

Memo

To: The Board
From: Thomas Sobel, Administrative Law Judge, Eduardo Blanco, Special Legal Advisor
cc: J. Antonio Barbosa, Executive Secretary; Paul M. Starkey, Acting Executive Secretary
Date: November 23, 2015
Re: Staff Proposal for an Education Access Regulation for Concerted Activity

I. Introduction

During the month of September 2015, the Board held a series of hearings for the purpose of gathering information on whether the ALRB needed to take additional steps to ensure that farmworkers were aware of their rights and protections under the Act with respect to protected concerted activity and what regulatory steps, if any, could or should be taken by the Board to increase that awareness. These hearings were held in Fresno, California on September 9, 2015, in Salinas, California on September 14, 2015 and in Santa Maria, California on September 15, 2015.¹

After the hearings were concluded, the Board requested staff to consider the Board's authority to enter employer premises to conduct onsite worker education and to prepare a draft regulation in accordance with the extent of such authority.

¹ The initial hearing in Fresno commenced with comments from ALRB Chairman William B. Gould IV, who stated that, "These hearings focus upon the worker – worker education and access to promote such exclusively." (RT 9/9/15: P. 6 L 10-11.)

II. History of the Board's Worker Education Program

Because exercising the rights guaranteed by the Act depends upon knowledge of its provisions and processes, from the inception of the Act, this Board has devoted considerable attention and resources to educating employees. It has produced and distributed a wide variety of informational materials about the purposes and procedures of the Act.

Historically, the Board has not left it to the parties to educate employees about their rights; it embarked on a direct-to-employee program of worker education under which Board agents took access to employees to educate them about their rights. Although these efforts were controversial, they were endorsed in the Initial Report to the Legislature by the Joint Committee to Oversee the Agricultural Labor Relations Act.

The Committee concluded that the fact that “[v]ery few of the individuals directly affected [sic] by . . . the ALRA have had prior experience” with the law, combined with the fact that “there was a serious lack of information concerning the fundamental concepts and procedures of the” Act, “compound[ed] the problems confronting the ALRB in its efforts to achieve the objectives of the [Act.]” However, taking account of complaints about the content of the procedures involved in taking access for this purpose, the Committee recommended that the Board develop more “precise guidelines for its Board agents in the conduct of worker education programs. These guidelines should be strictly adhered to and should include, except in extraordinary circumstances, advance notification of visits to [an employer’s] fields. Further, Board agents should receive specific training . . . in the techniques for making an objective presentation of workers’ rights under the ALRA.”

In 1978, the Board did hold hearings on adopting a worker education regulation, but it did not adopt one; instead, it maintained its ad hoc approach until 1979, when the court of appeal in *San Diego Nursery v Agricultural Labor Relations Board* (1979) 100 Cal 3d 128, held that in the absence of a valid regulation the Board could not continue the program. Just as significantly the court also held that 1) that Labor Code Section 1151(a) did authorize such access for the purpose of investigations authorized by the Act; 2) that the Board could properly conclude that its investigative authority begins before the filing of a petition for certification; and 3) that such investigative authority could include advising, notifying, or educating employees about their rights and obligations under the Act. Despite the court’s indication that a duly promulgated regulation was within the scope of the Board’s authority, the Board did not enact one.

In the ensuing decades, election related activity subsided and the ALRB's personnel resources went from over 200 positions to less than 40. Even during the years of limited resources, the Board sought out farmworker and supervisor outreach events and updated its printed outreach material. More recently, the Governor and Legislature approved significant additional resources for the ALRB, including resources for education and outreach, which provide a means for a renewed regulatory effort.

The 2015 public hearings confirm the emergence of a new population of immigrant workers less familiar with the American legal system, and more difficult to reach because of various language and cultural barriers. They also confirm that despite the Board's ongoing efforts at outreach, farmworkers, regardless of heritage or ancestry, remain largely unaware of their concerted activity rights and protections. Thus, it is as true of farmworkers today as it was in 1978 that, as the Joint Committee observed, "very few of the individuals directly [affected] by . . . the ALRA have had [any] experience of the law."

III. Summary of Evidence and Conclusions from the Hearings

These hearings provided the various constituent groups (Employers, Employer counsel, Farm Labor Contractors, Employee unions and the employees themselves) and experts from Academia and Non-profit Groups (NGOs) such as CRLA and CAUSE an opportunity to express their thoughts on the state of worker education and to suggest approaches, counter-approaches and constituent support for or opposition to suggested approaches or alternative methods of addressing any deficiencies in the Board's approach to farmworker education. At least on the part of unions and employer counsel, the expressed views, at the hearings, centered around comments made by Chairman Gould, enunciated at the August 3, 2015 Labor-Management Advisory Committee meeting, which posited the potential for creating a new regulation that would allow ALRB staff to enter the field work sites in order to educate farmworkers and supervisors regarding the concerted protected activity rights and protections provided to farmworkers under the Act.

Staff believes that the hearings revealed one point upon which all sides agreed and that, in the abstract, no side opposed educating farmworkers about their concerted activity rights and protections. Otherwise, there was considerable disagreement as to the appropriate means or methods by which the Board could achieve such education.²

² There were a few voices raised against the need for any education. In Salinas, Mr. Steve Scaroni whose opinion appears to be formulated from and entirely based on his relationship (as employer) to an employee pool made solely up of H2A visa program employees, none of

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In the staff's view, the real import and impact of these hearings are evidenced by what they either revealed or confirmed: In general, despite 40 years of outreach efforts by the Board, by unions and by Hispanic community legal, religious, social and cultural groups, today's farmworkers have little to no knowledge about the ALRA/ALRB and the rights and protections this law affords them. According to the most recent NAWS (National Agricultural Workers Survey) data (2012), in 2012, 95 percent of California farmworkers are foreign-born and their average age is 37. The NAWS also estimated that, in 2012, 63 percent of California farmworkers were undocumented and that 64 percent of the California farmworkers had, at minimum, a 6th grade education. The NAWS also established that the average number of years doing farm work in the United States was 14 years. 72 percent of farmworkers had one employer in 2012 and worked 46 hours per week for 40 weeks. Further, the NAWS states that 20 percent of California's farmworkers are indigenous.

Fair conclusions that can be derived from a review of the NAWS data are that health & safety conditions have been improving. However, the NAWS data also revealed that wages have not increased and that, in real terms, have actually decreased. In 1990, wages were \$9.80 (per hour) and in 2012 were \$9.06 (per hour). This NAWS data was, in many ways, confirmed by most of the farmworkers testifying at each hearing location and came from mestizo and indigenous workers alike. Mr. Rick Mines, a University of California, Berkeley researcher, former NAWS director and co-author of the seminal Indigenous Farmworker Study, in his testimony indicated that indigenous farmworkers are poorer than mestizo farmworkers.

A key factor taken from the farmworker witnesses and spoken of eloquently by some was their reluctance to confront employers (managers, supervisors and foremen) about working conditions because of a heightened fear of retaliation and/or deportation. Farmworker

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whom testified. Against all the other testimony presented, throughout the hearings, his view and situation must be seen as an atypical employment situation. There was also the testimony of Ms. Carmen Garza, a former farmworker, who testified in Fresno, whose views on farmworker use of modern communications technology must also be seen as atypical. There were workers in Salinas that wanted to be assured that information would be given regarding their rights to oppose their collective bargaining representative or to oppose a union seeking to organize. In Fresno, there was an expression of distrust leveled toward the Visalia Regional Office staff and Regional Director as being biased against workers opposed to a union and questioning the veracity of any information that would be given.

witnesses, particularly the indigenous farmworkers, consistently testified that their fears of retaliation are directly tied to their undocumented status and resulting in vulnerability to unlawful practices engaged in by foremen or other management, which was, essentially, expressed, by them, as a feeling of being powerless.

A key demographic change to the farmworker population in California is the growing percentage of farmworkers who are mono-lingual and can only speak (but not read or write) their indigenous language. The hearings revealed that the lack of an ability to speak Spanish and in particular to read Spanish is a growing obstacle to their ability to access agency written materials regarding their rights under the Act. This language barrier definitely contributes to their lack of knowledge about their labor rights and protections³ which would also correlate to this sense of being powerless.

Various alternative methods to work site education were advanced by employer representatives. As discussed below, these methods have either already been tried (agency outreach) or are unworkable (computers, cell phones, social media, radio/television, billboards and video training)⁴.

Finally, depending on the approach to regulatory language accepted by the Board, it is very unlikely that the suggested potential negative consequences to employers from education at the work sites will occur. Employers counsel/representatives voiced concern that a random selection approach or an approach to employer selection for education based on ulp filings will have employees believing that the employer was chosen because it is a bad actor that has been violating its employees' rights. Mr. Bedwell and Mr. Cloud also

³ This was attested to by various witnesses, including but not limited to Mr. Mines, Ms. Keffer, Mr. Leoncio Vasquez, Mr. Fausto Sanchez and Mr. Estrada to name the non-farmworker witnesses along with many farmworker witnesses who will not be named herein.

⁴ Also suggested, apparently as a corollary to these other methods, was a suggestion that we model our efforts on those of the Cal-OSHA Consultation Unit. Following the hearings, the Consultation Unit was contacted. A key point that was confirmed is that the Unit is "walled-off" from the OSHA enforcement personnel. Thus no citations are issued nor are violations seen ever reported to the enforcement personnel. Most of the training is done at events sponsored by the various employer organizations or by the workers compensation insurance industry. Events that occur at the work sites are voluntary. The Unit does not have a record of work site instruction but it can be said that they are infrequent when compared to industry or insurance company sponsored events. It was also learned that the number of employees at these events cannot be determined by the Unit. The impression was that it was not many if at all but there was no way to know for sure.

expressed another shared employer concern and that was the bias or appearance of bias on the part of ALRB regional or General Counsel staff. Mr. McClarty, a grower, felt that farmers would believe that ALRB staff had ulterior motives for educating workers. Mr. Barsamian felt that ALRB staff could not be expected to be neutral if they were also expected to investigate and prosecute. Mr. Resnick referred to that possibility as a conflict of interest. These concerns are alleviated by the proposed regulation (see proposed regulation) by using Board personnel specifically tasked with outreach duties and “firewalled” from both the General Counsel’s investigative obligations and the Board’s judicial functions.

Mr. Barsamian also expressed a concern about an impact on productivity if work time was used because work would not get done therefore negatively impacting perishable crops. He also believed that before and after work would also not be effective. Yet he also felt that lunchtime education would not work because workers were eating in the half hour lunch period which he felt would be ineffective as he believed education would take longer than that. We believe that the concerns regarding work time and before and after work are well taken. We also believe that for our purposes and educational design the half hour lunch will be sufficient. Mr. Maturino saw lunch time Board educational access as no different from the ability of a union to use the half-hour lunch to accomplish their (different) purposes. He reminded us that the half-hour lunch is the employees time and therefore their choice to listen or not, regardless of how they are being paid for their work time (hourly or piece-rate). A number of farmworkers also agreed that the lunch period would be the best time for education at the work site and that their own particular needs pre-work and post-work did not allow for any time in which to explain and more importantly to discuss ALRB information.

It is recommended that based upon the consideration of all of the information received from all of the constituent groups (employers, unions, academics, community representatives and, especially, farmworkers) and in light of the conclusions mentioned above, this Board should conclude that worksite education of farmworkers is essential so that the purposes of this Act may be effectuated and proposed regulatory activity, see proposed regulatory language, will ensure a fair, impartial and orderly processing of farmworker initiated requests for education.

The Hearings

Below, is a general discussion of those statements received which we believe the Board should find, enlightening, revelatory, important and ultimately persuasive. This is then followed by a closer look at the alternative counter-approaches or methods proposed for achieving the goal of an educated workforce mentioned above.

Numerous witnesses testified throughout the three days of hearing. The majority of the witnesses were, in fact, farmworkers⁵. These farmworker witnesses spoke from their hearts and painfully revealed their fears, their anguish and a conviction that their plights were hopeless and that they were powerless to alter their “lot”.

It is to be deeply appreciated that the farmworkers took the time to attend these hearings either as participants or as observers. It is recognized that to follow a long work day filled with tremendous physical exertion and to stay at a hearing until late in the evening when they would have to rise the next day at the crack of dawn was a great sacrifice. Their interest in these proceedings does, in its own way, underscore the importance they place on the issues of education and protection from retaliation.

However, it must also be recognized that not all farmworkers who were present at the hearings or who testified were supportive of the potential desire of the Board to create a regulation allowing access for educational purposes.⁶

Lack of Knowledge

It is safe to say that there were several themes echoed through the testimony of the various workers who spoke in support of a regulation providing for work site education. They stated that⁷: Many farmworkers don't know their rights.⁸ Many farmworkers did not know anything or very little about the ALRB and its protections.

Workers arrive from Mexico without any existing knowledge of labor laws or governmental protection against labor law violations from employers (Mr. Mines). Mr.

⁵ In total, 60 farmworkers testified. In Fresno 14 farmworkers testified; In Salinas, 29 farmworkers testified and; In Santa Maria, 17 farmworkers testified.

⁶ The views of this group also received the consideration given to all of the other participants and see footnote 2.

⁷ It was clear that the witnesses, for the most part, were including themselves in the group that had little or no knowledge.

⁸ Ms. Keffer, Director of CRLA's Indigenous Project articulated that even if there were ten CRLAs there are far more farmworkers without knowledge of their labor rights than could ever be reached by them. However, Mr. Anthony Raimondo, an attorney who represents agricultural employers, expressed with confidence that workers know their rights and Ms. Sylvia Lopez, farmworker, agreed with that viewpoint.

Vasquez⁹ specifically related this to indigenous farmworkers saying that labor rights was a concept that didn't exist in their culture. Worker witnesses also echoed the belief that many workers don't know their labor rights or the ALRB. From her experience, Ms. Irma Luna, who is currently a Field Examiner for the ALRB in the Visalia Regional office and who is of Mixteco descent and speaks both Mixteco Alto and Bajo, indicated that indigenous farmworkers don't know that concerted activity is protected under the Act. Workers also don't know where to go if there is retaliation for protected concerted activity. Mr. Alvarez¹⁰ indicated that indigenous workers do not understand the concept of protected concerted activity. Ms. Anjelica Isidro who is a Mixteco interpreter who works with the Mixteco community and who, herself, was a farmworker for over 20 years and had never heard of the ALRB in the years she was a farmworker. She believes, that like her, most Mixteco farmworkers in the Salinas area do not know of the ALRB.

Workers complained that supervisors were able to do whatever they wanted because indigenous workers don't know how to read, or write or speak Spanish. This in turn leads to further additional discrimination against indigenous farmworkers. For a further discussion of maltreatment under these types of circumstances see the book by Dr. Seth Holmes, *Fresh Fruit, Broken Bodies: Migrant Farmworkers in the United States* (2013) University of California Press pp 65-68.

Fear of Retaliation

Many workers spoke of fear of reprisals and that in fact retaliation did occur when farmworkers did speak up and protest a working condition. A number of witnesses, such as Mr. Vasquez, said that workers who do protest are fired on the spot. This showed other workers what would happen to them if they protested¹¹. They spoke of this fear as an impediment to protesting working conditions. In fact, as reported by one farmworker witness in Santa Maria, a fellow female worker had been observed suffering from apparent

⁹ Mr. Leoncio Vasquez is the Executive Director of the National Center for the Development of Indigenous Communities which assists over 5,000 indigenous families in the San Joaquin valley.

¹⁰ Mr. Mariano Alvarez, is a community worker in the CRLA Indigenous Project. He is of Triqui descent and speaks Triqui. He was also an interviewer for the Indigenous Farmworker Study.

¹¹ This is a classic example of an oft-used phrase, in labor law, referring to an employer using the "iron fist".

heat stress and no one protested when the foreman refused to take any helpful medical action.

Ms. Keffer believes that regardless of whether the farmworkers were indigenous or not, the “[C]oncept of retaliation is one that has to be explained in some detail, in my experience. It's not something that's automatically, you know, understood that, well, they're not allowed to discriminate against me. But if I complain about discrimination I didn't know that that, you know, taking actions against me would be illegal. And so I think that maps really well onto what the protections of the ALRA are and the fact that workers don't intuitively understand that if they complain in a group they are protected against retaliation for that kind of complaint, etcetera.”¹²

Ms. Davalos¹³ also spoke of the culture of fear that that exists among farmworkers. She sees them as a highly vulnerable population which is largely afraid of filing claims and reporting abuses. One reason, among several others, for this fear is quite obvious and was mentioned by at least one worker which was that the workers depend on their salaries to support their families. A worker at the Santa Maria hearing stated that fear is so great that it stopped some workers from attending our hearing because of concerns over employer retaliation or, as put by another worker, a fear that ICE (Immigration Control and Enforcement) would appear at the hearing.

Staff recommends that the Board should determine that indeed workers do not come forward because of multiple fears which act in combination: fears of retaliation (of being fired), fears of deportation, language barriers of Spanish, that are now being increasingly complicated by an additional language barrier of indigenous languages which amplifies all of the other elements many times over. These elements when coupled to feelings of powerlessness and hopelessness can be seen to be nothing less than overwhelming to employees that have little to no knowledge about the ALRA and the protections it provides.

¹² RT 9/9/15: P. 90-91 L 19-4.

¹³ Ms. Hazel Davalos is the Organizing Director for CAUSE, the Central Coast Alliance United for a Sustainable Economy. CAUSE works in both Oxnard and Santa Barbara Counties(Santa Maria is located in Santa Barbara County). It should be noted that the court reporter misspelled Ms. Davalos' last name as being Avalos.

The Cellphone Alternative ¹⁴

As for technology being available to indigenous farmworkers, a witness testified that they don't have access to technology. They can't afford to buy a computer and they don't have internet access where they live. They see it as a luxury they can't afford.

The Board should also determine that all or almost all farm workers have a cell phone¹⁵. This was not disputed by any of the constituent groups and the near ubiquitous presence of cell phones in the fields received confirmation from many of the witnesses (supporters and opponents, alike) at the hearings. However, when it comes to the latest versions of the cell phone, there are certain barriers that are faced by all farmworkers regardless of origin (mestizo or indigenous) such as low literacy rates, computer illiteracy and yearly incomes that are below the established U.S. poverty level. When combined and even separately, it is our belief that, for the farmworker, the purchase of a "smart" phone and the requisite (internet) data plan is a true luxury and prohibitively expensive.

Staff recommends that the Board should also accept, as fact, that, while among farmworkers cell phone ownership is very high, there was certainly no data or surveys provided to establish the contrary and counter-intuitive position that the majority of farmworkers can afford "smart phones" and the data plans. With what is commonly known about the average annual income of a farmworker in California, it is quite unlikely that the majority of them have the financial resources available to them to make such purchases. As Mr. Vasquez stated and as one farmworker witness in Santa Maria essentially put it, workers use their wages to pay rent, to pay for food, to send money back to Mexico or for the doctor, after that they don't have any money for the internet (and, presumably, this would extend to smart phones and data plans). The prohibitive cost to farmworkers of such products was also echoed by Mr. Alvarez.¹⁶

¹⁴ We have received information that the USEPA has also looked at the use of cellphones to contact farmworkers and making presentations to farmworkers via computer. They have concluded that texting to and between cellphones and downloading material to cellphones are significantly impacted by the type of phone service and data plans purchased by each worker.

¹⁵ Farmworkers do use their phones, regardless of type, to send each other text messages.

¹⁶ This applies equally to home computers. Ms. Isidro does a lot of home visits to farmworker families and said that they do not have access to the internet or to computers. This was also confirmed by Ms. Luna.

Ms. Isidro agreed that all farmworkers have cell phones and believed that some of them had smart phones but that they were limited with what they could do with them because they don't know how to read or write. They (cellphones), in her view, are mainly used to stay in contact with their children.

Finally, use of computers and cell phones is based upon having internet access. Worker testimony was clear and has not been contradicted; Internet access and/or data plans require income that is not available to farmworkers who mainly devote their incomes to their living situations and to providing for their families both here and in Mexico. Cellphones (and computers) are not an economically feasible or reasonable means for educating farmworkers.

Illiteracy and Communications Technology

A number of the alternatives to work site education proposed by employer representatives require the “consumer” to have a certain degree of literacy¹⁷. Not surprisingly, a similar degree of literacy is needed in order to maneuver communication technology: computers, the internet, social media and smartphones.¹⁸

With the data uncovered by staff, after the conclusion of the hearings, we establish that farmworkers (mestizo and indigenous) are insufficiently computer literate to maneuver smart phones to access any internet-based education and; farmworkers are insufficiently literate in Spanish to be able to understand the written explanations of the ALRA.¹⁹

¹⁷ A 2009 study analyzing the 2003 National Assessment of Adult Literacy arguably shows that there is a correlation between a low level literacy rate and not having a computer and also not being computer literate (See *Overcoming the Language Barrier: The Literacy of Non-Native-English-Speaking Adults*, 2009, Jin and Kling).

¹⁸ Mr. Pete Maturino, UFCW vice-president and who has extensive experience in organizing farmworkers, noted that the problem with using the internet to provide information was that the workers could not ask questions besides the fact that he believed that the workers did not have internet access. (Presumably this inability to ask instant questions is a problem that extends to all technology based forms of communication and to billboards as well.)

¹⁹ Studies in Mexico have shown that there is a wide gap in proficiency in the ability to use technology/computers based on socio-economic strata. This digital inequality points to the “...differences in material, cultural, and cognitive resources required to make good use of information and communication technology” and limited access prevents students from developing key skills that allow them to filter through information on the internet, find important information and develop skills.

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Mr. Mines indicated that there should be no expectation that brochures written in the workers native language could be read except by scholars. Nor should it be expected that indigenous workers that speak Spanish can read Spanish. Mr. Santos²⁰ stated that not one of the many farmworkers he interacted with through his work had access to a computer and they didn't know how to use one. Mr. Vasquez said that indigenous workers are not able to access information online and even though many do have cell phones they don't have the knowledge to search for information. Ms. Isidro expressed skepticism about the reading and writing abilities of the Mixteco farm worker community in their own language because most had not gone to school. She believed that a verbal approach to education was necessary.

Research indicates that a certain level of literacy is needed in order to use computers (and therefore smart phones). The NAWS data indicates that most farmworkers only have, at maximum, a 6th grade education. CAUSE results were fairly similar. (See CAUSE NOW report of September 2015 which reported that more than 13,000 farmworkers in Santa Barbara County are immigrants from Mexico with an average age of 36.8 years old and that over 10,000 of them completed elementary school.)

Standards have been developed by the U.S. Department of Labor to identify the different levels of literacy: marginally literate (a person who can read between the eighth and twelfth grade levels, but lacks the twelfth grade equivalence needed in complex technological society), functionally illiterate (a person who can read between the fourth and seventh grade levels) and totally illiterate (a person who has skills below the fourth grade level and cannot acquire information through print). Extrapolating from all of the data sources mentioned in our instant memorandum, we believe that, currently, the "functionally illiterate" category is where most mestizo farmworkers, whose first or only language is Spanish, can be placed. We believe that most indigenous farmworkers, and

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See "The Diffusion of the Internet in Mexico" by Thomasson, Foster And Press:
www.lanic.utexas.edu/project/etext/mexico/thomasson/thomasson.pdf.

²⁰ Mr. Fausto Santos is a community worker for CRLA in the Indigenous Project. He is of Mixteco descent and speaks both Mixteco Alto and Bajo. He was also an interviewer for the Indigenous Farmworker Study.

especially female indigenous farmworkers, can be placed in the category of “totally illiterate”.²¹

For both the majority of mestizo and indigenous farmworkers, it is plainly apparent that neither group is sufficiently literate to use technology to acquire or then to understand or interpret written materials. Neither group has attained the reading level needed in a “complex technological society” such as ours to use computers to (a) obtain information (knowledge) from the computer and then (b) have the ability to read and interpret that information.

Research also indicates that in the USA smartphone ownership and usage is highest among younger Americans with relatively high income and education levels (See April 2015 Report from PEW Research, U.S. Smartphone Use in 2015). “64 % of American adults now own a smart phone of some kind” (U.S. Smartphone Use, supra). “19% of Americans rely to some extent on a smart phone for internet access, but the connections to digital resources that they offer are tenuous for many of these users” (U.S. Smartphone Use, supra). The study found that “7% of Americans own a smartphone but have neither traditional broadband service at home, nor easily available alternatives for going online other than their cell phone” (U.S. Smartphone Use, supra). The study also confirmed our conclusion that farmworkers would use the texting feature on their phones, “Fully 97% of smartphone owners used text messaging...” (U.S. Smartphone Use, supra).

Farmworkers are likely to be in the group that does not have broadband access and has relatively few options in getting on the internet unless they have a “smart” phone. This group, in the PEW report, is referred to as “smartphone-dependent”. Although the data collected applies to the broad category of Hispanics in the USA it is highly likely that

²¹ Dr. Seth Holmes, a medical anthropologist who has extensively studied the plight of migrant farmworkers, also commented on farmworker literacy. Dr. Holmes observed a lack of proficiency in Spanish among the Triqui farmworkers he “studied”. He also noted an educational disparity between male and female Triqui farmworkers with the female Triqui farmworkers having less education which he attributed to the cultural gender-based roles in fulfilling domestic responsibilities. “Thus many of the women do not speak fluent Spanish. Neither male nor female Triqui had proficiency in English either written or spoken.” (See p. 3, Statement of Seth M. Holmes). Importantly, in the context of suggested alternatives to worksite education, Dr. Holmes noted that “... [N]one had access to a home computer.” (See p. 3, Statement of Seth M. Holmes).

farmworkers fall squarely within that part of the demographic (relatively low income) which have limited access to the internet and are more likely to terminate their cellphone service due to financial constraints. In this dependent group, “48% of smart-phone dependent Americans have had to cancel or shut off their cell phone service for a period of time because the cost of maintaining that service was a financial hardship” (U.S. Smartphone Use, supra). Because of this they are more likely to have fragmented access to their smartphone and the internet. They also gravitate towards relatively low-cost plans. “...those with relatively low-cost plans are actually more likely to have canceled or suspended service” (U.S. Smartphone Use, supra). This dependent group also reported more functionality problems (48 percent) with their phones such as poor or dropped signal quality and content not displaying properly (47 percent). (As to why this would be occurring in this low-income non-white demographic, PEW did not offer any explanation.) Other noteworthy statistics from the PEW report shows that only 9 percent of Americans with high school graduation or less have a smartphone; only 7 percent of Americans who live in rural America have a smartphone and; only 13 percent of Hispanics have a smartphone.²²

Data taken in Mexico that assessed internet access during the “nineties” (when NAWS data and Mr. Mines indicate our current farmworker population would still have been in Mexico) indicates that the percentage of the Mexican population, in 1994, using the internet was 0.044 percent which equates to 39,000 users, which in 1995 jumped to 94,000 users or 0.103 percent and by 2001, 3.672 percent of Mexico’s population was using the internet. This however would exclude the (Mexico) economic and educational strata from which our current population of farmworkers come as the internet use and its expansion were Mexican university and business driven.²³

²² Ms. Keffer indicated that although she has seen farmworkers with cellphones she has not seen many indigenous farmworkers with smartphones. Although she has seen the children of farmworkers having experience with computers and social media she has not seen that experience extended to their farmworker parents.

²³ The Diffusion of the Internet in Mexico, supra.

Cell phone signal²⁴

The problem of cell phone signal coverage, which is significant in the wide open spaces, away from most population centers, where most cell phone signals cannot be received (or sent), does deserve special mention in that it poses a very significant practical obstacle to a cellphone based educational approach. At the hearings, workers spoke of poor reception or signal for their cell phone while out in the fields. The Board, itself, has experienced this problem numerous times when it has journeyed to observe farming operations. Previous General Counsels and their Regional Directors and regional staffs have over the years also complained of this issue and continue to do so to this very day.

In summary, even if the Board were to consider cell phones as an educational alternative, it would not be a reasonable alternative because of the lack of literacy, in written Spanish, among adult mestizo and indigenous farmworkers coupled to the inherent problem of the inability to take all-versions of spoken Mixteco or Triqui and possibly other indigenous languages and to put them into writing for the mono-lingual indigenous farmworker. But, even if we assume that there were not any impediments to placing our educational materials into these languages and their multiple variations, the significant problem of a lack of literacy, amongst indigenous farmworkers, in their native languages remains²⁵. As was commented upon during the hearing in Fresno by Field Examiner Luna²⁶, it is only academics that read and write indigenous languages.

When farmworker illiteracy is combined with low technological skills, low income and poor or no cellphone signal/area coverage, the conclusion is inescapable that for the variety of reasons stated above cell phones should not receive any consideration as an appropriate or reasonable alternative means for educating farmworkers.²⁷

²⁴ We have received information that USEPA also found that the remoteness of most farm field locations impedes internet access as well as actual telephone service because of weak signal or no signal.

²⁵ The Board accepts that a majority of indigenous farmworkers do not read or write their own languages.

²⁶ Ms. Luna was also an interviewer for the Indigenous Farmworker Study and was previously employed by CRLA as a community worker.

²⁷ However, it should be noted that Mr. Bryan Little, a representative of the California Farm Bureau Federation, said that he has seen farmworkers use their cell phones to find out

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Other practical factors to be considered with the consideration of cell phones as a means of worker education is how would we acquire the workers cell phone numbers and; there is no guarantee that workers would have the opportunity at work to listen to an ALRB call; it must be believed that there would be little desire before or after work to take such an educational call given their before and after work schedules as discussed. As was said by a worker in Santa Maria, the opportunity to receive the information is limited because of the long physically taxing hours that they work. It was indicated by another Santa Maria worker that many people work 7 days a week and 10 to 12 hours per day.

The Other Avenues of Outreach Proposals

A. Community Outreach

As mentioned above, another alternative means of education being suggested by the employer community is through the use of community based educational events²⁸. An implication from their suggestion is that until now the ALRB has not been so engaged. Notwithstanding this implication, and as discussed above, the ALRB has, in fact, been engaging in efforts to educate farmworkers, at community based events, since agency inception, according to the institutional memory of agency staff. It is unfortunate that for the initial three decades of our existence detailed charts of these efforts were not maintained. However, detailed charts have clearly been in existence since 2011. Since 2011 to date, the aggregate totals of outreach events are: 126 farmworker events, 72 supervisor/manager events, 5 events where data was not input and 2 joint participation events for a grand total of 204 events; 11,403 farmworkers were reached and 3,790 supervisor/managers were reached over the time period and 552.25 personnel hours were used in total. The current approximate total of farmworkers in the state ranges from 650,000 to 1 million, extrapolating out over the next 24 years if we averaged the same

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what other employers are paying and regardless of phone types, he stated, the phones are used to communicate knowledge of all kinds.

²⁸ There exist well known exclusively farmworker oriented community events such as health fairs, the so-called “Day of the Farmworker” events that happen throughout the various rural counties in the Salinas, Central and San Joaquin Valleys as well as in the Ventura County and Imperial Valleys, churches, schools and some “stand-alone” events put on by the various federal and state labor agencies such as DOL or by DLSE.

number of events, of which we believe we attend most, we would have reached only another 66,000 plus workers.

Mr. Lozano²⁹ noted that most community events only occur annually and for such education to be effective the frequency of the education would have to be more frequent. It would have to be seasonal for each crop. A farmworker in Santa Maria also related that she didn't think a lot of people went to community outreach meetings and to her it was because of a lack of documents or an inability to speak English.

Mr. Little and Ms. Wineman³⁰ felt that the ALRB could rely, either totally or in part, upon the community organizations to undertake the education the ALRB wanted to provide. The organizations, in his view, exist to impart information. However, the idea of relying on non-profit groups to educate workers on behalf of the ALRB does not, in the long run, overcome the fear of government which is preventing workers from filing charges or even from protesting conditions at work. Many workers said the only way to overcome that kind of fear is for direct face-to-face education by the government representatives themselves at the work site. (See below discussion of fear.)

B. Video Training

A number of employer witnesses recommended that video trainings, that they indicate have been successfully used to educate farmworkers in connection to Cal-OSHA and the DFEH sexual harassment prevention requirements, were an alternative method for worker education. Witnesses commented on the existence of trainings for heat stress prevention. Mr. Bedwell³¹ expressed with confidence that employers have been successful in educating farm workers on heat illness issues through this method.

²⁹ Mr. Francisco Lozano is of Mixteco descent. He works with a Mixteco community group, the FIOB (Binational Front of Indigenous Organizations), in the Santa Maria area. He was a farmworker for 15 years.

³⁰ Ms. Claire Wineman, is the president of the Grower-Shipper Association of Santa Barbara and San Luis Obispo Counties. It represents over 160 farmers, shippers, and labor contractors among others.

³¹ Mr. Barry Bedwell represents the California Fresh Fruit Association. It should be noted that Mr. Bedwell was misidentified by the court reporter for a portion of his testimony as being Mr. Barbosa.

However, Ms. Keffer noted that video trainings do not take into account language variations. There are many variations within each of the indigenous languages of *Mixteco and Triqui*. The Board heard from a number of witnesses that spoke to the existence of variations, referred to by some as dialects, in Mixteco and in Triqui. The Board heard a number of workers speak to the issue of there not being a commonly read written Mixteco language and there was also indication from a worker that this was also an issue with Triqui.³² Mr. Estrada³³ believes that there are 16 different languages spoken in the State of Oaxaca. He also said that there are different dialects of the same language depending on which region a person came from. Mr. Carroll³⁴ stated that there are nearly 100 different dialects of Mixteco. The NAWs placed the number of indigenous languages at 60.

These variations no doubt create a special logistics problem but with appropriate ALRB pre-education visit planning it would not appear to be insurmountable. But the fact that there are so many different or potentially different dialects within an indigenous language, such as in Mixteco, the alternative approach of video training urged upon the Board by a number of witnesses would not appear to be feasible cost-wise as we would have to create potentially hundreds of different versions of the same text without any expectation we might be called upon to do education in those languages and, more importantly, we would not, ourselves, know that anyone would listen. Given worker fears expressed in their testimony, it is doubtful that any employer run training events could overcome those fears. It is not reasonable to expect the farmworkers to ask questions about how to protest working conditions when they fear that those questions will lead to retaliation.

Finally, Mr. Guadalupe Sandoval, the Director of the California Farm Labor Contractors Association, who has broad trainer experience stated that “video trainings are ineffective because they are not interactive and people do not pay attention.”

³² As Mr. Vasquez indicated, in the Salinas Valley, aside from Mixteco and Triqui, workers speak other indigenous languages such as Zapotec, Purepecho, Chatino and Nahuatl. There was no specific testimony as to whether or to what extent dialects existed within these other languages.

³³ Mr. Jesus Estrada has been a farmworker. He is of Mixteco descent. He now works with FIOB in the Santa Maria area. He was also an interviewer for the Indigenous Farmworker Study.

³⁴ Mr. Rob Carroll is an attorney who represents agricultural employers.

C. Miscellaneous alternatives

Mr. Sagaser³⁵ and other employer representatives expressed the belief that workers could be reached through social media³⁶, television, billboards and radio. As a number of witnesses testified there are not many radio programs conducted in indigenous languages and the programs are of limited length and the station signals don't reach all enclaves. It was noted that the signal did not reach Santa Maria. Another Santa Maria worker thought that because of the number of Mixteco dialects radio based education would not be effective because not all Mixtecos would understand. There was even less in the way of television access for indigenous languages and any media requiring reading such as billboards would not work with the various indigenous languages and dialects. Billboards would not be able to afford workers with an opportunity to ask on-the-spot questions and the desire should be to make sure that there is immediate follow-up to what is being said. This can only be assured through the immediacy of a face-to-face oral presentation for both mestizo and indigenous workers.

The Need for Education

Section 1152 provides the right under the ALRA for farmworkers to act in concert for "...their mutual aid or protection". ALRB and NLRB decisions establishing the requirements to gain this protection are legion. However, in essence, the issue being brought to the employer, or its representative, must be raised by two or more employees and it must be concerning a working condition. The employer is prohibited from engaging in retaliation against employees based on the employees engaging in this "protest". An employer who does retaliate stands in violation of section 1153(a) of the Act.

As stated by Ms. Keffer and echoed by other witnesses, she does not believe that workers would intuitively know that they should protest working conditions as a group thereby giving themselves protection under the law. "[It] is not something that I find is intuitively understood by the farm workers that I have come into contact with, the people who I interview because of problems in the workplace, or the people who I have worked with in

³⁵ Mr. Howard Sagaser is an attorney who represents agricultural employers.

³⁶ Social media also relies on written language and is dependent on internet access and a computer or smart phone is needed for the use of it.

just conducting general community education and outreach. There isn't a presumed understanding that you're more protected if you complain in a group"³⁷

Dr. Holmes' statement provides to the Board evidence that as to working conditions, such as health, pesticides exposure, including not being provided the opportunity to wash their hands, being given faulty training regarding protection from pesticide exposures, repeated failures by employers (or contractors) to pay the requisite minimum wage and being required to pay for rides to and from the work site (See p. 4, Statement to ALRB of Seth M. Holmes) workers are not coming together in mutual aid and for protection. In the Board's experience, these types of working conditions often form the bases upon which workers, regardless of whether the setting is agricultural or industrial, join together concertedly and protest.

The Argument for Work Site Education

As noted, above, previous Board efforts, over the past 40 years, to educate farmworkers through our participation at community farmworker oriented events, working with the Mexican consulates, participating in radio programs and other media has met with little success³⁸. These hearings also determined that the use of computer and other communication technologies that rely on a proficiency in computer or smart phone use would do little to educate a population that doesn't have such technology. The use of communication technology also is impeded by and doesn't overcome the literacy issues of both mestizo and indigenous workers. In fact, even if the smartphone/cell phone technology could be used by farmworkers with the degree of proficiency needed, there still remain practical problems, which, in our view, shut the door completely on this proposed alternative, *one of* which is that in a wide swath of rural California farmland cell phone signals are either severely limited or non-existent. Video trainings³⁹, billboards and/or focusing on radio based shows have also been shown to be unworkable.

³⁷ RT 9/9/15: P. 89-90 L20-2

³⁸ If success means the number of 1153(a) protected concerted activity charges filed by or received from a farmworker population numbering between 650, 000 to 1 million farmworkers.

³⁹ Mr. Resnick, who is vice-president and general counsel for the Western Growers Association, noted that trainings are required by other statutes such as by DFEH and Cal-OSHA. These trainings are to be done by the employer and apparently are done on company time and the employers pay their employees for it. Notably, the employer chooses the date of

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However, with these alternatives being eliminated, before the Board remains the problem of a workforce that remains largely unaware or only faintly aware of the ALRA and the rights and protections it provides coupled to the problem of finding a reasonable method to eradicate that lack of knowledge. It is submitted that the elimination of the employer proposed alternatives places the Board squarely on the path to work site education. This is a path that will have a number of hurdles and obstacles to be overcome. Hurdles arising from the choices made in model/methodology and obstacles arising from litigation that work site education will surely engender.

An obvious and existing method for modeling work site education procedures is in the existing section 20900 et seq. access procedures established for “Solicitation by non-employee organizers”. This allows for access before and after work and during lunch periods, in other words, during the “free” non-paid time of the employees.⁴⁰ However, experience has, perhaps, shown that even union organizers do not see before and after work (access) as viable/useful times for organizing. It is well known, from ALRB hearings and investigations, that before work, the workers are too busy placing themselves into position to start that day’s assignment and after work are either too tired or too in a hurry to stop and listen. This is supported by testimony at our instant hearings, as well. Ms. Isidro confirmed that in the Salinas area, workers get up before 5 a.m. and work until 5 or 6 p.m. and that after work they go pick up their children from the babysitters and then go home and cook for the family. “And they’re not able to do anything else.” Another farmworker explained that they have to get up before 5 in the morning to go to work and

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training and who does the training. However at the base of our trainings is overcoming worker fears of retaliation from their employers who they believe will fire them if they come to the ALRB. There is no indication that their fears exclude protesting sexual harassment or exclude health and safety violations and to the contrary, we heard from a number of worker witnesses that said they feared protesting health and safety violations including heat stress, job injuries and pesticide exposure.

⁴⁰ For the purposes of this discussion, it is assumed that the Board would not choose to provide for education sessions during work time. The Board is sensitive to the needs of the employer for productivity and the prompt handling of highly perishable commodities on the one hand and on the other the employees’ rights to choose not to participate in what would then essentially be a mandatory captive audience speech. (This does not even reach the underlying issues of employer payment for the education time, which appears mandated by DLSE rules and case law or *what* the rate of pay should be for that time).

then don't go home from work until 5 or 6 p.m. The only opportunity in such circumstances is to provide education at the worksite during the lunch break. The lunch period has always been and will always be the focal point of *any* access-taking.

As previously described by Ms. Davalos and many workers there exists among farmworkers a "culture of fear".⁴¹ Staff believes that any method of education adopted by the Board must, as part of its design, be directed at eliminating that culture. Ms. Davalos felt that work site education would set a different tone for the workers and would imbue them with the knowledge needed about how to exercise their labor rights without fearing retaliation.⁴² Mr. Mines expressed his belief that the workplace was the only place so as to be sure to get access to the "full universe of those people, and especially those that are in most need of it."

Dr. Holmes states that, "Part of the reason the workers were underpaid is that they had reason to be afraid to stand up to their employers for fear of losing their jobs and/or being deported." Dr. Holmes quoted a farmworker so as to provide an example of this widespread fear, "They are afraid of speaking because the farm will fire them. We want to say things to them but we can't because we don't have papers." (See p.4, Statement of Seth M. Holmes).

Workers brought our attention to their belief that, at least, among indigenous workers, they considered themselves when at work a part of a community or family as they all come from the same place (in Mexico). A number of other farmworkers talked about their belief that making the ALRB presentations at the work site would also go a long way to combatting worker fear and for the same reason that, at work, the workers have a close connection to each other. It is a connection beyond their particular employer and the belief was that information imparted there would be spread beyond their particular workplace.

⁴¹ The CAUSE NOW report also stated that only 3.7 percent of farmworkers have filed a complaint against their employer, compared to the many more that had experienced violations of the labor laws.

⁴² One example of a basis for concerted activity that is not raised because of fear, in Santa Maria, is the use of pesticides and the exposure of farmworkers to pesticides. Mr. Lozano explained that workers felt they could not raise that issue with their employers for fear of retaliation.

Mr. Barsamian⁴³ and Mr. Bogart⁴⁴ were among the many employer voices against work site education that wondered about how an employer would be selected for education⁴⁵. They believed that a random selection of an employer for education would leave a negative perception with the employees, a perception that the company was in some kind of trouble. Mr. Bedwell used the stronger term stigmatized to describe worker reaction to their employer being randomly selected. It is believed that the wording of the regulation (see proposed regulation) alleviates the concern regarding random selection as selection will be based on employee requests for education. Requests for education will reflect employees themselves pro-actively seeking to be educated about their rights and protections.

Recent case law, involving the so-called “non-productive” work time (discussed elsewhere) also argues heavily in favor of lunch time access to avoid drop-offs in company productivity and to avoid employer payment for company time being used for training. However it also raises the issue of what is to occur if our agents run over into work time or do not leave the work site prior to the end of the lunch period and that disrupts the return to work. Payment for the loss of work time may be required. It is believed that our access plan design (discussed elsewhere) eliminates this possibility.

Before the Board has even taken any steps to determine a methodology for such access, criticisms and accusations have already been leveled. Among these are that: the specific content (language) of the board agent presentation must be worked out as part of the regulation (to eliminate the criticism of bias or that this is union organizing in disguise); the regulation must make known to all constituents that these agents are “walled off” from ulp enforcement (to eliminate the criticism that we are merely looking for ulp violations) and; the manner by which an employer is selected for education must take into account the criticism that an employer will be tainted by the Board’s very selection of that employer for education.

⁴³ Mr. Barsamian is an attorney who represents agricultural employers.

⁴⁴ Mr. Bogart is president and general counsel of the Grower Shipper Association of Central California with a membership of over 400 growers, etc.

⁴⁵ A contrary union view to a trigger event for educational access was provided by Mr. Maturino who suggested an education approach initially triggered by ULPs. He also stated that later they could be triggered by random selection and that a focus should be placed on educating indigenous farmworkers.

As obstacles, it must be fully expected that, as discussed by some employer counsel such as Mr. Raimondo, Mr. Sagaser and Mr. Borden⁴⁶ among others, legal attacks will be made in the courts based upon arguments that there is no statutory basis for education and that there are constitutional infirmities (see below legal discussion).

Earlier, we spoke of a consensus that, in the abstract, no one opposed the idea of worker education. There was also another consensus and that was of the farmworkers, themselves, almost all of whom asked that the Board engage in education and that the education occur at the worksite. Ultimately given all the facts presented and after careful consideration of those facts, the staff believes that this Board is obligated to give that viewpoint greater weight, as under section 1152, farmworkers are the principal focus of our statute with the protection of their rights having to be of our paramount concern. Finally, it must be remembered that the need for education will always be continuous as a continuing stream of new workers coming to California's fields is a constant so that the educational efforts undertaken by the Board must themselves be continuous and permanent.

III. Legal Framework

A program of worker education may be considered directly related to several sections of the Labor Code. Labor Code Section 1140.2 provides that agricultural employees shall have the right to full freedom of association, the right to self-organization, and the right to engage in concerted activities for mutual aid or protection. Labor Code Section 1151(a) provides that the Board shall have access to all places of labor in order to conduct investigations required by the Act. Labor Code Section 1152 provides that employees shall have the right of self-organization, to engage in concerted activities, and the right to designate representatives of their own choosing. Labor Code Section 1156.3(c) provides that an agricultural employee or a group of agricultural employees may file a petition for certification and that the Board shall investigate such petitions.

The regulation can also be considered directly related to title 8, California Code of Regulations, sections 20900 [Access Rule,] 20910 [Prepetition List Rule,] and 20915 [Prepetition Investigation of Employer,] a series of linked regulations that both provide the means for employees to learn the advantages and disadvantages of self-organization and a mechanism to facilitate the Board's conduct of elections.

⁴⁶ Mr. Carl Borden is an attorney with the California Farm Bureau Federation.

Worker education could enable the Board to educate employees and employers about their rights, choices, and responsibilities under the Act and, by allowing the Board to anticipate and plan for possible election activity, the regulation can facilitate the conduct of elections within the brief seven-day election period.

A. The Applicability of NLRA Precedent

On December 20, 2010, the National Labor Relations Board proposed a regulation “requiring employers . . . to post notices informing employees of their rights as employees under the NLRA.” The proposed regulation included several provisions to ensure compliance with the posting requirement: the first provided that failure to post the notice would be considered an unfair labor practice; the second provided that failure to post the notice would toll the statute of limitations for filing unfair labor practice charges; and the third provided that willful failure to post the notice could be considered evidence of unlawful motive in other unfair labor practice cases.

The purpose of the proposed regulation was that

[e]nforcement of the NLRA and effectuation of Congress’s national labor policy . . . depends on the existence of outside actors who are not only aware of their rights but also know where they may seek to vindicate them within appropriate timeframes. * * * Given the direct relationship between employees’ timely awareness of their rights under the NLRA and the Board’s ability to protect and enforce those rights, [posting of such rights] is “necessary” for purposes of Section 6. * * * The effective workings of the NLRA’s administrative machinery . . . presuppose that workers and employers have knowledge of the rights afforded by the statute and the means for their timely enforcement. The statute, however, has no provision with respect to making that knowledge available, a subject about which the statute is totally silent.

In addition to arguments that the Board lacked authority to promulgate such a rule, some commenters also argued that the posting requirement would violate either the First Amendment or Section 8(c) because it was either a form of compelled speech or it regulated the content of what employers were required to “tell” their employees.

The regulation was challenged in two cases. The lead opinion of the court of appeals in *National Association of Manufacturers v National Labor Relations Board* [NAM] (USCA DC 2013) 717 F3d 947 ignored the parties’ arguments concerning the Board’s rule-making authority in favor of an analysis that focused on Section 8(c). Using First Amendment

authority to illuminate how the posting rule implicated speech rights contained in the Act, the court held that the Board’s rule violated 8(c):

Although [Section] 8(c) precludes the Board from finding noncoercive employer speech to be an unfair labor practice, the Board’s rule does both. Under the rule an employer’s failure to post the required notice constitutes an unfair labor practice. * * * And the Board may consider an employer’s “knowing and willful” noncompliance to be “evidence of antiunion animus in cases in which unlawful motive [is] an element of the unfair labor practice.” * * * The Board, in other words, will use the employer’s failure to post the notice as evidence of another unfair labor practice.⁴⁷

Although the lead opinion specifically declined to reach the question of the Board’s authority to promulgate a rule requiring posting of a notice, two members of the panel who concurred in the conclusions recited above, made a majority in further concluding that “[t]he NLRA – and [the rulemaking authority] in particular – simply [do] not authorize the Board to impose on an employer a freestanding obligation to educate its employees on the fine points of labor relations law.” In *Chamber of Commerce of the United States; South Carolina Chamber of Commerce v National Labor Relations Board* (USCA 4th Cir. 2012) 721 F3d 152, the Fourth Circuit court of appeals reached the same conclusion as the concurring members of the District of Columbia Circuit.

To the Board’s argument that the posting rule was reasonably necessary to effectuate the purposes of the Act, the Court held that “[t]he NLRB is ‘bound, not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate’ and that Congress had made the Board a purely reactive body, whose functions were not set in motion until a party filed a representation petition or a ULP charge.

The Board contends that the Act presupposes knowledge of NLRA rights and their enforcement mechanisms, and that “employee knowledge of NLRA rights and how to enforce them within statutory timeframes is crucial to effectuate Congress’s national labor policy through the processes established by Sections 8, 9, and 10. [Cite]” Essentially, the Board argues that because the enforcement functions provided for by Sections 9 and 10 are reactive, it was necessary to proactively create the challenged rule in order for

⁴⁷The lead opinion affirmed the district court’s holding that an employer’s failure to post the required notice might toll the 6 month statute of limitations also violated the Act.

employees to undertake their role in instigating those processes. With this reasoning, the Board attempts to derive from provisions governing the functions and operations of the agency the authority to do something entirely distinct from those functions.⁴⁸

In other words, both courts also held that however employees came to know about their rights was irrelevant to the Board's ability to perform its statutory functions: its role was limited to "lying-in-wait" for persons or parties to either file charges or raise representation issues.

Because the lead opinion in *NAM* explicitly treated the 8(c) problem as one of statutory interpretation, the question becomes whether this Board has to follow *NAM* in interpreting any effect that Labor Code Section 1155 might have on a proposed worker education regulation.

To accept the *NAM* court's interpretation of 8(c) as applicable precedent under our Act would upset settled law concerning the Board's remedial authority. This is so because if the posting of a notice concerning workers' rights violates 8(c) because it "puts words in the mouths of employers," it would follow that requiring employers to permit union organizers to enter their property to explain the benefits of representation would also violate 8(c). This, in turn, would put into question this Board's standard remedy for denials of organizational access, a remedy that has been consistently applied by the Board and that has received judicial approval. See, e.g. *Tex-Cal Land Management v Agricultural Labor Relations Board* (1979) 24 Cal 3d 335 (Board properly held the denial of organizational access to be an unfair labor practice.)

⁴⁸ The opinion goes on to consider the effect of Congress's failure to include a posting provision in the NLRA or, as the court puts it, "to impose duties upon employers proactively." The court noted that during its consideration of what became the NLRA, the 73rd Congress rejected a bill to include a provision that required any employer that was a party to a contract that conflicted with the NLRA 1) to notify its employees of that fact and 2) that made it an unfair labor practice to fail to do so. "Had Congress intended to require the posting of notices or make the failure to do so punishable as a ULP, it could have made that intent clear in its legislation." *Chamber of Commerce*, at 163, and esp. n. 13 The court also noted that the Railway Labor Act, which was being considered by the same Congress that enacted the Wagner Act, specifically included various posting provisions. The court concluded from this that when Congress intends notices to be posted, it specifically provides for them. It drew the same conclusion from the inclusion of posting provisions in other labor-related statutes.

To the extent, then, that the question is solely one of statutory interpretation, such an interpretation would run afoul of the ordinary rule that requires the parts of a statute to be interpreted as a whole and in light of the effect that a reading of any given part might have on the entire statutory scheme. (*Santa Barbara Taxpayers Association v. County of Santa Barbara* (1987) 194 Cal.App.3d 674, *Swaithes v Superior Court* (1989) 212 Cal App 3d 1082, *Industrial Indemnity Co. v Workers Comp. Appeals Bd.* (1978) 85 Cal 3d 1028.)

Since the exercise of employee Section 1152 rights when there are no alternative channels of effective communication has repeatedly been held to outweigh employer interests that are also respected by the state,⁴⁹ it would follow that the employees' right to information under Section 1152 would also outweigh whatever protection Labor Code Section 1155 might provide against an employer's having to accommodate messages with which it might disagree.

The scope of the statutory command to follow NLRA precedent was first construed in *Agricultural Labor Relations Board v Superior Court*. In that case, the employer argued that the Board's adoption of a rule regulating union access to employer property violated Section 1148 in that the NLRB decided questions of union access to employer property on a case-by-case basis. The court rejected that contention, first, on the grounds that "precedents" did not mean "procedure" or "practices." But more important, for present purposes, the Court concluded that "the Legislature intended [the Board] to select and follow only those precedents which are relevant to the particular problems of labor relations on the California agricultural scene." *Ibid*, at p. 413; See also, *F & P Growers Association v Agricultural Labor Relations Board* (1985) 168 Cal App 3d 667, 673: ["The

⁴⁹ In *Agricultural Labor Relations Board v Superior Court of Tulare County (Pandol)* (1976) 16 Cal 3d 392, 406, the Supreme Court held that property rights are not paramount to employees' rights to effective access to information. Quoting from *Babcock and Wilcox v NLRB* (1972) 351 US 105, 112, the court said:

"[E]mployers' property rights must give way to whenever the two interests are found to be in irreconcilable conflict: 'Organization rights are granted to workers by the same authority . . . that preserves property rights. Accommodation between the two must be obtained with as little destruction of one as is consistent with maintenance of the other. . . . But when the inaccessibility of employees makes ineffective the reasonable attempts by non-employees to communicate with them through the usual channels, the right to exclude from property has been required to yield to the extent needed to permit communication of information on the right to organize.'"

[l]egislature intended the board to select and follow only those federal precedents which are relevant to the particular problems of labor relations on the California labor scene.”]

This might seem a weak reed upon which to rely in distinguishing what the national Board was prevented from doing and what this Board is proposing to do since the problem of employee ignorance of the NLRA sought to be addressed by the national Board might seem little different from the problem this Board seeks to address. Nevertheless, there are a number of differences.

In support of its proposed regulation, this Board has held hearings on the need for education and has established a record upon which to draw and to make determinations; by way of contrast, the national Board essentially relied on the argument that “for employees to exercise their NLRA rights. . . they must know that those rights exist” and that “lack of notice of their rights disempowers employees.”⁵⁰ The record made by this Board goes beyond the argument that employees must know about the Act before they can resort to it: while it is trivially true that one cannot use a car if one does not know it is in the garage, it is not trivially true that if one does not know a vehicle is available, it cannot be used when it is needed. The Board’s hearings, as discussed above, have shown both that there is little awareness of the Act’s procedures as vehicles for the assertion of rights and that for the Act to function properly as a provider of rights and protections the deficit in workers’ knowledge of the Act must be eliminated.

Evidence presented at the hearings establishes that California’s farmworker population is largely illiterate, largely undocumented and that, by and large, farmworkers have never

⁵⁰ The Notice of the Final Rule states:

[T]he Board . . . *believes* that many employees are unaware of their NLRA rights and therefore cannot properly exercise [them.] The Board based this finding on several factors: the comparatively small percentage of private sector employees who are represented by unions and *thus* have ready access to information about the NLRA, the high percentage of immigrants in the labor force, who are *likely* to be unfamiliar with workplace rights in the United States; studies *indicating* that employees and high school students about to enter the workforce are generally uninformed about labor law; and the absence of a requirement that, except in very limited circumstances, employers or anyone else inform employees about their NLRA rights.[Emphases added.] See, p. 6, <https://www.federalregister.gov/articles/2010/12/22/2010-32019/proposed-rules-governing-notification-of-employee-rights-under-the-national-labor-relations-act>.

been exposed to the idea that workers have rights or that there are such things as labor organizations. Several witnesses testified that some of the most basic concepts of labor law, such as that the law protects the right of workers to act together and that it prohibits retaliation against them for doing so, are not intuitively understood by workers.

Adding more weight to the need for worker education is the influx of a new generation of workers from more remote areas of Mexico whose native language is not Spanish, but one of the so-called indigenous languages, such as Mixteco, Zapotec, Triqui, Chatino, Purepecha as well as many others. According to witnesses, the very idea that workers have rights that the state might protect does not exist in their culture, besides which they have a tradition of working without complaint. Even though many of these workers speak what one witness characterized as “market-level” Spanish, meaning enough Spanish to do basic business, their understanding of more complicated concepts, such as those contained in the Act, would be extremely hard to understandably convey in such basic Spanish. Similarly, written materials would be all but useless since most of these workers do not read in any of these languages even assuming the indigenous languages have a written counterpart. In other words, these workers do not understand the very regime of law represented by the Act, and since indigenous workers are more prone to suffer poor labor conditions than Mestizo Mexican workers, this group of workers especially needs to understand that such a regime exists.

Moreover, substantial evidence presented at the Board’s hearings indicates that traditional forms of outreach which the Board has engaged in have not closed the “information gap” revealed at the hearings and that reliance upon technology cannot be counted on to close it either.

The second difference that makes the federal cases inapplicable as precedent is that procedures that serve both to inform employees of their rights under the Act and to facilitate the election process, and which are clearly beyond the specific statutory “means” authorized by the legislature, have been created by this Board and upheld by the California courts. This history renders the courts’ conclusions in the *NAM* and the *Chamber of Commerce* cases, that the national Board is a purely “reactive” agency, inapplicable to the interpretation of the authority of this Board.

The linchpin of both courts’ majority opinions was the conclusion that the national Board’s functions are limited to responding to parties who have initiated actions either by filing charges or taking advantage of the Board’s specifically defined statutory

procedures.⁵¹ And in reaching this conclusion, both courts explicitly rejected declarations of policy or statements of purpose as useful in construing the scope of the national Board's authority in crafting means to fulfill the Board's specific statutory functions. By way of contrast, this Board's authority to make rules has repeatedly been read in light of the entire Act, including its statement of purposes, and when so read this Board's authority to create obligations on parties prior to their initiating any actions under the statute has been upheld. The ALRA, then, has not been read, as the federal Courts of Appeals read the NLRA, as though the Act's election and unfair labor practice procedures were isolated "reactive" functions.

Thus, in construing the Board's authority to promulgate the Access Rule to facilitate union organizing activity, the court in *Agricultural Labor Relations Board v Superior Court*, supra, at p. 416, wrote:

[On the basis of the factual findings made after hearing] the ALRB formally found that "Generally, unions seeking to organize agricultural employees do not have available alternative channels of effective communication. Alternative channels of effective communication which have been found adequate in industrial setting do not exist or are insufficient in the context of agricultural labor. [Cite] From this finding – and in furtherance of the expressed intent of the framers of the act – the Board concluded . . . that "The

⁵¹ Thus, in *Chamber of Commerce*, the court wrote:

The Board points to a number of sections in the Act, arguing that the rule is necessary to carry them out. The Chamber responds that no provision of the Act requires employers who have not committed labor violations to be subject to a duty to post employee notices. We agree. The NLRB serves expressly reactive roles: conducting representation elections and resolving ULP charges.

* * *

Section 1, which lays out the purpose and aspirations of the NLRA, does not provide the Board with authority to Act. The Board argues that because Section 1 sets forth the Act's policy in broad terms, it is 'specifically designed to permit the Board to spell out [its] applications. [Citation omitted]' However, any argument that the statute's statement of purpose can provide the agency with authority to promulgate any regulation in furtherance of that purpose is unavailing. The NLRB is "bound, not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate for the pursuit of those purposes." *Chamber*, supra, at 162, See also, *NAM* at 967.

legislatively declared purpose of bringing certainty and a sense of fair play to a presently unstable and potentially volatile condition in the agricultural fields of California can best be served by the adoption of rules on access which provide clarity and predictability to all parties.”

We conclude from the foregoing that the decision of the Board to create a limited right of access by means of a detailed and specific regulation *does not conflict with any intent of the Legislature*. . . .

And just as the Board created an obligation on employers to permit union organizers to enter an employer’s property prior to any labor organizations having filed a petition for certification, the Board also required employers to furnish a list of their employees names, current street addresses, and job classifications – in the Board’s terminology a prepetition list – prior to the filing of a petition under Labor Code Section 1156.3(c). This rule, too, was upheld by the Supreme Court in *Harry Carian, Inc. v Agricultural Labor Relations Board* (1984) 36 Cal 3d 654, where the court observed:

The rule in dispute here differs from the federal policy in requiring that an employer furnish a list of names and addresses prior to the scheduling of an election [indeed, prior to the filing of a petition for certification under Labor Code Section 1156.3(c)], upon notice by a union of its intent to organize the employer’s employees. Petitioners would have us say that this difference is fatal to the validity of the ALRB’s rule.

* * *

The Board adopted the prepetition list rule . . . after this court upheld the board’s access rule, and following public hearings in which the Board heard comments . . . regarding the access rule in operation. From these hearings and from its own experience the board reached two conclusions: that access should henceforth be limited to periods of seasonal peak, and that during such periods the opportunity of employees and union organizers to communicate with one another should be enhanced by making available to an organizing union a list of employees with names and addresses.

As important as facilitating the education of employees was to the Supreme Court’s upholding the Access and the Prepetition List rules, was the fact that both rules also served to facilitate the unique election processes of the Act, which are so different from those of the NLRA. The Court wrote:

[In upholding the Access Rule,] we took note of the ALRA's requirement for swift elections, "a difficulty not faced by the NLRB," and a factor likely to render traditional channels of communication too slow to be effective.

* * *

While facilitation of communication between employees and union organizers appears to be the prime motivation for the rule, the board has also explained that the rule serves as an aid to the board's election process: "Under a statutory command to conduct elections within seven days from the time a petition is filed, this Board has required that an election eligibility list be submitted within 48 hours, allowing a maximum of five days for investigation and correction of defects in the list and for use of the list to contact and inform employees of election issues. * * * These requirements place severe time constraints on the ability of the Board agents to investigate showing of interest, scope and composition of unit questions, and to arrange for orderly conduct of the election itself. * * * If the experience of this Board has taught that secret ballot elections can be properly conducted within seven days, it has also taught that much time is consumed in investigating these questions after the election in challenged ballot and objections proceedings. Moreover, a certain number of elections are inevitably set aside as a result of errors resulting from inadequate information at the pre-election stage. . . . The process of filing a response [to the preelection list requirement] coupled with increased contact with an employer's work force resulting from use of the list itself will bring to light possible disputes over units and voting eligibility 'early in the election campaign rather than in the last few days before the election.' * * * The parties themselves will be better prepared to respond to both pre- and post-election investigations of such questions, and serious problems in conduct of the election resulting from short pre-election investigations will be minimized. Thus the pre-petition list requirement as presently enacted will contribute substantially to the prompt and orderly resolution of the election proceedings which are the prerequisite to the collective bargaining process at the heart of this Act."

* * *

The board has authority to promulgate "such rules and regulations as may be necessary to carry out [the provisions]" of the ALRA. * * * Those provisions include the fundamental declaration of employee rights "to self-organization, to form, join, or assist labor organizations" (§ 1152), as well as the board's authority to administer and certify elections (§ 1156.3). The

prepetition list requirement is functionally related to both those provisions, and the board's explanation of the necessity for the requirement is patently rational, based upon the board's experience, and well within its policy discretion. * * * We conclude that the regulation is valid.⁵²

These cases clearly indicate that this agency has neither confined itself nor been consigned to merely “reactive” roles and that, especially in the area of facilitating employee education and the election process, the Board’s authority to impose obligations on parties has been upheld.

IV. The Board’s Regulatory Authority

Labor Code Section 1144 provides that “[t]he board may from time to time make, amend, and rescind, in the manner prescribed in Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, such rules and regulations as may be necessary to carry out this part.” An agency that has been delegated rulemaking authority has been delegated the power to make law:

It is a “black letter” proposition that there are two⁵³ categories of administrative rules and that the distinction between them derives from their different sources

⁵² *Harry Carian Inc., supra*, 36 Cal 3d at 666 - 668.

⁵³ The second of the two categories referred to by the Court in this passage is the power to make rules “interpreting a statute.”

Unlike quasi-legislative rules, an agency’s interpretation does not implicate the exercise of delegated lawmaking power; instead, it represents the agency’s view of the statute’s legal meaning and effect, questions lying within the constitutional domain of the courts. But because the agency will often be interpreting a statute within its administrative jurisdiction, it may possess familiarity with satellite legal and regulatory issues. It is this “expertise”, expressed as an interpretation (whether in a regulation or less formally . . .) that is the source of the presumptive value of the agency’s views. An important corollary of agency’s interpretations, however, is their diminished power to bind. Because an interpretation is an agency’s *legal opinion*, however “expert,” rather than the exercise of a delegated legislative power, it commands a commensurably lesser degree of judicial deference. (*Yamaha Corporation of America v State Board of Equalization, supra*, 19 Cal 4th 5-6)

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and ultimately from the constitutional doctrine of the separation of powers. One kind – quasi-legislative rules – represents an authentic form of substantive lawmaking. Within its jurisdiction, the agency has been delegated the Legislature’s lawmaking power. * * * Because agencies granted such substantive rulemaking power are truly “making law,” their quasi-legislative rules have the dignity of statutes. When a court assesses the validity of such rules, the scope of its review is narrow. If satisfied that the rule in question lay within the lawmaking authority delegated by the Legislature, and that it is reasonably necessary to implement the purposes of the statute, judicial review is at an end.⁵⁴

However, the initial question, whether an agency’s rule “does lie” within the lawmaking authority delegated by the Legislature, is essentially a judicial question and “[a] court does not . . . defer to an agency’s view when deciding this. . . .” A court will afford no more than “*respectful nondeference*”⁵⁵ to an agency’s view on that question.

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A regulation does not have to be the one or the other; it may entail both a “legislative” and an “interpretive” component: “[A]dministrative rules do not always fall neatly into one category or the other; the terms designate opposite ends of an administrative continuum, depending on the breadth of the authority delegated by the Legislature.’ Regulations that fall somewhere in the continuum may have both quasi-legislative and interpretive characteristics, as when an administrative agency exercises a legislatively delegated power to interpret key statutory terms.” (*Peter Ramirez v Yosemite Water Company, Inc.* (1999) 20 Cal 4th 2d 844, 853.)

⁵⁴ *Yamaha Corporation of America v State Board of Equalization* (1998) 19 Cal 4th 1, 3

⁵⁵ This is the Court’s own description of “the appropriate judicial attitude” in deciding questions of consistency. In this connection, it should be added that the “current” characterization of the appropriate judicial attitude as one of “respectful nondeference” cannot be easily squared with every other description of it. For example, in *Agricultural Labor Relations Board v Tulare County Superior Court* (1976) 16 Cal 3d 393, 411 Justice Mosk put the matter this way:

An administrative regulation, however, must also comport with various statutory requisites to validity. At the outset we take note of certain principles that govern this matter; although these rules have been often restated, it would be well to remember they are not merely empty rhetoric. First, our task is to inquire into the legality of the challenged regulation, not its wisdom. [Cite] Second, in reviewing the legality of a regulation adopted pursuant to a delegation of legislative power, the judicial function is limited to determining whether the regulation (1) is

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This principle is codified in Government Code Section 11342.1, which requires that “[e]ach regulation adopted . . . shall be within the scope of authority conferred,” and in Government Code Section 11342.2, which provides that, to be valid, every regulation must be “consistent and not in conflict with the statute and reasonably necessary to effectuate [its] purpose. . . .” *Association for Retarded Citizens – California v. Department of Developmental Services* (1985) 38 Cal 3d 384, pp. 390 – 391. The most common shorthand formulation for reviewing the threshold validity of a regulation – that is, whether it is within the scope of delegated authority – is: Does the regulation “alter or amend or enlarge or impair” the scope of a statute? *Morris v Williams* (1967) 67 Cal 2d. 733, 748. *Association for Retarded Citizens*, supra, at p. 391; *Irma Aguirre v Tony Lee* (1993) 20 Cal App 4th 1646, 1652.

If an agency regulation is determined to be consistent with and not in conflict with the agency’s enabling statute, an agency must also show that it is reasonably necessary to effectuate its purposes. The necessary prong has its own standard, namely, whether the agency has acted in an arbitrary or capricious manner.⁵⁶

As a general proposition, the *San Diego Nursery* case makes it clear that “an appropriately tailored rule authorizing prepetition access for a limited purpose” transgresses no statutory command; however, it also begs the question of what would constitute “an appropriately tailored rule.”

Although exactly how the program operated over 30 years ago is hard to pin down from the materials still available to the Board, it is clear from the opinion in *San Diego Nursery* that

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“within the scope of the authority conferred” [Citing Government Code Section 11373, the predecessor to current Section 11342.1] and (2) is “reasonably necessary to effectuate the purpose of the statute.” [Citing Government Code Section 11374, the predecessor to current Section 11342.2] Moreover, “these issues do not present a matter for the independent judgment of an appellate tribunal; rather both come to this court freighted with the strong presumption of regularity accorded administrative rules and regulations.” [Cite] See also, *Moore v California State Board of Accountancy* (1992) 2 Cal 4th 999, 1014

Speaking of the “strong presumption of regularity”, the Court in *Yamaha* commented: “we may have overstate[d] the level of deference [paid to administrative views of “consistency”] for “[a] court does not, in other words, defer to an agency’s view when deciding whether a regulation lies within the scope of authority delegated by the agency.” *Yamaha*, p. 11, fn. 4.

⁵⁶ *San Francisco Fire Fighters Local 798 v San Francisco* (2006) 38 Cal 4th 653, at 667

Board agents sought access after a union had filed both a notice to take access and a notice to organize, which, the court noted, “evidence[d] the fact that the [union] would engage in an organizational drive among the Employer’s workforce which might culminate in an election.”⁵⁷ By way of contrast, the educational access this memorandum is considering is designed to take place in the absence of organizing activity among California farmworkers. Moreover, the court did not ground the Board agents’ authority to take access in Section 1152 rights alone, but looked to connect the program with “the performance of duties imposed by the Act.” In the case of the worker education program at issue in *San Diego Nursery*, the court agreed with the Board that Labor Code Sections 1151 and 1151(a), which together give the Board “free access to all places of labor” “for the purpose of all hearings and investigations”, authorized the Board to take access to educate workers so long such access could be reasonably considered part of an “investigation.”⁵⁸

V. Staff Recommendation

Against the backdrop of the influx of a new and growing group of (indigenous) farmworkers with little or no understanding that they have any rights under law and the ineffectiveness of traditional methods for education engaged in by the Board to reach significant numbers of farmworkers, it is suggested that the Board could find 1) that the right of self-organization or to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, will always remain paper rights unless agricultural employees know that they have them, 2) that creating an avenue for employees to take the initiative in learning about their rights is necessary for them to obtain knowledge of them, 3) that, in the absence of union organizing activity, and of effective alternative means of informing employees about their rights, direct access by Board agents to the worksite is necessary to provide such information, and 4) that such access will reciprocally serve to provide the Board

⁵⁷ *San Diego Nursery, supra*, at 131-132

⁵⁸ Noting that federal precedent treated “the entire representation process” as an investigation, and that this Board had further created a series of steps, including the Access Rule and the requirement to provide a Prepetition list so that unions could inform employees about their rights under the Act, which steps, as quasi-legislative rules, were now part of the statutory election process, the court concluded that once a union had taken those steps, the Board was authorized to take access to “advise, notify or educate” employees and employers of their rights and obligations under the Act and to aid the election process.

with information that will enable it to more efficiently conduct elections within the brief statutory window for holding elections.

In accord with these findings, the Board could adopt a regulation providing that, upon the filing of an appropriate petition by employees, agents of the Board in a special unit that will take no part in investigating and prosecuting unfair labor practice complaints, will be authorized to take access to the property of an employer whose employees filed the petition for the purpose of informing employees of their rights under the Act to engage in protected concerted activity including their right to petition for an election.

It is also proposed that the regulation could require that, after service of the employee petition upon the employer, the employer shall be required to submit information about the location of the employer's fields, the present complement of the employer's employees, and the employer's peak employment, so that Board agents can more precisely conduct their field educational activities without interfering with company productivity and properly inform employees about their rights under the Act.

A proposed draft of a Worker Education Regulation

In *San Diego Nursery v Agricultural Labor Relations Board* (1979) 100 Cal 3d 128, the court of appeals held that the Board's authority to take access to all places of labor included the authority to advise, notify, or educating employees about their rights and obligations under the Act so long as it also serves investigatory purposes.

Draft of Proposed Regulation

Upon the filing a Notice of Concerted Activity Education by two or more employees with a regional office or with the unit for worker education in Sacramento, either the regional office or the worker education unit shall immediately conduct an investigation to determine if a notice of intention to take access or a notice of intention to organize has been filed by any labor organization or if the employees are currently represented by a labor organization.

If the Notice of Concerted Activity Education is filed with a regional office and if the regional office determines that there is no valid notice of intention to take access or notice to organize the employees of the employer on file and that no labor organization is currently certified to represent the employees of the employer, the Regional Director shall notify the unit for worker education.

Within 24 hours of receipt of the notice of Concerted Activity Education Director by the worker education unit, the unit shall serve the Notice upon the employer. Within 24 hours of service of such notice upon the employer, the employer shall provide the location of the

employer's fields, the number of employees employed in the week during which the notice was filed, and the employer's peak seasonal employment.

Upon receipt of the information referred to above, the unit for worker education shall endeavor to make voluntary arrangements as to particular times and places where its representatives may meet with and speak to employees to advise them of their rights under the Act and to answer such questions as they might have. Such voluntary arrangements shall include the employer's notifying employees that a representative of the unit for worker education will be available to inform employees about their rights under the ALRA at the time and place agreed to and that their attendance is voluntary.

If no agreement is reached pursuant to the preceding paragraph, the unit for worker education shall use its discretion in setting the time and place where it intends to take access and shall thereupon notify the employer of the time and the place where it intends to do so, provided that a minimum of one day's notice shall be given. The employer shall be responsible for notifying employees of the chosen time and place.

Such access shall take place during the lunch period only and at the place where employees take their lunch. Access shall terminate at the conclusion of the lunch period. If employees take their lunch in the field, Board representatives may enter the field. Access for the purpose of worker education shall be available only among the crew or crews that filed such notice.

Employers, supervisors and representatives of the employer may not be present during the employee information period.

During such presentations, Board representatives will neither solicit charges nor use any information obtained during the question period for the purpose of making referrals to other agencies for enforcement actions. The Worker Education Unit is there for the purpose of explaining the rights of employees under the ALRA and the procedures available under the Act.

Interference with employee right to receive information may be grounds for the Board to find an unfair labor practice.