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REACH AN AGREEMENT OR ELSE: MANDATORY ARBITRATION UNDER THE CALIFORNIA AGRICULTURAL LABOR RELATIONS ACT

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I. INTRODUCTION¹

On September 30, 2002, Governor Gray Davis signed Assembly Bill 2596 and Senate Bill 1156 into law. These bills amended the Agricultural Labor Relations Act to allow, nay require, a third party to set the terms of an agricultural contract when the parties are unable to reach a contract on their own. The bills were heralded as fulfilling a “promise”

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¹ This Article provides an overview of the area of agricultural labor relations law and the new provisions of the Agricultural Labor Relations Act requiring mandatory arbitration over contractual terms. The Article does not take “sides” between the growers and the farmworkers or the unions but rather discusses the law as it is currently written. The author has no doubt that farmworkers and growers each have legitimate points of view on the issues discussed herein; however, the Article is truly an academic and scholarly effort—one that takes a frank look at the law and comments thereon. No individual or group is depicted as a villain or as a hero. The law—not even the lawmakers—is the subject of criticism.

made to agricultural laborers² that they would have the right to fight for “decent wages and working conditions.”³ In reality, however, the bills create a statutory giant, a legislative labyrinth that creates many more problems than it could ever solve.

This article provides a complete picture of California agricultural labor relations and a thorough analysis of Assembly Bill 2596 and Senate Bill 1156 (hereinafter the “Mandatory Arbitration Bills” or the “Bills”)⁴ that amended the Agricultural Labor Relations Act (the “ALRA”). Specifically, this article gives a snapshot of the current economic and social situation of the growers and of the workers who labor on California’s farms and fields, discusses the exclusion of farmworkers from the National Labor Relations Act, provides an overview of California’s Agricultural Labor Relations Act, examines the legislative history of the Mandatory Arbitration Bills, analyzes the requirements of the Bills and the likely effect of the Bills, and concludes that the Bills do not “fix” the problem of dilatory conduct at the bargaining table. Finally, this article argues for the repeal of the Mandatory Arbitration Bills and provides suggestions for new amendments to the ALRA that will respect traditional views of contract negotiation while penalizing bad faith conduct at the bargaining table.

² This article uses agricultural laborers, agricultural workers, workers, and farmworkers interchangeably for purposes of simplicity. Specifically, these terms refer to those individuals who work on farms and in the fields, including orchard pruners, farm machine workers, livestock farmworkers, dairy farmworkers, poultry farm laborers, agricultural produce packers, and all those who plant and/or harvest crops. See EMPLOYMENT DEVELOPMENT DEPARTMENT, CALIFORNIA OCCUPATIONAL GUIDE NUMBER 225 (“Farmworker Occupations”), § “The Job” (1998) available at <http://www.calmis.ca.gov/file/occguide/FARMWORK.HTM>, for a description of job titles covered under the rubric of “farmworker occupations.” The article also uses the term growers or agricultural employers to refer to “agricultural employers” as such is defined by California Labor Code § 1140.4(a).

³ Gray Davis, Signing Message for Assembly Bill 2596 and Senate Bill 1156, September 30, 2002, *reprinted at* Historical Note to CAL. LAB. CODE § 1164 (Supp. 2003).

⁴ The bills are often referred to as “mediation bills;” however, as this article will make clear, the bills permit a third-party to impose the terms of a contract when the parties are not able to negotiate the terms of an agreement on their own. A decision setting the terms of a contract that is made by a neutral third-party on a matter presented to the third-party through testimony, documentary evidence, and legal argument is the classic textbook definition of binding arbitration. Thus, this article calls the bills the “Mandatory Arbitration Bills” and the codified provisions of the new law, the “Mandatory Arbitration Provisions.” See Discussion at Section V-B, *infra*.

II. AN OVERVIEW OF AGRICULTURE IN CALIFORNIA

A. *The Importance of California Agriculture: An Overview of Growers and Farmworkers*

California leads the nation in agricultural production.⁵ California grows a variety of commodities, “with no single crop dominating the agricultural economy. Approximately 92 percent of all U.S. grapes are produced in California. California produces about 54 percent of this country’s fresh market vegetable crops and about 58 percent of the major processing crops.”⁶ The state’s leading commodities are milk and grapes.⁷ More than 40 percent of major fruit production comes from California’s fields and orchards.⁸ In the last 25 years, 800,000 acres of orchards have been added, and harvested vegetable acreage has increased by over 40 percent in same period.⁹

Clearly, California is a top producer of agricultural products. In 2001, agriculture contributed \$27.6 billion to the California economy.¹⁰ Although California’s agricultural production is vitally important to the nation, it is important to note that agriculture accounts for only approximately 2 percent of California’s gross state product.¹¹ However, although industries such as manufacturing and services make a larger monetary contribution to the state’s economy,¹² agriculture is vital to the well-being of the state because of the importance of the product pro-

⁵ CALIFORNIA OCCUPATIONAL GUIDE NUMBER 225, *supra* note 2.

⁶ *Id.*

⁷ Milk and grapes are the two leading commodities in California, providing the highest cash receipts. *See, e.g.*, CALIFORNIA DEPARTMENT OF AGRICULTURE, CALIFORNIA AGRICULTURE: RESOURCE DIRECTORY (Specialty Crops Dominate California Agricultural Production), available at <http://www.cdfa.ca.gov>.

⁸ DON VILLAREJO, ET AL., SUFFERING IN SILENCE: A REPORT ON THE HEALTH OF CALIFORNIA’S AGRICULTURAL WORKERS 10 (2000). This research was conducted by the California Institute for Rural Studies sponsored by the California Endowment. The Report summarizes the initial findings of a large-scale, statewide population based survey of the health status of California Agricultural workers carried out in 1999. Five communities were selected at random to represent each of the state’s six agricultural regions: Arbuckle (Sacramento), Calistoga (North Coast), Cutler (San Joaquin Valley), Gonzales (Central Coast), and Vista (South Coast). The sixth agricultural region, Mecca—the desert, was not selected to be part of the project. *Id.* at 7. Half of the state’s agricultural workers are employed in the San Joaquin Valley. *Id.*

⁹ *Id.*

¹⁰ *See, e.g.*, CALIFORNIA AGRICULTURE: RESOURCE DIRECTORY, *supra* note 7.

¹¹ CALIFORNIA STATISTICAL ABSTRACT (2002). *California Gross State Product*, Table D-2, at <http://www.dof.ca.gov> (using figures from 2000).

¹² *Id.* (Manufacturing includes durable and non-durable goods. Services include, *inter alia*, hotels and lodging services, health services, personal services, and auto services.)

duced, namely products that feed the state and the rest of the nation, and because of the large number of people employed by California agricultural employers.

There are approximately 23,000 agricultural employers in California.¹³ Of these, nearly 85 percent employ 20 persons or less.¹⁴ Over the past several decades, California growers, like other agricultural producers, have “shifted from land extensive crops to vegetables, perennial tree and vine crops, floricultural products, and intensive livestock production.”¹⁵ As growers continue this shift in production, the demand for labor will continue to increase, along with the costs of production.¹⁶

Increased costs and lower market prices have put California farmers, like other farmers in the United States, in a precarious financial condition.¹⁷ Growers in California face competition from foreign producers that can grow or produce a variety of items at a fraction of the cost. For example, Gilroy, California, the “self-proclaimed garlic capital of the world,” has been losing its garlic market share for more than half a decade due to low-priced garlic imports from China.¹⁸ China now produces 66 percent of the world’s garlic, while California produces only 3 percent.¹⁹ Many Gilroy growers are beginning to import garlic themselves to sell in the marketplace.²⁰ While the city still crowns a “garlic queen” and provides “garlic scholarships,” it is trying to reposition itself as a “biomedical hub with affordable land for technology labs and research parks.”²¹ Likewise, until the United States Department of Commerce imposed a tariff on honey, honey producers faced a similar challenge from Chinese competitors.²² Perhaps even more competition from foreign growers is on the horizon; the United States Congress recently ap-

¹³ Philip L. Martin & Bert Mason, *Mandatory Mediation for Farm Workers: A New Era in Farm Labor?*, 6 AGRIC. & RESOURCE ECON. UPDATE 1, 11 (Nov./Dec. 2002).

¹⁴ *Id.* at 11.

¹⁵ Warren E. Johnston & Daniel A. Sumner, *California Agriculture Faces a Rough Financial Year*, 4 AGRIC. & RESOURCE ECON. 3-4 (Spring 2001).

¹⁶ *Id.* at 4.

¹⁷ See generally Johnston & Sumner, *supra* note 15, at 3; *California Farm Workers Near Insolvency*, SACRAMENTO BUS. J., May 8, 2001.

¹⁸ Rachel Konrad, *U.S. Garlic Farmers Concede to Chinese*, OTTAWA CITIZEN, July 24, 2003, at D7.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² Louis Freedberg, *Almonds Succeed Where Honey Fails*, SAN FRANCISCO CHRONICLE, May 28, 2002, at A10. (While honey producers need the protections of a tariff to compete, almond producers are able to sell their product to China. Due to the state’s favorable climate, almost all of the almonds grown in the world are grown in California).

proved free trade agreements with Chile and Singapore.²³ Thus, “Chile and Singapore will be added to the short list of countries, currently Mexico, Canada, Israel, and Jordan, that can trade goods and services with the United States with few barriers.”²⁴

Growers cannot get products to market without a large labor force. It is estimated that more than 700,000 farmworkers toil in California’s fields and livestock facilities.²⁵ These farmworkers earn lower wages than do non-farm workers. Indeed, from 1995 through 2002, the non-farm wage rate in the United States ranged from \$11.43 per hour in 1995 to \$14.77 per hour in 2002.²⁶ During the same time, the farm wage rate in the United States ranged from \$6.54 per hour in 1995 to \$8.80 per hour in 2002.²⁷ In California, the average farm wage ranged from \$5.75 per hour to \$6.88 per hour from 1999 to 2001.²⁸

Agricultural workers in California are mostly young Mexican men (34 is the median age) with low levels of education (six years or less) and very low incomes (\$7,500 to \$9,999 annually).²⁹ In addition, farmworkers are mostly migrants from southern Mexico or Central America who, for the most part, cannot read or write; barely one-half of the workers can read Spanish, and very few can read English.³⁰

Farmworkers also suffer from a variety of health-related problems. For example, farmworkers have been found to have a substantially greater incidence of high blood pressure as compared to the incidence of hypertension among all adults in the United States.³¹ It has also been

²³ Marilyn Geewax, *House Approves Free Trade with Singapore & Chile*, ATLANTA J.-CONST., July 25, 2003, at 1C; Helen Dewar, *Senate Approves Chile, Singapore Trade Pacts*, WASHINGTON POST, Aug. 2, 2003, at E02.

²⁴ Geewax, *supra* note 23.

²⁵ VILLAREJO, *supra* note 8, at 10. “Today, more than 85% of all of the labor needed to produce the state’s crops and livestock is performed by hired workers.” By comparison, in 1950, 40% of the work done on family farms was usually done by a family member. *Id.*

²⁶ UNITED STATES DEPARTMENT OF AGRICULTURE, NATIONAL AGRICULTURAL STATISTICS SERVICE, A COMPARISON OF U.S. WAGE RATES, 1981-2002, at <http://www.usda.nass.gov>.

²⁷ *Id.*

²⁸ CALIFORNIA EMPLOYMENT DEVELOPMENT DEPARTMENT, 2002 DIRECTORY OF CALIFORNIA LOCAL AREA WAGES, at [http://calmis.ca.gov/file/occu\\$/CCOISWages/DCLAW.CRM](http://calmis.ca.gov/file/occu$/CCOISWages/DCLAW.CRM). The wage information is based upon wages for farmworkers, food and fiber crops, for 1999-2001, for Santa Barbara and Ventura Counties.

²⁹ VILLAREJO, *supra* note 8, at 23 & 41. In fact, the low incomes earned by farmworkers with families qualify them for “economically disadvantaged status.” See, e.g., CALIFORNIA STATISTICAL ABSTRACT (2002), *Lower Living Income Levels and Poverty Guidelines for California Counties*, Table D-22, at <http://www.dof.ca.gov>.

³⁰ VILLAREJO, *supra* note 8, at 4.

³¹ *Id.* at 8.

reported that Hispanic farmworkers have higher rates of brain, skin and stomach cancers and leukemia than other Hispanics in California.”³² Moreover, 70 percent of farmworkers do not have any form of health insurance.³³ In addition to earning low wages and suffering from poor health, farmworkers face another problem, the shortage of affordable housing.³⁴ Indeed, although finding affordable housing is not a problem unique to farmworkers,³⁵ due to low wages and the seasonal nature of their work,³⁶ in many communities, farmworkers are forced to pool their resources and often “stack up 10 to 15 per house” to pay rent.³⁷

B. Unionization in the Fields

Membership in unions in the United States as a whole has steadily declined over the past 25 years.³⁸ Indeed, today it is estimated that 13.2

³² Kim Baca, *Study: Hispanic farmworkers experience higher rates of leukemia, brain and skin cancers*, AP STATE AND LOCAL WIRE, Mar. 18, 2002. Farmworkers’ advocates claim that this higher cancer and leukemia rate is due to exposure to pesticides. *Id.*

³³ VILLAREJO, *supra* note 8 at 8. Furthermore, only 7% of the farmworkers surveyed were covered by any government-funded program intended to serve low-income persons. *Id.* Finally, of the farmworkers surveyed, 16.5% said that their employers offered health insurance, but of that percentage, nearly 1/3 did not participate due to cost. *Id.*

³⁴ “One of the unusual aspects of the CAWHS [California Agricultural Worker Health Survey] is that it is also a housing survey. By using rigorous enumeration and sampling procedures, important information about housing conditions was determined.” VILLAREJO, *supra* note 8, at 21. For example, in one of the areas sampled, there were more temporary, labor camp, or informal dwellings than permanent dwellings. *Id.* Furthermore, vacancy rates were extremely low in the sampled communities, ranging from 1.3% to 4.5%. *Id.* “It is fair to say that these communities have a severe shortage of available housing. This finding is certainly related to the finding that two of them (Cutler and Mecca) have substantial numbers of temporary housing or labor camps, including informal structures that house significant numbers of workers.” *Id.*

³⁵ In California, “only about 27 percent of households can afford the median-priced home in their area.” Andrew LaPage, *Housing Prices Hit Highs*, SACRAMENTO BEE, June 20, 2003, at D1.

³⁶ “The seasonal and migrant farmworker population is one of the most economically disadvantaged groups in society. Because of low wages and the seasonal nature of their work, farmworkers have few resources to obtain decent housing.” THE ENCYCLOPEDIA OF HOUSING 175 (Willem van Vliet, ed. 1998).

³⁷ Fred Alvarez, *One Foot in the Door; An Innovative Oxnard Apartment Project is Seen as a Key 1st Step in Providing Housing for Ventura County’s Farm Workers*, LA TIMES, June 8, 2003, at Metro 6. A \$5.9 million project is underway in Oxnard County. The project will contain 24 apartment units, a legal clinic, and facilities for ESL classes and citizenship classes. *Id.* In addition, the complex will be “served by the Clinicas Del Camino Real Health Clinic less than a block away.” *Id.* Three other similar projects are in “the works,” and Oxnard County is looking to loosen zoning laws that would spur construction for farmworkers. *Id.*

³⁸ DAVID P. TWOMEY, LABOR & EMPLOYMENT LAW 2 (12th ed. 2004).

percent of the United States' workforce is unionized; this figure includes public sector employees.³⁹ As discussed below, farmworkers' unions in California have also seen their membership rolls wax and wane with the passage of time.

While there are many unions in California representing farmworkers, including the Teamsters and the Christian Labor Association,⁴⁰ the United Farm Workers ("UFW") is probably the most-recognized representative of agricultural workers. Cesar Chavez and Dolores Huerta⁴¹ founded the UFW in the 1960's when it was a "cause celebre for leftist urbanites and a powerful symbol of civil rights for Latinos."⁴² In its founding days, the UFW gained nationwide recognition by leading successful nationwide lettuce and grape boycotts, showing the nation "how a labor union could influence a relatively small number of consumers to exert tremendous pressure on employers."⁴³ Chavez, the UFW's most recognized and celebrated leader, died in 1993 at the age of 66.⁴⁴ After his death, he was honored by the State of California with a paid state holiday, becoming the first labor leader and Latino to be so honored.⁴⁵

Membership in the UFW has dwindled over the years.⁴⁶ The UFW had 80,000 members in 1973 when Cesar Chavez was at the helm.⁴⁷ Currently, the UFW has approximately 26,000 members, up from a record low of 21,000 members in the early 1990's.⁴⁸ This marked decrease in the number of members has been attributed to various causes. The UFW itself claims that its membership has declined due to the actions of the

³⁹ See *id.*

⁴⁰ E.g., Martin & Mason, *supra* note 13, at 1 (listing the UFW, the Teamsters, and the Christian Labor Association as unions holding contracts with growers).

⁴¹ William Bradley, *The Left Coast Goes Leftier; Even Gray Davis Gets Swept Along*, AMERICAN PROSPECT, Nov. 4, 2002, at 15 (Dolores Huerta listed as a co-founder of the UFW); Maria Alicia Gaura, *State Salutes Cesar Chavez*, SAN FRANCISCO CHRONICLE, Mar. 30, 2001, at A3 (Cesar Chavez founded the United Farm Workers' Union).

⁴² Editorial, *The UFW's Resurgence*, SAN FRANCISCO CHRONICLE, Sept. 1, 1997, at A22.

⁴³ See *id.*

⁴⁴ Gaura, *supra* note 41, at A3.

⁴⁵ See *id.*

⁴⁶ A thorough discussion of the reasons for the decline in membership in the various farmworkers' unions is beyond the scope of this Article. This Article simply raises the issue and provides some insights into this matter as they relate to the Article's main topic, the Mandatory Arbitration Provisions.

⁴⁷ Fred Alvarez, *UFW Wins Key Election at Berry Firm*, LA TIMES, Feb. 11, 2003, at Cal. Metro 1.

⁴⁸ Tracy E. Sagle, *The ALRB—Twenty Years Later*, 8 S.J. AGRIC. L. REV. 139, 167-68 (1998). See also Alvarez, *supra* note 47, at A1 ("Once a formidable national presence, with more than 80,000 members at its peak in 1973, the union suffered decades of declining membership and was barely at 20,000 members when Chavez died 20 years later.").

Agricultural Labor Relations Board (“ALRB”).⁴⁹ Chavez, Huerta, and others have claimed that, when the ALRB was established in 1975, it was an “arbiter for farm worker grievances,” but that it has been “weakened” by Board appointments offered by two successive California Republican administrations.⁵⁰ Furthermore, Arturo Rodriguez, the current President of the UFW, in arguing for the passage of the Mandatory Arbitration Bills, stated that a farmworker would not “risk” joining a union when “he knows that growers can resist signing a contract for decades.”⁵¹ It should be noted that recently, the UFW has worked “to reverse the downward spiral” in its membership rolls.⁵² With “unprecedented backing from the AFL-CIO,” earlier this year, it became the certified representative of nearly 900 strawberry workers at Coastal Berry Company, the largest strawberry grower in the nation.⁵³ The UFW now represents more than 1,600 workers in Watsonville and Oxnard, California, marking a “high point of a long-running campaign to carve a foothold in the state’s tough-to-organize strawberry industry.”⁵⁴

When discussing the decline in union membership, growers disagree with the UFW on the reasons for the decline in union membership. Indeed, growers argue that employees just do not feel the need for union representation as strongly as they may have in the 1970’s and 1980’s.⁵⁵ In addition, some point to the emergence of the Teamsters’ Union as a possible cause of the decrease of membership in the UFW.⁵⁶ Although the two unions may have contemplated a possible merger at one time, they now compete for new members.⁵⁷ Finally, another possible reason for the decline in union membership and the difficulties facing union organizers (which includes the problem of a migrating workforce) is the influx of laborers from Mexico in the 1980s and 1990s who left their

⁴⁹ *See id.*

⁵⁰ *See id.* (referring to Cesar Chavez). *See also*, Mark Martin, *Still Marching After All These Years*, SAN FRANCISCO CHRONICLE, Aug. 23, 2002, at A1.

⁵¹ Lesli A. Maxwell, *March Pushes Bill Union Heads to Capitol to Urge Davis to Overhaul State Farm Labor Laws*, FRESNO BEE, Aug. 25, 2002, at A1.

⁵² *See, e.g.*, Fred Alvarez, *supra* 47, at A1.

⁵³ *See id.*

⁵⁴ *See id.*

⁵⁵ Sagle, *supra* note 48, at 168.

⁵⁶ *See id.*

⁵⁷ When Chavez was the President of the UFW, there were negotiations about merging the UFW and the Teamsters’ Union; however, it appears that Chavez refused to drop the “hiring hall” policy of the UFW, and the negotiations failed. Sagle, *supra* note 48, at 168. A “hiring hall” is a union office “at which tradespeople congregate to take available jobs for which employers have asked the unions to provide workers.” JOHN A. FOSSUM, LABOR RELATIONS 564 (8th ed. 2002).

home country to escape difficult economic conditions and who are willing to work for very low wages.⁵⁸ Indeed, it is estimated that in the United States as a whole, the seasonal farm labor market attracts 200,000 to 400,000 foreigners each year.⁵⁹

Despite the decline in membership, California farmworkers' unions, most notably the UFW, have led many political fights in an attempt to secure legislation intended to benefit farmworkers. Unions have flexed their political muscle by making substantial contributions to candidates' coffers as well as engaging in grass-roots strategies. In terms of contributions, labor unions contributed at a rate of approximately 5-1 over growers to Davis' 2002 campaign.⁶⁰ Next, unions have been adept at putting together events to support new laws aimed at benefiting farmworkers. Indeed, the UFW was the major supporter of the Mandatory Arbitration Bills signed by Governor Davis in September 2002. In fact, the UFW held a vigil that lasted several weeks at the State Capitol to urge lawmakers to sign the bills,⁶¹ and it organized a 165-mile march from Merced to Sacramento in which almost all of the State Legislature's Democrats joined wearing red UFW T-shirts and buttons.⁶² The historic march, that followed the same path of a march led by Chavez in 1966, was capped off by a huge rally.⁶³ There is no doubt that farmworkers' unions, especially the UFW, remain a political and social force to be reckoned with in California.

⁵⁸ Martin, *supra* note 50, at A1.

⁵⁹ Philip L. Martin & J. Edward Taylor, *Poverty Amid Prosperity*, 1 AGRIC. & RESOURCE ECON. UPDATE 3 (1998).

⁶⁰ Gov. Davis' spokesman, Steve Maviglio, said "if anyone's keeping score, the contributions are about 5-1, labor over growers." Steve Lawrence, *UFW Plans 150-Mile March to Urge Davis to Sign Arbitration Bill*, AP STATE & LOCAL WIRE, Business News/State and Regional, Aug. 13, 2002, at LEXIS-NEXIS, News Library, News Wires database.

⁶¹ See Jim Wasserman, *Davis Signs Farmworker Mediation Bills*, AP STATE & LOCAL WIRE, Sept. 2002 (about 50 people held a vigil for "weeks" outside the state Capitol), at LEXIS-NEXIS, News Library, News Wires database.

⁶² Maxwell, *supra* note 51, at A1.

⁶³ Martin, *supra* note 50, at A1 ("The Central Valley march from Merced to Sacramento this week by Huerta and the UFW to lobby Gov. Gray Davis to sign a binding arbitration bill retraces the path taken by Cesar Chavez in 1966—a trek that became California's equivalent of the Southern civil rights marches of the same era."). See also Bradley, *supra* note 41 (Farmworkers' march "rolled into downtown Sacramento's Cesar Chavez Plaza the night before the big rally").

III. AGRICULTURAL LABOR LAW

A. *The Exclusion of Farmworkers from the National Labor Relations Act*

The National Labor Relations Act (the "NLRA") excludes farmworkers from coverage.⁶⁴ Although there are different opinions about the reasons for this exclusion, many growers' groups have surmised that the exclusion was due to the obvious differences between agriculture and industry, making a "labor relations law designed for industry" inappropriate to apply to agriculture.⁶⁵ In a similar vein, labor groups have stated that, in 1935 (when the NLRA was passed), "farms were primarily family and household enterprises; few farms were then 'factories in the fields'"⁶⁶

The reality, however, is that "the facts of the exclusion [of farmworkers under the NLRA] are far more simple and much more political."⁶⁷ The original version of the NLRA did not contain an exclusion for agricultural employees; it was added by the Senate Committee on Education and Labor.⁶⁸ The House of Representatives also excluded farmworkers when the bill was reported out of committee.⁶⁹ House Labor Committee Chairman Connery "defended the exclusion in these terms: 'We hope that agricultural laborers eventually will be taken care of If we can get this bill through and get it working properly, there will be the opportunity later, and I hope soon, to take care of the agricultural laborers.'"⁷⁰

The "opportunity" to amend the NLRA to include agricultural laborers has never fully materialized, although efforts have been made over the years following the passage of the NLRA. Indeed, the first bill to provide NLRA coverage to agricultural laborers was introduced in 1942; however, "the nation and the Senate were concerned with more urgent wartime matters;" therefore, the effort got little attention.⁷¹ It took until 1965 for "any bill in either house seeking labor relations law for farm workers to get as far as hearings."⁷²

⁶⁴ The National Labor Relations Act, 29 U.S.C. § 152(3) (2003) (the term "employee" shall not "include any individual employed as an agricultural laborer.")

⁶⁵ VARDEN FULLER, *HIRED HANDS IN CALIFORNIA'S FARM FIELDS* 116 (1991).

⁶⁶ *Id.* Indeed, in 1950, 15 years after the passage of the NLRA, over 40% of the work performed on California farms was done by a family member. See, e.g., VILLAREJO, *supra* note 8, at 10.

⁶⁷ FULLER, *supra* note 65, at 116.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at 117-18.

⁷² *Id.* at 118.

At first, labor groups sought coverage under the NLRA; however, they abruptly reversed their position and demanded federal protection but insisted that such protection permit them to be exempt from “certain onerous provisions of the National Labor Relations Act.”⁷³ Specifically, farmworkers wanted the ability to engage in secondary boycott activities.⁷⁴ The efforts of the farmworkers to have federal protection different than that of other labor groups pitted the United Farmworkers Organizing Committee against the AFL-CIO, which had supported farmworker inclusion into the NLRA as it was written, including subjecting the farmworkers to the prohibitions on boycott activities.⁷⁵ Proponents of federal legislation—either pro-farmer or pro-union—were not able to gather sufficient momentum; therefore, “organized farm interests again began to court the California State Legislature.”⁷⁶

B. The Agricultural Labor Relations Act

In general, “regulation of labor relations in the farm sector is left to the individual states. Most states do not provide comparable protection and rights for agricultural workers.”⁷⁷ California began exploring the possibility of enacting a comprehensive agricultural labor relations statute in the late 1960’s. Indeed, in 1966, the state Senate passed a resolution to begin the fact-finding process to “exhaustively review all existing states and federal legislation . . . together with any constructive proposals which take cognizance of the unique problems attendant to the production, harvesting, and processing of perishable farm commodities.”⁷⁸

Following their failed efforts in the late 1960’s in lobbying for federal legislation, growers and union representatives focused their efforts on California and pushed for a comprehensive state statute. The movement to create a legislative scheme to ensure the rights of agricultural workers to unionize was long and arduous. From 1966 to 1975, no fewer than 15 bills and one proposition were introduced and debated.⁷⁹ None would

⁷³ *Id.* at 120-21.

⁷⁴ *Id.* at 121. A secondary boycott “occurs when union members attempt to persuade an employer (secondary employer) or its employees who are not engaged in a current labor dispute to refrain from transacting business with an employer (primary employer) who is involved in a labor dispute.” *See, e.g.,* Sagle, *supra* note 48, at 152.

⁷⁵ FULLER, *supra* note 65, at 121.

⁷⁶ *Id.* at 130.

⁷⁷ TWOMEY, *supra* note 38, at 62-63.

⁷⁸ FULLER, *supra* note 65, at 131, quoting S.R. 148 (Cal. 1966).

⁷⁹ In 1967, Assemblyman Veysey presented AB 1163. *See* FULLER, *supra* note 65, at 132. In January 1971, Senator Harmer introduced SB 40. *Id.* at 133. In addition, in February 1971, Assemblyman Ketchum introduced AB 639. *Id.* Next, in March 1971,

ever become law. Then, in 1975, following his inauguration, Governor Jerry Brown took a step in leading the legislative efforts. On April 9, 1975, he proposed an agricultural relations act.⁸⁰ The momentum was strong and the time for a comprehensive statute was at hand. On May 26, 1975, the Senate approved the bill by 31 votes to 7; on May 29, 1975, the Assembly approved the bill by 64 votes to 10.⁸¹ Governor Brown signed the bill on June 5, 1975, and the law was effective August 28, 1975, just two months after it was enacted.⁸² The unprecedented speed at which the bill became a law “resulted in chaos for the growers and created a board with no direct experience. Growers knew nothing about the new labor law, and within a week were facing unfair labor practice charges and worker representation elections.”⁸³

The new law was to be known as the Alatorre-Zenovich-Dunlap-Berman Agricultural Labor Relations Act of 1975 (the “ALRA”).⁸⁴ Governor Brown stated that the new law was a “beginning,” not an “end.”⁸⁵ Furthermore, the California Legislature declared:

It is hereby stated to be the policy of the State of California to encourage and protect the right of agricultural employees to full freedom of association, self-organization, and designation of representatives of their own choosing, to negotiate the terms and conditions of their employment, to be free from interference, restraint, or coercion of employers For this purpose, this part is adopted to provide for collective bargaining rights for agricultural employees.⁸⁶

With the passage of the ALRA, California became one of only a handful of states to give agricultural employees the right to unionize as a way to “ensure peace in the agricultural fields by guaranteeing justice for all agricultural workers and stability in labor relations. [The ALRA] is intended to bring certainty and a sense of fair play to a presently unstable and potentially volatile condition in the state.”⁸⁷

AB 964 was introduced and heavily debated and commented upon by unions and growers. *Id.* at 134-35. In 1972, Proposition 22, a reincarnation of AB 964 was put on the ballot and lost. *Id.* at 135. When the Legislature convened in May 1974, four bills were introduced and debated. *Id.* at 145. The 1974 “legislative effort” was “just another entry into the ledge of ghosts.” *Id.* at 147. In 1975, AB 1 was introduced along with six other bills. *Id.* at 150.

⁸⁰ *Id.* at 150.

⁸¹ *Id.* at 153.

⁸² *Id.*

⁸³ Sagle, *supra* note 48, at 142-43.

⁸⁴ Alatorre-Dunlap-Berman Agricultural Labor Relations Act of 1975, CAL. LAB. CODE § 1140 (Deering 2004).

⁸⁵ FULLER, *supra* note 65, at 157.

⁸⁶ § 1140.2

⁸⁷ Historical note to § 1140.

C. *The Major Differences between the National Labor Relations Act and the Agricultural Labor Relations Act*

The ALRA was intended to fill a void, namely to cover a group of employees who are specifically *excluded* from coverage under the National Labor Relations Act (the “NLRA”).⁸⁸ “Employees” covered under the ALRA are those who are engaged in “agriculture.”⁸⁹ “Agriculture” includes:

farming in all its branches, and, among other things, includes the cultivation, and tillage of the soil, dairying, the production, cultivation, growing and harvesting of any agricultural or horticultural commodities . . . , the raising of livestock, bees, furbearing animals or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm⁹⁰

Under the ALRA, an agricultural employer is liberally construed to include any “person” acting directly or indirectly in the interest of an employer in relation to an agricultural employee as well as any grower, association or group.⁹¹ Finally, for purposes of the ALRA, a farm labor contractor is *not* an “agricultural employer;” however, the grower or employer engaging the labor contractor *is* considered to be the “agricultural employer.”⁹²

Despite the fact that the ALRA fills a void by providing coverage to employees left outside of the coverage of the NLRA, the ALRA has been modeled on the NLRA and looks to the NLRA for guidance, when appropriate.⁹³ The ALRA and the NLRA are similar in many ways. Indeed, both statutes establish a Board with two main duties: (1) to conduct or oversee representational elections, and (2) to adjudicate unfair labor practices.⁹⁴

In addition to having a Board with identical functions, the statutory rights of an employee under the ALRA are similar to those under the

⁸⁸ § 1140.4(b).

⁸⁹ *Id.*

⁹⁰ § 1140.4(a).

⁹¹ *Id.*

⁹² § 1140.4(c).

⁹³ The Agricultural Labor Relations Board shall follow applicable precedents of the NLRA. § 1148.

⁹⁴ The Agricultural Labor Relations Board was established by the ALRA. § 1141(a). There is also a general counsel of the Board. § 1149. The Board has two duties. First, it has a duty to prevent any person from engaging in any unfair labor practice. § 1160. Second, it has a duty to hold representative elections. § 1156.3(a). *See also* J.R. Norton Company, Inc. v. Agric. Labor Relations Bd., 26 Cal. 3d 1, 8 (1979) (The Agricultural Labor Relations Board possesses authority and responsibilities comparable to those exercised by the National Labor Relations Board).

NLRA. Under both the ALRA and the NLRA, employees have the right to organize or not, bargain collectively through representatives of their own choosing, and “to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.”⁹⁵ Next, employer and union practices deemed to be “unfair” under both statutes are nearly identical. For example, under the ALRA and the NLRA, the following are unfair labor practices:

“to interfere with, restrain, or coerce employees in the exercise of (their) rights;”⁹⁶

(to) discriminat(e) in regard to the hir(ing) or tenure of employment or any term or condition of employment;⁹⁷ and

to refuse to bargain collectively in (good faith).⁹⁸

Despite the similarities between the ALRA and the NLRA, the two statutes do differ in some important ways. First, petitions for representational elections are handled in a more expeditious fashion under the ALRA than they are handled under the NLRA. Within *seven days* of the filing of a valid petition, the Agricultural Labor Relations Board (the “Board”) must conduct a representational election.⁹⁹ Under the NLRA, there is no definite statutory deadline set for the time in which an election must be held. Instead, it is Board policy to “accord[] the highest priority” to the “processing and resolution of petitions raising questions concerning representation”¹⁰⁰ In practice, under the NLRA, after an election petition has been investigated and it is determined to be appro-

⁹⁵ 29 U.S.C. § 157 (1998); CAL. LAB. CODE § 1152 (Deering 2003).

⁹⁶ 29 U.S.C. § 158(a)(1) (1998) & CAL. LAB. CODE § 1153(a) (Deering 2003) (regarding employers); 29 U.S.C. § 157(b)(1) (1998) & CAL. LAB. CODE § 1154(a)(1) (Deering 2003) (regarding unions).

⁹⁷ 29 U.S.C. § 158(a)(3) (1998) & CAL. LAB. CODE § 1153(c) (Deering 2003) (regarding employers); 29 U.S.C. § 158(b)(3) (1998) & CAL. LAB. CODE § 1154(b) (Deering 2003) (regarding unions).

⁹⁸ 29 U.S.C. § 158(a)(5) (1998) & CAL. LAB. CODE § 1153(e) (Deering 2003) (regarding employers); 29 U.S.C. § 158(b)(5) (1998) & CAL. LAB. CODE § 1154(c) (Deering 2003) (regarding unions).

⁹⁹ CAL. LAB. CODE § 1156.3(a) (1989). A “valid” petition is one that is signed by or accompanied by authorization cards of a “majority” of employees; when there has been no valid election conducted among the agricultural employees within 12 months immediately preceding the election; and when there is no labor organization currently certified. § 1156.3(a) (1)-(4). If there is a strike, an election must be conducted within 48 hours of the filing of a valid petition. § 1156.3 (a).

¹⁰⁰ NATIONAL LABOR RELATIONS BOARD, CASEHANDLING MANUAL, § 11000.

priate to hold an election, an election will usually be held within 30 days.¹⁰¹

Elections are important under the ALRA because winning an election is the *only* way that a union can be recognized as the representative of a group of employees.¹⁰² In contrast, under the NLRA, an employer is permitted to recognize a union that has demonstrated its majority support by means *other than an election*.¹⁰³ Furthermore, it should be noted that, under the ALRA, the union represents a very large “bargaining unit” which consists of *all* agricultural employees working for an agricultural employer.¹⁰⁴ Under the NLRA, a bargaining unit must be made up of employees with common interests, namely employees who possess a common set of skills and who share similar job duties, hours, and pay.¹⁰⁵

Another significant difference between the two statutory schemes is that, under the ALRA, union organizers have access rights to a growers’ property for purposes of organizing.¹⁰⁶ In contrast, under the NLRA, unless the laws of a state provide otherwise, access to a private employer’s property to non-employee union organizers is strictly regulated and almost never permitted.¹⁰⁷ (However, it should be noted that, in California, because the State right to free speech as such has been interpreted under the State Constitution, union organizers have more expansive rights of access to private property than they have in the majority of states in the country).¹⁰⁸

¹⁰¹ NATIONAL LABOR RELATIONS BOARD, A GUIDE TO BASIC LAW AND PROCEDURES UNDER THE NATIONAL LABOR RELATIONS ACT, 12 (1997), *available at* <http://www.nlr.gov/publications/basicguide.html> (July 24, 2003) (on file with San Joaquin Agricultural Law Review).

¹⁰² See *F&P Growers Ass’n v. ALRB*, 214 Cal. Rptr. 355, 359 (Cal. Ct. App. 1985).

¹⁰³ See *NLRB. v. Gissel Packing Co.*, 395 U.S. 575, 579 (1969) (setting forth standard to issuing an order to bargain based upon a showing of union majority support from union authorization cards).

¹⁰⁴ CAL. LAB. CODE § 1156.2 (1989).

¹⁰⁵ The NLRB has “broad discretion” in determining an appropriate bargaining unit. TWOMEY, *supra* note 38, at 79. “The common employment interests of workers, such as skill and training requirements, functional unity, and the history of bargaining and personnel policy, are a primary consideration.” *Id.*

¹⁰⁶ CAL. CODE REGS. tit. 8, § 20900, (e)(3)(A)-(B) and (4)(A)-(B) (2003) (two identified organizers may enter the property of an employer for one hour before work and one hour after work and for up to one hour during lunch to “meet and talk” with employees).

¹⁰⁷ *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 539 (1992).

¹⁰⁸ *NLRB. v. Calkins*, 187 F.3d 1080, 1095 (9th Cir. 1999), *cert. den.* 2000 U.S. LEXIS 3031 (May, 1 2000) (due to rights afforded under the California Constitution, organizers can pass out handbills and picket in a grocery store’s private parking lot).

Yet another difference between the two statutes involves secondary boycotts.¹⁰⁹ Under the NLRA, secondary boycotts are prohibited except in the garment and construction industries.¹¹⁰ Under the ALRA, secondary boycotts are generally permitted.¹¹¹ Historically, secondary boycotts and calls for general consumer boycotts of farm products have been vital economic weapons in the arsenals of the farmworkers' unions.¹¹² They have also been the source of great economic concern and loss to the growers.¹¹³

Finally, the ALRA and the NLRA differ regarding the doctrine of "make whole relief" in the context of an employer's refusal to bargain.¹¹⁴ "Make-whole" relief is available for the purpose of "making employees whole" for losses of pay that they incur as a result of the employer's bad faith bargaining.¹¹⁵ To the contrary, under the NLRA, it is not permissible for the Board to award employees any wages that they might have lost due to an employer's refusal to bargain.¹¹⁶ Under the NLRA, the only remedies for failing to bargain in good faith are a cease and desist order and/or a Gissel Bargaining Order.¹¹⁷

¹⁰⁹ A secondary boycott "occurs when union members attempt to persuade an employer (secondary employer) or its employees who are not engaged in a current labor dispute to refrain from transacting business with an employer (primary employer) who is involved in a labor dispute." *See, e.g.,* Sagle, *supra* note 48, at 152.

¹¹⁰ 29 U.S.C. § 158(e) (1998).

¹¹¹ *See, e.g.,* CAL LAB. CODE § 1154 (Deering 2004).

¹¹² *See* Section V-B, *infra*.

¹¹³ *See id.*

¹¹⁴ § 1160.3 (The Board is authorized to make "employees whole, when the Board deems such relief appropriate, for the loss of pay resulting from an employer's refusal to bargain, and to provide such other relief as will effectuate the policies of this part.") On the other hand, a union is not likewise at risk for the imposition of a make whole order for its failure to bargain in good faith. *See, e.g.,* *Maggio v. ALRB*, 240 Cal. Rptr. 195, 197 (Cal. Ct. App. 1987) (The ALRA provides that a "remedial order may provide for the loss of pay from the employer's refusal to bargain. It does not refer to a union's refusal to bargain") (internal citations omitted).

¹¹⁵ *William Dal Porto & Sons v. ALRB*, 237 Cal. Rptr. 206, 211 (Cal. Ct. App. 1987).

¹¹⁶ Sagle, *supra* note 48, at 157.

¹¹⁷ A Gissel Bargaining Order is an order requiring the employer to bargain with the union; the Board will issue such an Order only in "exceptional cases" evidenced by outrageous, pervasive unfair labor practices and when there was a showing of union majority support. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 610 (1969).

D. Bargaining in Good Faith Under the Agricultural Labor Relations Act

1. The Duty to Bargain in Good Faith under the ALRA

Under the ALRA, a grower and a certified union are obligated to bargain collectively in good faith.¹¹⁸ To bargain in good faith, the grower and the union must

meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any questions arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.¹¹⁹

A union can violate its duty to bargain in good faith by engaging in “surface bargaining” or by frequent or prolonged delays in the bargaining process that show that the union did not “treat its bargaining obligation as seriously as it would other union business.”¹²⁰ However, a union that fails to bargain in good faith *cannot* be subjected to a make-whole order for its failure to bargain in good faith; *only* an employer faces the possibility of make-whole relief.¹²¹

A grower can fail to bargain in good faith: (1) by a technical refusal to bargain or (2) by surface bargaining.¹²² A “technical refusal to bargain” is a refusal to bargain when the employer contests the validity of the union’s certification.¹²³ “Surface bargaining” occurs when the employer merely “goes through the motions of negotiating a collective bargaining agreement without any real intent to enter into a binding agreement.”¹²⁴ A rather fine but critical line has been drawn by the Agricultural Labor Relations Board between hard bargaining and surface bargaining. Hard bargaining “is found where a party genuinely and sincerely insists on

¹¹⁸ CAL. LAB. CODE § 1153(e) (Deering 2004) (unfair labor practice for employer to fail to bargain in good faith); § 1154 (c) (unfair labor practice for union to fail to bargain in good faith).

¹¹⁹ § 1155.2.

¹²⁰ See *George Arakelian Farms Inc. v. ALRB*, 49 Cal. 3d 1279, 1288 n.4 (1989) (hereinafter *Arakelian Farms II*) for the definition of “surface bargaining.” See also *Maggio v. ALRB*, 240 Cal. Rptr. 195, 196-97 (Cal. Ct. App. 1987) (internal citations omitted) for a discussion of how a union can violate its duty to bargain in good faith.

¹²¹ *Maggio*, 240 Cal. Rptr. at 198 (The ALRA provides that a “remedial order may provide for the loss of pay from the employer’s refusal to bargain. It does not refer to a union’s refusal to bargain”) (internal citations omitted).

¹²² See *Arakelian Farms II*, 49 Cal. 3d at 1292.

¹²³ See generally *J.R. Norton, Co. v. ALRB*, 26 Cal. 3d 1, 10 (1979).

¹²⁴ *Arakelian Farms II*, 49 Cal. 3d at 1288 n.4.

provisions that the other party deems unacceptable, even though it may produce a stalemate."¹²⁵ Indeed, as has been oft-quoted by California courts, the Agricultural Labor Relations Act may require parties to sit down and bargain; however, it does not force the parties to agree to any particular terms or conditions of employment, including wages.¹²⁶ That time-honored concept, that the Board may require parties to negotiate but cannot force them to agree to any specific contractual terms, has been eliminated by the Mandatory Arbitration Provisions.¹²⁷

2. Make-Whole Relief Under the ALRA

Make-whole relief involves compensating employees by paying them the difference between what they would have been paid if the employer had bargained in good faith versus what they were actually paid (in light of the employer's unjustified refusal to bargain).¹²⁸ The concept of make-whole relief is based upon the "most elementary conceptions of justice and public policy" that "require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created," meaning that the wrongdoer, the grower, will pay, *literally*, for its refusal to bargain in good faith as is required by the ALRA.¹²⁹

a. Imposing the Make-Whole Remedy in Technical Refusal to Bargain Cases

In "technical refusal" to bargain cases, the Agricultural Relations Board must determine if the employer was justified in its refusal to bargain. Make-whole relief may be ordered only for unjustified technical refusals to bargain, namely if the refusal to bargain was a "stalling tactic"

¹²⁵ *William Dal Porto & Sons, Inc. v. ALRB*, 210 Cal. Rptr. 241, 246 (Cal. Ct. App. 1984) (hereinafter *Dal Porto I*) (internal citations omitted).

¹²⁶ *See, e.g.*, CAL. LAB. CODE § 1155.2 (a) (Deering 2004) (the obligation to bargain in good faith "does not compel either party to agree to a proposal or require the making of a concession"); *Dal Porto I*, 210 Cal. Rptr. at 246 (California Labor Code § 1155.2 is "at the heart of the critically important distinction between 'surface bargaining' and 'hard bargaining'").

¹²⁷ *See* discussion in Section IV, *infra*.

¹²⁸ *See, e.g.*, *Arakelian Farms II*, at 1285 n.3 ("Make-whole relief is a compensatory remedy that reimburses employees for losses they incur as a result of delays in the collective bargaining process. The remedy is designed to give agricultural employees the type of economic benefits they would have received if the parties had reached a timely agreement.") (internal citations omitted).

¹²⁹ *William Dal Porto & Sons v. ALRB*, 237 Cal. Rptr. 206, 213 (Cal. Ct. App. 1987) (hereinafter *Dal Porto II*) ("The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created.") (internal citations omitted).

used by a grower to avoid or delay its obligation to sit down and bargain with the union over the terms and conditions of employment.¹³⁰ In such a situation, the make-whole remedy serves “the salutary purpose of discouraging frivolous election challenges designed to stifle employees’ self-organization.”¹³¹ Make-whole relief will *not* be ordered if the technical refusal to bargain was justified, namely if the refusal was based upon a “good faith” belief that “errors in the election process affected the integrity of the [union] selection process.”¹³²

b. Imposing the Make-Whole Remedy in Surface Bargaining Cases

In surface bargaining cases, a make-whole remedy is *not* automatic upon a finding of employer wrongdoing; it is possible for an employer to avoid such a remedy.¹³³ In a surface bargaining case, the employer can avoid a make-whole remedy by providing “proof of legitimate disagreements on crucial subjects to show the parties would not have entered into a collective bargaining agreement despite the unfair labor practice [the surface bargaining].”¹³⁴ The employer makes such a showing by proving that “bad faith bargaining” was not the “but for” cause of the parties’ failure to reach an agreement; rather the employer proves that the parties failed to reach an agreement due to “legitimate disagreements” on “crucial issues” that would have led to impasse.¹³⁵ Specifically, the employer must come forward with evidence demonstrating that no agreement for higher wages would have been reached.¹³⁶ The employer may meet this burden by showing prior impasse, prior legitimate disagreements on crucial issues, and/or by showing that other “similarly situated growers and

¹³⁰ *J.R. Norton Co., Inc. v. ALRB*, 26 Cal. 3d 1, 32 (1979).

¹³¹ *Id.* at 31.

¹³² *Arakelian Farms II*, at 1292.

¹³³ The Board will impose a make-whole remedy after reviewing the case in two phases: a “liability phase” and a “compliance phase.” *Id.* at 1289. In the “liability phase,” the Board “issues an order adjudicating whether or not the Act has been violated, but [it] does not determine the extent of the employer’s liability.” *Id.* Next, in the “compliance phase,” the Board “fixes the damages” to be awarded to the employees. *Id.*

¹³⁴ *Dal Porto II*, 237 Cal. Rptr. at 213.

¹³⁵ *Id.* at 212. An impasse is “synonymous with a deadlock; the parties have discussed a subject or subjects in good faith, and despite their best interests to achieve agreement with respect to such, neither party is willing to move from its respective position.” *UFW v. ALRB (Bertuccio)*, 20 Cal. Rptr. 2d 879, 886 (Cal. Ct. App. 1993) (hereinafter *Bertuccio II*) (internal citations omitted).

¹³⁶ *Dal Porto II*, 237 Cal. Rptr. at 213. *See also, Bertuccio II*, 20 Cal. Rptr. 2d at 886 (employer must submit factual material from which the court will speculate about the parties’ inability to consummate an agreement).

union bargaining representatives had, as a matter of empirically demonstrable fact, gone to impasse over the same issues.”¹³⁷

If the employer is *not* able to prove to the satisfaction of the Board and the Courts that the parties would have never reached a contract and, therefore, faces imposition of a make-whole remedy, the question becomes: what rate should the employees be paid as part of the relief? The answer is that the Board will determine the appropriate wage by imputing an “agreement” to the parties and will then measure losses of pay and benefits with reference to the “imputed” contract.¹³⁸ “The ‘imputed contract’ may be inferred from ‘comparable contracts actually negotiated’ by the union with other growers.”¹³⁹

The fact that the Board may “impute” a contract to the parties and then order compensation to employees based upon the constructive contract does not mean that, in practice, make-whole relief is an easy weapon to use against growers. Indeed, the ALRB itself agrees that “procedures for determining whether make-whole is owed, the amount of make-whole owed, and the distribution of make-whole funds to workers are slow, so that a remedy designed to act as a goad to bargaining often produces years of litigation.”¹⁴⁰ Once the ALRB has determined the terms of the imputed contract, the Board collects the “make-whole monies and distributes them to workers.” Since 1975, the Board has collected only 13% of the amount owed by employers in make-whole relief.¹⁴¹ The low collection rate is likely due to several factors: the high turnover rate of the workforce making it difficult to find and compensate workers, the fact that a large percentage of the workers are unauthorized, the fact that many growers ordered to pay make-whole relief go out of business before funding the ordered remedy, and, finally, because many employers

¹³⁷ *Bertuccio II*, 20 Cal. Rptr. 2d at 886-87. (Any factual findings made by the Board will be upheld in a court proceeding if “supported by substantial evidence on the record considered as a whole.”). See, e.g., CAL. LAB. CODE 1160.8 (Deering 2004); *Bertuccio II*, 20 Cal. Rptr. 2d at 888 (internal citations omitted). Furthermore, it should be noted that, in cases involving a technical refusal to bargain, the employer does not have this same opportunity to prove that a contract would not have been reached even absent the bad faith refusal to bargain. *Arakelian Farms II*, 49 Cal. 3d at 1292. This difference is justified because the “two unfair labor practices are factually distinguishable and require different standards for evaluating the employer’s wrongful conduct.” *Id.* Indeed, in a technical refusal case, the evidence that the parties would not have entered into an agreement even if they had negotiated in good faith is necessarily speculative because there is no bargaining history between the parties.” *Id.* at 1293.

¹³⁸ *UFW v. ALRB (Bertuccio)*, 249 Cal. Rptr. 473, 484 (Cal. Ct. App. 1988) (hereinafter *Bertuccio I*), quoting *Dal Porto II*, 237 Cal. Rptr. at 214.

¹³⁹ *Id.*

¹⁴⁰ *Martin & Mason*, *supra* note 13, at 2.

¹⁴¹ *Id.* at 10.

settle with the Board for an actual amount less than what was originally ordered.¹⁴² Notwithstanding the “low” collection rate, since 1975, a significant amount of money—\$4.5 million—has been collected by the Board and distributed to workers.¹⁴³ Most recently, in fiscal year 1998-1999, “a total of \$368,399.86 was distributed to 202 agricultural employees”—a net award of approximately \$1,823.00 each.¹⁴⁴

Because of the “big stick” inherent in a make-whole remedy, it was expected that make-whole relief would “lead to contracts soon after unions won elections.”¹⁴⁵ However, that expectation has not materialized, at least not for all unionized farmworkers. Between 1975 (the year the ALRA was enacted) and 2002, “about 1,250 elections have been supervised by the ALRB, and two-thirds or 820 resulted in a union being certified to represent farm workers.”¹⁴⁶ Despite the number of unions being certified, the total number of agricultural employees covered under a contract between their certified union and their employer is less than one percent of the state’s farm employees. Specifically, the UFW, the Teamsters, and other unions representing field workers “have about 30 contracts covering fewer than 25,000 workers.”¹⁴⁷ On the other hand, the Christian Labor Association holds approximately 180 contracts covering three to four workers at dairy and poultry farms.¹⁴⁸ “There are perhaps another 250 farms on which workers voted for union representation, but there has been no contract.”¹⁴⁹ Thus, it is in the context of the failure to convert a union certification election into an executed collective bargaining agreement that union representatives fought to amend the ALRA. That “fight” ended with the passage and signing of the Mandatory Arbitration Bills.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ AGRICULTURAL LABOR RELATIONS BOARD, EXECUTIVE SUMMARY OF THE ANNUAL REPORT OF THE AGRICULTURAL LABOR RELATIONS BOARD FOR FISCAL YEAR 1999-2000, available at <http://www.alrb.ca.gov>.

¹⁴⁵ Martin & Mason, *supra* note 13, at 2.

¹⁴⁶ *Id.* at 1.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 11.

IV. THE MANDATORY ARBITRATION PROVISIONS OF THE AGRICULTURAL LABOR RELATIONS ACT

A. *Background of the Passage of AB 2596 and SB 1156—The Mandatory Arbitration Bills*¹⁵⁰

Starting in 2001, the California Legislature took on the task of amending the ALRA for the first time in 25 years¹⁵¹ to require arbitration over contractual terms when the parties are not able to agree to the terms of a contract through the negotiation process. As discussed *supra*, the UFW had lobbied hard for the passage of the Mandatory Arbitration Bills.¹⁵² The UFW argued that the passage of the Bills was necessary to help pull farmworkers out of the depths of poverty.¹⁵³ Growers responded that the UFW backed the passage of the Bills as a way “to beg politicians for union contracts that it (was) too weak to win on its own.”¹⁵⁴

In 2002, the Bills were passed along party lines, with Democrats tending to support the Bills and Republicans tending to oppose the Bills in each House.¹⁵⁵ Governor Gray Davis faced a difficult decision of whether or not to sign the Mandatory Arbitration Bills. Indeed, if he chose to sign the Bills, Davis risked angering the \$27 billion agricultural industry that opposed the Bills¹⁵⁶ —an industry that contributed more than \$1 million to his campaign,¹⁵⁷ and that contributed more than \$105,000 in the eight days preceding the signing of the Bills.¹⁵⁸ If he vetoed the Bills, Davis would incur the wrath of the organized labor groups that supported the Bills.¹⁵⁹ Governor Davis explained that he would make his decision on whether or not to sign the Bills “based upon

¹⁵⁰ See Discussion at Section IV-B, *infra*, for reasons why this Article uses the term “arbitration” instead of “mediation.”

¹⁵¹ See, e.g., Bradley, *supra* note 41, at 15.

¹⁵² See Section II-B, *supra*.

¹⁵³ Maxwell, *supra* note 51, at A1. Furthermore, as discussed more in depth in Section II-A, *supra*, the overwhelming majority of farmworkers earn less than \$10,000 per year.

¹⁵⁴ Maxwell, *supra* note 51, at A1.

¹⁵⁵ Steven Greenhouse, *Farm Union Bill Holds Peril for California Leader*, NY TIMES, Aug. 9, 2002 at A10.

¹⁵⁶ *Id.*

¹⁵⁷ *Thousands of Farm Workers Demonstrate at California Capitol*, FINANCIAL TIMES, Aug. 26, 2002.

¹⁵⁸ Mark Martin, *Growers Donate, Workers March*, SAN FRANCISCO CHRONICLE, Aug. 15, 2002, at A1.

¹⁵⁹ Greenhouse, *supra* note 155, at A10.

the merits of the initiative and on what is best for California . . . not . . . upon public protests by a small group.”¹⁶⁰

In the end, Davis signed the Bills stating that, by doing so, he was ensuring that the State of California fulfilled “the promise” made to agricultural workers in 1975 with the passage of the ALRA that they could “fight for decent wages and working conditions.”¹⁶¹ Davis further added that the Bills offered “a blueprint for addressing the most serious failings of the system when negotiations between growers and farmworkers cannot be resolved.”¹⁶² Moreover, Davis stated that the Mandatory Arbitration Bills were a “significant improvement” over an earlier Senate Bill that had also required mandatory arbitration but that he had vetoed.¹⁶³ This “improvement” included adding a five-year sunset provision, qualifying the definition of “employer” to include only those farms with 25 or more employees, applying the Mandatory Arbitration Provisions to first contracts only, as well as adding other rules about when the parties can invoke the provisions of the new Bills (discussed, *infra*, in Section B).¹⁶⁴ Despite these statements about the Mandatory Arbitration Provisions, on October 12, 2003, *a mere 10 months after the Provisions took effect*, Davis, on the eve of his last day in office, signed legislation to amend certain sections of the Provisions and to repeal the sunset provision.¹⁶⁵ Senator John Burton, who sponsored Senate Bill 75, said that the changes were needed because the Provisions’ “time scope [was] too narrow.”¹⁶⁶

The UFW hailed the passage and signing of the Bills as the most “important agricultural reform since Cesar Chavez’s successful struggle to allow farmworkers to unionize in 1975,”¹⁶⁷ adding that “farmworkers see a road to justice with this. They see that finally there is hope.”¹⁶⁸

The growers, on the other hand, offered a different analysis of the passage of the Mandatory Arbitration Bills. Indeed, growers stated that they

¹⁶⁰ *Thousands of Farm Workers Demonstrate at California Capitol*, FINANCIAL TIMES, Aug. 26, 2002.

¹⁶¹ Gov. Gray Davis, Signing Message regarding AB 2596 & SB 1156, reprinted at HISTORICAL NOTE to CAL. LAB. CODE § 1164.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ See Senate Bill 75; see also *From the Floor—Gray Davis’ Final Acts*, CALIFORNIA JOURNAL, at 40.

¹⁶⁶ Jennifer M. Fitzenberger, *Ag Labor Mediation Bill Moves to Governor’s Desk*, FRESNO BEE, Sept. 3, 2003, at C1.

¹⁶⁷ Martin, *supra* note 158, at A1.

¹⁶⁸ Wasserman, *supra* note 61, quoting Juanita Ontiveros, the Chairwoman of the UFW Support Committee for Northern California.

were “shocked and angered” by the passage of the Bills and added that, if the state wanted to help farmworkers, “it would be much better if it addressed the economic viability of the farmers, as well.”¹⁶⁹ Notwithstanding the polar-opposite views of growers and the farmworkers’ unions, the Mandatory Arbitration Bills are now the “law of the land.” Both growers and unions must learn to navigate the complicated legislative scheme created by the Bills.¹⁷⁰

*B. Mandatory Arbitration under AB 2596 and SB 1156—The New Mandatory Arbitration Provisions of the Labor Code*¹⁷¹

Under the Mandatory Arbitration Provisions of the California Labor Code,¹⁷² an agricultural employer or a union may file a “declaration” with the Board stating that the parties have not been able to reach an agreement and requesting that the Board order the parties to arbitration.¹⁷³ For purposes of the law, an agricultural employer retains the definition otherwise used in the act but is limited to those entities that employ 25 or more agricultural employees in any calendar week in the year preceding

¹⁶⁹ *Id.*, quoting Tom Nassif, President of the Western Growers Association and John Warmerdam, General Manager of Excelsior Farms.

¹⁷⁰ It should be noted that many of the state’s largest growers have challenged the Mandatory Arbitration Provisions in court on, *inter alia*, constitutional grounds. David Stirling, Vice-President of the Pacific Legal Foundation, that brought the suit on the farmers’ behalf, summarized the growers’ position as follows: “The statute basically strips parties of their constitutional right to collectively bargain without government interference.” See, e.g., Fred Alvarez, *Farming Industry Challenges New Labor Law*, LA TIMES, Feb. 26, 2003, at Cal. Metro pg. 7. Supporters of the Mandatory Arbitration Provisions contend that “they’ve already looked carefully at issues that could have torpedoed the new law. They are confident that they can win the legal fight and move forward with a measure they say is necessary to end decades of failed contract negotiations for farm workers.” *Id.* The lawsuit is on-going. An analysis of the constitutional implications of the law is beyond the scope of this Article. However, this Article argues that, even if the law is held to be constitutional, it should still be repealed for the reasons set forth herein. The Author notes that Mr. Stirling was kind enough to read a draft of this Article and provide his comments and insights. The Author thanks him for his assistance.

¹⁷¹ As set forth in Section IV-B, *infra*, this Article takes the position that the process discussed is an “arbitration” process, not a mediation process. Thus, this Article will refer to the person who presides over the “arbitration” as the “arbitrator,” not the “mediator.” Furthermore, it should be noted that the UFW filed its first Declaration requesting “arbitration” on July 3, 2003. The “responding party” is Pictsweet Mushroom Farms. Fred Alvarez, *UFW Requests Mediation*, LA TIMES, July 4, 2003, at Cal. Metro 1.

¹⁷² CAL LAB. CODE §§ 1164—1164.13 (Supp. 2003).

¹⁷³ § 1164(a). As set forth in Section V-B, *infra*, this Article takes the position that the process discussed is an “arbitration” process, not a mediation process. Thus, this Article will refer to the person who presides over the “arbitration” as the “arbitrator,” not the “mediator.”

the filing of a declaration.¹⁷⁴ (It is estimated that “relatively few farm employers, but most farm workers, are potentially covered” by the Mandatory Arbitration Provisions).¹⁷⁵

The declaration may be filed “at any time” at least 90 days *after* a renewed demand to bargain¹⁷⁶ has been made by an agricultural employer or a labor organization, *certified prior to January 1, 2003*,¹⁷⁷ if the following conditions are met:¹⁷⁸

- (1) The parties have failed to reach an agreement for at least one year after the labor organization was certified;
- (2) The employer has engaged in an unfair labor practice (namely one where a *final* Board decision has issued or where there is a settlement agreement that includes an admission of liability);¹⁷⁹ and
- (3) The parties have not previously had a binding contract between them.

If, on the other hand, the labor organization was certified *after* January 1, 2003, an agricultural employer or certified representative may file a declaration with the Board “at any time at least 180 days after the initial request to bargain by either party.”¹⁸⁰ Parties are limited to filing 75 declarations between January 1, 2003, and January 1, 2008; in counting the number of declarations filed, “the identity of the other party with respect to whom the declaration is filed, shall be irrelevant.”¹⁸¹

After the declaration is filed, the opposing party may, “within three days of service of the declaration, file an answer to the declaration.”¹⁸² The answer must identify “any statements in the declaration that are disputed.”¹⁸³ In addition, the answer “shall be accompanied by any documentary or other supporting evidence,” such as payroll records if it is disputed that the employer employs more than 25 employees.¹⁸⁴ All

¹⁷⁴ § 1164(a); § 1140.4 (c) (agricultural employer defined).

¹⁷⁵ Martin & Mason, *supra* note 13, at 10.

¹⁷⁶ CAL. CODE REGS., tit. 8, § 20400(a) (2) (2003) (A “renewed demand to bargain” is one that is made on or after January 1, 2003.) (All citations to the California Code of Regulations are to Title 8, dealing with the regulations for the Mandatory Arbitration Provisions).

¹⁷⁷ CAL. LAB. CODE § 1164(a) (2002).

¹⁷⁸ § 1164.11.

¹⁷⁹ CAL. CODE REGS. § 20400(a) (1). There is no requirement that the unfair labor practice must involve a party’s conduct at the bargaining table. *Id.*

¹⁸⁰ CAL. LAB. CODE § 1164(a) (2002).

¹⁸¹ § 1164.12

¹⁸² CAL. CODE REGS. § 20401(a).

¹⁸³ *Id.*

¹⁸⁴ *Id.*

statements in the declaration “that are not expressly denied in the answer shall be deemed admitted.”¹⁸⁵

Within five days after receiving the declaration and any answer, the Board must evaluate both filings to determine if the declaration is properly filed, if the answer has raised objections that require an evidentiary hearing, and/or if arbitration should be ordered.¹⁸⁶

If the Board orders an evidentiary hearing regarding the appropriateness of the declaration, the parties have the right to appear in person at the hearing, to present and cross-examine witnesses, and to introduce evidence.¹⁸⁷ Within 10 days of receipt of the transcripts or records from the hearing, the assigned Administrative Law Judge (“ALJ”) or Board member who presided over the hearing shall file a decision with the Board on the issues presented at the hearing.¹⁸⁸ Then, within 10 days of service of the decision of the ALJ or Board member, any party may file “exceptions” to the decision and a brief in support of the exceptions.¹⁸⁹ The Board must issue a decision on the exceptions within 10 days of receipt of the exceptions.¹⁹⁰

Once the parties have been ordered to arbitration, the parties must select an arbitrator.¹⁹¹ The arbitration process should commence within 30 days of the selection of the arbitrator “or as soon as is practical.”¹⁹² Prior to the arbitration, the parties must identify “those issues that are in dispute and those that are not in dispute, identify the standards by which [the party] propose[s] to resolve the disputed issues, and provide agreed upon contract language for those issues not in dispute.”¹⁹³ Arbitration shall proceed for 30 days; the parties may agree to extend the period an additional 30 days.¹⁹⁴ Parties may introduce evidence at the arbitration and examine and cross-examine witnesses, including expert witnesses.¹⁹⁵ The arbitrator must “preside” at the arbitration and rule on the admission and exclusion of evidence and “shall exercise all powers relating to the

¹⁸⁵ § 20401(b).

¹⁸⁶ CAL. LAB. CODE § 1164(b) (Supp. 2003); CAL. CODE REGS. § 20402 (a)-(d).

¹⁸⁷ CAL. CODE REGS., § 20402(d)(2).

¹⁸⁸ § 20402(d)(6).

¹⁸⁹ § 20402(d)(6)(B).

¹⁹⁰ *Id.*

¹⁹¹ After referring the matter to mediation, the Board shall request a list of nine individuals, experienced in labor mediation, from the California State Mediation and Conciliation Service. CAL. LAB. CODE § 1164(b) (Supp. 2003). In the alternative, the parties may mutually designate a mediator. CAL. CODE REGS. § 20403.

¹⁹² CAL. LAB. CODE § 1164(c) (Supp. 2003); CAL. CODE REGS. § 20405.

¹⁹³ CAL. CODE REGS. § 20407(a)(1).

¹⁹⁴ CAL. LAB. CODE § 1164(c) (Supp. 2003).

¹⁹⁵ CAL. CODE REGS. § 20406(a)-(d) (outlining discovery, subpoenas, and disclosure).

conduct of the [arbitration].”¹⁹⁶ If, at the conclusion of the period, the parties have not reached an agreement, the arbitrator may “certify that the [arbitration] process has been exhausted.”¹⁹⁷

Within 21 days of certifying that the process has been exhausted, the arbitrator shall file a report with the Board that “resolves all of the issues between the parties and establishes the final terms of a collective bargaining agreement.”¹⁹⁸ The arbitrator’s report shall be supported by the record and shall include the “basis” for his or her decision.¹⁹⁹ In reaching a decision, the arbitrator may consider the following: any stipulations of the parties,²⁰⁰ the financial condition of the employer,²⁰¹ a “comparison of corresponding wages, benefits, and terms and conditions of employment in collective bargaining agreements²⁰² covering similar agricultural operations with similar labor requirements,”²⁰³ wages or benefits paid by “comparable firms or industries in geographical areas with similar economic conditions,”²⁰⁴ and “the average consumer prices for goods and services” and the “overall cost of living in the area where the work is performed.”²⁰⁵ This “report” that the arbitrator files with the Board is actually the collective bargaining agreement as drafted by the arbitrator. Thus, in sum, if the parties are unable to agree to the terms and conditions of a collective bargaining agreement during the “arbitration period,” (*i.e.* the 30+ day period during which the parties present their divergent views to the arbitrator), the arbitrator is *statutorily required* to issue a decision setting the terms of the contract based upon the evidence and argument presented during the “mediation.” In effect, the Mandatory Arbitration Provisions require that the arbitrator become the “master drafter” of the parties’ collective bargaining agreement.

After the collective bargaining agreement, as envisioned and written by the arbitrator, has been served on the parties and filed with the Board, the arbitrator must transfer the official records of the proceeding to the Board.²⁰⁶ The Board now has jurisdiction over the parties’ collective

¹⁹⁶ § 20407(a)(2).

¹⁹⁷ CAL. LAB. CODE § 1164(c) (Supp. 2003).

¹⁹⁸ § 1164(d).

¹⁹⁹ *Id.*

²⁰⁰ CAL. LAB. CODE § 1164(e)(1)—as amended by Senate Bill 75.

²⁰¹ § 1164(e)(2).

²⁰² Parties are required to submit any collective bargaining agreements to which they are a signatory and which is entered into after January 1, 2003, to the Board to use as a reference. CAL. CODE REGS. § 20450.

²⁰³ CAL. LAB. CODE § 1164(e)(3)—as amended by Senate Bill 75.

²⁰⁴ § 1164(e)(4).

²⁰⁵ § 1164(e)(5).

²⁰⁶ CAL. LAB. CODE § 1164(d) (Supp. 2003); CAL. CODE REGS. § 20407(c).

bargaining agreement and becomes the new “master drafter” of any agreement. Within seven days of the filing of the report, the parties may petition the Board for review.²⁰⁷ The petition shall set forth “the particular provisions of the [arbitrator’s] report for . . . review, shall specify the specific grounds authorizing review, and shall cite the portions of the record that support the petition.”²⁰⁸

Within 10 days of receipt, the Board may accept or reject a petition.²⁰⁹ If the Board rejects the petition, the arbitrator’s report “shall become the final order of the Board.”²¹⁰ The Board may accept a petition that makes a prima facie showing (1) that a provision of the collective bargaining agreement set forth in the arbitrator’s report is “unrelated to wages, hours, or other conditions of employment;” (2) that a provision of the collective bargaining agreement set forth in the mediator’s report is “based upon clearly erroneous findings of material fact;” and/or (3) that a “provision of the collective bargaining agreement set forth in the mediator’s report is arbitrary or capricious in light of the mediator’s findings of fact.”²¹¹

If the Board determines that a provision of the collective bargaining agreement set forth in the arbitrator’s report is unrelated to wages, hours or other conditions of employment, is based upon a clearly erroneous finding of material fact, or is arbitrary or capricious, the Board must order that the arbitrator modify the collective bargaining agreement.²¹² In such a situation, the arbitrator must, within 30 days or as soon as practical,²¹³ meet with the parties *again*, for a period not to exceed 30 days, and prepare a second report.²¹⁴ Unless contested, this second report becomes the final order of the Board.²¹⁵ If contested, a party must file another petition for review with the Board and thereby starts the review process again.²¹⁶ There is no specific statutory limitation on the number of times that a party can go through the “report/petition/review” circular process. Indeed, it appears that this maze will end only when the Board calls a halt to the process and denies review of a petition, thereby making an arbitrator’s report the final order of the Board. Clearly, this is not an

²⁰⁷ CAL. LAB. CODE § 1164.3(a).

²⁰⁸ CAL. LAB. CODE § 1164.3(a); CAL. CODE REGS. § 20408(a).

²⁰⁹ CAL. LAB. CODE § 1164.3(a).

²¹⁰ § 1164.3(b).

²¹¹ § 1164.3(a)(1)-(3).

²¹² § 1164.3(c).

²¹³ CAL. CODE REGS. § 20408(c).

²¹⁴ CAL. LAB. CODE § 1164.3(c).

²¹⁵ § 1164.3(d).

²¹⁶ § 1164.3(d).

expedited process that you might miss if you blink—go ahead and blink. In fact, get a cup of coffee, take a nap, or even take a vacation. You won't miss a thing.

It should be noted that a party may also obtain review of a report if the report is procured by fraud, corruption, or other undue means, if the arbitrator was corrupt, or if the arbitrator engaged in misconduct that substantially prejudiced the rights of the petitioning party.²¹⁷ In such a situation, the Board may order an evidentiary hearing to resolve the dispute.²¹⁸

Within 30 days after a final order of the Board takes effect, a party may obtain judicial review from a California Circuit Court of Appeals or from the California Supreme Court.²¹⁹ Any judicial review, however, shall be limited to a determination of whether the Board acted “without, or in excess of, its powers or jurisdiction,” whether the Board “has not proceeded in the manner required by law,” whether the Board’s order was “procured by fraud or was an abuse of discretion,” or whether the Board’s order violates the petitioner’s rights under the California Constitution or the United States Constitution.²²⁰ The reviewing court does not have any statutory authority to hold a trial *de novo* nor does it have authority to “exercise its independent judgment on the evidence.”²²¹ Accordingly, the judicial review of the Board’s decision, namely review of the contract itself, is very limited. A contract approved by the Board will be, in most cases, the final binding “agreement” of the parties.²²²

²¹⁷ § 1164.3(e).

²¹⁸ CAL. CODE REGS. § 20408(b).

²¹⁹ CAL. LAB. CODE § 1164.5(a). Within 60 days after a Board’s order takes effect, a party can also file an action in superior court to enforce an order of the Board. § 1164.3(f).

²²⁰ § 1164.5(b)(1)-(4).

²²¹ § 1164.5(c).

²²² Although the statute is not altogether clear on the issue, it appears that, during the pendency of any appellate review, the appellate court may *not* stay an order of the Board unless “the court finds that (1) the appellant will be irreparably harmed by the implementation of the board’s order, and (2) the appellant has demonstrated a likelihood of success on the merits. *See, e.g.*, § 1164.3(f). This sub-section mentions a stay in the same paragraph as it discusses enforcing a Board Order. The sections of the Provisions dealing with judicial review do not mention a stay specifically. A document published by the Board itself called “Mandatory Mediation Questions and Answers” discusses the concept of a stay in more general terms. A question is asked: “Can the Board’s order be stayed during appeal?” The answer given is: “No final order of the Board may be stayed during any appeal under this section, unless the court finds that (1) the appellant will be irreparably harmed by the implementation of the Board’s order, and (2) the appellant has demonstrated a likelihood of success on appeal.” *See* AGRICULTURAL LABOR RELATIONS BOARD, MANDATORY MEDIATION QUESTIONS AND ANSWERS, available at www.arlb.ca.gov/mainpages/mandatory_mediationQA052303.htm.

V. THE MANDATORY ARBITRATION PROVISIONS DO NOT ACCOMPLISH THEIR STATED GOALS: THE ENDS DO *NOT* JUSTIFY THE MEANS

A. *The Provisions Do Not Respect the Time-Honored Views that the Relative Market Strength of the Parties Should Determine Contract Terms*

There are certain truths that labor scholars hold to be self-evident. One such truth is that the relative market strength of each party is supposed to frame the parties' relationship. Labor laws are not meant to "undertake governmental regulation of wages, hours, or working conditions."²²³ Rather, labor laws that impose a duty to bargain in good faith "provide a means by which agreement may be reached" with respect to wages, hours, and other terms and conditions of employment.²²⁴ The interest "expressed by those [labor laws] is not primarily in the working conditions as such. So far as the [law] itself is concerned these conditions may be as bad as the employees will tolerate or be made as good as they can bargain for. The [law] does not fix and does not authorize anyone to fix generally applicable standards for working conditions."²²⁵ Indeed, it is understood that, in the negotiation process, a strong union can dictate favorable terms for its members; a strong employer can force the union to make concessions.

The Mandatory Arbitration Provisions of the ALRA upset this tenuous balance between unions and employers. The California Legislature has eliminated the concept of negotiation of collective bargaining agreements and replaced it with litigation. Now, the relative bargaining strength of the parties will not dictate the final terms of a collective bargaining agreement. Under the Mandatory Arbitration Provisions, a "weak" union or "weak" employer can insist on, and perhaps obtain, more favorable terms than either would have been able to get on its own merit. The Mandatory Arbitration Provisions have created a system of government-subsidized bargaining, which could have a negative impact on the California economy.

Indeed, under the Mandatory Arbitration Provisions of the ALRA, employers will have to "justify" the wages and benefits offered to em-

²²³ *Terminal R.R. Ass'n of St. Louis v. Bhd. of R.R. Trainmen*, 318 U.S. 1, 6 (1943) (discussing the Railway Labor Act and the National Labor Relations Act); *see also* *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 18 (1937) ("The theory of the [NLRA] is that free opportunity for negotiation . . . may bring about the adjustments and agreements which the Act in itself does not attempt to compel.")

²²⁴ *Terminal R.R. Ass'n*, 318 U.S. at 6.

²²⁵ *Id.*

ploees. Hard bargaining, namely insistence on certain contractual terms, will cease to exist. An arbitrator, who will not likely have any special economic expertise, will set the economic terms of a contract at a rate that is "reasonable," which could include a rate higher than the employer can actually pay.

An added "wrinkle" to this already complex problem is that agricultural businesses, unlike other businesses, cannot "vote with their feet." Agricultural employers cannot simply leave the state if they do not like the laws. These employers are, literally, wedded to the land, and they cannot take the soil and the environment with them and set up shop in a neighboring state. So, will growers truly be able to pay contractual terms at a rate higher than they propose? Will farms be sold to make way for more lucrative uses for the land?²²⁶ Such remains to be seen. The problem is that the answer is not clear and the potential impact is not only to the State of California but to the rest of the country that California helps to feed. The California Legislature should have studied this issue in more depth before passing the Mandatory Arbitration Bills. Passing such dramatic amendments to the ALRA without sufficient research into the issue was, at best, short-sighted and, at worst, disastrous for the California and national economies.²²⁷

B. The Provisions Give the Unions Too Much Leverage and Upset the Labor Relations Playing Field

The Mandatory Arbitration Provisions permit a third-party to impose the terms of a contract when the parties are not able to negotiate the terms of an agreement on their own. A decision, including one that sets the terms of a contract, made by a neutral third-party on a matter presented to the third-party through testimony, documentary evidence, and legal argument is the classic textbook definition of binding or interest arbitration. Interest arbitration "is a process in which the terms and conditions of the employment contract are established by a final and binding

²²⁶ See, e.g., Steven C. Blank, Outlook for Farm Financial Conditions, 5 AGRIC. & RESOURCE ECON. UPDATE 5, 10 (Mar./Apr. 2002) (a 35-acre parcel of farmland in Ventura County was recently valued at about \$300,000 per acre, "due almost entirely to its development potential").

²²⁷ It is possible that research into this issue would produce results showing no negative effects to the economy will result from the Mandatory Arbitration Provisions. It is simply this author's position that more investigation/research should have been undertaken before the ALRA was amended. The author makes no statement about what such research would have concluded.

decision” of the arbitrator or arbitration panel.²²⁸ Thus, although the provisions call the process “mediation” and the person presiding over the process a “mediator,” it is clear that the process is one of arbitration. Simply because the Legislature shied away from the “arbitration” label does not mean that it codified a true “mediation” process.²²⁹

Interest arbitration is usually offered to employees as an alternative to the ability to strike.²³⁰ However, although the provisions grant a statutory right to the unions, namely the ability to invoke a process whereby a third party will set the terms of a contract, they do not require that the unions give up any of their economic weapons in exchange. It has been argued by some scholars that “either the right to strike or interest arbitration is needed to make collective bargaining work. The success of collective bargaining requires *only one of these alternatives*.”²³¹ In agricultural labor relations, strikes and boycotts are indeed powerful economic weapons because “time is of the essence” in terms of getting products to market. For example, in the mushroom industry, the product is “highly perishable.”²³² Mushrooms shipped within one day of being picked command the highest prices per pound; mushrooms not shipped within four days of being picked must be thrown away.²³³ Thus, a strike at harvest time can devastate a business. In addition, unions, particularly the UFW, have been quite adept at using secondary boycotts as economic weapons. Indeed, in one case, a mushroom boycott instituted by the UFW resulted in a 50 percent decrease in business to one grower during one growing season.²³⁴ It should be noted that unions, even if they are found to have engaged in an *illegal* boycott, are *not* required to compensate a grower or other party for losses incurred as a result of the union’s

²²⁸ Arvid Anderson and Loren A. Krause, *Interest Arbitration: The Alternative to the Strike*, 56 FORDHAM L. REV. 153, 153 (1987).

²²⁹ Senate Bill 1736 was another Senate Bill introduced to amend the ALRA. Senate Bill 1736 called for “mediation and arbitration,” and used the term “arbitrator.” SB 1736 envisioned a two-tiered process. The first level involved true mediation with a mediator. Then, if the parties could not reach an agreement, the parties could request to go to arbitration before an arbitrator who would issue a binding agreement. Senate Bill 1156, which was the bill signed by the Governor, deleted all references to “arbitration” and set forth the process described herein. For a discussion of SB 1736, see, e.g., California Legislative History of SB 1156, available at <http://info.sen.ca.gov/pub/01-02/bill/sen/sb>.

²³⁰ Anderson & Krause, *supra* note 228.

²³¹ *Id.* (emphasis added).

²³² See, e.g., *Pictsweet Mushroom Farms v. United Farm Workers*, Decision of the ALJ, June 19, 2002, at 10, available at ufw.org, *aff'd* 29 A.L.R.B. 1 (Mar. 14, 2003).

²³³ *Id.*

²³⁴ *Id.* at 11.

illegal activity.²³⁵ By contrast, under federal law, a party injured by a secondary boycott may sue a union for compensatory damages.²³⁶

In sum, permitting the unions to invoke an interest arbitration process without requiring that the unions give up any weapons in their arsenal unfairly tips the economic scales in favor of the unions. By leaving untouched a union's right to strike or to engage in boycott activity, the Mandatory Arbitration Provisions have created an uneven playing field. If the California Legislature determines that an interest arbitration process is appropriate in agricultural contracts, it should require that unions give up their right to strike or to engage in secondary activity.

C. *The Provisions are Cumbersome and Will Create Incredible Delays*

The process of *who* can file a declaration with the Board requesting arbitration, *when* such a declaration can be filed, and then *how* the parties go from arbitration to a final Board order is very complicated. One almost needs to diagram out the process to understand it fully; one also cannot set a watch by the process, but rather a calendar, as the whole procedure will likely take a very long time.

To file a declaration, if the union was certified *before* January 1, 2003, the union must attempt to bargain for 90 days, and, at the end of that 90 day period, the union can file a declaration *only* if the parties have never had a contract between them, if the parties have bargained for at least one year after the labor organization was certified, and if the employer has engaged in an unfair labor practice,²³⁷ namely one where a final Board decision has issued or where a settlement agreement has been entered into that includes an admission of liability.²³⁸ For unions certified *after* January 1, 2003, the process is less involved. In such a situation, the union can submit a declaration 180 days after the initial request to bargain.²³⁹ Thus, long-term unions have essentially been handicapped by the provisions—unions with longevity can invoke the provisions only if a laundry list of “horribles” have occurred. New unions can invoke the provisions after only the passage of time.

In addition to the complicated issue of who can file a declaration and when, the provisions are problematic in that they will not encourage

²³⁵ See, e.g., *UFW v. ALRB* (Cal. Table Grape Comm'n), 48 Cal. Rptr. 2d 696, 707 (1995) (ALRB has no authority “to award compensatory damages to persons injured in their property or business by unlawful secondary boycott activity”). The only remedy available is injunctive relief. *Id.* at 709 n.11.

²³⁶ 29 U.S.C. § 187(b).

²³⁷ CAL. LAB. CODE § 1164.11 (Supp. 2003).

²³⁸ CAL. CODE REGS., § 20400(a)(1).

²³⁹ CAL. LAB. CODE § 1164(a).

quick resolution of contractual impasses. Indeed, even the question of whether or not arbitration is appropriate can be litigated.²⁴⁰ Assuming that the Board decides that arbitration is appropriate, the next question is, "When will the selected arbitrator have an opening in his or her schedule to conduct a 'session' that can last from 30 to 60 days?" Next, after going through the 30 to 60 day process,²⁴¹ if the arbitrator determines that the process has been "exhausted," the arbitrator has 21 days to file a report with the Board.²⁴² Within seven days of the filing of the arbitrator's report, the parties may file a petition for review with the Board.²⁴³ The Board has 10 days to accept or deny the petition, and then the Board has 21 days to rule on the petition, which could include sending the parties *back* before the arbitrator for another 30 day period.²⁴⁴ The whole petition/review process can start again after the second report is filed.²⁴⁵ As such, a party that files a declaration *tomorrow* could reasonably expect to have to wait somewhere in the neighborhood of seven to eleven months for a final Board order. Then, the parties have the option of seeking judicial review of the Board's order, which would subject the parties to the timelines of the appellate court system.

Although the Mandatory Arbitration Provisions may not be good for California, they are good for the Board, arbitrators, and labor lawyers, as all stand to "benefit" from the extra work mandated by the Provisions. For example, Board decisions have steadily declined since 1975.²⁴⁶ Indeed, the Board "made 71 decisions in fiscal year 1978-1979."²⁴⁷ In fiscal year 1999-2000, the Board issued "a total of nine decisions involving allegations of [unfair labor practices] and matters relating to employee representation"²⁴⁸ The Mandatory Arbitration Provisions will undoubtedly provide the Board with more opportunities to enter the agricultural labor relations arena. It is unclear, however, if the Board will have the resources to contend with this increase in activity.

²⁴⁰ See, e.g., § 1164(b); CAL. CODE REGS., § 20402(c) & (d).

²⁴¹ CAL. LAB. CODE § 1164(c).

²⁴² § 1164(d).

²⁴³ § 1164.3(a).

²⁴⁴ § 1164.3(a)-(c).

²⁴⁵ See, e.g., § 1164.3(d).

²⁴⁶ Sagle, *supra* note 48, at 162.

²⁴⁷ *Id.*

²⁴⁸ EXECUTIVE SUMMARY OF THE ANNUAL REPORT OF THE AGRICULTURAL LABOR RELATIONS BOARD FOR FISCAL YEAR 1999-2000, *supra* note 144, at 3.

D. The “Magic Number” of 75

Governor Davis, in his Signing Message, stated that he was signing the Mandatory Arbitration Provisions because, *inter alia*, the Provisions applied only to agricultural employers with 25 or more employees,²⁴⁹ and because parties were limited to filing 75 declarations²⁵⁰ during the five-year period²⁵¹ that the provisions were originally scheduled to be in effect.²⁵² Recently, with the signing of Senate Bill 75, the five-year sunset provision has been replaced with the rule that a party is limited to filing 75 declarations between January 1, 2003, and January 1, 2008.²⁵³ This limit on the number of declarations makes even less sense now than when it was part of the sunset provision. Indeed, the “Magic Number” of 75 means that, at least potentially, some unlawful and obstreperous conduct will stay outside of the Mandatory Arbitration Provisions of the ALRA.

From 1975 to 2002, there were 1,250 union elections conducted at California agricultural employers; unions “won” 820 or 65.6 percent of these elections.²⁵⁴ Thus, it can be estimated that unions represent employees at multiple locations throughout the state. Despite a statewide presence, a union may file only 75 declarations over the next five years. It is unclear why the Legislature picked “75.” Why not 70 declarations? 60? The answer to this question of “Why 75?” is likely because “75” was a political compromise. This compromise means, however, that under the current legislative scheme, that 76th grower—even if it engages in the very worst type of conduct—can breathe easy.

In sum, the Legislature’s decision to limit the number of declarations that a party can file to 75 results in a law with limited effectiveness. If the California Legislature meant to ensure proper conduct at the bargaining table, it should have enacted a law that addresses every incident of bad faith conduct, even if it is committed by that “lucky” 76th grower.

²⁴⁹ CAL. LAB. CODE § 1164(a) (Supp. 2003). As mentioned in Section IV-B, *supra*, the Mandatory Arbitration Provisions will apply to “[r]elatively few farm employers, but [to] most farm workers” Martin & Mason, *supra* note 13, at 10. In the 3rd Quarter of 2001, there were 22,626 agricultural employers in California; approximately 3,770 reported having 20 or more employees; 18,856 reported having fewer than 20 employees. *Id.* However, of the 451,039 agricultural employees employed in the 3rd Quarter of 2001, 372,284 were employed by growers with 20 or more employees. *Id.*

²⁵⁰ CAL. LAB. CODE § 1164.12.

²⁵¹ *Id.* at § 1164.14.

²⁵² Gov. Davis, Signing Message, *reprinted at* HISTORICAL NOTE TO CAL. LAB. CODE § 1164.

²⁵³ CAL. LAB. CODE § 1164.12.

²⁵⁴ Martin & Mason, *supra* note 13, at 11.

VI. SUGGESTIONS FOR THE FUTURE

The Mandatory Arbitration Provisions of the ALRA will, in practice, serve only arbitrators, lawyers, and the Board. Indeed, the California Legislature has enacted a law that is fraught with the potential for delays, does not permit the relative bargaining power of the parties to dictate the terms of the contract, gives unions too much leverage by allowing them to retain all of their economic weapons while still being able to invoke an arbitration process, and potentially permits unlawful bargaining conduct to evade the grasp of the Mandatory Arbitration Provisions. In short, the provisions do too much and not enough at the same time. The provisions will not accomplish their stated goals of ensuring a “more effective collective bargaining process,”²⁵⁵ and they should be repealed.

This is not to say that the ALRA is working perfectly—changes are needed. There are many examples of growers that have engaged in a variety of acts, both in good faith and in bad, to avoid their obligation to bargain. Indeed, two employers in particular were referred to over and over again during the period before the Mandatory Arbitration Bills were passed—the Pictsweet Mushroom Farm and D’Arrigo Brothers, a vegetable grower in Salinas, California. At Pictsweet, the employees, represented by the UFW, have been without a contract since 1987 despite numerous attempts to bargain by the UFW.²⁵⁶ Likewise, at D’Arrigo Brothers, the employees voted to unionize in 1975 but, “despite decades of negotiations, the 1,400 workers still have no contract.”²⁵⁷ There is no doubt that dilatory, obstreperous, bad faith conduct should not be permitted under the ALRA. Indeed, the “right to organize is not supposed to be just an academic exercise,” but it should be a process that ends with a contract.²⁵⁸ However, the Mandatory Arbitration Provisions are not the right cure for the disease of bad faith bargaining. Instead, in place of the Mandatory Arbitration Provisions, this author has two recommendations.

First, it is recommended that the courts continue to utilize the “make-whole” remedy available under the ALRA. This is a powerful weapon against truly unlawful conduct at the bargaining table that has put more than \$4.5 million in workers’ pockets since 1975.²⁵⁹ However, some changes are needed to make this weapon more effective. Indeed, the Legislature should amend the ALRA to provide that, if an employer is

²⁵⁵ See ENACTMENT MESSAGE FOR SB 1156, § 1, at <http://info.sen.ca.gov>.

²⁵⁶ Fred Alvarez, *supra* note 171, at Cal. Metro 1.

²⁵⁷ Steven Greenhouse, *Farm Bill Holds Peril for California Leader*, NY TIMES, Aug. 9, 2002, at A10.

²⁵⁸ *Id.* quoting Marc Grossman, Spokesman for the UFW.

²⁵⁹ See, Discussion in Section III-D.2, *supra*.

found to have engaged in bad faith or surface bargaining, the imposition of liability is automatic. With such an amendment, the employer could no longer avoid liability by showing that the parties would never have reached an agreement even if the employer had acted in good faith.²⁶⁰ The only question to be litigated in such a situation would be what the terms of the imputed contract should be for the purpose of compensating employees.²⁶¹ By making the imposition of liability automatic upon a finding of bad faith bargaining, the Board would ensure that the remedy is timelier—employees would not have to wait years from the initial finding of bad faith bargaining to the final imposition of a dollar amount as a remedy.

The make-whole remedy available under the ALRA is truly a unique and distinctive feature of the law. Make-whole relief is aimed at *unlawful bargaining conduct*, not at hard bargaining itself or bargaining that is controlled by the relative market-strength of the parties. By amending the ALRA in the way proposed, the remedy would be even more effective.²⁶² In addition, the Board could use its resources to find a way to collect a higher percentage of the monies awarded as part of a make-whole remedy instead of being in the business of drafting collective bargaining agreements.

The second recommendation is for the Legislature to enact a “fine” system, one in the nature of punitive damages, as a way to punish unlawful bargaining. If a grower was found to have engaged in unlawful conduct at the bargaining table, the grower could then be subjected to a fine as a way to punish the grower and to discourage such conduct in the future. Such a fine would have to be proportional to the amount of monetary harm inflicted on the employees as a result of the employer’s conduct, the financial health of the employer, and the egregiousness of the employer’s conduct.²⁶³ The fines could also have a statutory cap placed

²⁶⁰ See *id.*

²⁶¹ See generally, *Bertuccio v. ALRB*, 249 Cal. Rptr. 473, 484 (Cal. Ct. App. 1988) (Once the Board decides that the employer has failed to bargain in bad faith, the Board must “impute” a contract to the parties to determine the appropriate rate at which the employees should be compensated).

²⁶² In cases involving a technical refusal to bargain, the employer is not permitted to introduce evidence showing that the parties would never have entered into a collective bargaining agreement even if the employer had acted in good faith. See, e.g., *George Arakelian Farms, Inc. v. ALRB*, 49 Cal. 3d 1279, 1292 (1989). An amendment to the ALRA regarding surface bargaining cases would simply require that the Board treat the two types of bad faith refusals to bargain in the same fashion when fashioning make-whole relief.

²⁶³ See, e.g., *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575 (1996) (any award of punitive damages must be reviewed by a court according to the following

upon them. Any fines awarded could be paid to the affected employees themselves or to a state fund that would use the money collected to benefit farmworkers in some way, namely by providing education, medical care, legal services, and/or housing aid.

Finally, as discussed in Section V-B, *supra*, if the mandatory arbitration provisions are to remain part of the statutory scheme of the state, a third suggestion is for the Legislature to eliminate a union's ability to engage in secondary boycott activities or in strikes. Thus, two powerful weapons in the union's arsenal would be eliminated in exchange for the ability to invoke a mandatory arbitration scheme. Such a compromise would help to balance the economic playing field of the parties.

VII. CONCLUSION

With the Mandatory Arbitration Provisions of the ALRA, it is truly a "new day" in California. In the words of Governor Davis, we do have a "blueprint for the future;" however, the concern is that it is a blueprint for disaster. Indeed, the concept of negotiation of collective bargaining agreements under the ALRA has been eliminated, and it has been replaced by litigation. Such is not a good result for growers or for the unions but only for arbitrators, lawyers, and the Agricultural Labor Relations Board. Perhaps this author is incorrect; perhaps the Mandatory Arbitration Provisions of the ALRA will force growers and unions to be reasonable and forthright in their positions at the bargaining table. Perhaps the sky is really *not* falling. For the sake of the California economy upon which millions of citizens rely, for the sake of the growers who attempt to profit from the soil while helping to feed a nation, and for the sake of the farmworkers who rely upon the sweat of their brow to support their families, this author certainly hopes so.

"guideposts:" (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases).