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WHO SHOULD PAY THE HUMAN PRICE OF "EVERY DAY LOW PRICES"?

JEFFREY A. BOTELHO*

I. INTRODUCTION

As we begin the new millennium, an alarming socio-economic trend is helping to widen the gap in quality of life between the "haves" and "have-nots" in the United States; the impact of this trend on the American public is substantial in both a social and an economic sense. Put simply, the trend is the practice of squeezing as much work as possible out of an unskilled workforce by giving employees as little as possible, in terms of pay, benefits, and collective bargaining power, in order to cut labor costs and attain greater profits.¹

The identity of the most powerful and glaring culprit in this systematic subjugation of American (not to mention, directly and indirectly, certain foreign) workers may or may not surprise you. You probably have shopped at these stores at least once, if not numerous times in the past year. Each week, 138 million shoppers across the globe visit this company's 4,750 stores; in 2002, eighty-two percent of U.S.

* I give special thanks to two of my professors and mentors at St. Thomas University School of Law, Professor Stephen Plass and Professor Elizabeth Pendo, without whom this comment would not have been possible. Professor Plass was instrumental in helping me hammer down a topic, and although this final version is not what either of us had in mind in the beginning, any shortcomings are my own fault, not his. Professor Pendo provided me with (either by handing them to me from her own "magic box" of research materials or by referring them to me) the principle sources which are the basis of this comment, giving me a base of knowledge that was imperative when working on such a tight schedule (the comment was written over an eight week period during fall semester of my second year of law school as a condition to my full membership on the *St. Thomas Law Review*). I also thank Ilona Demenina, the Editor-in-Chief, and Jake Even, the Notes & Comments Editor, and the rest of the *St. Thomas Law Review* for their support and encouragement throughout the writing process, and especially Mickey Budlong, our Administrative Assistant – if not for Mickey, this would not have been published. I thank my wife Cristina for supporting me, encouraging me, and for putting up with the stresses and anxieties that come with the three year ordeal that is the law school experience. I thank my parents, James F. Botelho, Jr. and Sharon G. Botelho, for encouraging me to march to the beat of my own drummer (and supporting me, even when the rhythm was off). Most importantly of all, I thank my Father in Heaven for the opportunities He has given to me, and my Lord Jesus Christ whose divine sacrifice gives my life meaning and hope and who teaches me every day through His Word the true essence of humanity.

1. See generally Simon Head, *Inside the Leviathan*, N.Y. REV. OF BOOKS, VOL. 51, ISSUE 20 (Dec. 16, 2004), available at <http://www.nybooks.com/articles/17647>.

households bought at least one item there.² Wal-Mart is everywhere, and if there is not a store near you now, chances are there will be in the near future.

This comment will provide an overview of Wal-Mart's more questionable (and, in many cases, illegal) employment practices, with a focus on both labor violations and a deficient health care plan. It will address some of the negative effects that Wal-Mart's health benefit policy has on American taxpayers. The comment will then turn its focus to the possibility of a return to unionization in the private sector as a means of acquiring adequate pay and better benefits for Wal-Mart workers. This discussion begins with an outline of the basic provisions of the National Labor Relations Act ("the Act") and continues with data which shows a direct and substantial correlation between unionization and higher pay and better benefits. Next will follow a discussion of Wal-Mart's staunch anti-union stance, including recent violations found by the National Labor Relations Board ("NLRB"), illustrating the need for increased penalties and other enhancements to the Act to ensure employer compliance with the law and provide employees with safeguards when employers refuse to bargain with a duly-elected collective bargaining unit. The comment will outline a current legislative proposal which addresses some of these needs, including a discussion of the probable effects of the amendments, should they pass. In sum, the comment will show the necessity for consistent and aggressive legislative, employee-based, and media pressure on Wal-Mart in a manner which may effectuate much-needed changes to its employment practices and, hopefully, those of similarly situated employers.

Wal-Mart is one of the most powerful companies in the world, given its size and its successful business model. In 2002, Wal-Mart's revenues of \$258 billion amounted to at least two percent of the U.S. Gross Domestic Product.³ With 1.2 million employees in the United States, it is the nation's largest private sector employer.⁴ Wal-Mart's success in leading its competitors in the "general merchandise" category with thirty percent of market share in 1999 has led *Fortune* magazine to call it the nation's "most

2. Steven Greenhouse, *The Nation*; *Wal-Mart, Driving Workers and Supermarkets Crazy*, N.Y. TIMES, Oct. 19, 2003, at 3.

3. See Head, *supra* note 1; see also GEORGE MILLER, DEMOCRATIC STAFF OF THE COMMITTEE ON EDUCATION AND THE WORKFORCE, 108TH CONG., EVERYDAY LOW WAGES: THE HIDDEN PRICE WE ALL PAY FOR WAL-MART 3 (Comm. Print 2004), available at <http://edworkforce.house.gov/democrats/index.shtml> (follow "Reports" hyperlink; then scroll down to "Labor Reports"; then, click on "2/16/2004 Report on Wal-Mart") (last visited Nov. 15, 2005).

4. MILLER, *supra* note 3, at 3.

admired company.”⁵ The secret to the company’s success is, in a word, efficiency. Effective use of logistics and information technology allows Wal-Mart to buy directly from manufacturers, eliminating the need, and excess cost, of buying from wholesalers or distributors.⁶ Nothing about using information or logistics models to perfect the order-to-delivery process, however, sounds off an alarm quite like Wal-Mart’s incredibly efficient use of *people* to accomplish its company policy of offering “Every Day Low Prices” to its consumers every day.⁷ “As Sam Walton wrote in his memoirs: . . . ‘payroll is one of the most important parts of overhead, and overhead is one of the most crucial things you have to fight to maintain your profit margin.’”⁸ As a result of Wal-Mart’s successful “fight” against overhead, Wal-Mart’s practices have been the subject of many articles, reports, and even conferences that scrutinize its labor practices. The American Federation of Labor and Congress of Industrial Organizations (“AFL-CIO”) authored a report spotlighting Wal-Mart as an example of why many workers either do not have employment-based health-benefits or are “under-insured” by such benefits.⁹ The Democratic Staff of the Committee on Education and the Workforce entitled their report on Wal-Mart’s numerous nefarious labor practices “Everyday Low Wages.”¹⁰ Finally, a conference devoted solely to these labor practices and their consequences was held in April of 2004 at the University of California, Santa Barbara.¹¹

Many shoppers who enjoy saving money at Wal-Mart and believe the company has their best interests in mind might shudder after reading the 2004 report from the Democratic Committee on Education and the Workforce. The report, authored by Representative George Miller of California, should make consumers think twice before happily walking their shopping cart into one of the huge red, white, and blue box-shaped buildings that have become fixtures of the American landscape.¹² Miller’s report details some of Wal-Mart’s numerous labor and employment

5. Head, *supra* note 1 (citing Jerry Useem, *One Nation Under Wal-Mart: How Retailing’s Superpower – and Our Biggest Most Admired Company – Is Changing the Rules for Corporate America*, FORTUNE, Mar. 3, 2003, at 64); see also Anonymous, *Fortune 500 Largest U.S. Corporations*, FORTUNE, Apr. 5, 2004, at F1.

6. Head, *supra* note 1.

7. *Id.*

8. *Id.*

9. AFL-CIO, WAL-MART, AN EXAMPLE OF WHY WORKERS REMAIN UNINSURED AND UNDERINSURED (Oct. 2003), available at http://www.coastalliance.com/area_wage_dev/WM_vs_insurance.pdf (last visited Oct. 10, 2005) [hereinafter AFL-CIO Report].

10. MILLER, *supra* note 3, at 1.

11. Head, *supra* note 1.

12. See generally MILLER, *supra* note 3, at 1.

violations, and other practices that, though not a direct violation of the law, in the end may prove costly to the American public.¹³ For example, since 1995, the NLRB has issued sixty complaints against Wal-Mart for impinging on workers' right to organize.¹⁴ The company has provided its upper-level employees with a "Manager's Toolbox to Remaining Union Free," complete with warning signs to look for, and a hotline number to call so that company specialists can be called in to impede organization.¹⁵ Within a week of a Wal-Mart meat-cutting department's organization of a union in 2000, Wal-Mart announced a phase-out of its meat-cutting departments entirely.¹⁶ When, after three years, Wal-Mart was ordered to bargain with the union, the company appealed the decision rather than comply with the order.¹⁷ In the Civil Rights arena, Wal-Mart has been accused of discriminating against women by denying them promotions and paying them less than half the wage level of male employees.¹⁸ With more than one million current and former employees, it is one of the largest class actions in history.¹⁹ Finally, Wal-Mart has violated the Fair Labor Standards Act ("FLSA"),²⁰ which requires hourly employees to be paid at least minimum wage and time-and-a-half for overtime (more than forty hours) in a week.²¹ A survey of the results of some lawsuits filed by employees against Wal-Mart over the past few years suggest that the practice of not paying required wages may be a widespread phenomenon: \$50 million in unpaid wages paid to 69,000 workers in Colorado; \$500,000 to 120 workers in New Mexico; and a 2002 jury verdict for 400 employees in Oregon who sued for unpaid, off-the-clock overtime.²²

That is not all. A Wal-Mart self-audit revealed "extensive violations of child-labor laws" for having minors working too many hours a day, too late, or for violation of laws requiring time for breaks and meals.²³ It has been claimed, by one store manager, that no corrective actions were taken in response to the audit.²⁴ Wal-Mart has also been caught using

13. *Id.* at 3.

14. *Id.*

15. *Id.* at 4.

16. *Id.*

17. *Id.* at 3-4.

18. MILLER, *supra* note 3, at 5.

19. *Id.*

20. *See generally* Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (2005).

21. *See generally* Fair Labor Standards Act, §§ 201-219; MILLER, *supra* note 3, at 5.

22. MILLER, *supra* note 3, at 5-6. In testimony for this case, a personnel manager said she was forced by her superiors to delete hours from employee time sheets for six years. *Id.* at 6.

23. Steven Greenhouse, *In-house Audit Says Wal-Mart Violated Labor Laws*, N.Y. TIMES, Jan. 13, 2004, at 16A.

24. MILLER, *supra* note 3, at 7.

undocumented workers. In October of 2003, federal agents raided sixty-one Wal-Marts in twenty-one states, and arrested 250 undocumented nightshift janitors.²⁵ Given the nature of Wal-Mart's general use of labor, the use of undocumented workers to win the "fight" against overhead can hardly give cause to surprise.

While violations of the law give cause for alarm, employment practices that are not direct violations of any particular statute are equally disturbing. Wal-Mart's fight to win the battle against overhead means paying its workers as little as possible. While the average supermarket employee makes \$10.35 per hour, the average sales clerk at Wal-Mart made \$8.23 on average in 2001.²⁶ Working an average of thirty-two hours per week, this means earning less than \$1,000 per month in take-home pay.²⁷ One-third of Wal-Mart's employees work part-time, which restricts access to benefits.²⁸ Full-time workers at Wal-Mart who made eight dollars per hour in 2003 were more than \$1,000 below the poverty line for a family of three.²⁹ The average hourly wage is so low that a full-time worker at Wal-Mart could be eligible for food stamps.³⁰ Company profits in 2002 amounted to \$6.6 billion.³¹ Is this where our tax dollars should be going?

With the cost of health care rising, Wal-Mart has an opportunity to offset its penny-pinching image by sharing some of its exorbitant profits by providing adequate health care to its employees. However, Wal-Mart's health plan reflects its ever-present concern for limiting overhead while showing its apathy toward the well-being of its employees. While Wal-Mart offers eligible employees health insurance, for some reason, less than half of Wal-Mart employees (between forty-one and forty-six percent) are covered under its plan.³² Wal-Mart plan participation is at least twenty percent (if not twenty-six percent) lower than the national average of *two-thirds* of workers who receive health coverage through their employers at other large firms in the country.³³ The reasons for this discrepancy, according to the AFL-CIO report, are Wal-Mart's eligibility requirements and the prohibitive cost of the plan.³⁴ For example, part-time workers must

25. *Id.* at 11.

26. *Id.* at 4.

27. *Id.*

28. *Id.*

29. *Id.*

30. AFL-CIO Report, *supra* note 9, at 8.

31. MILLER, *supra* note 3, at 5.

32. AFL-CIO Report, *supra* note 9, at 10.

33. *Id.*

34. *Id.*

wait *two years* to be eligible under Wal-Mart's current plan.³⁵ Furthermore, in 2002, Wal-Mart expanded the classification of part-time workers to those who work fewer than thirty-four hours per week; this means that someone who works only at Wal-Mart, who may want to work full-time (forty hours per week), will go without coverage for two years, as long as they are assigned less than thirty-four hours per week.³⁶ Second, the cost of the plan is prohibitive; in 2001, Wal-Mart workers paid *forty-two percent* of the total cost of the health plan, while typical employees at other large companies paid only *sixteen percent* of the total premium for single coverage (twenty-five percent for family coverage).³⁷ In 2004, premiums increased for all workers, with a single worker paying \$72.04 per month with a corresponding \$350 deductible (the amount that must be paid before coverage will kick in).³⁸

Because many Wal-Mart workers cannot afford to pay for the health plan, many of them turn to public assistance to pay for health care, or they choose to go uninsured.³⁹ In the words of the Miller report, "[e]ffectively, Wal-Mart forces taxpayers to subsidize what should be a company-funded health plan."⁴⁰ The Institute for Labor and Employment at the University of California-Berkeley found, in a study, that California taxpayers had subsidized over \$20 million in medical care for Wal-Mart employees *in that state alone*.⁴¹

Wal-Mart costs taxpayers on all fronts. The Democratic Committee on Education and the Workforce estimates that a two-hundred-person Wal-Mart store may cost *federal taxpayers* as much as \$420,000 per year, including monies for free lunches, section eight housing assistance, federal tax credits for low-income families, other Title I expenses, health care costs, and low-income energy assistance.⁴² Multiply this estimate by 3,600 (a low estimate of the number of Wal-Mart stores currently in operation in the U.S.),⁴³ and the estimated cost to U.S. taxpayers comes out to over \$1.5 billion per year. Are Every Day Low Prices worth it?

35. *Id.* at 11.

36. *Id.*

37. *Id.*

38. *Id.* at 12.

39. MILLER, *supra* note 3, at 8.

40. *Id.*

41. *Id.*

42. *Id.* at 9.

43. Wal-Mart, <http://www.walmartfacts.com/newsdesk/wal-mart-fact-sheets.aspx#a125> (scroll down to see the number of Wal-Mart stores currently in operation, according to the company's figures) (last visited Nov. 15, 2005).

If Wal-Mart were the only company resorting to these cost-cutting practices, perhaps American taxpayers could rest easier. But in the retail sector, with Wal-Mart the clear leader, other large firms have been forced to resort to similar practices in order to survive. In 2003, three large supermarket companies in California, with well-founded fears of the impact that Wal-Mart's entry into their markets would have, demanded a two-year wage freeze from its workers, lower pay scales for new employees, and greater employee contributions for health coverage, sparking a general strike.⁴⁴ Under similar circumstances, strikes occurred throughout the country in 2003, in the states of Missouri, West Virginia, Kentucky, and Ohio.⁴⁵

There is also evidence that the company has a negative economic impact on the communities where it operates. According to one report, Wal-Mart's aggressive expansion into Iowa led to the closing of forty-five percent of hardware stores and twenty-three percent of drugstores after the chain moved into the state in 1983.⁴⁶ A report compiled by Rodino & Associates found that openings of Wal-Mart Supercenters drive down local retail wages, place a strain on public services, and damage small businesses.⁴⁷ The message to other retailers is clear: Wal-Mart has lower prices because of their efficiency, and unless you become more efficient, the opening of a nearby Wal-Mart store will put you out of business. Competitors have heeded the warning, and efforts to copy Wal-Mart's practices in order to survive have become a business necessity.⁴⁸

The most striking problem lies in the fact that Wal-Mart has not been dissuaded, despite the numerous lawsuits that have been filed against it, from employing draconian labor practices to get the most out of its workers. Why not? One cannot be sure of the answer, but part of the reason may be that Wal-Mart management has made a business decision to forego any major changes in its illegal labor practices (impeding union organization, discriminating against female workers, failing to pay overtime, etc.) in light of what it perceives to be weak and ineffective labor and employment laws. Furthermore, Wal-Mart appears to have made another business decision in forcing its workers to bear a higher brunt of health care costs in order to maintain its profit goals. This is mere common sense – if employees can be made to pay for a high percentage of health care costs, a purely profit-driven company would not have it any other way.

44. Greenhouse, *supra* note 23.

45. *Id.*

46. AFL-CIO Report, *supra* note 9, at 8.

47. MILLER, *supra* note 3, at 9.

48. See Greenhouse, *supra* note 23 and accompanying text.

Wal-Mart sees no reason to change, because no one is forcing it to change. The laws of this country, and the way those laws are enforced, do not force them to change. Therefore, Wal-Mart associates, the lower-level employees of that company, as well as other retail employees whose superiors are forced to follow a “labor-efficiency” business model (and on an indirect level, you and I as taxpayers), must bear the brunt of Wal-Mart’s indiscretions and otherwise stingy labor practices. The principal question that this comment poses, one which demands an answer, is this: Who must pay the ultimate price for “Every Day Low Prices”? The answer must be Wal-Mart and employers like them.

II. HEALTH CARE: THE MOST IMPORTANT BENEFIT AN EMPLOYER PROVIDES

The generally accepted view, supported by a 2002 study by the Employee Benefit Research Institute (“EBRI”), is that employees prefer health care coverage to equivalent cash compensation, and that health benefits outrank all other benefits in terms of the importance to workers.⁴⁹ For this reason, and because of the rising cost of health care in these uncertain times, this paper will focus on the quality of provision of health benefits to employees by Wal-Mart, rather than on wages or other benefits.

Wal-Mart employees and their children have stood out like sore thumbs on the rolls of several state-sponsored health care programs.⁵⁰ In Georgia, a state survey found that, of the 166,000 children covered by that state’s PeachCare for Kids health insurance program, 10,261 had a parent who worked for Wal-Mart.⁵¹ In North Carolina, a hospital surveyed 1,900 patients who were Wal-Mart employees – thirty-one percent of them were on Medicaid, while sixteen percent did not have any insurance at all.⁵² A statistical study performed by the University of California at Berkeley Labor Center concluded that the families of Wal-Mart employees use “an estimated forty percent more in taxpayer-funded health care than the

49. Paul Fronstin & Ray Werntz, *The “Business Case” for Investing in Employee Health: A Review of the Literature and Employer Self-Assessments*, EBRI ISSUE BRIEF NO. 267 (Employee Benefit Research Institute, Washington, D.C.), Mar. 2004, at 3, available at http://www.ebri.org/publications/ib/index.cfm?fa=main&doc_type=1 (click on 2004 briefs) (last visited Nov. 15, 2005) [hereinafter *The “Business Case” for Investing in Employee Health*].

50. Reed Abelson, *States Are Battling Against Wal-Mart Over Health Care*, N.Y. TIMES, Nov. 1, 2004, at A1.

51. Andy Miller, *Wal-Mart stands Out on Rolls of PeachCare*, ATLANTA J. CONST., Feb. 27, 2004, available at http://www.global.factiva.com/en/arch/print_results.asp (last visited Apr. 7, 2006). The next highest employer on the Georgia list was Publix, with 734 children. *Id.*

52. Abelson, *supra* note 50, at A1.

average for families of all large retail employees.”⁵³ In Florida, Wal-Mart has more employees and family members (12,300 of 91,000 employees in state) enrolled in the state Medicaid program than any company in the state.⁵⁴ Wal-Mart’s response to such accusatory figures inevitably mirrors the response of Susan Chambers, executive vice-president in charge of benefits at Wal-Mart: “You can’t solve it for the 1.2 million associates if you can’t solve it for the country.”⁵⁵ Such glib responses fly in the face of the responsibility employers have historically taken in insuring the American public,⁵⁶ and an attitude like Wal-Mart’s, given their current expansion and the pressure on other retailers to copy their practices, will most certainly exacerbate the health-care crisis.

According to a March 2004 EBRI report,⁵⁷ America’s health care system depends on employers to pay health benefits, and federal and state programs like Medicare and Medicaid are only meant to insure those who cannot obtain employment-based health benefits.⁵⁸ Almost all large employers (those with more than fifty employees) offer health benefits, and since health care costs quintupled in the early 1980’s and have continued to rise, employers have continued to pay a large portion of health care costs nationally; on average, employers paid eighty-four percent of premiums for individual coverage and seventy-three percent of premiums for family coverage in 2003.⁵⁹ Contrast these figures with Wal-Mart, which now pays between sixty-seven percent and fifty-eight percent of health care costs for those who participate in the plan.⁶⁰ With Wal-Mart as the leader of the retail sector, these figures alone are disturbing, without even analyzing Wal-Mart’s relatively low participation rate among employees, because other retail employers have been forced to follow suit and pay a lower percentage of health care costs in order to compete.⁶¹ It goes without

53. ARINDRAJIT DUBE & KEN JACOBS, HIDDEN COST OF WAL-MART JOBS: USE OF SAFETY NET PROGRAMS BY WAL-MART WORKERS IN CALIFORNIA 1 (U.C. Berkeley Labor Center 2004).

54. Syndey Freedberg & Connie Humberg, *Lured Employers Now Tax Medicaid*, ST. PETERSBURG TIMES, Mar. 25, 2005, available at http://www.sptimes.com/2005/03/25/news_pf/State/Lured_employers_now_t.shtml (last visited Nov. 15, 2005).

55. Abelson, *supra* note 50, at A1.

56. *Id.* The national tradition of providing health insurance to workers began during WWII, when companies offered health benefits in lieu of higher pay. Unions at large manufacturing companies demanded such benefits after the war, and corporate employees across the country have come to expect health insurance as part of their employment. *Id.*

57. Fronstin & Werntz, *supra* note 49, at 3.

58. *Id.* at 4.

59. *Id.* at 4-5. Premiums have increased by more than ten percent annually since 2001, and are expected to continue to do so. *Id.*

60. Abelson, *supra* note 50, at A1; AFL-CIO Report, *supra* note 9, at 11.

61. See Greenhouse, *supra* note 23 and text accompanying note 44.

saying that with health care costs rising, many employers have struggled to provide health care, and some have not been able to do so; the percent of non-elderly (under sixty-five) uninsured increased to 17.3% in 2002, from 15.8% in 2000.⁶²

III. ONE POSSIBLE RESPONSE: A RETURN TO UNIONIZATION; EVIDENCE THAT COLLECTIVE BARGAINING WORKS

A recent EBRI study has found, perhaps not surprisingly, that union members are much more likely to have employment-based health insurance than non-union workers; however, the overall decline in unionized workers has contributed to the overall decline in the number of workers with health benefits.⁶³ Using data available as of September of 2003, the study found a pronounced difference between the percentage of unionized workers whose employers provide them health insurance (eighty-six percent) versus those employees who are not unionized (only sixty percent).⁶⁴ In the retail trade, eighty-four percent of unionized workers had health benefits through their employers, while only fifty-five percent of nonunion workers in that segment were covered.⁶⁵ This amounts to a twenty-six percent increase in the probability of coverage when workers are unionized.⁶⁶ The study also concluded that if unionization across the country continues to decline, as it has for the past two decades, the percentage of workers with health benefits will also decline, and the percentage of uninsured workers will continue to increase.⁶⁷

This information suggests that, if there is a way to pressure employers into providing health insurance with any success, “enhanced” unionization (a legal “beefing up” of existing labor legislation) may be one way to do so without requiring a complete overhaul of current labor and employment laws and/or the current health care system. The advantage to this approach over other means is that there are already laws on the books governing collective bargaining rights and requirements to negotiate in “good faith” with union leadership.⁶⁸ Changes can be made to the existing laws to

62. Fronstin & Wertz, *supra* note 49, at 6.

63. Paul Fronstin & John MacDonald, *Union Membership a Key to Health Care Coverage*, EBRI NEWS NO. 700 (Employee Benefits Research Institute, Washington, D.C.), May 9, 2005, available at <http://www.ebri.org/publications/prel/> (Scroll down to May 9, 2005, No. 700) (last visited Nov. 15, 2005) [hereinafter *Union Membership a Key to Health Care Coverage*].

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. See 29 U.S.C. §§ 151–187 (2005).

require that large firms like Wal-Mart *actually reach agreements* with elected representatives so that the workers themselves are represented at a basic level, more than current employment laws require. Other changes, especially stiffer penalties for infractions, are required to insure that companies readily comply with the law, rather than openly flout it.⁶⁹ This comment will outline and evaluate one proposed law currently pending in Congress which aims to address these issues.

IV. BRIEF HISTORY OF LABOR MOVEMENT

The earliest association of unions in the United States was the American Federation of Labor ("AFL"), which, for most of its forty-year existence, was led by Samuel Gompers, "who believed that workers could best achieve their goals . . . through the process of collective bargaining."⁷⁰ This idea has endured in the American labor movement to the present day.⁷¹ Early unions were focused in the areas of skilled trades, but with the growth of mass production industries, some union leaders tried to broaden union organization to include workers employed by the same employer or industry.⁷² Leaders fighting to unionize entire industries formed the Congress of Industrial Organizations ("CIO"), which split from the AFL and was successful in organizing workers in the auto and steel industries.⁷³ In 1955, after years of bitter rivalry, the AFL and CIO merged to become the AFL-CIO; of the 155 unions in the U.S. in 1990, ninety-four were affiliates of this large organization.⁷⁴ Recently, unions representing public workers have been the major source of growth in organized labor, while the shift in the American economy away from manufacturing jobs has led to a decrease in union activity overall due to resistance to unionization in the service and white collar industries.⁷⁵

The attitude of American courts in the early twentieth century toward labor legislation can be characterized by two Supreme Court decisions which held that: 1) state laws limiting the number of hours worked per day were an unconstitutional restraint on the freedom to contract out one's labor services;⁷⁶ and 2) federal regulation of the hours and labor conditions

69. See MILLER, *supra* note 3, at 3-4.

70. ALVIN GOLDMAN, *LABOR AND EMPLOYMENT LAW IN THE UNITED STATES* 30 (Kluwer Law International 1996).

71. *Id.* at 30-31.

72. *Id.* at 31.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at 32-33 (citing *Lochner v. New York*, 198 U.S. 45 (1905)).

of child workers were unconstitutional as a matter of local concern and beyond the scope of federal power.⁷⁷ Early congressional attempts to recognize the validity of labor unions were blocked by the Court, which held that Congress could not prohibit anti-union discrimination by railroads.⁷⁸ A subsequent decision affirmed a lower court award of treble damages against a union for promoting a boycott against a hat manufacturer which refused to recognize the union's collective bargaining representative.⁷⁹ It took the Great Depression for the Court to reconsider and, finally, remove the constitutional barriers to labor legislation when it recognized the validity of the NLRA in 1937.⁸⁰

V. THE NATIONAL LABOR RELATIONS ACT

Section seven of the NLRA consists of a legal declaration of employee rights as a collective bargaining unit.⁸¹ It reads:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [29 USCS § 158(a)(3)].⁸²

Section eight of the NLRA goes on to list the unfair labor practices of an employer, for which such employer may be charged for a violation.⁸³ Section (a)(1) is a blanket provision, which states: "It shall be unfair labor practice for an employer – (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section seven [29 U.S.C. § 157] of this title."⁸⁴ In a very basic sense, this provision says it is illegal for an employer to violate any of the employee rights enumerated in the previous section.⁸⁵ Sections (a)(2)-(5) lay out the sub-violations of the blanket provision in Section (a)(1).⁸⁶ Between them, they regulate and prohibit the following kinds of employer conduct, including: 1) a

77. *Id.* at 32-33 (citing *Hammer v. Dagenheart*, 247 U.S. 251 (1918)).

78. *Id.* (citing *Adair v. United States*, 208 U.S. 161 (1908)).

79. *Id.* (citing *Danbury Hatters Case*, 208 U.S. 274 (1908)).

80. *Id.* at 33-34 (citing *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937)).

81. 29 U.S.C. § 157 (2005).

82. *Id.*

83. *See generally* 29 U.S.C. § 158(a)(1)-(5).

84. 29 U.S.C. § 158(a)(1).

85. *Id.*

86. *Id.* at § 158(a)(2)-(5).

prohibition of domination or interference with the formation or administration of any labor organization, including a prohibition against providing one with financial support; 2) a prohibition of discrimination in hiring or firing or in terms or conditions of employment which may serve to encourage or discourage membership in any labor organization (however, a labor organization and an employer MAY reach an agreement that organization membership be a requisite for employment); 3) a prohibition on termination or other discrimination of an employee in retaliation for such employee's filing of charges or giving testimony under the Act; and 4) a prohibition on the refusal to bargain collectively with the employee's representatives.⁸⁷ The statute provides employees with some very important rights, but the most important of all is the right to bargain collectively, coupled with the obligation of the employer to negotiate in good faith with the union representative.⁸⁸ The Act defines what it means to bargain collectively:

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative . . . to meet . . . and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, *but such obligation does not compel either party to agree to a proposal or require the making of a concession: . . .*⁸⁹

This last caveat is important; there is no requirement for labor organization and employers to come to an agreement.⁹⁰ They need only negotiate in good faith.⁹¹ This raises the question of whether there *should* be an obligation for an employer to actually reach an agreement with a collective bargaining unit. It also raises a question of the role that the NLRB, the administrative unit that oversees all labor disputes, should have in this negotiation process. This comment will discuss one proposed amendment to the Act which attempts to address this question.

87. *Id.*

88. 29 U.S.C. § 158(d).

89. *Id.* (emphasis added).

90. *Id.*

91. *See id.*

VI. THE CORRELATION BETWEEN UNIONS AND HEALTH BENEFITS

A look at the disparity between the benefits “union” workers receive, as opposed to non-union workers, strongly suggests a direct and substantial correlation between union membership and better benefits. This correlation applies to both the public and the private sectors. An EBRI study found that in the public sector, where union workers account for thirty-six percent of all workers (the largest percentage for any sector), eighty-six percent of union workers received health benefits from their employer compared with sixty-eight percent of nonunion workers.⁹² These figures are even more pronounced in the private sector. In the service sector (which includes retail), eighty-seven percent of union workers have health benefits through their employer while only forty-five percent of non-unionized workers utilize such coverage.⁹³ Finally, in part-time jobs (one-third of Wal-Mart employees), union workers are *three times* more likely to receive health benefits through their employer than non-union employees (fifty-nine percent to twenty-two percent).⁹⁴ These figures show, unequivocally, that an employee who is part of a labor organization has a much better chance of acquiring health benefits through his employer than an employee who is not part of a labor organization.

These statistics might be encouraging if union organization were a simple process that could be quickly implemented on a grand scale. However, other statistics suggest this is far from true. Union rates have been declining at a rapid rate in the past few years, along with the rate of wage growth at large firms.⁹⁵

Part of the reason for these declines could very well be the loss of manufacturing jobs. Between 1987 and 2001, the proportion of workers in manufacturing jobs declined by two percentage points in small firms, eight points in mid-sized firms, and eleven points in large firms.⁹⁶ In fact, according to a study by the Commonwealth Fund, “[a]bout 60 percent of

92. Paul Fronstin & John MacDonald, *Union Status and Employment-Based Health Benefits*, 26 EBRI NOTES NO. 5 (Employee Benefits Research Institute, Washington, D.C.), May 2005, at 3, available at http://www.ebri.com/publications/notes/index.cfm?fa=notesDisp&content_id=3327 (last visited Mar. 28, 2006).

93. *Id.* at 5 (see Figure 4).

94. *Id.* at 4.

95. See SHERRY GLIED, ET AL., *Introduction to THE GROWING SHARE OF UNINSURED WORKERS EMPLOYED BY LARGE FIRMS*, at x (The Commonwealth Fund 2003), available at http://www.cmwf.org/publications/publications_show.htm?doc_id=221335 (last visited Mar. 28, 2006).

96. *Id.*

the rise in both the proportion and rate of uninsured workers nationally who are employed by large firms can be attributed to the decline in manufacturing jobs and unionization rates."⁹⁷

The uninsured rates among large firms, like Wal-Mart, are troubling. In 2001, twenty-six percent of the nation's uninsured (9.6 million) worked in or had a family member working for a large employer, including 2.7 million who were children.⁹⁸ The total increase in uninsured workers associated with large firms (five hundred or more employees) was seven percent between 1987 and 2001 (from twenty-five to thirty-two percent).⁹⁹ Similarly, the rates of workers insured through their own jobs in private large firms (as opposed to the public sector) fell from seventy-one percent in 1987 to sixty-six percent in 2001.¹⁰⁰

The main reason for the decline in insured workers in large firms, along with an increase in the number of low-wage workers, is the decline in *unionization rates*.¹⁰¹ In 1987, twenty percent of workers in large firms reported they were a member of a labor union; in 2001, the figure had fallen to seven percent, a decline of *one-third*.¹⁰² In fact, The Commonwealth Fund study attributed *thirty-eight percent* of the rise in the uninsured between 1987 and 2001 to the decline in unionization rates (as opposed to eighteen percent which was attributed to the loss of manufacturing jobs).¹⁰³ The study also noted that changing employment practices, such as the increased use of contingent workers (such as independent contractors), and policies which restrict health benefits for part-time workers (such as increased waiting periods), make the problem worse.¹⁰⁴ The study proposed some possible solutions, such as adopting a policy to eliminate waiting periods for employees or requiring employees to offer coverage.¹⁰⁵ However, both of these solutions would have a negligible effect if health coverage that is offered by an employer is not affordable to its employees.¹⁰⁶

97. *Id.*

98. *Id.* at 2.

99. *Id.*

100. *Id.* at 6 (see Figure 4).

101. *Id.* at 10.

102. *Id.*

103. *Id.* at 13.

104. *Id.* at 14.

105. *Id.* at 15. The latter view (laws requiring employers to offer health coverage) has been considered in California and several other states. However, there is a big question as to whether such laws would be effective without provisions to make offerings of coverage affordable to low-wage employees. *Id.* at 16.

106. *Id.* at 16.

These recommendations present a dilemma. While legislators, in good faith, may try to impose laws on employers which require them to offer health coverage, such efforts will be for naught if many employees will opt out of such coverage because it is prohibitively expensive. Other types of legislation, given the legal expertise large employers are able to obtain, may prove to be similarly ineffective if companies are able to find legal loopholes to shirk their obligations. The only true solution will require raising the standard of living for lower-level employees nationally; this means that both wages and health benefits must be considered together as part of larger agreements. What mechanism can hope to achieve such lofty goals? The answer, in some form or another, is one that has existed since the late 1800's – the now underutilized tool of collective bargaining. The workers who have been exploited and used as pawns in a larger economic game are the ones who have the most at stake; they must somehow take control of their destiny.

Quite simply, more collective bargaining units must be organized among employees, more bargaining agreements must be negotiated with employers and effectively enforced in courts for lower-wage employees to gain access to health benefits and a better chance of financial stability. The alternative is to wait for lawmakers to come up with solutions that may or may not be effective to addressing workers' needs, and may be somehow shirked or avoided by employers who have the benefit of expert legal advice (a luxury the average lower-level worker does NOT have). However, while it is attractive to think that lower-level employees everywhere will read this comment and start a grass-roots labor movement in their place of employment, the fact of the matter is that union membership rates have declined, at least to some degree, because of the attitude that certain employers have taken toward them.¹⁰⁷ It is unreasonable to assume that because workers have the right to organize, they will, especially in the face of management practices that discourage unions and continually fight efforts at organization. These workers need help to face the anti-union efforts of their employers. Wal-Mart's conduct in this regard, and its continuing fights against recognition of labor laws, points to a pressing need to "beef up" existing labor legislation and give its workers (and those of other firms) a fighting chance to bargain collectively with management.

107. See *Union Membership a Key to Health Care Coverage*, *supra* note 63.

VII. "WAL-MART IS OPPOSED TO UNIONIZATION OF ITS ASSOCIATES."¹⁰⁸ AGAINST THE RETAIL BEHEMOTH, DO "ASSOCIATES" HAVE A CHANCE?

Aside from the sheer number of labor-related lawsuits that have been filed against Wal-Mart in recent years, the most egregious and disturbing evidence of Wal-Mart's anti-union stance can be found in two management directives (one is dated 1991, the other is undated) aimed at curbing union activity.¹⁰⁹ These guides attempt to give Wal-Mart managers an understanding of labor relations and, above all, to emphasize to managers that, as Wal-Mart's corporate watchdogs, they must make all efforts to oppose unionization within the confines of the law.¹¹⁰ One report emphasizes that "staying union free is a full-time commitment" and tells managers, "you should be proud of remaining union-free."¹¹¹ It further "identifies" and characterizes employees who "'fit' that mold" as "susceptible" to unions in a manifestly derogatory manner, labeling and describing personality types, such as "the inefficient, low productive associate" and "the rebellious, anti-establishment associate."¹¹² One choice description, of "the overly-qualified associate" reads like the sarcastic diagnosis of an amateur psychologist:

This type of associate is out of his element. He will attempt to exert influence over his fellow associates in an effort to bolster his-deflated [sic] ego. . . . He might well be a Ph. D. operating a grinding machine or a former accountant sweeping the floor, but his station in life has deteriorated to the point that his vanity appreciable [sic] suffers.¹¹³

The author of the guide goes on to explain to managers the disadvantages of unionization to associates, listing all of the potentially negative consequences that a selfish, ineffective union may have and attributing negative characteristics to all unions.¹¹⁴ Despite the rough, slanted view the guides take towards those employees who may be

108. ORSON MASON, WAL-MART, LABOR RELATIONS AND YOU AT THE WAL-MART DISTRIBUTION CENTER #6022 at 2 (1991), *available at* http://www.ufcw.org/issues_and_actions/walmart_workers_campaign_info/relevant_links (Click on "anti union manuals" to download PDF file) (last visited Nov. 15, 2005) [hereinafter LABOR RELATIONS AND YOU].

109. *Id.*; WAL-MART, A MANAGER'S TOOLBOX TO REMAINING UNION FREE, *available at* http://www.ufcw.org/issues_and_actions/walmart_workers_campaign_info/relevant_links (Click on "anti union manuals" to download PDF file) (last visited Nov. 15, 2005) [hereinafter MANAGER'S TOOLBOX].

110. LABOR RELATIONS AND YOU, *supra* note 108, at 2.

111. *Id.* at 7.

112. *Id.* at 9.

113. *Id.* at 10.

114. *Id.* at 15-18.

“victimized” by unions, on the whole, the directives reflect an in-depth understanding of labor relations law and a sophisticated method of dealing with labor issues with the overriding goal of dissuading union activity.¹¹⁵ Part of this effort includes the designation of a Labor Relations Team, a group of upper-management experts for managers to call in the event of union activity.¹¹⁶ Considering some of the policies, it is not surprising Wal-Mart has been the respondent in so many actions brought by the NLRB. For example, managers are told that “Wal-Mart must respond to this type [employee signing of union authorization cards] of union activity immediately in an effort to stop card signing before the required 30% [the percentage required to petition the NLRB for an election] have been obtained.”¹¹⁷

Several claims brought under the NLRA demonstrate that Wal-Mart has utilized the foregoing policy to disrupt union activity in an illegal and intimidating manner. Wal-Mart has been held in violation of the NLRA for refusing to recognize and bargain with a certified union in Jacksonville, Texas.¹¹⁸ It has violated the Act by creating the impression that its employees were under surveillance because of their organizing activities and for harassing a union-supporting employee as he was shopping while off-duty in Denver, Colorado.¹¹⁹ In that case, the store manager was awoken by a midnight phone call from the overnight manager, who informed him that an employee had received a business card from a union organizer that night.¹²⁰ Later, at periodic shift meetings throughout a workday, the store manager, district manager, and a member of Wal-Mart’s labor relations staff met with workers to read a *prepared statement from Wal-Mart’s headquarters* indicating that management had knowledge of the worker’s organization efforts, which included a breakfast meeting with a union organizer, and reiterated (emphatically) Wal-Mart’s position of being “strongly opposed to a third party representing and speaking for any of our associates.”¹²¹ Other violations of the Act have included unlawful termination of an employee in an effort to curb union activity in a store in

115. *Id.* at 21-34.

116. MANAGER’S TOOLBOX, *supra* note 109.

117. *Id.*

118. Wal-Mart Stores, Inc. v. United Food & Commercial Workers Union, Local No. 455, No. 16-CA-20391-001-0, 2003 WL 21369270, at *1 (N.L.R.B. Div. of Judges).

119. Wal-Mart Stores, Inc. v. United Food & Commercial Workers Union Local No. 7, No. 27-CA-18206-2, 2003 WL 21779047, at *1 (N.L.R.B. Div. of Judges).

120. *Id.* at *3.

121. *Id.* at *4.

Port Orange, Florida.¹²² In a case where Wal-Mart was found to have violated the Act for impliedly telling employees to disregard union literature, and for taking union literature away from employees, the record included Wal-Mart's "no solicitation" policy.¹²³ A reading of the policy (from Wal-Mart's employee handbook, which Wal-Mart followed to the letter in that case) demonstrates the logistical difficulties facing any employee who aims to exert his legal right to organize.¹²⁴ It states:

[E]ngaging in non-work related activities during work time is not permitted. Associates may not engage in solicitation or distribution of literature during work time. In addition, solicitation or distribution of literature is not permitted at any time in selling areas during the hours the store is open to the public. Distribution of literature is not permitted at any time in any work area. Non-Associates are prohibited from soliciting or distributing literature in any Company facility at any time.¹²⁵

In the Nevada case, the store manager adhered strictly to the policy, showing a group of employees examples of union literature found on the sales floor and encouraging them to report any distribution of such literature (on the sales floor) to management.¹²⁶ Another store asked a union-organizer employee, in the store while off duty, to leave because he wore a t-shirt reading "Union Teamsters [front] Sign a [union] card Ask me how! [on back]."¹²⁷ After calling Wal-Mart's "union hotline" and being told that the shirt constituted solicitation, in violation of company policy, the employee was directed to leave the store immediately.¹²⁸ The Eight Circuit found that substantial evidence supported the NLRB's finding that Wal-Mart had violated the Act by characterizing the t-shirt as solicitation and ordering the employee to leave the store.¹²⁹ As for union (third-party) organizers, company policy forbids them from setting foot on Wal-Mart store premises, and management has, at least in one case, gone so far as to prohibit them from distributing union literature *outside* the store, even when they were over fifteen feet from the entrances (in conformance with company policy).¹³⁰ In that case, the two union

122. Wal-Mart Stores, Inc. v. United Food & Commercial Workers Int'l Union, No. 12-CA-20882, 2003 WL 22532371, at *1 (N.L.R.B. Div. of Judges).

123. Wal-Mart Stores, Inc. v. United Food & Commercial Workers Int'l Union, No. 28-CA-18255, 2004 WL 1047398, at *1 (N.L.R.B. Div. of Judges).

124. *Id.*

125. *Wal-Mart Stores, Inc.*, 2004 WL 1047398, at *2 (internal citations omitted).

126. *Id.* at *4.

127. *Wal-Mart Stores, Inc. v. NLRB.*, 400 F.3d 1093, 1095 (8th Cir. 2005).

128. *Id.*

129. *Id.* at 1098-99.

130. *Wal-Mart Stores, Inc. v. NLRB.*, 136 Fed. Appx. 752, 753-54 (6th Cir. 2005).

organizers were told to leave the premises; when they did not, an assistant manager called the police, who, when asked to do so by the same manager, gave the organizers a warning for trespassing.¹³¹ No Wal-Mart employee (manager or otherwise) informed the organizers that Wal-Mart's policy would allow the organizers to distribute literature as long as they remained fifteen feet from the entrances.¹³² This conduct was found to be in violation of the Act.¹³³

VIII. WHAT INFERENCES CAN WE, THE JURY, DRAW FROM THIS EVIDENCE?

The evidence here is a corporate policy that actively discourages unions along with several NLRB decisions which found that Wal-Mart has violated the Act on more than one occasion. What inferences can we draw from this evidence? First, it tells us that Wal-Mart understands that unions are important, and that they threaten its ability to pay employees what it wants and to offer (often meager) benefits on the terms that it wants. Allowing employees to gain bargaining leverage would be a disaster in Wal-Mart's war against overhead. Second, it tells us that Wal-Mart is so committed to dissuading union participation that it has invested considerable time and energy, including the creation of an entire work unit (the Labor Relation Team) to achieve its goal. Wal-Mart's conduct tells us much more than any statistics that correlate union activity with better working conditions, pay, and benefits possibly could. Wal-Mart is betting that with all its resources, its commitment to efficiency (the anti-"Time Theft" idea), and its control of the work environment, it can intimidate its employees so that they do not organize.

To understand the effect of Wal-Mart's policy, try to imagine yourself in a Wal-Mart employee's shoes. You are a part-timer making \$8.23 an hour. You have taken the job to get through school and to support a child. You would like to be eligible for health benefits, but company policy indicates that, as a part-timer, you will have to wait two years in order to be eligible. You would like to learn about what a union could do for you and the other workers, but you do not have time to meet with employees during off-hours, and you are well aware of the company policy against "time theft." You are also aware of the company policy against unions. What do you do? Quite probably, you would do nothing, because from your point of view, it's not worth the trouble. This is exactly the kind of reaction that

131. *Id.* at 753-54.

132. *Id.* at 752.

133. *Id.*

Wal-Mart hopes for and expects. The message is clear: listen to management, do what you are told, "go with the flow," or there will be problems.

IX. FORCING CORPORATE EFFICIENCY TO BOW DOWN TO AMERICAN JUSTICE: RECOMMENDATIONS AND EXHORTATIONS

Given that an entire set of laws, the NLRA, has been enacted to recognize employees' rights to organize and bargain collectively,¹³⁴ Wal-Mart's anti-union stance flies in the face of American justice. There is no question that for justice to be done, these employees must stand up and assert the rights that have been conferred to them. However, they will need help.

The recommendations to follow rest on the following findings, which this comment has identified: Wal-Mart's health care plan covers a much lower percentage of its workers than those at other large firms, which either ends up costing U.S. taxpayers (when Wal-Mart's workers claim benefits under state and federal medical and other types of welfare programs) or leaves workers uninsured;¹³⁵ Wal-Mart workers are intimidated into not forming or joining unions through an anti-union stance that gives employees the impression that unions are "not allowed;"¹³⁶ there is a direct correlation between the unionization of workers and higher wages and better health benefits, and in the service sector (including retail), unionized workers are almost *twice as likely* (eighty-seven percent against forty-five percent) as non-unionized workers to be covered.¹³⁷ These findings indicate that unionization of workers is not only in the interest of retail workers themselves, but in the interest of the American public, which, absent some radical voluntary changes (an unlikely occurrence) of employment practices in large firms like Wal-Mart, will be forced to support the employees of such firms through the utilization of their tax dollars to support public welfare health programs.¹³⁸

134. 29 U.S.C. §§ 151–187 (2005).

135. See MILLER, *supra* note 3 and accompanying text.

136. See Glied, *supra* note 95 and accompanying text.

137. See *The "Business Case" for Investing in Employee Health*, *supra* note 49 and accompanying text.

138. See MILLER, *supra* note 3 and accompanying text.

X. "THE EMPLOYEE FREE CHOICE ACT"¹³⁹

One possible response has been set out in proposed legislation introduced by Representative George Miller (CA) and Senator Ted Kennedy (MA) along with over thirty co-sponsors; it is titled "The Employee Free Choice Act."¹⁴⁰ The bill proposes several amendments to the N.L.R.A. The proposal would facilitate certification of a labor organization, without a secret election, if the NLRB, upon investigation, determines that a majority of employees have authorized an individual or labor organization to bargain on their behalf.¹⁴¹ It would also facilitate the rapid commencement of collective bargaining agreements by directing employers to start negotiations with representatives within ten days after certification. Under the proposal, if an agreement is not reached within ninety days of commencement, either party may request mediation from the Federal Mediation and Conciliation Service (the Service), which shall use its best efforts to bring them to agreement. If this effort has not produced an agreement after thirty days, the Service must refer the dispute to an arbitration board to be determined by the Service, which will render a decision that is *binding* on the parties.¹⁴² Finally, the proposal calls for increased penalties for violations of the Act. These proposals include treble damages (based on back-pay that is owed the employee), when an employer is found to have discriminated against an employee for asserting his right to organize under Section 8(a)(3) of the Act¹⁴³ and civil penalties (of up to \$20,000 for each violation) against employers, to be meted out by the Board when the employer willfully or repeatedly commits any unfair labor practice under Section 8(a)(1) (the blanket provision of the Act) while the employees are in the process of seeking representation by a labor organization or which occurs after organization but before a collective bargaining agreement has been reached.¹⁴⁴

To date, the bill has not been voted on; it has been read twice and referred to the Committee on Education and the Workforce and, more recently (on January 30th, 2004) to the Subcommittee on Employer-Employee Relations.¹⁴⁵ In any case, the bill, if it is ever passed, would be a

139. H.R. 3619 §§ 1-4, 108th Cong. (2003).

140. H.R. 3619 § 1; MILLER, *supra* note 3, at 19.

141. H.R. 3619 § 2.

142. H.R. 3619 § 3 (emphasis added).

143. H.R. 3619 § 4(b)(1).

144. H.R. 3619 § 4(b)(2)(B).

145. Thomas: Legislative Information on the Internet, *Bill Summary & Status*: H.R. 3619; S.1925, Nov. 5, 2005, <http://thomas.loc.gov/cgi-bin/bdquery/z?d108:HR03619> (follow links to Senate version, which is identical, to see legislative history of bill) (last visited Nov. 15, 2005).

welcome revision to the Act, and would address some of the problems presented here. The civil penalties provision, if enforced, would give employers like Wal-Mart, who seem to be taking calculated risks in disregarding the Act (or at least walking a very thin line between compliance and non-compliance), a reason to think twice before refusing to bargain with a duly formed collective bargaining unit.¹⁴⁶ Similarly, the provision calling for the award of *treble damages* to an employee who is discriminated against for asserting his labor rights would be a much more effective deterrent against such behavior.¹⁴⁷ The provisions calling for the assistance of the Service and, more importantly, the requirement of *binding arbitration* when negotiations between parties become deadlocked are much needed reforms which will enable employees a better chance to negotiate better labor conditions against employers with vastly superior legal and financial resources.¹⁴⁸ These provisions would bring a sense of urgency to the labor-management negotiation process that is currently lacking.

XI. THE NEED FOR EDUCATION, AWARENESS, AND ACTION TO INDUCE CHANGE

In the meantime, while we wait for the republican process to take its course (a House vote on the bill), what can be done? We must continue to expose the wrongs of unconscionable labor practices that persist, including the consequences these practices hold for the American people, and we must exhort those who are in positions of power to take effective measures to stop them. We must also educate those who may be subject to employer exploitation by informing them of their rights to organize and bargain collectively under the laws of the United States of America, and to encourage them to do so in a manner that fits within the confines of existing law.

Perhaps the greatest obstacle to change lies in the general apathy of the American people with respect to any efforts toward social justice. The only possible solution is to increase awareness of the current environment in a manner that will make the desire for change a pressing concern among Americans.

To a large degree, awareness *has* increased in the past few years, as Wal-Mart's questionable labor and employment practices have been

146. H.R. 3619 § 4(b)(2)(B).

147. H.R. 3619 § 4(b)(1).

148. H.R. 3619 § 3.

brought to light in the media.¹⁴⁹ However, in large part the focus has been on Wal-Mart's employment practices rather than on any adverse impact the company's practices have on the general public.¹⁵⁰ In order to increase public awareness of the company's *direct negative influence* on all Americans, the media must continue to report on the broader economic effects that Wal-Mart has on local communities and on taxpayers in general; these effects include the loss of local businesses due to Wal-Mart store openings, high costs to taxpayers through Wal-Mart's utilization of government construction subsidies, and finally, the high enrollment of its employees (and family members) in state medical welfare programs.¹⁵¹ While negative exposure of unfair employment practices is effective in increasing awareness, there is a strong argument that the best means to move the American public to action would be by pointing out that they are helping to finance the growth of this gigantic company through their tax dollars.

XII. ASSOCIATES UNITE!

On the other hand, change will not be possible unless those who are directly affected by Wal-Mart's labor practices, the "associates" of Wal-Mart, try to do something to change the conditions of their employment. Given Wal-Mart's strong anti-union stance and its adept deployment of skills and resources to avoid labor organization in its stores, as evidenced by the management manuals and the sampling of labor actions described in this comment, one immediately understands the monumental task facing any associate with hopes of achieving a collective bargaining position with Wal-Mart management.¹⁵² However, wide-scale organization is needed for employees to attain the bargaining position they need to gain better benefits and pay. Furthermore, wide-scale organization is also needed to expose Wal-Mart's illegal anti-union policies. The first goal should be to organize one store, and to negotiate an agreement with Wal-Mart management there. The end goal should be to organize all Wal-Mart workers and to negotiate a company-wide bargaining agreement with associates so that Wal-Mart begins to share some of its profits with its employees. The first step in any

149. See Head, *supra* note 1; Greenhouse, *supra* note 23; Abelson, *supra* note 50; Miller, *supra* note 3; and Freedberg & Humberg, *supra* note 54. This is only a sampling of the exposure Wal-Mart's employment practices have received in the media.

150. See generally Institute for Local Self-Reliance, *Big Box Economic Impact Studies*, Nov. 5, 2005, available at <http://www.newrules.org/retail/econimpact.html> (last visited Mar. 30, 2006). The article summarizes and references several such studies.

151. *Id.*

152. See LABOR RELATIONS AND YOU, *supra* notes 108, 111-116 and accompanying text.

wide-scale movement is education. To combat the policy of Wal-Mart management, which discourages unions, workers need to know that they have a right to organize for collective bargaining purposes¹⁵³ and that it is illegal for Wal-Mart to impede their organization in any way, as long as such activity is done during non-work time.¹⁵⁴ Workers must be informed of the DIRECT and SUBSTANTIAL correlation that exists between union membership and increased wages and benefits across the country,¹⁵⁵ and that Wal-Mart must bargain with union leaders, once such union leaders have been elected.¹⁵⁶ Finally, they should know that any attempts to thwart union organization, discriminate against an employee (in hiring or firing) for organizing efforts or involvement in a union, or refusal to bargain with any duly elected representative of a certified union are illegal and enforceable against Wal-Mart by the NLRB.¹⁵⁷

There are several ways that these basic points can be communicated to Wal-Mart workers (as well as those of many retailers who may engage in similar practices). One means of doing so is simple: anyone may stand outside the employee entrance of any such store and hand out flyers which include the talking points above. However, the assistance of established national unions is necessary and desirable because of their experience and expertise in organizing workers as well as their knowledge of labor laws. One such union that has directed its attention to Wal-Mart's labor practices is the United Food and Commercial Workers, or UFCW.¹⁵⁸ This labor organization has dedicated a website which explains the need to reform Wal-Mart's employment practices and provides support for workers who may want to organize.¹⁵⁹ Other organizations have been formed in response to Wal-Mart's labor practices, including, most recently, Wal-Mart Workers of America, launched by the website WakeUpWalMart.com.¹⁶⁰ This organization is trying to reach out to Wal-Mart workers through a radio and print advertising campaign in order to empower them to effectuate change.¹⁶¹ Membership is free for all former and current Wal-

153. 29 U.S.C. § 157 (2005).

154. *Id.*

155. See Fronstin & Wernitz, *supra* note 49 and accompanying text.

156. 29 U.S.C. § 157.

157. See generally *supra* notes 117-122 and accompanying text.

158. UFCW, *UFCW: A Voice for Working America*, Nov. 4, 2005, http://www.ufcw.org/issues_and_actions/walmart_workers_campaign_info/index.cfm (last visited Nov. 13, 2005).

159. *Id.*

160. WakeUpWalMartBlog, *WakeUpWalMart.com Launches Wal-Mart Workers of America (WWOA), the First National Association for Wal-Mart Workers*, Nov. 5, 2005, http://blog.wakeupwalmart.com/ufcw/2005/11/walmart_workers_3.html (last visited Mar. 30, 2006).

161. *Id.*

Mart workers; it is not a labor organization per se but more of a means for Wal-Mart employees to obtain information on the company's labor practices and their rights under federal labor laws.¹⁶² These kinds of organizations inform workers of their rights and provide them with a framework to assert those rights through collectively bargaining.

XIII. WILL WAL-MART CHANGE ON ITS OWN VOLITION?

Public pressure from legislators, the media, and other organizations may or may not cause Wal-Mart to change its employment practices for the better. An examination of the most recent public controversy surrounding Wal-Mart, based on the contents of a recent memo which proposed various measures to cut the costs of employee benefits, provides some clues which suggest that the company pays some heed to negative publicity.¹⁶³ On the one hand, the author of the memo, M. Susan Chambers, Wal-Mart's executive vice president of benefits, acknowledged that the company had to be careful in cutting its benefit costs because of the public perception that it had been stingy on wages and health coverage.¹⁶⁴ She also admitted that coverage was expensive for low income families, and that Wal-Mart has a high percentage of associates and their children on public assistance.¹⁶⁵ Chambers also noted, with some concern, that thirty-eight percent of Wal-Mart workers spent more than one sixth of their earning out of pocket for health care.¹⁶⁶ However, the primary objective of the memo's plan was to find a way to actively discourage unhealthy people from working at Wal-Mart in order to cut health benefit costs, an objective that, on its own, is a form of discrimination (one of Chamber's suggestions toward this end recommended requiring that all "associates" engage in some form of physical activity like "cart-gathering").¹⁶⁷ The goal behind the letter's recommendations was a familiar one: cut overhead costs to increase profits.¹⁶⁸ Chambers expressed concern that long-term (seven-year) associates earned much more than new (one year) associates and were not any more productive. The implication of her statement was clear: the company must find a way to push such long-term associates out the door. She concluded that "[t]he least healthy, least productive associates are more

162. WakeUpWalMartBlog, *supra* note 160.

163. Steven Greenhouse & Michael Barbaro, *Wal-Mart Memo Suggests Ways to Cut Employee Benefit Costs*, N. Y. TIMES, Oct. 26, 2005, at C1.

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *See generally id.*

satisfied with their benefits than other segments and are interested in longer careers with Wal-Mart" and that "[t]hese [proposed] moves would . . . dissuade unhealthy people from coming to work at Wal-Mart."¹⁶⁹

This memo confirms what we already know – Wal-Mart seeks to be profitable at all costs. It also shows that the company seeks to improve its public image with respect to labor practices. There may be some way to convince Wal-Mart, or at least sway the company, given its interest in protecting its image, that offering better benefits may protect its profits and stability in the long run. For example, a March 2004 EBRI report highlighted six major corporations that have taken a pro-active approach to providing on-the-job health care as well as employee health benefits in order to control costs by focusing on prevention and intervention of illness.¹⁷⁰ These are the kinds of examples that workers, legislators, and union organizers can mention in future interactions with Wal-Mart; perhaps, through pressure from outside the company's corporate board room (for which the last controversial Wal-Mart memo on employee benefits was produced), a compromise could be reached that would benefit all parties. While this goal is an ambitious one, it is definitely worth considering. Using Wal-Mart's interest in protecting its self-image may be the only means of achieving results at the bargaining table.

XIV. CONCLUSION

There is no question that the rising cost of health care in the past few years has presented a crisis for all employers, employees, and Americans in general (Wal-Mart's benefit costs were \$4.2 billion last year, up from \$2.8 billion three years prior).¹⁷¹ That overwhelming crisis has not been addressed here; this comment assumes that the problem will persist for some time into the future. In any case, the question is, "who should pay for health care?" Should it be a worker making less than \$20,000 a year, an employer who nets over \$6 billion in profits, or should it be the American people by way of their tax dollars? The answer is clear. Wal-Mart must be brought to the bargaining table. It is payback time.

The only way to hold Wal-Mart accountable is through pressure – we have seen that Wal-Mart will not take any positive steps on its own. Wal-Mart must be pressured by its employees into obeying our federal labor laws. Wal-Mart workers must be taught by volunteers and other organizations, such as the UFCW, to organize collectively and to assert

169. *Id.*

170. Fronstin & Werntz, *supra* note 49, at 3.

171. Greenhouse & Barbaro, *supra* note 163, at C1.

their bargaining rights. Some workers must emerge as strong leaders who actively assert their legal rights and are not intimidated by management practices that give them the impression that they are troublemakers.

However, its long list of labor violations indicates that the present laws may not serve to deter Wal-Mart in any meaningful way. Legislators in Congress must move to pass bills, such as the one proposed by Representative Miller from California, to increase penalties for infractions of labor laws as well as to enforce binding arbitration on employers and bargaining representatives who fail to agree once negotiations are initiated, thereby preventing further vacillation by employers who are hesitant to recognize duly elected union representatives.

To increase awareness in the consumer public, the media and the academic community must continue to expose Wal-Mart's questionable labor and employment practices and the effect of its expansion on the country, including the use of American tax dollars to subsidize Wal-Mart's growth and pay the expenses of state-run health care for many of its workers. Americans must know that they are helping to finance Wal-Mart's growth through their tax dollars. More academic and media investigations into Wal-Mart's economic effects on the American landscape are needed.

Finally, the American people, whether collectively or individually, must pressure Wal-Mart to improve the treatment of its workers by writing to their representatives in Congress and, perhaps, even to the leadership of Wal-Mart itself. Whatever other actions the American public chooses to take to force Wal-Mart, a company that holds profit as its supreme objective in its war against overhead, to respect and care for the employees that help make it so successful, is up to them. As for this American, I refuse to "pay less" for any product sold by a company that costs America so much, in so many ways.