1998

Labor Law Obstacles to the Collective Negotiation and Implementation of Employee Stock Ownership Plans: A Response to Henry Hansmann and Other "Survivalists"

Jeffrey M. Hirsch

Recommended Citation
Available at: http://ir.lawnet.fordham.edu/flr/vol67/iss3/2
ARTICLES

LABOR LAW OBSTACLES TO THE COLLECTIVE NEGOTIATION AND IMPLEMENTATION OF EMPLOYEE STOCK OWNERSHIP PLANS: A RESPONSE TO HENRY HANSMANN AND OTHER "SURVIVALISTS"

Jeffrey M. Hirsch*

INTRODUCTION

Policy debate in the United States over how best to promote employee productivity increasingly emphasizes the importance of employee ownership of firms. Employee ownership plans, which can vary from those that merely serve as a form of pension to those through which employees undertake a complete buy-out of a firm, have increased in large part as a result of the tax breaks given to these plans. As American business has begun to follow economies such as Japan’s, in which companies seek to capture some of their employees’ information about the production process, viewing this input as part of a superior organizational form, employee ownership has taken a more prominent role in the American workplace.

On a theoretical level, employee ownership may result in significant advantages for firm performance over conventional investor ownership. Evidence reveals, however, fewer employee-owned firms than such theories would suggest, resulting from either overly optimistic or misguided theories or from other factors that may limit the number of employee-owned firms. The “survivalist” critique, as argued most notably by Professor Henry Hansmann, suggests that this paucity of employee-owned firms is evidence of their inefficiency relative to investor-owned firms.¹ This Article contends that labor law may be a limiting factor that creates obstacles to the implementation of employee ownership and control; therefore, labor law may be a reason

---

* Law clerk to Chief Judge H. Robert Mayer, United States Court of Appeals for the Federal Circuit. B.A., 1992, University of Virginia; M.P.P., 1995, College of William & Mary; J.D., 1998, New York University. Special thanks is owed to Professor Samuel Estreicher, who both provided the idea for this Article and gave enormous assistance throughout its development. I would also like to thank Professor Lewis Kornhauser, Professor William Nelson, and Paul Schmidt for their helpful comments. All errors are, of course, my own. An earlier and shorter version of this Article will appear in Proceedings of N.Y.U. 50th Annual Conference on Labor (Samuel Estreicher ed., forthcoming 1998).

¹. See, e.g., Henry Hansmann, When Does Worker Ownership Work? ESOPs, Law Firms, Codetermination, and Economic Democracy, 99 Yale L.J. 1749 (1990) (citing the lack of observed employee-owned companies as evidence of their economic inefficiency).
for the relatively low number of plans, not the inefficiencies cited by the "survivalist" critique.

Proponents of employee ownership argue that public subsidies for Employee Stock Ownership Plans ("ESOPs") are warranted by their positive effect on firms' economic efficiency, yet many contend that employee ownership is an inefficient organizational form and should not be subsidized. What the empirical evidence seems to show, however, is that ESOPs, particularly those that have some degree of employee control, can benefit certain types of firms.²

In seeking this control, employees must often rely on unions, which possess advantages that may make them the best employee representatives to advance employee ownership.³ Unions, however, have been particularly hesitant to initiate ESOPs. While this disinclination results from many factors, such as workers' risk-aversion, unions' traditional role in labor relations, and unions' lack of employee ownership expertise, the National Labor Relations Act ("NLRA" or "Act")⁴ also erects barriers to union involvement in employee ownership. In particular, the National Labor Relations Board's ("NLRB" or "Board") interpretation of the Act creates obstacles to the implementation of plans that involve significant employee control.

This Article argues that the Board, through its interpretation of the NLRA, is unjustifiably opposed to employee control and ownership of a firm. This resistance both limits the number of beneficial plans that can be implemented and prevents employees who participate in employee ownership plans from gaining control in exchange for incurring increased financial risk. The Board, like many unions, holds a traditional view of the workplace, where there is a clear, and often antagonistic, distinction between labor and management. This view precludes employee ownership plans, which typically blur this distinction.⁵ This Article asserts that the Board's adherence to a strict line between labor and management is harmful in the employee ownership context. Employee ownership plans provide a means through which the interests of both labor and management may be protected, while also allowing the increased employee input that business seeks in the present economic environment. Board obstacles to employee ownership, therefore, often prevent plans that could help a firm. Moreover, once a plan is implemented these obstacles limit employees' ability to bargain for control, a significant factor in the benefit workers gain from employee ownership.

Part I of this Article discusses the basic structure and history of ESOPs. Part II then reviews some of the advantages and disadvantages of employee ownership, as well as economic literature on ESOPs' ef-

². See infra Part II.C.
³. See infra notes 61-67 and accompanying text.
⁵. See infra note 369 and accompanying text.
fect on firm performance. Part III examines the labor law issues that are implicated by employee ownership plans, particularly focusing on plans that contain significant employee input into firm decision-making. Finally, part IV discusses the effects of labor law obstacles on the implementation of employee ownership, and suggests some reform possibilities.

I. ESOP STRUCTURE

Support for worker ownership as a superior firm structure, at least for certain types of companies, has been growing for years. Much of this movement is centered on ESOPs, through which employees are able to invest in their firm’s equity. Typically, these plans create a trust for employees that borrows money, then loans the borrowed money to the employer while obtaining stock from the employer as repayment for the loan. ESOPs, however, can take many forms, with varying levels of employee control. Presently, there are approximately 10,000 companies that have ESOPs and around 2,000 of these plans hold a majority of the company’s stock. ESOPs cover over 11.5 million employees, who collectively control an estimated $150 billion in assets. Moreover, companies in which employee ownership is “dominant” (usually consisting of 15% or more of the firm’s stock) could make up a quarter of the companies on the New York Stock Exchange, American Stock Exchange, and over-the-counter markets by the year 2000. The majority of ESOP firms, however, are closely-held companies.

6. This Article does not limit its analysis to ESOPs; rather, any employee ownership plan, particularly one that implicates employee control over firm decision-making, will be relevant to the discussion. The term “ESOP” will often be used, however, and, unless stated otherwise, the discussion will apply to all similar employee ownership plans.

7. See Deborah Groban Olson, Union Experiences with Worker Ownership: Legal and Practical Issues Raised by ESOPs, TRASOPs, Stock Purchases and Cooperatives, 1982 Wis. L. Rev. 729, 732 n.1 [hereinafter Olson, Worker Ownership]. ESOPs are defined in I.R.C. § 4975(e)(7). Workers do not have full voting rights in about 85% of ESOP companies. See John Hoerr, ESOPs: Revolution or Ripoff?, Bus. Wk., Apr. 15, 1985, at 94, 95.


9. See Uchitelle, supra note 8, at 3.

10. See Rosen, supra note 8, at 7.

11. See id. at 14.

12. See Joseph R. Blasi & Douglas L. Kruse, Strategic Problems and Tactical Promise: Unions and Employee Ownership, 42 Lab. L.J. 498, 505-06 (1991), for a discussion of the rapid increase in employee ownership in publicly traded companies. As of 1994, 21% of companies on the three major exchanges had an average of 15% employee ownership. See Adam Bryant, Subtler Than a Picket Line, N.Y. Times, Apr. 17, 1994, § 3, at 7 [hereinafter Bryant, Subtler].

13. See Blasi & Kruse, supra note 12, at 500.
The structure of ESOPs can vary significantly, but at their core they are equity plans that hold shares of a company in a trust for their participants. The most important variation among plans involve the rights given to employees. Employee ownership plans typically do not have to "pass-through" voting rights to the employee-owners, and even with pass-through voting, a trustee may vote in place of actual workers. Pay-outs for ESOPs can vary widely, with most plans holding the shares until a worker leaves and, most importantly, the level of actual worker participation in managerial policy-making (e.g., involvement in firm decision-making, voting rights, etc.) is never certain. Because an ESOP can provide significant tax advantages to a company that needs increased cash flow, an employer can create an ESOP that owns a majority of the company but gives employees virtually no voice in managerial policy-making.

ESOPs are qualified under the Internal Revenue Code as a stock bonus plan. In a "leveraged" ESOP, employers, employees, unions, management, or third-parties can set up an Employee Stock Ownership Trust ("ESOT"). This entity can borrow money to buy company stock or sell new shares of its own stock to buy existing shares. The trust holds the stock as collateral against the loan. The trustee can come from either inside or outside the company, but has a duty to the participants alone. The employer and employees then make contributions, in varying amounts depending on the plan, to pay back the loan. As contributions are made, the stock is gradually released from the trust and qualified employees can receive the stock. The ESOP allows employers to borrow money with significant tax breaks, while employees are given stakes in the firm's equity. Because a loan is made with the firm's future as collateral, the ESOP is considered "leveraged." The ability of employers to gain tax breaks and employees to gain equity, and the rights associated with equity, are the major differences between ESOPs and a leveraged buy-out ("LBO"). These differences may explain some of the growing popularity for ESOPs relative to LBOs, which exhibit much narrower em-


15. See Rosen, supra note 8, at 9-10.

16. See infra notes 23-28 and accompanying text. As discussed below, ESOPs without employee input or control seem to further the operational advantages of employee ownership less than plans with such control. See infra text accompanying notes 175-81. This Article, therefore, will focus on employee ownership negotiations that involve actual worker input in firm decision-making.

17. See I.R.C. § 4975(e)(7).


20. See id. at 9.

21. See infra notes 23-28 and accompanying text.
ployee participation and do not receive subsidies. Non-leveraged ESOPs generally are created either to supplement or replace pension plans, or as an alternative means of compensation. The employer, and sometimes employees, contribute to the non-leveraged ESOP, thereby giving employees company stock that they can either keep or cash-out upon leaving the company.

The precise structure of ESOPs—beyond the level of employee control—has little direct impact on labor law's treatment of employee ownership. Their structure, however, is critical to their treatment under the tax code. Therefore, because the tax advantages for employee ownership plans are an inherent component of their use, the tax implications for such plans must be understood to evaluate their implementation under labor law.

A. Tax Implications of ESOPs

A significant advantage of employee ownership is an employer's ability to sell shares to the trust and then make tax-deductible contributions to the ESOP, enabling the trust to buy back the loan while deducting all of the interest and deducting from the principal up to 25% of the compensation paid to employees out of the plan. An ESOP also allows an employer to deduct up to 15% of the compensation given to participants under the plan. If the employer has a money purchase pension plan as well, up to 25% of the contributions is deductible. Finally, the maximum yearly employee contribution is the lesser of 25% of the employee's wages or $30,000; this cap includes contributions to any other qualified benefit plan.

It is estimated that the use of an ESOP will create tax savings over a typical buy-out equal to 40% of the amount contributed. Also, if the ESOP owns a majority of the company, interest payments on debt are usually around 85% of those on a non-ESOP buy-out.

To be eligible for participation in the ESOP the employee must be deemed a qualified "participant," which usually requires full-time

22. See Wilkus, supra note 18, at 25 (1994). A LBO is simply a means by which a buyer can borrow money, often using the target company's assets as collateral, in order to purchase a firm. Leveraged ESOPs are basically the same, except they enjoy tax benefits that LBOs do not. Leveraged ESOPs are favored by unions because they allow the use of credit to purchase a large share of the company. See Blasi & Kruse, supra note 12, at 502-03.

23. See I.R.C. § 404(a)(9)(A)-(B) (1994); see also id. § 1032 (stating that no gain or loss will be recognized by a corporation's sale of stock).


25. See id. § 404(a)(7).

26. See id. § 415(c)(1).

27. See Wilkus, supra note 18, at 46 (describing the savings that result from the ability to deduct contributions to ESOPs).

28. See id. (describing the savings that occur because, in such cases, 50% of the interest income is deductible).
work at the firm for at least one year. The stock must fully vest in five years, or start vesting 20% per year after three years (fully vesting after eight years). Participants do not have to pay taxes on dividends as long as they still own equity in the trust. Moreover, employees usually only are able to sell their shares upon leaving the company. The level of ownership that employees can receive varies from minimal to total ownership, but typical ESOPs involve around 30% to 40% employee ownership of the firm; approximately a third of companies with employee ownership are majority-owned. It is estimated that ESOPs provide an average benefit to employees “equal to 1.5 times [their] annual pay over 10 years and 4 times [their] annual pay after 20 years.”

B. The Role of Employees in ESOPs

One difficulty in setting up ESOPs is the inclusion of employee control in the management of the firm. Gaining employee control through an ESOP is usually necessary to realize many benefits of the employee-ownership. Generally, however, firms are reluctant to give employees increased power. In private companies, employees must be given pass-through voting rights. At a minimum, this would allow for a trustee, who owes a fiduciary duty to the employee-owners, to vote on major decisions such as closings or relocation. In public companies, employees must be given the same voting stock as required for all public firms, which provide greater voting rights than stock in private companies.

The level of actual control given to employees, however, can vary widely depending on the structure of the ESOP. Because voting rights can be assigned to a trustee, an individual employee-owner may only possess financial distribution rights in her company, without obtaining any voting rights. Once the shares are distributed (as the loan

30. See id. § 411(a)(2)(A)—(B).
31. See id. § 404(k)(1).
32. See Rosen, supra note 8, at 8.
33. See id.
34. Id. at 14 (describing the results of a National Center for Employee Ownership (“NCEO”) study that measured total benefits from the ESOP to the participant, including dividends and stock value, against wages).
35. See infra note 181 and accompanying text.
36. See infra note 186 and accompanying text (discussing the divergence of interests between shareholders and managers that may lead management to protect their own salary, job security, or decision-making power over potentially contradictory interests of the firm).
38. Compare I.R.C. § 409(e)(2) (discussing a registration-type class of securities), with I.R.C. § 409(e)(3) (discussing requirements of other employers).
39. See, e.g., Bruce V. Bigelow, Shipyard Merger Has Run Aground, San Diego Union-Trib., Aug. 7, 1996, at C-1 (reporting an example of an ESOP that gives individual employees little control in their company).
is paid off), the employee-owner is able to vote those shares; it takes many years, however, for such a distribution to occur. Thus, employee-owners are left facing the risks associated with equity without any voting rights in their stock.

The tax incentives given to ESOPs illustrate the public policy favoritism that they have enjoyed. The “father” of ESOPs, Louis Kelso, managed to convince Senator Russell Long that employee ownership would enable wealth to be spread to workers, thereby improving the economy.40 ESOPs were initially introduced in 1974 as part of the Employee Retirement Income Security Act (“ERISA”).41 Their use began to grow in the 1970s, not because of the economy-stimulating benefits posited by Kelso and Long, but rather, as a defense mechanism against hostile takeovers.42 A Supreme Court decision preventing states from passing anti-takeover legislation,43 as well as a 1989 Delaware Court of Chancery ruling that upheld the use of a defensive ESOP,44 caused their use to grow dramatically.45 In particular, ESOPs began to be used as a capital raising mechanism, in large part as a result of their tax incentives.46 In the 1980s, ESOPs also were being used as a weapon by hostile raiders attempting to acquire companies.47 In the late 1980s, firms began to realize the value of ESOPs as a means of funding pensions and retirement benefits.48 While the use of ESOPs as either a takeover defense or a means to save a troubled company has been well publicized, The National Center for Employee Ownership (“NCEO”) estimates that less than 4% of ESOPs are established for these purposes.49

40. See Elana Ruth Hollo, Note, The Quiet Revolution: Employee Stock Ownership Plans and Their Influence on Corporate Governance, Labor Unions, and Future American Policy, 23 Rutgers L.J. 561, 563-64 (1992) (discussing Kelso’s impact on the use of ESOPs); see also 93 Cong. Rec. S40,753 (daily ed. Dec. 11, 1973) (statement of Sen. Long) (“I am convinced we cannot retain our economic greatness if we do not ... make it possible within a few years, for every household and individual in America to become an owner of a viable holding of productive capital.”).
42. See Hollo, supra note 40, at 572.
43. See Edgar v. Mite Corp., 457 U.S. 624, 630 (1982) (holding that an Illinois law creating disclosure requirements for takeovers, and preventing the bidder from soliciting support while the target company is free to do so, violated the Commerce Clause).
44. See Shamrock Holdings, Inc. v. Polaroid Corp., 559 A.2d 257, 274 (Del. Ch. 1989) (holding that the use of an ESOP as an antitakeover defense did not violate director’s fiduciary duty).
45. See Hollo, supra note 40, at 573-74.
46. See id. at 574.
47. See id. (describing raiders’ attempts to gain employee-owner votes through proxy battles and tender offers).
48. See id. at 575 & n.57 (discussing the integration of ESOPs and 401(k) plans).
49. See Rosen, supra note 8, at 8 (citing NCEO estimates). In addition to their use as a benefit plan or takeover tool, 3% of ESOPs involve employee concessions, and 8% replace pension plans. See id. Other estimates have been even lower, including 1% used in takeovers. See Blasi et al., supra note 8, at 65. Another estimate is 2.5% involving benefit concessions from either wages or pensions. See Douglas L. Kruse,
Employees, as well, have begun to view employee ownership more favorably, often as a tool to obtain increased participation. This participation can provide employees with gains in working conditions, as well as the chance to increase their share of a firm's future profits. Yet, employers are often reluctant to weaken their own managerial power in order to give employees increased rights. As this Article will discuss, labor law not only encourages this reluctance, but also places additional barriers to employee and union attempts to increase participation through employee ownership.

Unions traditionally have been reluctant to initiate employee ownership plans. There are several reasons for this. First, the creation and management of ESOPs takes a great deal of specialized knowledge, which most unions do not possess. The large informational start-up costs can be a significant barrier to unions, and especially individual employees, seeking to initiate an ESOP. Only in industries where employee ownership emerged as a response to financial problems such as the steel and plywood industries have unions been willing to investigate ESOP opportunities.

Second, ESOPs decrease employees' financial diversification. As discussed below, employees, who generally have few if any significant assets, face a significant financial risk when their wages, future benefits, and savings are tied to a single corporation. For example, ESOPs may be used to replace pension plans rather than to supplement them, thereby concentrating employees' present and future benefits in one firm. Unions are, therefore, justifiably reluctant to expose their members to the degree of financial risk associated with employee ownership.

Unions also typically prefer to equalize employee compensation within an industry. A successful ESOP can create significant disparities among firms represented by a single union, thereby hurting a

Pension Substitution in the 1980s: Why the Shift Toward Defined Contribution?, 34 Indus. Rel. 218 (1995). It does appear, however, that unions are typically involved in ESOPs associated with troubled firms, perhaps accounting for the greater publicity for this type of plan. See Blasi & Kruse, supra note 12, at 504-05.

50. See Bryant, Subtler, supra note 12 (citing the Teamsters and other unions' increased use of shareholder suits on behalf of employees); Diane E. Lewis, Unions Seeking Leverage as Shareholders, Boston Globe, Apr. 7, 1996, at 71 (citing unions' increased willingness to use ESOPs to address workplace issues).

51. See infra Part II.
52. See infra note 186.
54. See infra Part II.B.1.
55. See Wilkus, supra note 18, at 33-35.
56. See Hollo, supra note 40, at 590. ESOPs are exempted from ERISA diversification requirements. See 29 U.S.C. § 1107(b) (1994).
57. See Hollo, supra note 40, at 589-90.
union’s attempt to set industry-wide wages.58 Labor leaders, moreover, like employers and the Board, are firm believers in the traditional dichotomy between management and labor.59 Union leaders also may fear the creation of a conflict of interest between the employee-owners’ interest as workers and their interest in the overall well-being of the firm.60 Finally, there is the question of a union’s ability to represent the employee-owners’ interests both as employees and as owners—for example, a union may favor fixed short-term benefits over long-term profitability. This concern may be mitigated, however, by the structure of most ESOP firms, through which the employee-owners’ labor interests will be represented by union board members, while their equity interests are directly protected by the ESOT trustee and indirectly protected by non-union directors.

Despite unions’ past reluctance to initiate employee ownership plans with significant employee control,61 labor organizations seem to be much better suited for the task than individual employees, and could be a strong force in the growth of employee ownership plans involving employee control.62 Unions possess the resources and organizational strength to protect workers’ interests in forming ESOPs.63 Of these interests, the desire for actual employee control in employee-owned firms will be central to unions’ role in forming employee ownership plans.64 Because unions’ primary role has been to guarantee the security and economic welfare of workers, an increased role in promulgating employee ownership fits organized labor’s desire to increase worker influence.65

59. See Hollo, supra note 40, at 590-91; see also Delmonte, supra note 53, at 15-16 (detailing labor’s traditional view of worker ownership).
61. This reluctance is indicated by data that shows an underrepresentation of unions participating in ESOPs. See Blasi & Kruse, supra note 12, at 502-05 (finding that unions, despite representing 12.2% of the workforce at the time, only participated in 7.02% of leveraged employee buyouts, and those plans that they were involved in tended to be for troubled, and typically smaller, companies or as concessions in bargaining).
63. See Delmonte, supra note 53, at 18.
64. See id. at 19; see also Lewis, supra note 50, at 71 (detailing the rise in union shareholder activism).
65. See Deborah Groban Olson, Giving Employee Owners a Real Voice as Stockholders, 6 J. Employee Ownership L. & Fin. 109, 116-17 (1994) [hereinafter Olson, Real Voice]; see also Bryant, Subtler, supra note 12, at 7 (discussing the “growing number of union-related efforts to lobby for change with proxies instead of pickets”).
The union's involvement does not stop once an ESOP is promulgated. Unions also can play an important role in monitoring the company's operation and representing workers' interests, within the limits of the law, in certain firm decisions. While organizations specializing in ESOP formation, such as American Capital Strategies, can be used by employees during this process, unions have more experience representing employee interests in negotiations with employers, albeit not necessarily in their capacity as employee-owners. As unions become more experienced with employee ownership plans, their involvement in initiating and renegotiating these plans, as well as representing employee-owners on the company's board of directors, may become more important. Indeed, the repeated dealings with a company may allow a union to represent employee-owners in much the same way as they represent bargaining unit workers now; unions, therefore, can have an important role in protecting employee-owners' interest in an ongoing organization that is at least partially employee-owned.

Although unions may at present play a limited role in employee ownership plans, they are vital to the careful creation of ESOPs that provide actual employee participation and respect for employee interests. Some sources of unions' limited influence appear self-imposed. Labor law, however, also may create barriers to union participation in ESOPs. In order for unions to assume a prominent role in ESOP implementation, these barriers must be addressed. The potential advantages and disadvantages of employee ownership also play a key role in determining whether, or where, to implement an ESOP. One must understand the potential risks and benefits of employee ownership plans in order to evaluate their present regulation.

---

66. The ESOP trustee does not fill this function. The trustee may not even be selected until after the ESOP is implemented, thereby precluding employee protection during the formation of the ESOP. Also, the trustee's duty is to the financial status of the fund, which protects the employee-owners' equity interests, but not their interests as employees. There is a possible conflict of interest if the trustee is affiliated with the same union representing the employee-owners' labor interests. The trustee, however, has a fiduciary duty to the employee-owners' equity interests alone, although this duty does not, of course, eliminate the conflict.

67. See Blasi & Kruse, supra note 12, at 505; see also Don Driver, Kelly Union Eyes Stock Ownership—Group Officials Looking into Proposals with Contractors, San Antonio Express-News, Sept. 21, 1995 (describing union activity in initiating an ESOP with employee control), available in 1995 WL 9502940; Lewis, supra note 50 (noting labor unions' growing stress on gaining power through shareholder activism, including use of the AFL-CIO's data set, which monitors performance of corporate boards). Unions also can be a source of information for workers who are unaware of the possible benefits of gaining greater managerial control.
II. PROS AND CONS OF EMPLOYEE OWNERSHIP

The literature on employee ownership cites significant differences in terms of its impact on business. Perhaps, as a result of the difficulty in isolating the effect of employee ownership on firm performance, commentators such as Hansmann have cited the paucity of ESOPs as evidence of their inefficiency as a corporate structure—this is the "survivalist" critique. This Article disagrees with those commentators, arguing that labor law obstacles to employee ownership are partially responsible for the relative lack of ESOPs observed.

A. Advantages of ESOPs

Demonstrating that employee ownership can have beneficial effects on firm performance justifies removal of some of the Board's obstacles to ESOP creation. The following is a presentation of the effects that employee ownership may have on a firm's performance. Economic research on the efficacy of employee ownership shows that ESOPs can benefit certain companies and should not be stifled by the Board. If the Board is to achieve its goals of promoting industrial peace and addressing inequitable bargaining power in the workplace, it should not obstruct employee ownership plans that may help the firm while enhancing employee voice.

1. Reduction of Information Asymmetries

Under the traditional workplace model, both employers and employees have a clear incentive to withhold certain types of information from one another. Management has informational advantages regarding a firm's financial status and future plans, such as plant closings or relocations, which can directly affect workers. Conversely, employees know more than employers about their own preferences and effort levels, production changes that may improve productivity, and the performance of managers. As a result of what Professor Alan Hyde calls "low trust of management among employees," workers will with-
hold information that management would prefer to have. This lack of trust may result from firm-specific “cultural” reasons, past mistakes by management, or simply a traditional adversarial view of the workplace. Similarly, management has incentives not to disclose information related to their bargaining position, such as the firm’s finances. Both parties’ unwillingness to share information has an impact on bargaining over resource allocation. The presence of these significant information asymmetries produces inefficient outcomes for the firm.

Employee ownership potentially can remove these asymmetries by giving employees increased access to firm information, while enhancing workers’ incentive to reveal their own informational endowments. By providing employee-owners with an equity interest in the firm, an ESOP may reduce these asymmetries relative to alternative structures. Equity in the firm increases employees’ financial stake in the firm’s performance, as well as providing a more direct link between equity and performance, thereby increasing incentives to share information that will benefit the firm.

a. Communication of Worker Preferences and Financial Information

The informational advantages possessed by both labor and management are often used by the parties strategically during negotiations. These information asymmetries (e.g., an employer’s inability to accurately gauge employee preferences, and employees’ lack of access to financial data), however, may prevent an economically inefficient bargaining outcome. If both parties obscure information, potential compromises that could allow a better outcome are not discussed. Employee ownership can increase the chances of labor and management sharing more information with each other.

Due to the strategic nature of labor bargaining, where both sides typically move from extreme positions to an eventual compromise, workers will often have incentives to misrepresent their preferences, with management having the rational response of disbelieving such claims. Worker claims regarding their preferences, such as trade-offs between conditions and compensation, are often perceived by employers as being a strategic tactic, thereby diminishing their credibility. By making a stronger connection between firm performance and employee compensation, employee ownership imposes more of the costs of false claims on employees (in addition to costs already

74. Id. at 196-97.
75. See Hansmann, supra note 1, at 1766.
76. See id. at 1766-67.
77. See id. Similarly, employer claims about a firm’s financial status often lack credibility.
imposed, such as those from strikes). Employee ownership, therefore, can remove the incentives for misrepresentation and lead to a more efficient allocation of firm resources vis-à-vis worker preferences.

As game theory illustrates, the ability to move to cooperative strategies is vital to solving problems, such as the "prisoners' dilemma" where enforcement and informational problems create losing situations for both sides. Traditional employment settings can create the "prisoners' dilemma" where individuals have an incentive to shirk despite a greater gain if all employees work harder. An agreement that encourages group cooperation can solve this bargaining problem. Employee ownership may facilitate this cooperation because workers who have a share of the firm's equity may be more willing to reveal their preferences in regard to productivity possibilities, bearing risk, and tying compensation to productivity (e.g., merit pay). As a result of this incentive to share information, employee ownership and supervision "may increase labor's share of the pie without contracting capital's share."

Given that many firms implement ESOPs as a solution to their financial difficulties, the lack of trust by employees towards this type of employer claim is important to the firm's future prosperity. An employer who wants to cut benefits in order to save the firm must have a reliable means of passing financial information to employees. In a typical adversarial relationship, however, employees will be quite skeptical of employer claims of financial trouble. If an ESOP were in place initially, employee representation on the board of directors could be a source of trusted information that employees and management could use to facilitate bargaining and necessary changes in labor allocation.

While employee ownership is not always associated with employee representation, plans that were intended to address needs associated with a rapidly changing market often have given employee-owners

---

78. These costs include the additional time spent on bargaining, as well as the misallocation of resources that may occur with bargaining involving imperfect information (e.g., bargaining failures).
81. See Axelrod, supra note 79, at 15.
82. See Hyde, supra note 73, at 200.
83. See id.
84. See id. at 201.
85. Harper, Reconciling Collective Bargaining, supra note 60, at 47.
87. See id. at 273-74.
Employee access to financial information could be vital to a firm's attempt to alleviate financial problems or adapt to a dynamic economic environment. Further, employee representation on the board of directors can be a vehicle for sharing financial information that employees are likely to trust.

By removing informational barriers such as the veracity of financial distress, employee ownership may allow necessary concessions to occur, even when the firm is not in immediate distress. This improvement in the bargaining environment is increasingly important for firms that require frequent restructuring in the face of a dynamic economic market. The increased uncertainty that accompanies firms in dynamic industries may make employee ownership particularly beneficial in reducing information asymmetries that inhibit the ability of these firms to change.

The frequency of bargaining breakdowns also should decrease as bad faith is minimized and both parties' assumptions about the firm's financial situation are closer to each other. Information asymmetries may prompt a lack of understanding on both sides, thereby increasing the chances of a miscalculation of positions—even in the absence of intentionally misleading claims—and creating higher bargaining costs. If employee ownership increases communication and access to information between labor and management, understanding among the parties can increase. Therefore, even when information from either side is not withheld or misleading, employee ownership can reduce some bargaining costs.

Hansmann questions employee ownership's informational advantages by stating that plans with significant employee control prevail in workplaces such as law firms, where the information asymmetries are relatively low. While his observation may be true, this evidence does little to discount employee ownership's potential to increase the incentives to share information. An inability to isolate the effects of


89. See id. (manuscript at 23).

90. See id. (manuscript at 15). The breakdown of these informational barriers can occur through employees' increased access to the firm's financial information, or employees' reduced incentive to give false claims due to their greater stake in the firm. See id. (manuscript at 14-15).

91. See id. (manuscript at 6).

92. See id. (manuscript at 19-20).

93. See id. (manuscript at 24).

94. See id. (manuscript at 21).

95. See Hansmann, supra note 1, at 1766 (stating that the small size of most law firms and lack of hierarchy between management and the firm's professionals are reasons that information sharing between management and professionals in such firms would be high).
employee ownership on firms with high asymmetries makes any conclusions speculative. Hansmann’s criticism assumes that the choice of investment structure is not affected by other factors, such as labor law, which could limit employee ownership in spite of its advantages over investor-owned firms. This Article argues that this assumption is unwarranted and obtains no support from the prevalence of employee ownership in unexpected areas, such as those with low information asymmetries.

b. Agency Costs of Delegation to Management

A significant cost to many investor-owned firms is the hiring of managers. Investors often have very little contact with the firm, resulting in a high “agency cost of policing management.”96 Workers, however, possess an obvious advantage in policing management over investors with limited information about a firm. Both their intimate knowledge of a firm and the financial incentive of worker-owners to help the entire firm could lead to a significant decrease in the cost of monitoring supervisors within worker-controlled firms.97 Hansmann contend that the lack of successful worker-owned firms in industries that have high agency costs shows that this potential advantage is overstated.98 Some anecdotal evidence suggests, however, that an increase in employee ownership may create savings in the hiring of supervisors.99 While the precise magnitude of management savings is unclear, these savings represent a potential benefit of increased employee ownership and control.

2. Mutual Monitoring

Companies are typically worried about workers failing to work as hard as the firm would like. Thus, much of management’s role is to monitor workers in an attempt to limit this “shirking.”100 Hansmann points out that these monitoring costs will result in a “moral hazard” problem; he contends that a firm only will agree to pay for a low level of work, and employees only will work at this low level, even though both parties may prefer a higher level of effort and correspondingly higher compensation.101 A stake in one’s firm may result in employ-

96. Id. at 1768 (citing Michael C. Jensen & William H. Meckling, Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure, 3 J. Fin. Econ. 305 (1976)).
97. See Blasi et al., supra note 8, at 62; Hansmann, supra note 1, at 1768.
98. See Hansmann, supra note 1, at 1768-69.
100. Monitoring concerns also may be considered an information asymmetry. See supra notes 88-91 and accompanying text.
101. See Hansmann, supra note 1, at 1761 n.48 (citation omitted). Moral hazard problems depend on management being unable (or only able at a very high cost) to discern between high and low levels of work. See id.
ees monitoring their colleagues better than traditional supervisors, thereby reducing shirking and its costs.\(^{102}\)

Proponents of ESOPs contend that the shared costs of worker productivity will increase employee-owners' incentives to limit shirking. By spreading the residual claims of the firm's success among the employees, employee ownership forces employee-owners to bear some of the costs of shirking, thereby reducing their incentive to work less.\(^{103}\) This gain is especially noticeable relative to investor-owned companies, which have higher monitoring costs.\(^{104}\) The connection that employee ownership makes between the incentives of workers and the firm also may lead to increased monitoring by employee-owners as they attempt to encourage other employees to work at a higher level of productivity.\(^{105}\) The increased incentive for self and mutual monitoring can provide significant gains for the firm through increased efficiency and lower monitoring costs.\(^{106}\) The lack of financial diversification associated with employee ownership also gives employees more incentive to work harder and increase monitoring than other compensation systems that do not involve employee equity holdings in the firm.\(^{107}\)

Furthermore, employee ownership may provide an opportunity for employees to "work[] smarter, not just work[] harder."\(^{108}\) The ability to participate in the management of one's workplace may increase productivity because employee-owners have a heightened interest in the work product and are more willing to invest their own time in additional training.\(^{109}\) Contrary to Hansmann's law firm example, Alan Hyde asserts that lawyers who have an ownership stake in their firm will work "harder and smarter" than those under a traditional management scheme.\(^{110}\)

The potential advantage from increasing managerial competence, using labor and machinery more efficiently, improving production techniques, and enhancing worker performance makes employee ownership an attractive means of saving monitoring resources.\(^{111}\) ES-

---

104. See id. at 374-75.
106. See Hansmann, supra note 1, at 1762. The impact that employee-owners' work has on firm performance, as well as the cost to monitor such workers, will affect the potential savings implicated by employee ownership.
107. See Melton, supra note 103, at 381.
108. Hyde, supra note 73, at 183.
109. See id.; see also Schwab, supra note 71, (describing the increased willingness of employee-owners to participate in training programs).
111. See Gordon, supra note 88 (manuscript at 26).
LABOR LAW OBSTACLES

OPs, by tying employees' compensation directly to corporate performance, can lead to less shirking by employee-owners and increased monitoring of others.112

Employee ownership is not, however, a cure for all of the ills of a firm. Indeed, critics suggest that employee ownership may exacerbate certain problems. Hansmann points out that worker ownership is prevalent in easily-monitored service professions, like law.113 Moreover, employee ownership could increase shirking by the original owner-managers because the cost of their shirking has been spread to employees.114 Also, if employee-owned firms used group-based award systems more heavily, then shirking could actually increase because of the free-rider problem associated with a weak connection between work level and gains.115 Cooperation among workers, however, can create a corporate culture that reduces free-rider incentives, particularly in smaller firms.116

As with most factors cited as a gain or cost of ESOPs, the net effect on monitoring costs remains ambiguous.117 What does seem clear is that firm-specific characteristics may play a large part in the extent to which monitoring savings will be realized through employee ownership.

3. Reduction of Worker Lock-In

Employee ownership also may reduce the possibility of a worker employed at a specific job for an extended period becoming "locked-in" to that job. Potential causes of this phenomenon include workers acquiring skills specialized to that job (thereby making them more productive at that job than in the general labor market) and personal attachments to a community.118 The result is that a worker's costs to leave a job may significantly increase over time, thereby allowing the employer to pay the "locked-in" worker a lower wage.119 Because employees presumably have a personal interest in avoiding this effect,

112. See id. Tying compensation to share prices is, however, a weaker incentive than others means, such as merit pay or bonuses, that are in the employer's control.

113. See Hansmann, supra note 1, at 1762-63. While he acknowledges evidence of productivity gains in the plywood industry after employee ownership appeared, he discounts its impact as being minor. See id. at 1763 n.54 (citation omitted).

114. See id. at 1763 n.54.

115. See id. at 1763 n.54.

116. See id. at 1763 n.54.

117. This author is unaware of any empirical studies examining employee ownership's effect on shirking costs.

118. See id. at 1764.

119. See id. Hansmann suggests the wage will be at the "next best alternative" for the employee. See id. More specifically, an employer would only have to pay at the
worker ownership can reduce the propensity of a firm to take advantage of lock-in, assuming employee-owners will not collectively decide to exploit older, and more locked-in, workers.120

Hansmann does not find any correlation between industries that experience more lock-in and worker-owned firms.121 He suggests that large industrial and service firms, where lock-in is more likely to occur, have a lower rate of employee ownership than more mobile industries, which tend to be worker-owned (e.g., taxicabs drivers, refuse collectors, and plywood industry laborers).122 Hansmann acknowledges that reducing the exploitation of lock-in may be an important ESOP incentive and that his anecdotal evidence is not conclusive.123 His use of only "survivalist" evidence fails to isolate the lock-in effect while holding other factors, such as labor law, constant. Accordingly, his correlation does not prove or disprove employee ownership’s effect on lock-in exploitation. The impact of lock-in may be small either way, but it still may contribute to ESOPs’ superiority in certain firms.

4. Participation

In addition to the above factors, employees’ participation in managerial policy-making may be beneficial to both the firm and its workers. Seemingly minor influences, such as a daily reminder of the firm’s performance through the stock price, can emphasize employees’ connection with their workplace.124 More importantly, the psychological relationship between a worker and the firm becomes less adversarial with increased worker control, leading to a potential improvement in morale.125 An ESOP that provides significant control, versus mere equity interests, could provide benefits to an employee-owned firm if these psychological effects exist.

As discussed above, employees possess an intimate knowledge of the production process. Employers’ increasing attempts through “employee involvement” initiatives to gain access to such information is evidence of the significance of this information asymmetry.126 Em-

---

120. See id. Employee ownership could exacerbate lock-in by increasing the attachment a worker has to her job. The key, however, is whether the firm will exploit lock-in; mere attachment to work may be desired by both the employer and employee. Other employee-owners may be less willing to use the lock-in effect to lower compensation for fellow employees.

121. See id. at 1764-65.

122. See id.

123. See id. at 1765.

124. See Gordon, supra note 88 (manuscript at 29). But see id. (manuscript at 29 n.45) (noting that falling stock prices may discourage workers).


ployee ownership could give employees who feel they are participating in the firm’s managerial process added incentive—beyond that provided by their equity interest—to provide valuable production information to employers. The National Center for Employee Ownership (“NCEO”) has found that firms with employee participation in decision-making have higher growth rates. The NCEO also has stated that employees have better attitudes toward work as the number of shares contributed to an ESOP increases. Other studies have not been able to conclusively find a connection between ESOPs and morale or productivity, yet there is evidence that employee influence over firm decision-making, rather than mere ownership, may increase participation and productivity.

Commentators also have suggested that employee-owned businesses lower absenteeism, reduce turnover, increase worker flexibility, and lead to better care of equipment.

"[W]orkers as a whole are motivated to strive for the success and growth of the enterprise when they are equitably included in a transaction and their ownership shares are accompanied by participation and communication."

These participation effects are perhaps the most difficult to quantify, yet they also may be the most important. If a company is able to improve morale through an ESOP, it could achieve substantial benefits.


128. See Hester, supra note 86, at 273.

129. See Olson, Worker Ownership, supra note 7, at 734 n.4 (citing U.S. General Accounting Office, supra note 127, at 39-42 (reporting several studies that were inconclusive as to the causal relationship between employee ownership and increased morale and productivity)).

130. See id. (citing James O'Toole, The Uneven Record of Employee Ownership, Harv. Bus. Rev., Nov-Dec. 1979, at 185, 194); see also Blasi et al., supra note 8, at 63 (arguing that employee ownership is most beneficial when implemented with changes in decision-making policies such as increased employee input).


132. Wilkus, supra note 18, at 25.
The empirical literature suggests that employee participation has a positive correlation with productivity. Within employee-owned firms this productivity increase comes primarily from participation closer to the "shop floor"—i.e., participation that deals with things such as job redesigning or work groups. Mere stock ownership and share voting does not appear to produce significant productivity increases. Ownership along with participation, however, appears to lead to increased productivity. It is important that an employee ownership plan allow employee-owners to exert significant decision-making influence in order to fully capitalize on the plan's potential.

5. Job Security

Another possible advantage of employee ownership is increased job security. In addition to the security that improved firm performance provides, employee ownership that includes employee participation in management and board representation can give employees better information and improve union bargaining power, resulting in further job security gains. It is likely that employee representation on a corporate board could provide quicker notice of a firm's fiscal troubles, thereby allowing faster and more effective worker concessions that may save the company. A union can also bargain for alternatives that are more beneficial to employees by gaining access to a company's financial strategies and the valuable information contained therein.

The evidence of increased job security, however, is not robust. Yet, while it seems that employee-owned companies are still willing to "downsize" in the face of economic realities, they may be more apt to delay or minimize job elimination than investor-owned firms. If employees perceive ownership as a connection between their well-being and the firm's, controversies surrounding lay-offs may decrease.

---

133. See U.S. General Accounting Office, supra note 127, at 30; Blasi et al., supra note 8, at 63.
135. See Michael A. Conte & Jan Svejnar, The Performance Effects of Employee Ownership Plans, in Paying for Productivity: A Look at the Evidence, supra note 80, at 143, 167 (stating that "participation groups improve company performance in an employee ownership setting, though share voting and board representation do not"); see also Levine & Tyson, supra note 134, at 198 (finding that studies showed that high-participation firms outperformed low-participation firms, on average, by 15% in terms of output per worker—i.e., productivity).
136. See Levine & Tyson, supra note 134, at 203. It is not clear, however, to what extent ownership and participation together provide greater benefits than participation alone.
137. See Olson, Worker Ownership, supra note 7, at 779.
138. See Uchitelle, supra note 8, at 3. It is not clear what effect such delay has had on the firms or the employees' long-term security.
Employee-owners can attempt to minimize job losses, thereby reducing hostility if downsizing becomes a financial reality.

B. Costs of Employee Ownership

While employee ownership provides significant benefits to a firm, it creates costs as well. Similar to ownership benefits, the costs of ESOPs are difficult to quantify with any precision. Several costs associated with employee ownership, however, are identifiable. These include increased employee financial risk, internal governance problems, and the "horizon problem."

1. Increase in Employee Financial Risk

Alan Hyde states that "risk aversion is the single greatest problem with employee ownership and the single greatest obstacle to its wider spread."139 If employees' pensions and personal wealth are tied up in the same company as employees' wages, their finances are severely underdiversified.140 Given that most employees do not own stock or have other significant savings, tying both their present and future income to one company can be a significant disincentive to employee ownership.141

Hyde describes risk diversification as the major reason for the lack of employee ownership in companies which do not have political or professional dispositions towards such plans.142 He argues that employee ownership often involves companies that are financially troubled because employees are willing to take on the added risk of ownership only when the firm is in trouble.143 Additionally, the lack of diversification and transferability of ESOP equity (which occurs due to both the time it takes to release the ESOP stock to employees and requirements of many plans that sales of such stock be made only within the firm) reduces the value of the stock to employee-owners, especially in privately-held companies.144 The result is underdiversified savings for employees, made up of equity that they value less than conventional common stock (which has no limits on cashing-out).

139. Hyde, supra note 73, at 205-06. Workers already submit themselves to a great deal of risk through employment-at-will contracts and the threat of termination through union contracts. See Hansmann, supra note 1, at 1773.
140. See Hansmann, supra note 1, at 1772.
141. See Hyde, supra note 73, at 203-08; see also Hester, supra note 86, at 269-70 (stating that most unions will not substitute employee stock ownership plans or defined contribution plans for the traditional defined benefit pension plans).
142. See Hyde, supra note 73, at 207.
143. See id.; see also id. at 207 n.157 (giving possible solutions to reduce employee risk).
144. See Melton, supra note 103, at 380-81. Most ESOPs, in both public and private firms, limit the transferability of stock by employee-owners, in large part to keep the stock in the hands of company insiders. See id.
Further risk is also incurred due to the buy-back requirement of most ESOPs. For privately-held companies, the ESOP is obligated to repurchase shares of employees who leave.\textsuperscript{145} This means that successful companies will face added costs when employees seek to cash-out earlier than expected. If this buy-back obligation cannot be met, the ESOP has a higher chance of failing, thereby increasing the risk associated with underdiversification.\textsuperscript{146}

Hansmann contends that this problem is overstated; he argues that risk diversification in employee-owned firms is not much different from that in investor-owned firms with at-will employment contracts.\textsuperscript{147} Hyde counters by stating that "[n]o goal has shaped union bargaining behavior more over the last fifty years than the protection of employees from risk and insecurity."\textsuperscript{148} Indeed, as Hansmann points out, even union employees face termination in bad times.\textsuperscript{149} Therefore, the tying of employee pensions and savings into the firm sometimes will, it seems, be a significant deterrence to employee ownership. While the magnitude of the effect of under-diversification on the initiation of employee ownership plans may be in doubt, this concern seems to be a significant factor in unions' reluctance to initiate an ESOP. The ultimate question is whether the benefits of employee ownership, including possible gains in job security, are strong enough to offset the risks associated with under-diversification. Unions, if they gain the proper expertise, may provide an invaluable resource to employees in attempting to evaluate this trade-off.

2. Internal Governance Inefficiencies

Collective governance, which Hansmann suggests is the most serious problem resulting from employee ownership, poses several possible efficiency losses for the firm. Typically, an employee-owned firm will allow voting by employee-owners on major firm decisions.\textsuperscript{150} Hansmann contends that a greater use of collective governance, stressing employee input over traditional managerial schemes, will result in more inefficient decisions by the firm.\textsuperscript{151}

\textsuperscript{145} See I.R.C. § 409(h)(1) (1994) (giving a participant in a private-held employee-owned firm the "right to require that the employer repurchase employer securities under a fair valuation formula"); see also Rosen, supra note 8, at 18 (recommending that the cost of a repurchase obligation plan be considered when companies create an ESOP).


\textsuperscript{147} See Hansmann, supra note 1, at 1773 (stating that despite "this seeming anomaly[,] . . . for many workers investor-owned enterprise may not offer strikingly less risk than does worker-owned enterprise").

\textsuperscript{148} Hyde, supra note 73, at 205.

\textsuperscript{149} See Hansmann, supra note 1, at 1773.

\textsuperscript{150} See id. at 1779.

\textsuperscript{151} See id. at 1779-82.
The first possible source of collective governance costs is the divergence among employee-owners over issues such as wage allocation. Majority voting as a decision-making tool may present a potential inefficiency in the governance process. If the median voter's interests, which ultimately win under majority rule, differ from the mean voter's, deviations from the optimal outcome will result. This criticism of employee ownership, however, compares the collective governance structure to an optimal structure that probably does not exist. The real question is not how collective governance compares to the ideal, rather it is how employee control compares to the alternative, investor-run structure. As Hansmann admits when discussing employee-appointed boards, the voting mechanism for boards of directors is generally majority rule, which suffers from the same problem as collective governance, although the severity of the problem may be minimized by the more homogenous interests of shareholders. Whether this inefficiency creates significant costs is uncertain, however.

Hansmann asserts that conflicts of interest among workers can be more severe than between stockholders, which are muted by corporate law's success in resolving conflicts between shareholders. For this assertion to be true, workers must have more heterogeneous preferences (e.g., job security v. wages) than investors, and this heterogeneity must result in efficiency losses greater than those under investor governance. Hansmann, however, fails to cite any real evidence that this increased conflict actually translates into significant efficiency losses or evidence that employees' heterogeneous interests have in fact hobbled employee ownership experiments that have occurred.

The evidence that Hansmann does provide is that employee ownership is found typically in firms with homogenous workforces, such as legal services and plywood industries. It is not clear, however, that these industries are as homogenous as he suggests; for instance, few law firms compensate all of their partners equally. Moreover, it is possible that the equity sharing of employee ownership will mute the collective governance costs of firms that do have a heterogeneous workforce. The governance-cost theory does not appear to adequately explain the prevalence or lack of employee ownership in certain industries and, without more evidence, remains unsatisfying as an explanation of the lack of observed employee ownership.

152. As Hansmann notes, this problem could be avoided if such decisions were keyed to objective measures. See id. at 1789-90.
154. See Hansmann, supra note 1, at 1779-81.
155. See, e.g., id. at 1782 (discussing insider trading prohibitions).
156. See id. at 1783.
157. See Hyde, supra note 73, at 169 n.35.
158. See Hansmann, supra note 1, at 1783-84.
Hansmann also suggests that maintaining a collective governance system, in addition to the decisions it produces, generates added costs. He argues that additional costs may be imposed on the firm as a result of resources needed to obtain information for collective governance participation\(^\text{159}\) and to counter employee strategic behavior (e.g., hiding information),\(^\text{160}\) as well as the transaction costs incurred through voting cycles.\(^\text{161}\) Once again, these costs may be divergences from an optimal model, but they are present in traditional governance structures as well. Employee-owners also are likely to delegate some decision-making to an executive, just like a traditional firm.

Investor-owned firms simply are not the ideal that Hansmann suggests when he compares them to collectively-governed firms.\(^\text{162}\) Furthermore, there is little more than anecdotal evidence to support his contention that "worker ownership works best when there is minimal opportunity for conflicts of interest among the worker-owners."\(^\text{163}\) Even if he is correct, the magnitude of the costs is uncertain and, at a minimum, suggests that, in firms with relatively homogenous employee interests, collective governance will not generate significant costs.\(^\text{164}\)

One source of costs that may occur is the initial fixed costs required to obtain information. Just as a union must acquire financial information before implementing an ESOP, workers who wish to participate in managerial decisions must make an investment in learning about managerial policy. The question will turn then on whether this investment is a wise one.

Collective governance costs associated with employee ownership represents a potential cost to employee-owned firms, but evidence as to its actual effect is equivocal. Organizational inefficiencies could be a significant problem for employee ownership, yet there is no strong empirical evidence that ESOPs differ significantly from investor-run firms in this regard except for Hansmann's survival accounts—i.e., what set of organizational forms have prevailed over time. Additionally, the magnitude of this problem must be viewed in light of employee-owned firm's over-all performance vis-à-vis investor-owned firms. As discussed below, evidence of the efficiency of employee-owned firms counters the claim that collective governance is inherently inferior to investor-owned firms.\(^\text{165}\)

\(^{159}\) See id. at 1781-82.
\(^{160}\) See id. at 1781.
\(^{161}\) See id.
\(^{162}\) See Hyde, supra note 73, at 169 n.35.
\(^{163}\) Hansmann, supra note 1, at 1784.
\(^{165}\) See infra Part II.C.
LABOR LAW OBSTACLES

3. Horizon Problem

Because employee-owners' stock is not usually as liquid as common stock, (participants must often wait until they leave the firm to sell-out, or at least sell to other employees) some academics have suggested that incentives for projects with long-term pay-offs will be reduced. This “horizon problem” results from the inability of employees’ stock to accurately value long-term gains, creating a situation that favors present consumption over investment. The result is a company that fails to make proper long-term investments, thereby hurting its financial prospects.

The loss in liquidity, as Hansmann notes, does not appear to be serious. The ability to sell to new workers, or sell when leaving, seems to provide the necessary incentives for long-term investments. Even if some individual worker preferences have short horizons, the median worker horizon will mirror their expected tenure, which is generally long enough to maintain long-term investment projects. While the value of investment to employee-owners is important, the horizon problem does not appear to result in a significant divergence in willingness to undertake long-term investments between employee-owned and investor-owned companies.

C. Performance Data

While breaking down the individual benefits and costs of ESOPs is important, the most significant factor in measuring the efficacy of employee ownership is the company’s performance. Examining whether employee-owned firms perform better than investor-owned ones will reveal whether employee ownership can offer a real advantage. Such data, however, is very difficult to obtain. As illustrated by Hyde’s description of when ESOPs are beneficial—i.e., “sometimes”—firm-specific factors may govern the profitability of a company changing to employee ownership. These characteristics often will influence whether a firm chooses an ESOP, thereby blurring the causation between employee ownership and profitability. Firm-specific factors make the attempt to isolate and measure employee ownership’s effects on firm performance very difficult. These variables include firm

167. See Hansmann, supra note 1, at 1774.
168. See id.
169. See id.
170. Hyde, supra note 73, at 174.
171. See Blasi et al., supra note 8, at 63.
size, employee characteristics, policy-making structure, technology, and labor-relations history.\textsuperscript{172}

According to a recent survey of past studies' measurement of performance differences between ESOP and non-ESOP firms, 85\% of companies with ESOPs had higher productivity than investor-owner firms.\textsuperscript{173} When comparing a firm's productivity before and after implementation of an ESOP, 82\% of the companies had increased productivity after employee ownership was created.\textsuperscript{174}

In this study of ESOP performance, Blasi, Conte, and Kruse compare public companies with ESOPs against those without.\textsuperscript{175} The study used four different measures of performance: "return on equity, return on total earning assets, price/earnings ratio, and profit margin."\textsuperscript{176} The authors concluded that, among firms of the same size, employee-owned firms had significantly higher growth in returns on assets and equity, and had higher profit margins.\textsuperscript{177} Evidence that productivity increases as a result of ESOP implementation was weaker, but they concluded that where differences did exist, employee-owned firms tended to perform better.\textsuperscript{178} Also, the most robust connection between ESOPs and productivity was found in smaller companies.\textsuperscript{179} The authors' conclusion seems to affirm Hyde's "sometimes" theory; there is no automatic productivity increase after implementing an ESOP, but if there is a change it will tend to be for the better, particularly if the company is smaller.\textsuperscript{180}

\begin{itemize}
\item \textsuperscript{172} See id.
\item \textsuperscript{173} See id. The average magnitude was 6.2\% higher productivity, with 19\% of the estimates statistically significant (below a p-value of 0.05). See id.
\item \textsuperscript{174} See id. The average productivity increase was 4.4\%, with 17\% of the estimates having p-values below 0.05. See id. Only one study found a statistically significant positive effect of a substantial magnitude (1.8\%-2.7\% higher productivity for each year). See Subal C. Kumbhakar & Amy E. Dunbar, \textit{The Elusive ESOP-Productivity Link}, 52 J. Pub. Econ. 273, 273 (1993). Blasi, Conte, and Kruse note, however, that statistical analysis of the aggregate of these studies rejects the null hypothesis that ESOP implementation has no effect on productivity. See Blasi et al., \textit{supra} note 8, at 63.
\item \textsuperscript{175} See Blasi et al., \textit{supra} note 8, at 65 (defining an "ESOP" firm as one with over 5\% of the equity market value held by an employee ownership plan, as per the SEC definition of a major stakeholder). Productivity is the marginal product of each employee, measured by sales or value added per employee. The study also controlled for the level of employment and capital/labor ratios. See id.
\item \textsuperscript{176} Id. at 66 (citation omitted).
\item \textsuperscript{177} Id. at 71.
\item \textsuperscript{178} See id. at 78. For example, employee ownership of greater than 5\% is associated with a 15\% increase in value-added per employee. See id. at 71. Moreover, they found that concessions by employees had no effect on productivity. See id.
\item \textsuperscript{179} See id. at 77.
\item \textsuperscript{180} See id. at 77-78; see also \textit{supra} notes 127-30 and accompanying text (citing various inconclusive studies concerning the effects of ESOPs on moral and productivity). Hyde's theory, while not conclusive, suggests the following traits for a firm that would most benefit from employee ownership:
1. high conflicts of interests between managers and employees.
\end{itemize}
Although a precise conclusion as to ESOPs' efficacy is lacking, some generalizations may be offered. Smaller firms with low trust may be the most promising companies for employee ownership gains. In companies that do not share these characteristics, however, employee ownership may improve performance in some cases, and rarely imposes significant costs to the firm. The structure of the ESOP is also important, as gains often require that employee ownership be accompanied by changes in the policy-making structure, particularly measures giving employee-owners increased participation. It seems, therefore, that many firms could greatly benefit from a change to employee ownership.

Attempts to judge employee ownership's efficacy are still met with evidence indicating that the actual level of employee ownership is less than one might expect given the theoretical advantages of ESOPs. It is possible that the advantages of employee ownership have been overstated, yet the empirical data shows that, for certain firms, employee ownership leads to real gains.

Other factors may be reducing the level of employee ownership. One of these factors may be labor law's regulation of employee ownership. Because of unions' comparative advantage as employee representatives in ESOP initiation and negotiations, they will often be involved in plans that implicate employee control. Union involvement in these plans, as well as some individual action, will implicate labor law; any obstacles imposed could significantly influence the level of employee ownership in the United States. Labor law obstacles may also affect the structure of employee ownership plans. These obstacles often result in plans that are not as beneficial to the firm and employees as they could be if freed of the restraints of the present regulatory scheme. The impact of labor law on employee ownership must, therefore, be examined by those who wish to study employee ownership's efficacy, as well as by those who are concerned about the form and quantity of plans implemented.

III. Labor Law Problems

The prevalence of firms that have benefited from ESOPs and the promise that other firms could profit in the future portend a continuing growth in employee ownership. Unions, however, still remain

---

2. low trust between managers and employees, as a result of ideological, cultural, or firm-specific factors.
3. suboptimum employment contracting as a "solution" to these problems; that is employment "conventions" that institutionalize:
   a. low incentives for employee productivity, or
   b. high unnecessary supervision costs; or
   c. inefficient allocation of risks.
Hyde, supra note 73, at 195.
181. See supra notes 130, 136.
182. For example, employee solicitation for an ESOP.
uninvolved with employee ownership unless a firm is in financial trouble. Labor organizations’ resistance to initiating employee ownership plans seem to come in part from a traditional view of their role in the workplace. Yet, the growing desire of business for increased worker input, as well as possible gains to the firm through employee ownership, are making ESOPs hard for unions to ignore. What remains to be explored are the external barriers that may prevent unions from increasing their role in employee ownership. One concern is the regulation of employee ownership by labor law and its potential effect on labor’s ability to initiate and shape the growth of ESOPs. Labor law’s regulation of employee ownership, therefore, may be an important factor in unions’ reluctance to become involved in such plans. If labor law is a significant obstacle to employee ownership, it may be possible to enact reforms that allow employers, employees, and unions to benefit from employee ownership, while remaining faithful to traditional labor concerns.

A. Are Employee Solicitations for Employee Ownership Covered Under Section 7?

If a union, or an individual employee, wishes to implement employee ownership, it must both garner support from the employees and bargain with the employer. Depending on the structure of the ESOP, labor law may pose obstacles to such solicitation attempts. In particular, NLRB interpretations of the NLRA have not protected against employer retaliation attempts to initiate ESOPs with significant employee control—features arguably necessary for many of the potential benefits of employee ownership.183

Employers or managers often will seek to protect their managerial power by resisting employee ownership plans involving employee control. Managers who wish to scuttle solicitation attempts have many means to accomplish their goal, including enforcement of no-solicitation rules, refusals to bargain, or even dismissals of employees supporting the plan. These decisions to resist employee ownership may not be the most beneficial for the firm. Because managers typically value their stock-option shares less than outside investors value their shares, there may be a gap between managerial and investor interests.184 This differing valuation can mitigate, or perhaps adversely affect, a significant goal of stock-options—to increase managers’ conformity to outside investors’ preferences. Managers also may have

---

183. Because labor organizations usually are involved in employee-initiated ESOPs, this Article will generally refer to unions. It will be noted, however, where the law treats actions by individual employees different from actions of unions.

184. See Blasi et al., supra note 8, at 63.

185. See Melton, supra note 103, at 377 (arguing that extra risk and transfer restrictions makes “the value the manager assigns to his shares . . . less than that assigned to the shares by outside investors”).
individual interests, such as their salary or job security, that leads them to make decisions that benefit their interests over that of the firm.¹⁸⁶ Employers, and particularly managers, may, therefore, resist attempts to decrease their control over firm policy, even where increased employee control may benefit the firm as a whole. Employee control, therefore, can provide a correction to these misaligned interests by moving the firm in the direction it would have gone if manager interests were better aligned with those of the firm.

In order to prevent such resistance, an unfair labor practice must be found, typically for the interference with employees’ section 7¹⁸⁷ rights, as enforced through section 8(a)(1).¹⁸⁸ Section 7 of the NLRA states, in part, that “[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .”¹⁸⁹

Because ESOPs (or their trusts, ESOTs) are not considered labor organizations,¹⁹⁰ solicitation for employee ownership must fall under the “mutual aid or protection” clause of section 7 to be protected. In order for an activity to be considered “mutual aid or protection,” the Board must hold that it is both concerted and protected. This test was defined in NLRB v. Oakes Machine Corp.¹⁹¹ as being satisfied if: “(1) the employee’s activity was concerted; (2) the employer was aware of its concerted nature; (3) the activity was ‘protected’ by the act; and (4)

¹⁸⁶. See Jennifer Arlen & Deborah M. Weiss, A Political Theory of Corporate Taxation, 105 Yale L.J. 325, 337 (1995) (noting that one cause for the lack of managerial resistance to double taxation vis-à-vis shareholders is that “[m]angers may pursue investment strategies designed not to maximize profits but to secure their positions and increase their salaries” (citation omitted)); John C. Coffee, Jr., Shareholders Versus Managers: The Strain in the Corporate Web, 85 Mich. L. Rev. 1, 35 (1986) (stating, in the takeover context, that “managers had declined to adopt their shareholders’ preferences with respect to the issues of risk, growth, and the optimal payout of earnings, until the takeover forced them to do so”); Manuel A. Utset, Towards a Bargaining Theory of the Firm, 80 Cornell L. Rev. 540, 571 (1995) (stating that “managers and shareholders will have a conflict of interest . . . [where] individual interests conflict with the collective interest in reaching a bargain as quickly and as cheaply as possible” (citation omitted)).
¹⁸⁸. See id. § 158(a)(1) (making it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in § 157 of this title”).
¹⁸⁹. Id. § 157.
¹⁹⁰. See id. § 5152(5) (stating that a “labor organization” means any organization . . . which exists for the purpose . . . of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work”).
¹⁹¹. 897 F.2d 84, 93-94 (2d Cir. 1990) (holding an employee’s letter, complaining of the company president’s actions, to be protected as an activity aimed at replacing a supervisor, which was directly related to the terms and conditions of employment).
the discharge or other adverse personnel action was motivated by the protected activity."  

Typically, when an employee or union supports employee ownership, the "concerted" prong of the section 7 test is not in dispute. While individual activity is often not covered by section 7, the Board has stated that activity is concerted when it "encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action . . . ." An individual employee who advocates an ESOP to fellow employees is clearly seeking to induce group action and the action is, therefore, considered to be concerted under section 7. The more significant concern for employee ownership is whether solicitation for such plans is protected. Although a proposed ESOP that does not implicate significant employee control poses few concerns, attempts to gain control over the company have not been well received by the Board.

The "mutual aid and protection" analysis requires that the activity in question promote a section 7 objective. While solicitation for employee ownership appears to fall under the "mutual aid and protection" clause, the Supreme Court has held that section 7's scope is limited by the requirement that the objective of the concerted activity must pertain to employees acting in their interests as employees. In *Eastex, Inc. v. NLRB*, the Court found that distribution of a union newsletter protesting the President's veto of a higher minimum wage, as well as Texas' Right-to-Work statute, was protected under section 7. The Court stated that an individual employee's actions are protected within the "mutual aid or protection" provision of section 7 when the activity relates to "employees' interests as employees;" a determination left in the first instance to the Board.

---

192. Id. at 88.
193. Meyers Indus., Inc., 281 N.L.R.B. 882, 887 (1986) (holding that an individual employee's refusal to drive an unsafe vehicle was not concerted activity). Compare Burle Indus., Inc., 300 N.L.R.B. 498, 501-03 (1990) (holding that an employee's inquiries into other employees' physical well-being after a chemical leak was concerted activity), and Frank Briscoe, Inc. v. NLRB, 637 F.2d 946, 949 (3d Cir. 1981) (holding that filing racial discrimination charges with the Equal Employment Opportunity Commission constituted concerted activity), with Mushroom Transp. Co. v. NLRB, 330 F.2d 683, 685 (3d Cir. 1964) (holding that an employee's repeated advising to other employees as to their rights under the collective bargaining agreement was not concerted activity).
194. See Harrah's Lake Tahoe Resort Casino, 307 N.L.R.B. 182, 182 (1992) (holding that an individual employee's ESOP solicitation was unprotected under section 7, but noting that "[t]here is no question that [the individual's] activities were concerted").
195. See supra text accompanying note 189.
197. See id. at 569-70.
198. Id. at 565-68.
199. See id. at 568; see also G & W Elec. Specialty Co., 154 N.L.R.B. 1136, 1137 (1965) (holding that an employee's solicitation of signatures for a petition that addressed the operation of the employee credit union was protected concerted activity,
held that the "mutual aid or protection" clause is to be interpreted more broadly than mandatory subjects of bargaining (wages, hours, and conditions of employment); otherwise, "the phrase 'or other mutual aid or protection' [would be read] out of the Act."  

The Board confronted the issue of whether solicitation for employee ownership is protected, concerted activity under section 7 in Harrah's Lake Tahoe Resort Casino. In Harrah's, Larry George, a casino dealer, distributed literature that encouraged employees to support a leveraged buy-out of their employer through an ESOP purchase of 50% of the firm's stock. George placed his flyers near company newsletters, in the employee lounge, and in the cafeteria. He was then dismissed because management stated that his flyers violated company policy against distributions in work areas such as the cafeteria.

The central issue in the case was whether George's activities were considered "mutual aid or protection" under section 7. The General Counsel argued that Harrah's had committed unfair labor practices by telling George how he could solicit, by firing him, and by

---

200. See 29 U.S.C. §§ 158(d), 159(a) (1994); infra Part III.B.

201. G & W Elec., 154 N.L.R.B. at 1138 (footnote omitted). However, the Board does not appear to be following this distinction, as a comparison of part III.A and part III.B of this Article will reveal.


203. George proposed that the ESOP trust, which held 1% of the company's stock at the time, borrow $335 million in order to buy 50% of the company's outstanding (publicly traded) stock. He also wanted the company to shift 50% of its corporate debt to the trust, which would be paid back by the firm's future income. George believed that this plan would save the company $31 million in taxes. See id. at 184. The flyer was titled "Money For Nothin'" and stated in part:

Our ESOP Trust borrows money from a commercial bank to buy 50% of [the firm's] stock for the employees.

Since the employees then own 50% of the stock, we get 50% of the operating income ("profits").

For the following 10 to 15 years, we use our share of the profits to pay off the bank loan.

At the end of 10 years, each employee owns stock which could be worth as much as 3 times his annual earnings (salary plus tips). If we leave sooner, we get less. If we stay longer, we get more. . . . [The benefits include] participatory management . . . [such as] morale, productivity, and profitability.


204. See Harrah's, 307 N.L.R.B. at 184. In fact, some flyers were placed in the company newsletter, but George denied any involvement. See id. at 185.

205. See id. George was later reinstated after promising to allow the company to review any future literature distributed by him and to follow the no-distribution policy. See id. at 185-86.

206. See id. at 182.
making him clear future solicitations after his reinstatement. The Administrative Law Judge ("AL") found, and the Board agreed, that the objective of the proposal "was to transfer ownership and control of the Respondent to the employees." Because "any benefits ... would flow to employees' presupposed corporate ownership," the employer did not violate the NLRA by firing George for his solicitation. The Board found that "the proposal does not advance employees' interests as employees but rather advances employees' interests as entrepreneurs, owners, and managers."

The ALJ, upon whom the Board decision relied, based his findings on the fact that ESOP benefits presupposed ownership and that George's plan was an attempt to change the corporate structure. The holding relied on Nephi Rubber Products Corp. where, after a business shut down, several ex-employees attempted to create an ESOP to purchase the company. When a competing enterprise bought the company, the new owners refused to hire the employees who had pushed for the ESOP. The Nephi Board held that these ex-employees were acting solely as entrepreneurs, not as employees, and their conduct was not protected by section 7. In Harrah's, the Board reasoned that the sought-for 50% ownership would necessarily involve a change in corporate control similar to Nephi, leaving George's solicitation unprotected.

There are several problems with the Harrah's analysis. One is the Board's premise that "current employees would not enjoy any of the envisioned benefits unless and until they, through the ESOP, effectively controlled the corporation." This assumption ignores the fact that many, if not most, ESOPs do not involve voting rights for most managerial decisions. While George's proposal mentioned "par-

207. See id. 186-87 (noting the future clearance charge was the only violation found by the Board).
208. Harrah's, 1992 NLRB LEXIS 482, at *6 (Member Devaney, dissenting). The dissent disagreed with this characterization, arguing that George was only trying to improve the employee's financial stake and had shown no interest in managerial control as such. See id. at *9 (Member Devaney, dissenting).
209. Id. at *6 (Member Devaney, dissenting)
210. Harrah's, 307 N.L.R.B. at 182. Some attempts to change management, however, can be protected. See NLRB v. Oakes Mach. Corp., 897 F.2d 84, 89 (2d Cir. 1990) (finding activity opposing a supervisor to be protected if, inter alia, the supervisor dealt directly with employees and conditions of employment).
211. See Harrah's, 307 N.L.R.B. at 186.
212. 303 N.L.R.B. 151, 158 (1991) (finding activity not to be protected by section 7 because it was "designed solely for the purpose of influencing or producing changes in the management hierarchy" (citing Retail Clerks Union, Local 770, 208 N.L.R.B. 356, 357 (1974))).
213. See Nephi, 303 N.L.R.B. at 158. The Board decided the successorship issue by holding the new firm to be a successor. See id. at 156-57.
214. See id. at 158.
216. Id.
217. See supra notes 35-39 and accompanying text.
ticipatory management,” its primary objective was to increase employee compensation. Under George’s ESOP, it was quite possible that the employees could benefit financially (i.e., by obtaining improved job security) from their stock ownership, yet possess little or no managerial voice.

A more significant problem is the degree of sought-after managerial control thought necessary to preclude section 7 protection. If employees believe that their firm would benefit from increased employee control, what can they do to push for this change? The Nephi ruling was based on Good Samaritan Hospital & Health Center and Retail Clerks Union Local 770, Retail Clerks International Association, both of which precluded section 7 protection for activity that was designed solely to influence or change management. The Board, in Good Samaritan, had ruled that such employee pressure would be allowable as long as it was not designed solely to change the managerial structure. In Retail Clerks, six employees had actively opposed the election of the new company president, and took steps such as stuffing envelopes and distributing literature for the new president’s opponent. The president fired the six employees, which the Board ruled was not a section 8(a)(1) violation because employees “ha[ve] no protected right to engage in activities designed solely for the purpose of . . . producing changes in the management hierarchy.” While activity designed solely to change management may not be appropriate for union economic pressure, it does not follow that activity primarily addressed to employee concerns, but to be accomplished through changes in management should also be prohibited.

As Harrah’s dissent points out, the Board appeared to ignore the “solely” requirement of Nephi and Retail Clerks. In particular, the Harrah’s Board claimed that, despite being factually distinguishable, “the underlying rationale [of Good Samaritan] . . . supports our deci-

218. See Harrah’s, 1992 NLRB LEXIS 482, at *9 (unpublished dissent) (Member Devaney, dissenting).
219. 265 N.L.R.B. 618, 626 (1982) (finding no section 8(a)(1) violation for firing two employees who complained about their manager’s performance because the employees’ objective, to change the managerial philosophy of their supervisor, was “outside the objectives of the mutual aid or protection provisions of the [NLRA]”).
221. See Good Samaritan, 265 N.L.R.B. at 626-27; Retail Clerks Union, 208 N.L.R.B. at 357.
222. See 265 N.L.R.B. at 626.
223. See 208 N.L.R.B. at 356.
224. Id. at 357.
225. See 1992 NLRB LEXIS 482, at *8-*9 (Member Devaney, dissenting). The Board recognized, however, that “[t]he dissent correctly points out that George’s proposal envisioned enhanced benefits for current employees and was not designed solely to product [sic] changes in management.” Harrah’s Lake Tahoe Resort Casino, 307 N.L.R.B. 182, 182 (1992). The Board, however, still relied on the Good Samaritan progeny, arguing for its application because the proposal would “fundamentally . . . change how and by whom the corporation would be managed.” Id.
tion in this case." Good Samaritan, however, clearly states that the non-protected activities "were not directed to improve their lot as employees, but were instead an effort on their part to affect the ultimate direction, philosophy, and managerial policies of Respondent." Harrah's reliance on these cases is perplexing, given that George's motivation was clearly intended to improve the employees' "lot" as employees. The Board, in the same year as Harrah's, stated that section 7 coverage depends not on "the mere potential . . . for a voice or control [over firm decision-making] . . . . Rather, it is [the] actual control or an effective voice" that is significant. One could argue over the extent to which George sought management control, but the facts of the case clearly illustrate that his primary concern was for increased compensation. Through Harrah's, the Board appears to be eliminating section 7 coverage for any ESOP proposal that was designed to change the employee-employer relationship. The Board's treatment of the facts in Harrah's also suggests a rule that excludes section 7 protection for activity implicating merely the potential of managerial control, even where the employee's central aim is to increase compensation. Under either interpretation, the test for protected objectives established in Harrah's seems to raise a far more restrictive hurdle than had been the case under prior Board law.

As stated above, the Board assumes that "any 50-percent shareholder, including an ESOP trust, would as a practical matter exercise effective control . . . ." This leaves open the question of what level of potential control will eliminate a proposal's protection under the NLRA. In Harrah's, the ESOP would not have had a majority stake

227. 265 N.L.R.B. at 626 (footnote omitted).
228. George's flyer, titled "Money for Nothin,'" described his plan to obtain 50% of the employer's stock through an ESOP, which he explicitly claimed would increase employees' compensation once the debt was paid. See supra note 203.
229. Science Applications Int'l Corp., 309 N.L.R.B. 373, 376 (1992). The Board rejected the employer's argument that employees holding less than 1% of the company stock should not be allowed to organize because of the potential for gaining managerial control, on grounds that employees sought no changes in management hierarchy. See id. at 374-76.
230. See supra note 203.
231. See Science Applications, 309 N.L.R.B. at 376. In Science Applications, the Board invoked Harrah's to hold that:
   Employee-stockholders also may be excluded from the protections of the Act where they possess or seek an "effective voice" in management or participate directly in corporate policy formulation through membership on an employer's board of directors.
   In circumstances where a group of employees own less than a majority of an employer's stock and otherwise have no voice in management they are afforded full representational rights.
   Id. at 375 (internal citations omitted); see also id. at 376 (stating that Harrah's involved "an attempt to gain control over management through majority control of stock by a unified group of employees").
232. Id. at 376.
in the company, but it was still considered an unprotected objective. It appears, therefore, that an ESOP with a significant amount of stock will be excluded from section 7 protection, given its mere potential for "effective control." The level of potential control required to preclude section 7 coverage is unclear, however, especially since the Board did not base its decision on the percentage of equity that the ESOP holds. The result is a rule that is far more restrictive of employee rights than previous Board decisions and a rule that also fails to provide clear guidelines regarding the level of protection that section 7 provides to employee solicitation efforts to obtain employee ownership plans.

The Harrah's decision illustrates a serious reluctance by the Board to allow any change in corporate structure under section 7. While Harrah's declares that it is following past cases, the decision's rejection of the "solely" entrepreneurial objective standard cuts back on the coverage previously afforded by Nephi. Harrah's may simply be a reflection of the Board's traditional view of the employee-employer relationship. Yet, the appropriateness of this policy in today's economic environment is doubtful. Although solicitation for employee ownership may not have been originally intended as a protected activity, the language of section 7 does not preclude the Board from changing its interpretation to better accommodate emerging employee concerns for participation in firm decision-making. The changing structure of firms, which now seek more employee input and responsibility, suggests that activities supporting employee ownership should be protected. As will be discussed below, employee solicitation for increased control can protect employee rights during implementation of an employer-initiated ESOP and allow employees to improve their conditions of employment. Both of these objectives relate to "employees' interests qua employees" and suggest that solicitation of employee ownership should be protected. The Board, however, appears to be moving in the opposite direction, as seen by its willingness to exclude from section 7 efforts in support of a plan that involves changes in managerial rights.

If the true test for protection of employee activity under section 7 is whether the actions attempt to provide "mutual aid or protection" to employees, then it seems that the Harrah's Board got its reasoning backwards. The Board implies that if an employee or union proposed a plan that sought stock for the employees with no control, then it would be protected under section 7. The benefits derived from

233. See Hollo, supra note 40, at 569.

234. See Estreicher, Employee Involvement, supra note 126, at 150 (arguing for a partial repeal of section 8(a)(2) by limiting the definition of "labor organization" to those that "bargain with" employers over working conditions).

235. See Harrah's Lake Tahoe Resort Casino, 307 N.L.R.B. 182, 182 (1992) (holding that "we do not view the envisioned benefits for current employees as bringing the
such an ESOP, however, would come to employees only in their capacity as investors. Yet, an ESOP that seeks to implement some degree of employee control benefits employees not only through stock, but also through better working conditions and other gains derived from increased worker input. These incentive and informational benefits of stock ownership affect "employees qua employees." If the Board's test is truly "employees' interests as employees," then section 7 should protect plans that are designed to seek improved conditions for employees through managerial control. By returning to the "solely" test of Nephi, attempts to implement employee ownership would be excluded from section 7 protection if the plans were only intended to address a change in ownership. Plans that addressed benefits and working conditions, such as the one in Harrah's, would be protected.

The Board's traditional view of employee interests, as well as its concern over enabling employers to maintain managerial control free from union interference, no doubt prevent it from taking the above approach. Concerns over union interference, however, are protected by other aspects of the Act and should not prevent all employee attempts to increase their policy-making role in the firm. If the Board is concerned about other problems that employee control implicates (e.g., conflicts of interest of a union that represents employee-owners on the firm's board of directors, union interference with management, or employer domination of a union), it should discuss those issues directly and reverse Harrah's. Instead, the Board seems to have opted for a wholesale preclusion of section 7 protection for activity that seeks to expand employee ownership as a means of improving both the financial and working conditions of employees.

B. Are Attempts to Implement Employee Ownership a Mandatory Bargaining Subject?

If a union wishes to insist, during collective bargaining, that the employer establish an ESOP, a critical question is whether the plan is a mandatory or permissive subject of bargaining. If a subject is found

---

236. Workers, of course, would be eligible for ESOP benefits only if they were employees (or ex-employees). The Board, however, clearly does not consider this factor to be relevant; otherwise, the Harrah's proposal would be protected.

237. For a discussion of benefits, see supra part II.

238. See Eastex, Inc. v. NLRB, 437 U.S. 556, 565-68 (1978); see also G & W Elec. Specialty Co., 154 N.L.R.B. 1136, 1137 (1965) (finding a section 8(a)(1) violation for the firing of an employee who criticized operation of company credit union, because such criticism was related to the interests of employees as employees).

239. Eastex, 437 U.S. at 567.

240. See infra Part III.E.2.

241. Title 29, section 158(d) of the United States Code provides in pertinent part:
to be mandatory, the party that has initial control over the topic must both bargain with a sincere desire to reach an agreement and bargain in good faith, and to an impasse, before implementing changes in a previous agreement.\textsuperscript{242} Any midterm modifications of a mandatory subject also must be agreed upon by both parties before a change is made.\textsuperscript{243} Moreover, employees who strike over an employer's failure to bargain over a mandatory subject cannot be discharged.\textsuperscript{244}

The most important implication of the mandatory subject determination for a union wishing to implement an ESOP is the ruling in \textit{NLRB v. Wooster Division of Borg-Warner Corp.}\textsuperscript{245} that the non-controlling party (typically, the union) can use economic pressure, if an impasse occurs, to insist on the mandatory subject.\textsuperscript{246} The corollary to the \textit{Borg-Warner} rule is that if the subject is declared to be permissive, the non-controlling party cannot use economic pressure to insist on the matter.\textsuperscript{247} Therefore, if a particular subject is declared permissive, a union has no legally protected means of exerting economic pressure to force an unwilling employer to even discuss the subject.

A mandatory subject is one that encompasses "wages, hours, and other terms and conditions of employment" under section 8(d) of the NLRA.\textsuperscript{248} Congress's intent in implementing a mandatory bargaining requirement came from "an awareness that refusals to confer and negotiate had been one of the most prolific causes of industrial strife."\textsuperscript{249} The Supreme Court held that mandatory subjects involve matters

---


\textsuperscript{243} See NLRB v. Katz, 369 U.S. 736 (1962) (finding an unfair labor practice where the employer unilaterally changed wage and leave policies); see also Harper, \textit{Leveling the Road}, supra note 242, at 1478-79 (discussing the restrictions on mandatory bargaining).

\textsuperscript{244} See Harper, \textit{Leveling the Road}, supra note 242, at 1478-79.

\textsuperscript{245} 356 U.S. 342 (1958).

\textsuperscript{246} See id. at 349-50; Harper, \textit{Leveling the Road}, supra note 242, at 1447.


\textsuperscript{248} See Borg-Warner, 356 U.S. at 349.

about which employees could make concessions. The Court has also held that collective bargaining is more appropriate for labor investment issues rather than capital investment concerns. Presently, the primary test for mandatory bargaining subjects focuses on section 8(d) "duty to bargain" subjects ("wages, hours, and other terms and conditions of employment").

The Court has struggled to articulate a clear test to determine whether a subject is mandatory or permissive. In First National Maintenance Corp. v. NLRB the Court employed a balancing test, weighing the employer's need for uninhibited decision-making against the benefits to labor relations and the collective bargaining process that would occur through negotiation. This balance seeks to exclude from mandatory bargaining decisions that have a weak impact on employer-employee relations, particularly those that involve significant elements of entrepreneurial decision-making. The First National Maintenance balancing test, however, is quite vague and, given the importance of deciding whether a subject is mandatory, has faced heavy criticism.

Because of the wide variety of employee ownership plans, the determination of a plan's mandatory or permissive nature will also vary. The central line in such an inquiry is the degree of employee control that the plan contemplates. If, like many ESOPs, the employer-initiated plan provides little or no employee control, with stock being provided to offset wage or other benefit reductions, it would seem to be a mandatory subject. If negotiations over this type of ESOP reach an impasse, and the subject is determined to be mandatory, the employees will be able to use economic pressure to prevent the employer from unilaterally implementing the plan. The ESOP's effect on em-

250. See id. at 214 (declaring subcontracting to be a mandatory subject of bargaining, as employees could potentially offer labor cost concessions).

251. See id. at 213; see also Michael C. Harper, The Scope of the Duty to Bargain Concerning Business Transformations, in Labor Law and Business Change: Theoretical and Transactional Perspectives, supra note 86, at 25, 29-30 [hereinafter Harper, Scope of Duty] (arguing that such a view ignores the economic reality that a decision on either type of investment affects the other).


254. See id. at 679.

[In view of an employer's need for unencumbered decision making, bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business.

Id.]

255. See, e.g., Harper, Leveling the Road, supra note 242, at 1449 (claiming that the First National Maintenance decision limited the scope of compulsory bargaining topics without evidencing a statutory intent to do so); Thomas C. Kohler, Distinctions Without Differences: Effects Bargaining in Light of First National Maintenance, 5 Indus. Rel. L.J. 402 (1983) (opining that the First National Maintenance decision would have less impact on collective bargaining than expected).
ployee benefits in this situation clearly involves "wages" and "conditions of employment" under section 8(d) and would, therefore, allow a union to insist, even through economic pressure, on its demands regarding the ESOP's impact on benefits.

A plan that does not involve benefit reductions, but still does not implicate changes in control, will also be considered mandatory. In *Richfield Oil Corp. v. NLRB,* the D.C. Circuit enforced a Board order finding that an employer's refusal to bargain with the union over a unilaterally-imposed ESOP (entirely funded by the employer) violated sections 8(a)(1) and 8(a)(5) of the NLRA. The court concluded that the ESOP, which held an insignificant portion of the employer's publicly traded stock, implicated both "wages" and "conditions of employment." The court then held that wages are a subject of mandatory bargaining when they involve "direct and immediate economic benefits flowing from the employment relationship." Moreover, the court stated that conditions of employment involve any benefit received immediately or in the future that "forms a part of the consideration for work performed . . . ."

An important consideration for the court was whether the plan involved benefits that, all other things being equal, would make the job more attractive than one without the benefit. Because eligibility for the Richfield ESOP required participants to be an employee for a minimum number of years, as well as requiring employee contributions to the plan for those that elected to participate, the benefits resulting from the ESOP were considered "wages" by the Board and the court. These "wages" would make employment with Richfield more desirable than employment with a comparable employer with-

256. 29 U.S.C. § 158(d).
257. 231 F.2d 717 (D.C. Cir. 1956).
258. 29 U.S.C. § 158(a)(1) (making it an unfair labor practice "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in § 157").
259. *Id.* § 158(a)(5) (making it an unfair labor practice "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of § 159(a)").
261. Richfield announced the ESOP as a voluntary "deferred distribution" plan under which the company would match an employee's contribution by 50 cents on the dollar, in addition to an annual contribution to the plan based on profits. *See id.* at 718-19. The union wanted to increase the number of employees eligible for participation, to put in place safeguards in case of a strike or lockout, and to make other minor changes. *See id.* at 718.
262. *See id.* at 724.
263. *Id.* (quoting W.W. Cross & Co. v. NLRB, 174 F.2d 875, 878 (1st Cir. 1949)) (holding a group health and accident insurance program to be a mandatory subject of bargaining under § 159(a)).
264. The court made an analogy to insurance and pension programs. *See id.* at 724.
265. *Id.* (quoting Inland Steel Co. v. NLRB, 170 F.2d 247, 253 (7th Cir. 1943) (holding pension and seniority policies to be a mandatory subject of bargaining)).
266. *See id.* at 724. The Board's opinion also noted that Richfield's ESOP was covered by I.R.C. §§ 165(a) and 23(p), which stated, in part, that such plans are for the
out the ESOP; therefore, the plan was also considered a "condition of employment." In view of these features, the Richfield ESOP, without any employee control over managerial policy, was considered to be a subject of mandatory bargaining.

Under Richfield, it is clear that employees can exert economic influence regarding an ESOP's effect on employee benefits. The ability of a union or employees to initiate discussion of employee control, unrelated to direct employee benefits, is far less certain. While some commentators have suggested that control aspects of ESOPs would be mandatory if negotiated benefits were offered in exchange, this result is not clear under existing decisional law. Professor Deborah Olson, for example, argues that employees who make concessions in times of financial turmoil may face a plan that, because of the speed often needed to finance such deals, is unfair. She concludes that, as shareholders, employee-owners should be allowed to demand voting rights in stock plans without labor law interference. The Board and the courts, however, do not appear to be following Olson's suggestion. The Richfield court explicitly pointed out that the ESOP did not imply any managerial control, implying that if the plan did involve control it would not be mandatory.

In cases where economic circumstances force the firm to propose an ESOP, the extent of voting rights or other types of control should not be a frequently-raised issue. A union that wants some degree of control to counter an employer-initiated ESOP's reduction of benefits does not have to use economic pressure to achieve its goal. The union merely has to refuse to acquiesce to concessions that are not accompanied by increased employee control over firm decision-making. If employees are willing to strike for increased control, a simple refusal to

---

exclusive benefit of employees and are considered compensation for employees' services actually rendered. See Richfield Oil Corp., 110 N.L.R.B. 356, 360 n.7 (1954).

267. See Richfield, 231 F.2d at 724.

268. See id.; see also NKS Distrib., Inc., 304 N.L.R.B. 338 (1991) (declaring an ESOP similar to the one in Richfield to be a mandatory subject of bargaining), vacated, 149 L.R.R.M. (BNA) 1277 (N.L.R.B. 1995); Allied Chem. & Alkali Workers of Am., Local Union No. 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157 (1971) (limiting mandatory subject to those that "vitaly" effect conditions of employment).

269. See Olson, Worker Ownership, supra note 7, at 787 (explaining that "where the employees are forced . . . to agree to a stock plan in exchange for some previously negotiated pay or benefits [because of external economic circumstances], all aspects of the plan, including voting rights, must be mandatory subjects of bargaining").

270. See id. at 787-88.

271. See Richfield, 231 F.2d at 721 (holding that "[t]here is involved no threat to Richfield's 'maintaining the integrity of its own business ownership' . . . . Nor is there substance to the claim that the situation 'necessarily and inevitably involves bargaining about the conditions and prerogatives of ownership.'").

272. The issue could certainly be relevant. The prospect of economic pressure or refusal to discuss the issues, however, becomes less likely as employees and the union will be more concerned with the firm's survival than with expanding employees' role in firm decision-making.
accept the management's ESOP proposal appears to be far less painful and avoids potential *Borg-Warner* problems. The result is a situation where Board interference is not likely to be requested.

The central question over the Board's role in this area is how employee-instigated ESOPs, particularly proposals initiated independent of employer requests for concessions, would be classified. The probable holding is that any aspects of the ESOP that are not directly related to employee—i.e., non-equity—benefits would be considered permissive under the NLRA. Union attempts to force discussion, or use economic pressure, in order to obtain any degree of managerial control would, therefore, be unprotected.\(^\text{273}\) Board rulings state that matters that "affect the scope, direction, or nature of the business" would be considered permissive.\(^\text{274}\) The Board further emphasizes that unions can represent employees only "in their capacity as employees" and have no claims as stockholder representatives of the employees.\(^\text{275}\) Aspects of the plan that directly affect employee compensation, such as concessions made for the ESOP or benefits from the plan, therefore, are considered mandatory. Yet, managerial decision-making rights under employee ownership would seem to be permissive, thereby preventing employees or a union, bargaining over a union-initiated ESOP proposal, from insisting on a significant managerial role or any other expansion of decision-making power. It is unclear, however, whether an employee-instigated ESOP would be considered permissive in its entirety, or whether only economic pressure for voting rights and other forms of control would be precluded.\(^\text{276}\)

\(\text{\textsuperscript{273}}\) See *supra* note 246 and accompanying text. The suggestion is that if the ESOP were to implicate the "integrity of its own business ownership" or the "prerogatives of ownership," it would be considered a permissive subject of bargaining. See *Richfield*, 231 F.2d at 721.

\(\text{\textsuperscript{274}}\) See *United Techs.*, 115 L.R.R.M. (BNA) 1281, 1281 (N.L.R.B. 1984) (holding that decision to transfer and consolidate certain unit work is not a mandatory bargaining subject under section 8(a)(5) and 8(d)), overruled on other grounds by Dubuque Packing Co., 303 NLRB 386 (1991); see also *First Nat'l Maintenance Corp. v. NLRB*, 107 L.R.R.M. (BNA) 2705 (N.L.R.B. 1981) (imposing no duty to bargain over decision to close part of its business); Fibreboard Paper Prods., 57 L.R.R.M. (BNA) 2609, 2611 (N.L.R.B. 1964) (holding that "'contracting out' of the work previously performed by members of an existing bargaining unit is a subject about which which the [NLRA] requires employers and the representatives . . . to bargain collectively"); Winn-Dixie Texas, Inc., 234 N.L.R.B. 72, 76 (1978) (holding that a new stock option plan that did not involve employer contributions, and did not contemplate employee control, is a mandatory bargaining subject).

\(\text{\textsuperscript{275}}\) See *Richfield Oil Corp.*, 110 N.L.R.B. 356, 363 (1954).

\(\text{\textsuperscript{276}}\) Even those commentators who have urged alternatives to the *Borg-Warner* approach are often unclear as to their position on the bargainability of ESOP proposals. See, e.g., *Harper, Scope of Duty, supra* note 251, at 29-30 (noting the failure of the Court to define the scope of mandatory bargaining specifically in relation to employee ownership). Harper argues that the distinction between mandatory and permissive subjects should be determined by the subject's effect on the employer's product market. See *id*. He supports the *Richfield* decision because the ESOP had no
One problem with the Board’s application of Borg-Warner in these instances is that if employees have a significant amount of stock, without having voting rights or corporate board membership, the company is able to avoid accountability to a significant, if not a majority, segment of its stockholders. Moreover, as will be discussed below, managerial rights under an ESOP are still protected from undue labor influence. The NLRA’s policy to encourage industrial harmony, therefore, is not served by allowing management, which may hold its own self-interest above that of shareholders to avoid economic pressure from unions trying to implement a control-sharing ESOP that may boost efficiency, production, and other components of the firm’s performance.

Employee ownership is not, of course, guaranteed to improve a firm’s performance. Yet, worker attempts to improve their lot as employees through such plans should not be summarily prohibited merely because they create an incidental effect on managerial policymaking or the decision-making structure. Safeguards may be implemented that avoid dangers the Board believes employee ownership presents (e.g., union conflicts of interest, union interference with management, and employer domination of unions). Moreover, employee attempts that are aimed solely at managerial change can remain prohibited, while still allowing employees to seek support for employee ownership plans that implicate some degree of influence over firm decision-making.

The combination of the Board’s policy on both mandatory bargaining and the coverage of section 7 places extraordinary hurdles on unions or employees trying to implement an ESOP that increases employee involvement in management. While solicitation for employee ownership would be considered concerted activity, Harrah’s may preclude its protection under section 7 by declaring such activity an unprotected objective. In addition, employee ownership plans that implicate worker control are probably permissive subjects of bargaining, meaning that unions or employees cannot even insist on a discussion of these plans.

influence on the product market. See id. Moreover, he argues that courts should protect unions’ right to exert economic pressure in support of proposals that benefit employees, including pollution levels in the community. See id. An ESOP that implicates significant employee control, however, may be treated as permissive under Harper’s analysis, as there is potential for employees to influence the product market.

277. See Olson, Worker Ownership, supra note 7, at 788.
278. See id.
279. See supra note 186 and accompanying text.
280. See Olson, Worker Ownership, supra note 7, at 788.
281. See infra Parts III.E, III.F.
283. See supra Part III.A.
If a union is supporting employee ownership, its ability to force the issue is significantly circumscribed by labor law. While the union could bring up the ESOP in negotiations, under *Borg-Warner* it is excluded from exerting any economic pressure to insist on any significant employee control. *Borg-Warner* also weakens the union's collective bargaining strength as it forces the union to truncate its opening position regarding employee ownership in order to avoid any suggestion that it is seeking the amount of control that would render the ESOP proposal a permissive subject. Moreover, under *Harrah's*, an employer can freely discipline union members who solicit employee-controlled ESOPs, because pressure for a permissive subject is an unprotected means of seeking section 7 protection.\(^{284}\)

The individual employee may not fare much better. Even if the Board gave the employees more leeway than the union, *Harrah's* eliminates any effective means that unorganized workers can use to garner support for an ESOP that implicates potential control in the face of a hostile employer. By placing any ESOP that could potentially implement employee control outside of section 7 protection,\(^{285}\) the Board allows a resistant employer to stifle any employee attempts to gain support for such a plan.

The inability of employees to obtain leverage against a resistant employer through economic pressure or on-site solicitation is peculiar. This stifling of all significant employee control attempts does not appear to further the NLRA's interests of "industrial peace."\(^{286}\) There is no evidence that employees will abuse employee ownership proposals to injure the collective bargaining process or the firm. Indeed, an employee stake in the firm's equity and an increase in shared management could achieve the opposite result. Given the beneficial effect that employee ownership can have on working conditions and employee-employer relations, excluding these ESOPs from section 7 protection appears to be unwarranted. Furthermore, in situations where employee ownership would benefit the company, yet where management does not have the proper incentives to implement a change, the limits on ESOP proposals may lead to decision-making by managers

---

284. See NLRB v. Washington Aluminum Co., 370 U.S. 9 (1962). Changes in section 8(d) interpretations, however, would also affect section 7, allowing some means that were previously unprotected.

285. This may be an overstatement given the Board's later interpretation of *Harrah's*. See Science Applications Int'l Corp., 309 N.L.R.B. 373, 376 (1992) (stating that *Harrah's* involved "an attempt to gain control over management through majority control of stock by a unified group of employees"). While this conclusion is borne out by the facts, *Harrah's*, itself, presumed that actual control would result from the ESOP.

that differs from outside investors, thereby introducing inefficient behavior into the firm and into the economy.

The Borg-Warner framework, in particular, is inappropriate for employee ownership. Aside from the oft-stated criticisms of this framework, its effect on unions, in combination with Harrah's, unjustifiably hinders employees' attempt to seek control through employee ownership. Employers opposed to employee ownership can express their antagonism through no-solicitation rules, refusals to bargain, and even dismissals of employees supporting ESOPs with control. Employees and unions, however, are unable to insist on bargaining or use economic pressure for the same plans. There is a concern that unions will exert undue influence over a firm's entrepreneurial decisions, yet employee-owned firms are rarely dominated by employees and if so, limits on their influence are clearly established. Most employee-owned companies, even if majority employee-owned, only have a minority of employee board members. Employees will have some influence over entrepreneurial policy, but the dangers implicated by employee control, especially when labor policy is removed from employee board members' input, seem trivial compared with the potential gains of employee ownership, as well as the harm to employees' bargaining power occurring under the present framework.

The combination of the Board's rulings on mandatory subjects of bargaining and the scope of section 7 reveals an unwillingness to encourage or protect employee attempts to initiate ESOPs that could benefit their firms and the economy. This position fails to advance the Board's enforcement of the Act, and limits the implementation of potentially beneficial ESOPs. Additionally, those ESOPs that are created under the present Board interpretations also may allow

287. See supra note 186 and accompanying text.
288. See supra note 247.
289. See Harper, Leveling the Road, supra note 242, at 1447.
290. See, e.g., Gordon, supra note 88 (manuscript at 33-34) (describing UAL's board, with only three out of twelve-directors representing employees); Adam Bryant, Pilots Just Want a Little R-E-S-P-E-C-T, N.Y. Times, Jan. 26, 1997, § 4, at 14 (describing growing union frustration with management at United Air Lines ("UAL"), despite its being an employee-owned company).
291. Seeinfra note 364 and accompanying text. These protections will also limit the ability of unions to exert strategic behavior in order to extract gains through the corporate decision-making process. For instance, UAL has removed its union board representatives from labor policy decisions. The twelve member board is made up of five public directors, four independent directors, two union directors, and one "salaried and management" director (who represents employees). See Gordon, supra note 88 (manuscript at 33). The employees directly elect three members and have a say in the election of the six other non-public directors. See id. (manuscript at 34). All labor issues, such as the collective bargaining agreement, are handled by the "Labor Committee," which has at least one outside public director, one independent director, and at least one other director, but cannot have a union director. See id. (manuscript at 35).
employers to disregard attempts by employees to offset the increased financial risk of employee ownership through employee participation in managerial decisions. These interpretations are not necessitated by the Act; indeed, the policies behind the NLRA would seem to encourage a plan that could benefit both the firm and its employees, as well as the relations between them.

C. Disclosure of Information

In order for employees, or a union, to consider initiating an ESOP, access to the firm’s financial information is essential for them to make informed decisions about the value of the firm, and hence, the ESOP. When an employer offers an ESOP, such as where financial trouble creates a need for cash, the financial information asymmetries will not pose a problem if the employer has a sincere desire to persuade employees to make the concessions in return for which the ESOP is being offered. Yet, if workers seek employee ownership outside of this concessionary context, particularly in an attempt to gain more managerial control in the face of hostile management, the employer has no incentive to provide employees with financial information. Without this information, employees are unable to evaluate the financial stability of the firm, thereby precluding any serious consideration of employee ownership. There is, therefore, a need to understand the extent to which employees or a union can force the employer to turn over information regarding an ESOP proposal.

An employer’s duty to disclose financial information has been limited by the courts. In *NLRB v. Truitt Manufacturing Co.*, the Supreme Court stated that an employer who claims an inability to pay wage increases must disclose financial information supporting that claim. Subsequent judicial interpretation of *Truitt* has limited this duty to these facts, thereby allowing intelligent employers to avoid disclosure through properly-worded bargaining responses. Under this scenario, a drive for employee ownership will lack critical information regarding the firm’s profits, costs, sales, and production levels (other than what is publicly available), making any serious attempt to push for an ESOP hopeless. The perpetuation of this information asymmetry...

292. Information may be required in such situations if the negotiations were considered a mandatory subject of bargaining. See supra note 252 and accompanying text.

293. This duty is derived from the duty under 29 U.S.C. § 158(a)(5) to bargain in good faith. See 29 U.S.C. § 158(a)(5) (1994) (making it an unfair labor practice “to refuse to bargain collectively with the representatives of his employees, subject to the provisions of § 159(a)”).


295. Id. at 152-53.

296. See Graphic Communications Int’l Union, Local 508 v. NLRB, 977 F.2d 1168, 1170-71 (7th Cir. 1992).

try may not only injure employee ownership prospects, but may limit labor-management cooperation as well.\textsuperscript{298}

If an employer, during ESOP discussions, claims a need for compensation reductions due to financial constraints, \textit{Truitt} will certainly apply. A claim of an inability to continue the business without concessions implicates the \textit{Truitt} duty and the employer will have to provide financial information that enables the union to adequately judge the merits of the employer's claim for relief and consider the ESOP proposal that the employer is offering in exchange for concessions. An employer's refusal to provide "requested financial information [that] is relevant to the subject under negotiation"\textsuperscript{299} constitutes a failure to bargain in good faith under section 8(a)(5).\textsuperscript{300}

\textit{Eberhard Foods, Inc.},\textsuperscript{301} is one of the few NLRB discussions related to information demands about ESOPs. In \textit{Eberhard}, the union challenged an employer's refusal to give financial information that the union wanted to protect employees' ownership rights under the ESOP.\textsuperscript{302} The \textit{Eberhard} pension plan had been converted into an ESOP and the union was concerned over its stability given recent sales of many of the company's stores. The NLRB General Counsel stated that the employer's refusal to provide information in this case violated section 8(a)(5), as "an employer must comply with a union's request for information that will assist the union in fulfilling its responsibilities as the employees' statutory representative."\textsuperscript{303} The information must be given "[w]here [it] concerns wage rates, job descriptions, and other information relating to employees in the bargaining unit."\textsuperscript{304}

If the Board does not presume the information to be relevant to bargaining issues,\textsuperscript{305} the union has the burden of proving relevance.\textsuperscript{306} In \textit{Eberhard}, the General Counsel assumed that the ESOP was a mandatory subject of bargaining,\textsuperscript{307} thereby presuming that the infor-

\textsuperscript{298} See \textit{id.}; see also Jill Hodges, \textit{Reaching for a New Contract; Unions Await Payoff at High-Flying NWA}, Star-Trib., July 29, 1996, at 1D (indicating that labor-management cooperation resulting from employee ownership has improved productivity).


\textsuperscript{301} No. GR-7-CA-29140, 1989 NLRB GCM LEXIS 141 (June 30, 1989) (giving an advisory decision from the NLRB Office of General Counsel).

\textsuperscript{302} See \textit{id.} at *5. Twenty-eight items were requested in an "attached copy" that was not included in the decision.

\textsuperscript{303} \textit{Id.} at *6 (citing Detroit Edison Co. v. NLRB, 440 U.S. 301, 303 (1979)).

\textsuperscript{304} \textit{Id.}

\textsuperscript{305} Those issues include wages, job descriptions, and information relating to unit employees. See \textit{New York Times Co.}, 270 N.L.R.B. 1267, 1273 (1984).


\textsuperscript{307} 1989 NLRB GCM LEXIS 141, at *9 (assuming the ESOP was mandatory because it replaced the pension plan and was therefore considered a part of the employees' compensation).
mation sought was relevant. Given this relevance, the General Coun-
se1 held that the union was entitled to information regarding the
financial strength of the ESOP and recommended a complaint be
made against the employer for violating section 8(a)(5) by failing to
provide the union with the information at issue. By placing the bur-
den of proving relevance on the union where a subject is permissive,
and placing the burden on the employer where the subject is
mandatory, a balance is struck between the firm's interest in secrecy
and the union's interest in disclosure.

What Eberhard does not confront is a case, such as with a majority
employee-owned firm proposal, where the proposed ESOP is not a
mandatory subject of bargaining. In particular, if a union sought in-
formation about the company in order to propose significant manage-
rial control for employees, it is unclear if Truitt applies. The union
would have the burden of showing the information's relevance to col-
lective bargaining. Because the Truitt duty is tied to mandatory bar-
gaining subjects, seeking information for a controlling ESOP would
probably not be considered part of employer's duty to provide finan-
cial information.

The inability to gather financial information effectively kills a
union's or an employee's ESOP proposal. There is a need to pro-
tect an employer's sphere of confidentiality, yet whether confidential-
ity concerns are implicated simply because of an ESOP's potential
level of control is questionable. In any event, one solution to these
confidentiality fears is to give the information to a third party, who
would then make recommendations to the union regarding the
ESOP.

In Bauman v. Bish, Weirton Steel Company created such an or-
organization (the "committee") when it was in financial trouble and en-

308. See id. at *16.
Moreover, in a case where the union answers an employer's ESOP proposal with a
demand for information, the analysis will mirror that of the mandatory/permissive
distinction—i.e., the request will be considered relevant if it goes to wages, hours, or
conditions of employment. See supra notes 248-55 and accompanying text. If the
ESOP involves any benefit changes, the employer will likely have to disclose financial
information regarding the proposal and the firm's financial strength.
311. See, e.g., Jim McKay, A Mean Strike: A Union Organizing Drive in Ellwood City Leads to Firings, an Alternative Newspaper and Little Chance of a Settlement Any Time Soon, Pitt Post-Gazette, Sept. 1, 1996, at E1 (describing a case where the em-
ployer demanded a nonrefundable payment of $500,000 to allow the union to look at
the books of an ESOP, thereby killing the union's proposal to take over the plan).
312. See Detroit Edison Co., 440 U.S. at 310, 316-17 (holding that an employer did
not have to give the union copies of aptitude tests taken by employees challenging the
testing procedure because there would be no adequate protection of the tests' secrecy).
tertaining an ESOP proposal. In an effort to obtain data that consultants of the committee had used in making recommendations to the company, the union sued under the Labor-Management Reporting and Disclosure Act of 1959. The union was not satisfied with the consultants' recommendations—in particular, the finding that the ESOP could succeed with a 32% reduction in labor costs—and wanted to analyze the data itself. The consulting firm hired by the committee, however, kept the data and computer model of the steel industry that was used confidential. The union argued that they needed the data to adequately evaluate the proposed 32% cut in compensation, while the employer answered that the cost information included in the data needed to be kept secret from competitors and that the consulting firm had a proprietary interest in keeping the information confidential. The court denied the union's request, stating that an expert third party was sufficient to provide financial information to the union. Moreover, the court asserted that the firm's concern over dissemination of the information by the union was fully addressed by giving the information to a third party.

It is possible that a union will not be content in limiting its access to financial information to third-party intermediaries, as in Bauman, but the union is still free to reject the employer's proposal. Furthermore, the third party option may not be useful when the employee ownership plan implicates employee control. The ESOP will not be considered a mandatory bargaining subject in this instance, and if the union is unable to show the information's relevance to conventional collective bargaining subjects, no further disclosure can be had under the NLRA. It also is possible to allow unions access to the information, but require secrecy clauses. The Board, however, has not been willing to accept secrecy clauses as adequate protection for an employer's interest.

Access to financial information is critical to the creation of employee ownership plans. The Board places a great deal of weight on

314. The Weirton Joint Study Committee had twenty-one representatives of the Independent Steelworkers Union, three representatives of the Independent Guard Union, and five management representatives. See id. at 1056.
315. 29 U.S.C. § 411(a)(1) (1994) (guaranteeing union members the right to participate in the deliberations and business of the union's meetings). Despite the complaint's reliance on the Labor-Management Reporting and Disclosure Act, the court based its decision on the NLRA's duty to bargain. See Bauman, 571 F. Supp. at 1058 (noting that as this was a civil action, the NLRB was not involved in the litigation).
316. See Bauman, 571 F. Supp. at 1056. The data included cost information from both Weirton and other steel companies, as well as the consultant's own steel industry model. See id.
317. See id. at 1057.
318. See id.
319. See id. at 1060.
320. See id. (citing Detroit Edison Co. v. NLRB, 440 U.S. 301 (1979); NLRB v. Truitt Mfg. Co., 351 U.S. 149 (1955)).
321. See Estreicher, Labor Law, supra note 247, at 41-42.
the employer's need to maintain secrecy, often overriding a union's legitimate needs for the information. Although it is difficult to quantify the actual effects of the Board's holdings, the result may be a significant decrease in the number of ESOPs that unions otherwise would initiate.

D. "Employee" Status

The NLRA's traditional dichotomy between labor and management\(^ {322} \) poses a significant obstacle to employees gaining managerial control through employee ownership plans. Because employee-owners possess interests as both employees and owners, there is a question as to how these workers should be treated under the Act. The Board has decided a number of cases involving stock ownership plans and an employee-owner's "employee" status. Generally, continued protection under the NLRA is inversely related to the extent of control, or "effective voice," that employee-owners have over corporate decisions.

In the past, the Board (with some prodding from the Supreme Court) has excluded managers who "formulate and effectuate management policies"\(^ {323} \) from NLRA jurisdiction, often when challenges are made to a unit determination. If this rule were broadly read, any employee-owner who participates in an ESOP with majority control that allows the employee-owner to vote on managerial matters could be excluded from the NLRA.\(^ {324} \) Yet, as long as employee-owners only retain control through voting rights, there is no fiduciary duty imposed on the employer or their union. Therefore, conflict of interest concerns over a potential loyalty to ownership are avoided.\(^ {325} \) These employees are not "managers" as intended under the Act. The fact that they hold an equity stake in the firm should not bar their ability to seek collective representation.

If employee-owners possess significant power over managerial policy-making, a problem could arise for their continued coverage under the NLRA. Some commentators have suggested that the employer-employee delineation should be based on whether the employee-owner has "responsibility to exercise significant discretion in implementing the policies of owners other than themselves."\(^ {326} \) The Board, however, has ruled that any employee-owners who merely have an

---

325. See id. at 58.
326. Id.
"effective voice" in corporate policy will be excluded from the protections of the NLRA.\footnote{327}

The first major Board decision that examined the concern over the employee-owner distinction was Union Furniture Co.\footnote{328} The firm had been employee-owned from its inception, but at the time of the election only nine non-supervisory employees (out of about ninety) were shareholders (out of twenty-six).\footnote{329} The Board decided to remove the nine employees from a bargaining unit (but did not hold that they could not receive protection under the NLRA) after the union sought their exclusion before an election, fearing they would vote against the union. Four of the employees were members of the company's board of directors (out of a total of seven), while the other five were rank-and-file employees who had a significant voice in the election of directors.\footnote{330}

The Board based the exclusion on two factors, the first being the employee-owners' voice over management policy. While "the mere ownership of stock in a corporation does not preclude the inclusion of the stockholder in a collective bargaining unit[,]\footnote{331}" the Board noted that, in this case, "matters of labor policy would be referred to the [stockholders].\footnote{332} The employee-owners also had a strong voice in the election of some of the board of directors, thereby giving them a "substantial interest" in the company.\footnote{333}

In addition to the employee-stockholders' managerial voice, the Board also raised concerns about the divergence in interests between employees who owned stock and those who did not.\footnote{334} Union Furniture thereby set up a two-prong analysis through which the Board examines the divergence in interests between employees and employee-
owners, as well as the strength of employee-owners' voice over corporate policy. 335

Union Furniture's two-pronged analysis has been used, to varying degrees in later Board holdings. In Brookings Plywood Corp., 336 118 non-supervisory employees each held one of 242 shares of the company. 337 While there were many units at issue, the primary one consisted of 117 employees, 113 of which were employee-shareholders. 338 The Board stated that "mere ownership of stock . . . does not preclude the inclusion of a stockholder in a collective bargaining unit of the corporation's employees unless the employee-stockholder's interest is of such nature as to give him an effective voice in the formulation and determination of corporate policy." 339 Because the number of employee-owners was so large, however, the Board found that their control over corporate policy, in addition to preferential treatment over non-owner employees (e.g., higher wages and better promotions), prevented them from being protected under the NLRA. 340

Similarly, in Sida of Hawaii, 341 the firm was owned by 142 shareholders (holding one share each), with 27 owners being ex-drivers and 115 being present drivers. 342 The Board excluded the employee-owners from the unit, holding that they could not be considered employees because of the preferential treatment they received, such as rebates for sick days, and their control over labor policy. 343 In particular, the Board was concerned that the directors would be forced to

335. See also Lakes Pilots Ass'n, Inc., 320 N.L.R.B. 168, 178 (1995) (excluding group of employee-owners that owned over half of the company's voting stock); Sida of Haw., Inc., 191 N.L.R.B. 194, 195 (1971) (holding that drivers who owned shares of the company must be in different bargaining unit than non-owners); Cab Servs., Inc., 123 N.L.R.B. 83, 83, 85 (1959) (excluding thirty-eight out of forty-eight employee-owner cab drivers because, as sole stockholders of the company, they had an effective voice in setting corporate policy and received preferential treatment over non-stockholders); Coastal Plywood & Timber Co., 102 N.L.R.B. 300, 301-02 (1953) (holding that employee-stockholders controlling 20% of outstanding stock had no effective voice in management policy and received no preferential treatment, and were, therefore not employees under the Act); Brookings Plywood Corp., 98 N.L.R.B. 794, 799 (1952) (excluding employee-owners with strong policy influences from the unit); Mutual Rough Hat Co., 86 N.L.R.B. 440, 444-45 (1949) (including three stockholder-employees, each of whom held two out of 28 outstanding shares and two of the three were on the board of directors (which was not involved in management affairs), in unit because they did not participate in management decisions and did not receive preferential treatment).

336. 98 N.L.R.B. 794.

337. See id. at 798.

338. See id. at 797.

339. Id. at 798.

340. See id. at 798-99.


342. See id. at 195.

343. See id.
deal with employees who had the power to oust them, thereby preventing “arms-length bargaining.”

Although the Board continues to use *Union Furniture*’s two-factor analysis, it has weakened the strict dichotomy between labor and management roles. In *S-B Printers, Inc.*, the Board moved from its earlier holding that the mere possibility of “effective voice” would preclude inclusion in a unit to requiring an actual exercise of managerial power, or a “real voice” in corporate policy-making. Similarly, *S-B Printers* looked to actual, as opposed to potential, divergence of interests between employee-owners and non-owners. The purpose of excluding employees with control over managerial decisions, particularly those involving labor policy, is that “to include stockholders in the unit would be inappropriate because of the considerable adverse impact on the nonshareholder [employees].” By requiring actual control or divergence of interests, the Board is able to prevent harm against non-owner employees, while allowing some shared interests between management and labor.

Despite the implications of *S-B Printers*, the Board seems more willing to rely on mere potential control of management to exclude employee-owners. In *Florence Volunteer Fire Department, Inc.*, the Board excluded paid firefighters from a unit of volunteer firefighters because their shareholder status gave them voting rights regarding all operational policies. The employees in question controlled only two out of six board representatives, and the representatives did not vote on wage and employee benefit matters. The Board, however, held that because the employees made up 25% of the workforce, which ratified all board action, the employees “constitute a large homogeneous group clearly having the potential for influencing management policy . . . and are therefore excluded as managerial employees.” The exclusion occurred despite the absence of proof of a diversion of interests or differential treatment between employee-owners and non-owners.

It is unclear whether *Florence* is merely an anomaly. While some later cases have used the two-factor test, other analyses seem to

---

344. *See id.*
345. 227 N.L.R.B. 1274, 1274-75 (1977) (denying attempt to remove 10 employees (out of unit of 13) who owned 25% of their firm’s stock because there was no evidence that the employees in question possessed actual control over managerial decisions, or were treated differently than non-owner employees).
348. *See id.*
351. *See id.* at 956.
352. *Id.* at 957.
353. *See, e.g., Science Applications Int’l Corp.,* 309 N.L.R.B. 373, 374-76 (1992) (allowing election for unit of employee-owners that held only 0.000022% of outstanding
focus solely on the amount of actual control that employee-owners possess.\textsuperscript{354} For instance, in \textit{EFCO Corp.}, the ALJ rejected the employer’s defense, against an section 8(a)(2)\textsuperscript{355} charge, that the employee-benefit committee in question was made up of employee-stockholders who were not eligible members of a labor organization.\textsuperscript{356} Because the employee-owners in this case held only 25\% of the firm’s stock, the ALJ ruled that such employees could be members of a labor organization, as “[t]here has been no showing [of] . . . actual control, or an effective voice in Company policy . . . .”\textsuperscript{357} No mention of differential treatment for non-owner employees was made.

Excluding employee-owners from a unit of non-owner employees whose interests are divergent, particularly when owners receive favorable treatment, is an appropriate response to the NLRA’s requirement of a unit based on “common interests.”\textsuperscript{358} If employee-owners do have divergent interests from other employees, they should be separated from the unit, but allowed to seek representation on their own. Yet, the justification for preventing employees with significant managerial control from obtaining any collective representation is less obvious.\textsuperscript{359}

Even in the absence of divergent interests among employees, the Board’s position against employee control could prevent unions from obtaining employee ownership plans that allow homogenous voting among employee-owners (e.g., through a trust).\textsuperscript{360} This strategy, how-


\textsuperscript{355} 29 U.S.C. § 158(a)(2) (1994) (making it an unfair labor practice for an employer “to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it”).


\textsuperscript{357} \textit{Id.} at *66.

\textsuperscript{358} See 29 U.S.C. § 159(b).

\textsuperscript{359} See Harper, \textit{Reconciling Collective Bargaining, supra} note 60, at 57-61 (describing the intent of the NLRA to create an adversarial system between labor and management loyal to owners, not between labor and employee-owners with no loyalty to other shareholders).

\textsuperscript{360} See Katherine Van Wezel Stone, \textit{Labor and the Corporate Structure: Changing Conceptions and Emerging Possibilities}, 55 U. Chi. L. Rev. 73, 125 (1988) (arguing that the reliance on actual power proscribes employee collective representation when they are able to vote in a significant block); see also, e.g., Florence Volunteer Fire Dept., Inc., 265 N.L.R.B. 955, 957 (1982) (finding that paid firefighters were managerial employees who should not be included in a bargaining unit because they “constitute a large homogeneous group clearly having the potential for influencing management policy”); Sida of Haw., Inc., 191 N.L.R.B. 194, 195 (1971) (excluding stockholder drivers from a bargaining unit of non-owner drivers because the stockholder drivers already have an effective voice in determining policy). While the \textit{Florence} decision suggests that this proscription could occur, it is unlikely that the Board would take this position to its extremes. See supra notes 350-52 and accompanying text.
ever, is one of the best ways that employees can gain real power to affect their concerns as employees. The Board's emphasis on a traditional model of the workplace may be in play, but does not seem warranted here. Employee-owners who possess actual control over entrepreneurial policy still have work-related concerns that justify collective representation. Whether voting occurs through a trustee or a one-person one-vote system, employee-owners' concerns as employees may not always be satisfied through stock ownership or even managerial control. Board of director representatives are required to represent the employee-owners' shareholder interests, which may diverge from their interests as employees.

By relying on control alone as a basis for removing employee-owners from bargaining units, the Board assumes that employee-owners' participatory rights are strong enough to protect their interests as employees, as well as owners. This assumption, however, is often false. Employee-shareholders in virtually all firms will not be able to address the number of work-related concerns covered by the NLRA. Although actual control could allow employee-owners to influence labor policy, the amount of control over this subject is generally limited. Therefore, employees may want, and need, collective representation based on their employee interests alone.

The Board has recognized that "stockholder-employees not only have a proprietary interest in the [e]mployer-corporation, but also have an interest, at least as great, in their status as paid workers." Yet, the Board's desire to maintain the traditional workplace structure unjustifiably obstructs employees' interests in protecting their section rights when they are excluded from a bargaining unit because of their ESOP's voice in policy-making. Although employee ownership of a firm is not a structure that the NLRA was created to address, typical ESOP firms, even with employee control, are not significantly different from firms of the past. Most employee-owned firms, even those in which the employees hold a majority of equity, have a significant number of non-employee board members. Moreover, allowing union board members some input in the firm's labor policy decisions should not present too great a threat to either the firm's or employees'

---

361. See Uchitelle, supra note 8, at 3.
362. See Gordon, supra note 88 (manuscript at 35-36) (discussing the limits placed on union board members' influence over labor policy, including no input on labor issues).
363. Everett Plywood & Door Corp., 105 N.L.R.B. 17, 19 (1953); see id. at 18 (allowing election for unit composed of shareholder employees that held 370 out of 480 shares and only one unit member, out of approximately 365, was not a shareholder).
364. For example the Board of UAL has a majority of non-employee members. See, e.g., Gordon, supra note 88 (manuscript at 33) (discussing UAL's 12 member board, which contains three union designees and a separate subset of members (the "Labor Committee") that excludes union designees and deals with labor issues); see also Hodges, supra note 298 (describing Trans World Airlines' board, which gives the union three out of 15 seats in exchange for employee concessions).
interests. While there will be some conflict of interest problems implicated by union influence in a firm's labor policy, as discussed below, mere influence rather than full control mitigates these conflicts and allows employee-owners to have both their equity and labor interests represented. Union board representatives also may be able to reduce some of the inefficient negotiations and outcomes and that occurs with a purely adversarial bargaining system. As long as employee-owners do not have total control over labor policy, the employer-employee relationship that the NLRA was meant to address still exists and employee-owners should be allowed to seek collective representation.

E. Union Representation Problems

If an ESOP involves some degree of control for employees, unions will often play a key role in exercising the control. Yet, this role may create problems that result from the union's primary duty to protect unit employees' rights. The NLRA establishes several requirements that are intended to maintain the union's duty to employees free of any actual or potential conflicts of interest. These labor law protections, therefore, may pose barriers to union involvement in employee ownership.

1. Union Directors and Their Duty to Employees

The Board is concerned that a union with managerial interests may not properly fulfill its role as an employee representative. In general, this duty will not be violated if the Board determines that the unions' board representation does not interfere with the employees' free choice for unconflicted representation. Problems arise, however, where labor policy is being discussed with union board members' input. Union participation in these decisions clearly violates the traditional dichotomy between labor and management and recusals by union board members may be required.

365. See supra notes 73-95 and accompanying text.
366. The employee-owners' equity interest will be protected by the ESOP trustee, who manages the ESOT and has a fiduciary duty to the employee-owners. The trustee may be a union representative, but her duty is exclusively to the employee-owner's equity interest. Any firm policy-making power given to the employee-owners through employee ownership will not be exercised directly through the trustee. Rather, employee-owners will have input in firm decision-making, typically through representation on the board of directors. The union will often have the greater role in this type of representation.
368. See Delmonte, supra note 53, at 21.
369. See id. at 20; see also Medical Found. of Bellaire, 193 N.L.R.B. 62, 64-65 (1971) (holding that a union must not interfere with employees' right to a representative by placing itself on both sides of the bargaining table).
370. See supra note 362. Union domination of a firm's board, even if it is not involved in creating labor policy, could still present conflict of interest problems. If the
Under the NLRA, this conflict of interest usually manifests itself through a section 8(a)(2) charge (often made by a rival union), viewing the conflict as an issue of employer domination of the union—i.e., the union and employer becoming the same entity or the employer having improper influence over the union. The NLRB test looks to the union representatives’ level of influence over a corporate board, the amount of control they have over corporate policy, and the potential for “infecting” the bargaining process through use of their control. The Board usually requires a union to hold a majority of board seats before a section 8(a)(2) violation is found, stressing the need for actual, rather than potential, control. Majority board representation by a union, therefore, is necessary to implicate a conflict of interest, yet it is not clear that such a level of representation is sufficient to find a violation. In other, non-board representation cases, the Board has imposed “a considerable burden on a non-consenting employer [who refuses to bargain with the union based on an alleged conflict of interest] . . . to come forward with a showing that danger of a conflict of interest interfering with the collective bargaining process is clear and present.” A heavy burden of proof, there-

---

372. This conflict also may arise in the context of the Board’s certification of a union. See, e.g., Anchorage Community Hosp., Inc., 225 N.L.R.B. 575 (1976) (holding that a union can represent employees despite occupying seven out of fifteen board seats).
373. See John Lund, Union Owned or Sponsored Building Trades Cooperatives: A Review of Labor Law Issues, 41 Lab. L.J. 685, 690 (1990); see also St. Louis Labor Health Inst., 230 N.L.R.B. 180, 182 & n.9 (1977) (finding a conflict of interest where the president of the union represented the employer, a non-profit medical equipment supplier, in collective-bargaining negotiations with his own union).
374. See Lakes Pilots Ass’n, 320 N.L.R.B. at 177-78; Anchorage Community Hosp., 225 N.L.R.B. at 579; see also St. Louis, 230 N.L.R.B. at 182 (finding a section 8(a)(2) violation because of the conflict of interest implicated by union officials’ dual role as members on the board of directors of the medical clinic in question, and the union’s role as a provider of the majority of the clinic’s demand); Centerville Clinics, Inc., 181 N.L.R.B. 135 (1970) (same). UAL, for instance, has avoided this concern by having only three employee representatives out of twelve board members, and none of the employee representatives deal with labor policy. See supra note 291.
375. See Olson, Worker Ownership, supra note 7, at 791-92.
376. NLRB v. David Buttrick Co., 399 F.2d 505, 507 (1st Cir. 1968); see also H.P Hood & Sons, Inc., 182 N.L.R.B. 194 (1970) (holding that an employer was required to bargain with the union, because a loan made by the International Brotherhood of Teamsters to the employer’s competitor was not a conflict of interest given a lack of proof of intervention by the Teamsters in the local union’s bargaining).
fore, is required to overcome the Board's policy of favoring employees' free choice of a bargaining representative. In *Richfield Oil Corp.*, the Board allowed the union to bargain for employees that held only a minority of the company's stock and had no managerial control.377 This ruling has not been extended to ESOPs that control a majority of a company's stock and give the union board representation. The Board clearly stated that union representatives can only represent employee-stockholders in their interests as employees and not over "stockholder meetings, corporate elections, or any other matter in which only stockholders have the right to be heard."378 Using *Richfield*, the Board would apparently allow employee-owners to be represented by a union under an ESOP with a minority holding of shares. What is less clear are the ramifications of an ESOP with majority control by the union. *Richfield* seems to suggest that no conflicts of interest exist if union representatives only bargain with regard to "rates of pay, wages, hours of employment, or other conditions of employment."379 Yet, any attempt to discuss managerial policy may not only be a permissive subject of bargaining,380 but may result in a conflict of interest between the union's duty to employee-owners and non-owners.

The union can also violate its duty to employees by possessing interests in companies that compete with its members' employer. If a union gains majority control of an employer's board of directors, the unions' representational activity in other firms may be limited because such control, "even where the directors are nothing more than members of their unions and not serving in the capacity of union officers or employees, appears to normally disqualify the union from representing competitors of that employer."381 In cases such as *Bausch and Lomb Optical Co.*,382 where the union operated a direct competitor of the employer, the Board will clearly disqualify union representation.383 This test is concerned with the traditional arms-length bargaining relationship and seeks to avoid entanglement between the union and the employer.384 Yet, the *Bausch and Lomb* analysis does not apply when employees merely own company stock.385 In these

377. 110 N.L.R.B. 356 (1954), aff'd sub nom. NLRB v. Richfield Oil Corp., 231 F.2d 717 (D.C. Cir.); see also James O. Castagnera & Michael R. Ostrowski, *Players Without Picket Signs: A Plan for Employee Ownership in Professional Athletics*, 42 Wayne L. Rev. 73, 98 (1995) (stating that the NLRB "did consider and reject the contention that a union cannot represent and bargain for employees of an employee-controlled company" (emphasis omitted)).
379. Id.
380. See supra Part III.B.
381. Lund, supra note 373, at 689.
383. See Lund, supra note 373, at 691.
384. See id. at 692.
385. See Olson, *Worker Ownership*, supra note 7, at 790.
situations, the conflict of interest concern is eliminated because competition between employee-owners and management is lacking.\textsuperscript{386} A union that seeks significant control in a firm, however, must be careful to look at its other representational interests. If the union does obtain control of a firm, there is a risk that it will be precluded from representing employees of that firm's competitors.

A union contemplating an employee ownership plan needs to respect its duty to employees. Unions must be sensitive to conflict of interest problems when negotiations over the board's structure occur, particularly discussions involving the union's role on the board.\textsuperscript{387} While a typical employee buy-out plan involving concessions will result in one-third of the board of directors representing salaried employees, one-third representing the bargaining unit, and one-third being independent,\textsuperscript{388} a union majority on the board could pose serious labor law problems. Unions have attempted to minimize conflicts of interests by allowing employees to elect union designees as board members who do not have official roles with the union.\textsuperscript{389} Yet, the extent to which such a voting scheme is a safeguard against violations is unclear; therefore, a union with a majority of board seats cannot be certain it will avoid a finding of a conflict of interest.

The Board has a legitimate interest in protecting the union's duty to its employees. Holding that a union majority on the board of directors constitutes a conflict of interest, therefore, is appropriate. Where the union has total control of the firm, it has essentially become the firm. Under this scenario, the union faces a conflict between its duty to represent the employees and its duty to all shareholders having the ultimate control in running the company. A bright-line rule that prohibits a union majority on the board allows union board representation to occur under an employee ownership plan without confusion regarding conflict of interest problems. Unions that intend to continue representing unit employees merely need to limit their board representation to less than a majority. Employee ownership plans can create significant employee control, while only providing employee-

\textsuperscript{386} See id. In fact, because of the lower diversification involved with ESOPs, employee-owners have an even greater incentive to see that the firm is performing at its best.

\textsuperscript{387} See Gordon, supra note 88 (manscript at 33) (discussing UAL's insulation of employee board members from firm labor policy); see also Helen S. Scott, \textit{Union Directors and Fiduciary Duties Under State Corporate Law}, in Labor Law and Business Change: Theoretical and Transactional Perspectives, supra note 86, at 115, 124-25 (discussing conflicts of interest implicated by union board representatives' duties to shareholders and workers).

\textsuperscript{388} See Wilkus, supra note 18, at 35 (discussing typical board structure following employee buy-out plans).

\textsuperscript{389} See Olson, \textit{Worker Ownership}, supra note 7, at 793-94 (discussing why employee-stockholders board representation may lessen conflicts of interest).
owners with a minority of board seats. These plans should act as a model for unions who seek increased control for employee-owners, but want to avoid conflict of interest problems. Alternatively, employee-owners could achieve a majority of board seats by electing some non-union representatives. The key is to avoid having a union in a situation where it must represent the labor policy interests of both the firm and the workers.

2. Union Interference With Management

Union board representation also raises concern over possible union interference with an employer’s selection of a bargaining representative, which is prohibited under the NLRA. This problem can arise when union board members are involved in a fight over the choice of an employer’s bargaining representative, thereby implicating section 8(b)(1)(B).

There has been little Board action on union interference resulting from employee ownership. The most relevant case is NLRB v. Amax Coal Co. In Amax, the union struck in an attempt to induce the employer to join a national trust for employee pension and welfare benefits. The employer alleged that the union was interfering with the trustee, and that interference was a violation of section 8(b)(1)(B) because the trustee was a collective bargaining representative. The Court held that the trustee merely ran a benefit plan and was not engaged in collective bargaining. The union was found not to have violated section 8(b)(1)(B) because there was no interference with the adversarial collective bargaining process.

It is unclear, however, whether any attempt by union board members to influence the choice of a bargaining representative would run afoul of section 8(b)(1)(B). Some have argued that board members are entitled to affect management direction, and that union board members should be free to do so under the NLRA. Yet, union in-

390. See Gordon, supra note 88 (manuscript at 33-35) (discussing UAL’s employee ownership plan and resulting board structure).
391. For example, a non-union employee representative sits on UAL’s Board. See supra note 291. This non-union board member is elected by the employees, but has no connection to the union, thereby avoiding any potential conflicts of interest that the union’s board representation may implicate.
392. See 29 U.S.C. § 158(b)(1)(B) (1994) (making it an unfair labor practice for a union to “restrain or coerce ... an employer in the selection of his representatives for the purposes of collective bargaining”).
393. See Olson, Worker Ownership, supra note 7, at 795.
395. See id. at 326.
396. See id. at 327.
397. See id. at 337-38.
398. See id. at 335-36; see also Olson, Worker Ownership, supra note 7, at 795 (analogy holding that trustee did not serve in the adversarial role of a collective bargaining representative).
399. See Olson, Worker Ownership, supra note 7, at 795-96.
fluence over a firm's choice of a bargaining representative seems to violate the Board's attempt to maintain adversarial collective bargaining relations, free from conflicts of interest. While a union that has a majority of seats on a board would clearly have problems regarding their duty to employees, union representatives merely voting on an employer's collective bargaining would probably result in a section 8(b)(1)(B) violation. The Board has not ruled directly on this question, however. Union members' direct involvement in an employer's choice of bargaining representative seems to go against the Act's concerns in this area. Under Amax, the Board would likely proscribe a union's direct vote on management's choice of collective bargaining representatives. This exclusion would not significantly limit the union board members' role as an employee-owner representative, but would maintain the integrity of the collective bargaining process.

F. Employer Domination of a Union

One of the original purposes of the NLRA was to protect employees against sham "company unions" that employers created to avoid recognizing employees' choice of collective representation. The policy behind section 8(a)(2) was to allow employees to choose, free from employer influence, an independent representative to protect their interests. The legislative history of the NLRA reveals the concern over employer-dominated unions that subjugate employees' ability to engage freely in collective bargaining. Initial Board decisions, therefore, avoided any potential conflict of interest, no matter how small. Yet, with the increasing demand for employee input into firm decision-making, the justification for this strong position has been questioned.

In the employee ownership context, the Board usually bases a section 8(a)(2) violation on the extent to which the employer, through the union ESOP trustees, has influence over the union, and whether

400. See supra Part III.E.1.
401. See Gordon, supra note 88 (manuscript at 33-35).
402. See Estreicher, Employee Involvement, supra note 126, at 125, 129-33.
403. 29 U.S.C. § 158(a)(2) (1994) (making it an unfair labor practice for an employer "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it").
404. See Estreicher, Employee Involvement, supra note 126, at 129-33; see also Harper, Reconciling Collective Bargaining, supra note 60, at 7 (discussing purpose of independent employee representative).
406. See Harper, Reconciling Collective Bargaining, supra note 60, at 9 (citing Kunst, 100 N.L.R.B. 146, 150 (1952)); see also Shell Oil Co., 2 N.L.R.B. 835, 847 (1937) (noting that allowing union use of the telephone was evidence of an illegal company interference).
407. See Estreicher, Employee Involvement, supra note 126, at 126-27.
408. See supra note 126 (discussing the TEAM Act).
this influence diminishes the union's ability to represent employees fairly.\textsuperscript{409} Typically, this analysis mirrors that of a union's fiduciary duty to its members.\textsuperscript{410} The Board looks for a conflict of interest between the union's representation on the firm's board and their duty as the employees' collective bargaining representative. Where union members make up the majority of a board of directors, the Board typically finds a section 8(a)(2) violation resulting from a conflict of interest.\textsuperscript{411} The Board has held that where a union has a dual role as both the employees' exclusive representative and as the majority representative on the board of directors, the union (considered the employer at this point) is unable to adequately represent the employees and a section 8(a)(2) violation occurs.\textsuperscript{412} This "proximate danger of infection of the bargaining process"\textsuperscript{413} is deemed to be too great to satisfy the NLRA's requirement that the employees' representative be fully aligned with their interests.

As with a union's duty to employees, the concern over employer domination of a union is serious, but avoidable. The union and employer can readily construct safeguards that prevent the union from having a dual role as both the employer and employee representative. A carefully constructed plan, such as the one at United Air Lines (where union representatives are not involved in labor policy), can both preserve a union's board representation and its role in collective bargaining, while avoiding a conflict with the union's duty to employees.\textsuperscript{414}

G. Exclusion of Union Members from an ESOP

A firm risks violating section 8(a)(5)\textsuperscript{415} if it creates an ESOP that includes unit employees without first bargaining with the union. Conversely, establishing a benefits plan through an ESOP that excludes

\begin{itemize}
\item \textsuperscript{409} See Olson, Worker Ownership, supra note 7, at 792; see also David Buttrick Co., 167 N.L.R.B. 438 (1967) (holding that an employer was required to bargain with the union, because a loan made by the International union to the employer's competitor was not a conflict of interest given a lack of proof of intervention by the International in the local union's bargaining), modified sub. nom. NLRB v. David Buttrick Co., 399 F.2d 505 (1st Cir. 1968).
\item \textsuperscript{410} See supra Part III.E.1.
\item \textsuperscript{411} See Lakes Pilots Ass'n, Inc., 320 N.L.R.B. 168, 179-80 (1995) (finding a section 8(a)(2) violation where union officers were elected during a joint union and company director meeting); St. Louis Labor Health Inst., 230 N.L.R.B. 180, 182 (1977) (finding a conflict of interest where the president of the union represented the employer, a non-profit medical equipment supplier, in collective-bargaining negotiations with his own union).
\item \textsuperscript{412} See supra Part III.E.1.
\item \textsuperscript{413} Centerville Clinics, Inc., 181 N.L.R.B. 135, 140 (1970) (quoting NLRB v. David Buttrick Co., 399 F.2d 505, 508 (1st Cir. 1968)).
\item \textsuperscript{414} See Gordon, supra note 88 (manuscript at 33-37).
\item \textsuperscript{415} 29 U.S.C. § 158(a)(5) (1994) (making it an unfair labor practice "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of § 159(a)"").
\end{itemize}
union members risks violating section 8(a)(1) by discriminating against employees who choose to be represented by a labor organization. This problem seems to have some significance as, of the approximately 53% of employees who do not participate in ESOPs at their firm, almost 20% are excluded because of their union membership, or because they were foreign workers. The tension between these unfair labor practices has been reasonably met by the Board, which has protected a union's right to bargain over ESOPs, while preventing the exclusion of union members from employee ownership plans.

The Board has found an unfair labor practice when a company's ESOP totally excludes union members—i.e., when the employer flatly refuses even to bargain over such employees' inclusion. When an employer precludes union members from ever participating in an ESOP, the Board has held that the plan violates employees' section 7 right to choose collective representation. Yet, if the ESOP is considered a mandatory bargaining subject, an employer cannot unilaterally implement the plan if it includes union members. The solution to this problem for many companies has been to include a provision in its ESOP eligibility requirements that excludes union members unless the collective bargaining agreement explicitly allows participation. The Board has stated that these provisions do "not cut off the benefits prior to negotiations, but contemplate[ ] the continuation of the benefits during the negotiations."

The Board's response to this potential problem is warranted. The balance between the union's right to bargain over mandatory subjects and the employees' right to participate in employee ownership plans is satisfied. While this approach may delay unit employees' participation in employee ownership, there should be little difficulty in ob-

\[\text{Source(s):} 416. 29 U.S.C. § 158(a)(1) (making it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in § 157").
\]

\[\text{417. See Blasi & Kruse, supra note 12, at 499 (citing statistics, compiled by Douglas Kruse, of 1984 reports to the IRS by employee-owned firms with over 100 employees).}
\]

\[\text{418. See Raven Indus., Inc., Nos. 9-CA-2799, 9-RD-1575, 1991 NLRB LEXIS 973, at *20 (Aug. 7, 1991) (finding a section 8(a)(1) violation where union members were excluded from participation in a profit sharing plan); Belcher Towing Co., 265 N.L.R.B. 1258, 1267-69 (1982) (finding section 8(a)(1) and (a)(3) violations where employer exempted employees covered by collective bargaining agreement from the ESOP); Bendix-Westinghouse Automotive Air Brake Co., 185 N.L.R.B. 375, 379 (1970) (finding an unfair labor practice when an employer requires a union to waive bargaining rights over the ESOP for members to be eligible).}
\]

\[\text{419. See supra note 331 and accompanying text.}
\]

\[\text{420. See supra notes 257-68 and accompanying text.}
\]

\[\text{421. See Handelman Co., 283 N.L.R.B. 451, 452 (1987) (holding that the following plan did not violate section 8(a)(1): "(1) 'Covered Employee' means any Employee who is classified by the Company as full-time and who: . . . (ii) Is not covered by a collective bargaining agreement entered into by the Company unless such agreement, by specific reference to the Plan, provides for coverage under the Plan."].}
\]

\[\text{422. Id. at 452.}
\]
taining an agreement between the employer and the union. Because the employer is initiating the ESOP, it would seem to have little incentive to exclude union members, unless the employer is motivated by anti-union animus. The one potential sticking point would be a union demand for additional benefits. If, for example, the union demands that the ESOP provide additional benefits or control, an employer's legal refusal could result in a plan in which only non-unit employees participate. It is unlikely, however, that this result will occur. A union has little reason to exclude its members from an ESOP merely because the benefits (not requiring employee concessions) provided are not as large as the union would like. Moreover, if the plan involves concessions that the union is unwilling to accept, the Board protects a union's decision to participate in the plan, as well as the freedom to exert economic pressure against the employer.423

A union's ability to insist on a permissive aspect of an ESOP, such as employee control, remains a problem. This issue, however, is a function of the Board's mandatory/permissive regime,424 and is not affected by employee ownership participation rules. Accordingly, the Board has adequately met employer, employee, and union concerns regarding the exclusion of unit employees. These issues, therefore, will not be problematic for a properly created employer-initiated ESOP.

IV. THE EFFECT OF LABOR LAW OBSTACLES ON ESOP FORMATION

The Board's application of labor law to employee ownership plans creates significant obstacles to the implementation of employee managerial rights. While the Board's respect for the traditional employee-owner dichotomy may have been justified in the past, present economic conditions make the continued wisdom of this policy doubtful. One must ask whether Board interference with employee ownership, particularly with plans that contemplate employee control, is warranted in today's economic environment. Given increased employer interest for employee involvement in managerial policy,425 employees must be able to protect themselves from the threat of employer dominance. Employee ownership provides a compromise between the parties, giving employers more access to employees' informational advantage, while protecting employee interests in the workplace.

The different aspects of labor law appear to be linked in the application to employee ownership, focusing heavily on employee-owners' ability, or potential ability, to exert control over firm policy. While violations of a union's duty to employees require a majority presence

423. See supra notes 266-68 and accompanying text.
424. See supra Part III.B.
425. See supra note 126 and accompanying text.
of union members on the corporate board, other problems are based on the employee-owners' "actual control" or "effective voice" in managerial policy. The actual control or effective voice requirement creates severe hurdles. A resistant employer can easily stymie a union or employee that seeks to increase employee control through an ESOP. If the ESOP is found to provide "effective voice" or control, the employee's solicitation and insistence on plans contemplating such control will not receive section 7 protection. An employer, therefore, can bar solicitations for these plans by proscribing any attempt by an employee to seek on-site support, and can legally terminate an employee who violates the ban. Any attempts to obtain financial information can also be rebuffed by an employer if the plan seeks significant employee control. Finally, and most importantly, a union is unable to insist upon, or use economic pressure to secure, a proposal that implicates employee control over managerial policy-making.

In addition to these obstacles, the Board's labor law interpretations also create uncertainty for proponents of employee ownership. Because the Board's application of its test for "employee control" occurs post hoc, and typically without advisory judgments, a union may be unsure whether their activity on behalf of an ESOP is protected. The Board's application of unions' duty to employees, which centers on whether the union controls a majority of the board representatives, at least provides a clear rule that unions can satisfy by creating an employee ownership proposal. The "effective voice" distinction provides no such guidance. If, for example, an employer proposes an ESOP that the union will accept only if employees are given a greater voice in managerial policy, the union faces uncertainty as to the legality of its continued insistence. If the employer opposes increased employee control, the union lacks a clear picture of what legal means it can use to encourage movement by the employer. An employer can also prevent an employee attempt to solicit support if the Board later determines that the employee proposal seeks too much control. Employees may even be legally fired if they miscalculate the level of control sought.

The Board's position against employee control also significantly limits a union's bargaining ability. Bargaining often requires movement from both sides, yet the Board's employee ownership jurisprudence places a ceiling on the union's proposals, thereby limiting their ability to bargain effectively. An employer can frame the negotiations by proposing no employee control, while the union must truncate its first offer to fall below the level of control that would allow an em-

426. See supra note 374 and accompanying text.
427. See supra note 347 and accompanying text.
428. See supra Part III.A.
430. See id. at 185.
ployer to preclude discussion. Of course, an employer that is serious about implementing an ESOP can bargain with the union at or above the "effective control" level. The scope of the negotiations, however, is effectively determined by the employer. The result of the Board's application of the NLRA to employee ownership places an immense bar on the implementation of employee input into managerial policy. The union's primary role is to represent employees in collective bargaining. There does not appear, therefore, to be justification for fettering a union's ability to bargain with employers over employee control.

The Board's determination of section 7 coverage in Harrah's is also particularly troubling. Presumably, employees are now unable to advance any proposals for significant input into managerial decision-making without fearing employer retaliation. If the employer proposes an ESOP and an employee encourages other workers to seek control through the plan, that employee could be fired. Even in a financially troubled company, management's unwillingness to discuss employee ownership could legally preclude employee attempts to save the company by exchanging wage concessions for equity and some level of control.

The Board's protection of employer resistance to proposals for employee control in situations where they also proscribe union or individual employee insistence on employee control seems hypocritical. Employee efforts to gain control are clearly concerted and the only justification for leaving such action unprotected is the Board's reliance on the traditional separation between employees and owners. Yet, by barring protection for an entire employee ownership proposal due to the mere potential for employee control, the Board eliminates any realistic chance for employees to initiate ESOPs that provide the most benefit to workers. The threat that the Board perceives in such control is not obvious. The rules against union domination and conflicts of interest remove the serious problems associated with employee control. What, then, is the danger in employees possessing an "effective voice" in managerial policy? Some managers may be threatened, particularly if employee ownership is a superior organizational structure. This protection for managerial interests, however, seems to lack adequate justification for precluding section 7 coverage for a plan that may benefit not only employees, but the entire firm.

One of the most serious problems for employee ownership results from the Borg-Warner rule, which prohibits economic pressure for permissive bargaining subjects. While an argument can be made

431. See id. at 182.
432. See supra notes 193-94 and accompanying text.
433. See supra Part III.E.
434. See supra note 186.
that employee control should be considered a "condition of employment" and, therefore, a mandatory bargaining subject.\textsuperscript{436} The Board would probably designate plans seeking such control as permissive. The problem that arises is that "permissive" subject treatment means that unions are not able to employ economic pressure to insist on increased employee control.\textsuperscript{437} Because unions are best suited to handle initiation and control of these plans,\textsuperscript{438} limits on their power of insistence are serious. As stated above, a union’s ability to initiate ESOP discussions implicating employee control could be eliminated in the face of a hostile employer. Borg-Warner adds an even more troubling aspect by rendering the union unable to bargain over employee control terms in an employer-initiated ESOP.

Employer attempts to use employee ownership as a capital raising tool can be quite useful for a firm, yet it can also leave employees with increased risk.\textsuperscript{439} Ideally, a union should be able to counter employer ESOP requests with demands for the level of employee control that would compensate for these risks.\textsuperscript{440} Yet, Borg-Warner precludes a union from insisting on any significant employee control. The result of this preclusion is either an ESOP that leaves employees with more risk, or a bargaining breakdown that eliminates a plan with potential benefits for the entire firm. Theoretically, management would allow increased employee control if it provided an overall benefit for the company, but possible misaligned interests, such as management self-protection,\textsuperscript{441} can hinder such agreements. A union, therefore, is unable to insist on an ESOP that could potentially benefit both employees and the company as a whole merely because management, whose objections could be very weak, opposes the proposal.

Alternatives to the Borg-Warner approach would, at a minimum, allow unions with strong preferences about employee control to insist on these measures. Justice Harlan’s Borg-Warner dissent would separate the duty to bargain from the right to insist.\textsuperscript{442} The result of his approach would allow unions that felt strongly about employee control to use economic pressure to effectively communicate their preferences to employers who exercise their right not to bargain about employee control. Borg-Warner remains the law, however, even though its regulation of preferences in this area makes little sense.

\textsuperscript{436} See Olson, Real Voice, supra note 65, at 116-17.
\textsuperscript{437} See supra note 247 and accompanying text.
\textsuperscript{438} See supra notes 61-67 and accompanying text.
\textsuperscript{439} See supra Part II.B.1.
\textsuperscript{440} Clearly, discussion of benefit concessions will be mandatory. Demands for employee control, however, particularly where no concessions are sought and decreased diversification would result, remain permissive.
\textsuperscript{441} See supra note 186.
Labor law, therefore, only furthers the reluctance that unions already have towards employee ownership, even where a plan could benefit both employees and the firm. Proscriptions against union or employee attempts to initiate an ESOP that it believes would help a firm or its employees do little to further the policies of the NLRA. On the contrary, allowing unions, or employees, to demonstrate their preferences for employee ownership through the normal use of economic pressure would both increase protection for employee interests, while possibly eliminating managerial resistance to a change that could ultimately benefit the firm. This change is within the Board’s interpretative and implementation power under the Act and would foster economic growth through the implementation of beneficial ESOPs in situations where they were previously barred.

The final issue regarding labor law obstacles to the implementation of employee ownership is the changing structure of the American workplace. The need for increased worker participation and input in the production process has been heralded by business for years. Unions, however, are concerned about their workplace role diminishing as a result of employee participation occurring outside of the collective bargaining process. If the labor law obstacles discussed here were relaxed, employee ownership could provide a means through which all parties could benefit.

Conclusion

The implementation of ESOPs with significant employee control could allow unions to retain an important role in the workplace. Unions are uniquely suited to defend and represent employee interests in the negotiation, implementation, and maintenance of employee ownership plans because of their organizational and informational advantages. Additionally, employees would benefit through increased participation and equity in the firm. And, if employers are serious about employee participation, ESOPs that increase employee control should be an acceptable means of gaining employee input. Employee ownership, therefore, could provide a compromise between employers who want increased employee input into the production process, unions who want to protect their role in the workplace, and employees who seek to protect their interests by obtaining managerial control.


444. See supra notes 53-60 and accompanying text.

445. See supra notes 61-68 and accompanying text.

446. See supra notes 61-67 and accompanying text.

447. Reduced diversification, however, must remain a concern.
In certain situations, ESOPs providing employee control can benefit firms. While unions are better suited to initiate and manage employee ownership plans, they have been reluctant to become involved in these plans. Although some of this reluctance results from organized labor's own attachment to tradition, labor law obstacles, at a minimum, create severe disincentives for unions to change their ways. The result is that a potentially better organizational structure can be barred by employers or managers who use labor law as a shield against employee-initiated ESOPs that threaten their power. Furthermore, precluding employee attempts to gain managerial control leaves employees more vulnerable to financial risk and employer influence, and thereby less willing to provide information valuable to the firm. Employee ownership, by increasing employee participation in managerial decisions, could improve their firm's performance, while also protecting employee interests and maintaining unions' role in labor relations. This potential, when considered with the negative impact that labor law has on the implementation of employee ownership plans, may provide critics like Hansmann with an explanation for the relative dearth of such plans.

Labor law is not the only obstacle to employee ownership, yet it is a serious problem that is often avoidable. The Board should consider relinquishing its reliance on the past and allow employees and unions to seek support for, or insist on, plans that could benefit all the parties involved. Without such a change, the Board risks an unwarranted siding with employers and management, who may forego the firm's benefit for their own by eliminating employee pressure for increased employee ownership and control. The economic environment continues to change, and employee ownership is a vital part of this dynamic climate. Rather than create obstacles to a business structure that counters its traditional workplace model, the Board should recognize these changes and facilitate implementation of employee ownership plans.