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EVALUATING THE EFFECTIVENESS OF NATIONAL LABOR RELATIONS ACT REMEDIES: ANALYSIS AND COMPARISON WITH OTHER WORKPLACE PENALTY POLICIES

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ABSTRACT

The goal of this paper is to examine the implied penalty policies underlying the remedies created by the National Labor Relations Act (NLRA) in terms of the policies' impact on employer and union behaviors. We present a simple model of deterrence as a means of evaluating workplace penalty policies in terms of their influence on employer behavior, particularly through deterrence effects. We also compare the remedies for violations embodied in the NLRA with penalty policies under other workplace legislation, such as the Fair Labor Standards Act and the Occupational Safety and Health Act. We then evaluate the size of financial costs for violations against individuals of specific provisions of the NLRA by firms and unions for the period 2000-2009. We show that the implied penalties are modest, particularly in terms of providing sufficient incentives to comply with the law in a timely manner. Given this finding, we examine other potential remedies available under the NLRA, in particular, methods to address the impact of delays (the length of time from the filing of the charge or the issuance of the charge to the time of its adjudication before an administrative law judge at the National Labor Relations Board or through the federal courts) on workplace representation through unionization.

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Introduction

The National Labor Relations Act (NLRA) has been one of the most controversial pieces of labor legislation passed during the New Deal era. From management's perspective, the original form of this law, the Wagner Act of 1935, gave labor unions an easy method of organizing the firm's workforce using the government's enforcement mechanism and the legitimacy of a federal statute to promote union organizing. During the years following the passage of the Act, unionization grew markedly in the United States. In contrast, the 1947 Taft-Hartley Amendment to the Act was viewed by labor union leaders as a "slave labor act," because it stated that unions could also be found guilty of unfair labor practices that were similar to those that management might commit and it included substantial monetary fines for potential restraint of business activity (Wagner, 2002). These provisions were deemed so abhorrent from labor's perspective that former AFL-CIO president Lane Kirkland called for its abolition, saying labor could do better without provisions of the NLRA (Apgar 1984).

Workplace regulations—whether the NLRA, the Occupational Safety and Health Act, or any of the other major federal statutes—attempt to change private behavior so that it conforms with public policy objectives. Regulations provide for a means of monitoring behavior and providing incentives or penalties to move the regulated party in the desired direction. One way of evaluating the adequacy of any regulatory system is assessing how significant those incentives are in light of the benefits of maintaining status quo behaviors.

The goal of this paper is to examine the remedy policies underlying the NLRA regarding their impact on the employer and union behaviors the Act addresses. We do so by providing a context and theoretical background for comparing the remedies arising from violations of the Act

with the penalties arising from violations of other major federal workplace policies. We present a general framework for evaluating the manner in which workplace penalty policies affect employer behavior, particularly through deterrence effects. With this framework as a backdrop, we evaluate the level and the changes in extent of the remedies for violations of the Act against individuals by firms and unions and then estimate the impact of these remedies as a means of "making whole" workers affected by violations and on the incentives of companies and unions to comply with the law in a timely manner. Given this analysis, we then examine other potential remedies to better attain the objectives of the Act, in particular, methods to address the impact of delays (the length of time from the filing of the charge or the issuance of the charge to the time of its adjudication before an administrative law judge at the National Labor Relations Board (NLRB) or through the federal courts) on the ability for workers to choose representation.

The paper describes the economic costs of both labor and management violating the NLRA and suggests a method of determining appropriate remedies. In the first section, we describe the existing rationales for workplace penalties and develop a theory of optimal penalties from the perspective of both the firm and society. In the next section, we apply the theory to the NLRA, provide new descriptive data on the adequacy of back pay awards to affected workers and the costs to firms and unions of violating the Act against individuals, and discuss its implications for union organizing. We also discuss the implications of providing industrial democracy in the workplace through unionization in the face of relatively low costs to both labor and management of violating the Act. In the third section, we examine the impact of delays on achieving the basic goals of the NLRA and explore remedies outside of potential penalties to improve performance of the Act. The final section is a summary of our conclusions.

Conceptual aims of workplace penalty policies

To evaluate the adequacy of remedies under the NLRA, it is useful to first examine the different justifications for workplace penalties generally.[1] Penalty policies (in particular those embodied in legislation) arise from the same political processes that drive legislation. Weil (2008) argues that passage of federal workplace legislation has been driven by distinctive dynamics, where successful efforts to pass workplace policies in the past 50 years have required two conditions: significant differences within the business community in opposition to legislation and particularly strong ties between the labor movement and other communities in support of legislation. One consequence of those dynamics is that penalty policies (as well as the recourse to criminal versus civil fines) reflect the particular political coalitions and their relative strengths needed to pass specific legislation.[2] This has led, for example, to exemption of small

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[1] This discussion focuses primarily on *de jure* penalties as opposed to *de facto* penalties. In fact, there are substantial differences between the two, arising from several factors: the manner in which personnel of regulatory agencies carry out enforcement; the review process provided under different statutes; judicial review of penalties; and the pressures placed on regulatory agencies by Congress, the Executive Branch, and stakeholders.

[2] For example, the legislative effort that led to passage of the Mine Safety and Health Act in 1969 began in response to a major mining disaster in Farmington, West Virginia, which put the political coalition favoring its passage in a stronger position relative to opponents. This resulted in the original act including relatively stringent penalties and significant enforcement powers for the agency created by the legislation. In contrast, opponents of plant closing legislation held greater sway during the long political battle that ultimately led to passage of the Worker Adjustment Retraining and Notification Act (the WARN Act). This Act has a far less stringent set of penalty policies and creates no separate administrative apparatus for enforcement (Fung, Graham, and Weil 2007; Weil 2008).

workplaces under many statutes as well as diminished enforcement authority or less draconian penalty policies.[3]

But even given the political context underlying penalty policies, there are other factors that may lead them to be inconsistent in terms of the fines imposed for what might seem comparable infractions of the law. Sunstein et al. (2002) argue that the administrative penalties across a variety of federal legislation exhibit substantial "incoherence," in that the penalties in one domain (for example, violation of the Wild Bird Conservation Act carrying a maximum penalty of $25,000) may appear far more draconian than those in another (serious violation of health and safety standards under the Occupational Safety and Health Act carrying a maximum penalty of $7,000).

The seeming incoherence of wider policies arises from the fact that administrative penalty policies are set within the context of specific *categories* (for example, the relevant category being penalties under a single act such as the Wild Bird Conservation Act) rather than on a larger, cross-category basis. Within a given category (for example, workplace safety), policymakers may anchor penalties based on "the intensity of emotions they evoke" (Sunstein et al. 2002, p.1187). Incoherence between penalty policies therefore reflects the fact that when legislators draft, judges review, or regulators implement penalty policies, they are typically not required to look beyond the particular policy domain in which they operate.[4] The basis of a

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[3] See Weil (2008) pp. 299-308; Fishback and Kantor (2000).

[4] Note that these features of incoherence can be taken advantage of in the political processes discussed earlier. That is, those arguing either in favor of or against stronger penalties can use the institutional myopia posited

penalty system may therefore be anchored to different reference points that are inconsistent because those decisions were made in relative isolation.

Once a penalty policy has been anchored within a given category, policymakers structure gradations of violations based on factors like the severity of the violation or the past record of the regulated party. This aspect of penalty-setting, within a given policy context, may reflect more coherent ranking schemes: less serious violations typically have lower penalties than do serious ones; violations arising for the first time or which do not seem to reflect a clear intent to circumvent the law are dealt with less harshly than repeat violations or those which involve a party acting willfully to violate the law. Seen in this light, intra-category penalty policy appears more rational. However, since each category of policies constructs gradations of penalties around an anchor independent of other contexts, penalties in the aggregate diverge further; "moral intuitions [driving gradations] do not specify a scaling factor for the task of translating punitive intent into dollars" (Sunstein et al. 2002, p. 1187).

These forces may operate even within a single policy domain. Federal workplace policies are set by a variety of agencies. Most agencies that enforce workplace polices are part of the U.S. Department of Labor—for example, the Wage and Hour Division (WHD) for labor standards; the Occupational Safety and Health Administration (OSHA) for most private sector and some public health and safety issues, except, notably, the Mine Safety and Health Administration, (MSHA) which oversees health and safety in underground and surface mining; and the Employee Benefits Standards Administration (EBSA); etc. Despite their common home

by Sunstein et .al. (2002) to escape the potentially higher (or lower) fines suggested by legislation from another category.

department and the responsibility of the U.S. Secretary of Labor to ultimately set policy for them, penalty and other enforcement policies across those agencies vary widely because they were established by different pieces of legislation, in different eras, and operate fairly autonomously. Some of these agencies, like the Wage and Hour Division (WHD) and the Employee Benefits Standards Administration (EBSA), administer multiple pieces of major legislation, leading to varied policies even in the context of a single agency.

The forces leading to incoherence are even stronger for those agencies dealing with workplace policy but operating outside of the Department of Labor—notably the National Labor Relations Board (NLRB). The views of the top policymakers of such agencies may differ with those of the Secretary of Labor. As a result, there is remarkable variation in the penalties set even within the area of workplace policy.[5] It is therefore undeniable that the type of penalty policies will differ significantly as a consequence of the politics of enactment and institutional factors driving the incoherence.

Remedies as penalties under the NLRA

A comparison of the NLRA with other workplace policies begins by recognizing that the U.S. Supreme Court has repeatedly held that the Act "is designed to perform a remedial function

[5] Coglianese (2002) challenges Sunstein et al. (2002), arguing that there is greater coherence across penalty policies than meets the eye. For example, the existence of other forms of liability or availability of other remedies and differences in the state of mind of the violators or the type and size of regulatory targets may lead to sensible differences across categories of regulation that may still be rational from a category-specific perspective but lead to greater incoherence across categories. Coglianese, however, does not provide evidence of the extent of cross-category incoherence driven by these instrumental factors.

and that punitive sanctions may not be imposed for violations" (Gould 1994, p. 120).[6] In this sense, remedies are not intended to serve as penalties—at least in a strictly legal sense. However, since NLRA remedies represent real costs to employers or unions arising from violations of the Act, they operate as *de facto* penalties and can be evaluated as such.

In reviewing the rationale for penalty policies how might one try to rationally judge what a coherent and consistent policy might look like? Although acknowledging that current policies reflect the political and institutional factors discussed above, we begin by thinking about the aims of an optimal policy. Given this, we look at other workplace regulations in light of what an optimal policy might require. Finally, we use insights from this wider analysis to evaluate current and prospective NLRA policies.[7]

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[6] This view has long been established, in a series of rulings going back to Local 60, *United Brotherhood of Carpenters v. NLRB*, 365 U.S. 651, 655 (1961); *NLRB v. Seven-Up Bottling*, 344 U.S. 344, 346 (1953). See Gould (1994, pp. 119-127) for an extended discussion.

[7] Posing the question in this way is not simply an exercise in academic analysis. Sunstein et al. (2002, p. 1192) point out that greater coherence could be generated: "The Office of Information and Regulatory Affairs (OIRA), within the Office of Management and Budget (OMB) should provide a full accounting of regulatory penalties, publicize it, and evaluate the existing pattern of outcomes, with recommendations both to agencies and to Congress. The longstanding mission of OMB in general and OIRA in particular has been to produce more in the way of global rationality, with respect to regulation and the budget generally. This role should be extended to better rationalization of the system of administrative penalties. Note in this regard that even without legislative change, agencies have considerable room to maneuver…The purpose of executive oversight would be to move agency practice in the direction of a sensible overall pattern of penalties." In 2010, Sunstein was appointed and confirmed as the head of OIRA in the Obama administration, where, presumably, he can push to make this vision a reality.

Workplace policies, like most regulatory policies, attempt to change the behavior of individuals, organizations, and markets. The underlying assumption of these policies is that regulated parties, left on their own, will make choices that are counter to the public interest. The instruments of regulation—whether penalties, incentives, disclosure, or market-related devices like carbon trading—attempt to change the benefits and costs of targets of public policy in order to change their choices and behaviors.

Analytically, the purpose of penalty policies is to increase the regulated party's costs of noncompliance in one of two ways. First, penalties have a direct effect when connected to the finding of a violation during an inspection. The penalty imposes a cost for past violations and often also imposes an ongoing cost for continuing noncompliance. (For example, the Mine Safety and Health Act imposes additional fines of up to $7,500 for each day the violation is not abated after the prescribed date for compliance.) Assessed penalties are also thought to change the subsequent behavior of the inspected firm, leading it to remain in compliance in the future. Affecting behavior of the parties being directly inspected is sometimes termed "specific deterrence".[8]

Second, penalties may change the behavior of regulated parties prospectively: the prospect of receiving a penalty creates potential costs that regulated parties seek to avoid through

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[8] Penalty policies may also reflect some underlying notion of justice beyond recovering the benefits of non-compliance or the harms inflicted from the violation. These would include some larger sanction for the moral wrong of committing the act itself, which underlies criminal penalties. Others argue that organizations and individuals adhere to laws more out of custom and culture than fear of financial penalties. See, for example, Earle and Peter (2009). We do not consider those aspects of penalty policy here.

voluntary compliance. These *general deterrence* effects of penalties are particularly important when the government is unable to inspect all firms (or individuals) covered by the policy and must instead depend on deterrence to change behavior. The amount of penalties in this case could reflect the benefits of noncompliance or the harm imposed. But it should also reflect the probability of inspection and detection.

At the outset, we argue that *de facto* specific and general deterrence effects of penalty policies transcend their *de jure* basis. That is, legislation underlying regulations often has an explicit reasoning behind the system of penalties established by it. The legislation might cite deterrence (or its equivalent) as the system's rationale. But the explicit intent of the legislation need not insure that the penalties will have such effects. And, as argued above, in the case of the NLRA, the fact that the Act is framed in terms of remedies rather than penalties does not diminish its potential deterrent impact in practice.

A law can cite deterrence as the basis for its penalties, but if those penalties are small in relation to the economic benefits arising from noncompliance, they will have little *de facto* impact on behavior and, therefore, on deterrence. Similarly, a law that does not explicitly base its penalty policies on deterrence does not preclude those penalties from having real deterrence effects. This is important in evaluating penalties under the NLRA because those penalties are based on a rationale of making whole those workers who have been affected by a violation of the Act rather than on either form of deterrence. As we discuss below, making-whole remedies still create a set of incentives and disincentives for employers or unions that, in turn, affect behavior.

A simple model of enforcement

If the aim of penalty policy is to change behavior, what should be the basis by which penalties are set? Deterrence theory states that penalties should reflect the potential gains received from failing to comply and the probability that a party will be investigated. A simple model of enforcement provides a useful basis to understand the components of setting an optimal penalty policy.[9]

Imagine that an agency in the Department of Labor is attempting to set a penalty level to induce compliance with a new law. Assume that the typical employer being regulated is risk neutral and that the costs of complying with the new law are known by the agency. If the government is seeking to bring the typical firm into compliance, it has two tools: inspections (occurring with a probability of p) and fines (F).[10] The government agency will need to set

[9] This framework derives from Becker (1968) and Stigler (1971) and is laid out in greater detail by Polinsky and Shavell (2000). A useful summary of the deterrence literature can be found in Winter (2008). For early discussions regarding deterrence under workplace regulations, see Ashenfelter and Smith (1979) regarding the minimum wage standard of the Fair Labor Standards Act; Ehrenberg and Schumann (1983) regarding overtime provisions of that Act; Smith (1979) regarding the Occupational Safety and Health Act; and Appleton and Baker (1984) regarding the Mine Safety and Health Act.

[10] There are nuances to both inspection probabilities and fines we do not deal with here. We assume that the relevant probability is that of the inspection itself occurring. There is a separate probability function regarding whether the investigator, once on site, detects an underlying violation. We assume that this probability is 1.0. Also, the penalty initially assessed is, under most statutes, very different from the one ultimately paid. The difference arises because of the right of employers under most workplace statutes to appeal a citation or violation (Weil 2010). We assume here that penalties will be paid with complete certainty and that the penalty initially assessed on the employer is equal to the penalty it ultimately pays.

policy by seeking to change employer behavior, given that compliance with the new law is costly and employers are choosing not to comply prior to its passage.

The employer decides whether or not to comply with the new law, which will cost W. It makes this decision by minimizing the expected total costs of compliance $E(C)$, which are based on the costs of complying W and the expected fine for not complying $(p(F))$. Since our focus is on the optimal penalty level, assume that the probability of inspection p is set by the level of resources available to the agency.[11]

The firm's options are to comply and face the costs of compliance with a probability of γ and to not comply and face the expected penalty $p(F)$:

(1) $E(C) = \gamma(W) + (1-\gamma)p(F)$.

Differentiating the expected costs of compliance with respect to the probability of complying gives

(2) $d(E(C))/d\gamma = W - p(F)$.

The optimal policy to minimize expected costs is, therefore, where

(3) $W - p(F) = 0$,

or the point of indifference between compliance and noncompliance is where $W = p(F)$.

[11] As we discuss below, the NLRB does not enforce provisions of the NLRA, but instead responds to complaints about violations of its provisions by employees. We can still think of the p as the probability that a violation of the Act triggers a complaint to the Board and subsequent action.

This analysis implies that the employer will choose not to comply when the expected penalty is less than the cost of complying with the law $(W > p(F))$, will choose to comply when the costs of compliance are less than the expected penalty $(W < p(F))$, and will be indifferent between complying and not complying when the costs of compliance are just equal to the expected penalty $(W = p(F))$. From the government's perspective, if it seeks to set the optimal penalty level F given a current level of enforcement (and, therefore, probability of inspection p), it should set the penalty where[12]

(4) $F \geq W/p$.

That is, the penalty should increase linearly with the costs of complying but exponentially with the probability of detection. Specifically, equation (4) means that if it cost the employer $1,000 to comply with the new rule, then the expected penalty for violation should equal $2,000 if there is a 50 percent probability of investigation ($1,000/0.5); $4,000 if there is a 25 percent probability; and $10,000 if there is a 10 percent probability. For an agency like the MSHA , that undertakes a minimum of four inspections per year, the optimal penalty should be close to that dictated by the harms inflicted. However, the annual probability of an investigation in most industries covered by the Occupational Safety and Health Act or the Fair Labor Standards Act is far below 10 percent, meaning that optimal penalties must be adjusted upward by a factor of more than 10 in light of deterrence theory.

[12] Note that the more general conclusion is that the government should consider the probability of inspections and the penalty as substitutes in achieving a desired compliance outcome given the costs of compliance W. We discuss this trade-off further below.

Violations under the NLRA are identified and reported by workers, unions, and employers.[13] Unfair labor practices arising from employer misconduct, such as dismissal due to involvement in organizing, will likely be identified by individual workers or by labor unions involved in organizing efforts and taken to the NLRB. Unfair labor practices by unions, such as intimidation of workers, will likely be identified by employers or employees and similarly taken to the Board. In both instances, the complaint will instigate some sort of response by the Board (akin to an enforcement action under other statutes). This agency role played by either unions or employers substantially raises the probability that an unfair practice will be identified.[14] This means that the probability of enforcement under the NLRA can be reasonably considered to be close to 1.0.

Table 1 presents the percentage of complaints that were filed in regional offices in 2000-2009 that were found to have merit by the director and the staff of those offices for each major section of the NLRA that involves individuals. The NLRB concluded that in about 25-30 percent of these cases there was sufficient cause to take the claim forward to the next step of adjudication. The fact that unions, companies, and individuals filed many more claims that are

[13] Section 10(c) of the Act states that "whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint." 29 U.S.C. § 160(b).

[14] See Weil (2005) for a discussion of the critical role played by third-party agents in the exercise of worker rights under various workplace policies. Here, the workers have an agent substantially solving the public good problems that arise in other areas of workplace rights.

not taken to the next step than claims that are demonstrates that there is a significant inflow of potential cases to the Board.[15] If the agency role of unions in the case of employer violations or of firms in the case of union violations is sufficient, then this may imply a probability of surfacing problems close to 1.0 and, therefore, from equation (4), that the effectiveness of deterrence largely turns on the adequacy of penalties.

Rationales for penalty policies

In general, if the aim of deterrence is to tip the regulated party toward compliance, it does not strictly matter whether one changes the expected costs of noncompliance by increasing the probability of inspection or the expected penalties, once a violation is caught. Given that enforcement is costly, optimal deterrence theory suggests that it makes more sense from the regulator's perspective to increase penalties as much as possible in order to maximize the impact of a constrained regulatory budget (Polinsky and Shavell 1998, 2000). However, this view suggests that there need not be a rationale for the size of the penalty beyond affecting expected costs of noncompliance.

An alternative basis for setting optimal penalty policies is to have the expected penalty for a given violation reflect something real about the basis of that penalty. Once such a rationale is chosen, the penalty can be further adjusted to reflect the underlying probability of inspection, or *enforcement.* This approach comports with the way that legislators write penalties (to solve problems clearly defined by the legislation), that judges tend to review penalties (in terms of

[15] However, this rate might also reflect resource limits at the NLRB that require the Board to triage cases that are brought forward. We do not have sufficient data to rule this out.

whether they are reasonable, given the violation), and that investigators behave (often driven by notions—explicit or implicit—of what is fair).[16]

The above model of optimal policy reflects the case in which the government is seeking to induce the level of compliance implied by the employer's internal cost of compliance. This is not necessarily equivalent to the optimal level from society's point of view, since it does not tell us anything about the social costs associated with noncompliance. From this perspective, there are several bases for setting the optimal level of compliance.

In the simple model discussed above, the government is seeking to obtain compliance with the law given internal costs of the employer. Here, the government needs to assess the penalty in terms of the *benefits received* by the employer from noncompliance (which is equivalent to W). For example, by paying below the minimum wage under the Fair Labor Standards Act, an employer is able to achieve lower unit labor costs than if it complied with the law. As a result, a basic feature of a finding of violation under that Act is payment of back wages, equal to the amount of money owed to the workers during the time they were underpaid. Another optional feature of the finding of a Fair Labor Standards Act violation provides workers with liquidated damages equal to the amount of back wages owed. Liquidated damages can be thought of as additional compensation for the potential benefits received by the employer during the period of underpayment (for example, reflecting the return arising from the underpayment).

[16] In general, see Bardach and Kagan (1982) on this. See also Sparrow (2000) on inspector behavior and judgments of fairness by OSHA..

Moreover, the ability to bring class action lawsuits in the states with the potential for punitive damages with large payouts can also serve as major deterrents.[17]

However, assume that the costs to society from noncompliance are greater than the costs to the employer of complying. This is plausible in cases in which there is a significant externality, that is, when the costs of complying go significantly beyond those faced by the employer. In such a case, the appropriate penalty level for consideration is not the benefits received from noncompliance W, but an amount reflecting the *harms inflicted* on society from noncompliance (H). In such a case, the optimal penalty should be

(5) $F = H/p$,

with $H \neq W$.

In a case with significant externalities associated with noncompliance that go beyond the costs of complying ($H > W$), a penalty set on the basis of the costs of compliance will be too low. It is also possible that H may be below W when the regulatory standard is too stringent—that is, the costs of compliance exceed the harms inflicted on society.[18] Many workplace policies attempt to remediate an externality. The Occupational Safety and Health Act, for example, is premised on the need to reduce workplace risks because employers' incentives to reduce injuries and illnesses fall below those desirable from a social perspective. Penalties in this sense should

[17] Braun *v. Walmart,* Class Action, 19-CO-01-9790, 2008.

[18] More formally, this implies that the optimal fine should be based on the marginal social cost to society of the workplace problem. As a result, from the harms-inflicted perspective, the optimal penalty policy is the result of dividing the Pigovian tax set to remedy an externality by the probability of detection.

reflect the costs imposed on workers—for example, increases in morbidity and mortality arising from exposures.

Penalties based on these two rationales— benefits received and harms inflicted—can in some cases be quite similar and in other cases diverge markedly. One can imagine cases (like minimum wage violations) in which the benefits received are close to the harms inflicted: back wages—the difference between what an individual was paid and what the Fair Labor Standards Act requires in terms of minimum wages or overtime—are a measure of both the direct benefits received from an employer failing to pay statutory wages and the harms inflicted on the worker not receiving them.[19] Similarly, one component of the penalties assessed for violations of the discrimination regulations administered by the Office of Federal Contract Compliance Programs is make-whole relief, which requires that a victim of discrimination be restored to the economic and status positions that the victim would have occupied had the discrimination never taken place. By requiring payment of this amount, the employer is essentially required to pay the equivalent of the direct amount of compensation and other benefits arising from the discriminatory practice (the benefits received from discrimination).[20]

[19] This is an oversimplification, however, since the decision to not comply leads to employer hiring decisions premised on a lower price for labor and, therefore, an incentive to hire more workers. Bringing the change in employment arising from noncompliance into the calculation means that both the benefits received from non-compliance include both changes in profitability to the firm arising from noncompliance and changes in harms in the net social welfare for those who are underpaid as well as for those who might not be employed if the firm complied with the law.

[20] This is at best a minimum estimate: as above, the reduced labor costs arising from such discrimination changes the basis of hiring decisions by the firm. Different models of discrimination and assumptions about the

Still, the benefits-received and harms-inflicted measures might differ significantly: failure to provide workers information under OSHA's hazardous communication standard might provide only nominal direct benefits to an employer (and, therefore, call for only a small penalty under the benefits-received model) but impose large costs from additional risks born by workers unaware of their exposures as a result of noncompliance. In general, any regulation that involves amelioration of an externality may imply penalties far larger from a harms-inflicted perspective than from a benefits-received perspective.

How well can the NLRA affect the behavior of employers or unions given that penalties *per se* are eschewed and remedies under the Act are grounded in making the worker whole? Section 10(c) of the Act states this as the principal authority of the Board in the face of unfair labor practices:

> If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair

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operation of the surrounding labor market have implications about the economic benefits (if any) arising to the firm from discriminatory practices. For example, under assumptions of competitive labor markets, discriminatory practices drive up (not down) the marginal cost of labor, requiring employer's to pay extra for discriminatory tastes. (For example, they pay a premium in not allowing workers access to jobs because of their characteristics even when those workers' marginal productivity would make them more attractive than other workers.) In this case, the benefits-received model implies that restitution of discrimination will lower costs through the elimination of such practices. For a summary of models, see Lang (2007).

> labor practice, and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this Act.[21]

If one thinks of remedies as *de facto* penalties, then those described in 10(c) imply a penalty policy rooted in a benefits-received model—that is, that the benefits for noncompliance (committing an unfair labor practice) can be seen as roughly equivalent to the losses imposed on those parties directly affected by the unfair labor practice (for example, the workers who are dismissed because of involvement in an organizing campaign or who quit because of intimidation by a union). As we discuss below, rooting remedies in a benefits-received rather than harms-imposed model results in *de facto* penalties that are far below those required to "effectuate the policies of this Act."

Addressing clear and present risks

The above discussion does not account for another dimension of penalty (or remediation) policy which may be important in cases involving clear and present risks or dangers or in which the persistence of violations could undermine public policy objectives. In this subset of cases, optimal policy has an important time dimension, in that it needs not only to change behavior, but also to distinguish between minor and major violations. This aspect of penalty policy is most explicitly recognized under MSHA: violations with a higher gravity—in terms of the severity of violations (defined by the number of lost work days associated with them), persons potentially affected, and likelihood of occurrence—have higher penalty levels associated with them. For example, for a large, underground coal operator, a violation involving no lost work days, fewer

[21] 29 U.S.C. § 160(c).

than 10 workers exposed, and an unlikely occurrence of the event at which the standard is directed would be between $100 and $125. If the same standard violation involved potentially disabling injuries, more than 10 workers, and a high likelihood of occurrence, then the penalty would be closer to $20,000.[22]

Both safety and health acts and a variety of workplace regulations overseen by the Employee Benefits Standards Administration also provide for a penalty per day that violations remain present, after the time set by the agency for abatement or compliance has been past: $7,500 per day for the Mine Safety and Health Act; $7,000 for the Occupational Safety and Health Act; and $1,100 for the Employee Benefits Standards Administration. The concepts underlying these daily penalties relate to the dangers or harms potentially faced by workers for each day that a cited violation persists.

If the problems arising from the violation are consequential enough that a failure to redress them promptly thwarts the public interest, then recourse beyond penalties under some statutes is also set out. MSHA is a prime example, not surprisingly, given the tremendous risks prevailing in underground mining. Its section 104(b) states that in a follow-up inspection, if its official finds that a violation has not been abated within the time required (and that there is no basis for further extension), then the official can order that the operator "immediately cause all

[22] The Mine Safety and Health Act has an explicit and detailed point system for scoring violations, made up of 12 criteria laid out in the U.S. Code of Federal Regulation. See 30 CFR 100.3(b)-(f), which is a series of tables laying out the point system, and 30 CFR 100.3(g), which converts the points into an actual penalty amount that goes up to the statutory maximum of $70,000. The above example assumes no negligence and no prior violation history of the particular mine operator in both cases.

persons . . . to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary [of Labor] determines that such violation has been abated."[23] The Act also provides the Mine Safety and Health Administration the authority to determine whether an imminent danger requiring immediate redress exists.[24] In general, violations that threaten health and safety or inflict significant damage on policy aims have this characteristic, and an optimal penalty policy may require a separate authority to invoke.

Other workplace laws provide means to address the persistent and time-sensitive violations that undermine their basic aims. The Fair Labor Standards Act allows the Wage and Hour Division to embargo goods produced when the employer has significantly violated minimum wage or overtime requirements or has used child labor. The provision has been commonly employed in the garment industry, where a manufacturer can have its goods embargoed (held from being sent, for example, to a retail customer) because a contractor to that manufacturer violated one of the standards. (See Weil 2005 for a discussion of this provision.) The embargo authority has also been applied to other industry segments, most commonly, to agriculture (Leonard 2000).

Another powerful tool to address significant breaches of workplace statutes, perhaps without the time dimension underlying the above examples, but Lin which the fundamental purpose of the law is perceived to be thwarted due to continued violation, is the use of the federal government's role as a major customer for services. This includes workplace policies covering

[23] PL 91-173, Sec.104(b).

[24] Sec. 103(a).

federal contractors, like discrimination laws administered by the Office of Federal Contractor Compliance Programs or the Davis-Bacon Act's prevailing wage laws for federally funded construction, administered by the Wage and Hour Division of the Labor Department. Here, the federal government can threaten to debar the company—that is, deprive it of the right to do work for the government in the future. Given the size of contracts involved, this authority is significant and is wielded, appropriately, under exacting sets of conditions.

The ability to immediately shut down mining operations, embargo the flow of goods in commerce, or debar companies from doing business with the federal government involves the imposition of implicit penalties that far outweigh the explicit penalty policies discussed above. Studies show, not surprisingly, that these implicit penalties have substantial impacts on behavior when invoked. For example, Weil (2005) shows that the behavior of garment manufacturers in response to actual or threatened embargoes suggests an implicit penalty of over $100,000.[25]

The requirement that the NLRB provide reinstatement for those affected by unfair labor practices in the NLRA's section 10(c) (above) suggests that part of the remedy envisioned under the Act recognizes the importance of time in redressing problems. This implies that an evaluation of the adequacy of penalty policies under the Act should include the means by which the Board has to provide for reinstatement in a timely manner, as we discuss below.

[25] See Weil (2005, pp. 243-244). See also Weil and Mallo (2007) for evaluations of the impact of embargoes and monitoring systems on the behavior of garment contractors in New York City and Los Angeles.

Evaluating the adequacy of remedies under the NLRA

Virtually all federal workplace policies have a system of enforcement underlying them. These include a mechanism to surface problems (through complaints, audits, investigations, or combinations of these activities). And they have penalties, remedies, and related financial mechanisms related to the compliance activity of the regulated entity.

Figure 1 provides an overview of the NLRA and other major workplace laws discussed above with respect to key dimensions of their penalty policies. In order to evaluate the adequacy of remedies under the NLRA relative to other workplace polices, we compare major workplace policies regarding the elements of optimal policy described above.[26] In this section, we also evaluate the adequacy of remedies under the NLRA to affect the behavior of management and unions in relation to the Act's objectives. We undertake this evaluation using both data on NLRB adjudication over the past decade and comparative analysis of the law in relation to other workplace statutes.

Underlying basis of NLRA penalties

Unlike other workplace statutes administered by the U.S. Department of Labor, the NLRA does not empower its agency to conduct investigations to assess compliance. Instead, the NLRB merely responds to complaints of unfair labor practices arising principally under the sections described above. This means that the probability of enforcement is largely contingent on the willingness of employees, firms, and unions to step forward if their rights under the NLRA are violated.

[26] See Weil (2010) for a more extensive discussion of the coherence of federal workplace penalty policies.

Since the NLRA itself is rooted in the notion of collective action, many of the problems arising in the use of employees to trigger enforcement under other statutes do not arise here (Weil 1991, 1999, 2005; Budd 1997; Fine and Gordon, forthcoming). Again, unions play the critical agency role if employers commit unfair labor practices and employers do so in regard to allegations of union violations. In this sense, the NLRA is similar to the Mine Safety and Health Act in that workplaces where there have been violations are almost assured an investigation (in the mining law's case, because the law requires a minimum of four inspections per year for all underground mining operations). In contrast, only a small fraction of workplaces will receive an investigation under the FLSA, OSHA and other workplace laws listed in Figure 1.

The high probability of response to an alleged violation means that the incentives for specific or general deterrence are rooted in the magnitude of the penalty itself. As noted above, in the case of the NLRA, penalties consist of the remedies for violations of the Act. These remedies have two components. First, the remedies for unfair labor practices committed by employers (sections 8(a) (3), 8(a) (4), and 8(a) (5)) are reinstatement and provision of lost back pay for the appropriate period[27]. That is, if the NLRB (or an administrative law judge) finds that workers were dismissed because of their union activity or in exercising their rights by reaching out to the NLRB, then the remedy is the amount of back pay owed the workers from the time they were dismissed until they were reinstated minus any earnings received from employment in

[27] We do not explicitly include 8(a)(1) or 8(b)(1) violations for either management or labor since they are overarching violations not attached to a specific deed committed by either management or labor against an individual. These provisions are added to all other charges by the NLRB automatically because any such violations are considered to have necessarily "restrained or coerced" employees' Section 7 rights under the Act.

the interim (not including unemployment compensation). Similarly, if workers leave employment because of intimidation by a union in the course of a campaign, during bargaining, or for related reasons, then the penalty facing the union is to make whole the losses incurred by those workers. The NLRA only provides for explicit penalties in the case of contempt or defiance of a judicially enforced Board order. The magnitude of *de facto* penalties is, therefore, largely determined by the number of workers affected by the unfair labor practice and the amount of time that the action led to a loss of compensation. The Act does not include an ability to file class action lawsuits for groups of individuals who may have been intimidated by employer actions.

The basic rationale for this omission is that the underlying harm is associated with lost wages, so the remedy should reflect this. In terms of the deterrence model embodied in the remedy, this would imply that a company weighs its decision to comply largely on the basis of compensating workers who were dismissed for the organizing activities, the amount of their lost wages (but not benefiting from their services over that time period). If the harms inflicted on society by the unfair labor practice are greater than the lost compensation (that is, as in equation (5), $H > W$), then the penalty policy underlying the NLRA will be insufficient to deter unfair labor practices to the extent that is socially desirable.

These characteristics of remedies under the NLRA make them somewhat similar to penalty structures under the Fair Labor Standards Act and the Employee Benefits Standards Act as well as under various federal policies dealing with workplace discrimination. The primary penalty is built around recovery of the wages owed the worker as a result of the violation. For example, the Fair Labor Standard Act's reliance on recovery of back wages (and to a far lesser

extent, liquidated damages) and only nominal civil monetary penalties suggests an underlying model of noncompliance driven by the gains received by an employer by failing to meet pay obligations. This makes some sense given that the spillover consequences of this sort of provision of workplace laws are likely to be relatively small.[28]

This rationale for NLRA remedies contrasts with that for safety and health acts and other statutes listed in Figure 1, in which penalties represent a charge related to committing the violation of the law or standard itself. The criteria for successively higher safety and health penalties primarily center on the assessed gravity, or severity, of the violation. Judging the severity of the violation requires the inspector to assess the probability that the violation could lead to an injury or illness, the severity of that potential injury or illness (for example, a lost work day or death), and the number of workers potentially affected by it. In addition, the penalty reflects the underlying behavior of the employer: did the violation arise from an error or poor information, or was it done "knowingly and willingly"?

These criteria primarily regard the potential harm to workers arising from the employers' failure to follow safety and health standards. This harm-based rationale is important and consistent with the notion that those statutes address workplace externalities. The implied size of externalities differs dramatically in the sense of the degree to which they rise with violations. Even more, the variety of industries and workplace risks covered by the Occupational Safety and Health Act would suggest that a far more nuanced set of guidelines that reflect the very different

[28] An exception to this basis for penalties under the Fair Labor Standards Act is the logic driving maximum penalties available under the law—violations of child labor that could endanger young people.

size of externalities in industries like construction and financial services should guide penalty-setting using a harm-based approach.[29]

Magnitude of remedies for NLRA violations

Given that remedies are rooted in reinstating and making whole workers whose rights have been violated under the NLRA, the magnitude of remedies is important to analyzing their potential impact on employer behavior. For some perspective, we add a column to Figure 1 listing the maximum penalties under other federal statutes as well as those under the NLRA. One striking contrast to note is that other workplace statutes—even those like the Fair Labor Standards Act which, like the NLRA, is primarily based on recovery of back pay—provide for explicit, maximum penalties for certain types of violations, separate from remediation of lost compensation. The NLRA has no such provision.

Academic studies and government reports have attempted to estimate the size of the penalties imposed for violating the NLRA. The implied penalties for violating the Act in these studies range from about $3,000 to between $10,000 and $15,000 (Kleiner, McLean, and Dreher 1988 and Commission on the Future of Labor Management Relations 1994). Unlike previous reviews of the remedies under the Act, we here disaggregate the various substantive sections of

[29] Note that the basis for penalties could (but does not) follow a benefits-received view of noncompliance. Such an approach would reflect, for example, the relative costs of complying with different standards (installing scaffolding; machine-guarding equipment; providing proper ventilation) and basing an assessment on the amount saved by the employer by failing to follow those standards. Such an approach is hardly antithetical to a regulatory agency: in fact, the Environmental Protection Agency has explicitly used it since the 1980s (Lear 1998; Libber 1999; EPA 1984a, 1984b, 2004).

the Act by the major violations and show how they have varied over time. Our approach provides a much more detailed and comprehensive analysis of the remedies than do previous examinations.

The four substantive sections of the NLRA that are most likely to be violated by management are sections 8(a)(2), which charges that a union is dominated by the employer; 8(a)(3), which focuses on violations of discrimination for union activity by employers; 8(a)(4), which includes violations for discrimination by an employer for providing testimony to the NLRB; and 8(a)(5), which involves violations by management for failing to bargain in good faith with representatives of labor organizations.[30]

Table 2 shows the number of individuals and citations for violations of each section of the NLRA for the 10-year period from 2000 through 2009. The largest number of violations occurred for section 8(a)(3), with 1,355 citations (about 56% of all violation types presented in the table) and more than 29,000 employees involved. Section 8(a) (5) had the largest number of individuals involved during the period of our data, with more than 43,600 workers receiving back pay from NLRB judgments.

In Table 3, we show the average— mean and median— costs of violating the NLRA over the 10-year period from 2000 through 2009 for both management and labor union violations, measured in terms of back pay per individual and per citation (with the latter being almost

[30]We thus focus on the costs and remedies of these violations by firms and labor organizations against individuals.

always a violation by a firm or a union).[31] The largest penalties per individual are for cases in which individuals were discharged for testifying or providing information to the NLRB (section 8(a) (3)), with a mean penalty of more than $29,000. The highest mean dollar violation per citation, however, was for violations arising from company-dominated unions or bargaining over wages, hours, and terms and conditions of employment outside the prescribed guidelines of collective bargaining (section 8(a) (2)). Violations of the Act by unions (sections 8(b) (2) and 8(b) (3)) resulted in much smaller fines per individual and per citation. Although not an explicit part of our analysis, we also give the values for 8(a)(1) violations at the bottom of the table.

There was considerable variation in the amount awarded to individual workers by NLRB administrative law judges, by both years adjudicated and section of the Act. Table 4 shows the values for each year and section of the Act as well as the mean and median amount of back pay per worker during 2000-2009, adjusted by the consumer price index over that 10-year period. The data do not include settlements between the parties that may have occurred in anticipation of an award. (Those settlements remain private.) Nevertheless, the data do provide a guide for what both labor and management may perceive as an upper bound for an award that goes to an administrative law judge.

Over the entire 10 years, for section 8(a) (3), the most frequently violated section of the law against individuals; the median back pay per worker was close to $11,000. The next column

[31] The period 2000-2009 has the most accurate available data on dollar remedies and duration of cases in digitally readable form. Although we have access to data from the 1990s, the number of cases and the accuracy of the data for those years are questionable.

provides similar estimates for section 8(a) (4), which protects workers from discrimination because they provided testimony to the NLRB. The table shows median awards for individuals of about $15,000 (ranging from about $3,500 in 2009 to more than $57,000 in 2005). The other sections of the Act had much lower settlements. The median levels of back pay for sections 8(a) (2) and 8(a) (5) (both involving violations by management) are about $7,100 and $8,400 (ranging from about $2,000 to nearly $22,000). For 8(a)(5) these violations would generally be management making unilateral decisions during the course of negotiations or taking unilateral actions during a period covered by a collective bargaining agreement that may also involve individual workers. We also give sensitivity estimates of the back pay for violations when only single sections of the NLRA are violated in the footnotes of the Table.

Consistent with the move to level the labor management relations playing field following a spike in strikes and labor disputes after World War II, the Taft-Hartley provisions of the NLRA also provide for penalties against unions that violate individual workers' rights under the Act. Under section 8(b) (2), unions can also be found guilty of attempting to cause an employer to discriminate against employees for their lack of participation in union activities. Section 8(b) (3) is a violation of a union refusing to bargain collectively with an employer. (Although other potential actions by unions against businesses—such as secondary boycotts, picketing, or refusing to handle any product of any other employer—are violations and may involve many workers and large awards, since they require payment of lost earnings of the firm due to the job action, they were not included in our data, which focus on an analysis of violations against individuals.)

An overview of the violations and their costs was presented in Table 2, but the yearly estimates of costs in terms of back pay per individual are given in the final two columns of Table 4, which provide yearly values adjusted by the consumer price index. For section 8(b)(2), where the NLRB or courts found the unions guilty of violating the Act, the median back pay per individual during 2000-2009 was just under $12,000 (ranging over the years from a few thousand dollars to more than $55,000 in 2004). Given the relatively few violations of these provisions, it is not surprising that the spread is so large. Similarly, the final columns of Table 4 show violations by unions for failing to bargain in good faith, and they show even larger variations. The median dollar amount of violations for individuals was only $836 (although the mean was about $6,700 given the high back pay remedy in 2003).

How far do these calculated remedies in Table 4 go in regard to making affected workers whole? (That is, how large are median penalties with respect to the lost earnings experienced by workers?) For workers, the loss of a job is large in comparison to the back pay awarded by an NLRB administrative law judge long after the violation occurred. We do not have direct evidence of the replacement rate of these awards (that is, the amount of back pay settlements relative to the lost earnings of affected workers). However, Brudney (2010) provides estimates which suggest that a significant percentage of workers who ultimately received back pay remedies were not fully compensated for lost earnings, less the amount earned through interim employment. He estimates that 43 percent of all employees receiving back pay through formal Board orders received an amount less than what those workers' case files would indicate would

fully compensate them for the earnings loss they experienced.[32] Older studies also indicate that a significant percentage of employees who were found to have been unlawfully discharged and won the right to be reinstated did not ultimately return to their employers or returned only briefly. This implies longer term disruptions to earnings profiles arising from the discharge that would also not be recovered via the back pay award method used by the Board (U.S. General Accounting Office 1982; Kleiner 1984).[33]

Evaluating penalties as deterrence

What is the impact of remedies under the NLRA as a spur to changing employer behavior (that is, as a means of specific or general deterrence)? Answering this question requires consideration of the magnitude of costs that penalties represent relative to the benefits of non-compliance, as depicted in the model earlier in the paper. As we discuss below, the back pay

[32] The percentage of employees who do not receive full compensation for lost earnings because of an employer action found to be in violation of the NLRA varies according to the process of resolution, going from 20 percent of all cases for non-NLRB settlements to 15 percent for informal settlements and to 39 percent of all cases where a court ordered the settlement. Brudney's estimates are for fiscal year 2006 closed cases involving an unlawful employer discharge, where a final payment had been made to affected individuals, and are based on a comparison of the final amount actually paid to the full amount originally calculated by the regional Board office, deducting for interim earnings from other employers during the period of discharge. See Brudney (2010, Table 3, and generally, pp. 22-32).

[33] In particular, the U.S. GAO (1982) found that 58 percent of workers fired for union activity and then reinstated by the NLRB were no longer working for their employers within one year and that 29 percent of those workers were fired again.

remedies tend to be small in comparison to the perceived and actual gains by management of reducing the influence of a union or stopping an organizing drive (Freeman and Kleiner 1999).

To more fully understand the influence of the law on firm behavior, we present an analysis of the costs to firms of violations of the NLRA by citation (which represents firm-level penalties). Table 5 presents the results by the major sections of the law by citation rather than the amount an individual worker would receive. These dollar values may reflect the costs to the firm of a strategy of trying to stop an organizing drive (8(a)(3) or 8(a)(4)) or weaken the union during the collective bargaining process (8(a)(5)) or the costs to the unions of disciplining their members or weakening an employer's bargaining position (8(b)(2) and 8(b)(3)). They do not include the costs of attorney fees or indirect costs such as the potential lost output due to a drop in productivity within a firm.

The first column of Table 5 shows that the median citation to firms for violations of section 8(a) (2) was more than $140,000 over the 10-year period.[34] The median monetary awards ranged widely during that period, from about $48,400 in 2005 to nearly $4,400,000 in 2007. The second column shows similar data for the most widely used part of the NLRA, section 8(a) (3). There the median citation over the study period was about $206,500, ranging from nearly $83,000 in 2008 to about $503,000 in 2005.

In contrast to other violations against individuals, section 8(a) (4) focuses on violations against individuals for their participation in NLRB procedures. Median citations for these violations equaled approximately the same amount as for 8(a) (3), around $216,000 (but with a

[34] Here, as elsewhere, we primarily use median rather than mean figures for remedies.

wider range, from $51,000 in 2003 to $750,000 in 2005). The composition of the payouts is largely determined by the number of individuals involved in the case and their previous earnings.

Finally, citations for section 8(a) (5), the provision that focuses on good faith collective bargaining and the law, had the highest median citation, about $473,000. This section of the NLRA is the most widely used and has coverage for the largest number of individuals. During the 10-year period for which we were able to get data from the Board on decisions, the highest value for this section was more than $784,000 in 2004. In contrast, the lowest value was about $228,500 in 2001. This reflects in large part the larger coverage of workers per case in this section of the Act.

Union violations of worker rights were less numerous than employer violations over the study period, and median citations on unions were much lower. The final two columns of Table 5 present similar data to that shown for management violations of the NLRA for violations of section 8(b) (2). This section of the Act focuses on union discrimination against individuals for their participation in union activities. Given that there were fewer cases, it is not surprising to learn that there were wider swings in the dollar payouts and in the duration of the awards from claims to settlement by the Board. The median citation over the period was about $55,000, varying from slightly more than $12,000 in 2000 to almost $360,000 in 2006.

The least used section of the NLRA was section 8(b) (3), which deals with union failure to bargain in good faith. The median back pay per citation equaled only about $25,000 for the five years with citations. There were no rulings by the NLRB on this provision for the years 2000, 2004-2006, or 2008. Citation levels ranged from only about $200 in 2007 to $102,000 in 2009. These values should be read with much care because of the extremely small number of

citations that were settled in each year and the small number of workers involved (135). We also give sensitivity estimates of the back pay per citation when only single sections of the NLRA are violated in the footnotes of the Table.

Do the penalties presented in Table 5 translate into an incentive to change behavior—that is, do they reduce the likelihood of worker rights under the Act being violated? Unlike safety and health act penalties, which consider the spillover elements of a violation (by accounting for the number of workers potentially affected by the violation), remedies under the NLRA do not account for losses incurred by workers who were impacted by a thwarted election procedure or collective bargaining attempt. Unlike the Fair Labor Standards Act, which provides for civil monetary penalties for repeat offenders, or the safety and health acts, which allow a direct modification of penalties due to patterns of noncompliance, the NLRA penalty policy also does not explicitly escalate penalties due to past violations of the Act (although there might be related remedies, such as fines for failing to follow the Board's ruling and injunctive relief under circumstances we discuss below).

However, even if back pay fully compensated workers who were unjustly dismissed for exercising rights under the NLRA,[35] the basis for the penalty itself is at odds with what is required if the intention is deterrence. Using back pay as the primary basis for penalties makes sense under the Fair Labor Standards Act, since the benefits received by an employer from non-compliance arise from the savings from paying below-statutory minimum wage or overtime requirements. Penalties based on back wages (and adjusted to reflect the probability of detection

[35] As noted above, the Brudney (2010) results suggest that the back pay awards probably do not always meet even this objective.

and the prior compliance history of the employer) make sense given the labor standards compliance decision.

Table 5 results suggest that the expected costs to an employer over the past decade of attempting to thwart a unionization drive (thereby violating 8(a) (3)) are around $200,000. In contrast, the benefits of thwarting unionization—that is, the cost savings arising from continued operation as a nonunion enterprise—are potentially much larger, since they include the present value of future increases in wages and benefits arising from unionization as well as other resulting transfers of surplus from shareholders and owners of the firm to the workforce.

As an illustration, imagine a 200-person company in which current employees receive total compensation of $30,000 each year. By thwarting a union drive that would make prospective annual compensation grow annually by 5 percent rather than 2 percent without a union, the company would save about $6.8 million over the course of 10 years.[36] The voluminous literature on union effects on wages and benefits provide more systematic evidence that the potential benefits of union avoidance are very large relative to the small costs portrayed in Table 5.[37]

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[36] This estimate represents the present value of the difference in compensation costs between compensation increasing at a 2 percent rate versus a 5 percent rate over the 10-year period, with a discount rate of 5 percent over the period assumed.

[37] Even more, research by Logan (2002, 2007) indicates that firms are willing to expend significant resources for union avoidance, at times far in excess of the probable wage and benefit costs of unionization. This implies an even higher upper bound on the potential costs of compliance from an employer's perspective.

Since the benefits of union avoidance dwarf the costs of paying back wages to those workers directly caught in the cross hairs of union avoidance through unfair labor practices, the benefits of noncompliance are clear. Many scholars, going back to Weiler (1983), Freeman and Medoff (1984), and Gould (1993), have made similar arguments.[38] However, we emphasize that the incentives to commit unfair labor practices to thwart the NLRA arise from the basic structure of its *de facto* penalty policy, rooted as it is in the notion of making whole only those workers directly affected by unfair labor practices rather than reflecting the wider harms inflicted through those actions.

It is less clear how the penalties shown in Table 5 affect union behavior. The much lower back pay per citation for union unfair labor practice cases suggests that the prospective costs of violation are also lower for unions, which, in and of itself, would increase the incentives for noncompliance. However, recall also the very low incidence of citations brought against unions for unfair labor practices during the period 2000-2009 (Table 2): only 58 citations for 8(b)(2) violations and a scant 6 for 8(b)(3) citations. The average number of workers receiving back pay per case was also much smaller for these unfair labor practices (ULP) relative to those

[38] In his assessment of the adequacy of remedies under the NLRA more than 25 years ago, Weiler (1983, p. 1789) notes that "at first blush, the back pay award might seem to serve both remedial and deterrent functions. Although from the employees' point of view the award is merely compensation for what has been lost, from the employer's point of view it is a financial penalty: the employer is required to pay for services it has not received. The problem is that this 'fine'—paid to the worker rather than the state—is far too small to be a significant deterrent."

committed by management.[39] This would suggest either lower recourse to the NLRB for such cases or a lower incidence of violations. The fact that the study period occurred largely during 2000-2009, a period when the federal government placed great scrutiny on union activity in general, would suggest the latter explanation.[40]

Given the relatively low costs of violating the NLRA by firms and the potential benefits of stopping a union during an organizing drive (that include a lower wage bill and fewer constraints on management in the allocation of labor resources), it might not be surprising to find that violations of the Act are high or increasing. Recent studies document the increase in violations and their consequences on election win rates and the completion of first-time collective bargaining agreements (for example, Flanagan 2005; Freeman 1985, 2005; Ferguson 2008).

As further illustration of the incentives for noncompliance under existing penalty policies, we examine data on the relative growth of two groups of workers from the early 1950s to the period 2006-2009: workers who were fired and then offered reinstatement to their prior jobs as a result of NLRB actions and all workers who voted in favor of unions in NLRB elections. Figure 2 presents the ratio of these two groups of workers.

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[39] The median number of workers receiving back pay per case for the entire 2000-2009 period varies widely across NLRA sections, but is consistently smaller for union violations:

Management ULPs:8(a)(2): 117, 8(a)(3): 2458, 8(a)(4): 185, 8(a)(5): 3820; Union cases—8(b)(2): 26, 8(b)(3): 1.

[40] This is particularly illustrated by increased reporting requirements and enhanced enforcement of them under the requirements of union financial disclosure required by the Labor Management Reporting and Disclosure Act (29 U.S.C. Section 401). See Fung, Graham, and Weil (2007, pp. 199-201).

The ratio has increased strikingly over five decades: only about 1 in 200 workers who voted in favor of a union were fired in the 1950s. In contrast, during the last 10-years, the ratio has been close to 7 in 200, suggesting a sevenfold increase in management resistance to unionization since the 1950s. These results show that management has, at a minimum, been deterred less and less from using terminations to try to stop union organizing (Freeman 1984; Kleiner 2001). The correlation between the increase in terminations by employers and the decline in unionization over the same period underscores the relationship between the two trends.

In essence, the penalties in Table 5 for employers represent relatively small costs that do not reduce their reluctance to use discriminatory activities to try to stop organizing drives. These results are also consistent with survey results by Freeman and Rogers (1999) indicating that while 32 percent of nonunion workers and 90 percent of current union workers would vote for a union in the private sector, only 7.6 percent of private sector workers belonged to a union in 2008 (Farber and Krueger, 1993, Freeman and Rogers 1999; Bureau of Labor Statistics 2009).

Developing an economically rational penalty approach

The rationale for NLRA remedies is closer to the benefits-received rationale than the harms-inflicted rationale. Because the harms inflicted by unfair labor practices go beyond the workers directly affected by discharge, this means that the Act's remedies are likely to be ill-suited to a deterrence-based objective of curbing behaviors that thwart the ability of workers to make free choices regarding workplace representation.

Section 10(c) of the NLRA provides the NLRB with an ability to order parties to "cease and desist from such unfair labor practice, and to take such affirmative action including

reinstatement of employees with or without back pay, *as will effectuate the policies of this Act"* (italics added).[41] An interpretation of the italicized phrase is that the Board has authority to pursue penalty policies that could go beyond making affected workers whole and potentially allow for a more deterrence-oriented approach. Jumping off from this notion, Brudney (2010) argues for changes in the administration of penalties to push the Board to draw on its ability to set mandatory remedies in response to violations of the Act, thereby raising expected penalties. He argues that the U.S. Supreme Court in its *Phelps Dodge* decision of 1941 implies that the NLRB can pursue objectives beyond repairing injuries in setting back pay levels:

> The majority opinion in *Phelps Dodge* relies heavily on the Board's expansive powers to remedy unlawful employer discrimination—not only through the "limited function" of repairing private injuries but also by acting "in a public capacity to give effect to" the law's declared public policies, including "safeguarding… the right of self-organization."[42]

Brudney goes on to describe an approach to setting mandatory minimum back pay awards that would not require, in his view, changes to the statute since they draw on authority already granted to the NLRB. The mandatory minimums would provide that "employees discharged as a result of unlawful employer discrimination should receive at least one calendar quarter of back pay, to be awarded without regard to net loss or mitigation efforts."[43] In a related

[41] 29 U.S.C. § 160(c).

[42] *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941) at 193, cited in Brudney (2010, p. 5).

[43] Additionally, he advocates that "unlawfully discharged employees whose liability or backpay determination is litigated to the Board or appellate court stages should receive at least one year of back pay, again in

vein, the Board recently announced its decision to require that back pay awards should be adjusted to account for compounded (rather than simple) interest between the time the earnings losses occurred and the time the award was made to the worker.[44]

In contrast to other statutes listed in Figure 1, the NLRA's penalty scheme does not provide for escalating penalties in light of past behavior of an employer or union, nor does it allow for consideration of ancillary impacts ("harms-inflicted" in the terms described above) in setting penalties to better serve deterrence ends—even given a broad reading of 10(c). Brudney's (2010) mandatory minimum penalty idea and the proposed NLRB policies on interest could possibly redress the fact that individuals are not usually made whole under existing procedures. But it seems a stretch that these changes could sufficiently increase expected penalties to the extent required from a deterrence perspective. In fact, even the substantially increased penalties incorporated into the recently proposed Employee Free Choice Act in the

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unreduced form." The mandatory minimum penalties are modeled on cases involving the failure of employers to bargain in good faith regarding plant closures (Brudney 2010, pp. 3-5).

[44]The new policy is in the decision *Jackson Hospital Corp. d/b/a Kentucky River Medical Center.* (356 NLRB. No. 8, at 4–5, released 10/25/10). In it, the Board determines that compound rather than simple interest better achieves the Act's intent of "making employees whole." In the decision, the Board reasons that compound interest comports with current practices of private lenders, such as credit card companies, as well as many monetary obligations imposed by federal law, such as under the Internal Revenue Code. The policy also applies retroactively to current pending cases.

U.S. Congress would reduce, but not close, the yawning gap between the benefits and the costs of noncompliance.[45]

An alternative approach is to look at remedies linked to reducing the time between allegations of violations of the NLRA and rulings by various levels of the NLRB. As discussed earlier, many public policies have special procedures separate (or in addition to) penalties to deal with imminent dangers posed by violations or in response to major or repeated violations of workplace laws (as displayed in the final column of Figure 1). Most strikingly, the Mine Safety and Health Act provides for mine closures in the event of failure to remediate dangerous conditions.

In the case of the NLRA, the objective of allowing employees to freely choose collective bargaining through a fair election requires that the election process move ahead in as unobstructed a manner as possible. As many have noted for several decades, the time required to process violation claims has significant impacts on election outcomes, with longer delays leading

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[45] The Employee Free Choice Act (111th Congress, H.R. 1409, S. 560) proposes two important changes to NLRA policy. First, it would increase the amount an employer would be required to pay in cases of illegal employee discharge or discrimination during an organizing campaign or first contract drive to become two times back pay in the form of liquidated damages, in addition to the back pay owed (that is, treble damages for violations in these cases). Second, it would create civil penalties of up to $20,000 per violation against employers found to have willfully or repeatedly violated employees' rights during an organizing campaign or first contract drive. Together, the proposals would move the penalty model underlying the NLRA to one closer approximating the harms-inflicted approach and potentially raise deterrent effects appreciably.

to diminished likelihood of election (and first contract) success.[46] Delays in processing unfair labor practices during 1960-1980 are cited by Weiler (1983) and by Gould (1993).

Our own evaluation of NLRB data also suggests significant delays between the filing of claims and their resolution by the Board. Table 6 presents the total time that elapsed between the filing of initial claims and final decisions by the Board in those cases under the six major sections of the NLRA between 2000 and 2009. For violations by employers, the median ranged from 6.1 years for 8(a) (4) cases all the way up to 7.2 years for 8(a) (2) cases. The median delay for union violations cases was shorter for 8(b) (3) violations—3.8 years—but about 6.4 years for 8(b) (2).[47] . We also give sensitivity estimates of the durations between the initial claim and the decision for unique citations when only single sections of the NLRA are violated in the footnotes of the Table.

Brudney (2010, p. 29, Table 1) provides estimates for time requirements of earlier steps of the process during the period 2004-2008.[48] First, he shows that the average number of days from the time a worker is fired to the time the worker receives back pay ranges from 270 days

[46] Weiler (1983, p. 1788) notably remarks that "if the employer's purpose had simply been to punish the worker for supporting the union, the fact that the law would effectively undo this damage at the employer's expense might discourage the use of the tactic in the future. But the real purpose of such discharge is to break the momentum of the union's organizing campaign."

[47] The data in the tables are for claims that were ultimately decided by an NLRB administrative law judge, the Board, or an appellate court.

[48] Brudney (2010) does not provide separate estimates for violations of different sections of the Act as we do in Table 5.

for cases handled via a non-NLRB settlement (that is, an agreement between the parties reached through the intervention of the Board regional office) to 537 days for cases requiring an informal settlement agreement involving the Board staff to about 1,735 days (4.75 years) for cases decided by the NLRB to 2,612 days (7.2 years) for cases securing compliance through the courts.[49] Thus, even when back pay restitution is secured through informal settlements, not involving a formal decision by the Board requires, on average, more than a year for resolution.

The long duration between initial claims and ultimate determination depicted in Table 6 underscores the continuing problem of delays. If "justice delayed is justice denied" in workplace elections, analogs to the ability of the Mine Safety and Health Act to close dangerous mining sections; the ability of the Fair Labor Standards Act to embargo goods in the face of egregious violations of child and labor standards; and the ability of the Office of Federal Contract Compliance Programs to debar contractors that flout equal employment requirements are consistent with enhanced penalties for the NLRA. .

The goal of assuring that workers have a right to choose whether they wish to have workplace condition issues resolved through collective bargaining should lead us to pursue policies that quickly stop potential unfair labor practices, reinstate workers, and allow the continuation of election processes pending resolution of the complaint. Once again, there are

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[49] Brudney's estimates use Board charges as the denominator. Brudney (2010, p. 30, Table 2) also presents time estimates calculated on a per affected employee basis. The latter estimates yield even longer durations. For example, the average time between the filing of a charge and receipt of back pay through non-NLRB settlement increases to 351 days; via informal settlement, to 759 days; via compliance with a Board settlement, to 2,229 days; and via compliance with a court, to 3,869 days.

many examples of policies that have been advocated to insure that election processes move rapidly, including those embodied in the various versions of the Employee Free Choice Act.

One avenue to reduce delays within the control of the NLRB is to find administrative mechanisms to triage and resolve cases more quickly so as to hasten elections through informal resolution. This has been a recurring objective of the Board (notably, the Commission on the Future of Labor Management Relations during the Clinton administration). It is not clear, however, how far such a solution can go in reducing the delays shown in Table 6 that in large part arise in the later stages of the administrative process (in particular, the time between an administrative law judge decision and a Board decision).[50] Fundamentally, however, since a significant incentive for the unfair labor practices is slowing the election or negotiation process, it often is not in the interests of the parties to informally resolve complaints.

A potentially more effective response to delays not requiring legislative change is using the NLRB's authority under section 10(j) of the Act to seek temporary injunctive relief in response to unfair labor practice cases. Section 10(j) empowers the Board to petition a federal District Court for an injunction to temporarily prevent unfair labor practices by employers or unions and to restore the status quo, pending the full review of the case by the Board. The section

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[50] It is interesting to compare the estimated delays in processing unfair labor practice claims of Weiler and Gould for 1980 and 1990. In most cases, Gould's figures for 1990 show about the same or slightly reduced time elapsed between filing of claim to complaint; complaint to the close of hearings; and the close of hearings to the administrative law judge decision. However, the time required between that decision and a Board decision increased markedly (from 133 days in 1980 to 315 days in 1990). This is the primary reason that total elapsed time from filing to Board decision rose from 484 days in 1980 to 691 days in 1990.

reflects Congressional concern about delays inherent in the administrative processing of unfair labor practice charges which could frustrate the Act's objectives. In determining whether the use of section 10(j) is appropriate, the Board examines whether injunctive relief is necessary to preserve its ability to remedy unfair labor practices as well as if the violator would otherwise reap the benefits of its violation.

Even absent changes in legislation, the NLRB could invoke 10(j) in a larger number of cases in which violations potentially undermine the conduct of fair elections.[51] Table 7 presents the number of 10(j) cases submitted by regional offices to Washington, D.C. (the first step in the process), the number of requests to pursue relief by the Board's General Counsel, and the number of authorizations for injunctive relief approved by the Board.[52] Gould (1994 notes with

[51] The proposed Employee Free Choice Act would expand the existing requirement for the NLRB to seek a temporary federal court injunction against certain forms of union misconduct (involving "secondary boycotts" and "recognitional picketing") to also include proscribed injunctive relief in cases in which employers discriminate against employees who attempt to organize a union. While the prospects for major legislative changes to the NLRA seem unlikely (for reasons that have long thwarted labor law reform—see Weil 2009), increasing the *volitional* use of existing authority regarding injunctive relief, particularly when there is a pattern of violations on the part of employers, is within the administrative purview of the Board and therefore a more tractable avenue to thwart violations of the law. See Gould (1993, pp. 158-162) for an insightful discussion of this issue.

[52] The figures from 1982-1992 are from Gould (1993, Table 5.3); data for 1992-2006 are from the NLRB and are tabulated by the authors.

alarm the reduction in cases between 1982 and 1991.[53] Although the number of cases subsequently increased during the Clinton administration (during which Gould served as chair of the NLRB), it never returned to the levels in 1982-1983. The number of cases submitted to Washington and that were ultimately authorized fell precipitously during the period 2001-2006, most strikingly in the number of cases submitted from the field; the number submitted in 2006 was less than one-quarter the number submitted in 1983.

Obviously the NLRB cannot rely upon the use of the courts to enjoin behavior as a day-to-day tool of resolving the problems discussed here.[54] But increasing the use of 10(j) commensurate with the growth in violations of the NLRA may be a potential response to that growth over the last few decades. Strategic application of 10(j) could demonstrate the Board's seriousness in thwarting, particularly, patterns of egregious violations or in cases with salience to other current or potential instances of violations (for example, in circumstances which represent a new class of violations that seem antithetical to the aims of fair election processes). In so doing, use of 10(j) could potentially deter some violations by making clear the kind of behaviors

[53] A decade earlier, Weiler (1983, p. 1801) remarked with respect to use of 10(j) that "the Board thus failed to use what was and still is, for preventive as well as for reparative purposes, the most effective weapon in its arsenal."

[54] The statute also makes it difficult to move for injunctive relief in that it requires agreement by the five-member Board after the NLRB's General Counsel has sought such relief. One statutory change pursued in past attempts at labor law reform has been to give regional NLRB attorneys the same right to directly seek injunctive relief (without consent from the Board) for employer violations of the Act that they currently have under section 10(l) for certain union unfair labor practices.

that the Board would not tolerate with respect to their negative impacts on delaying elections or impeding bargaining in good faith.[55]

Conclusions

Remedies (or implied penalties) under the National Labor Relations Act (NLRA) have focused exclusively on the restitution of those directly injured by an employer or by a union in violation of their rights. We have shown that the benefits for individuals of winning a claim under the Act are comparatively small, meaning that the Act often fails to achieve even remediation of those whose rights have been violated. Further, the costs of violating the NLRA to a typical firm are quite small: on average, only about $205,000 for section 8(a) (3), the most violated section of the Act. These expected costs represent a fraction of the benefits to employers (who are much more likely to commit violations against individuals than are labor organizations) from thwarting organizing drives. It is, therefore, not surprising to find that there has been a sevenfold increase in the percentage of violations of the Act by management as measured by the ratio of workers offered reinstatement to their previous jobs under the NLRA remedies as a percentage of workers voting for unions by year under elections supervised by the National Labor Relations Board (NLRB).

[55] The final column of Table 7 suggests that less than half of the cases from the field were ultimately moved forward by the NLRB. However, the potential deterrence effect of injunctions may arise from the volume of activity at the regional level, which might be observed as a signal of Board toleration of patterns of repeated or egregious violations of the Act. In this sense, the fall in 10(j) cases submitted to Washington over time is the most troubling in terms of its diminishing impact on prospective behavior.

While remediation of injuries may be a suitable focus for some workplace policies, it is insufficient for the NLRA given the absence of any appreciable deterrence measure to serve as a complement. It should, therefore, come as no surprise that the Act for decades has been ineffective in curbing behaviors that are antithetical to its fundamental aims. As the parties learned about the low penalties associated with the NLRA, neither labor or management seems to have been bothered by the costs relative to the benefits of violating the Act.

If the objective of the NLRA is to provide workers with a means to freely choose collective bargaining as their instrument of workplace representation, then penalty policies could make sure that reinstatement is quick and that for the cost to either employers or unions of thwarting that choice is great. Our analysis in this article suggests that given the significant incentives for noncompliance, the remedies and the current levels of penalties for the relevant sections of the Act reviewed here, it would take major changes in policies to secure those ends. Changing behavior would be consistent with minimizing delays in the process, whether through exploration of available administrative remedies available to the NLRB or through more fundamental reform of the law to assure compliance.

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Table 1

Percentage of complaints that resulted in citations by the Regional Offices of the NLRB, 2000-2009

NLRA Section		% complaints yielding citations by Regional NLRB Offices
8(a)(2)	Mean	26.2%
	S.D.	4.3%
8(a)(3)	Mean	27.8%
	S.D.	5.0%
8(a)(4)	Mean	26.1%
	S.D.	5.4%
8(a)(5)	Mean	26.1%
	S.D.	3.2%
8(b)(2)	Mean	31.7%
	S.D.	19.6%
8(b)(3)	Mean	17.5%
	S.D.	6.4%

Source: National Labor Relations Board data, analyzed by the authors.

Table 2

Number of NLRA citations and number of individuals receiving back pay as a result, 2000-2009

NLRA section	Citations	Individuals
8(a)(2)	69	8,034
8(a)(3)	1,355	29,128
8(a)(4)	171	3,370
8(a)(5)	768	43,685
8(b)(2)	58	1,404
8(b)(3)	6	135

Source: National Labor Relations Board data, analyzed by the authors.

Table 3

Average values of back pay per individual and per citation, 2000-2009*

	Back pay ($)[a]			
	Per individual		**Per citation**	
	Mean	**Median**	**Mean**	**Median**
8(a)(2)	4,192	7,115	488,053	140,078
8(a)(3)	29,128	10,959	235,519	206,586
8(a)(4)	15,904	15,033	313,423	216,798
8(a)(5)	8,452	8,410	480,783	473,439
8(b)(2)[b]	4,032	11,801	97,601	55,199
8(b)(3)[c]	1,450	836	32,628	25,028

Source: National Labor Relations Board data, analyzed by the authors.

[a] Since 8(a)(1) violations are added to all other charges by the NLRB automatically because any such violations are considered to have necessarily "restrained or coerced" employees' Section 7 rights under the Act we do not explicitly examine them. However, violations where this provision was included for the time period of our analysis for individuals was $9,136 (mean) and $8,716 (median) and for citations the mean was $245,923 and a median of $173,334. There were only 74 8(a) (1) only cases where remedies were awarded over the 10 year period. The awards for individuals were $26,381 (mean) and $19,339 (median) and for citations the mean was $135,460 (mean) and a median of $92,020. The average duration from the time of filing to adjudication was 2,048 days.

*The values are adjusted by the consumer price index by year, with 2009 as the base.
See Tables 4 and 5 for additional notes on these estimates.

[a]For these two sections, the means, medians, and standard deviations are based on only the years which had recorded cases.

Table 4

Back pay per individual, by year and by NLRA section involved, 2000-2009 (in dollars)*

Year case closed	8(a)(2)	8(a)(3) [a]	8(a)(4)	8(a)(5) [b]	8(b)(2) [c]	8(b)(3) [c]
2000	$ 3,147	$ 11,246	$ 13,923	$ 8,584	$ 2,704	$ -
2001	$ 12,978	$ 13,465	$ 19,846	$ 5,700	$ 17,957	$ 6,951
2002	$ 6,069	$ 8,036	$ 7,256	$ 5,845	$ 26,845	$ 596
2003	$ 2,005	$ 11,384	$ 9,331	$ 8,236	$ 32,321	$ 25,028
2004	$ 16,563	$ 15,744	$ 16,142	$ 14,055	$ 55,199	$ -
2005	$ 3,024	$ 26,717	$ 57,738	$ 12,680	$ 8,075	$ -
2006	$ 8,584	$ 9,920	$ 36,381	$ 6,807	$ 2,280	$ -
2007	$ 3,480	$ 5,941	$ 33,000	$ 4,701	$ 11,801	$ 108
2008	$ 21,952	$ 10,041	$ 13,155	$ 13,257	$ 3,621	$ -
2009	$ 8,161	$ 10,671	$ 3,547	$ 12,956	$ -	$ 836
Total, 2000-2009	$ 85,963	$ 123,166	$ 210,320	$ 92,821	$ 160,802	$ 33,520
Mean $ per year	$ 8,596	$ 12,317	$ 21,032	$ 9,282	$ 17,867	$ 6,704
Median $ per year	$ 7,115	$ 10,959	$ 15,033	$ 8,410	$ 11,801	$ 836
Standard Deviation	$ 6,650	$ 5,726	$ 16,655	$ 3,605	$ 17,648	$ 10,619

Source: National Labor Relations Board data, analyzed by the authors. The values are adjusted by the consumer price index by year, with 2009 as the base.

[a] Reported mean and median reflect cases where just 8(a)(3) violations were cited and where both 8(a)(3) and 8(a)(5) citations were cited. Since the NLRB provides an overall remedy and does not separate out back pay for each citation, in those cases where both are cited, the back pay award is included in the tabulation for both sections. Excluding all cases where the employer was cited for both types of violations, the estimated average back pay per individual for 8(a)(3) for the time period is $19,343 (mean) and $16,303 (median). Similarly where there were only citations for only other 8(a) violations the results were as follows for 8(a) (2) $2,842 (mean) and $3,180 median, for 8(a) (4) $8,725 (mean) and $2,008 (median).

[b] Reported mean and median reflect cases where just 8(a)(5) violations were cited and where both 8(a)(3) and 8(a)(5) citations were cited. In those cases where both are cited, the back pay award is included in the tabulation for both sections. Excluding all cases where the employer was cited for both types of violations, the estimated average back pay per individual for 8(a)(5) for the time period is $7,437 (mean) and $5,620 (median), Similarly where there were only citations for only other 8(b) violations the results were as follows for 8(b) (2) $17,931(mean) and $13038 (median) and for 8(b) (3) $8,352 (mean) and $3,894 (median).

[c] For these sections, the means, medians, and standard deviations are based on only the years which have recorded cases.

Table 5: Back pay per citation, by year and by NLRA section involved, 2000-2009 (in dollars)*

Year case closed	8(a)(2)	8(a)(3) [a]	8(a)(4)	8(a)(5) [b]	8(b)(2) [c]	8(b)(3) [c]
2000	$ 53,049	$ 196,225	$ 224,308	$ 393,674	$ 12,166	$ -
2001	$ 102,383	$ 146,338	$ 209,288	$ 228,573	$ 41,044	$ 41,708
2002	$ 381,481	$ 247,932	$ 523,892	$ 391,932	$ 161,072	$ 1,789
2003	$ 82,191	$ 203,673	$ 51,047	$ 298,020	$ 52,521	$ 25,028
2004	$ 139,132	$ 209,499	$ 692,973	$ 784,071	$ 55,199	$ -
2005	$ 48,376	$ 502,945	$ 750,596	$ 675,439	$ 95,103	$ -
2006	$ 141,024	$ 226,309	$ 231,927	$ 354,285	$ 359,899	$ -
2007	$ 4,390,041	$ 337,590	$ 192,792	$ 672,363	$ 39,336	$ 216
2008	$ 190,246	$ 82,774	$ 106,623	$ 647,944	$ 71,515	$ -
2009	$ 497,821	$ 154,238	$ 54,477	$ 553,205	--	$ 102,000
Total 2000-2009	$ 6,025,745	$ 2,307,522	$ 3,037,924	$ 4,999,506	$ 887,856	$ 170,741
Mean $ per Year	$ 602,574	$ 230,752	$ 303,792	$ 499,951	$ 98,651	$ 34,148
Median $ per year	$ 140,078	$ 206,586	$ 216,798	$ 473,439	$ 55,199	$ 25,028
Standard Deviation	$ 1,338,850	$ 116,939	$ 257,593	$ 189,909	$ 106,787	$ 41,661

Source: National Labor Relations Board data, analyzed by the authors. *The values are adjusted by the consumer price index by year, with 2009 as the base.

[a] Reported mean and median reflect cases where just 8(a)(3) violations were cited and where both 8(a)(3) and 8(a)(5) citations were cited. Since the NLRB provides an overall remedy and does not separate out back pay for each citation, in those cases where both are cited, the back pay award is included in the tabulation for both sections. Excluding all cases where the employer was cited for both types of violations, the estimated average back pay per individual for 8(a)(3) for the time period is $91,356 (mean) and $98,946 (median). Similarly where there were only citations for only other 8(a) violations the results were as follows for 8(a) (2) $9,024 (mean) and $9,024 median, for 8(a) (4) $22,800 (mean) and $22,518 (median).

[b] Reported mean and median reflect cases where just 8(a)(5) violations were cited and where both 8(a)(3) and 8(a)(5) citations were cited. In those cases where both are cited, the back pay award is included in the tabulation for both sections. Excluding all cases where the employer was cited for both types of violations, the estimated average back pay per individual for 8(a)(5) for the time period is $710,546 (mean) and $319,430 (median). Similarly where there were only citations for only other 8(b) violations the results were as follows for 8(b) (2) $96,917(mean) and $55,199 (median) and for 8(b) (3) $42,631 (mean) and $33,368 (median).

[c] For these sections, the means, medians, and standard deviations are based on only the years which have recorded cases.

Table 6

Average duration (days) between claim and decision, by NLRA section, 2000-2009

Year case	**Employers**				**Unions[a]**	
	8(a)(2)	**8(a)(3)**	**8(a)(4)**	**8(a)(5)**	**8(b)(2)**	**8(b)(3)**
2000	2,953	2,153	2,235	2,388	2,336	0
2001	2,536	1,968	1,909	2,467	1,908	1,401
2002	2,884	2,331	2,941	2,759	1,403	3,954
2003	2,684	2,578	1,795	2,968	2,004	1,567
2004	2,219	2,215	2,589	2,596	2,999	0
2005	1,454	2,199	2,360	2,081	2,912	0
2006	1,176	1,933	1,523	2,202	3,911	0
2007	2,741	2,369	2,408	2,146	1,489	755
2008	2,059	2,432	2,219	2,522	3,025	0
2009	3,353	2,519	1,277	2,720	0	1,034
Total 2000-2009	24,058	22,697	21,256	24,848	21,987	8,711
Mean days per year	2,405.8	2,269.7	2,125.6	2,484.8	2,443.0	1,742.1
Median days per year	2,609.8	2,273.2	2,227.0	2,494.6	2,335.8	1,401.0
Median years	7.2	6.2	6.1	6.8	6.4	3.8
Standard Deviation	683.4	216.8	502.6	287.9	829.6	1,276.3

Source: National Labor Relations Board data, analyzed by the authors.

[a] For these sections, the means, medians, and standard deviations are calculated only for the years which had recorded cases.

[a] Reported mean and median values in the table reflect cases where there could have been multiple sections per citation. Excluding all cases where the employer was cited for multiple sections, the estimated durations for 8(a)(2) for the time period is 1,750 days (mean) and 1,638 days (median), 8(a)(3) 2,159 days (mean) and 2,056 days (median), 8(a)(4) 1,199 days (mean) and 1255 days (median), 8(a)(5) 2,398 days (mean) and 2,392 days (median), 8(b))(2) 2,426 days (mean) and 2336 (median), and 8(b)(3) 1,991 days (mean) and 1,489 (median).

Table 7

Injunctive relief granted by the National Labor Relations Board, 1982-2006

Fiscal year of requests	Total number of 10(j) cases submitted to Washington	Number of GC 10(j) requests*	Number of Board 10(j) authorizations	Percentage of total requests receiving Board authorization
1982	255	58	53	23%
1983	309	71	51	23%
1984	195	40	30	21%
1985	168	42	38	25%
1986	163	45	43	28%
1987	155	37	37	24%
1988	166	44	43	27%
1989	163	62	62	38%
1990	157	41	39	26%
1991	142	36	38	25%
1992	116	27	26	23%
1993	137	42	42	31%
1994	207	85	83	41%
1995	259	109	104	42%
1996	131	59	53	45%
1997	124	62	53	50%
1998	104	53	45	51%
1999	115	58	45	50%
2000	154	73	68	47%
2001	99	43	43	43%
2002	87	26	16	30%
2003	90	24	17	27%
2004	70	22	14	31%
2005	61	22	15	36%
2006	69	30	25	43%

**Source:* 1982-1991, Gould (1994); 1992-2006, National Labor Relations Board data analyzed by the authors GC refers to general council.

Figure 1

Comparative penalty policies for U.S. federal workplace statutes

Statute	Underlying basis of penalty	Maximum penalties and basis for assessment [a]	Penalty based on benefits received or harms inflicted?	Probability of investigation?	Additional remedies for clear and present problems?
National Labor Relations Act (NLRA) [a]	Reinstatement and back pay for violations of rights	Reinstatement of all workers adversely affected by violation and full back pay compensation.	**Unclear**	**High—Presence of collective agents to identify violations**	**Yes—Temporary injunctive relief requires expeditious relief**
Fair Labor Standards Act (FLSA) [b]	Back wages for violations; civil monetary penalties for repeat violators	• $10,000 and/or 6 months for criminal violations of minimum wage, overtime, child labor, and record keeping laws. • Full back pay and an equal amount in liquidated damages for violations of minimum wage or overtime laws. • $11,000 per violation, or $50,000 per violation if it causes serious injury, for having child labor which violates the FLSA.	**Benefits received**	**Low**	**Yes—Embargo authority for goods paid in violation of Act under some circumstances**
Occupational Safety and Health Act (OSHA) [c]	Penalties related to number worker affected, severity, past behavior of employer	• $5,000 minimum and $70,000 maximum per violation for willful or repeated violations. • Requires a penalty ("shall be assessed") up to $7,000 per citation for a serious violation. • $7,000 per day for a citation has been issued within the period permitted for its correction (and as modified by appeals of the violation to the OSHA Review Commission), where there has been a failure to abate or the violation continues. • Maximum of $10,000 and/or 6 months in prison for willful violation where that violation caused death to any employee, given conviction. • Maximum of $20,000 and/or 1 year in prison for willful violation that caused death to any employee, given conviction and where the conviction is for a second conviction.	**Harms inflicted**	**Low**	**No ability comparable to that of MSHA to close dangerous areas or workplaces**

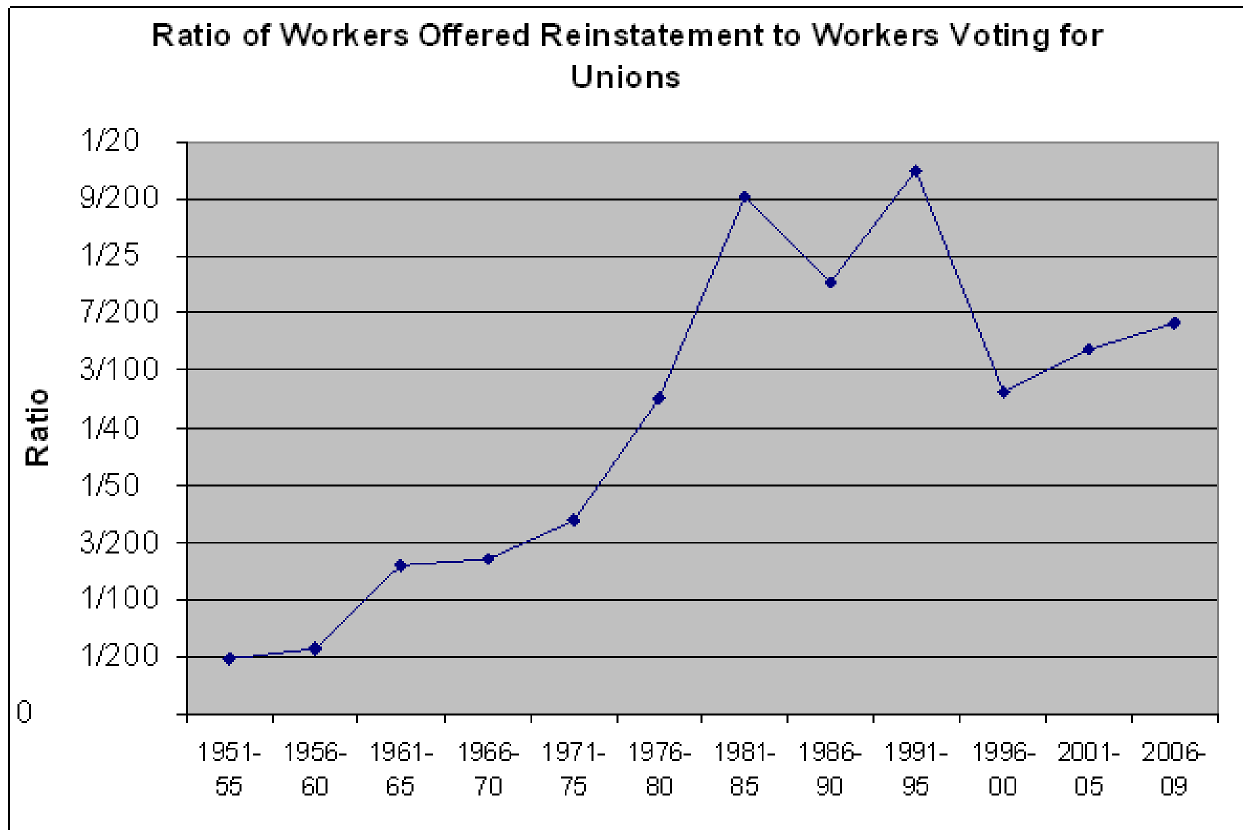
Statute	Underlying basis of penalty	Maximum penalties and basis for assessment [a]	Penalty based on benefits received or harms inflicted?	Probability of investigation?	Additional remedies for clear and present problems?
		• Maximum of $10,000 and/or 6 months in prison for knowingly making false statements, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained.			
Mine Safety & Health Act (MSHA) [d]	Penalties related to number workers affected, severity, past behavior of mine operator	• $70,000 per violation of MSHA standards or other provisions. Each occurrence of a violation of a mandatory safety or health standard may constitute a separate offense. • $7,500 per day for failure to abate a cited violation by the time required by MSHA. • Minimum $5,000 and not more than $60,000 per violation for failure to provide timely notification to the Secretary for the following accidents: (1) The death of an individual at the mine, or (2) An injury or entrapment of an individual at the mine, which has a reasonable potential to cause death. • $220,000 per violation for flagrant failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard that substantially and proximately caused, or reasonably could cause, death or serious bodily injury.	**Harms inflicted**	**High—Minimum number of annual inspections required (2 for above ground, 4 for underground)**	**Yes—Ability to close sections, mines to restrict access to dangerous areas and conditions**
Employee Polygraph Protection Act (EPPA) [e]	Penalties related to employer abuse of polygraph	• $10,000 per violation for employer who improperly forces employee to take a lie detector test. • Civil suit by employee for lost wages for employer forcing improper taking of lie detector test.	**Harms inflicted**	**Low**	**No**
Contract Work Hours and Safety Standards Act (CWHSSA) [f]	Loss of contracting ability with federal government	Loss of contracting ability with government for contractors that have employees work in dangerous or unsanitary conditions.	**Benefits received**	**Medium—Audits of federal contractors**	**Yes—Debarment from federal contracting**

Statute	Underlying basis of penalty	Maximum penalties and basis for assessment [a]	Penalty based on benefits received or harms inflicted?	Probability of investigation?	Additional remedies for clear and present problems?
Family Medical Leave Act (FMLA) [g]	Back pay and liquidated damages	Full back pay and an equal amount in liquidated damages for not allowing an employee leave or somehow injuring an employee who takes leave.	**Benefits received**	**Low**	**No**
Office of Federal Contract Compliance Policy (OFCCP) [h]	Back pay and reinstatement of workers; debarment	Full front pay, back pay for two years before filing, and possible reinstatement for discrimination by federal contractor; mirrors Title VII of the Civil Rights Act.	**Benefits received**	**Medium—Audits of federal contractors**	**Yes—Debarment from federal contracting**
Employee Benefits Standards Act (EBSA) [i]	Penalties related to severity of violation	• $1,100 per day for failure or refusal to provide a document. • $150 per day, $50,000 maximum, for missing or deficient IQPA report. • $100 per day, $36,500 maximum, for significant reporting errors. • $ 300 per day, $30,000 per year maximum, cumulative $180,000 maximum, for failing to file an annual plan report.	**Harms inflicted**	**Low**	**No**

[a] Citations for maximum penalties: NLRA: 29 U.S.C. § 160(c); FLSA 29 U.S.C. 216(a), (b), (e) / OSHA 29 U.S.C. 666(a), (b), (c), (d), (e), (f), (g) / MSHA 30 U.S.C. 820(a); 30 CFR 100.5(c); 30 CFR 100.4(c); 30 CFR 100.5(d) 30 U.S.C. 820(b) / EPPA 29 U.S.C. 2005(a)(1); (c)(1) / CWHSSA 40 U.S.C. 3704(b)(2) / FMLA 29 U.S.C. 2617(a)(1) / OFCCP Executive Order 11246 / EBSA 29 U.S.C. 1132(c)(8); 29 U.S.C. 1132(g)(2)(C)(ii); 29 U.S.C. 1132(c).

Figure 2

Ratio of workers offered reinstatement to workers voting for unions, 1950-2009



Source: NLRB Annual Reports, various years, analyzed by the authors