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OpEd: The Shop Steward in the Oval Office

Labor Day takes on a sobering meaning with NLRB regulators eager to do a president's bidding.

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For organized labor, Labor Day is customarily a time for celebrating the history and accomplishments of unions in America. This year, organized labor might also want to raise a toast on Monday to President Obama's National Labor Relations Board and all that the NLRB has accomplished for the president's union allies.

For years, organized labor's share of the private workforce has been in decline. But thanks to a series of orchestrated steps by the NLRB—culminating in a watershed decision last week—unions have the best opportunity in decades to turn around their dwindling numbers.

In the first of those steps, since 2010 the Obama NLRB has issued a series of important decisions expanding employee and union bargaining power, and broadening the category of employer unfair-labor practices. For example, it has given employees unprecedented power to use employer email for union purposes and to challenge employer-conduct rules—such as rules requiring politeness and civility in the workplace—as overly broad and unlawful.

The NLRB has also paved the way for employees to avoid arbitration of individual workplace disputes in favor of judicial class actions and their potential for high-litigation costs and substantial class monetary awards. The NLRB also has made it easier for employees to use social media to publicly, and even falsely, criticize company management with an ease and on a scale never before possible—and be free of discipline for doing so. NLRB decisions of this type are designed to give employees a sense of empowerment, put employers on the defensive, and lay the groundwork for more successful union organizing.

Second, the NLRB has granted unions almost unlimited power to define unilaterally the groups of employees they want to organize. Instead of having to organize on a plantwide or storewide basis—which had been traditionally favored for decades—unions can now organize in so-called "micro units" consisting of departments or classifications of employees within a factory (e.g., the loading dock) or a store (e.g., the cosmetics department).

This permits unions to, in effect, gerrymander for a union election, picking units where they know they can win a victory, even though they could not have won a union election conducted in a traditional larger bargaining unit. In this way, unions can gain a foothold at many locations where they were previously unable to do so.

Third, the board has issued so-called quickie election rules that effectively cut by more than a third (from a median of 38 days to 24) the amount of time that the employer has to campaign before an election is held to certify, or not, the union as the workers' exclusive representative in negotiating wages, hours and working conditions.

Unions already have a natural advantage in such elections because they can prepare their campaigns and file election petitions at the time of their choosing, while employers have only a limited time to respond to a union campaign. This rule change is expected to lead to even higher union win rates (they already win over 60% of the elections).

Finally, and most recently, on Aug. 27 the NLRB issued its landmark "joint employer" decision, making it far easier for a union to claim that a company must bargain—along with its contractors or franchisees—with the union representing the contractors' or franchisees' employees.

For decades, joint-employer status would be found by the NLRB only in situations where one company actually and directly dictated the terms and conditions of employment at a second company. Now the NLRB says it will also find joint-employer status based on a company's power to affect the terms and conditions of employment of its contractors' or franchisees' employees, even if that power has never been exercised.

This change alone gives organized labor two big opportunities. Unions can organize small—e.g., on the basis of a contractor's operation, such as a cleaning crew in an office building, or a single franchisee's fast-food store. But at the same time they can bargain big, by gaining access to the deeper pockets of the joint-employer company which retained the contractor or granted the franchise. This lets the union seek higher wages and benefits than might have been supportable by a contractor or franchisee alone. Further, once joint-employer status is determined, a company may be bound by its contractors' or franchisees' collective-bargaining agreements, and by other legal and contractual claims of their employees.

Some of steps the NLRB has taken—for instance, the election regulations and cases involving employer-conduct rules—are being litigated in the federal courts and may be challenged in Congress. But given the vicissitudes of litigation and the impotency of congressional action when the president wields a veto pen, the policies embedded in the NLRB's actions will be with us for some time. Unless and until there is a change in political control in the 2016 elections, we can expect more of the same from the NLRB. Unfortunately for business, this is not the last sobering Labor Day of the Obama presidency.

Mr. Meisburg served as a member of the National Labor Relations Board under George W. Bush and as general counsel of the NLRB under both George W. Bush and Barack Obama.