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Unionizing the Contingent Workforce: Squaring the NLRB's 2004 Decision in Oakwood Care Center with the United States' Obligations as a Signatory to the International Labour Organization

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COMMENT

**UNIONIZING THE CONTINGENT
WORKFORCE: SQUARING THE NLRB’S 2004
DECISION IN *OAKWOOD CARE CENTER* WITH
THE UNITED STATES’ OBLIGATIONS AS A
SIGNATORY TO THE INTERNATIONAL
LABOUR ORGANIZATION**

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I. INTRODUCTION

Economic liberalism has increased emphasis on contingent employment, resulting in a sizable departure from the traditional long-term employment model that has been of significant legal and social consequence for international industrial relations.¹

1. See Judy Fudge, *The Legal Boundaries of the Employer, Precarious Workers and Labour Protection*, in BOUNDARIES AND FRONTIERS OF LABOUR

Considerable scholarship illustrates the amplified use of temporary employment by multinational corporations struggling to adapt in the globalized industrial complex.² While alternative labor arrangements offer management a host of strategic benefits, antiquated domestic labor law is statutorily under-inclusive of temporary workers, often failing to afford the most fundamental employment rights to this vulnerable and burgeoning sector of the workforce.³ Given the incongruity between the employment relationship that the National Labor Relations Act (“the Act”)⁴ assumes and the nuanced

LAW: GOALS AND MEANS IN THE REGULATION OF WORK 295–97 (Guy Davidov & Brian Langille eds., 2006) (concluding that the traditional employment model upon which the contemporary study of labor relations is based has undergone fundamental structural changes in response to globalization). *See generally* Gillian MacNaughton & Diane F. Frey, *Decent Work for All: A Holistic Human Rights Approach*, 26 AM. U. INT’L L. REV. 441, 442–43 (2011) (acknowledging the enormous social impact that decades of deregulation, privatization, and globalization have had on the vulnerable workforce).

2. *See* News Release, Bureau of Labor Statistics, Contingent and Alternative Employment Arrangements, February 2005 (July 27, 2005), *available at* <http://www.bls.gov/news.release/conemp.nr0.htm> (indicating that 1.8–4.1% of the American workforce was engaged in temporary work in February 2005); U.S. GOV’T ACCOUNTABILITY OFFICE, GAO/HEHS-00-76, CONTINGENT WORKERS: INCOMES AND BENEFITS LAG BEHIND THOSE OF REST OF WORKFORCE 16 (2000), *available at* <http://www.gao.gov/new.items/he00076.pdf> (demonstrating that between 1982 and 1998, the number of temporary jobs rose 577%, making it the fastest-growing portion of the U.S. labor market); *cf.* Kim Van Eyck, *Flexibilizing Employment: An Overview*, INT’L LABOUR ORG. 1–2 (SEED, Working Paper No. 41, 2003) (reasoning that corporations with an international presence increasingly turn to labor market flexibilization to achieve a competitive advantage in an environment of rapidly-changing markets).

3. *See* Guy Davidov, *Joint Employer Status in Triangular Employment Relationships*, in BOUNDARIES AND FRONTIERS OF LABOUR LAW: GOALS AND MEANS IN THE REGULATION OF WORK 2–3 (Guy Davidov & Brian Langille eds., 2006) (reasoning that by embracing temporary employment, risk traditionally absorbed by employers may be “outsourced” to employees); *Policies and Regulation to Combat Precarious Employment, Bureau for Workers’ Activities*, INT’L LABOUR ORG. 6 (2011) (warning that weak legislative frameworks and “impotent enforcement mechanisms” not only reduce the availability of certain rights, but also reduce the likelihood that a temporary employee will be able to successfully assert and protect the limited rights that he or she may have). *But see Special Report: Contingent Workers*, U.S. DEP’T OF LABOR (2011), *available at* http://www.dol.gov/_sec/media/reports/dunlop/section5.htm (finding that labor flexibility, when appropriately regulated, can be a healthy development for workers, too, as temporary arrangements promote better work-life balance and autonomy at work).

4. National Labor Relations Act, 29 U.S.C. §§ 151–69 (2006).

employment relationship that practically exists, temporary workers elude protective regulation under the Act, often performing the same work as long-term workers without the same benefits and safeguards. Common features of contingent work include uncertainty as to employment duration, ambiguity regarding which employer determines the terms and conditions of employment, low wages, inadequate benefits, and, most important for purposes of this comment, crippling legal and practical obstacles to joining trade unions.⁵

Particularly salient is the National Labor Relations Board's ("NLRB" or "the Board") 2004 decision in *Oakwood Care Center* ("*Oakwood*"), wherein a three-member majority interpreted Section 9(b) of the Act to read that a bargaining unit incorporating both temporary workers supplied by a "supplier employer" (that is, a private employment agency) and the user employer's core employees is statutorily impermissible absent consent of both the user and supplier employers.⁶ The consequences of *Oakwood* on domestic labor law are two-fold. First, by conditioning the legality of the arrangement on employer consent, *Oakwood* imposes upon temporary employees an elevated burden to accessing collective representation guaranteed by Section 7 of the Act.⁷ Further, the

5. See Kathleen Barker & Kathleen Christensen, *Introduction: Controversy and Challenges Raised by Contingent Work Arrangements*, in CONTINGENT WORK: AMERICAN EMPLOYMENT RELATIONS IN TRANSITION 4-8 (Kathleen Baker & Kathleen Christensen eds., 1998) (noting the diverse degree of control that firms have over their employees); Katherine Stone, *Legal Protections for Atypical Employees: Employment Law for Workers Without Workplaces and Employees Without Employers*, 27 BERKLEY J. LAB. & EMP. L 251, 253-55 (2006) (demonstrating that labor and employment laws do not afford full protection to temporary employees, and that statutory under-inclusion impacts a variety of rights ranging from collective bargaining to occupational health and safety).

6. See *Oakwood Care Ctr.*, 343 N.L.R.B. 659, 663 (2004) (expressly overruling the Board's 2000 decision in *M.B. Sturgis* and holding instead that jointly-employed temporary employees seeking to unionize with employees solely employed by the "user" employer must, consistent with Section 9 of the National Labor Relations Act, demonstrate sufficient mutuality of interest and obtain the consent of both the "user" employer and the "supplier" employer).

7. See Bitu Rahebi, Comment, *Rethinking the National Labor Relations Board's Treatment of Temporary Workers: Granting Greater Access to Unionization*, 47 UCLA L. REV. 1105, 1122-24 (2000) (arguing that the joint-employer consent doctrine as originally applied in *Greenhoot* and ultimately reaffirmed in *Oakwood* presents an overwhelming obstacle to temporary employee unionization).

decision simultaneously affords employers an unqualified constructive veto on a temporary worker's right to unionize such that an employee otherwise capable of satisfying the elevated burden may still be barred from membership arbitrarily and without just cause.⁸ *Oakwood* is not without its detractors, however, and in June 2013 an NLRB regional director ordered an election among temporary workers over calls to dismiss the petitions pursuant to the Board's holding in *Oakwood*.⁹

Domestic confusion regarding proper legal treatment of the contingent workforce does not, however, exempt the United States from obligations under the international labor law framework.¹⁰ As a signatory to the International Labour Organization ("ILO"), the United States has, on the basis of membership alone, undertaken a

8. See David A. Recht, Comment, *Neither Mutual Aid Nor Protection: How Current National Labor Relations Board Practice Denies Temporary Workers Their Rights to Organize*, 38 CONN. L. REV. 565, 566–67 (2006) (finding that *Oakwood* is irreconcilable with the legislative intent of the Act because the consent requirement effectively allows employers to “block a proposed bargaining unit without any adjudication through the Board or review by the courts”); cf. Tiffany Fonseca, Comment, *Collective Bargaining Under the Model of M.B. Sturgis, Inc.: Increasing Legal Protections for the Growing Contingent Workforce*, 5 U. PA. J. LAB. & EMP. L. 167, 167–68 (2002) (recalling that the dual-consent requirement “kept nearly every temporary employee from collective bargaining in the last decade” and predicting that removal of the consent requirement in *M.B. Sturgis* will make it easier for temporary employees to participate in collective bargaining).

9. See Decision and Direction of Election, Bergman Bros. Staffing Inc., No. 05-RC-105509 (June 20, 2013), available at [http://op.bna.com/dlrcases.nsf/id/mamr-993n4c/\\$File/Bergman.pdf](http://op.bna.com/dlrcases.nsf/id/mamr-993n4c/$File/Bergman.pdf) (ordering the representation election of workers supplied by a temporary employment agency and finding that if *Oakwood* were to apply in this instance, temporary employees “would effectively be denied any opportunity to exercise their statutory rights”); Lisa Milam-Perez, *Staffing Company Workers Not Temps – At Least as to Agency That Dispatched Them; NLRB Regional Director Calls for Election*, WOLTERS KLUWER, <http://www.employmentlawdaily.com/index.php/news/staffing-company-workers-not-temps-at-least-as-to-agency-that-dispatched-them-nlrb-regional-director-calls-for-election/> (reporting on the regional director's decision to order an election).

10. See James Atleson et al., INTERNATIONAL LABOR LAW: CASES AND MATERIALS ON WORKERS' RIGHTS IN THE GLOBAL ECONOMY, 57–61 (2008) (highlighting that pursuant to the Fundamental Declaration on Principles and Rights at Work, ILO Convention No. 87 is so central to the ILO's mission that, unlike the majority of international labor law promulgated at the ILO, the treaty is binding and enforceable on the basis of membership alone, regardless of sovereign attempts to ratify).

binding commitment to guarantee unobstructed associational and collective rights to all workers pursuant to ILO Convention No. 87 on Freedom of Association and Protection of the Right to Organize (“Convention No. 87”).¹¹ This comment attempts to reconcile the Board’s decision in *Oakwood* with the ILO’s command that all workers, without distinction or discrimination whatsoever, shall have the right to establish, join, and structure unions of their choosing without previous authorization.¹²

Part II of this comment surveys the organizational structure and substantive mandate of the ILO, and comprehensively reviews ILO Convention No. 87.¹³ Part II then reasons through the *Oakwood* decision and clarifies the Board’s inconsistent application of Section 9(b) of the Act to temporary workers in *M.B. Sturgis, Inc.* and *Lee Hospital*.¹⁴ Part III comparatively analyzes Convention No. 87 with

11. See ILO Declaration of Fundamental Principles and Rights at Work, 37 I.L.M. 1237 (June 19, 1998), available at <http://www.ilo.org/public/english/standards/relm/ilc/ilc86/com-dtxt.htm> (declaring that freedom of association and the effective recognition of collective bargaining are so central to the mandate of the ILO that Convention Nos. 87 and 98, which address these issues, are binding on the basis of membership alone).

12. See ILO Convention Concerning the Freedom of Association and Protection of the Right to Organise art. 2, July 9, 1948, 68 U.N.T.S. 17 [hereinafter ILO Convention No. 87] (“Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.”); see also ILO Committee on Freedom of Association, *Report in Which the Committee Requests to Be Kept Informed of Development*, ¶ 242, Case No. 2083 (Can.), Rep. No. 324 (Mar. 2001) [hereinafter CFA Case No. 2083] (“Article 2 of ILO Convention No. 87 provides that all workers ‘without distinction whatsoever’ should have the right to organize, which the Committee on Freedom of Association has considered to mean that this freedom should be guaranteed without discrimination of any kind.”); cf. ILO Committee on Freedom of Association, *Report in Which the Committee Requests to Be Kept Informed of Development*, ¶ 754, Case No. 2556 (Colom.), Rep. No. 349 (Mar. 2008) [hereinafter CFA Case No. 2556] (recalling that all workers, whether employed permanently or temporarily and jointly or solely, must be permitted to join organizations of their choosing without distinction whatsoever pursuant to Article 2 of ILO Convention No. 87).

13. See discussion, *infra* Part II.A (illustrating the ILO’s tripartite system of governance and explaining the ways by which the ILO promulgates, regulates, and enforces international labor law and policy); see also discussion, *infra* Part II.B (gauging the protections afforded to workers under ILO Convention No. 87, and explaining how they apply to the United States).

14. See discussion, *infra* Part II.C (chronicling the Board’s conflicting

the Board's 2004 ruling in *Oakwood*, ultimately concluding that the decision is textually and jurisprudentially inconsistent with the United States' obligations under the ILO.¹⁵ In closing, Part IV encourages the U.S. Senate to ratify ILO Convention No. 181 on Private Employment Agencies and advocates returning to well-settled Section 9(b) precedent pursuant to *M.B. Sturgis*.¹⁶ Embracing these recommendations would promote compliance with international labor law.

II. BACKGROUND

Domestically, rapid growth in temporary employment has fractured the legal foundation upon which labor law typologies apply.¹⁷ This fracture is evidenced most clearly by the Board's inconsistency on the central issue presented in *Oakwood*: whether the legislative intent of Section 9(b) of the Act is achieved by allowing temporary employees to unionize with solely employed employees as a matter of unqualified right, or if structured bargaining is better preserved by requiring employer consent.¹⁸ ILO Convention No. 87

jurisprudence on the proper application of Section 9(b) of the Act to temporary workers in *Greenhoot*, *Lee Hospital*, *M.B. Sturgis*, and *Oakwood Care Center*).

15. See discussion, *infra* Part III (finding that by interpreting Section 9(b) of the Act to require the consent of both the user employer and the supplier employer before a jointly-employed temporary worker can unionize with solely-employed employees of the user employer, the Board allows employers to impermissibly interfere with the right to form and join unions as guaranteed by ILO Convention No. 87 and made binding on the United States under the Declaration on Fundamental Principles and Rights at Work).

16. See discussion, *infra* Part IV.A.

17. See Craig Becker, *Labor Law Outside the Employment Relationship*, 74 TEX. L. REV. 1527, 1531 (1996) (opining that American labor law assumes a long-term, stable relationship between employee and firm, and concluding that as firms rearrange and downsize, many temporary employees become vulnerable to exploitation); Stone, *supra* note 5, at 254 (suggesting that labor law governing collective bargaining and individual employment rights are dependent on the assumption of long-term employment relationships, and reasoning that decentralization of production has left many contingent workers without a safety net); see, e.g., The Dunlop Comm'n on the Future of Worker-Management Relations: Final Report, U.S. DEP'T OF LABOR & U.S. DEP'T OF COMMERCE 61-64 (1994), available at http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1004&context=key_workplace (critiquing current labor and tax laws as creating incentives for employers to evade legal obligations under a guise of promoting flexibility and efficiency).

18. See *Oakwood Care Ctr.*, 343 N.L.R.B. 659, 661-63 (2004) (reconsidering

provides a more developed and accessible framework to address this issue.¹⁹ To properly juxtapose the United States' international legal obligations with the Board's holding in *Oakwood*, one must first appreciate the broad commands of the Convention and the conflicting jurisprudence of the Board.²⁰ What follows is a comprehensive review of both, as well as a brief primer on the mandate of the ILO.²¹

A. THE ORGANIZATIONAL STRUCTURE AND SUBSTANTIVE MANDATE OF THE INTERNATIONAL LABOUR ORGANIZATION

The origins of the ILO can be traced to international unrest in the wake of the First World War.²² Labor tranquility was deemed central to preserving global peace, economic stability, and social justice.²³ Given these concerns, Part XIII of the Treaty of Versailles created a

the central issue presented in *M.B. Sturgis*); cf. Harold Datz, *When One Board Reverses Another: A Chief Counsel's Perspective*, 1 AM. U. LABOR & EMP. L.F. 67, 68–69 (2011) (providing perspective on the statutory basis for a seated Board reversing a predecessor, and chronicling instances of inconsistency on a variety of labor law issues).

19. See Aaron B. Sukert, Note, *Marionettes of Globalization: A Comparative Analysis of Legal Protections for Contingent Workers in the International Community*, 27 SYRACUSE J. INT'L L. & COM. 431, 435–37 (2000) (finding considerable discrepancies in applying international labor standards to contingent workers in Europe, Japan, and the United States, specifically between protections afforded by national regulation and those provided by international labor law).

20. Compare discussion, *infra* Part II.B (defining the United States' international legal obligation to provide unqualified and unobstructed access to the freedom of association pursuant to ILO Convention No. 87), with discussion, *infra* Part II.C (explaining the broad discretionary authority vested in the Board under Section 9(b) of the Act and the resulting interpretive conflict stemming therefrom relating to the freedom of association of temporary workers).

21. See discussion, *infra* Part II.A (analyzing the historical origins, organizational structure, and substantive mandate of the ILO).

22. See JEAN-MICHEL SERVAIS, INTERNATIONAL LABOUR ORGANIZATION (ILO) 15 (Roger Blanpain ed., 2011) (pointing out that international decision-makers viewed unchecked labor revolutionaries in vulnerable post-World War I Eastern Europe as a risk to international peace and stability, so much so that interested parties lobbied for the creation of an international institution to regulate and oversee such matters).

23. See STEVE HUGHES & NIGEL HAWORTH, THE INTERNATIONAL LABOUR ORGANIZATION (ILO): COMING IN FROM THE COLD 5–6 (Thomas G. Weiss ed., 2011) (chronicling generally the international concerns spawning the creation of the ILO following World War I).

permanent international body dedicated to labor protection.²⁴

Currently, the ILO exists as the specialized agency of the United Nations responsible for strengthening the dialogue on matters of labor relations and employment law.²⁵ Characterized by its unique tripartite decision-making apparatus, the ILO's governing body affords equal voice to employer groups, trade unions, and government delegates in an attempt to establish an experiential, ideological, and regional basis for international decision-making.²⁶ This body governs through promulgation of international labor standards taking form in "Conventions" and "Recommendations."²⁷ The ILO is also empowered as an adjudicatory, supervisory, and investigative mechanism.²⁸ Of central importance to this comment is

24. See SERVAIS, *supra* note 22, at 15–16 (citing the Treaty of Versailles as promoting the regulation of the hours of work, including the establishment of a maximum working day and week; the regulation of the labour supply; the prevention of unemployment; the provision of an adequate living wage; the protection of the worker against sickness, disease, and injury arising out of his employment; the protection of children, young persons, and women; provision for old age and injury; protection of the interests of workers when employed in countries other than their own; recognition of the principle of freedom of association; and the organization of vocational and technical education and other measures).

25. See *About the ILO*, INT'L LABOUR ORG., <http://www.ilo.org/global/about-the-ilo/lang--en/index.htm> (last visited Oct. 29, 2013) (defining the main objectives and mission of the ILO as promoting rights at work, encouraging decent employment opportunities, and enhancing social protection for workers globally).

26. See HÉCTOR BARTOLOMEI DE LA CRUZ ET AL., *THE INTERNATIONAL LABOUR ORGANIZATION: THE INTERNATIONAL STANDARDS SYSTEM AND BASIC HUMAN RIGHTS* 10–11 (1996) (contending that, because of its tripartism, ILO decisions possess a "unique authority" and "realism" that is absent from most U.N. Specialized Agencies and other purely governmental organizations); *Social Dialogue*, INT'L LABOUR ORG., <http://www.ilo.org/global/about-the-ilo/decent-work-agenda/social-dialogue/lang--en/index.htm> (last visited Oct. 29, 2013) (advocating tripartism as a method for incorporating experiential knowledge of governments, unions, and employer groups on matters of labor and employment law).

27. See ATLESON ET AL., *supra* note 10, at 55–56 (explaining that conventions are the substantive legal instruments of the ILO that become binding upon ratification, and that Recommendations, while not traditional "law," supplement conventions by providing interpretive and practical guidance to the ILO membership).

28. See BARTOLOMEI DE LA CRUZ ET AL., *supra* note 26, at 101–05 (discussing the institutional mechanisms used to resolve disputes amongst members, investigate alleged instances of non-compliance, and supervise implementation of ILO instruments domestically).

the Committee on Freedom of Association (“the Committee” or “CFA”), which adjudicates, alleged violations of Convention No. 87.²⁹

B. DISSECTING ILO CONVENTION NO. 87 AND THE FUNDAMENTAL DECLARATION ON PRINCIPLES AND RIGHTS AT WORK

Convention No. 87 recognizes the freedom of association and the right to bargain collectively as fundamental human rights.³⁰ It is the principle treaty regulating international labor relations, and is widely considered a seminal instrument of the ILO without which the organization would be incapable of effectuating its mission.³¹ Interestingly, the United States has not ratified the Convention.³²

29. See *id.* at 101–02 (characterizing the Committee on Freedom of Association as a “specialized body” tasked with examining complaints against member states and developing precedential jurisprudence clarifying the principles and standards of ILO Convention No. 87); *Committee on Freedom of Association*, INT’L LABOUR ORG., <http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/committee-on-freedom-of-association/lang-en/index.htm> (last visited Oct. 29, 2013) (“[I]n 1951 the ILO set up the Committee on Freedom of Association (CFA) for the purpose of examining complaints about violations of freedom of association, whether or not the country concerned had ratified the relevant conventions.”).

30. See BARTOLOMEI DE LA CRUZ ET AL., *supra* note 26, at 165–67 (comparing ILO Convention No. 87 with existing international human rights instruments such as the Treaty of Versailles, the 1944 Declaration of Philadelphia, and the Universal Declaration of Human Rights, each of which codified the freedom of association and right to bargain collectively as fundamental human rights).

31. See ATLESON ET AL., *supra* note 10, at 57–58 (recognizing ILO Convention No. 87 as integral to the purpose, mandate, and mission of the ILO); *cf. ILO Mandate*, INT’L LABOUR ORG., <http://www.ilo.org/public/english/about/mandate.htm> (last visited Oct. 29, 2013) (“The ILO formulates international labour standards in the form of Conventions and Recommendations setting minimum standards of basic labour rights: freedom of association, the right to organize, collective bargaining, abolition of forced labour, equality of opportunity and treatment, and other standards regulating conditions across the entire spectrum of work related issues.”).

32. See *Ratifications for the United States*, INT’L LABOUR ORG., http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102871 (last visited Oct. 29, 2013) (cataloging the United States’ ratification of Fundamental Conventions, Governance Conventions, and Technical Conventions, and finding that the United States has not ratified ILO Convention No. 87); see also ATLESON ET AL., *supra* note 10, at 55–56 (offering three reasons for the United States’ low ratification rates, including that (1) U.S. law and practice substantially comply with the Convention, making ratification unnecessary; (2) principles of federalism grant states jurisdiction over many aspects of labor law

To combat chronic non-ratification by member states, the ILO unanimously adopted the Fundamental Declaration on Principles and Rights at Work in 1998, codifying the freedom of association and the right to organize as core international labor standards.³³ Although the effectiveness and scope of the Declaration are often the subjects of criticism, the Declaration's impact as a matter of international labor law is clear.³⁴ Pursuant to the Declaration, signatories to the ILO have, on the basis of membership alone, a binding obligation "to respect, to promote, and to realize" the freedom of association and the right to bargain collectively.³⁵ The Declaration is of considerable importance because it confers constitutional status upon Convention No. 87, binding non-ratifying members—including the United States—to its terms and making susceptible all member states to investigative and enforcement action at the ILO's Committee on

that ILO Convention No. 87 addresses; and (3) ratification could require changing existing federal law, which is squarely within the purview of Congress).

33. See HUGHES & HAWORTH, *supra* note 23, at 51 (listing the "core labor standards" adopted by the International Labour Conference's Declaration on Fundamental Principles and Rights at Work as including the freedom of association and effective recognition of collective bargaining, the elimination of forced labor, the elimination of child labor, and the elimination of employment discrimination such that signatories have a binding obligation "to respect, to promote, and to realize in good faith" such standards); see also ILO Director General, *The ILO, Standard Setting and Globalization* (1997), available at <http://www.actrav.itcilo.org/actrav-english/telearn/global/ilo/law/ilodg.htm> (viewing adoption of the Declaration as an attempt to continuously effectuate the mandate of the ILO in the wake of globalization).

34. See, e.g., Philip Alston & James Heenan, *Shrinking the International Labor Code: An Unintended Consequence of the 1998 ILO Declaration on Fundamental Principles and Rights at Work?*, 36 N.Y.U. J. INT'L L. & POL. 221, 235 (2004) (criticizing the Declaration as merely promoting the core labor standards as opposed to creating firm legal obligations); Lance A. Compa, *Core Labour Rights: Promise and Peril*, 9 INT'L UNION RTS. 20, 21 (2002) (discrediting the core labor standards approach as an ineffective narrowing of international labor law that creates tiers of rights suggesting that certain rights are more important than others).

35. See generally ILO Declaration of Fundamental Principles and Rights at Work, *supra* note 11 (codifying as "Core Conventions" ILO Conventions No. 87 on Free Association, No. 98 on Collective Bargaining, No. 29 on Forced Labor, No. 138 on Child Labor, No. 100 on Equal Pay for Equal Work, and No. 111 on Employment Discrimination); ILO, *The International Labour Organization's Fundamental Conventions*, 9–10 (2002), available at http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_095895.pdf.

Freedom of Association.³⁶

1. ILO Convention No. 87: Freedom of Association and Protection of the Right to Organize Convention (1948)

An instrument comprehensive in scope, Convention No. 87 governs the fundamental right of workers “without distinction whatsoever” to join trade unions of their choosing without previous authorization.”³⁷

Article 2 establishes the substantive right to free association pursuant to three interdependent clauses.³⁸ First, the “without distinction whatsoever” clause emphasizes the universal applicability of the Convention, and guarantees all workers access to protected rights without discrimination of any type as to race, sex, religion, nationality, occupation, or political opinion.³⁹ When interpreting this clause, the Committee on Freedom of Association categorically prohibits differential allocation of protected rights on the basis of these characteristics. Second, the “join organizations of their own choosing” clause mandates that decisional autonomy be practically exercisable and fully respected in law and in fact.⁴⁰ Beyond

36. See ATLESON ET AL., *supra* note 10, at 57 (explaining that the core Conventions were so integral to the mandate and mission of the ILO that membership alone creates a binding obligation to comply with the instruments, and that the binding-on-the-basis-of-membership scheme allows members to file complaints for violations of the treaty against members who, but for the Declaration, would not be subject to the Conventions for failure to ratify).

37. ILO Convention No. 87, *supra* note 12, art. 2.

38. See *Freedom of Association: Digest of Decisions of the Freedom of Association Committee of the Governing Body of the ILO*, INT'L LABOUR ORG., 45, 57, 65 (5th ed. 2006), available at http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@normes/documents/publication/wcms_090632.pdf [hereinafter *Digest of Decisions* (2006)] (segmenting Committee decisions on the basis of the three clauses).

39. See International Labour Conference, *Report IV (1): Organisations of Rural Workers and Their Role in Economic and Social Development*, 6, 60th Sess. (1975) [hereinafter ILO Report IV(1)] (accepting that the Convention applies to all workers who earn a wage by means of selling individual labor); International Labour Conference, *Report III (Part 4B): Freedom of Association and Collective Bargaining*, ¶ 45 (1994) [hereinafter ILO Report III (Part 4B)] (indicating that discriminatorily allocating rights protected and afforded under Convention No. 87 on the basis of race, national origin, religion, political opinion, sex, or employment status is impermissible).

40. See *Digest of Decisions* (2006), *supra* note 38, ¶ 310.

preserving an employee's right to choose amongst competing representative organizations, the Committee incorporates within this clause the right of workers to freely structure and compose those organizations as they deem fit.⁴¹ Finally, the "without previous authorization" clause protects against unduly burdensome prerequisites to trade union membership amounting, in practice, to insurmountable obstacles to free association.⁴²

C. MAKING SENSE OF THE BOARD'S INCONSISTENT SECTION 9(B) JURISPRUDENCE RELATING TO TEMPORARY EMPLOYEES

Congress vests considerable discretionary authority in the Board to determine whether a petitioned-for unit is compositionally "appropriate" for collective bargaining.⁴³ Section 9(b) of the Act provides that the Board shall decide in each case whether, "in order to assure to employees the fullest freedom in exercising rights guaranteed by this Act," the unit "appropriate for collective bargaining" shall be the employer unit, plant unit, craft unit, or subdivision thereof.⁴⁴ Congressional guidance is limited, and the

41. See CFA Case No. 2556, *supra* note 12, ¶ 754 (interpreting the "join organizations of their own choosing" clause of Article 2 of Convention No. 87 to include the right of workers to structure and compose unions as they see fit).

42. See *Digest of Decisions* (2006), *supra* note 38, ¶ 272 (permitting administrative formalities to union accreditation but providing that "such requirements must not be such as to be equivalent in practice to previous authorization, or as to constitute such an obstacle to the establishment of an organization that they amount in practice to outright prohibition").

43. See *N.L.R.B. v. Action Auto.*, 469 U.S. 490, 494 (1985) ("Section 9(b) of the Act vests in the Board authority to determine 'the unit appropriate for purposes of collective bargaining.' The Board's discretion in this area is broad, reflecting Congress' recognition 'of the need for flexibility in shaping the bargaining unit to the particular case.'") (citation omitted); see also *Recht*, *supra* note 8, at 572–73 (concluding that a literal reading of Section 9(b) gives the Board considerable latitude and minimal guidance on how to answer the dispositive question of whether the unit, as petitioned for, can adequately represent the interests of the workers included).

44. See National Labor Relations Act, 29 U.S.C. § 159(b) (2006) (granting the Board authority to structure units for collective bargaining in a manner consistent with the aims of the Act). See generally Francis M. Dougherty, Annotation, "Community of Interest" Test in NLRB Determination of Appropriateness of Employee Bargaining Unit, 90 A.L.R. FED. 16 (1988) (accumulating Section 9(b) case law controlling the Board's appropriateness determinations in a variety of employment contexts, and listing factors relevant to a "community of interest" inquiry).

majority of criteria used to make propriety determinations have been spelled out jurisprudentially.⁴⁵

Traditionally, structuring bargaining units is a straightforward pursuit dependent on workers sharing a “community of interest” such that the unit will simultaneously “serve the Act’s purpose of effective collective bargaining” and be “relatively free of conflicts of interest” amongst its members.⁴⁶ Though not exhaustive, similarity in hours, wages, benefits, skills, supervision, and terms of employment are most indicative of mutual interest.⁴⁷ By limiting unit composition on these factors, the Board protects employers and employees against fragmented bargaining.⁴⁸

Although the “community of interest” methodology is widely accepted in bilateral employment settings, the Board is divided on the question of whether commonality of interest is the proper Section 9(b) “appropriateness” standard for temporary workers in joint

45. See Fonseca, *supra* note 8, at 175–76 (interpreting Section 9(b) of the Act to grant broad discretion to the Board to compose appropriate bargaining units while, at the same time, failing to provide applicable standards by which propriety is governed).

46. Cf. M.B. Sturgis, Inc. 331 N.L.R.B. 1298, 1305 (2000) (conducting a contemporary Section 9(b) community of interest analysis by applying *Kalamazoo Paper Box Co.*, *Swift & Co.*, and other relevant Board precedent). Compare *Kalamazoo Paper Box Corp.*, 136 N.L.R.B. 134, 137 (1962) (listing factors included in a Section 9(b) community of interest analysis and finding substantial discrepancy), with *Swift & Co.*, 129 N.L.R.B. 1391, 1393 (1961) (listing factors included in a Section 9(b) community of interest analysis and finding substantial mutuality).

47. See Michael J. Hely, *The Impact of Sturgis on Bargaining Power for Contingent Workers in the U.S. Labor Market*, 11 WASH. U. J.L. & POL’Y 295, 312–13 (2003) (indicating that among the many factors considered in a Section 9(b) community of interest analysis, basic features of employment, such as earnings, job functions, and skills, are weighted most heavily).

48. See Joy Vaccaro, *Temporary Workers Allowed to Join the Unions: A Critical Analysis of the Impact of M.B. Sturgis Decision*, 16 J. CIV. RIGHTS & ECON. DEV. 489, 494–95 (2002) (reasoning that because overly broad bargaining structure would impose practical limitations of effective collective bargaining, the interests of management and the workforce are better served by a bargaining process that categorizes interests). But see Eric Rosenfeld, *N.L.R.B. Restores Representation Rights to Temps.*, N.Y.L.J., Sep. 25, 2000, at 3 (criticizing the Board’s application of the community of interest test to temporary workers in *M.B. Sturgis*, arguing that because it fails to recognize inherent asymmetry between fulltime and temporary workers, the test inadequately protects associational freedoms of these workers).

employer, or “triangular,” relationships.⁴⁹ The Board’s jurisprudence on this issue has fluctuated widely, and competing approaches are discussed below.

1. Greenhoot, Inc. (1973) and Lee Hospital (1990): Origins of the Dual Consent Requirement

Greenhoot, Inc. (“*Greenhoot*”) is universally perceived as the foundation for the *Lee Hospital* and *Oakwood Care Center* decisions, though there is considerable debate as to the extent that the latter cases deviated from the former.⁵⁰ In *Greenhoot*, the Board found that a petitioned-for unit composed of employees working for the same company at fourteen separate locations under fourteen separate employers was a multiemployer unit under the Act.⁵¹ Consistent with the Act, the Board held that a multiemployer unit would not be appropriate for bargaining absent consent of each employer.⁵² The *Greenhoot* decision was concerned only with multiemployer bargaining, and left untouched the Board’s joint employer precedent, which accepted units composed of commonly interested temporary

49. See *Uyeda v. Brooks*, 365 F.2d 326, 329 (6th Cir. 1966) (stating that “the touchstone of an appropriate bargaining unit is the finding that all of its members have a common interest in the terms and conditions of employment”). *But see generally* *Oakwood Care Ctr.*, 343 N.L.R.B. 659 (2004) (holding that the community of interest test is relevant, but not determinative in multilateral employment contexts).

50. See *Oakwood Care Ctr.*, 343 N.L.R.B. at 659; *Lee Hosp.*, 300 N.L.R.B. 947, 948 (1990) (justifying each holding on precedent set by *Greenhoot* that stood for the proposition that temporary workers are prohibited from membership in a unit of fulltime employees of the user employer absent consent of both the user and supplier employer). Compare *Rahebi*, *supra* note 7, at 1124 (arguing that the extension of *Greenhoot* in *Lee Hospital* and *Oakwood Care Center* is inconsistent with the Board’s traditional Section 9(b) jurisprudence and was not authorized under any reading of *Greenhoot*), with *Hely*, *supra* note 47, at 296 (criticizing the Board’s decision in *M.B. Sturgis* as a “historic departure” from settled Section 9(b) precedent as established in *Greenhoot* and *Lee Hospital*).

51. See *Greenhoot, Inc.*, 205 N.L.R.B. 250, 251 (1973) (reasoning that to preserve the Act’s command that units be composed to serve principles of effective bargaining, separate bargaining units at each of the fourteen locations would be appropriate).

52. See *id.* (holding that the Act prohibits multiemployer bargaining to the extent that the parties have not stipulated to the matter); *cf.* *Fonseca*, *supra* note 8, at 175–76 (understanding the Board’s avoidance of multiemployer bargaining as a method of ensuring that unrelated and distinct employers would not be bound by the same union contract).

and regular employees.⁵³

In 1990, the Board extended *Greenhoot* to the joint-employer setting.⁵⁴ In *Lee Hospital*, the Board reviewed a regional director's order that a petitioned-for unit of certified registered nurse anesthetists ("CRNAs") jointly employed by Lee Hospital and Anesthesiology Associates, Inc. was not appropriate for bargaining under Section 9(b) of the Act.⁵⁵ On review, the Board adopted a new framework for determining the propriety of joint employer units. Breaking from traditional Section 9(b) precedent, it held, similarly to multiemployer units in *Greenhoot*, that such units were prohibited without employer consent.⁵⁶ The Board announced that joint-employer status, not mutuality of interest, was determinative.⁵⁷ Under *Lee Hospital*, two employers that can achieve joint employer status by showing codetermination of matters meaningfully impacting the employment relationship are able to limit union influence by withholding consent on a temporary worker's ability to join an existing unit.⁵⁸

53. See, e.g., *Sun-Maid Growers of California v. N.L.R.B.*, 618 F.2d 56, 59 (9th Cir. 1980) (holding, post-*Greenhoot*, that as a joint-employer of temporary employees supplied by a private staffing agency, Sun-Maid and the staffing agency had a duty to bargain with a unit consisting of both temporary and fulltime workers).

54. See *Lee Hosp.*, 300 N.L.R.B. at 948 (reasoning that, pursuant to *Greenhoot*, "the Board does not include employees in the same unit if they do not have the same employer").

55. See *id.* at 947-48 (describing that the regional director refused to approve the Board because the CRNAs lacked sufficient mutuality of interest with existing members of the unit).

56. See *id.* at 948 (citing *Greenhoot* for the proposition that "the joint employer issue must be resolved to determine whether a separate CRNA unit is appropriate . . . because, as a general rule, the Board does not include employees in the same unit if they do not have the same employer, absent employer consent").

57. See *id.* (adopting the regional director's ultimate decision, but refuting his logic, instead determining that the joint-employer issue, not the community of interest issue, would determine whether the CRNAs could join the unit as a matter of unqualified right) (citing *TLI Inc.*, 271 N.L.R.B. 798 (1984); *Laerco Transportation*, 269 N.L.R.B. 324 (1984)).

58. See Rahebi, *supra* note 7, at 1115 (stating that *Lee Hospital's* interpretation of joint-employer status incentivizes joint-employers to use this power strategically to prevent employees from organizing); cf. Recht, *supra* note 8, at 582 ("*Lee Hospital* got it wrong, and in doing so deprived temporary workers of any practical ability to exercise their right to organize under the Act.>").

2. *M.B. Sturgis (2000): Resurrecting Mutuality of Interest and the Unqualified Right to Organize*

Following *Lee Hospital*, the temporary employment phenomenon became cause for global concern, and the Board, recognizing the economic realities of alternative labor arrangements, stressed that current law effectively denied temporary workers representation.⁵⁹ Laying the foundation for its reversal, the Board reconsidered *Lee Hospital* under a new majority in *M.B. Sturgis, Inc.* (“*M.B. Sturgis*”).⁶⁰ There, the Board reviewed an order that fifteen temporarily-supplied employees jointly employed by M.B. Sturgis and Interim, Inc. could not be included in the existing M.B. Sturgis bargaining unit because Interim withheld consent pursuant to *Lee Hospital*.⁶¹ The Board overruled *Lee Hospital*, holding instead that a unit composed of temporary workers jointly employed by a user employer and a supplier employer and employees who are solely employed by the user employer is statutorily appropriate without employer consent.⁶²

The Board instituted a two-part test for analyzing these issues going forward. As a threshold matter, the Board first considered whether the user employer and the supplier employer are joint-

59. See *M.B. Sturgis, Inc.*, 331 N.L.R.B. 1298, 1298 (2000) (“[A] growing number of employees who are part of what is commonly described as the ‘contingent work force’ are being effectively denied representational rights guaranteed them under the National Labor Relations Act.”).

60. See *id.* (noting that *Greenhoot* and *Lee Hospital* were decided before the growth of temporary employment arrangements and that the opinions required reconsideration in light of new evidence illustrating the economic realities of such arrangements); cf. Susan N. Houseman, *Why Employers Use Flexible Staffing Arrangements: Evidence from an Establishment Survey*, 55 INDUS. & LAB. REL. REV. 149, 149 (2001) (surveying employers to determine which companies are using temporary employees and why they are turning to alternative labor arrangements).

61. See *M.B. Sturgis*, 331 N.L.R.B. at 1298–1300 (reasoning that regardless of the fact that the temporarily-supplied employees performed similar tasks as M.B. Sturgis employees under common supervision, so the regional director’s decision was consistent with *Lee Hospital*).

62. See *id.* at 1304–05 (refuting in its entirety the Board’s logic in *Lee Hospital* and holding instead that “a unit composed of employees who are jointly employed by a user employer and a supplier employer, and employees who are solely employed by the user employer, is permissible under the statute without the consent of the employers”).

employers.⁶³ Two employers jointly employ the same workers if, through “substantial day-to-day control over [the] employees,” each codetermines terms and conditions of employment.⁶⁴ Next, the Board considered whether the employees seeking inclusion in the unit share sufficient mutuality of interest with the unit’s existing members under the community of interest test.⁶⁵ Under *M.B. Sturgis*, a temporary employee, who demonstrates that she is jointly employed and commonly interested, possesses an unqualified right to join the unit, notwithstanding employer resistance.⁶⁶

3. *Oakwood Care Center (2004) Reversing M.B. Sturgis, and
Current Section 9(b) Interpretation*

Following a shift in power during the Bush administration, observers believed *M.B. Sturgis* was ripe for reconsideration by the

63. *See id.* at 1301 (requiring, as a matter of logic, that the joint-employer determination operate as a threshold question because if the user and the supplier employer are not found to be joint-employers, any unit including employees of both employers would be a multiemployer unit whose propriety is conditioned entirely on employer consent pursuant to the Act).

64. *See id.* (holding that “[u]nder current Board precedent, to establish that two or more employers are joint employers, the entities must share or codetermine matters governing essential terms and conditions of employment”); *see also* *N.L.R.B. v. Browning-Ferris Indus.*, 691 F.2d 1117, 1124 (3d Cir. 1982) (holding that when two employers have such control over employees that both share or codetermine essential terms and conditions of employment, a joint-employer relationship exists); *cf. Rahebi, supra* note 7, at 1117 (indexing the factors considered in a joint-employer analysis, including: (1) supervision; (2) hiring and firing authority; (3) establishment of rules and conditions; (4) compensation and benefits methodology; and (5) allocating responsibilities).

65. *Cf. Berea Pub. Co.*, 140 N.L.R.B. 516, 517 (reasoning that some variance in terms and conditions of employment does not necessarily prohibit a finding of common interest, but that in certain instances, separate bargaining units will be appropriate). *See generally Rahebi, supra* note 7, at 1105 (noting that jointly employed temporary employees must be granted membership within a user employer’s unit if the two groups share a community of interest under traditional Section 9(b) jurisprudence).

66. *M.B. Sturgis*, 331 N.L.R.B. at 1308 (“We hold today that consent requirements for multiemployer bargaining among separate and independent employers do not apply to units that combine jointly employed and solely employed employees of a single user employer. We will apply traditional community of interest factors to decide if such units are appropriate. For all of the reasons set forth in this decision, we overrule *Lee Hospital* to the extent it is inconsistent with our decision today.”).

now Republican Board.⁶⁷ In 2004, the Board took up *Oakwood*, wherein a regional director acting pursuant to *M.B. Sturgis* approved a unit of employees solely employed by Oakwood Care Center and workers jointly employed by Oakwood and N&W Staffing Agency.⁶⁸ The new majority expressly overruled *M.B. Sturgis*, characterizing the decision as irreconcilable with the legislative intent of Section 9(b).⁶⁹ The Board returned to the dual consent doctrine as conceptualized in *Lee Hospital* and held that units combining solely and jointly employed workers are multiemployer units that are statutorily appropriate only upon the consent of the user and supplier employer.⁷⁰ Neither Oakwood Care Center nor N&W consented to the arrangement, and the petition was dismissed.⁷¹

Similar to *Lee Hospital*, the *Oakwood* decision spawned a variety of literature, some supportive, most critical.⁷² Given that *Oakwood* leaves open the possibility of temporary workers organizing their respective private employment agency, the decision, at least debatably, comports as a matter of law with the Section 7 Rights of

67. See Hely, *supra* note 47, at 297 (predicting that in the early 2000s *M.B. Sturgis* would be reversed by Bush appointees prone to siding with management in labor disputes).

68. See *Oakwood Care Ctr.*, 343 N.L.R.B. 659, 659 (2004) (describing that some of the employees were solely employed by Oakwood, and that there was no dispute that the remaining employees were jointly employed by Oakwood and N&W pursuant to the Board's joint-employer precedent).

69. See *id.* at 661–62 (recalling that the plain meaning of Section 9(b) endorses four types of bargaining units—employer, craft, plant, or subdivision—and that any other arrangement, specifically a unit of temporary and permanent employees, is permissible only upon employer consent). *But see id.* at 663–65 (Liebman, M. & Walsh, M., dissenting) (reasoning that Section 9(b) “describes the source of the bargaining unit, not the source of its members” and therefore considers appropriate a unit encompassing all of an employer's workers).

70. See *id.* at 662–63 (criticizing the policy implications of bargaining unit composition under the *M.B. Sturgis* model as giving rise to significant conflicts of interest and failing to adequately protect employee rights).

71. See *id.* at 663 (reasoning that to hold otherwise would promote fragmented bargaining in violation of the plain meaning of Section 9(b)).

72. See Paul H. Derrick, *Unions Now Able to Organize Temporary Workers*, 12 S.C. LAW 15, 16–17 (2001); Hely, *supra* note 47, at 296. *But see* Fonseca, *supra* note 8, at 177; Charles J. Morris, *A Blueprint for Reform of the National Labor Relations Act*, 8 ADMIN. L.J. AM. U. 517, 562–63 (2005); Rahebi, *supra* note 7, at 1113–14; Recht, *supra* note 8, at 587–88; Vaccaro, *supra* note 48, at 502 (refuting the interpretation of Section 9(b) adopted by the Board in both *Lee Hospital* and *Oakwood Care Center*).

Employees.⁷³ *Oakwood's* detractors, however, suggest that, as a matter of fact, organizing staffing agencies is problematic, and that the decision forecloses any prospects of real and meaningful collective representation.⁷⁴ Temporary workers tend to be geographically dispersed and of varied interests, often working unrelated jobs of marginal physical proximity.⁷⁵ With this in mind, many argue that the organizational plausibility and representative capacity of the temporary agency unit is considerably limited compared to that of the user employer unit.⁷⁶ Beyond consequences for temporary workers, some perceive *Oakwood* as potentially having lasting effects on the long-term stability and prosperity of unionized private employment agencies.⁷⁷ David Recht indicates that

73. See *Oakwood Care Ctr.*, 343 N.L.R.B. at 663 (finding the Board's decision consistent with the Section 7 Rights of Employees under the Act, given that, as a matter of law, temporary employees may exercise such rights at their respective staffing agencies, even if the ruling forecloses upon their ability to exercise such rights at the user employer's workplace); cf. National Labor Relations Act, 29 U.S.C. § 157 (2006) (conferring upon employees the right to establish and join unions, and to collectively bargain through representatives of the membership's choosing). *But see Oakwood Care Ctr.*, 343 N.L.R.B. at 669 (Liebmann, M. & Walsh, M., dissenting) ("The majority, then, seems to have gone out of its way to make it impossible for joint employees to exercise their Section 7 rights effectively.").

74. Katherine V.W. Stone, *A Labor Law for the Digital Era: The Future of Labor and Employment Law in the United States*, in LABOR AND EMPLOYMENT LAW AND ECONOMICS 697 (K.G. Dau-Schmidt, Seth Harris & Orly Lobe eds., 2009) ("Agency temporary workers are dispersed and have little contact with each other. Thus, as a practical matter, temporary workers lack representation or a collective voice."); cf. Fonseca, *supra* note 8, at 179 (reasoning that, as a matter of logic, temporary employee bargaining under the dual-consent regime is dysfunctional given that virtually no employees have succeeded in achieving consent).

75. See Rahebi, *supra* note 7, at 1115 (characterizing an organization of temporary employees of a single staffing agency as inherently weak because the employees work in different places, have unrelated responsibilities, are of varied education and skill, turnover at high rates, and do not share uniform concerns or priorities).

76. See *id.* at 1113–15; Recht, *supra* note 8, at 567; Vaccaro, *supra* note 48, at 504 (suggesting that even should a group of temporary employees overcome hurdles to organizing at the agency, the unit will be fragmented, weak, and ineffective) (citing *Sturgis* 2000 N.L.R.B. Lexis 546, at 54).

77. See Rahebi, *supra* note 7, at 1114 (citing *Malbaff Landscape*, in which the Board held that it was not an unfair labor practice for a user employer to terminate a contract with a supplier employer merely because temporary employees had unionized the supplier employer, to support the proposition that employers may

instead of paying increased wages and benefits “that would likely result from the collective bargaining agreement” with a unionized private employment agency, the user employer may simply, consistent with the Act, terminate its contract with the agency and “seek a union-free staffing agency to supply its temporary employees.”⁷⁸ Regardless, the decision remains good law under the Obama Board, or lack thereof.⁷⁹

III. ANALYSIS

Ideally, squaring the Board’s interpretation of Section 9(b) in *Oakwood* with the sweeping commands of Convention No. 87 would involve a two-step inquiry measuring both textual and jurisprudential compliance. However, the substantive, rights-granting provisions of Convention No. 87 are limited, thus truncating the value of a textual comparison.⁸⁰ Still, it remains worth mentioning that, given the considerable restrictions on temporary worker unionization under

compromise alternatives to organizing under *Lee Hospital*); cf. Malbaff Landscape, 172 N.L.R.B. 128, 129 (1968) (“Section 8(a)(3) outlaws employer discrimination against employees. But an employer does not discriminate against employees within the meaning of Section 8(a)(3) by ceasing to do business with another employer because of the union or nonunion activity of the latter’s employees.”).

78. See Mark D. Oliveri, M.B. Sturgis and the NLRB’s Reevaluation of the Contingent Employee’s Ability to Unionize: Ramifications and Recommendations for the User Employer, 27 DEL. J. CORP. L. 151, 177 (recommending that employers seeking to limit the impact of *M.B. Sturgis* on labor costs terminate any and all contact with unionized private employment agencies); Recht, *supra* note 8, at 565–66 (reasoning that an employer can simultaneously limit its dealings with a unionized private staffing agency and behave in accordance with its obligations under the Act).

79. See *NLRB Update: Key NLRB Precedents Likely to Fall Under Liebman Board*, FORD HARRISON LLP (Aug. 25, 2009), <http://www.fordharrison.com/5230> (charting the predicted course of the Liebman Board on issues relevant to management); cf. Jeffrey Toobin, *A Judicial Atrocity*, NEW YORKER (Jan. 29, 2013), <http://www.newyorker.com/online/blogs/comment/2013/01/the-awful-recess-appointment-ruling-in-canning-v-national-labor-relations-board.html> (criticizing the D.C. Circuit’s recent ruling in *Canning v. N.L.R.B.* wherein the court struck down as unconstitutional President Obama’s recent appointments to the NLRB, thus placing current Board precedent in limbo and leaving the Board unable to achieve quorum).

80. See generally ILO Convention No. 87, *supra* note 12, art. 2 (“Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.”).

Oakwood, the text of the decision appears irreconcilable with the broad, protective intent of Convention No. 87.⁸¹ Thankfully, the terminology of the Convention has been fleshed out at length by the Committee on Freedom of Association whose precedent gives effect to the vague language of the treaty.⁸² To determine whether current application of Section 9(b) is consistent with international labor law, this analysis will juxtapose the Board's decision in *Oakwood* with CFA case law interpreting the three substantive clauses of Convention No. 87.⁸³

A. *OAKWOOD CARE CENTER IS IRRECONCILABLE WITH THE COMMITTEE'S INTERPRETATION OF ILO CONVENTION NO. 87*

The "without distinction whatsoever" clause is indicative of the Convention's comprehensive scope, and the ILO's governing body has stated that the treaty applies to anyone earning a living through work.⁸⁴ Specifically, the ILO prohibits distinction on the basis of employment status, finding that whether a worker is employed on a permanent basis, for a fixed term, or as a contract employee should bear no consequence on the right of that worker to join an organization of his or her choosing.⁸⁵ The CFA has held repeatedly

81. Compare *id.* (declaring that all workers must be capable of joining unions of their choosing as a matter of employee autonomy), with *Oakwood Care Ctr.*, 343 N.L.R.B. 659, 662 (2004) (holding that a jointly-employed temporary employee is statutorily prohibited from joining the bargaining unit of the user employer absent consent of the user and supplier employer, and that, should consent be withheld, the employee's only recourse will be to organize the private employment agency).

82. See, e.g., Digest of Decisions (2006), *supra* note 38, at 45, 59, 65 (cataloging the Committee on Freedom of Association's interpretative rulings relating to the "without distinction whatsoever," "join organizations of their choosing," and "without previous authorization" clauses of Article 2 of ILO Convention No. 87).

83. See discussion, *infra* Part III.A.1-2; discussion, *infra* Part III.B.1-2; discussion, *infra* Part III.C.1 (juxtaposing the Board's decision in *Oakwood Care Center* with CFA case law on the "without distinction whatsoever" clause, the "join organizations of their choosing" clause, and the "without previous authorization" clause to determine whether current interpretation of Section 9(b) of the Act is jurisprudentially consistent with Convention No. 87).

84. ILO Report IV(1), *supra* note 39.

85. See Digest of Decisions 2006, *supra* note 38, ¶ 255 (reading the "without distinction whatsoever" clause to prohibit differentially allocating protected rights on the basis of temporary employment status); see, e.g., ILO Report III (Part 4B), *supra* note 39, ¶ 45 (emphasizing that the freedom of association and right to

that the “status under which workers are engaged with the employer should not have any effect on their ability to join workers’ organizations and participate in their activities.”⁸⁶ Further, signatories contravene the “without distinction whatsoever” clause by differentially allocating, on the basis of a protected category, Article 2 rights in a manner that inhibits the full and free exercise of such rights.⁸⁷

1. CFA Case No. 2556 (Colombia)

The right of workers to join, structure, and compose unions of their choosing without previous authorization cannot be withheld on the basis of occupational status. Emphasizing the broad applicability of the “without distinction whatsoever” clause of Convention No. 87, the Committee in *CFA Case No. 2556 (Colombia)* (“Colombia”) prohibited use of employment status as a factor upon which membership in a bargaining unit could be denied.⁸⁸ In *Colombia*, the Union of Chemical and Pharmaceutical Industry Workers alleged that by declining to register a union because its membership included temporary workers supplied by private employment agencies,

organize should be guaranteed without discrimination of any kind as to race, sex, nationality, occupation, religion, or political opinion).

86. See *CFA Case No. 2556*, *supra* note 12, ¶ 754 (“The Committee recalls in this regard that the status under which workers are engaged with the employer should not have any effect on their right to join workers’ organizations and participate in their activities. The Committee likewise recalls that all workers, without distinction whatsoever, whether they are employed on a permanent basis, for a fixed term or as contract employees, should have the right to establish and join organizations of their own choosing.”); *CFA Case No. 2083*, *supra* note 12, ¶ 254 (“The Committee recalls in this regard that all public service workers other than those engaged in the administration of the State should enjoy collective bargaining rights . . . and that, according to the principles of freedom of association, staff having the status of contract employee should enjoy this right.”).

87. See *CFA Case No. 2083*, *supra* note 12, ¶ 256 (recommending that the Canadian government amend the Public Service Labour Relations Act to ensure that temporary and casual workers have the same access to labor rights currently enjoyed by full time workers); *cf.* *Digest of Decisions (2006)*, *supra* note 38, ¶ 209 (stating that, as a matter of general principle, discrimination of any kind on the basis of sex, race, beliefs, political opinion, occupational status, or nationality will not be tolerated).

88. See *CFA Case No. 2556*, *supra* note 12, ¶ 754 (recalling that the right to establish and join unions of one’s choosing as guaranteed by ILO Convention No. 87 includes the broad ability of all workers, without distinction whatsoever, to structure and compose such unions).

Colombia's Ministry of Social Protection had violated Convention No. 87.⁸⁹ In response, the Colombian Government stated that the refusal was based on the fact that the proposed unit included both pharmaceutical workers and temporary workers from private employment agencies assigned to carry out functions of the pharmaceutical companies, thus impermissibly combining two separate industries.⁹⁰ Finding for the Union, the Committee held that "the free exercise of the right to establish and join unions includes the free determination of the structure and composition of unions" and that this arrangement was in plain violation of the "join organizations of their choosing" clause.⁹¹ More importantly, the Committee utilized the "without distinction whatsoever" clause to uphold the indivisibility of the three clauses, reasoning that the right to join, structure, and compose unions without previous authorization cannot be withheld on the basis of occupational status.⁹² Therefore, a worker's employment status should be legally irrelevant to that employee's ability to lawfully join a trade union, and the Colombian Government was obligated to register the proposed unit of solely and temporarily employed workers.⁹³

There can be no doubt that the Board's decision in *Oakwood* fails under the *Colombia* standard as an impermissible constraint on the right of workers to freely determine "the structure and composition

89. See *id.* ¶¶ 749–51 (indicating that because the petitioned-for unit combined solely-employed employees of the user employer and jointly-employed employees of the supplier employer, the Ministry charged with approving units for bargaining denied the unit recognition, and refused to recognize its statutes and executive committee).

90. See *id.* ¶ 750 ("[T]he refusal to register the organization in question as a trade union was due to the fact that the workers belonging to it do not work in enterprises from the same industry, as is required under article 356 of the Substantive Labour Code.").

91. See *id.* ¶ 754 (applying existing Committee precedent and ruling that the status under which workers are engaged with the employer shall have no effect on the right of such workers to join unions and take part in related activities).

92. See *id.* ("In the present case, the workers should have the right to establish an industrial organization as they see fit . . . irrespective of the type of relationship they have with those companies.").

93. See *id.* ¶ 755 (inviting the Governing Body to recommend that the Colombian Government take necessary measures to approve the petitioned-for unit as proposed, and to keep the Committee informed of developments related to this matter).

of unions.”⁹⁴ While the *Oakwood* decision does not foreclose entirely upon the possibility of temporary workers joining units of the user employer, the near impossibility of achieving requisite consent is well documented.⁹⁵ The practical inability of temporary employee unionization under *Oakwood* runs afoul of the Committee’s rule that all workers, without distinction, must be free to establish and join unions of their choosing, and must be allowed to structure and compose such organizations as they see fit.⁹⁶

Moreover, the Colombian Government and the Board justified withholding recognition of the petitioned-for unit on identical grounds.⁹⁷ Each reasoned that temporary workers supplied by private employment agencies could not be incorporated in the unit of the user employer because that would generate impermissible multiemployer bargaining, regardless of whether the temporary employees and the user employer’s workers were performing nearly

94. Compare *Digest of Decisions* (2006), *supra* note 38, ¶ 333 (“The free exercise of the right to establish and join unions implies the free determination of the structure and composition of unions.”), with *Oakwood Care Ctr.*, 334 N.L.R.B. 659, 663 (2004) (holding that temporary workers supplied by private employment agencies can be excluded from the user employer’s bargaining unit on the basis of employment status so long as the employer does not consent to the arrangement).

95. See *Oakwood Care Ctr.*, 334 N.L.R.B. at 663–64 (reasoning that if temporary employees fail to achieve requisite consent under the dual-consent standard, such employees are still able to exercise protected trade union rights by organizing with other temporary employees employed by the private employment agency). *But see* discussion, *supra* Part II.C.3 (criticizing temporary employee unionization as envisioned by *Lee Hospital* and *Oakwood* as creating crippling legal and practical obstacles to pursuing either route discussed by the *Oakwood* majority).

96. Compare *Oakwood Care Ctr.*, 334 N.L.R.B. at 663 (prohibiting temporary employees from membership within the user employer’s unit absent employer consent), with CFA Case No. 2556, *supra* note 12, ¶ 754 (stating that “all workers, without distinction whatsoever, whether they are employed on a permanent basis, for a fixed term or as contract employees, should have the right to establish and join organizations of their own choosing” and to freely structure and compose such organizations).

97. Compare *Oakwood Care Ctr.*, 334 N.L.R.B. at 662 (refusing to approve the petitioned-for unit because the temporary employees were provided by a private employment agency, and thus combining them with the user employer’s employees would constitute impermissible multiemployer bargaining even though the employees performed similar work), with CFA Case No. 2556, *supra* note 12, ¶ 750 (refusing to approve the petitioned-for unit because the workers operate in different industries, even though they both perform pharmaceutical work on behalf of the user employer).

identical tasks.⁹⁸ The Committee expressly shunned this approach, holding instead that an employee's employment status, whether temporary or permanent, cannot be used to deny membership in a bargaining unit.⁹⁹ *Oakwood* unequivocally endorses the contrary and is plainly inconsistent with the Committee's holding in *Colombia*.¹⁰⁰

2. CFA Case No. 2083 (Canada)

Whether an employee operates on a temporary or permanent basis cannot support discriminatorily allocating rights guaranteed by convention No. 87 pursuant to the "without distinction whatsoever" clause. In 2000, the Canadian Labour Congress filed a complaint with the Committee alleging that New Brunswick's Public Service Labour Relations Act ("PSLRA") contravened Convention No. 87 by excluding temporary workers from the statutory definition of "employee."¹⁰¹ As a result, temporary employees could not "avail themselves of the right to join unions of their own choosing or to bargain collectively, as was otherwise open to 'employees' under § 25 of the [PLSRA]" and were susceptible to penalty for engaging in concerted activity.¹⁰² The Canadian government claimed that

98. See *Oakwood Care Ctr.*, 334 N.L.R.B. at 662; CFA Case No. 2556, *supra* note 12, ¶ 750 (citing inclusion of workers operating under temporary employment status as the basis for denying recognition to the petitioned for unit).

99. See CFA Case No. 2556, *supra* note 12, ¶ 754 (finding impermissible the use of employment status as a basis upon which employers and government can differentially allocate universally protected rights under Convention No. 87); see also ILO Committee on Freedom of Association, *Report in Which the Committee Requests to Be Kept Informed of Development*, ¶ 592, Case No. 2301 (Malay.), Rep. No. 333 (Mar. 2004) [hereinafter CFA Case No. 2301] (emphasizing that it is for the workers themselves to decide whether to organize a union, how to structure that union, and how best to compose the union).

100. See discussion, *supra* Part III.A.1 (applying the Committee's holding in *Colombia* to the facts presented in *Oakwood*).

101. See CFA Case No. 2083, *supra* note 12, ¶¶ 235, 240 (indicating that the Canadian Labour Congress and the Canadian Union of Public Employees filed this Complaint pursuant to existing Committee jurisprudence, holding that Article 2 of Convention No. 87 states that workers "without distinction whatsoever" should have the right to organize and that this right must be guaranteed without discrimination of any kind); *cf. id.* ¶ 237 (reviewing Canada's general ratification record and finding that its parliament has ratified Convention No. 87).

102. See *id.* ¶ 240 (reading prior Committee holdings to require that the statutory definition of "employee" be amended for temporary employees such that they too can enjoy rights and protections afforded by national labor law frameworks); see *id.* ¶¶ 241–42 (categorizing three separate issues raised by

temporary workers are “so fundamentally different from those regular employees” that the distinction included in the PSLRA was warranted, necessary, and consistent with Convention No. 87.¹⁰³

Finding for the Canadian Labour Congress, the Committee rejected the Government’s reasoning, holding instead that the statutory exclusion of temporary employees violated the “without distinction whatsoever” clause of Convention No. 87, which prohibits differential allocation of protected rights on the basis of employment status.¹⁰⁴ The scope of Convention No. 87 cannot be limited on the basis of employment status, and whether an employee operates on a fixed or permanent term cannot support discriminatorily allocating the right of all workers to join organizations of their choosing without previous authorization.¹⁰⁵

differential treatment of temporary workers: (1) plain fact that under PSLRA temporary workers are denied the ability to organize and bargain collectively; (2) potential for reprisals for temporary employees engaging in otherwise protected union activity; and (3) lack of ability to enter into enforceable collective agreements).

103. See CFA Case No. 2083, *supra* note 12, ¶¶ 246, 254 (interpreting the government’s argument to find dispositive the fact that temporary employees are so different in their terms of employment that the distinction is reasonable as found by the Supreme Court of Canada in the 1980s).

104. See *id.* ¶¶ 250–55 (“Given these statutory definitions, at the very least, casual workers could not join public service employee organizations because they are not ‘employees’ within the meaning of the PSLRA. On the basis of available evidence, the Committee can therefore only conclude that casual workers cannot join organizations of their own choosing, and enjoy the various related rights.”); *id.* ¶ 253 (“The Committee recalls that all workers, without distinction whatsoever, whether they are employed on a permanent basis, for a fixed term, or as contract employees, should have the right to establish and join organizations of their own choosing.”); see also ILO Convention No. 87, *supra* note 12, art. 2 (authorizing workers and employers, “without distinction whatsoever,” to establish and join organizations of their own choosing without previous authorization).

105. See CFA Case No. 2083, *supra* note 12, ¶¶ 252–53 (recalling that both denying a protected right to temporary workers that regular workers enjoy and denying a protected right to public employees that private sector employees enjoy are instances of prohibited discrimination plainly in violation of the “without distinction whatsoever” clause of Article 2 of Convention No. 87); see also ILO Committee on Freedom of Association, *Report in Which the Committee Requests to Be Kept Informed of Development*, ¶¶ 845–46, Case No. 2158 (India), Rep. No. 330, (Mar. 2003) [hereinafter CFA Case No. 2158] (ruling that “the status under which workers are engaged with the employer . . . should not have any effect on their right to join workers’ organizations,” and holding that temporary employees could not be denied a statutory right to appeal a dismissal afforded to regular employees on the basis of employment status).

Parallels between *Canada* and *Oakwood* are clear and transferable.¹⁰⁶ Acting on the assumption that temporary workers are “so fundamentally different from regular employees,” the Canadian Government differentially allocated access to fundamental labor rights guaranteed by the Convention.¹⁰⁷ Similarly, the Board in *Oakwood* differentiated on the basis of temporary employment status, requiring temporary workers satisfy a higher Section 9(b) burden than long-term employees.¹⁰⁸ In *Canada*, the ILO squarely rejects this, unequivocally mandating that the right to free association be granted uniformly, without distinction or discrimination whatsoever as to temporary occupational status.¹⁰⁹ In light of the Committee’s broad interpretation of the “without distinction whatsoever” clause, it is clear that the *Oakwood* decision fails to pass muster under the *Canada* standard.¹¹⁰

106. See *Oakwood Care Ctr.*, 343 N.L.R.B. 659, 660–62 (2004) (addressing the issue of whether, pursuant to Section 9(b) of the Act, jointly-employed temporary employees can be forced to achieve the consent of the user and supplier employer when fulltime solely-employed workers have no such obligation); cf. CFA Case No. 2083, *supra* note 12, ¶¶ 250–56 (considering whether the Canadian government can, consistent with ILO Convention No. 87, deny temporary workers in the public service the right to organize and collectively bargain when the right is enjoyed by both regular public sector employees and temporary employees in the private sector).

107. See CFA Case No. 2083, *supra* note 12, ¶¶ 247, 249 (observing that the circumstances of temporary employees are “quite different from those of regular public service employees” and that this fundamental difference in terms and conditions of employment warrants the “definitional distinction” in the PSLRA).

108. See *Oakwood Care Ctr.*, 343 N.L.R.B. at 662 (reconsidering *M.B. Sturgis* and upholding differential standards for temporary workers because jointly-employed temporary employees have their terms and conditions of employment set by both the user and the supplier employer, while the solely-employed regular workers have their terms and conditions of employment set by the user employer alone).

109. See CFA Case No. 2083, *supra* note 12, ¶ 253 (recalling that all workers, “whether they are employed on a permanent basis, for a fixed term, or as contract employees,” must be capable of exercising the right to establish and join unions of their own choosing).

110. Compare *id.* ¶ 254 (holding that pursuant to the “without distinction whatsoever” clause, the PSLRA must be amended such that temporary workers currently excluded from the statutory definition of employees are afforded the same rights to unionize and bargain collectively as currently enjoyed by ordinary employees as defined in the statute), with *Oakwood Care Ctr.*, 343 N.L.R.B. at 663 (requiring temporary workers satisfy a burden not imposed on regular workers before they can access rights otherwise guaranteed by Convention No. 87).

B. THE *OAKWOOD* DECISION CANNOT BE SQUARED WITH THE COMMITTEE'S INTERPRETATION OF ILO CONVENTION NO. 87

Interpreting the “join organizations of their choosing” clause, the CFA has held unequivocally that all workers shall possess full freedom to choose amongst unions, and that such freedom must be “fully established and respected in law and in fact.”¹¹¹ Mere textual compliance is insufficient; free choice must be practically exercisable and absolute autonomy is required.¹¹² Any scenario in which “an individual is denied any possibility of choice between different organizations” is irreconcilable with the intent of the Convention.¹¹³ Beyond condemning outright prohibitions on employee choice, the CFA reads the “join organizations of their choosing” clause to incorporate, consistent with principles of free exercise, the right to determine how to organize, structure, and compose unions as necessary to maximize representative capacity.¹¹⁴

1. *CFA Case No. 1615 (Philippines)*

The “join organizations of their own choosing” clause prohibits any situation in which workers are denied the possibility of choice amongst different workers' organizations. According the Committee,

111. See ILO Committee on Freedom of Association, *Interim Report*, ¶ 1353, Case No. 2388 (Ukr.), Rep. No. 337 (2005); *CFA Case No. 2301*, *supra* note 99, ¶ 592 (“The right of workers to establish and join organizations of their own choosing . . . cannot be said to exist unless such freedom is fully established and respected in law and in fact.”).

112. See *Digest of Decisions* (2006), *supra* note 38, ¶ 310 (indicating that the “join organizations of their own choosing” clause of Convention No. 87 requires that workers must be able to exercise this right in full freedom and that any law that suppresses the ability to exercise this right in practice will contravene the Convention regardless of whether it comports textually).

113. Compare *Fonseca*, *supra* note 8, at 190, and *Rahebi*, *supra* note 7, at 1113–15, and *Recht*, *supra* note 158, at 565–66, 585–86 (concluding that *Lee Hospital* and *Oakwood* left jointly-employed temporary workers with only one possible way to organize that was practically impossible to execute), with *Digest of Decisions* (2006), *supra* note 38, ¶ 324 (“A situation in which an individual is denied any possibility of choice between different organizations . . . is incompatible with the principles embodied in Convention No. 87.”).

114. See ILO Committee on Freedom of Association, *Report in Which the Committee Requests to Be Kept Informed of Development*, ¶ 681, Case No. 2115 (Mex.), Rep. No. 327 (2002) [hereinafter *CFA Case No. 2115*] (recalling that “the free exercise of the right to establish and join trade unions implies the free determination of the structure and composition of unions”).

the “join organizations of their own choosing” clause prohibits any situation in which a worker “is denied any possibility of choice between different organizations.”¹¹⁵ This principle was upheld in *CFA Case No. 1615 (Philippines)* (“*Philippines*”), where the Committee attempted to square Policy Instruction No. 20, which required temporary workers to join a particular bargaining unit, with precedent requiring that employee autonomy must exist in both law and in fact.¹¹⁶ The International Federation of Building and Wood Workers (“IFBWW”) alleged that the dismissal of temporary workers for attempting to join a bargaining unit not endorsed by Policy Instruction No. 20 violated Convention No. 87.¹¹⁷ The Committee held that Policy Instruction No. 20 contravened Convention No. 87 by preventing fixed-term workers “from organizing at the enterprise level . . . and by authorizing them only to join the recognized trade union.”¹¹⁸

Oakwood fails to comply with the “join organizations of their own choosing” clause as interpreted in *Philippines* because the Board’s interpretation of Section 9(b) interferes with the free association of temporary workers “inasmuch as it prevents them from organizing at the enterprise level” and by “authorizing them only to join the recognized trade union.”¹¹⁹ By conditioning membership in the user

115. See *Digest of Decisions* (2006), *supra* note 38, ¶ 324 (declaring any scenario wherein legislation denies a worker any possibility of choice amongst different organizations as inconsistent with the Convention).

116. See ILO Committee on Freedom of Association, *Report in Which the Committee Requests to Be Kept Informed of Development*, ¶¶ 316–17, Case No. 1615 (Phil.), Rep. No. 292 (Mar. 1994) (discussing the committee’s previous examination of the case and describing the IFBWW’s complaint that Policy Instruction No. 20 contravenes the freedom of association and collective bargaining rights of temporary workers in violation of Convention No. 87).

117. See *id.* ¶¶ 313–17 (alleging that temporary workers had been improperly dismissed for violating Policy Instruction No. 20 when, in fact, the strike was legal since Policy Instruction No. 20 is an unfair labor practice).

118. See *id.* ¶¶ 327–28 (“In the Committee’s opinion, Policy Instruction No. 20 interferes with the freedom of association and the right to collective bargaining to fixed-term project workers, inasmuch as it prevents them from organizing at the enterprise level with a view to setting up a bargaining unit.”).

119. Compare Rahebi, *supra* note 7, at 1113–15 (explaining why it is important for temporary workers to have access to unions), and Fonseca, *supra* note 8, at 172–73 (noting that while the number of temporary workers grows, they often are still denied benefits as employers misclassify them as “independent contractors,” precluding them from the benefits of unionization), with *Digest of Decisions* (2006), *supra* note 38, ¶ 324 (prohibiting situations where an employee is denied

employer's unit on dual consent, *Oakwood* impermissibly limits employee choice, and clearly runs afoul of the Committee's command that the right to establish and join organizations must be fully available in law and in fact.¹²⁰ The Committee has noted that any situation "in which an individual is denied any possibility of choice between different organizations . . . is incompatible with the principles embodied in Convention No. 87."¹²¹ Given that employers acting pursuant to *Oakwood* have every incentive to withhold requisite consent, jointly-employed temporary workers are left only with the option of organizing the private employment agency, an arrangement that—because it is impractical and exists in isolation—contravenes Convention No. 87.¹²²

2. CFA Case No. 2115 (Mexico)

Full and free exercise of the right to join unions implies the unqualified right to determine the structure and composition of those unions. The Committee's ruling in *CFA Case No. 2115 (Mexico)* ("*Mexico*") stands for the proposition that the right to join unions autonomously under the "join organizations of their own choosing" clause incorporates the right to freely structure and compose those very unions.¹²³ In *Mexico*, a Mexican construction union attempted to open its membership to temporary, casual, and aspiring workers in a variety of construction-related fields by amending its bylaws.¹²⁴ The

any possibility of choice between organizations).

120. Cf. *Digest of Decisions* (2006), *supra* note 38, ¶¶ 309–10 ("The right of worker to establish and join organizations of their own choosing . . . cannot be said to exist unless such freedom is fully established in law and in fact.").

121. See *id.* ¶ 324 ("A situation in which an individual is denied any possibility of choice between different organizations, by reason of the fact that the legislation permits the existence of only one organization in the area in which the individual carries on his or her occupation, is incompatible with the principles embodied in Convention No. 87.").

122. See *M.B. Sturgis, Inc.* 331 N.L.R.B. 1298, 1298 (2000) (reasoning that under *Lee Hospital*, which was ultimately reaffirmed in *Oakwood*, temporary workers are effectively prohibited from organizing at the user employer level); cf. Rahebi, *supra* note 7, at 1113–15 (analyzing temporary employee organizing under *Lee Hospital*, and concluding that bargaining as conceptualized in that decision, and as ultimately reaffirmed in *Oakwood*, is impractical).

123. See *CFA Case No. 2115*, *supra* note 114, ¶ 681 ("The Committee recalls in this connection that the free exercise of the right to establish and join trade unions implies the free determination of the structure and composition of unions.").

124. See *id.* ¶ 667 (proposing an amendment to expand union membership).

Ministry of Labour and Social Security declined to register the proposed amendment, and the union sought relief at the ILO for what it perceived as a violation of Convention No. 87.¹²⁵

Finding for the union, the Committee urged the Mexican government to ensure that workers had the right to freely structure and compose unions pursuant to the “join organizations of their own choosing” clause.¹²⁶ Given that *Oakwood* categorically limits the membership of bargaining units in practice, it is clear that the decision fails to adhere to the broad recognition of worker autonomy as evidenced in the *Mexico* decision and Convention No. 87 itself.¹²⁷

C. THE *OAKWOOD* DECISION IS INCONSISTENT WITH COMMITTEE INTERPRETATION OF ILO CONVENTION NO. 87

The “without previous authorization” clause was originally included in the Convention to guard against arrangements in which a decision-maker brandished unbridled discretion as to membership determinations, for which his basis may have been entirely arbitrary.¹²⁸ These scenarios are however, uncommon, and the preponderance of relevant CFA case law interpreting this clause

125. See *id.* ¶¶ 668–69 (alleging that the Ministry’s refusal to register the amendment was in violation of the Convention No. 87).

126. See *id.* ¶ 681 (recalling that the right to freely determine the structure and composition of unions is strictly within the purview of workers pursuant to the “join organizations of their own choosing” clause, and recommending the Mexican government take measures to ensure this principle is reflected in national labor law).

127. Compare *id.* (reading the “join organizations of their own choosing” clause to incorporate the right to include in a membership whom the membership deems suitable, thus striking down the Mexican government’s attempt to dictate who can participate in a single union), with *Oakwood Care Ctr.*, 343 N.L.R.B. 659, 663 (2004) (limiting the right of employees to join organizations of their own choosing and compose those organizations accordingly by requiring temporary workers to achieve dual employer consent before joining the user employer’s unit).

128. See ILO Committee on Freedom of Association, *Report in Which the Committee Requests to Be Kept Informed of Development*, ¶ 380, Case No. 2225 (Bosn. & Herz.), Rep No. 332 (Nov. 2003) [hereinafter CFA Case No. 2225] (finding that a government agency that unjustifiably refuses to register a trade union is out of compliance with Convention No. 87 pursuant to the “without previous authorization” clause); see also *Digest of Decisions* (2006), *supra* note 38, ¶ 273 (“A law providing that the right of association is subject to authorization granted by a government department purely in its discretion is incompatible with the principle of freedom of association.”).

addresses legislatively or judicially imposed formalities or prerequisites to unionization.¹²⁹ Although the ILO has recognized that governments may impose administrative formalities on unionization, it has stated that such formalities will contravene the Convention when they are “of such nature as to impair the free establishment of organizations” or operate in practice as an outright prohibition on unionization.¹³⁰ For example, requiring employees to navigate a convoluted and arbitrary union accreditation process is considered tantamount to obtaining prior consent to unionize in violation of the “without previous authorization” clause.¹³¹ To determine whether a state-imposed prerequisite passes muster before the ILO, the CFA engages in a balancing test, comparing the state’s interest in its registration scheme to the employees’ ability to fully and freely join organizations of their choosing pursuant to that scheme.¹³²

129. See, e.g., ILO Committee on Freedom of Association, *Report in Which the Committee Requests to Be Kept Informed of Development*, ¶ 1056, Case No. 2346 (Mex.), Rep. No. 337 (June 2005); ILO Committee on Freedom of Association, *Report in Which the Committee Requests to Be Kept Informed of Development*, ¶ 200, Case No. 2327 (Bangl.), Rep. No. 337 (June 2005); ILO Committee on Freedom of Association, *Report in Which the Committee Requests to Be Kept Informed of Development*, ¶ 778, Case No. 2079 (Ukr.), Rep. No. 329 (Nov. 2002) (“Recalling that the founders of a trade union should comply with the formalities prescribed by legislation but that these formalities should not be of such a nature as to impair the free establishment of organizations.”).

130. Compare *Digest of Decisions* (2006), *supra* note 38, ¶ 272 (encouraging trade unionists to observe formalities and prerequisites to unionization as proscribed by law), with *id.* ¶ 276 (“Although the founders of a trade union should comply with the formalities proscribed by legislation, these formalities should not be of such a nature as to impair the free establishment of organizations.”).

131. See BARTOLOMEI DE LA CRUZ ET AL., *supra* note 26, at 184–85 (indicating that such formalities equate to impermissible prior authorization when they are long, complicated, or applied in a manner inconsistent with their purpose).

132. See, e.g., CFA Case No. 2225, *supra* note 128, ¶ 377 (“While the founders of an organization are not freed from the duty of observing formalities which may be prescribed by law, such requirements must not be such as to be equivalent in practice to previous authorization, or as to constitute such an obstacle to the establishment of an organization that they amount in practice to outright prohibition.”); *Digest of Decisions* (2006), *supra* note 38, ¶¶ 272–73, 276, 279 (indicating the factors considered in determining whether prerequisites or formalities created impermissible “previous authorization” to unionizing).

I. CFA Case No. 2675 (Peru)

National labor law violates the “without previous authorization” clause when it is applied inconsistently with principles of free association such as to limit access to rights otherwise guaranteed under Convention No. 87. In *CFA Case No. 2675 (Peru)* (“*Peru*”), the General Confederation of Workers of Peru complained that Article 32 of Act No. 22342, which authorized industrial companies dealing in non-traditional exports to execute very short-term employment contracts, unfairly prejudiced the ability of temporary workers to freely exercise trade union rights.¹³³ According to the Complaint, temporary workers avoided engaging in union activity for fear that short term contracts would not be renewed.¹³⁴ The Peruvian Government admitted that the practice was commonly used to discourage trade union membership in clear violation of binding ILO instruments.¹³⁵ Importantly, the Committee noted that even absent discriminatory intent, a law contravenes international labor law if its impact, in practice, extinguishes a temporary worker’s ability to exercise rights under Convention No. 87.¹³⁶ The Committee found this arrangement to be in violation of the “without previous authorization” clause, holding that the systematic use of short-term contracts presented “an obstacle to the exercise of trade union rights.”¹³⁷

Accordingly, the Committee recognizes two classes of violations committable against the “without previous authorization” clause: those in which unchecked discretion is vested in a government

133. See ILO Committee on Freedom of Association, *Report in Which the Committee Requests to Be Kept Informed of Development*, ¶¶ 839–47, Case No. 2675 (Peru), Rep. No. 357 (June 2010) (alleging that Article 32 of Decree Law No. 22342 violates Conventions No. 87 and 98 as applied to temporary and contract workers).

134. See *id.* ¶ 839 (reasoning that given the nature of short-term contracts, temporary employees are hesitant to exercise otherwise protected trade union rights for fear that such behavior will induce management to decide against renewal).

135. See *id.* ¶ 873 (“The Government also states in general, in the sector in question that ‘temporary contracts have been used repeatedly as a means of discouraging trade union membership.’”).

136. See *id.* ¶ 875 (inviting the government to examine ways to protect against practical obstacles to exercising trade union rights as produced by the systematic use of very short term employment contracts.)

137. See *id.*

authority, and those in which national law limits the free establishment of workers' organizations.¹³⁸ The *Oakwood* decision is a clear example of both. In *Oakwood*, the Board implemented different standards on the basis of employment status by heightening, to a level of impracticality, the requisite Section 9(b) "appropriateness" showing for temporary workers.¹³⁹ While the *Oakwood* standard may have been implemented to protect against fragmented bargaining, it has operated as an outright prohibition on the right of temporary employees to unionize.¹⁴⁰ This fact, combined with the unqualified right of employers to veto temporary employee organizing under *Oakwood*, makes it clear that the decision institutes unachievable prerequisites to unionizing in violation of the "without previous authorization" clause.

IV. RECOMMENDATIONS

A. THE U.S. SENATE SHOULD RATIFY AND IMPLEMENT ILO CONVENTION 181 INTO THE NATIONAL LABOR LAW FRAMEWORK

Achieving compliance with international labor law requires the U.S. Senate to ratify ILO Convention No. 181 on Private Employment Agencies and Congress to implement its protective measures into the national labor law framework.¹⁴¹ Convention No.

138. See, e.g., *Digest of Decisions* (2006), *supra* note 38, ¶¶ 273, 276 (warning members that any union recognition process that either affords a government department unqualified discretion to make accreditation determinations or, in practice, impairs the free establishment of workers' organizations will be out of compliance with the Convention).

139. See Recht, *supra* note 8 (suggesting that *Oakwood* creates a legal underclass of employees who face insurmountable barriers to unionizing that are not imposed on other types of workers).

140. See discussion, *supra* Part II.C (discussing the impracticality of temporary employee unionization under *Oakwood*).

141. See generally ILO Convention (No. 181) Concerning Private Employment Agencies, June 19, 1997, 2115 U.N.T.S. 249 [hereinafter ILO Convention No. 181] (recognizing the legitimacy of private employment agencies and condoning their existence in the international labor market on the condition that such agencies afford employees certain rights and protections with respect to their employment); ILO Recommendation No. 188 Private Employment Agencies Recommendation, June 19, 1997, 85th ILC Sess., available at http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0:NO::P12100_ILO_CODE:R188 (supplementing ILO Convention No. 181 with technical assistance, definitional clarification, best practice methodology, and general advice on proper implementation).

181 represents a significant departure from traditional international labor regulation in that, for the first time, the ILO recognized—albeit cautiously—the inevitability and legitimacy of private labor market intermediaries whose sole purpose is the sale of labor as a commodity.¹⁴² The Convention adapts to globalized employment by promoting managerial flexibility and publicly condoning the operation of private employment agencies, and by combatting statutory under-inclusion of temporary workers and deliberate mischaracterization of employees by employers looking to avoid obligations under national labor law.¹⁴³

The triangular employment relationship is expressly covered under Article 1(1) of the Convention.¹⁴⁴ Of significant consequence for U.S. compliance is Article 4, which unequivocally requires member states to take measures to “ensure that the workers recruited by private employment agencies . . . are not denied the right to freedom of association and the right to bargain collectively.”¹⁴⁵ Further, Article 11 guarantees that workers employed by private employment

142. See Frances Raday, *The Insider-Outsider Politics of Labor-Only Contracting*, 20 COMP. LAB. L. & POL'Y J. 413, 413–14 (1998) (“The historic stance of the ILO was to oppose private labor market intermediaries, as such, on the grounds that they would undermine the principle that ‘labour is not a commodity.’ In 1997, in Convention 181, the ILO reversed this policy and legitimized private intermediaries, not only as job-placement agencies, but also as direct providers of labor services.”).

143. See *Private Employment Agencies, Temporary Agency Workers and Their Contribution to the Labour Market* 5–8 (Int'l Labour Org., Issue Paper WPEAC-2009, 2009), available at http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---sector/documents/meetingdocument/wcms_162740.pdf; Jan Theron, *Intermediary or Employer? Labour Brokers and the Triangular Employment Relationship*, 26 INDUS. L.J. 618, 618–19 (2005) (balancing the modern employer's need for flexibility with the contingent worker's need for safe, stable, and statutorily recognized employment); Raday, *supra* note 142, at 413 (indicating that the historic stance of the ILO on the impermissibility of private employment agencies could not be squared with globalization's impact on the employment relationship and that, to stay relevant in the international law community, the ILO had no choice but to condone the existence of private labor intermediaries).

144. See ILO Convention No. 181, *supra* note 141, art. 1(1)(b) (defining “private employment agency” to include “services consisting of employing workers with a view to making them available to a third party . . . which assigns their tasks and supervises the execution of these tasks”).

145. See *id.* art. 4 (“Measures shall be taken to ensure that the workers recruited by private employment agencies providing the services referred to in Article 1 are not denied the right to freedom of association and the right to bargain collectively.”).

agencies must be, in practice, adequately protected as to the freedom of association, the right to collective bargaining, minimum wages, proper working conditions, and several other categories.¹⁴⁶ Convention No. 181 more precisely addresses the vulnerabilities of temporary workers in triangular employment relationships as compared to comprehensive yet generally worded protections afforded by Convention No. 87.¹⁴⁷ By ratifying Convention No. 181, the United States could remove practical obstacles to unionizing imposed by the *Oakwood* decision, achieve compliance with binding international obligations, and guarantee the fundamental rights of free association and collective bargaining to all workers.¹⁴⁸

B. THE NATIONAL LABOR RELATIONS BOARD SHOULD OVERRULE
OAKWOOD AND RETURN TO SETTLED SECTION 9(B)
JURISPRUDENCE RELATING TO TEMPORARY EMPLOYEES UNDER
M.B. STURGIS

By replacing the traditional “community of interest” test with the dual consent requirement, the Board in *Oakwood* disrupted decades of settled precedent governing Section 9(b) propriety determinations.¹⁴⁹ For the reasons discussed in Part III, the Board’s current application of Section 9(b) to temporary workers pursuant to *Oakwood* plainly contravenes the United States’ international commitments by imposing crippling legal and practical obstacles to

146. See *id.* art. 11 (ensuring adequate protection for temporary workers with respect to free association, collective bargaining, minimum wages, hours, benefits, training, workplace safety, workers compensation, and parental benefits).

147. Compare *id.* art. 1(1)(b) (specifying coverage under the act to include employees in a triangular employment relationship), with ILO Convention No. 87, *supra* note 12, art. 2 (covering generally all workers “without distinction whatsoever”).

148. Cf. Rahebi, *supra* note 7, at 1113–15 (analyzing the practical obstacles to unionization created by the *Oakwood* decision). Compare ILO Convention No. 181, *supra* note 141, arts. 4, 11 (requiring both legal and practical access to trade union rights for employees of private employment agencies in triangular employment relationships), with *Oakwood Care Ctr.*, 334 N.L.R.B. 659, 663 (2004) (holding that jointly-employed temporary employees of private employment agencies in triangular employment relationships cannot, consistent with Section 9(b) of the Act, unionize with core employees of the user employer absent consent of the user employer and the private employment agency).

149. See discussion, *supra* Part II.C.3 (comparing scholarship on the *Oakwood* decision to determine how significant of an impact the decision had on traditional Section 9(b) appropriateness precedent).

full and free exercise of trade union rights.¹⁵⁰ To comply with international law, the Board should expressly overrule *Oakwood* and reinstitute the exclusivity of the “community of interest” test previously upheld in *M.B. Sturgis* as the determinative methodology for unit propriety.¹⁵¹

Under *M.B. Sturgis*, all workers, regardless of employment status, have uniform prerequisites to unionization, none of which unnecessarily inhibit a temporary worker’s access thereto.¹⁵² So long as a petitioned-for unit is composed of mutually interested workers, the unit will be considered “appropriate” under Section 9(b) of the Act.¹⁵³ Whether employers consent to the arrangement is of no legal consequence.¹⁵⁴ The *M.B. Sturgis* regime complies with the three substantive clauses of Article 2(2) Convention No. 87 in that all workers, “without distinction whatsoever,” must demonstrate uniform criteria to unionize and can, upon sufficient showing of mutuality, “join organizations of their choosing freely and “without

150. See discussion, *supra* Part III.A–B (critiquing the *Oakwood* decision against international legal obligations pursuant to Convention No. 87).

151. Cf. discussion, *supra* Part II.C (describing how to properly undertake a traditional Section 9(b) community of interest analysis with respect to temporary employees, and listing the factors considered determinative of mutuality). Compare *Oakwood Care Ctr.*, 334 N.L.R.B. at 663 (holding that for jointly employed temporary workers to join a bargaining unit consisting of solely-employed employees of the user employer, the temporary worker must first achieve sufficient mutuality of interest and then attain consent from both the supplier and user employer), with *M.B. Sturgis, Inc.* 331 N.L.R.B. 1298, 1305–06 (2000) (holding that a jointly-employed temporary worker need only show sufficient mutuality of interest to join a bargaining unit with solely employed employees of the user employer).

152. See *M.B. Sturgis*, 331 N.L.R.B. at 1308 (ruling that the Board “will apply traditional community of interest factors” to determine whether units that combine jointly-employed and solely-employed employees of a user employer are appropriate for purposes of Section 9(b)); see also *Uyeda v. Brooks*, 365 F.2d 326, 329 (6th Cir. 1966) (“The touchstone of an appropriate bargaining unit is the finding that all of its members have a common interest in the terms and conditions of employment, to warrant their inclusion in a single unit to choose a bargaining agent.”); cf. Dougherty, *supra* note 44, at 16 (cataloging factors considered in a Section 9(b) community of interest analysis).

153. See *M.B. Sturgis*, 331 N.L.R.B. at 1305–06 (holding that the “community of interest” test applies and is determinative in a Section 9(b) “appropriateness” determination).

154. See *id.* at 1304–05 (declining to accept the “faulty logic” of *Lee Hospital* and holding that the “Board does not require ‘consent’ of the employer in order for employees to be represented for collective bargaining in an employer-wide unit.”).

previous authorization.”¹⁵⁵

V. CONCLUSION

As a matter of international labor law, *Oakwood* was wrongly decided. Conditioning the freedom of association and the right to collective bargaining on employer consent impermissibly limits the full and free exercise of guaranteed rights. The ILO squarely rejects this arrangement and consequently, Section 9(b) of the National Labor Relations Act, as applied to temporary employees, does not comply with ILO Convention No. 87.

155. Compare *id.* at 1305–07 (holding generally that jointly-employed temporary workers should be subject to the same prerequisites as solely-employed employees under Section 9(b)), with ILO Convention No. 87, *supra* note 12, art. 2 (requiring that all workers, without distinction whatsoever, be afforded the right to organize in workers’ organizations of their own choosing without previous authorization).