Coercion in Labor Law: A Fresh Perspective

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Date : July 22, 2019

Michael M. Oswalt, The Content of Coercion, 52 **U.C. Davis L. Rev.** 1585 (2019).

The National Labor Relations Act (NLRA) prohibits employers and labor organizations from coercing others in several respects. Section 8(a) (1) prohibits employers from coercing employees with respect to their right to engage in concerted activity for mutual aid and protection and to refrain from such activity. Section 8(b)(1)(A) prohibits labor organizations similarly and Section 8(b)(4) prohibits labor organizations from coercing any person with one of four prohibited objects, the most significant being forcing that person to cease doing business with another person, i.e. engage in a secondary boycott. But the NLRA does not define coercion and the National Labor Relations Board (NLRB) and courts have made mostly intuitive judgments about what is coercive. In *The Content of Coercion*, Michael Oswalt seeks a path to an empirical basis for analyzing whether employer or labor organization conduct is coercive. Although I disagree with several of Oswalt's conclusions for labor law doctrine, I admire this work for its path-breaking analysis.

Oswalt observes that the NLRA began as the union-supportive Wagner Act but was counterbalanced by the employer-friendly Taft-Hartley amendments. The result was a "fundamentally hybridized statute that protects the right to freely choose [whether to organize] as it also defends the right to freely meddle [in that choice], setting the stage for a conundrum that has haunted labor law ever since: how much free speech is too much for free choice?" (P. 1592.) The answer is when speech becomes coercive because coercion overcomes rational decision making. But, lacking a definition of coercion, the NLRB has resorted to analytical shortcuts. Threats over which a party has control are coercive but predictions of what could happen, absent other unfair labor practices, are not. Picketing is coercive but hand-billing is not.

In his quest for a more empirically-based approach to determining whether speech or conduct is coercive in labor law, Oswalt turns to the expanding study of the role emotions play in decision making. He provides a very useful account of the developing scholarship in the field and then applies it to labor law. He avers that the emotion most important in analyzing coercion in labor law is fear and urges that fear in the workplace is inherent in the employer's authority over all employees. A prime antidote to fear, however, is a feeling of control. From this, Oswalt derives a two-step approach to determining the presence of coercion. First, there must be a showing that the "whoever was allegedly coerced credibly feared something relevant to the Act's prohibitions." (Pp. 1642-43.) The second inquiry is how much control did the allegedly coerced persons or parties have? Applying this approach to employer anti-union statements and actions, Oswalt finds that "every instance of employer anti-unionism is likely to be considered coercive because in the workplace, employees' fear derives from employer authority and in an at-will environment employees have no control," i.e. they must obey or risk their jobs. (P. 1647.) Oswalt realizes that finding every employer missive to be coercive "is not going to happen." (P. 1648.) Indeed, it flies in the face of NLRA Section 8(c) which protects employer speech that contain "no threat of reprisal or threat or promise of benefit." But he offers one area of employer conduct where his approach can change current doctrine without running afoul of statutory language. Oswalt argues that employer requirements that employees listen to employer anti-union messages either in one-on-one meetings with supervisors or in large scale captive audience presentations are prima facie coercive under his two-step analysis because employees will have credible fears of adverse consequences if they disobey or fail to heed the message. To counter this, at step two of his analysis, Oswalt argues the NLRB should require employers to give employees a right to opt out of such meetings, thereby providing employees with a sense of control that will serve as an antidote to their fear.

Turning to allegations of union coercion of employees, typically with respect to employees' rights to refrain from union activity, Oswalt uses his two-step approach as a vehicle for distinguishing between illegal threats of violence and lawful threats of social ostracization. He then examines secondary boycotts and urges that picketing is not necessarily scary and should not be considered coercive per se. Rather, he would require the moving party to produce evidence that bystanders, customers or employees were credibly afraid of the picketing. That would move the analysis to step two, which is to ask whether the fear was necessarily uncontrollable or whether there were reasonable alternatives available to the allegedly coerced party, such as ignoring the picketers or other demonstrators or walking around them or, for a neutral employer, waiting for the demonstrators to leave.

Oswalt's work raises many questions and is open to disagreement. For example, under current NLRA doctrine, giving employees a right to opt out is often not a defense to charges of coercing their exercise of their right to engage in union activities. For example, an employer may not directly ask employees to participate in an anti-union video even if it assures them that they may decline. Doing so is considered tantamount to an illegal poll of employees. Instead, the employer may only post a general invitation to employees to participate and wait for some to opt in. Should this approach be reconsidered in light of Oswalt's analysis that an option not to participate instills a sense of control that serves as an antidote to a sense of fear, or does the existing doctrine undermine Oswalt's basic analysis?

Oswalt urges that credible fear inherent in everything an employer says and does and employees lack a sense of control unless the employer provides it. But does this hold as universally as Oswalt suggests? What about during times of labor shortages? What about workers with skills that are in high demand? What about jobs that require considerable time in training and experience before new hires operate efficiently?

How, if at all, should the analysis apply to pro-union statements by an employer? Under current doctrine, such statements are lawful when phrased as statements of neutrality, such as, "the employer has a positive relationship with the union and is not opposed to you selecting the union as your bargaining representative." Does the two-step analysis call such doctrine into question?

Oswalt's analysis also raises questions with respect to union coercion of dissenting or reluctant employees. Why should we distinguish between instilling fear of physical violence from fear of being socially ostracized? Does the evolving science of human emotions support or counsel against that distinction?

With respect to secondary boycotts, the allegedly coerced neutral is not the consumer or employees but the neutral business. Although consumers might ignore a picket or demonstration in front of a retailer, the retailer cannot control the consumers' reactions. How does this factor into the two-step analysis? And, under current doctrine, a union picketing a product produced by an employer against whom the union is on strike does not engage in a secondary boycott even when that picketing is at the consumer entrances to a neutral retailer. This is so as long as the union confines its boycott call to the struck product and the struck product does not comprise the overwhelming majority of the retailer's offerings. Should this doctrine be reconsidered in light of the developing science of emotions? For example, might the retailer have a credible fear of the picketing even if it is confined to the struck product?

The above questions demonstrate why I question some of Oswalt's analysis but still admire the work. He has provided a fresh and potentially compelling approach to assessing coercion as prohibited by the NLRA. It is an approach that scholars, the NLRB, and courts should not ignore.

Cite as: Martin H. Malin, *Coercion in Labor Law: A Fresh Perspective*, JOTWELL (July 22, 2019) (reviewing Michael M. Oswalt, *The Content of Coercion*, 52 **U.C. Davis L. Rev.** 1585 (2019)), https://worklaw.jotwell.com/coercion-in-labor-law-a-fresh-perspective/.