A MEASURED APPROACH: EMPLOYMENT AND LABOR LAW DURING THE GEORGE W. BUSH YEARS

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On the whole, the Bush Administration took a thoughtful and measured approach to labor and employment law issues. Two principal themes emerged from the Administration's approach: first, that government should provide clarity in the law to the greatest extent possible, and, second, that enforcement and other discretionary efforts should channel limited resources toward the most pressing problems. This Essay will consider examples of these themes from four labor and employment statutes that featured prominently in debates during the Bush years: the Fair Labor Standards Act (FLSA), the Sarbanes-Oxley Act's (SOX) whistleblower provisions, the Employee Retirement Income Security Act (ERISA), and the National Labor Relations Act (NLRA).

The Essay will also briefly address a response to the Administration's approach by its critics, who increasingly sought to expand the law through state and local government initiatives. Although such efforts achieved some modest successes, attempts at more sweeping change faced significant federal preemption obstacles and largely failed. Looking forward, with Democratic majorities in both houses of Congress and a sympathetic ear in the White House, efforts in the States may wane with the promise of more sweeping—and perhaps less measured—action at the federal level.

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I. FAIR LABOR STANDARDS ACT

In 2004, the Bush Labor Department revised the fifty-year-old regulations that define "white collar" employees exempt from the overtime requirements of the FLSA, a task that previous administrations had promised to do but failed to achieve.[1] Although the revisions were long overdue and did not dramatically shift the law, they faced a groundswell of opposition from entrenched interest groups. In the end, however, the revisions greatly increased the clarity and administrability of the law and facilitated future enforcement efforts targeted to assist those most in need of the FLSA's protections.

The FLSA was enacted in 1938 to provide protection "to help those who toil in factory and on farm" to obtain "a fair day's pay for a fair day's work."[2] To "raise the wages of the most poorly paid workers and to reduce the hours of those most overworked,"[3] it set a nationwide minimum wage[4] and required the payment of time-and-a-half for hours worked beyond forty per week.[5] Consistent with the view that many workers, but not all, lack sufficient bargaining power to fend for themselves, the Act exempts from its overtime-pay requirements various categories of employees, including those "employed in a bona fide executive, administrative, or professional capacity."[6] The Act does not define these so-called white collar exemptions, instead leaving that task to the Secretary of Labor.[7]

The regulations defining the white collar exemptions had not been substantially revised since 1954.[8] The relevance of the older version has waned over the last fifty years largely because the American economy had shifted predominantly from

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1. *See infra* note 18 and accompanying text.

2. Franklin D. Roosevelt, Message to Congress (May 24, 1937). For a more detailed discussion of the FLSA reforms, from which this summary is adapted, see WILLIAM J. KILBERG & JASON C. SCHWARTZ, SAGA OF REFORM: REGULATION OF WORKER OVERTIME (2004) [hereinafter FLSA MONOGRAPH].

3. H.R. REP. NO. 75-1452, at 9 (1937).

4. 29 U.S.C. § 206 (2000).

5. 29 U.S.C. § 207 (2000).

6. 29 U.S.C. § 213(a)(1) (2000).

7. *Id.*

8. *See* U.S. GEN. ACCOUNTING OFFICE, FAIR LABOR STANDARDS ACT: WHITE-COLLAR EXEMPTIONS IN THE MODERN WORK PLACE 3 (1999) [hereinafter GAO REPORT].

manufacturing to services,[9] and because inflation had diminished the value of the threshold wage amounts used in the regulations. The old regulations, for example, established a $250-per-week threshold for "high salaried" white collar employees eligible for a less rigorous analysis of their job duties in determining exempt status.[10] Raises in the federal minimum wage for a forty-hour work week, however, made this level increasingly meaningless.[11] Moreover, references to such positions as "leg man"[12] and "strawbosses"[13] in the illustrations provided by the old regulations were anachronistic and had become mostly useless to both employers and employees. As Secretary of Labor Elaine Chao recognized, the old rules

> reflected the structure of the workplace, the type[s] of jobs, the education level of the workforce, and the workplace dynamics of an industrial economy that has long since changed. With each passing decade of inattention, the overtime regulations became increasingly out of step with the realities of the workplace and provided less and less guidance to workers and employers.[14]

For these reasons, there was widespread recognition that the old regulations needed to be reworked. The United States General Accounting Office had recommended to the Clinton Administration "that the Secretary of Labor comprehensively review current regulations and restructure white-collar exemptions to better accommodate today's work place and to anticipate future work place trends."[15] Such a seemingly simple prescription for change was easier said than done given the widely divergent opinions concerning the form such changes should take.

The tension over the form of any revisions is reflected in the decades of delay and inaction that preceded the Bush Admini-

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9. *Id.* at 1.

10. 29 C.F.R. §§ 541.119, 541.214, 541.315 (2004).

11. *See* 29 U.S.C. § 206 (2000) (setting a minimum wage of $5.15 per hour, equivalent to $206 per week). In 2007, the minimum wage was raised again, to reach $7.25 per hour by July 2009. Fair Minimum Wage Act of 2007, Pub. L. No. 110-28, 121 Stat. 112, 188.

12. 29 C.F.R. § 541.302(f)(2) (2004).

13. 29 C.F.R. § 541.115(b) (2004).

14. *Assessing the Impact of the Labor Department's Final Overtime Regulations on Workers and Employers: Hearing Before the Comm. On Educ. and the Workforce*, 108th Cong. 9 (2004) (statement of Elaine L. Chao, Secretary of Labor) (footnote omitted).

15. GAO REPORT, *supra* note 8, at 4.

stration's efforts. In 1981, the Labor Department "stayed indefinitely" its previous proposal to readjust the FLSA's salary thresholds in response to public comments urging a more comprehensive review,[16] and, in 1985, it sought public comment on "all aspects of the regulations."[17] From 1985 until the Bush Labor Department published its proposal in March 2003, the Department published statements of regulatory priority twice per year emphasizing reform of the regulations.[18] Notwithstanding this professed emphasis from both Republican and Democratic administrations, little progress was made.

In addition to the infirmities occasioned by the age of the regulations, the old rules had been increasingly exploited over time by plaintiffs eager to collect outsized judgments premised on employers' technical non-compliance with the regulations. In *Reich v. Malcolm Pirnie, Inc.*,[19] for example, the Department of Labor obtained a more than half-million dollar judgment on behalf of four hundred otherwise-exempt employees because twenty-four of them had been subject to a *total* of just $3,269 in technically improper pay deductions (which had been reimbursed to employees) on the ground that all of the exempt employees were theoretically "subject to" the improper deductions.[20] In a California state law case, involving the exempt status of insurance adjusters (who had for many years been understood to be exempt), and purportedly, but improperly, applying federal regulatory concepts, a jury awarded more than $90 million in damages plus prejudgment interest to plaintiffs who were held to have been misclassified.[21] The rise of such "gotcha" litigation, confusion in the case law, and the staggering judgments which often resulted, created motivated stakeholder classes with employers (by and large) on one side, and the plaintiff's bar and labor unions on the other. Any

16. 46 Fed. Reg. 18,998, 18,998 (Mar. 27, 1981).

17. 50 Fed. Reg. 47,696, 47,696 (Nov. 19, 1985).

18. *See, e.g.*, 65 Fed. Reg. 23,014, 23,029 (Apr. 24, 2000); 65 Fed. Reg. 73,303, 73,408 (Nov. 30, 2000); 66 Fed. Reg. 25,679, 25,687 (May 14, 2001); 66 Fed. Reg. 61,125, 61,222 (Dec. 3, 2001); 67 Fed. Reg. 33,307, 33,314 (May 13, 2002); 67 Fed. Reg. 74,057, 74,170 (Dec. 9, 2002).

19. 821 F. Supp. 905 (S.D.N.Y. 1993).

20. *Id.* at 906–10.

21. *Bell v. Farmers Ins. Exch.*, 105 Cal. Rptr. 2d 59 (Ct. App. 2001); *Employer held to have broken law on overtime*, NAT'L L.J., Feb. 4, 2002, at C9.

changes that threatened to alter the status quo with respect to exempt and non-exempt workers sparked instant controversy.

After meeting with more than forty of these stakeholder groups, representing both employers and employees, the Bush Labor Department finally published a proposed rule in the *Federal Register* on March 31, 2003.[22] The Department of Labor received an astounding 75,280 comments during the ninety-day regulatory comment period. Although only 600 of the comments were substantive (the rest were form letters), the comments reflected the intense public debate that was raging simultaneously in the media and in Congress. The AFL-CIO accused the Administration of robbing workers of overtime pay.[23] The Economic Policy Institute, which is funded by organized labor, issued a widely cited study contradicting the Labor Department's estimate that 644,000 employees would lose overtime with its own estimate of 8 million employees.[24] An author of that study wrote a Labor Day editorial arguing that "[t]he 8-hour day and 40-hour week that our great-grandparents fought for during a 50-year struggle and finally won in the New Deal will be nothing but a memory if the administration and its big business allies succeed in their stealth attack on this key labor protection."[25]

Unfortunately, despite the rhetoric, the substance of the revised regulations received little attention. An examination of that substance reveals the sensible nature of the changes and their important public purpose: to protect the lowest paid workers and to provide clarity to employees and employers, thereby reducing litigation.

As an initial matter, the revised regulations make clear that the exemptions do not apply to those for whom the FLSA's protections were designed, stating that non-management "carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, longshoremen, construction workers and laborers are entitled to minimum wage and overtime premium

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22. 68 Fed. Reg. 15,560 (Mar. 31, 2003).

23. *See* FLSA MONOGRAPH, *supra* note 2, at 18.

24. Jared Bernstein & Ross Eisenbrey, *Eliminating the right to overtime pay: Department of Labor proposal means lower pay, longer hours for millions of workers* (Econ. Pol'y Inst., Briefing Paper No. 139, 2003), *available at* http://www.epi.org/publications/entry/briefingpapers_flsa_jun03/.

25. Ross Eisenbrey, *Sad Labor Day for Working Americans*, MONTEREY HERALD, Aug. 31, 2003.

pay under the Fair Labor Standards Act, and are not exempt under the regulations in this part no matter how highly paid they might be."[26] The regulations also create reasonable and administrable salary thresholds, increasing the minimum salary required for exemption from $155 per week ($8,060 per year) to $455 per week ($23,660 per year)[27] and applying a streamlined test for those highly compensated employees making over $100,000 per year.[28] This automatic protection for those making less than $23,660 per year and the recognition that those making six-figure salaries are presumptively not in need of additional overtime pay (so long as they "customarily and regularly" perform exempt functions[29]), are eminently reasonable and a certain improvement in the law.

In addition to revising the white collar regulations, the Administration took other steps to ensure that the FLSA's requirements be as clear as possible and enforced effectively. Notably, the Labor Department's Wage and Hour Division made great strides in providing well-reasoned opinion letters to those parties requesting them. These opinion letters are particularly important because they give crucial guidance in addressing difficult problems and may be relied upon under the 1947 Portal-to-Portal Act amendments to the FLSA.[30]

Moreover, contrary to critics' claims that the Bush Labor Department catered only to business interests, the Department was an active supporter of FLSA plaintiffs. For example, the Department filed notable amicus briefs in support of the plaintiffs in the "donning and doffing" cases.[31] The Department also focused its enforcement efforts by setting a compliance priority

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26. 29 C.F.R. § 541.3(a) (2004); *see also* 29 C.F.R. § 541.3(b)(1) (2004) (expressly excluding from exemption "police officers, detectives, deputy sheriffs, state troopers, highway patrol officers, investigators, inspectors, correctional officers, parole or probation officers, park rangers, fire fighters, paramedics, emergency medical technicians, ambulance personnel, rescue workers, hazardous materials workers and similar employees, regardless of rank or pay level").

27. 29 C.F.R. § 541.600 (2004).

28. 29 C.F.R. § 541.601 (2004).

29. *Id.*

30. *See* 29 U.S.C. § 259 (2000).

31. Brief for the Secretary of Labor as Amicus Curiae Supporting Petition for Panel Rehearing and Petition for Rehearing *En Banc*, Tum v. Barber Foods, Inc., 360 F.3d 274, 281 (1st Cir. 2004) (Nos. 02-1679, 02-1739), *available at* http://www.dol.gov/sol/media/briefs/main.htm; Brief for the Secretary of Labor as Amicus Curiae, Alvarez v. IBP, Inc., 339 F.3d 894 (9th Cir. 2003) (Nos. 02-35042, 02-35110).

in low-wage industries with chronic violations, especially where large numbers of immigrant workers are employed. In the words of the Department:

> These workers are more willing to accept low-wages and less likely to complain to the government when their rights have been violated. To meet this challenge, the Department employed directed *enforcement*, aggressive *compliance assistance* to both workers and employers, and *strategic partnerships* to ensure compliance problems in these industries do not go unabated.[32]

The Administration's prioritization of enforcement in this regard—which resulted in the successful prosecution and recovery of back pay in a large number of cases[33]—is suggestive of its general approach and undoubtedly was a good use of the limited resources available.[34]

II. SARBANES-OXLEY WHISTLEBLOWER PROVISIONS

The expansion of federal whistleblower law was another significant labor and employment development of President Bush's tenure. In the wake of the collapse of energy giant Enron and other corporate scandals, whistleblowing assumed a new prominence in the public consciousness early in the Administration. Indeed, *Time* magazine's 2002 Persons of the Year were whistleblowers, including Sherron Watkins of Enron and Cynthia Cooper of WorldCom. According to the magazine, they "took huge professional and personal risks to blow the whistle . . . and in so doing helped remind us what American courage and American values are all about."[35] With the passage of the Sarbanes-Oxley Act of 2002,[36] a whole new universe of whistleblower litigation emerged.

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32. Dep't of Labor, Fact Sheet: Creating Opportunities for the Asian Pacific American Community (July 23, 2008), http://www.dol.gov/asp/programs/factsheet/apa2.htm.

33. *Id.*

34. Earlier administrations were often less focused in their enforcement efforts. In *Reich v. John Alden Life Insurance Co.*, for example, the Clinton Labor Department pursued an FLSA enforcement case involving marketing representatives earning up to $75,000 per year (and averaging $50,000 per year). 126 F.3d 1, 5 (1st Cir. 1997). It is difficult to imagine that there were not more worthy cases meriting the Department's resources at the time.

35. Richard Lacayo & Amanda Ripley, *The Whistleblowers*, TIME, Dec. 30, 2002, at 5.

36. Pub. L. No. 107-204, 116 Stat. 802.

Sarbanes-Oxley enacted whistleblower protections for employees who provide information or investigatory assistance relating to their reasonable belief of a violation of Securities and Exchange Commission rules, federal laws relating to fraud against shareholders, or federal mail, wire, and bank fraud statutes.[37] Employees are protected against adverse employment action when they share such information with or provide assistance to federal agencies, Congress, or representatives of the employer with supervisory or investigatory authority.[38] Remedial provisions of the statute entitle prevailing employees "to all relief necessary to make the employee whole," including reinstatement and back pay, as well as litigation costs and attorneys' fees.[39]

Although initial administrative law judge (ALJ) decisions under Sarbanes-Oxley led to substantial uncertainty in interpreting the new law, the Bush Department of Labor's Administrative Review Board (ARB), to which the Secretary delegates her decisional authority, demonstrated in its decisions a concerted effort to bring clarity to the law.

In *Platone v. FLYi, Inc.*,[40] for example, the ARB reversed the ALJ's decision, holding that the alleged misconduct did not fall within Sarbanes-Oxley's coverage. *Platone* involved an airline's labor relations manager who complained of billing irregularities between the union and the company regarding reimbursement when pilots were unable to fly because of union business. The decision was significant because the ARB made clear that the Act "does not provide whistleblower protection for all employee complaints about how a public company spends its money and pays its bills," but rather is limited to those communications that "definitively and specifically" relate to the listed categories of fraud or securities violations under the statute.[41]

In addition to clarifying the law, the Department has intervened in support of whistleblowers to bolster its enforcement powers in the field. In *Bechtel v. Competitive Technologies, Inc.*,[42]

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37. 18 U.S.C. § 1514A (2006).

38. 18 U.S.C. § 1514A(a)(1) (2006).

39. 18 U.S.C. § 1514A(c) (2006).

40. No. 04-154 (Sept. 29, 2006), *aff'd sub nom.* Platone v. U.S. Dep't of Labor, 548 F.3d 322 (4th Cir. 2008).

41. *Id.* at 17.

42. 448 F.3d 469 (2d Cir. 2006).

for example, the Secretary intervened in federal court on behalf of the plaintiff to enforce a preliminary order of reinstatement issued following the Department's initial investigation. The case arose when a corporate vice president alleged that he was terminated for making internal complaints about financial disclosures and brought an action to enforce a preliminary reinstatement order. The district court entered a preliminary injunction enforcing the order, and the employer appealed. Although the Second Circuit ultimately vacated the district court's injunction, the Department filed a brief supporting the plaintiff's argument that the district court had the authority to enforce the order of reinstatement.[43] Efforts like these suggest that the Bush Labor Department was willing to expend its limited resources in aggressive support of enforcement powers on behalf of whistleblowers, even in cases where the reviewing court disagreed.

III. ERISA

As in the whistleblower context, the Enron debacle had a substantial effect on litigation under ERISA. Although securities class actions have long followed the disclosure of accounting and other improprieties by public companies, a new category of cases often referred to as "ERISA stock drop cases" has become a fixture of the post-Enron legal landscape.[44]

ERISA stock drop cases generally allege that material misstatements or omissions made by a company caused losses in employee investments in company stock through 401(k) or employee stock ownership plans (ESOPs). Although the cases routinely involve factual allegations similar to those in companion securities cases, there are notable differences. The ERISA cases often involve different defendants, different legal duties, and afford different relief. In addition to alleging the same material misrepresentations involved in the securities cases, the ERISA cases also generally add allegations that plan fiduciaries violated their duty of prudence by continuing to offer or hold (or both) company stock in the plan despite knowing that the stock was

43. Brief for the Secretary of Labor, Bechtel v. Competitive Techs., 448 F.3d 469 (2d Cir. 2006) (No. 05-2404), 2005 WL 5289280.

44. *See* Craig C. Martin et al., *What's up on Stock-Drops?* Moench *Revisted*, 39 J. MARSHALL L. REV. 605, 605–06 (2006).

not a prudent investment.[45] Finally, the cases routinely involve important and specialized ERISA questions as well as occasional participation by the United States Department of Labor.

The ERISA stock drop cases provide a window through which one can see some of the recurrent challenges that faced the Bush Administration and shaped the development of labor and employment law during the period. The cases are a function of the rise of 401(k) plans and ESOPs, which are part and parcel of the increased employee mobility and demand for portability of retirement benefits reflective of the period. Additionally, the cases emerged in the wake of Enron and other corporate accounting scandals that plagued the Bush years (and which also led, of course, to the Sarbanes-Oxley Act and its whistleblower protections, discussed above). In its reaction to the ERISA cases, the Bush Administration characteristically provided active support to plaintiffs it perceived to have legitimate complaints, but also sought to provide clarifying guidance and to reduce unnecessary litigation. Two actions by the Administration are illustrative: the issuance of a Field Assistance Bulletin addressing the fiduciary responsibilities of directed trustees, and the Department's amicus brief in support of the plaintiffs in the Enron stock drop case.

With respect to the first issue, ERISA provides that a fiduciary (who exercises discretionary authority or control over a plan's assets) may appoint a directed trustee to manage the plan "in which case the trustees shall be subject to proper directions of such fiduciary which are made in accordance with the terms of the plan and are not contrary to [ERISA]."[46] Directed trustees are typically third-party service providers that conduct transactions at the direction of a named fiduciary. They often provide their directed trustee services at a very low cost as a subsidiary to other financial services being provided to the employer; that low cost reflects, in part, the limited role (and presumed limited liability) of the directed trustee. The degree of fiduciary responsibility owed by directed trustees has been the subject of much litigation, however, because they are often

45. *See* 29 U.S.C. § 1104(a)(1)(B) (2006) (creating a duty to manage the plan assets "with the care, skill, prudence, and diligence under the circumstances then prevailing").

46. 29 U.S.C. § 1103(a)(1) (2006).

perceived to have deep pockets and are therefore attractive targets to plaintiffs.

In *Field Assistance Bulletin No. 2004-03*, the Department considered the following question in response to the uncertainty in the law: "In the context of publicly traded securities, what are the fiduciary responsibilities of a directed trustee?"[47] The Department recognized, of course, that "when a directed trustee knows or should know that a direction from a named fiduciary is not made in accordance with the terms of the plan or is contrary to ERISA, the directed trustee may not, consistent with its fiduciary responsibilities, follow the direction."[48] The Department adopted a sensible view of the limited scope of the directed trustee's responsibilities in a number of commonly litigated scenarios. The Department clarified, for example:

> A directed trustee does not, in the view of the Department, have an independent obligation to determine the prudence of every transaction. The directed trustee does not have an obligation to duplicate or second-guess the work of the plan fiduciaries that have discretionary authority over the management of plan assets and does not have a direct obligation to determine the prudence of a transaction.[49]

Recognizing the reality of today's financial services providers, the Department also took the position that material, non-public information possessed by one arm of a financial institution generally will not be imputed to those performing its directed trustee functions.[50] The Department's position on these issues has been granted substantial deference in the courts and has helped to provide valuable clarity in the law.[51] It has apportioned responsibility for fiduciary decision making in a sensible manner—with primary responsibility resting on the employer fiduciaries—thereby facilitating the continued provision of directed trustee services at a reasonable cost without unrealistic liabilities.

It is worth noting, however, that the Bush Department of Labor filed an influential amicus brief in support of the plaintiffs

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47. U.S. DEP'T OF LABOR, FIELD ASSISTANCE BULLETIN NO. 2004-03, at 1 (2004).

48. *Id.* at 2–3.

49. *Id.* at 4.

50. *Id.* at 5.

51. *See, e.g.*, *In re* WorldCom, Inc. ERISA Litig., 354 F. Supp. 2d 423, 425 (S.D.N.Y. 2005) (granting directed trustee's motion for summary judgment).

in the Enron stock drop case.[52] This decision reflected the Administration's dedication of resources to important enforcement matters and aggrieved employees, despite charges by its critics of overzealous support of business interests and inadequate enforcement. In the brief, the Department argued that plaintiffs had adequately alleged that the compensation committee of Enron's board of directors, the company itself, and Chairman Ken Lay had breached the fiduciary duties they owed to employees participating in Enron's plans.[53] The Department also argued strongly against the defenses asserted by the defendants,[54] even though the Department's positions would have important implications for other, and perhaps less egregious, cases.

IV. NATIONAL LABOR RELATIONS BOARD

Like the Labor Department, the National Labor Relations Board (NLRB) under President Bush's Administration has been attacked as a partisan, pro-employer body. A careful examination of the decisions most frequently criticized by labor unions (and targeted for reversal), such as *Dana Corp.*[55] and *The Guard Publishing Co.*,[56] however, reveals a sensible and even-handed approach to the law.

The *Dana Corp.* decision has important implications for the current "card check" legislation and for the recent trend of "corporate campaigns" in which labor unions employ a variety of labor, public relations, and marketplace strategies to pressure employers into voluntary acceptance of a union at some or all of their facilities. In *Dana Corp.*, the Board responded reasonably to the practical realities of modern-day corporate campaigns, in which an employer may be pressured to recognize a union based upon employee authorization cards, which might not reflect the actual desire of employees. In such cases, the Board reversed its prior doctrine, which had foreclosed decertification elections in the period following voluntary recognition

52. Brief of the Secretary of Labor as Amicus Curiae Opposing the Motions to Dismiss, Tittle v. Enron Corp., No. H-01-3913 (S.D. Tex. Aug. 30, 2002), *available at* http://www.dol.gov/sol/media/briefs/enronbrief-8-30-02parti.htm.

53. *Id.* at 3–28.

54. *Id.* at 29–37.

55. 351 N.L.R.B. 434 (2007).

56. 351 N.L.R.B. 1110 (2007).

of a union based on employee authorization cards (that is, card check).[57] The Board recognized that "the freedom of choice guaranteed employees . . . is better realized by a secret election than a card check."[58] Therefore, the Board modified its prior doctrine to allow an employee or rival union to file a decertification petition (supported by signatures of at least 30% of eligible employees) within forty-five days of the employer's voluntary recognition of a union.[59] The decertification petition would then trigger a secret ballot election to determine whether and by whom employees would like to be represented in collective bargaining.[60] This decision is targeted by unions for reversal, to protect their current gains from corporate campaigns and their expectation of future gains from the Employee Free Choice Act, or the so-called card check legislation, if passed.

In *The Guard Publishing Co.*, the Board again applied a common-sense approach to modern-day workplace realities, when it upheld the legality of employer prohibitions on union-related use of its e-mail system.[61] The Board reasoned that e-mail is a form of company equipment that can legitimately be restricted by the employer, as distinguished from off-duty, in-person solicitation.[62] The Board further found that the common practice of allowing occasional personal use of e-mail would not support a charge of discriminatory application of an employer's e-mail policy, provided that the employer treats all e-mails soliciting support for a group or organization similarly.[63] This is another decision targeted by unions for its practical effect on organizing campaigns. It can hardly be described, however, as a radical pro-employer decision; instead, it should be viewed as a sensible recognition of e-mail practices.

V. STATE AND LOCAL MEASURES

In response to the more measured approach at the federal level, unions and other critics increasingly turned to state and

57. *Dana Corp.*, 351 N.L.R.B. at 434.
58. *Id.* at 438.
59. *Id.* at 434.
60. *See id*.
61. 351 N.L.R.B. at 1110.
62. *Id.* at 1114–16.
63. *Id.* at 1118–19.

local law in pursuit of more dramatic changes. San Francisco and Washington, D.C. enacted mandatory sick leave policies during the period,[64] and a number of states raised their minimum wages above federal levels. Two prominent, but ultimately unsuccessful, examples of this tactic include California Assembly Bill 1889, which restricted recipients of state funds from assisting, promoting, or deterring union organizing, and the Maryland Fair Share Health Care Fund Act, sometimes called the "anti-Wal-Mart law," which required Wal-Mart to spend a fixed percentage of its payroll on health insurance or make payments into a state fund. These two cases illustrate both the success with which unions and other Administration opponents pressed their agendas in state legislatures, as well as the potency of federal preemption litigation in defeating such moves.

It took almost the entire Bush Administration for the saga of California Assembly Bill (AB) 1889 to unfold. California Governor Gray Davis signed the bill on September 28, 2000, but it was not until June 19, 2008, that the United States Supreme Court ultimately struck it down in *Chamber of Commerce of the United States v. Brown*.[65] The bill prohibited certain employers from using state funds "to assist, promote, or deter union organizing."[66] Although this language is facially neutral, it was clear from the outset that the purpose of the legislation was to limit anti-union speech and to strengthen union organizing campaigns.[67] To this end, AB 1889 contained express exemptions for "activit[ies] performed" or "expense[s] incurred" in connection with "[a]llowing a labor organization or its representatives access to the employer's facilities or property," and "[n]egotiating,

64. *See* Nikita Stewart, *Council Approves Sick Leave In District: Bill Will Mandate Paid Job Absences*, WASH. POST, Mar. 5, 2008, at B1.

65. 128 S. Ct. 2408 (2008).

66. CAL. GOV'T CODE §§ 16645–16649 (West Supp. 2009).

67. California was not the only state to pass such a measure. *See* N.Y. LAB. LAW § 211-a (2003); MASS. GEN. LAWS ch. 7 § 56 (2006). Moreover, one of President Obama's first acts in office was to issue Executive Order 13,494, 74 Fed. Reg. 6101 (Feb. 4, 2009), *Economy in Government Contracting*, which prohibits government contractors' recovery of costs incurred "to persuade employees . . . to exercise or not to exercise, or concerning the manner of exercising, the right to organize and bargain collectively." It remains to be seen how this measure and a related executive order mandating certain pro-union postings will be interpreted and whether they will face and survive legal challenges.

entering into, or carrying out a voluntary recognition agreement with a labor organization."[68]

Although the bill was expected to affect employers in a range of industries, it was targeted primarily at the healthcare industry, to which the state's Medi-Cal program provided substantial funds to a large number of employers.[69] The bill had included a dual enforcement mechanism, which allowed for civil actions by private taxpayers and the state attorney general, and harsh penalties. Employers running afoul of the law were subject to liability for the amount of funds expended in violation of the statute, as well as a civil penalty equal to twice that amount, plus attorneys' fees and costs. Passed on a strictly party-line vote, and with unions quickly availing themselves of the statute's provisions through reporting and litigation, the bill was unsurprisingly and quickly challenged by employer groups.[70]

On a motion for summary judgment, the United States District Court for the Central District of California found AB 1889 to be preempted by section 8(c) of the NLRA,[71] which provides that "[t]he expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic or visual form, shall not constitute an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit."[72] Although a Ninth Circuit panel affirmed this decision,[73] it was ultimately reversed by that court after rehearing en banc.[74]

The Supreme Court granted certiorari and reversed the Ninth Circuit on federal preemption grounds.[75] In a 7-2 opinion by Justice Stevens, amounting to a complete victory for opponents of the law, the Court held that the AB 1889 "policy judgment that partisan employer speech necessarily 'interfere[s]

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68. CAL. GOV'T CODE § 16647(b), (d) (West Supp. 2009).

69. *See* John Logan, *Innovations in State and Local Labor Legislation: Neutrality Laws and Labor Peace Agreements in California*, *in* UNIV. OF CAL. INST. FOR LABOR & EMPLOYMENT, THE STATE OF CALIFORNIA LABOR 2003, at 159–62 (2003).

70. *See, e.g.*, Chamber of Commerce of the U.S. v. Lockyer, 422 F.3d 973, 980–82 (9th Cir. 2005), *vacated*, 463 F.3d 1076 (9th Cir. 2006) (en banc).

71. Chamber of Commerce of the U.S. v. Lockyer, 225 F. Supp. 2d 1199 (C.D. Cal. 2002).

72. 29 U.S.C. § 158(c) (2006).

73. 422 F.3d at 976.

74. 463 F.3d at 1080.

75. Chamber of Commerce of the U.S. v. Brown, 128 S. Ct. 2408 (2008).

with an employee's choice about whether to join or to be represented by a labor union'" had been rejected by Congress in the Taft-Hartley Act amendments to the NLRA.[76]

In another piece of employer-targeting legislation backed by unions, the Maryland Fair Share Health Care Fund Act required employers with more than 10,000 employees in the state to spend at least 8% of their total payrolls on employees' health insurance costs or to pay the state for the amount that they fell short.[77] As the Fourth Circuit noted, however, it was not a law of general applicability: "Resulting from a nationwide campaign to force Wal-Mart Stores, Inc., to increase health insurance benefits for its 16,000 Maryland employees, the Act's minimum spending provision was crafted to cover just Wal-Mart."[78]

In the face of an ERISA preemption challenge by the Retail Industry Leaders Association (RILA) trade group, Maryland argued that Wal-Mart could comply with the law without altering its ERISA plan because it could make payments directly to the state. The Fourth Circuit, however, rejected this argument and held the statute to be preempted, noting that because "in *most* scenarios, the Act would cause an employer to alter the administration of its healthcare plans," the purported alternatives could not save it from preemption.[79]

In the wake of the decision, RILA's president stated that "[t]he court has sent a strong message at states looking at similar bills: these violate federal law."[80] The director of state legislative programs for the AFL-CIO, which lobbied for the law, was forced to agree: "We have to go back to the drawing board."[81]

If these two cases suggest that federal preemption challenges remain a substantial obstacle to state and local efforts, organized labor and its allies may choose to redirect their efforts toward Washington. With support from the White House, and Democ-

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76. *Id.* at 2414.

77. MD. CODE ANN., LAB. & EMPL. §§ 8.5-101 to -107 (LexisNexis 2008).

78. Retail Indus. Leaders Ass'n v. Fielder, 475 F.3d 180, 183 (4th Cir. 2007).

79. *Id.* at 197.

80. Michael Barbaro, *Appeals Court Rules for Wal-Mart in Maryland Health Care Case*, N.Y. TIMES, Jan. 18, 2007, at C4 (quoting Sandra L. Kennedy).

81. *Id.* (quoting Naomi Walker). For a recent discussion of how Wal-Mart has become a leader in addressing health insurance issues without the compulsion of state law, see Ceci Connolly, *At Wal-Mart, a Health-Care Turnaround: Once Criticized, Company Is Now an Innovator in Employee Coverage*, WASH. POST, Feb. 13, 2009, at A1.

ratic majorities on both sides of Capitol Hill, the fortunes of organized labor in the federal city may well be looking up in the wake of President Bush's departure. Whether the response to these good fortunes will be a measured one is yet to be seen.

CONCLUSION

In sum, the Bush Administration was effective in reforming and enforcing the laws of the workplace where such efforts were needed most, even if it did not seek the sweeping legal reforms that its proponents would have liked and that its opponents accused it of doing. Ironically, it is that accusation that has been taken as reality and as justification for an ambitious agenda for the Obama Administration. With substantial majorities in the House and Senate, President Obama is likely to have a fair measure of success. But if the labor and employment legacy of a presidential administration can be gauged by sound policies that bring clarity to the law and the effective use of limited resources, stacking up to the Bush Administration's measured approach will be a tall order indeed.