meagher & Flom, began providing emergency assistance to more than 13,000 employees. Lawson, 7 Employers Join to Provide Child Care at Home in a Crisis, N.Y. Times, Sept. 7, 1989, at A1, col. 1. According to an advocate of the program, a child care backup system for parents is required because today's communities no longer consist of extended families or comfortable familiarity with neighbors. Id. at C12, col. 1.
85. See FRIED, supra note 1, at 13; see also NAT'L COMMISSION ON WORKING WOMEN, supra note 43. There are also government subsidies, but since they are limited, the responsibility to support employees' child care needs falls on the employer. FRIED, supra note 1, at 13. For instance, the Dependent Care Tax Credit is the largest source of federal financial assistance for child care. See NAT'L COMMISSION ON WORKING WOMEN, supra note 43; see also FRIED, supra note 1, at 43. Each year, it allows employees to claim expenses totaling up to $2400 for one child and $4800 for two or more children. CHILD CARE ACTION CAMPAIGN, CHILD CARE TAX BREAK (undated). The deduction is based on a percent of that claim according to the amount of income. Id. The credit is deducted from the amount of taxes due. Id. However, an employee may not claim child care expenses exceeding his or her income, or in the case of married couples, exceeding the income of the lower earning spouse. NAT'L COMMISSION ON WORKING WOMEN, supra note 43.
Employers may directly pay the provider of child care or reimburse the parents for the child care expenses. A flexible benefits plan permits each employee to choose benefits from two or more alternatives. Employees are allowed to choose an employer-subsidized form of child care that is best suited to meet family needs. Employers may be hesitant to offer child care services as a fixed benefit because only a small number of employees need the services each year. Therefore, with a cafeteria plan, employers can add child care services to a flexible benefits package without being concerned with problems of equity caused by the small proportion of employees with child care needs.

Employers' financial assistance has also been in the form of discount programs or reimbursement accounts for employees at selected child care programs. Child care centers may have openings, and therefore, in order to promote their services, the centers offer a discount arrangement to a large group of parents in the company. Some discount arrangements are made with a child care chain, which enables employees to use the discount at any chain center in a given area. One problem with discount arrangements is that they provide financial assistance only to those employees who use the des-

86. See EMPLOYERS AND CHILD CARE, supra note 2, at 24. For example, Polaroid Corporation in Boston has provided child care subsidies for its lower income employees. Id. at 25. These subsidies are calculated on a sliding scale basis according to the family's income. Id. The 4C's Child Care Assurance Plan in Orlando, Florida provides a system in which employers can give the employees a 25 to 50% subsidy for child care expenses. Id. “The Assurance Plan provides counseling and referral for the employees, monitors the child care vendors, provides support services for the child care vendors and handles the payment of the subsidy which goes directly to the vendor.” Id.

87. Id. at 24.

88. Id. at 25. “Hewitt and Associates in Minneapolis estimates that around 20 percent of major employers have flexible benefits plans, and 80 percent of those flexible benefits plans include a flexible spending account, either employer-funded or employee-funded, that can be used for child care expenses.” Id.

89. Id.

90. See TRENDS, supra note 57.

91. See EMPLOYERS AND CHILD CARE, supra note 2, at 25.

92. Id.

93. See FRIED, supra note 1, at 14 (stating that employers may purchase slots in a community-based child care program and then offer these slots to their workers at a graduated discount based on the employees' income).

94. See EMPLOYERS AND CHILD CARE, supra note 2, at 24.

95. For example, “Kinder-Care, the largest national child care chain, offers a 10 percent discount to company employees if the employer subsidizes 10 percent of the child care costs and if a minimum of 6 children will be using the services.” Id. Forty-five companies have negotiated discount arrangements with Kinder-Care. Id.
Employers can also support their employees' child care needs by instituting various flexible personnel policies. These family-oriented work policies give parents flexibility in their work schedules, thereby allowing them to deal with family concerns. Parents who have the ability to provide their children with support experience "less stress on the job, better productivity and a more positive attitude toward work than parents with inflexible work schedules." Family-oriented work policies include flexitime which allows employees to choose arrival and departure times that coincide with their children's child care services or local school schedules.

All employees work during a core period and they work the requisite number of hours each day.

Flexible personnel policies also include part-time work schedules. Employers who allow their employees to work part-time receive positive results. According to the Department of Labor, in a survey of 481 organizations with part-time workers, "62 percent of the companies reported higher productivity of the part-time workers over full-time workers and only 5 percent reported decreased productivity." However, part-time employment forces employees to make many sacrifices. For instance, part-time jobs are lower paying than full-time jobs, few if any benefits are provided, and no promotions or advancements are offered. One possible solution to the disadvantages of part-time employment is for employers to "establish part-time positions with pro-rated benefits and a ladder for advancement.

Job sharing is another type of flexible personnel policy.

96. Id.
97. See TRENDS, supra note 57; NAT'L COMMISSION ON WORKING WOMEN, supra note 43.
98. See EMPLOYERS AND CHILD CARE, supra note 2, at 26.
99. An estimated 13% of organizations with 50 or more employees have flexitime. Id. at 28. According to the Women's Bureau of the Department of Labor, case studies and surveys of over 70 companies indicate that flexitime results in: slight increases in productivity and significant reductions in overtime and recruiting costs. Absenteeism is reduced and tardiness is virtually eliminated in cases where employees are allowed flexibility on a daily basis. An improvement in employee morale was noted by 97 percent of the companies in one survey, and employees noted that flexitime allowed reductions in commuting time.

Id.
100. Id.
101. The Women's Bureau has reported that in 1985, "27 percent of women were employed part time and 10 percent of men were part time workers." Id.
102. Id.
103. Id.
104. Id.
105. "Rolscreen Company in Pella, Iowa, offered job sharing to its 2,000 employees, and 50 pairs of assembly line workers chose to job share. Overall absenteeism of the pairs fell from
Job sharing includes two people who share the work responsibility of one full time job. One advantage of job sharing is that employers can retain valued employees after childbirth and employees can continue their careers at a reduced work schedule. Job sharers have more flexible work schedules and they face fewer interruptions at work because one employee can cover for the other employee's child care emergencies. Another form of flexible personnel policies is called "flexplace work", which occurs when employers allow their employees to work in their homes. Parents are able to work at home and simultaneously carry out their parental responsibilities. According to the Department of Labor, "an estimated 15,000 people work in their homes presently, but the Office of Technology Assessment reported that 15 million computer jobs could be relocated to homes." However, union leaders are concerned that homeworkers will be exploited by the employer. Wisconsin Physicians Services in Madison hire one hundred homeworkers who work less than twenty hours per week at wages well below the full-time union wages at the company. Other family-oriented work policies include family leave, parental sick leave and extended maternity and paternity benefits.

Employers have begun to realize that their employees' child care needs must be supported in order to achieve greater productivity at the workplace. As a result, many programs have been created to enable parents to balance their work and child care responsibilities. However, it is important to be aware that the progress made thus far has often resulted from union initiative. Successful efforts have already been made in which union initiated child care programs

5.8 percent to 1.2 percent when they moved to job sharing." *Id.* at 29.

106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.*
113. See *Trends*, supra note 57; Nat'l Commission on Working Women, *supra* note 43.
114. See *supra* notes 66-89 and accompanying text.
115. See Nussbaum, *supra* note 23, at 468 (stating that many child care policies are coming at the unions' initiative); see also Service Employees International Union, *supra* note 72 (demonstrating union child care activities in over 20 states). For example, in Colorado, the United Food and Commercial Workers Union set up a unique union-run child care center which is open from 6:00 a.m. to 11:00 p.m., including Saturdays, because the union members' work schedules require extended day care services. *Id.* The center functions as a not-for-profit operation and the child care fees are kept as low as possible. *Id.*
and benefits have been accomplished through the collective bargaining process.116 With employer supported day care as a mandatory bargaining subject, further accomplishments can be achieved by unions and employers, alike.117

III. MANDATORY EMPLOYER SUPPORTED CHILD CARE

A. Historical Background

Since employer supported child care is such an essential need in our society, it should be construed as a mandatory subject for collective bargaining, pursuant to the NLRA.118 The Taft-Hartley Act of 1947119 amended the NLRA to obligate unions, as well as management, to "bargain collectively" in regard to "wages, hours and other terms and conditions of employment." Failure to bargain on each subject embraced within the statutory phrase constitutes an unfair labor practice.120

Although Congress amended the Act in 1947, it did not substantively define the characterization of bargaining subjects.122 Congress

116. For example, the United Food and Commercial Workers Union and Campbell Soup Company in New Jersey established an on-site day care center for children from 18 months to 6 years old. SERVICE EMPLOYEES INTERNATIONAL UNION, supra note 72. In Massachusetts, the Service Employees International Union, in 1981, established an infant/toddler child care center at the Boston City Hospital which serves union members who work at the hospital. FRIED, supra note 1, at 33.

117. For instance, once a subject is considered to be a mandatory subject of collective bargaining, then "within that area neither party is legally obligated to yield." Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203, 210 (1964).

118. The bargaining obligation is first articulated in Title I, Section I of the NLRA:

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 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.


119. The Taft-Hartley Act is also known as the Labor Management Relations Act (LMRA) which amended the Wagner Act, the original enactment of the NLRA.

120. NLRA § 8(d), 29 U.S.C. § 158(d) (1947).

121. Section 8 of the NLRA makes it an unfair labor practice for either side to refuse to bargain with the other. Section 8(a)(5) of the Act states that "[i]t shall be an unfair labor practice for an employer - to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title." NLRA § 8(a)(5), 29 U.S.C. § 158 (a)(5) (1947). Conversely, section 8(b)(3) states that "[i]t shall be an unfair labor practice for a labor organization or its agents - to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title." NLRA § 8(b)(3), 29 U.S.C. § 158 (b)(3) (1947).

122. In fact, due to the congressional "absence of definitional or restrictive statutory
gress intentionally left the words "wages, hours and other terms and conditions of employment" without further definition in order to give to the Board the power to further define the subjects in light of changing circumstances. In fact, Congress rejected a House bill to have a narrow list of bargaining subjects, and instead adopted the more general language which now appears in section 8(d). Since Congress did not find it necessary to take from the Board and the courts the power to decide what were mandatory bargaining subjects, the Board and courts continue to interpret the broad language of the Act in order to determine the proper scope and subject matter of collective bargaining.

It is evident from the legislative history of the Act, that the general phrase of section 8(d) was clearly meant to maintain future interpretation by the NLRB. For instance, a House report has declared that:

[the appropriate scope of collective bargaining cannot be determined by a formula; it will inevitably depend upon the traditions of an industry, the social and political climate at any given time, the needs of employers and employees, and many related factors. What are proper subject matters for collective bargaining should be left in the first instance to employers and trade unions, and in the second place, to any administrative agency skilled in the field and competent to devote the necessary time to a study of industrial practices and traditions in each industry or area of the country, subject to review by the courts. It cannot and should not be straitjacketed by legislative enactment.]

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123. See infra notes 132-34 and accompanying text.
124. In enacting the Taft-Hartley Act of 1947 to amend the NLRA, Congress rejected the original House bill which would have limited bargaining subjects to:
(i) wage rates, hours of employment, and work requirements; (ii) procedures and practices relating to discharge, suspension, lay-off, recall, seniority, and discipline, or to promotion, demotion, transfer and assignment within the bargaining unit; (iii) conditions, procedures, and practices governing safety, sanitation, and protection of health at the place of employment; (iv) vacations and leaves of absence; and (v) administrative and procedural provisions relating to the foregoing subjects.

125. "The original House bill had contained a specific listing of the issues subject to mandatory bargaining . . . but this attempt to 'strait-jacket' and to 'limit narrowly the subject matters appropriate for collective bargaining' . . . was rejected in conference in favor of the more general language adopted by the Senate and now appearing in § 8(d)." Ford Motor Co., 441 U.S. at 495-96.
126. See infra note 161.
This report displays Congress’ intent that collective bargaining should adapt to varied circumstances, including the “social climate” of an industry. The demand for child care is such an imperative concern in the “social climate” of the current labor force, as most children of the 1990’s will be reared in households where their parents work outside the home. Therefore, in accordance with the legislative history of the NLRA, collective bargaining should adapt to accommodate this social change. Due to employers’ and unions’ response to the demand for child care in today’s “social climate”, it would be consistent with the congressional intent of the Act to classify employer supported day care as a mandatory subject of collective bargaining. However, in order for this to occur, the proviso to the amendment of the LMRA, which prohibits child care as a mandatory bargaining subject, must be omitted.

B. The Classification of Bargaining Subjects: The Mandatory-Permissive Dichotomy

The language of section 8(d) of the NLRA merely directs parties to confer in good faith with respect to “wages, hours and other terms and conditions of employment.” The law relating to the designation of bargaining subjects has not received much direction from the simple language of the NLRA or from its legislative history. Therefore, a series of Supreme Court decisions reflect the scope and evolutionary nature of the mandatory bargaining analysis. It was not until 1958, when the distinction between mandatory and permissive subjects was first set forth in the landmark case, NLRB v. Wooster Division of Borg-Warner Corporation.

In Borg-Warner, the Supreme Court affirmed the Board’s finding that an employer commits an unfair labor practice by insisting upon inclusion in a contract of clauses not dealing with “wages, hours and other terms and conditions of employment”, and thus not within the mandatory obligation of section 8(d). In other words,

128. Id.
129. See EMPLOYERS AND CHILD CARE, supra note 2, at 1.
130. See supra notes 59-93 and accompanying text.
133. See supra notes 122-27 and accompanying text.
134. See infra notes 135-55 and accompanying text.
136. In Borg-Warner, the employer conditioned acceptance of any contract on (1) a “recognition clause” that granted recognition solely to the local union, even though the international union was the certified bargaining representative of the Board, and (2) a “ballot clause” which provided for a secret ballot vote of both union and non-union employees in the
the Supreme Court accepted the Board's proposal that bargaining subjects which are mandatory allow the proposing party to insist on their inclusion in the proposed agreement, and that the other party must discuss them.\textsuperscript{137} However, this duty is limited to the subjects in section 8(d) and "within that area neither party is legally obligated to yield."\textsuperscript{138} If the subjects are permissive, then the proposing party must withdraw them from further consideration if the other party does not voluntarily agree to their acceptance.\textsuperscript{139} The holding in \textit{Borg-Warner} stands for the general rule that despite a party's good faith effort to bargain, an unfair labor practice exists when a party insists to impasse upon the inclusion of a permissive bargaining subject (i.e. a subject that is not encompassed within the statutory phrase of section 8(d) of the NLRA).\textsuperscript{140}

The Supreme Court in \textit{Allied Chemical & Alkali Workers Local Union No. 1 v. Pittsburgh Plate Glass Company} further refined the definition of mandatory bargaining subjects to include subjects that "vitaly affect" employees.\textsuperscript{141} The Court held that benefits for already retired employees were not a mandatory bargaining subject.\textsuperscript{142} Therefore, the employer did not violate section 8(a)(5) of the Act by modifying, during the term of the contract, the health insur-

\textquote[137]{Wooster Division of Borg-Warner Corp., 36 L.R.R.M. 1439, 1440 (1955).}
\textquote[138]{Borg-Warner, 356 U.S. at 349.}
\textquote[139]{Borg-Warner, 36 L.R.R.M. at 1440. There are also illegal subjects where neither party is legally obligated to compromise its position with respect to them. \textit{See} A. Cox, D. Bok & R. Gorman, \textit{Labor Law} 443 (1986) (explaining that all of the Justices in \textit{Borg-Warner} "endorsed the proposition that it is an unfair labor practice to insist upon the inclusion in the contract of an illegal provision or to use economic force in support of such a demand.").}
\textquote[140]{Borg-Warner, 356 U.S. at 349.}
\textquote[141]{404 U.S. 157 (1971).}
\textquote[142]{Pittsburgh Plate Glass, 404 U.S. at 172.
Employer-Supported Child Care

The Court noted that section 8(d) of the Act “does not immutably fix a list of subjects for mandatory bargaining.” However, “it does establish a limitation against which proposed topics must be measured. In general terms, the limitation includes only issues that settle an aspect of the relationship between the employer and the employees.” Although the Court accepted the Board’s “vitaly affects” test, it disregarded the Board’s conclusion that the test was met regarding retired employees’ benefits. The Court concluded that retirees could not appropriately be included in the unit with active employees because “they plainly do not share a community of interests [with the active employees] broad enough to justify [such] inclusion.”

The Supreme Court’s decision in Ford Motor Company v. NLRB limited the “vitaly affects” test of Pittsburgh Plate Glass to apply only to individuals or conditions outside the bargaining unit. The Court held that in-plant cafeteria and vending machine food and beverage prices are mandatory subjects of collective bargaining. The employer argued that food prices and services were too trivial to be considered a mandatory bargaining subject because the topic does not “vitaly affect” the terms and conditions of employment. The Court disposed of this argument because the “vitaly affects” test applies to issues involving individuals or conditions outside the bargaining unit and has no application to matters involving an employer and bargaining unit employees.

143. *Pittsburgh Plate Glass*, 404 U.S. at 180. “The benefits that active workers may reap by including retired employees under the same health insurance contract are speculative and insubstantial at best.” *Id.*
144. *Pittsburgh Plate Glass*, 404 U.S. at 178.
145. *Id.*
146. The Court stated that: [w]e agree with the Board that the principle of Oliver and Fibreboard is relevant here; in each case the question is not whether the third-party concern is antagonistic to or compatible with the interests of bargaining-unit employees, but whether it vitally affects the ‘terms and conditions’ of their employment. But we disagree with the Board’s assessment of the significance of a change in retirees’ benefits to the ‘terms and conditions of employment’ of active employees.
149. *Id.*
150. *Id.* at 500-01.
151. “[T]he matter of in-plant food prices and services is an aspect of the relationship between Ford and its own employees. No third-party interest is directly implicated, and the standard of *Pittsburgh Plate Glass* has no application.” *Ford Motor Co.*, 441 U.S. at 501.
fact that the matter may not have vitally affected the terms and conditions of employment was irrelevant because the matter involved an aspect of the employer-employee relationship.  

The Court’s decision in Ford Motor Company is noteworthy for its declaration that the Board has primary responsibility for classifying which topics shall be deemed mandatory bargaining subjects. The Court traced the history of the Wagner and Taft-Hartley Acts and concluded that “Congress made a conscious decision to continue its delegation to the Board of the primary responsibility of marking out the scope of the statutory language and of the statutory duty to bargain.” The Board’s decisions in the area of collective bargaining “if reasonably defensible . . . should not be rejected merely because the courts might prefer another view of the statute.” Therefore, the employer’s triviality argument was rejected by the Court by giving deference to the Board’s determination that subjects concerning food prices and services are not too trivial for the collective bargaining process.

C. The NLRB’s Interpretation of “Terms and Conditions of Employment”

Prior to the Taft-Hartley Act, it was an unfair labor practice for an employer to refuse to bargain “in respect of rates of pay, wages, hours of employment, or other conditions of employment.” In the Taft-Hartley Act, Congress added section 8(d) which obligated an employer and union to confer in good faith with respect to “wages, hours of employment and other terms and conditions of employment.” In other words, the amendment included “terms” of employment as part of the definition of mandatory bargaining subjects.

The Board has interpreted this addition to have a broader meaning than “working conditions”. According to the Board, this statutory phrase refers to “the terms or conditions under which employment status is afforded or withdrawn”, rather than “the physical

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153. Id. at 496.
154. Id. at 497.
155. Id. at 501.
156. The Developing Labor Law, supra note 122, at 758.
conditions under which employees are compelled to work.”

Hence, the NLRB has carried out Congress’ intent by broadly interpreting the Act from the outset.

The Supreme Court’s decision in *Borg-Warner* divided legal bargaining topics into two categories, and made the Board’s interpretation of section 8(d) of the Act critical to the development of collective bargaining. Subsequent to the *Borg-Warner* decision, various cases commit the Board to defining which bargaining subjects are mandatory. Yet, despite the Board’s latitude in interpreting section 8(d) of the Act, there are limitations on the subjects that can be encompassed within the statutory phrase, “other terms and conditions of employment.” In order to be considered a mandatory bargaining subject, the proposal must have a direct effect on the employment relationship, and a material and significant impact on the “terms and conditions of employment”. It does not include every issue that might be of interest to unions or employers, and therefore, a “remote, indirect or incidental impact is not sufficient.”

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159. *Inland Steel Co.*, 21 L.R.R.M. at 1311.
160. See supra notes 136-40 and accompanying text.
161. For instance, in 1947, NLRB Chairman Paul Herzog suggested to the Senate Committee that the Board should exclusively define the subjects of collective bargaining. See THE DEVELOPING LABOR LAW, supra note 122, at 759. Chairman Herzog’s suggestion has been adopted, as displayed in Justice Stewart’s concurrence in the 1964 *Fibreboard* decision.
162. For instance, in 1947, NLRB Chairman Paul Herzog suggested to the Senate Committee that the Board should exclusively define the subjects of collective bargaining. See THE DEVELOPING LABOR LAW, supra note 122, at 759. Chairman Herzog’s suggestion has been adopted, as displayed in Justice Stewart’s concurrence in the 1964 *Fibreboard* decision.
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D. Employer Supported Child Care as a Mandatory Bargaining Subject

Employer supported child care should be construed as a mandatory bargaining subject because the significant demand for day care in the workforce is clearly a “term and condition of employment”, within the meaning of section 8(d) of the NLRA. Bargaining proposals coming within the meaning of “other terms and conditions of employment” fall within various areas, one of which is employment security. Employment security deals with matters that affect “hire, tenure and discharge.” Employer supported child care has a direct impact on employment security because it deals with potential employment, as well as the employees’ continuance in their jobs.

First of all, more women would be eligible for hire, provided that employer supported child care exists. Studies indicate that many non-working mothers would be willing to work if affordable child care were available. This potential to the labor force is significant, especially in light of labor shortages that are already beginning to appear. “The labor force is now growing at slightly more than 1 percent a year, compared to double that rate during the 1970’s and early 1980’s.” Since employers offer child care benefits to induce more women to enter the workforce, it is clear that employer supported day care is directly related to hire.

Furthermore, employer supported child care has a direct impact on continued employment, as portrayed in the different levels of tenure based on sex. Generally, men have more tenure than women...
because their labor force participation has been more continuous.174
"Many women currently in the work force interrupted their careers for extended periods for home and family responsibilities and, moreover, some resumed work in a different career."175 Mothers often leave work because the accepted work structure of eight hour shifts makes it difficult for women to juggle family and employment responsibilities.176 Part-time work is sometimes an option, but it is reflected in poorer compensation and benefits, especially when job benefits are based on seniority and longevity of service.177 Without affordable day care, women are almost forced to leave their careers to be exclusive child caretakers. Therefore, the lack of employer supported child care directly affects employment security because women's career interruptions for extended periods of time result in lower tenure than men. In addition "[t]he lower tenure of women may reflect their underrepresentation in the higher paying managerial, professional and craft jobs."178

Employer supported child care has a material and significant impact179 on employment security, a term and condition of employment, because it is directly related to hire and tenure. Since employment security is considered to be a mandatory subject of collective bargaining, pursuant to the Act, then employer supported child care should fall into this classification. In order for this to be achieved, the amendment's provision of section 302 of the LMRA, precluding the classification of employer supported child care as a mandatory bargaining subject, must be omitted. As a result, the NLRB can exercise its delegated authority from Congress, in light of the changing "social climate" of today's labor industry.180

174. See Carey, supra note 173, at 5.
175. See Carey, supra note 173, at 5.
176. See supra note 27.
177. See Coalition of Labor Union Women, supra note 36.
178. Carey, supra note 173, at 5. This underrepresentation of women in higher paying jobs can also be related to discrimination. See Fisk supra note 35, at 89 (stating that gender discrimination occurs when women try to fit the "male model" of full-time work without having adequate care to do so, which leads to adverse employment consequences because of their conflicting responsibilities to their children). The Board has held that the elimination of sex discrimination in the work force is a mandatory subject of collective bargaining. The Developing Labor Law, supra note 122, at 816-17. Since child care results in the elimination of sex discrimination by affording women equal opportunity at the workplace, employer supported child care should be a mandatory bargaining subject. See supra notes 35-39 and accompanying text.
179. See generally Seattle First National Bank, 444 F.2d at 33.
180. See H.R. No. 245, supra note 127.
IV. SECTION 302 OF THE LABOR MANAGEMENT RELATIONS ACT

A. Congress' Recognition for Employer Supported Child Care

In 1969, Congress recognized the "pressing national need" for child care.\textsuperscript{181} Congress felt that trust funds, providing day care centers through the collective bargaining process, were an important benefit for mothers' ability to meet family obligations.\textsuperscript{182} The availability of day care centers "would serve the national interest by increasing the pool of working women."\textsuperscript{183} The centers would be a significant attraction for mothers seeking work.\textsuperscript{184} Furthermore, industries, where women comprise a major portion of the workforce, would "find these centers advantageous in hiring and retaining employees."\textsuperscript{185} Therefore, in order to meet the "pressing national need" for child care, Congress had to amend the LMRA.\textsuperscript{186}

Section 302 of the LMRA prohibits payments by employers of money or other valuable contributions to employees.\textsuperscript{187} However, section 302 sets forth six exceptions to this general prohibition.\textsuperscript{188} Con-
gess, in 1969, amended section 302 by adding a seventh exception, which validated employer contributions for trust funds established to provide child care centers for dependents of employees. However, Congress expressly provided that the enactment of this bill will not require a labor organization or employer to bargain on the establishment of the trust funds, and refusal is not an unfair labor practice. In other words, a necessary proviso of the bill's enactment was to establish that this form of employer contribution to day care was a permissive, rather than a mandatory bargaining subject.

Congress simply stated that employer supported child care cannot be a mandatory bargaining subject without stating the reason behind this decision. A possible explanation may have been the general dislike towards unions at that time, due to their powerful position. In fact, upon consideration of the bill, Representative Martin of Nebraska stated that H.R. 4314 specifically provides that the funds are to be paid by management and not by unions, which constitutes a one-sided piece of legislation. "To keep our labor-management relationships on an even keel legislation and the laws enacted in this field have to be kept on an equal plane. At the present time, in my estimation, the pendulum favors the unions." If this topic was construed as a mandatory bargaining subject, then according to Representative Martin, it would simply give "the unions themselves another club in their insatiable desire to have things in their favor and laws passed that will benefit the unions in opposition to the welfare of management and business itself." This interpretation of the union's position is somewhat suspect when unions have been responsible for negotiating collective bargaining agreements.

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189. 29 U.S.C. § 186(c)(7) (1969). The amendment to section 302 of the LMRA also included the validation of employer contributions to trust funds established to provide educational scholarships for employees and their dependents. 29 U.S.C. § 186(c)(7) (1969).
192. Throughout history, the use of labor organizations was met with bitterness. "Unions not only increased the power of employees to demand and secure higher wages, shorter hours and other benefits increasing labor costs, and so seemed to threaten the company's profits; they also curtailed the power of corporate management to make unilateral decisions." Cox, supra note 139, at 12.
194. Id.
195. Id.
sponsible for social and economic change throughout history.196

B. Changing Demographics

According to the legislative history of the LMRA, testimony was received from the Day Care and Child Development Council of America, Inc.197 This organization reported that “about 10.6 million mothers with children under 18 years old were working in March, 1967, [and] 4.5 million of these children were under 6 years of age.”198 Subsequent to the compilation of this data, there has been a significant change in the makeup of America’s workforce, requiring alternatives to traditional work schedules.199 The traditional two-parent family where the male is the sole breadwinner applies to only 10 percent of all American families.200 “Nearly 57% of all two-parent families would be living under the federal poverty line, if both parents were not working.”201

When compared to the statistics that were provided to Congress upon the amendment of section 302, there are many more workers presently in need of dependent care for their young children.202 This demand for child care is expected to increase as more mothers enter the workforce.203 According to the Consumer Expenditure Survey in 1987, half of all women with children under age 3 worked outside the home.204 However, fewer than one-fourth of such mothers

196. See FRIED, supra note 1, at 3 (stating that unions have been historic leaders in the movement for social and economic justice).
197. See Pub. L. No. 91-86, supra note 181, at 1161.
198. Id. The testimony further stated that there was a “shocking shortage of day-care facilities [which] means that many mothers are forced to make unsatisfactory child care arrangements while they work.” Id. Another problem caused by the shortage of day care spaces was revealed in a 1967 survey of welfare mothers in New York City which indicated that “one out of five non-working women questioned offered lack of child care facilities as the reason for their unemployment.” Id.
199. See WOMEN & WORK, U.S. DEP’T OF LABOR, ALTERNATIVE WORK PATTERNS DESCRIBED IN NEW FACT SHEET (1987) (demonstrating that alternatives to traditional work schedules are needed because in 1985, “60 percent of mothers with children aged 3-5 and 50 percent of mothers with children under age 3 were in the labor force.”).
200. FRIED, supra note 1, at 40.
201. Id.
202. For example, in March 1987, 52 percent of mothers with children one year old or younger were in the labor force. WOMEN & WORK, U.S. DEP’T OF LABOR, OVER HALF OF MOTHERS WITH CHILDREN ONE YEAR OR UNDER IN LABOR FORCE IN MARCH 1987 (1987). Five years earlier, the proportion was 43 percent and ten years before, it was only 32 percent. Id.
203. See 6 IN TEN NEW LABOR ENTRANTS WILL BE WOMEN, supra note 5. Projections indicate that 21 million new jobs will be created between now and the year 2000. Id. Six out of 10 new entrants to the labor force in this time period will be women. Id.
204. Jacobs, supra note 30, at 15.
worked outside the home in 1967, which is the same year as the data relied upon by Congress to formulate its decision that child care was a pressing national concern.\textsuperscript{205} Therefore, if the 1967 statistics, which are substantially lower than the present ones, were sufficient to prompt Congress to amend the Act, then something more must be done now, due to the dramatic rise of the participation in the workforce of women with young children.

Not only has there been a change in demographics since the enactment of the amendment, but there has also been an insignificant effort made by employers to provide child care support to employees.\textsuperscript{206} Many employers and unions have worked out contracts to meet the needs of their employees.\textsuperscript{207} However, according to the U.S. Labor Department’s Bureau of Labor Statistics, only 2\% of the nation’s establishments with ten or more employees sponsor day care centers for their workers’ children.\textsuperscript{208} Therefore, it is quite clear that Congress’ primary objective in amending section 302 of the LMRA, which was to provide employer supported day care to employees, has not been achieved.\textsuperscript{209} It is not sufficient for employer supported child care to be a permissive subject of collective bargaining because it has not resulted in a substantial benefit to working mothers. In order for the labor force to prosper, employer supported child care should be a working condition pursuant to the NLRA, and therefore, a mandatory bargaining subject, thus redacting the proviso to section 302 of the LMRA.

\section*{V. CONCLUSION}

In 1969, the increased participation in the workforce of women workers with young children created a climate in which Congress recognized the need for change by allowing employer contributions to employees for child care services.\textsuperscript{210} Since 1969, our society has undergone major changes in the area of women’s employment which is displayed in the current statistics that “90\% of all women have or will have a child during their careers.”\textsuperscript{211} Therefore, Congress must acknowledge that a more radical change is necessary, because child

\begin{itemize}
  \item \textsuperscript{205} \textit{Id.}
  \item \textsuperscript{206} See supra note 43.
  \item \textsuperscript{207} See supra notes 59-85 and accompanying text.
  \item \textsuperscript{208} Women & Work, U.S. Dep’t of Labor, Labor Department Reports on Employer Child Care Practices (1988).
  \item \textsuperscript{209} See supra notes 181-86 and accompanying text.
  \item \textsuperscript{210} See supra notes 197-201 and accompanying text.
  \item \textsuperscript{211} Fried, supra note 1, at 41.
\end{itemize}
care services for employees have not improved from the prior congressional attempt to rectify the problem. The only viable solution is to eliminate the proviso to section 302(c)(7) of the LMRA which prohibits the classification of employer supported child care as a mandatory bargaining subject.

Furthermore, the proviso to the amendment of section 302 of the LMRA is inconsistent with Congress' own legislative history of the Act.\textsuperscript{212} Congress intentionally left the bargaining subjects in section 8(d) without further definition and instead delegated to the Board, the task of determining which topics are mandatory bargaining subjects.\textsuperscript{213} Congress felt that the Board's expertise in the field would enable the Board to apply the language of the Act to the complexities of industrial life.\textsuperscript{214}

The object of this Act was not to allow governmental regulation of the terms and conditions of employment, but rather to insure that employers and their employees could work together to establish mutually satisfactory conditions. The basic theme of the Act was that through collective bargaining the passions, arguments, and struggles of prior years would be channeled into constructive, open discussions leading, it was hoped, to mutual agreement.\textsuperscript{215}

It is highly likely that the NLRB, when confronted with the issue of employer supported child care as a mandatory bargaining subject, would reach a reasonable and principled result in holding that this topic is a mandatory subject, because it bears a direct relationship to the "terms and conditions of employment."\textsuperscript{216} It follows from this conclusion that the NLRB be given the opportunity to exercise its broad discretion and construe employer supported child care as a mandatory bargaining subject, thus eliminating the proviso to section 302(c)(7).\textsuperscript{217} The current "social climate"\textsuperscript{218} of the labor industry supports this conclusion because "[c]hild care is crucial to millions of working Americans."\textsuperscript{219}

\begin{footnotesize}
\begin{enumerate}
\item See 29 U.S.C. § 186(c)(7) (1969); H.R. No. 245, supra note 127.
\item See Ford Motor Co., 441 U.S. at 495-96.
\item Id. at 496.
\item NLRA § 8(d), 29 U.S.C. § 158(d) (1947).
\item See H.R. No. 245, supra note 127.
\item WOMEN & WORK, U.S. DEPT OF LABOR, SECRETARY DOLE REQUESTS PUBLIC COMMENT ON LIABILITY INSURANCE FOR CHILD CARE (1989) (quoting former Secretary of Labor, Elizabeth Dole). Former Secretary Dole asked the public to help the Labor Department determine whether liability insurance barriers prevent employers from providing on or near-site child care. This information was needed because "[m]any employers are instituting
\end{enumerate}
\end{footnotesize}
Employer supported child care must be a priority in today's workforce, and therefore it is insufficient to place this topic on the bargaining table as just a permissive subject. Employers and unions have to bargain for child care so that mothers do not have to choose between employment and quality care for their children. Such a choice is not even a realistic option when the majority of two-parent families would fall below the federal poverty line if both parents were not working. Child care is the crucial support service which enables families to maintain stable employment. This is confirmed by the response to increased employee demand for child care. As a result, many contracts are now being negotiated in order to include provisions concerning employer supported day care. Child care negotiations between unions and employers coincide with the legislative history of the Act because the “proper subject matters for collective bargaining should be left in the first instance to employers and trade unions . . .” followed by the Board’s determination, rather than be “straitjacketed by legislative enactment.” Throughout history, unions have been responsible for social and economic change. This tradition will be kept alive through the unions’ negotiations for employer supported child care, pursuant to its classification as a mandatory bargaining subject.

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