

# **United States of America**

## **Submission to the United Nations Universal Periodic Review**

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### **Labor Rights**

This joint submission provides information under Sections B, C, and D as stipulated in the General Guidelines for the Preparation of Information under the Universal Periodic Review regarding failures of domestic legislation, policy, and practice, to adequately protect labor rights, and specifically the rights to freedom of association, collective bargaining and the right to strike. The report submitters are dedicated to advancing freedom of association and compliance with fundamental labor rights.

#### **Submitted by:**

AFL-CIO

Cornell Law School Labor Law Clinic

International Brotherhood of Teamsters

International Commission for Labor Rights

International Labor Rights Fund

Labor and Employment Committee, National Lawyers Guild

Service Employees International Union (SEIU)

The Transport Workers of America, AFL-CIO

United Electrical, Radio and Machine Workers of America (UE)

The United Steelworkers (USW)

**Endorsed by the following 17 Organizations and 6 Individuals:**

## **Endorsements:**

**Organizational Endorsements:** The Advocates for Human Rights; Human Rights Advocates; Human Rights Litigation and International Advocacy Clinic, University of Minnesota Law School; Human Rights Project, Urban Justice Center; International Worker Justice Campaign from North Carolina; La Raza Centro Legal, Inc; Leonard Peltier Defense Offense Committee; Malcolm X Center for Self-Determination; Meiklejohn Civil Liberties Institute; Metro Atlanta Task Force for the Homeless; National Employment Law Project; National Lawyers Guild; National Whistleblowers Center; Paso del Norte Civil Rights Project, El Paso, Texas; Public Interest Projects; Three Treaties Task Force of the Social Justice Center of Marin; Tompkins County Immigrant Rights Coalition.

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## A. EXECUTIVE SUMMARY

It is appropriate for the Council to review labor rights in the United States as the UDHR, the ICCPR as well as the ICESCR define such rights as basic human rights. While this year marks the seventy-fifth anniversary of the National Labor Relations Act,<sup>i</sup> the American working class is experiencing the worst economic crisis in eighty years. Union density in the private sector stands below eight per cent, about five points lower than the level of unionization in 1935, when the NLRA was first enacted. The NLRA specifically excludes significant groups of employees, and recent court decisions have further limited coverage. There is overwhelming evidence that the rights of U.S. workers to freely associate, form unions, strike and collectively bargain remain in decline. Core internationally established labor rights are not adequately protected by state and federal laws that govern the American workplace.<sup>ii</sup> Workers have resorted to international fora to seek redress. Many positive decisions from international agencies have not been followed.

In order to comply with obligations under pertinent international instruments it is necessary for the United States to:

- (1) Take action to and promote legislation to ensure all workers are deemed employees under federal and state labor laws, and have equal access to all available remedies, regardless of migration status:
- (2) Seek passage of legislation which provides effective remedies against employer coercion and interference with freedom of association and collective bargaining as included in the pending Employee Free Choice Act
- (3) Initiate consultation and enforcement of labor violations with its trading partners pursuant to the provisions of the free trade agreements.
- (4) Take action to ratify ILO conventions 87 and 98 and to guarantee recognition and enforcement of the rights and guarantees set forth in the ILO's 1998 Declaration of the Fundamental Principles and Rights At Work, and ILO convention 151 governing freedom of association and collective bargaining for public sector workers.

## **B. BACKGROUND AND FRAMEWORK**

### **a. International Obligations**

1. The international obligations which form the backdrop of this report are the Universal Declaration of Human Rights (Articles 2, 4, 7, 8, 20, 23 & 24); the International Covenant on Civil and Political Rights (Articles 2, 8 & 22); the International Covenant on Economic Social and Cultural Rights, (Articles 7 and 8). Also implicated are the Convention on the Elimination of Racial Discrimination (Article 5) and International Labor Organization Conventions referred to as core labor standards as stated in the Declaration of Fundamental Principles and Rights at Work.

### **b. Legislative and Policy Framework**

2. In the United States, the National Labor Relations Act (NLRA) protects an employee's 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 purposes of collective bargaining or other mutual aid or protection..."<sup>iii</sup>

## **C. U.S. WORKERS ARE DENIED PROTECTIONS UNDER INTERNATIONAL AND DOMESTIC LAW**

### **a. The Workers Movement Has Been Under Sustained Attack**

3. Union representation and the labor movement have always played a major role in achieving workplace justice, raising living standards, and ushering many groups of workers into the American middle class. U.S. employers have, however, waged what Business Week [in a 1994 article] called "one of the most successful anti-union wars ever" with spectacular results. Union membership is now at its lowest level since the 1920s. The union membership rate in 2009 declined to 12.3%, comprising 15.3 million workers.<sup>iv</sup> In 1983 there were 17.7 million union members, 20.1% of the workforce. In the public sector, where employer hostility to union organizing campaigns is greatly diminished, the union membership rate in 2009 was 37.4% compared to 7.2% in the private sector.<sup>v</sup>
4. This war has been facilitated in part because U.S. labor policies fall short of international standards. For example, the United States' failure to protect the freedom of association rights of striking workers, public sector employees, and its principles regarding so-called "employer free speech" have repeatedly come under criticism by the International Labor Organization.<sup>vi</sup> Workers' voices have continually been silenced by threats, harassment, required participation in anti-union meetings, discharges, and by the laborious, toothless process of the National Labor Relations Board itself.<sup>vii</sup>
5. All workers suffer from the denial of the right to join and form labor unions and to collectively bargain, but because women and people of color benefit disproportionately from union representation, they are also the most harmed by denial of this right. In 2006, median weekly earnings for African Americans were 36% greater for unionized than for non-union workers, 8% greater for Asian Americans, and 46% greater for Hispanic union members.<sup>viii</sup>

## **b. Excluded Workers Denied Full Protection of their Core Labor Rights**

6. Entire categories of workers are excluded from statutory protections to engage in freedom of association, and to form and join trade unions, resulting in unfavorable conditions of work, unequal pay, and reduced remuneration.

### **Exclusions Based on Industry**

7. Domestic workers and agricultural workers (historically jobs held by African-Americans and now largely held by persons of Latino ancestry and immigrants) are explicitly excluded from significant protections provided under federal law. Two recent New York City studies found that almost all domestic workers are women, 95% of them women of color, immigrants from Latin America and the Caribbean, Asia, and Africa.<sup>ix</sup> Seventy-eight percent of U.S. agricultural workers are from Mexico and Latin America.<sup>x</sup> They are excluded from the definition of “employee” under the NLRA
8. State and federal employees are also excluded from protection under the NLRA, and state employees often find their labor rights further limited by state legislation which fails to fill in the gaps left by the federal labor law protections. In North Carolina, for example, General Statute (NCGS) §95-98 explicitly prohibits collective bargaining in the public sector. The workers filed a complaint with the Committee on Freedom of Association of the ILO protesting this law, which declares any agreement or contract between the government of any city, town, county, other municipality or the state of North Carolina and any “labour union, trade union, or labour organization as bargaining agent for any public employees” to be illegal unlawful, void and of no effect.<sup>xi</sup> This legislation frustrates the ultimate purpose of the freedom to associate by prohibiting collective bargaining and functions as an obstacle to advancing racial equality.
9. The International Commission for Labor Rights (ICLR) conducted an independent study of North Carolina’s public worker employment in 2005. The ICLR found race and gender-based discrimination present in hiring, promotions, pay, the exercise of discipline and termination; all areas in which collective bargaining would normally play a prominent role and protect workers from the prejudices and preferences of individual supervisors.<sup>xii</sup> The Commission also reported, “from the perspective of experts, workers, North Carolina legislators, and state agencies, certainly the prevalence of race-based discrimination is the overarching barrier to workplace justice in public sector workplaces in North Carolina.”<sup>xiii</sup> Public hearings revealed that many workers are treated in ways that reflect anti-union and racist sentiments.<sup>xiv</sup> In one instance when workers tried to organize a union, they found a dummy hanging by its neck from a tree across the street from the parking lot where 90% of the black workers park; a white man stood next to the dummy saying, “you going to end up like this”.<sup>xv</sup>
10. The United Electrical, Radio and Machine Workers of America Union (UE) and UE Local 150 of North Carolina filed a complaint on December 7, 2005 with the International Labour Organization alleging a violation of the workers’ right to collective bargaining.<sup>xvi</sup> The ILO Committee, noting the central role the right to freedom of association and collective bargaining plays in improving the living and working conditions of union members,<sup>xvii</sup> recommended the establishment of a collective bargaining framework for the public sector in North Carolina, and the repeal of NCGS §95-98 in order to bring state legislation into conformity the rights of freedom of association and collective

bargaining.<sup>xviii</sup> To date, this has not happened, in violation not only of ILO principles but of Article 5(e)(ii) of CERD.

### **Exclusions based on Classification of Employee as Supervisor or Independent Contractor**

11. Expansive, pro-employer interpretations of the NLRA's statutory exclusion of supervisors and independent contractors from the coverage of labor law have recently been issued by federal courts and the NLRB, placing the right to unionize beyond the reach of tens of millions of workers.
12. In 2006, the NLRB ruled that twelve registered nurses who worked as charge nurses were supervisors excluding them from the right to organize. The Board held that any worker that nominally coordinates and guides the work of other nurses or health care workers are supervisory personnel who have no right to unionize.<sup>xix</sup> Based on two prior Supreme Court rulings<sup>xx</sup> that broadly defined what constituted supervisory conduct, the Board's latest ruling held that a worker becomes a supervisor if they "assign" another employee to work in a particular location or direct a coworker to perform "certain significant overall tasks." The Board indicated that a retail worker morphs into a supervisor when directing another worker to stock shelves or when a charge nurse designates a licensed practical nurse to administer medication. Under the *Oakwood Healthcare* ruling a worker can also be labeled as a supervisor if she "responsibly directs" another by giving ad hoc instructions to perform certain tasks. The Board used these standards to find that the nurses were supervisory even though they spent the vast majority of their time doing direct patient care and played no role in resolving workplaces grievances. The current chair of the NLRB, Wilma Liebman, one of two dissenters in *Oakwood Healthcare*, ominously noted that it creates a class of workers existing in a legal limbo "hav[ing] neither the genuine prerogatives of management, nor the statutory rights of ordinary employees."<sup>xxi</sup> Under this ruling, eight million professionals employees and skilled workers will join the thirty-two million members of the U.S. workforce – one out of four workers – who, according to the U.S. General Accounting Office, do not have the legal right to join unions.<sup>xxii</sup>
13. In April 2009, the D.C. Circuit of the U.S. Court of Appeals overturned the NLRB-sponsored election in which truck drivers in a Massachusetts facility who worked for Fedex Home Delivery – one of the nation's largest parcel delivery services – voted overwhelming to join the Teamsters Union.<sup>xxiii</sup> The appeals court held that the truck drivers were independent contractors because they own their own trucks and, therefore, have the potential to use them for other entrepreneurial 'business opportunities.' The court made no factual finding that the workers who unionized actually did use their trucks for other business purposes. The court rejected the NLRB regional director's ruling that these workers are employees because they perform a regular and essential part of FedEx's normal operation, must follow routes configured by the company, are trained by the company, must plaster the name of FedEx on their trucks doing business in the company's name and take considerable guidance from the FedEx management. Indeed, the truckers use a company vacation plan, group insurance and pensions and have a permanent working arrangement with FedEx.

### **Exclusions based on immigration status**

14. While deemed to be employees protected under the National Labor Relations Act (NLRA), in *Hoffman Plastics Compounds, Inc. v. National Labor Relations Board*,<sup>xxiv</sup> the United States Supreme Court constructively denied undocumented workers protection under the NLRA through the denial

of back pay.<sup>xxv</sup> The elimination of the only meaningful remedy to the worker has had the practical effect of eliminating the enforceability of this right and limiting undocumented workers' right to freedom of association,<sup>xxvi</sup> and leaving workers more vulnerable to exploitative working conditions because, without an effective remedy available, undocumented workers are less likely to risk job loss by attempting to form or join a union, or speak out about poor working conditions.

15. Despite the United States' repeated contention that undocumented workers receive the same protections as citizen workers in their rights under the National Labor Relations Act, the reality is very different. Employers have used the *Hoffman* decision to deter employees from pursuing their employment rights and from voting in union elections,<sup>xxvii</sup> and unauthorized workers and others working with them are now more vulnerable to intimidation from their employers.<sup>xxviii</sup> A recent report by Human Rights Watch focusing on the meatpacking industry, found that many employers threaten to call immigration authorities if workers seek to organize or make claims for labor law protection.<sup>xxix</sup> One study found that 52% of employers in workplaces that include undocumented immigrant workers threaten to call immigration authorities during organizing campaigns.<sup>xxx</sup> As evidenced in these studies and other experiences, the *Hoffman* decision has severely undermined labor protections, resulting in increased labor exploitation, and the creation of a racialized two tiered workforce in the United States.<sup>xxxi</sup>

**c. Interference With Freedom of Association:  
Right to Organize, Bargaining Collectively & Strike**

**The Failure to Sanction or Remedy Coercive Employer Behavior During Union Organizing Drives Excludes Workers from Union Protection**

16. The system of legal protections intended to protect workers who choose to join unions in the U.S. is widely recognized as badly broken and ineffective. An exhaustive 2009 study of employer responses to union organizing efforts concluded that it is standard practice during NLRB sponsored elections for corporations to subject workers to threats, unlawful interrogations, harassment, surveillance and retaliatory firings for supporting a union.<sup>xxxii</sup> Of particular concern is that the key elements of employer anti-union campaigns now include an increase of the more coercive and retaliatory tactics: threats of plant closing, discharges, harassment and surveillance. Illegal tactics are in fact the norm with 57% of employers illegally threatening to shut operations if the union wins; a third of employers fire workers for union activity during NLRB election campaigns; 28% attempt to infiltrate the organizing committee; and, almost two-third of employers use one-on-one meetings to interrogate and harass workers about their supporting the union.
17. To date, efforts to reform the NLRA have failed. Indeed, one scholar has regrettably noted that despite marked changes in the structure of U.S. labor markets and technological change, “no other body of federal law that governs a whole domain of social life – has been so insulated from significant change for so long.”<sup>xxxiii</sup> Most recently, the union-sponsored Employee Free Choice Act, intended to allow workers to form unions by ‘card-check’ – a method widely sanctioned by state public sector labor law, has not been brought to a vote in the U.S. Congress. EFCA would also provide modest improvements in remedies for violations of labor law and attempt to deal with a currently intractable problem – the fact that even one year after a successful elections, 52% of newly formed unions had no collective bargaining agreement, and two years out, 37% of newly formed

unions still had no labor agreement. EFCA would remedy this by mandating arbitration of first contracts.

### **Restricting The Right to Strike**

18. The ILO has long recognized that the right of workers to peacefully strike is a fundamental exercise of their freedom of association. The ILO's Committee on Freedom of Association has held that "[t]he right to strike is one of the essential means through which workers and their organizations may promote and defend their economic and social interests."<sup>xxxiv</sup> International law recognizes a general right to strike for all workers, in both the private and public sector, except for the very limited exceptions of members of the armed services and police forces, public servants who exercise authority in the name of the State and workers employed in services so essential that their interruption could endanger the life, safety or health of a substantial portion of the population.<sup>xxxv</sup>
19. Nonetheless, in the U.S., vast swaths of workers are prohibited from exercising their right to strike. Recent labor disputes involving public sector workers in New York and Massachusetts, both states that ban public sector strikes,<sup>xxxvi</sup> are indicative of the harsh penalties public employees and their unions are subject to for engaging in a refusal to work to improve their contract terms. In the private sector, the right to strike is in practice sorely compromised by longstanding judicial doctrine granting employers the right to permanently hire replacement workers anytime workers strike for economic reasons. Strike data further confirm that there is no meaningful right to strike in the U.S. At its peak, strike activity in the early 20<sup>th</sup> century claimed a 22.5% workforce participation rate, and now is less than 1%. In 2009 the number of major work stoppages was at its lowest point since 1947 with only 5.<sup>xxxvii</sup> The number of workers involved in the strikes, and the amount of time off the job in 2009, were the lowest recorded.
20. In December 2005, New York City subway workers, members of Transit Workers Union 100, struck after the Metropolitan Transit Authority demanded the union accept a two-tier system for pension and health care benefits for its members. The work stoppage, launched after the MTA offered a series of bad faith bargaining proposals, was peaceful and orderly; at no time did it present any threat to the health or safety of New Yorkers. Nevertheless, even before the strike began, the court granted the request of the Attorney General of New York State for an injunction. The strike, which lasted for sixty hours, resulted in a 2.5 million dollar fine against the union, forfeiture of automatic dues reduction for nineteen months and ten days of incarceration for Local 100 President, Roger Toussaint, for violating the injunction.
21. The Boston Teachers Union, Local 66, American Federation of Teachers began a public discussion of whether to hold a one-day work stoppage in January and February of 2007 after more than one year of acrimonious, unsuccessful negotiations for a successor collective bargaining agreement and a year and a half after the prior union agreement had expired. The teachers' union was fined \$30,000 by a Massachusetts trial court after publicly calling for a meeting of the members in accordance with the union's by-laws where there could be a discussion whether the union should support a one-day strike. The judge found that the union had engaged in conduct prohibited under Massachusetts collective bargaining law and enjoined the union.



22. The adverse impact of state sanctions that outlaw legitimate trade union activity aimed at improving terms and conditions of employment are long-lasting. For the TWU, the heavy fine, loss of union revenue, the injunction and jailing of a prominent trade union leader undermine the union's ability to represent its members and challenge bad faith bargaining by their employer. Similarly, the current law in Massachusetts places a heavy pall over the First Amendment right of union members to gather and discuss collective action to challenge an employer's bargaining position free of state interference. These affronts to international labor standards continue even as the rationale for limiting public sector workers' rights to strike continues to erode.

**d. Weak Enforcement of the North American Agreement on Labor Cooperation (NAALC) and Dominican Republic-Central American Free Trade Agreement (DR-CAFTA)**

23. This section will address the weak enforcement of the labor provisions in two trade agreements: NAALC and DR-CAFTA.<sup>xxxviii</sup> The North American Free Trade Agreement (NAFTA) includes a "side agreement," the North American Agreement on Labor Cooperation (NAALC), requiring each country, among other things, to enforce its own labor laws. The enforcement mechanisms in the National Administrative Office of each country have proven ineffective.

**NAFTA**

24. The structure of NAALC sets up three tiers and gives little importance to freedom of association violations, by playing them in the least important tier for enforcement with no possibility of penalties. Furthermore, claims can only be brought against governments, rather than against employers. But possibly most significant to the challenges of the NAALC is the lack of transparency in the process and ultimate decisions. Information regarding cases submitted to the National Administrative Offices (NAOs) of the United States, Mexico, and Canada is disorganized, difficult to find, out of date, and conflicting from website to website.<sup>xxxix</sup>

25. According to the U.S. Dept. of Labor, 34 cases have been filed under NAALC since its inception in 1994; 21 cases have been filed with the U.S. NAO—16 involving issues of freedom of association and 8 also involving issues of the right to bargain collectively. Of all 21 cases filed with the U.S. NAO, 4 have been withdrawn, hearings were held on ten, 8 have gone to ministerial-level consultations, and the U.S. NAO declined to accept 6 of them for review.<sup>xl</sup>

26. Within the past 4 years, there have been only 2 proceedings under the NAALC.<sup>xli</sup> U.S. Submission 2006-01 (Coahuila) was filed by the United Steelworkers following a mine explosion that killed 65 miners. The USW claimed that workers were denied freedom of association rights and proper access to appropriate labor tribunals. The U.S. NAO declined to review the case, citing related proceedings in Mexico and the ILO and stating that a review would not further the objectives of the NAALC.<sup>xlii</sup> A lawsuit was recently filed in a U.S. District Court against the Grupo Mexico and related companies on behalf of three widows of miners killed in the explosion.<sup>xliii</sup>

27. U.S. Submission 2005-03 (Hidalgo) alleged that the Mexican government failed to effectively enforce labor laws regarding the freedom of association, the right to bargain collectively, and the right to strike.<sup>xliv</sup> The focus of the complaint was Mexico's labor tribunal's questionable denials of FTVO-CROC's efforts to obtain collective bargaining rights on behalf of workers at Rubie's de

Mexico, a textile plant. The Final Report found that the Mexican labor authorities overuse of technical denial, unwarranted delays, and ineffective communications were problematic. The Final Report called for a more transparent and accessible process, but also faulted the union for using “legal strategies” that contributed to delays and confusion, and therefore found that consultations at the ministerial level were not warranted.

### **DR-CAFTA**

28. April 23, 2008, saw the first effort by a private group to bring a claim against a party under DR-CAFTA. The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) and six Guatemalan workers’ unions filed a claim with the U.S. Department of Labor pursuant to DR-CAFTA provisions alleging the mistreatment of union leaders and workers – from illegal firing, to death threats, to several reports of murder. Petitioners argued that Guatemala’s failure to enforce its domestic labor laws with regard to freedom of association, the right to organize and bargain collectively, and acceptable conditions of work allowed these acts to be committed and go unpunished, and in so doing, Guatemala failed to comply with its commitments under the ILO Declaration on Fundamental Principles and Rights at Work.
29. On January 16, 2009, the DOL’s findings overwhelmingly supported petitioners’ claims, confirming most of the alleged facts, but declined to recommend that the U.S. request consultations with Guatemala pursuant to Article 16.6.1 of DR-CAFTA, the key enforcement provision in the treaty.
30. The labor protections in free trade agreements, which provide justice for those most vulnerable to exploitation, are meaningless unless the U.S. initiates consultation and enforcement over abuses with its trade partners.

#### **e. The US has failed to take action on ILO Decisions**

31. The United States is a member of the ILO. Even though the U.S. has not ratified Conventions 87 and 98, the Committee on Freedom of Association accepts complaints against the U.S. There have been 4 cases filed against the United States with the ILO in the past 4 years. Unfortunately, despite its participation before the ILO, the United States has not taken sufficient measures to implement the recommendations set forth by the ILO, and violations persist under the UDHR, ICCPR and ICERD regarding the right to freedom of association, to join and participate in unions, and the underlying fundamental right to work and to dignity through work.
32. **No. 2547 (graduate teaching assistants)** In this case, the decision of the NLRB in *Brown University*, 342 NLRB 483, denying graduate student teaching assistants the right to collectively bargain, was found to be contrary to freedom of association principles. The committee recommended that the United States take necessary steps, including legislation, to ensure that graduate student teaching assistants are not excluded from the protections of freedom of association and collective bargaining. The *Brown University* decision, however, has been cited favorably by the NLRB.
33. **No. 2524 (supervisor definition)** In *Oakwood Healthcare, Inc.*, 348 NLRB No. 37; *Croft Metal, Inc.*, 348 NLRB No. 38; and *Golden Crest Healthcare Center*, 348 NLRB No. 33, the NLRB

expanded the definition of “supervisor,” effectively excluding a larger class of employees from collective bargaining units. The ILO complaint also highlighted the problem of the new definition creating an increase in litigation by employers to challenge the status of employees. The committee urged the United States to ensure that only workers “genuinely representing the interests of employers” be defined as supervisors under the NLRA.

34. **No. 2460 (North Carolina public employees)** As noted above, under state law, North Carolina public employees are prohibited from bargaining collectively. The complaint alleged that this not only frustrated the workers’ right to freedom of association, but also resulted in widespread discrimination in public employment. The committee recommended that the United States take steps to repeal the North Carolina statute prohibiting collective bargaining in public employment and to recognize the right of all workers to freedom of association.
35. **No. 2292 (national security employees – Executive authority to exclude)** Under federal law, the President has the authority to exclude certain national security employees from collective bargaining. This case was filed specifically because over 56,000 TSA airport screeners had been denied collective bargaining rights. The Committee recommended that the TSA employees be given the opportunity to freely choose representation to collectively bargain over all matters not directly related to national security issues.<sup>xiv</sup>
36. Despite 4 cases filed in the past 4 years regarding the interpretation of the NLRA and other laws restricting the freedom of association and demonstrating a trend towards increased exclusion of workers from collective bargaining, the United States has not taken any steps recommended by the ILO Committee to ensure that the rights to freedom of association and collective bargaining are upheld.

**f. The U.S has failed to appoint an effective National Contact Point to enforce the OECD Guidelines on Multinational Enterprises**

37. The U.S. National Contact Point (NCP) for the OECD Guidelines on Multinational Enterprises, which have protections for the rights freedom of association and collective bargaining, is housed in the Department of State. The U.S. National Contact Point is one of few government offices established explicitly to ensure that the U.S. lives up to its international obligations. However, the U.S. NCP has an extremely poor track record compared to many European governments. The unions and NGOs involved in this drafting do not know of any cases where the US NCP has helped bring a resolution to alleged violations. An overhaul of the NCP resulting in a clear, transparent, responsive process that fulfills the government’s obligation to investigate and “offer its good offices” to resolve abuses by U.S. corporations or taking place on U.S. soil is a key step in ensuring that human rights, including workers’ rights, are upheld.

**D. RECOMMENDATION FOR ACTION BY THE U.S. GOVERNMENT**

- **Take a leadership role within the international community and at home to ensure protections for freedom of association and collective bargaining for all workers**
  - Take Administrative action and promote legislation to ensure *all* workers are deemed “employees” under federal and state labor laws, and have access to equal rights and remedies regardless of immigration status or job classification.

- Seek passage of legislation that protects freedom of association and collective bargaining through card check, first contact arbitration, and more effective remedies against employer coercion and interference with rights of association and collective bargaining, as is included in the pending Employee Free Choice Act.
- Initiate consultation and enforcement of labor violations with its trading partners pursuant to the provisions of the free trade agreements.
- Take action to ratify ILO Conventions 87, 98, and 151, and to guarantee recognition and enforcement of the rights and guaranties set forth in the ILO's 1998 Declaration on Fundamental Principles and Rights at Work.

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<sup>i</sup> 29 U.S.C. § 141 et seq. (2010).

<sup>ii</sup> As rights to collective bargaining and freedom of association have diminished in the United States, there is an increased need for employment laws that allow for individual enforcement of fundamental rights at work, and while the United States has an extensive array of employment laws aimed at redressing discrimination, health and safety, social security, and medical leave, those laws fall short. A discussion of those shortcomings, while important, is beyond the scope of this report.

<sup>iii</sup> National Labor Relations Act, 29 U.S.C. § 157 (2006).

<sup>iv</sup>, Bureau of Labor Statistics, U.S. Dept. of Labor, January 20010 (<http://www.bls.gov/news.release/pdf/union2.pdf>)

<sup>v</sup> *Id.*

<sup>vi</sup> Rebecca Smith, *Human Rights at Home: Human Rights as an Organizing and Legal Tool in Low-wage Worker Communities*, 3 STAN. J. CIV. RTS. & CIV. LIBERTIES 285 (Fall 2007)

<sup>vii</sup> Let All Voices Be Heard, at 5; Gordan Lafer, NLRB Elections: Neither Free nor Fair, (Washington, DC: American Rights at Work) 2007, *available at* <http://www.americanrightsatwork.org/publications/general/neither-free-nor-fair.html>.

<sup>viii</sup> Let All Voices be Heard, at 8.

<sup>ix</sup> Annette Bernhardt, Siobhán McGrath and James DeFilippis, *Unregulated Work in the Global City*, (New York: Brennan Center for Justice, 2007), 63; DOMESTIC WORKERS UNITED & DATACENTER, *HOME IS WHERE THE WORK IS: INSIDE NEW YORK'S DOMESTIC WORK INDUSTRY* (July 14, 2006), *available at* <http://www.domesticworkersunited.org/homeiswheretheworkis.pdf>.

<sup>x</sup> Findings from the National Agricultural Workers Survey (NAWS) 2001 - 2002. A Demographic and Employment Profile of United States Farm Workers. U.S. DEPARTMENT OF LABOR, OFFICE OF THE ASSISTANT SECRETARY FOR POLICY, OFFICE OF PROGRAMMATIC POLICY, Research Report No. 9. March 2005, *available at* <http://www.doleta.gov/agworker/report9/toc.cfm>.

<sup>xi</sup> ILO Case No. 2460, p. 215, *available at* <http://www.ilo.org/public/english/standards/relm/gb/docs/gb298/pdf/gb-7-1.pdf>.

<sup>xii</sup> ICLR Report, page 2.

<sup>xiii</sup> ICLR Report, page 20.

<sup>xiv</sup> ICLR Report, page 28.

<sup>xv</sup> ICLR Report, page 28.

<sup>xvi</sup> ICLR Report, page 19.

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<sup>xvii</sup> ILO Case at 230.

<sup>xviii</sup> *Id.*

<sup>xix</sup> *Oakwood Healthcare, Inc.*, 348 NLRB 37; 180 LRRM 1257 (2006).

<sup>xx</sup> *NLRB v. Kentucky River*, 532 U.S. 706 (2001); *NLRB v. Healthcare & Retirement Corp. of America*, 511 U.S. 579 (1994).

<sup>xxi</sup> *Oakwood Healthcare*, 180 LRRM at 1272.

<sup>xxii</sup> Collective Bargaining Rights, GAO-02-835 (2002).

<sup>xxiii</sup> *FedEx Home Delivery v. NLRB*, 563 F.3d 492 (D.C. Cir. 2009)

<sup>xxiv</sup> 535 U.S. 137 (2002).

<sup>xxv</sup> Back pay is pay for work that would have been performed but for the unlawful termination, and is the only remedy available to the individual whose rights under the NLRA have been violated by the employer. The other substantive remedy available to an individual was reinstatement to the worker's former position, but that remedy was earlier foreclosed for undocumented workers by the Immigration Reform and Control Act of 1986 (IRCA), the law that prohibits the knowing employment of undocumented workers, and is not at issue here. See, *Sure-Tan, Inc.*, 467 U.S. at 903-904.

<sup>xxvi</sup> *Report on Complaints against the Government of the United States presented by the AFL-CIO and the Confederation of Mexican Workers (CTM)*, Case No. 2227, ILO Committee on Freedom of Association, (November 2003). See also, Smith & Ruckelshaus, 8 (200?).

<sup>xxvii</sup> See Human Rights Advocates report for further discussion.

<sup>xxviii</sup> See Petition Alleging Human Rights Violations of the Human Rights of Undocumented Workers, available at: <http://www.nelp.org/docUploads/FinalPetition%2Epdf>.

<sup>xxix</sup> Lance Compa, *Blood, Sweat and Fear: Workers' Rights in U.S. Meat and Poultry Plants*, Human Rights Watch, (Jan. 2005), available at <http://www.hrw.org/reports/2005/usa0105/>.

<sup>xxx</sup> *How to Join a Union: Employer Interference by the Numbers*, American Federation of Labor - Congress of Industrial Organizations (2006), available at <http://www.aflcio.org/joinaunion/how/employerinterference.cfm>.

<sup>xxxi</sup> As noted above, Gen. Rec. 30 calls upon States party to "take measures to eliminate discrimination against non-citizens in relation to working conditions and work requirements,"<sup>xxxii</sup> and notes that any differentiation in the treatment of citizens and non-citizens must be judged "in light of the objectives and purposes of the Convention," and "applied pursuant to a legitimate aim" and be "proportional to that aim."<sup>xxxiii</sup> But the U.S. has offered no such justification, but instead maintains that the denial of the remedy is separate and distinct from the denial the right.

<sup>xxxii</sup> *No Holds Barred: The Intensification of Employer Opposition to Organizing*, Kate Bronfenbrenner, Ph.D. (Economic Policy Institute 2009).

<sup>xxxiii</sup> Cynthia Estlund, *The Ossification of American Labor Law*, 102 Columbia L.Rev. 1527, 1530 (2002).

<sup>xxxiv</sup> ILO CFA Digest of Decisions 2006, paragraph 522.

<sup>xxxv</sup> ILO CFA Digest of Decisions, 2006, paragraphs 576 and 581.

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<sup>xxxvi</sup> Thirty-nine of the fifty states and the federal government outlaw strikes or any form of concerted work slowdown by public sector employees.

<sup>xxxvii</sup> “Work Stoppages: Five Major Strikes, Lockouts Occurred in 2009,” Bureau of Labor Statistics, <https://www.bls.gov/news.release/pdf/wkstp.pdf>.

<sup>xxxviii</sup> As of 2008, only 23 workers’ rights cases against four U.S. trading partners had been filed in the U.S., despite there being eight agreements with workers’ rights provisions in force with thirteen different countries, and reports that violations were occurring repeatedly in at least ten of those countries.

<sup>xxxix</sup> See NAALC website: [http://new.naalc.org/public\\_communications/publiccom.htm](http://new.naalc.org/public_communications/publiccom.htm); Canada’s website: [http://www.hrsdc.gc.ca/eng/lp/spila/ialc/pcnaalc/01List\\_of\\_Public\\_Communications.shtml](http://www.hrsdc.gc.ca/eng/lp/spila/ialc/pcnaalc/01List_of_Public_Communications.shtml); The United State’s websites: <http://www.dol.gov/ilab/programs/nao/status.htm>; [http://www.dol.gov/ilab/programs/nao/public\\_submissions.htm](http://www.dol.gov/ilab/programs/nao/public_submissions.htm) Regarding the U.S. websites in particular, if Google did not offer a web caching service, some of this information would not be found as the links often malfunction.

<sup>xl</sup> Status of Submissions under the North American Agreement on Labor Cooperation <http://www.dol.gov/ilab/programs/nao/status.htm#iib7> (last updated September, 2007).

<sup>xli</sup> Hidalgo Report U.S. NAO 2005-03; and Coahuila Decision U.S. NAO 2006-01.

<sup>xlii</sup> Coahuila Decision U.S. NAO 2006-01 (August 31, 2007).

<sup>xliii</sup> Widows Lawsuit Seeks Damages over Disaster that Killed 65 Mexican Miners Four Years Ago Today, [http://www.usw.org/resources/civil\\_rights/news?id=0021](http://www.usw.org/resources/civil_rights/news?id=0021) (Feb. 19, 2010).

<sup>xliiv</sup> Hidalgo Report U.S. NAO 2005-03 (August 31, 2007).

<sup>xlv</sup> See <http://whitehouse.blogs.foxnews.com/2010/03/27/will-he-or-wont-he-anxietyanticipation-build-over-possible-obama-recess-appointments/> There are many news reports regarding the TSA appointment and much speculation that TSA workers will have representation soon.