Testimony by Elizabeth Milito
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House Committee on Small Business

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on the subject of

Adding to Uncertainty: The Impact of DOL/NLRB Decisions and Proposed Rules on Small Businesses

Dear Chairman Graves and Members of the Committee:

On behalf of the National Federation of Independent Business (NFIB), I appreciate the opportunity to submit for the record this testimony to the House Committee on Small Business on the hearing *Adding to Uncertainty: The Impact of DOL/NLRB Decisions and Proposed Rules on Small Businesses*.

Introduction

Thank you for inviting me to testify today regarding the impact of the recent Department of Labor (DOL) and the National Labor Relations Board (NLRB) decisions and rules on small business. My name is Elizabeth Milito and I serve as Senior Executive Counsel for the National Federation of Independent Business (NFIB) Small Business Legal Center.

NFIB is the nation's leading small business advocacy association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents 350,000 independent business owners who are located throughout the United States and in virtually all of the industries potentially affected by these rules and decisions.

The NFIB Small Business Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses.

NFIB's national membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no

standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. Roughly 15 percent of NFIB members employ 10-20 people and approximately 28 percent have 10 or more employees.[1] The NFIB membership is a reflection of American small business, and I am here today on their behalf to share a small business perspective with the Committee.

Currently, small businesses in this country employ just over half of all private-sector employees.[2] Small businesses pay 44 percent of total U.S. private payroll.[3] And small businesses generated 64 percent of net new jobs over the past 15 years.[4] Small businesses are America's largest private employer. For this reason it is critical that DOL and the NLRB understand small firms' unique business structure and the exceptional problems that the decisions and labor rules of DOL and the NLRB would place on small businesses.

Suffice it to say that labor law is difficult to understand. The current NLRB is changing the law by reversing precedential decisions, promulgating new rules, and expanding enforcement through increased penalties. And this is not new or unique to the current NLRB; with each new administration comes new direction at the NLRB. Even experienced labor lawyers struggle to keep up with ever-changing legal landscape. It is doubly difficult for small business owners to understand the quirks and nuances of labor law, which sometimes can seem illogical and counterintuitive.

Imagine, then, the challenge facing America's small businesses – the backbone of our economy – when it comes to understanding and complying with labor law. These businesses are run by men and women who are struggling day-to-day simply to make

[1] http://www.nfib.com/about-nfib/what-is-nfib-/who-nfib-represents (last visited October 3, 2011).
[2] http://www.sba.gov/advocacy/7495/8420 (last visited October 3, 2011).
[3] *Id.*
[4] *Id.*

ends meet. They typically have no administrative staff, little human resource expertise, and certainly no regular access to legal counsel.

Today, small business owners contend with antidiscrimination laws, family, medical and other protected leave laws, wage-hour laws, privacy laws, workplace safety laws and labor laws. They often struggle to decipher the mysteries of overlapping, sometimes even conflicting, federal, state and local laws. These laws and regulations also are expensive; according to the Small Business Administration, workplace compliance costs small business nearly 36 percent more per employee than it costs large businesses.[5] The problem is compounded by the fact that small businesses often times can't afford human resources or legal departments to give them advice on the laws. The vast majority of small business owners treat their employees and customers like their extended family. They work hard to do what is right, but their informal and unstructured nature and more limited financial resources means that they sometimes require greater flexibility in creating policies and solutions.

Today I will discuss how recent DOL and NLRB labor rules and decisions will impact small businesses. Specifically, I will address the "persuader rule", the "ambush election rule", and the "poster rule". Additionally, I will briefly touch on a few other recent NLRB decisions. I will also provide some insights into how small businesses handle labor matters, and highlight some of the differences between how small business owners and large corporations operate.

The Persuader Rule

[5] Impact of Regulatory Costs on Small Firms, www.archive.**sba**.gov/advo/research/rs371tot.pdf (last visited October 3, 2011).

Imagine for a moment a man named Randy, a plumber in Illinois who worked by himself for years before deciding to hire a few assistants to cover growing demand for his services. Randy serves as CEO, President, Treasurer, HR VP, CFO and front-line supervisor of his company, all while working on the front line as a plumber on a daily basis. One day Randy gets approached by someone identifying himself as a representative from the local Plumbers Union. He tells Randy that three of Randy's four plumbers want to be represented by a union.

Randy does not know much about unions, but he knows he does not want a union representing the four plumbers he employs and works with hand-in-hand on a daily basis. Should he talk with the employees? What can he ask them? What can he tell them? When can he talk with them? What does Randy do?

Imagine for a moment a painter in Ohio named Mark. He borrowed money and bought a friend's failing painting company. He tries to provide steady employment to the six employees who worked for his friend. He hustles business day and night, trying to get indoor work during the rainy season and outdoor work during the summer months. One day a Teamster business agent tells Mark that he has to sign on to a Teamster contract to work on a government project Mark has landed. The contract has higher wage rates than Mark pays, and requires signatories to pay into the Teamster health & welfare, pension, and charitable funds. Mark wants no part of signing the agreement, but he really needs the work. What does Mark do?

Imagine for a moment a woman named Betsy, who borrowed money to buy a small clothing store in California. The little boutique employed three people, mostly on a part-time basis. Somehow the three were covered by a UNITE HERE contract from a relationship that began long before anyone at the store worked there. Betsy decides that she does not need a union – and the part-time employees do not really want the union, either. So when Betsy

opens the doors of her shop for the first time, she tells her part-time employees that they do not have the union anymore. Within days Betsy gets a nasty letter from the UNITE HERE local, advising her that she cannot unilaterally walk away from the union. The local demands information from Betsy, and wants to set up a date to begin negotiations. What does Betsy do?

Imagine for a moment a woman named Val, who owns a 12-employee hair salon. She heard from some friends that she should have a handbook for her employees. She thinks that is a good idea. She also has heard that it is a good idea to include a grievance procedure of some sort in the handbook so that employees have a "voice" in their careers. She has heard about peer review committees for certain types of discipline, and she wants to look into building into her handbook some sort of similar grievance-processing mechanism. Val does not know where to start.

Today Randy, Mark, Betsy and Val would call NFIB. After an initial brief consultation with an NFIB employee, each small business owner would then be directed to find a local attorney to help them. Typically the local attorney then becomes a business partner for these small businesses – helping the businesses through the maze that is today's field of labor law. It is this partnership that is at grave risk due to DOL's proposed persuader rule.[6]

Under the new persuader rule, all actions, comments or communications that could have a "direct or indirect" "object" to "persuade" employees would be reportable. This includes drafting documents, training, drafting policies – virtually *everything* that labor counsel does for clients – and whether or not there is union organizing activity or other protected, concerted activity going on at all. The widened scope of "persuader" activities is

[6] Labor-Management Reporting and Disclosure Act; Interpretation of the "Advice" Exemption RIN 1215-AB79; RIN 1245-AA03 (June 21, 2011 Notice of Proposed Rulemaking).

so broad as to include virtually every form of legal advice and counsel in the labor relations field.

The danger the new DOL rule poses is not simply revealing the law firm or consultant's identity – which was the congressional objective of the Labor-Management and Reporting Disclosure Act (LMRDA). The real danger is the requirement that lawyers, if they report as a "persuader" for one client, will be required to disclose all fees and arrangements from all clients for all labor relations services, even those services not considered "persuader activity." Further, lawyers who report have to report the portions of their salary derived from such activities.

The net result of the new proposed rule will be that lawyers and law firms with normal attorney-client relationships where such information is treated as privileged and confidential may no longer be willing or available to advise employers because to do so will force them to breach their ethical obligations. This is an enormous concern for the Randys, Marks, Betsys, and Vals of our economy. If this happens, they will have two choices – either "go it alone" and not seek any advice (hoping they guess correctly) or find a lawyer who is willing to overlook the ethical obligations and other issues involved with filing as a persuader.

DOL's proposed regulation is much more than simply a "reinterpretation" of the LMRDA's "Advice" Exemption. In fact, it eviscerates that exemption and makes virtually any "advice" from law firms and other organizations reportable "persuader activity." We fear that this proposal will limit small employers' access to counsel on most aspects of labor law. Such limited access will rob employers of their right to speak freely and lawfully on many employment issues, and employees of their right to receive lawful and complete information on employment matters that affect them on a daily basis. This is not good for small employers, their employees, or the U.S. economy.

The Ambush Election Rule

Our nation's labor law was conceived for the purpose of protecting the free flow of commerce by encouraging collective bargaining to avoid disruptions. Under the 76-year-old National Labor Relations Act (NLRA), bargaining about employees' terms and conditions of employment can only occur between employers and labor organizations chosen by employees to be their representatives.

The starting point for representation is employee choice. Choice is the act of selecting freely following consideration of options. Section 8(c) of the NLRA encourages "free debate on issues dividing labor and management." For an employer to engage, it must first become aware. As Canadian experience proves, covert union campaigning results in significantly higher rates of union representation over an open exchange of views by both the union and the employer to inform employees and respond to issues raised.[7]

The Board's new ambush election rule[8] will significantly undermine an employer's opportunity to learn of and respond to union organization by reducing the so-called "critical period" from petition filing to election from the current median of 38 days to as few as 10-21 days.[9]

To ensure due process in representation case matters, Congress amended Section 9 of the NLRA requiring the Board to investigate each petition, provide an appropriate hearing upon due notice, and decide the unit appropriate. The Board's new rule will restrict the presentation of evidence enabling fair deliberation of unit appropriateness issues by creating a 20 percent voter eligibility/unit placement review threshold, imposing a "claim it or

[7] Chris Riddell, "Union Certification Success Under Voting Versus Card-Check Procedures: Evidence from British Columbia, 1978-1998" 57 ILR Rev. No. 4. (2004), p. 498.
[8] Proposed Rulemaking Regarding Representation Case Proceedings, RIN 3142-AA08 (June 21, 2011 Notice of Proposed Rulemaking).
[9] Member Hayes dissent.

waive it" rule regarding unit scope and related evidentiary issues, and requiring production of detailed employee lists including personal telephone numbers and email addresses.

With the Board's new election rule, NFIB believes that employee informed choice and due process notice and hearing required by Section 9 will be compromised, particularly for small employers lacking labor relations expertise and in-house legal departments. Why rush the ballots? Because the more employees think about joining a union, the less likely they are to unionize.

Dissenting Board member, Brian Hayes, protested the rule as a "radical manipulation of our election process."[10] He said the main purpose of this unprecedented move by the NLRB was to prevent employers from expressing their views about collective bargaining. The NLRB majority, he suggested, is launching a campaign to sneak pro-labor measures past Congress and undermine legal precedent in order to assist unions.

The Poster Rule

Board member Hayes' assumption was proven correct when in August the President's appointees on the NLRB ordered small businesses to display a poster instructing workers on how to form unions.[11] It did so despite the fact that the law creating the NLRB gives it no such authority over free speech. The "Notice Posting Rule," which becomes effective November 14, 2011, imposes an unfair labor practice by threatening private businesses with increased scrutiny, investigations and an indefinite expansion of the statute of limitations for filing unfair labor practice charges.

Last week, NFIB filed a lawsuit on behalf of small businesses challenging the NLRB's intrusion into the workplace. We've asked the court to overturn the rule and declare

[10] 76 Fed. Reg. 36831.
[11] Notification of Employee Rights Under the National Labor Relations Act, RIN 3142-AA07 (August 30, 2011 Final Rule).

that the NLRB lacks statutory authority to require such a posting by six million private-sector employers and to expand the penalty provisions – the latter of which will disproportionately burden small businesses.

The posting rule will affect millions of private sector employers that are not under suspicion of committing an unfair labor practice to display the posting. Section 6 of the NLRA – which the Board cites as its authority for this rule – only grants the NLRB the ability to administer the act when a representation petition or unfair labor practice charge is filed.

According to the Board's own statistics, only 23,381 unfair labor charges and 3,402 representation petitions were filed with the board in 2010.[12] Together, these situations account for less than a fraction of 1 percent of private sector employers. The Board is clearly beyond the scope of its authority to regulate the more than 99 percent of employers not implicated in these filings or charges.

In addition, the Board admits that the NLRA is "almost unique among federal labor laws in not including an express statutory provision requiring employers routinely to post notices at their workplaces informing employees of their statutory rights."[13] Unlike in other major acts, Congress specifically avoided granting the Board the authority to require a notice posting when it passed the NLRA. In the absence of an election petition or a finding of an unfair labor practice, the Board lacks the authority to require employers to post any notice, and certainly not a notice that is far more detailed and pointed than the notices required when the Board's jurisdiction is properly invoked.

Finally, the posting rule will impose significant penalties on employers who fail to post this notice, including a finding that a failure to post the notice will constitute an independent unfair labor practice and result in an indefinite expansion of the statute of

[12] http://www.nlrb.gov/shared_files/GC%20Memo/2011/GC%2011-03%20Summary%20of%20Operations%20FY%2010.pdf .
[13] 75 Fed. Reg. 80415.

limitations for filing any other unfair labor practice charge. The Board does not have authority to impose these obligations and penalties against an employer when there has been no finding – or even an allegation – of an unfair labor practice. Small businesses are particularly vulnerable to accidental violations because the regulatory compliance burden most often falls on the small business owner who operates without a human resources professional or compliance staff.

More than 7,000 comments from employers, employees, unions and others were received by the NLRB and, as admitted by the Board, most objected to all or parts of the new rule. The Board's decision to proceed with the rule in the face of such adversity and against legal authority demonstrates the audacity of the Board and its indebtedness to unions, which comes at the expense of small business.

NLRB Decisions Impact Small Business

Along with the recent regulations proposed and promulgated by DOL and the NLRB, the Board issued a number of decisions that will only serve to bolster union rolls at the expense of small business. In our members' opinions, these unabashedly pro-union decisions put politics above the best interests of this country by creating more uncertainty for small business owners at a time when they are trying to create jobs and get our economy back on track.

On August 26 of this year, the NLRB decided three such cases, *Specialty Heathcare*, *Lamons Gasket Co.*, and *UGL-Unicco Service Co.* Additionally, the Board is currently in the middle of a lawsuit against Boeing – the ramifications of which will have a lasting impact on this country's business climate.

For starters, in *Specialty Healthcare*,[14] the Board ruled to allow so-called "micro-unions," which will allow unions to organize mini-bargaining units throughout a business. *Specialty Healthcare* involved a non-acute care nursing home in which a union sought to organize a group that consisted only of nursing assistants, to the exclusion of other nonprofessional employees of the facility. The Board decided that such sub-unit organizing was permissible. This means that small business owners could face numerous union organizing campaigns from different unions even if they have only a few employees. Ultimately, the decision creates additional expense and administrative burdens for small business.

Lamons Gasket Co.[15] involved "card check" elections in which employees sign cards to show their interest in joining unions. The Board ended protections that allowed employees to immediately petition for a real, private ballot union election if their employer was forced by a union into a "card check" agreement. Employees deserve a voice and also deserve the protection of a private ballot election; this decision effectively blocks such free choice.

Finally, in *UGL-Unicco Service Co.*,[16] a majority of the Board considered whether to restore the "successor bar" doctrine which was discarded in *MV Transportation*. That doctrine provided that when a successor employer met its legal obligation to recognize an incumbent employee representative, that previously chosen representative was entitled to represent the employees in collective bargaining with the new employer for a reasonable period of time. In *UGL-Unicco* the Board chose to restore the "successor bar" doctrine,

[14] 357 NLRB No. 83 (2011)

[15] 357 NLRB No. 72 (2011).

[16] 357 NLRB No. 76 (2011).

providing that neither the new owner, nor employees, nor rival unions can stage an immediate challenge to the union and must instead give a "reasonable period" and a "fair chance" for the union to prove its merits after a merger or acquisition. Ultimately, the decision strengthens a union's ability to retain representation after a business is sold – a stranglehold that comes at the mercy of employees and business owners.

Any doubt as to whether the NLRB strayed from its role as an impartial arbiter to instead become just an extension of labor unions was resolved when it filed a complaint against Boeing.[17] The charge filed against Boeing highlights the ongoing battle between free enterprise and unions. In this high profile case, the NLRB accused Boeing of setting up a non-union plant in South Carolina, a "right to work" state, to retaliate against unionized workers in Washington for striking. The NLRB now wants to force the company to produce all of its new line of Dreamliner jets in Washington instead of allowing the company to diversify and make a portion of the jets in South Carolina. Neither the Board nor any court has ever imposed a remedy so drastic as to force a company to essentially abandon a multi-million dollar facility and to move production across the country. The outcome of the Boeing case will have lasting effects for all businesses and will only serve to discourage business expansion and investment in the United States.

[17] http://www.nlrb.gov/news/national-labor-relations-board-issues-complaint-against-boeing-company-unlawfully-transferring- (last visited October 3, 2011).

Conclusion

NFIB has 350,000 members across the country. They are honorable and fair employers, and they are troubled, confused, and scared by the avalanche of labor regulations and rules coming out of DOL and the NLRB.

Why should anyone care about how these government entities treat small business? This question can be answered with one word — jobs. Jobs are what Americans want and need, and most jobs in America are created by small businesses. According to the Small Business Administration, "small firms accounted for 65 percent (or 9.8 million) of the 15 million net new jobs created between 1993 and 2009."[18] Small businesses in America represent 99.7 percent of all employer firms and employ half of all private sector employees.[19]

Unemployment in this country is at an alarming level right now, with 14 million Americans looking for work and a 9.1 percent unemployment rate.[20] As the largest group of private employers, small businesses will be integral in creating jobs and getting America back to work. At a time like this, it would be foolish to impose oppressive and confusing new legal restrictions and regulations on small businesses. These will only dissuade small business owners from hiring new workers and expanding their businesses. If we hope to ever turn our economy around, we must start by halting this tidal wave of new regulations that will do nothing but crush small businesses and further prolong America's economic woes. Thank you.

[18] http://web.sba.gov/faqs/faqIndexAll.cfm?areaid=24 (last visited October 3, 2011).
[19] http://www.sba.gov/advocacy/7495/8420 (last visited October 3, 2011).
[20] http://www.bls.gov/news.release/empsit.nr0.htm (last visited October 3, 2011).