

Small Gifts and Big Trouble: Clarifying the Taft-Hartley Act

By JAMES ACHERMANN*

Introduction

SECTION 302 of the Labor Management Relations Act (“LMRA”), commonly known as the Taft-Hartley Act and codified at 29 U.S.C. § 186 (collectively “Section 186”),¹ prohibits employers and their agents from issuing bribes, bestowing gifts, and engaging in conflict of interest payments to employees, union officials, and labor organizations.² While the statute attempts to curb potential dishonesty and unfair influence within the management/union relationship, its provisions are overly expansive and vague.³ The plain language of the statute is extremely broad, using convoluted and ambiguous terminology. However, because the criminal penalties for violating Section 186 are severe, it is important to have a working knowledge of how courts have interpreted it. Criminal penalties are applied in two forms: (1) for transactions which involve a “thing of value” exceeding \$1000, the penalty is imprisonment for five years and a fine for each violation; and (2) for transactions in which the “thing of value” is \$1000 or less, the penalty is imprisonment for one year and a fine.⁴ This Article illuminates the statute’s general terms by using legal precedent and analysis.

* James Achermann received his J.D. from the University of San Francisco School of Law after obtaining a B.A. in Political Science and History from the University of California, at Davis. Currently he is a practicing attorney who specializes in employment and labor law. He would like to thank both of his parents, Bob and Joan Achermann, for their love and support. He would also like to thank Ken Absalom and Ed Nevin for their mentorship, as well as the University of San Francisco and the USF Law Review for the gift of knowledge and assistance with this Article.

1. DEP’T OF JUSTICE, *Criminal Resource Manual 2413 Outline of 29 U.S.C. § 186 (Taft Hartley Act § 302)*, http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm02413.htm (last visited Aug. 30, 2009).

2. 29 U.S.C. § 186 (2006).

3. *United Steelworkers v. U.S. Gypsum Co.*, 492 F.2d 713, 732 (5th Cir. 1974); *United States v. Lanni*, 466 F.2d 1102, 1103–05 (3d Cir. 1972).

4. 29 U.S.C. § 186(d) (2006).

The statute is separated into three subsections. Section 186(a) prohibits employers or those acting in the interest of employers from making any payments or loans of “any thing of value” to labor unions or their representatives. Further, subsection (a) prohibits employer payments that would constitute a bribe or that are aimed either directly or indirectly at forming committees to influence employee organization or collective bargaining.⁵ Section 186(b) creates synonymous liability to subsection (a) in the payee that accepts, requests, demands, receives, or agrees to receive any prohibited “thing of value” as described in subsection (a).⁶ Section 186(c) lists nine spe-

5. 29 U.S.C. § 186(a) (2006) states:

(a) Payment or lending, etc., of money by employer or agent to employees, representatives, or labor organizations

It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

6. 29 U.S.C. § 186(b) (2006) states:

(b) Request, demand, etc., for money or other thing of value

(1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

(2) It shall be unlawful for any labor organization, or for any person acting as an officer, agent, representative, or employee of such labor organization, to demand or accept from the operator of any motor vehicle (as defined in section 13102 of Title 49) employed in the transportation of property in commerce, or the employer of any such operator, any money or other thing of value payable to such organization or to an officer, agent, representative or employee thereof as a fee or charge for the unloading, or in connection with the unloading, of the cargo of such vehicle: *Provided*, That nothing in this paragraph shall be construed to make unlawful any payment by an employer to any of his employees as compensation for their services as employees.

cific exceptions to the broad prohibitions contained within subsection (a) and (b).⁷ This Article first examines the exceptions provided in subsection (c), and then endeavors to clarify subsections (b) and (a) in turn.

I. Exceptions Identified in Section 186(c)

This Article focuses only on those exceptions that would be of greatest importance to union officials and members. They are as follows:

3. with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business . . . ;
4. with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided*, [t]hat the employer has . . . a written assignment . . . ;
5. with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees, and their families and dependents . . . for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance . . . ;
6. with respect to money or other thing of value paid by any employer to a trust fund established by such representative for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training programs . . . ;
7. with respect to money or other thing of value paid by any employer to a pooled or individual trust fund established by such representative for . . . scholarships for the benefit of employees, their families, and dependents . . . child care centers . . . or financial assistance for employee housing . . . ;
8. with respect to money or other thing of value paid by any employer to a trust fund established . . . for the purpose of defraying the costs of legal services.⁸

A. Section 186(c)(3): Sale or Purchase of an Item at the Prevailing Market Price in the Regular Course of Business

Section 186(c)(3) allows payments made for the sale or purchase of an item at the prevailing market price in the regular course of business.⁹ In *United States v. Carlock*,¹⁰ the payment in question was rent

7. See 29 U.S.C. § 186(c) (2006).

8. *Id.* § 186(c)(3)–(8).

9. *Id.* § 186(c)(3).

paid by the employer to the union for the use of a bulldozer. The court debated whether the exception applied to rental property. The trial court, however, declined to answer this question. Rather, the court found that the rent paid by the employer was far above the market price and actually reflected a price more akin to that of a new bulldozer.¹¹ The court concluded that the exception did not apply under these egregious circumstances.¹²

In *United States v. Pecora*,¹³ a testimonial dinner was held to honor the defendant, a union business manager, for his involvement in the labor movement. Several employers of the defendant's union members purchased over \$25,000 in tickets and advertising. After expenses were paid for the dinner, the defendant received the excess profits in cash. In holding that the payments violated Section 186, the Third Circuit found the exception in subsection (c)(3) did not apply.¹⁴ Specifically, the court noted:

Even if we were to assume that a testimonial dinner was a "commodity," and even if we were to assume that it was sold in "the regular course of business," it would strain credulity to believe that the market price for an advertisement in the program was \$300 or that the value of the dinner was twenty-five dollars per person. The fact that out of gross proceeds of \$44,400 the expenses of the dinner amounted only to \$11,871.72 belies a conclusion that the testimonial was offered at the market price.¹⁵

These examples highlight the ways in which courts narrowly interpret this exception and emphasize "true market value" in determining whether the exception applies. For example, the fact that the employers in *Pecora* purchased tickets was not in and of itself the problem. Rather, Section 186 proscribed the quantity of tickets purchased at such an excessive price. Similarly, the rent paid on the bulldozer in *Carlock* was well above the market rate. Thus, Section 186(c)(3) is only applicable if one is truly making the purchase or sale within the regular scope of business, and the price does not deviate from the prevailing market price.

10. 806 F.2d 535 (5th Cir. 1986).

11. *Id.* at 543-44.

12. *Id.* at 545-46.

13. 484 F.2d 1289 (3d Cir. 1973).

14. *Id.* at 1294.

15. *Id.*

B. Section 186(c)(4): Dues Deductions

Section 186(c)(4) allows an employer to deduct union dues directly from an employee's pay.¹⁶ To fall within this exception, an employer must receive a written assignment from each employee for all dues deducted.¹⁷ Further, the authorization cannot be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs first.¹⁸ The Ninth Circuit has noted "[t]he dues check-off procedure of [Section 186(c)(4)] is designed to ensure not only the 'protection of the employee' but also administrative convenience in the collection of dues."¹⁹

Despite the one-year limitation set out under Section 186(c)(4), the Department of Justice ("DOJ") will not prosecute employers who automatically renew these authorizations so long as the employer provides an annual "escape period."²⁰ Further, the DOJ will not prosecute for authorized deductions for payment of initiation fees and assessments, giving a broad interpretation of the statutory term "membership fees."²¹ The term "membership fees" includes both "service fees" assessed against non-member employees,²² as well as "supplemental dues."²³ While an employee may revoke an authorization at will during the time between collective bargaining agreements,²⁴ an attempted revocation during a valid collective bargaining agreement—but outside the aforementioned escape period—will be ineffective. However, the mere fact that a check-off arrangement has been labeled as "membership dues" within a collective bargaining agreement does not ensure that it will be safe from Section 186 prosecution. Courts

16. 28 U.S.C. § 186(c)(4) (2006).

17. *Id.*

18. *Id.*

19. *Associated Builders & Contractors v. Carpenters Vacation & Holiday Trust Fund*, 700 F.2d 1269, 1277 (9th Cir. 1983) (citing *NLRB v. Atlanta Printing Specialties and Paper Prods. Union* 527, 523 F.2d 783, 786 (5th Cir. 1975)).

20. JOHN E. HIGGINS JR., *THE DEVELOPING LABOR LAW: THE BOARD, THE COURTS, AND THE NATIONAL LABOR RELATIONS ACT* 2177 (5th ed. 2006) (citations omitted); *see also Machinists Monroe Lodge 770 v. Litton Bus. Sys.*, 334 F. Supp. 310 (W.D. Va. 1971).

21. HIGGINS, *supra* note 20, at 2177 (citations omitted).

22. *Id.* at 2178 (citing *Grajczyk v. Douglas Aircraft Co.*, 210 F. Supp. 702 (S.D. Cal. 1962)).

23. *Schwartz v. Associated Musicians, Local 802*, 340 F.2d 228, 233 (2d Cir. 1964).

24. HIGGINS, *supra* note 20, at 2178 (citing *United Elec., Radio and Mach. Workers v. Westinghouse Elec. Corp.*, 345 F. Supp. 274 (W.D. Pa. 1972), *aff'd mem.*, 478 F.2d 1399 (3d Cir. 1973)).

R

R

will look to the purpose of the fee, not the name or manner in which it was collected, to judge its character.²⁵

C. Section 186(c)(5)–(8): Payments to Trusts

Section 186(c)(5) allows payments by the employer to trust funds established “for the sole and exclusive benefit of the employees of such employer, and their families and dependents.”²⁶ In order for the exception to apply, the four requirements within subsection (c)(5)(B) must be met. First, the detailed basis on which such payments are made must be specified in a written agreement with the employer.²⁷ Second, employees and employers must be equally represented in the administration of such a fund.²⁸ Third, in the event the employer and employee groups deadlock on the administration of such fund, and there are no neutral persons empowered to break such deadlock, the trust agreement provides that the two groups shall agree contractually on an impartial umpire to decide such dispute.²⁹ Fourth, the trust agreement calls for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement.³⁰

Under the exception set forth in Section 186(c)(5), any payments to the trust fund must be made for the benefit of employees. Making payments on behalf of independent contractors would not fall within

25. *Master Insulators v. Int’l Ass’n of Heat and Frost Insulators and Asbestos Workers, Local No.1*, 925 F.2d 1118 (8th Cir. 1991); *see also* *Detroit Mailers Union No. 40*, 192 NLRB 951 (1971).

26. 29 U.S.C. § 186(c)(5) (2006).

27. *Compare* *Thurber v. W. Conference of Teamsters Pension Plan*, 542 F.2d 1106, 1109 (9th Cir. 1976) (holding that written authorization is required), *and* *Moglia v. Geoghegan*, 403 F.2d 110, 117 (2d Cir. 1968) (same), *with* *Brown v. C. Volante Corp.*, 194 F.3d 351 (2d Cir. 1999) (holding that employer’s signature is not necessary on agreement when employer contributes funds based on the agreement), *and* *Nat’l Leadburners Health & Welfare Fund v. O.G. Kelly & Co.*, 129 F.3d 372 (6th Cir. 1997) (same).

28. *NLRB v. Amax Coal Co.*, 453 U.S. 322, 330 (1981); *see also* *Culinary and Serv. Employees Union, Local 555 v. Haw. Employee Benefit Admin. Inc.*, 688 F.2d 1228 (9th Cir. 1982) (finding that with funds that cover multiple employers or unions, each individual employer or union is entitled only to the total number of employer trustees that equal the total number of union trustees, not equal representation).

29. 29 U.S.C. § 186(c)(5)(B) (2006) (providing that if the parties are unable to come to agreement on an impartial umpire within a reasonable amount of time, upon petition by either party, a district court of the United States for the district in which the trust has its principle office will appoint an impartial umpire).

30. *Id.* § 186(c)(5).

the exception.³¹ However, an agreement by which non-employee hours were used to formulate the total amount an employer had to pay into a fund could fall within the exception.³²

In nominating and selecting trustees, both the union and employer must be careful in how selections are made so as not to violate the equal representation requirement of Section 186(c)(5)(B).³³ Equal care must be shown in establishing removal procedures for trustees. Any trustee who may not be removed “at will” could arguably violate the equal representation requirement.³⁴ Funds that institute the four requirements would be exempt from Section 186.

The exceptions under Section 186(c)(6)–(8) allow employer payments to trust funds established for the following purposes: “pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training programs[;]” “scholarships for the benefit of employees, their families, and dependents . . . child care centers . . . or financial assistance for employee housing[;]” and “defraying the costs of legal services.”³⁵ All three exceptions must conform to the trust requirements in Section 186(c)(5) in order to fall within the overall exception.

The nine exceptions correspond to some of the more basic and necessary components of many union/employer relationships, including membership fees and trust funds. However, the scope of the exceptions in Section 186 is extremely narrow and union/employer transaction will likely fall within the statute’s general prohibition.

31. *Labor Relations Divs. of Constr. Indus. v. Teamsters Local 379*, 156 F.3d 13, 19–21 (1st Cir. 1998) (defining the term “employee” under Section 186).

32. *See Walsh v. Schlecht*, 429 U.S. 401 (1977) (finding that if a clause in the agreement between a union and contractors required the contractor to pay contributions to trust funds, and the amount of those contributions was measured by the hours of work performed on the project by employees of nonsignatory subcontractors with the benefits payable only to workers employed by signatory employers, the provision would fall within exception to the general Taft-Hartley Act); *see also Todd v. Benal Concrete Constr. Co.*, 710 F.2d 581 (9th Cir. 1981) (finding that the Labor Management Relations Act barred trust fund payments on behalf of owner-operators who were, in reality, independent contractors under the common law agency test, notwithstanding a provision of the collective bargaining agreement requiring employer contributions to trusts on behalf of those individuals).

33. *Quad City Builders Ass’n v. Bricklayers Union No. 7*, 431 F.2d 999 (8th Cir. 1970) (“Any plan as a minimum requirement should be so designed that active Union members, who at times serve as employees, do not have a dominant voice in the election of management trustees.”).

34. *Teamsters Local No. 145 v. Kuba*, 631 F. Supp. 1063, 1071 (D. Conn. 1986) (holding that “a provision of the trust agreement requiring ‘proper and just cause’ for the removal of a trustee violate[d] Section 302(c)(5) of the LMRA, 29 U.S.C. § 186(c)(5), and [was] therefore unenforceable”).

35. 29 U.S.C. § 186(c)(6)–(8) (2006).

Therefore, a step-by-step breakdown of the crucial statutory terms will help rein in the enormous breadth of the statute.

II. Jurisdictional Standards for Section 186(a)-(b)

Section 186 imposes criminal penalties for those violations that affect interstate commerce.³⁶ The term “affecting commerce” is defined as “in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.”³⁷ This jurisdictional standard has been applied in a broad manner under which most industries would fall within its scope. In *Sheet Metal Contractors Ass’n v. Sheet Metal Workers International Ass’n*,³⁸ the Ninth Circuit assessed the interstate commerce jurisdictional requirement and declared that there was no need to consider how much interstate business an employer may do. The Ninth Circuit noted the purpose of the statute was to “prevent employers from tampering with the loyalty of union officials, and disloyal union officials from levying tribute upon employers.”³⁹ Thus, the court found that an employee need only establish a violation by an employer and an employee representative to impose liability for criminal penalties on an employer.⁴⁰

In *United States v. Ricciardi*,⁴¹ the Second Circuit laid out a framework for assessing Section 186 claims. The first step in assessing the jurisdictional question was to identify the relevant industry being affected.⁴² The court went on to write, “the relevant industry for the purposes of 29 U.S.C. § 186(a)(1) and (b)(1) comprises all business activities in the same field as the business activities of employers whose employees were represented by the recipients of the allegedly unlaw-

36. *Id.* § 186(a), (d).

37. *Id.* § 152(7).

38. 248 F.2d 307 (9th Cir. 1957).

39. *Id.* at 311 (quoting *United States v. Ryan*, 225 F.2d 417, 426 (2d Cir. 1955)).

40. The court noted:

We cannot believe that in an attempt to accomplish this objective Congress intended to provide that the levying of tribute should be prohibited only where the employers were large ones whose volume of interstate business was substantial, but that the unions had full liberty to levy tribute upon the smaller employers within the same industry, even though the union officials represented employees who are employed in an industry which, as such, affected commerce.

Id.

41. 357 F.2d 91 (2d Cir. 1966).

42. *Id.* at 94–97.

ful payments.”⁴³ The standard laid out in *Ricciardi* creates an expansive jurisdictional net for Section 186. The inquiry as to whether the violation affects commerce is not limited to the literal employee representative and employer within the matter, but rather extends to all business activities in the same field. Thus, it is almost impossible to imagine a situation that would not meet the Section 186 jurisdictional standard. In fact, the indictment need not even contain an allegation of which industry is affected or how the violation actually affects commerce.⁴⁴

III. Constitutionality

Challenges to the constitutionality of Section 186 have proven unsuccessful. Attacks have come in a variety of forms—including the First Amendment’s protection of religious freedom.⁴⁵ However, the majority of the attacks have alleged that Section 186 is void for its vague language. Repeatedly, courts have held that the language of the statute is sufficient, and that a reasonable person would know if his or her conduct is prohibited.⁴⁶ The terms “any representative of any of his employees,”⁴⁷ and “any payment”⁴⁸ have both been unsuccessfully challenged on a basis of vagueness.

In *United States v. Sink*,⁴⁹ the defendant union leader contended that the term “would admit to membership” was vague in that it made conduct criminal that had not yet occurred. The court stated the statute “prohibited, with certain exceptions, payments by an employer to

43. *Id.* at 95.

44. *United States v. Di Salvo*, 251 F. Supp. 740, 743 (S.D.N.Y. 1966) (citing *Ricciardi*, 357 F.2d at 91).

45. *See United States v. Thompson*, 466 F. Supp. 18 (W.D. Pa. 1978) (defendant who received a Christmas card that contained \$900 in cash from an officer of the company argued that the act was protected by the First Amendment. However, the court found this argument unconvincing, as the cash was paid from company funds and sent by an officer.), *aff’d mem.*, 588 F.2d 825 (3d Cir. 1978).

46. *See United States v. Ryan*, 128 F. Supp. 128 (S.D.N.Y. 1995) (citing *United States v. Harriss*, 347 U.S. 612 (1954)), *rev’d on other grounds*, 225 F.2d 417 (2d Cir. 1955).

47. *Id.* at 134–35 (finding that the term “any representative of any of his employees” of Section 186 was sufficient to inform a reasonable person as to whether or not they would fall within the statute’s reach); *Di Salvo*, 251 F. Supp. at 740 (stating that the congressional expansion of Section 186 to expressly include loans post *Ryan*, does not render it constitutionally vague); *see also Harriss*, 347 U.S. at 612 (finding that if the statute is plainly directed to a general class of cases, it will not be struck down as vague even though marginal cases pose questions of doubt).

48. *United States v. Lanni*, 466 F.2d 1102, 1109 (3d Cir. 1972) (“The statute’s broad prohibition of ‘all payments’ gave the appellants fair notice that indirect payments were included.”).

49. 355 F. Supp. 1067 (E.D. Pa. 1973), *aff’d mem.*, 485 F.2d 683 (3d Cir. 1973).

the labor union representatives of the employer's labor force."⁵⁰ In addition, the court found "[t]he statute recognized a similar, and possibly greater danger, in comparable situations where the laborers would be unionized in the future."⁵¹ As such, "the statute prohibited payments by employers to labor union representatives of unions that 'would admit to membership, any employees of such employer.'⁵² Furthermore, the instructions given to the jury at trial stated "the defendant could not be found guilty unless (1) the local union of which the defendant was president would admit to membership any of the employees of MacClean Service Company, Inc. [the employer]; and (2) the defendant knew that such employees would be admitted to membership."⁵³ The court also advised the jury that the phrase "would admit to membership" meant "a present intention of the employees to apply for union membership or a present intention of MacClean Service Company to come into the Philadelphia area and employ laborers who would and could be admitted to the local union."⁵⁴ The court disagreed that the term was vague.

At least two courts have since disagreed with the *Sink* court's "present sense" interpretation of "would admit into membership."⁵⁵ Yet, it is worth noting that the court's approach only side-stepped the constitutional vagueness challenge by relying on present-intent jury instructions. If courts continue to discredit *Sink*'s present-intent standard, it may leave Section 186 vulnerable to further vagueness challenges.

IV. Scierter/Criminal Intent

Section 186(d) sets out the criminal penalties associated with the Act, as well as the requisite intent or scierter that must be established for conviction.⁵⁶ Section 186(d)(1) details the circumstances that require a higher level of scierter. Under this elevated standard, a participant of the transaction must act willfully with the knowledge of the transaction and with an intent to benefit himself or to benefit other persons he knows are not permitted to receive a payment, loan, money, or other thing of value under Section 186(c)(4)–(c)(9). The higher element of scierter is imposed to safeguard against inadvertent

50. *Id.* at 1070.

51. *Id.*

52. *Id.* (citing 29 U.S.C. § 186(a)(2) (2006)).

53. *Id.* at 1070.

54. *Id.* at 1070–71.

55. *See* *United States v. Pecora*, 798 F.2d 614, 622 (3d Cir. 1986); *United States v. Browne*, 505 F.3d 1229, 1251–52 (11th Cir. 2007).

56. 28 U.S.C. § 186(d) (2006).

violations of the statute, such as when payments are made to improperly structured benefit trusts.⁵⁷

The more relevant intent requirement under Section 186(d)(2) covers all other prohibited transactions. Section 186(d)(2) only requires that the participant in the prohibited transaction act willingly.⁵⁸ In *United States v. Phillips*,⁵⁹ the Eleventh Circuit broke down Section 186 and gave strong support for the contention that Section 186(d)(2) requires only that the payments were made willingly with no further criminal intent. The court points out that subsections (a)(1) and (a)(2) prohibit “any payment,”⁶⁰ while subsections (a)(3) and (a)(4) state the requisite intent as “intent to influence.”⁶¹ Therefore, the court reasoned:

Congress must have intended sections 186(a)(1)–(2) to prohibit payments to representatives even if they were made without any intent to influence. Any other interpretation would render the requirement of “an intent to influence” in sections 186(a)(3) and (a)(4) mere surplusage. Under appellants’ interpretation of “willfully” in section 186(d), sections 186(a)(1) and (a)(2) would serve only to prohibit payments made to employee representatives without any intent to influence but with the specific intent to violate the law. We cannot agree with such a nonsensical result; the statutory scheme is coherent and rational when “willfully” is interpreted as requiring only general intent.⁶²

There is no requirement that the plaintiff prove that the defendant acted with knowledge of the statutory prohibition in order to find a violation of Section 186. Rather, the plaintiff need only prove that the defendant acted willfully.⁶³

57. DEP’T OF JUSTICE, *Criminal Resource Manual, 2413 Outline of 29 U.S.C. 186*, in U.S. ATT’Y MANUALS, http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm02413.htm (last visited Aug. 29, 2009); see also *United States v. Papis*, 910 F.2d 1357, 1363 (7th Cir. 1990):

The reasonable conclusion is that Congress meant to add an additional element for certain payments in § 186(d)(1) that would not apply to other payments. The legislative history fortifies this conclusion: for payments under § 186(d)(2), “the committee determined not to include a specific *mens rea* requirement for prosecutions under (d)(2). The *mens rea* requirement for prosecutions under (d)(2) will continue to be ‘willfully.’”

Id. (citations omitted).

58. 28 U.S.C. § 186(d)(2) (2006).

59. 19 F.3d 1565 (11th Cir. 1994).

60. *Id.* at 1580 (citing 29 U.S.C. § 186(a)(1)–(2) (2006)).

61. *Id.* (citing 29 U.S.C. § 186(a)(3)–(4) (2006)).

62. *Id.* at 1580–81.

63. *United States v. Cody*, 722 F.2d 1052, 1059 (2d Cir. 1983) (requiring proof only that defendant “received and knew that he was receiving a benefit of value”); *United States v. Bloch*, 696 F.2d 1213, 1216 (9th Cir. 1982) (“A ‘willful’ violation of 29 U.S.C. § 186 requires only that the defendant act with knowledge that the payments are from a person

V. Employer

Section 186 prohibits gifts from “any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer.”⁶⁴ In *United States v. Donovan*,⁶⁵ the court held that in an indictment based on Section 186, the charges levied against the accused must be pled with particularity. A generic charge will therefore not suffice, and any charge against an employer under the statute must be precise to be upheld under the Sixth Amendment.⁶⁶ Thus, the pleadings cannot state, in general terms, that an employer defendant has violated Section 186. For example, in identifying an employer, the pleadings must state whether the employer is an individual employer, an association of employers, a person acting as a labor relations expert, adviser, or consultant to an employer, or a person acting in the interest of an employer.

For the purposes of Section 186, the term “employer” includes any person acting as an agent of an employer directly or indirectly.⁶⁷ Courts have relied upon precedent to define what constitutes an employer for purposes of Section 186. As such, the term employer has been interpreted as “anyone who owns, or who engages in operating, for himself, a business having employees”⁶⁸ Additionally, courts have used Section 186 to prohibit any payments made by an employer through a non-employer private corporation, implicitly extending the definition of employer over these corporations.⁶⁹

acting in the interest of an employer. . . . [K]nowledge of the statutory prohibition itself is not necessary.”); *United States v. Pecora*, 484 F.2d 1289, 1294 (3d Cir. 1973) (requiring knowledge only “(1) that there were ‘payments’; and (2) that the payments came from employers who employed workers represented by [defendant]”); *United States v. Carter*, 311 F.2d 934, 943 (6th Cir. 1963) (quoting Judge Learned Hand for the proposition that “the word ‘willful,’ even in criminal statutes, means no more than that the person charged with the duty knows what he is doing. It does not mean that, in addition, he must suppose that he is breaking the law.”); *see also* *United States v. Silva*, 517 F. Supp. 727, 735 (D. R.I. 1980) (“The word ‘willfully’ means that the person knowingly and intentionally committed the acts which constituted the offenses charged. . . . The word does not require, as a part of its meaning, that there be any knowledge or awareness that such act or omission is in fact prohibited by law.”).

64. 29 U.S.C. § 186(a) (2006).

65. 339 F.2d 404 (7th Cir. 1964).

66. *Id.* at 407–08.

67. 29 U.S.C. § 152(2) (2006).

68. *NLRB v. New Madrid Mfg. Co.*, 215 F.2d 908 (8th Cir. 1954); *see also* *Hotel Employees and Rest. Employees, Local 8 v. Jensen*, 754 P.2d 1277, 1285 (Wash. Ct. App. 1988).

69. *United States v. Overton*, 470 F.2d 761, 765 (2d Cir. 1972).

Despite the emphasis on defining the role of employer, an employer/employee relationship is not necessary for a conviction under Section 186.⁷⁰ In *United States v. Ferrara*,⁷¹ union officials representing Walgreens' staff used their influence to coerce members to give up privileges in the collective bargaining agreement in exchange for a promise that Walgreens would buy its coffee from Wechsler Coffee, a company giving kickbacks to the union.⁷² The court held that Section 186 applied, despite the fact that the Wechsler Coffee did not employ union members.⁷³

In *United States v. Overton*,⁷⁴ two brothers were representatives of the union and had significant roles in the formation and operation of a private stock company, Coordinated Community Services, Inc. ("CCS"). Three of the four shareholders of CCS had ties to Associated Grocers of Harlem, which in turn had ties to the union the Overton Brothers represented. Shortly after CCS's formation, Overton transferred his ownership of the company to another corporation, which was owned by his brother. CCS contracted with food manufactures and then solicited payments from them to guarantee that its products would be placed in Harlem Grocery Stores. It was clear at trial that CCS conferred a thing of value upon members of Overton's Union who represented store clerks.⁷⁵ In fighting the Section 186 claim, two of the CCS stockholders, who were also employers, argued that CCS, a non-employer, was the entity that conferred the "thing of value" and not the individual two stockholders. The Second Circuit held that "[p]ayments by these employers, though made through a non-employer corporate instrumentality, are nevertheless within the prohibition of the statute."⁷⁶

70. *United States v. Ferrara*, 458 F.2d 868, 872-73 (2d Cir. 1972).

71. 458 F.2d 868 (2d Cir. 1972).

72. *Id.*

73. *Id.* at 873; *see also* *Wabash Publ'g Co. v. Dermer*, 650 F.Supp. 212, 215-16 (N.D. Ill. 1986) (finding that payments to union workers at a race track made by the printing company that printed track betting tip sheets and was in competition with other publishers violated Section 186, despite the fact that the shop stewards who received the payments were not employees of the printing company. The court held that, "if all other prerequisites under 29 U.S.C. § 186(a)(4) can be met, the fact that the union employees who the stewards are accused of attempting to influence were not employees of the plaintiff does not bar a claim for violation of that subsection.").

74. 470 F.2d 761 (2d Cir. 1972).

75. *Id.* at 766.

76. *Id.* at 765; *see also* *Haley v. Palatnik*, 509 F.2d 1038, 1041 (2d Cir. 1975) (holding that "[t]here is nothing to require that, in order to constitute a violation of § [186](a) and (b) the moneys agreed to be paid to the union representative or official be paid from the employer's funds").

In *United States v. Burge*,⁷⁷ the defendant was a business agent for a union representing air freight workers in the midst of a turf war with a rival union. The defendant promised an employer that he would keep wages down, allow the employer to continue his health and welfare plan, and guarantee the employer other benefits, if the employer hired the defendant's consulting firm as an independent contractor. The defendant argued at trial that he was an employee of the employer being paid for services rendered, and thus fell within the exception created by Section 186(c)(1). The Sixth Circuit held the conviction was proper despite the defendant's independent contractor status, because the payments were intended to influence him in his status as a union representative and not for his work done as an independent contractor.⁷⁸ Therefore, union officials and employees must be careful in establishing any business relationship with an employer, even if those employees are not unionized, have no intention of unionizing, have no relationship to their union, or are employers under the subchapter and any relationship between them that involves a "thing of value" can be scrutinized under Section 186.⁷⁹

The Second Circuit looked beyond contracted language to find an employer status when enjoining a musicians' union from collecting taxes from a bandleader.⁸⁰ In *Cutler v. American Federation of Musicians*,⁸¹ the court upheld an injunction prohibiting the union from collecting a flat-fee tax from bandleaders who were also union members. The court determined that the band leader was an employer for the purposes of Section 186, despite the existence of a form contract, which explicitly stated the purchaser of the band's services—and not the band leader—was the employer. The court pointed out that the band leader "has all effective control of the orchestra."⁸² He "hires the sidemen, decides how much is to be charged for the performance and what share is to be allocated to each sideman, subject of course to union minimum charges. He also pays all the expenses of each performance, workmen's compensation, insurance premiums, withholding taxes and other taxes."⁸³

77. 990 F.2d 244 (6th Cir. 1992).

78. *Id.* at 249.

79. *Wabash Publ'g Co. v. Dermer*, 650 F. Supp. 212, 215–16 (N.D. Ill. 1986).

80. *Cutler v. Am. Fed'n of Musicians*, 316 F.2d 546, 548 (2d Cir. 1963).

81. *Id.* at 546.

82. *Id.* at 548.

83. *Id.*

A. Agent of an Employer

The scope of who constitutes an employer is further expanded by the use of the term, “any person acting as an agent of an employer, directly or indirectly. . . .”⁸⁴ “In determining whether any person is acting as an ‘agent’ of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified [is] not . . . controlling.”⁸⁵ Courts have held the terms employer and employee are not mutually exclusive.⁸⁶ One must look to the situation surrounding the need to define a person as an employer or employee, as well as in what capacity that person is acting, in order to define whether the person is acting as an agent of an employer. In light of the liberal construction of how agency principles have been applied to anti-union behavior surrounding other statutory sections, there is no reason to believe that a similarly liberal view would not be the lens by which employers agents are judged.⁸⁷

B. Unions and Union Trust Funds

A union can qualify as an employer under Section 186. Under 29 U.S.C. § 152(2) (2006), a labor organization, other than when acting as an employer, is exempt from the definition of “employer.”⁸⁸ The qualification of “other than when acting as an employer” applies to

84. 29 U.S.C. § 152(2) (2006).

85. 29 U.S.C. § 152(13) (2006); *see also* Bennion v. NLRB, 764 F.2d 739, 743 (10th Cir. 1985); NLRB v. Truck Drivers Local Union No. 449, Int’l Bhd. of Teamsters, 728 F.2d 80, 86 (2d Cir. 1984) (standing for the proposition that the absence of actual authorization or subsequent ratification is not controlling on the question of agency in connection with a union or employer, and authority to act may be implied or apparent).

86. A foreman, in his relation to his employer, is an “employee” within this subchapter, and, in his relation to the laborers under him, is a representative of his employer; therefore, he is an “employer” under this subchapter. *See* NLRB v. Skinner & Kennedy Stationery Co., 113 F.2d 667, 671 (8th Cir. 1940); NLRB v. Armour & Co., 154 F.2d 570, 575 (10th Cir. 1946).

87. *Vista Verde Farms v. Agric. Labor Relations Bd.*, 158 Cal. Rptr. 20, 24 (Ct. App. 1979) (“‘In determining responsibility for anti-union activities, principles of agency and its establishment are to be construed liberally.’ The determination of whether a third party’s acts were [a]ctually authorized or subsequently ratified by the employer is not necessarily conclusive on the question of agency. Rather, the court must determine, upon looking at the record as a whole, whether the activities in question would create an impression of agency among the affected employees.” (quoting NLRB v. Ark.-La. Gas Co., 333 F.2d 790, 795 (8th Cir. 1964) (citing NLRB v. Mayer, 196 F.2d 286, 288 (5th Cir. 1952))), *rev’d*, 625 P.2d 263 (Cal. 1981).

88. 29 U.S.C. § 152(2) (2006).

unions even though they are engaged in a non-profit business.⁸⁹ The label of employer also extends to union welfare trusts with employees.⁹⁰

C. Non-Profit Employers

Section 186 does not protect non-profit associations with an exception. However, after the 1974 amendments to Section 186, the National Labor Relations Board (“NLRB”) asserted jurisdiction over non-profit organizations and removed the threat of criminal penalties.⁹¹ The most significant example of this can be found in *NLRB v. Holtville Ice & Cold Storage Co.*⁹² In that case, the court deemed a non-profit association composed of farmers and others “employers” because “the association’s secretary-manager determined which persons the member-employer should hire as employees.”⁹³

VI. Representative of Employees

Section 186(a) prohibits an employer from making payments to four broad categories of individuals:

- (1) to **any representative of any of his employees** who are employed in an industry affecting commerce; or
- (2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or **would admit to membership**, any of the employees of such employer who are employed in an industry affecting commerce; or
- (3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce **in excess of their normal compensation** for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or
- (4) to any officer or employee of a labor organization engaged in an industry affecting commerce with **intent to influence** him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.⁹⁴

89. *Office Employees Int’l Union, Local No. 11 v. NLRB*, 353 U.S. 313, 313–15 (1957).

90. *Blassie v. Kroger Co.*, 345 F.2d 58, 71–72 (8th Cir. 1965).

91. *NLRB v. Holtville Ice & Cold Storage Co.*, 148 F.2d 168 (9th Cir. 1945).

92. *Id.*

93. *Id.* at 170.

94. 29 U.S.C. § 186(a) (2006) (emphasis added).

While violations could be charged in multiple categories at once, each category must be dealt with separately in order to fully comprehend Section 186.

A. Representative of Any of the Employer's Employees

Section 186(a)(1) prohibits an employer from making payments to any representative of any of its employees who are employed in an industry affecting commerce.⁹⁵ The term "representative" "includes any individual or labor organization."⁹⁶ The term "labor organization" includes the following:

[A]ny organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.⁹⁷

*Brennan v. United States*⁹⁸ is illustrative. In that case, the Eighth Circuit upheld a district court's jury instruction that found a person authorized to act does not necessarily have to exercise any of the powers conferred upon him. The court held:

Representative as used in this Act may also include one who is empowered, authorized or designated by any employee or employees to represent any employee or employees in any negotiation with their employer for the establishment of a new union and its recognition by such employer as a representative of said employees in any matter relating to their wages, hours, or working conditions.⁹⁹

The court further defined the term by stating:

Any labor organization, such as a local union, union council, union conference or international union which is empowered, authorized or designated by any employee or employees to act on his or their behalf in any dealing with the employer with respect to hours, wages or working conditions is by virtue thereof a representative of such employee or employees, and any individual who actively holds and occupies an office or position of responsibility in any such union local, council, conference, or international, who is empowered or authorized in such office or position to act for any such labor organization in which he holds office in such way as to affect any such employee in a substantial way in any dealing with the employee's employer with respect to hours of labor, wages or working

95. *Id.* § 186(a)(1).

96. *Id.* § 152(4).

97. 29 U.S.C. § 152(5).

98. 240 F.2d 253, 264 (8th Cir. 1957).

99. *Id.*

conditions, is thereby also a representative of such employee or employees.¹⁰⁰

Therefore, Section 186 covers any representatives, including those who only represent a minority of the employees.¹⁰¹ An employer need not have knowledge of the exact representation when the payment is made.¹⁰² In *Korholz v. United States*,¹⁰³ the employer was unaware of how many employees the union leader represented. The employer only knew the union leader was attempting to organize the employer's labor through secret ballot. The Tenth Circuit held there was sufficient evidence to show the employer made payments because it believed the union represented its employees.¹⁰⁴

In assessing whether an individual qualifies as a representative, the individual's title and employment status have little relevancy. The duties of an individual are strong evidence in establishing representation, but are not necessarily required.¹⁰⁵ These duties include representing the union in any jurisdictional problem occurring on the job, investigating grievances, ensuring that job conditions are safe, checking in the employees in the morning and checking the employees out at night, ensuring that union dues are paid by checking union cards, and generally looking out for the union members' welfare.¹⁰⁶

The more important question is the function that the alleged representative plays. For example in *Sheet Metal Contractors Ass'n v. Sheet Metal Workers International Ass'n*,¹⁰⁷ the plaintiff, an employers' association, brought suit against a union that did not directly represent any of its employees. However, the defendant union did represent sheet metal workers in locations that plaintiff's employees were sometimes contracted to work. The lawsuit arose from an agreement to establish a joint industry board that would require the plaintiff to pay whenever its employees were contracted to work in locations covered by the defendant's union. This would maintain the base rate the defendant

100. *Id.*

101. *United States v. Pecora*, 267 F.2d 512, 515 (3d Cir. 1959).

102. *Korholz v. United States*, 269 F.2d 897 (10th Cir. 1959).

103. *Id.*

104. *Id.* at 902.

105. *Mech. Contractors Ass'n v. Local Union 420*, 265 F.2d 607, 611 (3d Cir. 1959) (finding that persons designated by a union to administer a fund derived from employer contributions were representatives within the meaning of Section 186, even where none of the fund's purposes included collective bargaining for the employees, representation on the job, or addressing grievances); *Sheet Metal Contractors Ass'n v. Sheet Metal Workers Int'l Union*, 248 F.2d 307, 315-16 (9th Cir. 1957).

106. *United States v. Kaye*, 556 F.2d 855, 862 (7th Cir. 1977) (finding that a part-time business agent was a representative).

107. 248 F.2d 307 (9th Cir. 1957).

union had bargained for in the area. Plaintiff brought suit seeking a declaratory judgment that the payments would violate Section 186. The defendant union argued it was an outside union, not a representative of the employer's employees, and therefore the trust would not violate Section 186. In finding that the union was a representative of the employer's employees, the Ninth Circuit looked past the fact the employer and the union would share representation on the board, and instead focused on the function of the defendant union. Specifically, the court found that even though one purpose of the joint industry board was to protect the defendant union's members, the board also assisted sheet metal workers who were employees of the plaintiff, and thus qualified as a representative of the employer's employees under Section 186(a)(1).¹⁰⁸

Arguably, an individual cannot represent employees unless his representation was in some way authorized or subsequently ratified.¹⁰⁹ Yet, this argument has been heavily discredited by those amendments to Section 186 that sought to stem employers' attempts at bribery of union officials in an effort to block unionization of their present employees.¹¹⁰ Therefore, a payment to a representative that did not currently represent employees could be in violation of Section 186(a)(2).

B. A Labor Organization "Would Admit to Membership"

Section 186(a)(2) states that payments by an employer to "any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce."¹¹¹ A string of cases have sought to clarify the term "would admit to membership," as the language gives little guidance as to its limits.

In *United States v. Sink*,¹¹² the employer was a cleaning business actively seeking to expand into the Philadelphia area. Sink was the president of a Philadelphia-based union that represented janitors and cleaning persons. Sink accepted payment in the form of a hotel room from the corporate employer. There was no question that, at the time of the payment, the union did not represent any of the employer's

108. *Id.* at 314–15; *see also Mech. Contractors Ass'n.*, 265 F.2d at 607.

109. *Ventimiglia v. United States*, 242 F.2d 620 (4th Cir. 1957).

110. *United States v. Cody*, 722 F.2d 1052, 1058–59 (2d Cir. 1983) (citing S. Rep. No. 86-187 (1959), *reprinted in* 1959 U.S.C.C.A.N. 2318, 2329–30).

111. 29 U.S.C. § 186(a)(2) (2006).

112. 355 F. Supp. 1067 (E.D. Pa. 1973), *aff'd mem.*, 485 F.2d 683 (3d Cir. 1973).

current employees, as there were none in Philadelphia. However, in finding Sink guilty, the trial court implied through its jury instructions that a “present intent” to admit the corporation’s employees was required.¹¹³ The Third Circuit upheld the reasoning and the present-intent requirement employed by the trial court in assessing the term “would admit to membership.”¹¹⁴

Similarly, in *United States v. Cody*,¹¹⁵ the employer/contractor allowed a local union official to use a luxury apartment for free. The Second Circuit found no impropriety because the employer did not employ laborers represented by the union. The court rejected the argument that the “would admit to membership” language included any employer who *would have* employed union members in the future. Yet, the court admitted “there may be circumstances in which the possible future hiring of unionized workers might lead to abuses that § 186 was designed to prevent.”¹¹⁶ The Second Circuit went on to differentiate the present case from *Sink*, stating that “[i]n *Sink*, there was no doubt that the employer was actively planning expansion into Philadelphia, where its present employees would have been admitted to the local union.”¹¹⁷ Further, the court found “that the gift from the employer to the Philadelphia union representative was made at the time this expansion was being contemplated.”¹¹⁸ Unlike in *Sink*, the relationship between the construction company as an employer and Cody as a union officer “was too nebulous at the time the gift was made to be the basis for a criminal charge.”¹¹⁹

In *United States v. Pecora*,¹²⁰ the Third Circuit was confronted with three arguments as to why the term “would be admitted to membership” could not apply to payments from an employer to a union repre-

113. The court crafted a jury instruction which read:

When we say “would admit to membership,” that does not mean some indefinite, uncertain future, vague possibility. It means at the time the acts were performed and done that as of that time there was either a present intention for the employees of MacClean Service Company to apply for membership or that there was a present intention for MacClean Service Company to obtain work in the Philadelphia area and to employ employees that would and could be admitted to membership in Local No. 69.

Id. at 1071.

114. *Id.*

115. 722 F.2d 1052 (2d Cir. 1983).

116. *Id.* at 1059.

117. *Id.* (citing *U.S. v. Sink*, 355 F. Supp. 1067 (E.D. Pa. 1973), *aff’d mem.*, 485 F.2d 683 (3d Cir. 1973)).

118. *Id.*

119. *Id.*

120. 798 F.2d 614 (3d Cir. 1986).

sentative. First, the union that received payments could not represent the employer's workers because jurisdiction had been awarded to another local of the same international.¹²¹ Second, the employer's employees were already covered by a collective bargaining agreement with another union and therefore any interference would be barred by the NLRB's contract bar rule.¹²² Third, Section 186(a) required a present intent to organize the employer's employees to membership.¹²³

In rejecting all three arguments, the Third Circuit wrote "[w]e are unwilling to hold that, where an employer pays off a union to keep it from attempting to represent its workers, the existence of possible roadblocks to the actual accomplishment of the union's 'threat' will conclusively render section [186](a)(2) inapplicable."¹²⁴ The court recognized that if there was an actual impossibility as a matter of law, such an event may block the application of Section 186(a)(2).¹²⁵ Further, the court found that a present intent was not required to prove a violation under Section 186(a)(2). Specifically, the court found:

To hold that section [186](a)(2) requires a present intention rather than a potential to attempt to organize a group of employees would allow employers to evade the operation of section [186] by timing their payoffs in such a way that they were paid at times when a union local could not assert its right, and would require an inquiry into the subjective intentions of employees, employers, and union officials.¹²⁶

Lastly, the Third Circuit distanced itself from its previous decision in *Sink*, holding any implied present-intent requirement gleaned from that case was moot since the court only held the jury instruction was not prejudicial to the plaintiff.¹²⁷

The most current reading of the language "would admit to membership" is from *United States v. Browne*.¹²⁸ In *Browne*, the plaintiffs were a brother/sister team who were a high-ranking union official and a union administrative assistant respectively. One of the defendants had accepted payments from numerous employers, none of which employed anyone in the union Browne represented at the time the payments were made. Browne relied heavily on the language of *Cody* in

121. *Id.* at 621.

122. *Id.* at 619.

123. *Id.* at 625.

124. *Id.* at 623.

125. *Id.*

126. *Id.*

127. *Id.* at 624.

128. 505 F.3d 1229 (11th Cir. 2007).

asserting that there must be an existing relationship between the employer and members of the union.¹²⁹ In grappling with the language of Section 186(a)(2), the Eleventh Circuit went beyond the *Cody* court to acknowledge a possible criminal violation only when employers attempt to block unionization of their present employees through bribery of union officials.¹³⁰

The *Browne* court also rejected any notion of a present intent requirement, instead stating that the “relevant consideration in applying § 186(a)(2)’s ‘would admit to membership’ clause is whether the union would admit any of the employees who were currently working for the employer at the time the subject payment was made.”¹³¹ The court acknowledged its holding would limit the government’s ability to prosecute violations where there is only a possible future employment relationship between a potential employer and individuals who would be admitted to membership in the union. The court also noted that “[o]ur holding here rules out the possibility that the statute could impose criminal liability on either a union official who receives a payment, or a potential employer who makes one, while the would-be employer has no employees at the time who would be admitted.”¹³² The *Browne* decision limits the scope of Section 186(a)(2) by shackling the statute to the present circumstances at the time the alleged unlawful payments are made. Based on *Browne*, the government cannot prophesize a future relationship in order to criminally prosecute.

C. Payment in Excess of Normal Compensation

Section 186(a)(3) prohibits payments by an employer under the following circumstances:

[T]o any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing¹³³

There is a void of case law that corresponds to Section 186(a)(3). The most likely reason for such scarcity of precedent is that logically almost every situation that would give rise to a possible Section

129. *Id.* at 1250.

130. *Id.* at 1251.

131. *Id.*

132. *Id.* at 1252 n.18.

133. 29 U.S.C. § 186(a)(3) (2006).

186(a)(3) violation would also give rise to an unfair labor practice charge under the National Labor Relations Act (“NRLA”) and arguably be preempted. However, there is some conflict between circuits as to whether Section 186 would be subject to preemption under the primary jurisdiction doctrine explained below.

In *Local 355 Hotel, Motel, Restaurant & Hi-Rise Employees and Bartenders Union v. Pier 66 Co.*,¹³⁴ the union brought a Section 186(a)(3) claim based on allegations that the employer had offered wage increases, promotions, and free schooling to induce employees into filing for decertification of the union with the NLRB. The employer argued that the union was attempting to circumvent the exclusive jurisdiction of the NLRB by bringing what were actually unfair labor practice charges in federal court disguised as criminal violations. The court, citing language in the Supreme Court’s decision in *San Diego Building Trades Council v. Garmon*,¹³⁵ agreed with the employer by finding that the NLRB had primary jurisdiction in deciding what constituted an unfair labor practice. Additionally, federal courts do not have jurisdiction over activity that is arguably subject to sections 7 or 8 of the NLRA. As such, the court must defer to the exclusive competence of the NLRB when faced with matters of this kind.¹³⁶

The NLRB’s primary jurisdiction applies in the following circumstances:

[W]here a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views.¹³⁷

While there is no precedent applying the doctrine of primary jurisdiction to Section 186(a)(3) specifically, the theory has been applied numerous times to collective bargaining issues giving rise to Section 186 claims.¹³⁸

134. 599 F. Supp. 761 (S.D. Fla. 1984).

135. *Id.* at 764 (citing *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959)).

136. *Id.*; *see also* *United Food and Commercial Workers, Local 400 v. Marval Poultry Co.*, No. 84-0126-H, 1986 WL 25434 (W.D. Va. July 10, 1986).

137. *Am. Commercial Barge Lines Co., v. Seafarers Int’l Union of N. Am.*, 730 F.2d 327, 338 (5th Cir. 1984) (citing *United States v. W. Pac. R.R. Co.*, 352 U.S. 59 (1956)).

138. *See id.* at 327; *Cent. Fla. Sheet Metal Contractors Ass’n v. NLRB*, 664 F.2d 489 (5th Cir. 1981); *Mobile Mech. Contractors Ass’n v. Carlough*, 664 F.2d 481, 487, 488 n.10 (5th Cir. 1981).

The Sixth Circuit has approached the applicability of the primary jurisdiction doctrine in a much more critical light.¹³⁹ In *Hospital Employee's Division of Local 79, Service Employees International Union v. Mercy-Memorial Hospital Corp.*,¹⁴⁰ the Sixth Circuit noted that the primary jurisdiction doctrine was established to ensure uniformity under the NLRA, but was not designed to preempt other independent liability-creating statutes. The Sixth Circuit reasoned that while Section 186 and sections 7 and 8 of the NLRA prohibit similar activities, they provide different independent remedies. Additionally, if the primary jurisdiction doctrine were valid in the Section 186 context, it would effectively void Section 186 claims, because potentially every Section 186 claim would also constitute an unfair labor practice under sections 7 or 8 of the NLRA.¹⁴¹ Because there is conflicting case law, this branch of Section 186 should continue to be monitored; the application of the primary jurisdiction doctrine has major implications in regards to the practical use of Section 186 as a combative tool against employers.

D. Payment with the Intent to Influence

Section 186(a)(4) prohibits payments by employers to “any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.”¹⁴² An officer is defined as “any constitutional officer, any person authorized to perform the functions of president, vice president, secretary, treasurer, or other executive functions of a labor organization, and any member of its executive board or similar governing body.”¹⁴³ Courts have been unwilling to define the term “officer,” and arguments aimed at examining the scope of an officer’s duties have been futile. In fact, “Congress in 1959 foreclosed this argument when it passed Section 186 to cover ‘any officer or employee’ of a labor organization.”¹⁴⁴

139. *Hosp. Employees' Div. of Local 79, Serv. Employees Int'l Union v. Mercy-Memorial Hosp. Corp.*, 862 F.2d 606 (6th Cir. 1988).

140. 862 F.2d 606 (6th Cir. 1988).

141. *Id.*; *see also* *United Food and Commercial Workers Local 204 v. Harris-Teeter Supermarkets, Inc.*, 716 F. Supp. 1551 (W.D.N.C. 1989) (applying the same argument to ERISA).

142. 29 U.S.C. § 186(a)(4) (2006).

143. 29 U.S.C. § 402(n) (2006).

144. *United States v. Fisher*, 387 F.2d 165, 168 (2d Cir. 1967) (holding that even a person not formally an officer could fall within the broad definition of officer); *see also*

There is little case law addressing the specific intent required within Section 186(a)(4). In *United States v. Ferrara*,¹⁴⁵ the Second Circuit noted that although there is no intent requirement for Section 186(a)(1), there is such a requirement for Section 186(a)(4).¹⁴⁶ To show the requisite intent for Section 186(a)(4), one must only show the payments were intended to influence “any” of the officer’s or employee’s actions.¹⁴⁷ Arguments to the effect that the intent must be to influence the collective bargaining process have failed.¹⁴⁸

VII. Thing of Value

Under Section 186, it is illegal for an employer to “pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value”¹⁴⁹ to those persons who would fall within Section 186(a)(1)–(4). Defining what constitutes a “thing of value” is a case-by-case assessment.

In *United States v. Roth*,¹⁵⁰ the court found that a loan constituted a “thing of value,” and wrote “[v]alue is usually set by the desire to have the ‘thing’ and depends upon the individual and the circumstances.”¹⁵¹ The *Roth* court went on to expound on “a thing of value” and ended its opinion with the following caveat:

[I]t may be argued that a five-dollar Christmas tie is a ‘thing of value’ and a Christmas present hopefully is to create good will in the recipient towards the donor. Countless hypothetical cases can be put, each on its facts approaching that evanescent borderline between the proper and the improper. No calculating machine has yet been invented to make these determinations with certainty. In the meantime the courts must rely upon the less mechanical judgment and common sense which under the present system is, and of necessity must be, lodged in judges and juries.¹⁵²

United States v. Kaye, 556 F.2d 855 (7th Cir. 1977) (finding that a part-time business agent constituted an officer).

145. 458 F.2d 868 (2d Cir. 1972).

146. *Id.* at 873 n.5 (“[T]his Court said that ‘[§ 186] makes such payments unlawful only if they were intended to influence the actions of the recipient in relation to the union of which he is an officer.’ While this statement is true with respect to § 186(a)(4), it is clear from the statutory language that intent to influence is not a requisite element of § 186(a)(1).” (quoting *United States v. McCarthy*, 422 F.2d 160, 162 (2d Cir. 1970))); *see also* *United States v. Gigante*, 982 F. Supp. 140 (E.D.N.Y. 1997).

147. 29 U.S.C. § 186(a)(4) (2006).

148. *United States v. Pecora*, 798 F.2d 614 (3d Cir. 1986).

149. 29 U.S.C. § 186(a) (2006).

150. 333 F.2d 450 (2d Cir. 1964).

151. *Id.* at 453.

152. *Id.* at 454.

The following is an inventory of what has been—and what has not been—deemed “a thing of value” under Section 186.

Held Not to Constitute a Thing of Value

- An employer’s list of employees’ names and addresses, even when given to rival labor unions seeking to represent the employees¹⁵³
- Neutrality Agreements governing the recognition of labor unions¹⁵⁴
- Intangible benefit of continuing ability to influence corrupt union practices¹⁵⁵
- Payments to an orchestra leader by the local union because it was a “work equivalent”¹⁵⁶
- Payment made by the National Football League to the players’ union pursuant to a licensing litigation settlement¹⁵⁷
- Payment by the employer of employee wages directly to a bank where the wages were to be deposited into employee-created savings accounts¹⁵⁸
- Employer’s payment to employee of wages for the time spent attending a union grievance¹⁵⁹
- Contributions by employer to a welfare fund where the official later gained control of the fund and used it for his own benefit¹⁶⁰
- Concessions to an employer that allowed employees to attend union presentations on paid time¹⁶¹
- Back-pay award ordered by the board to a victim of discrimination and accepted by the pension trust¹⁶²

Held to Constitute a Thing of Value

- Power to direct payments to others¹⁶³

153. *Wyman-Gordon Co. v. NLRB*, 397 F.2d 394 (1st Cir. 1968), *rev’d on other grounds*, 394 U.S. 759 (1969).

154. *Hotel Employees & Rest. Employees Union, Local 57 v. Sage Hospitality Res. LLC*, 390 F.3d 206 (3d Cir. 2004); *see also Patterson v. Heartland Indus. Partners, LLP*, 428 F. Supp. 2d 714 (N.D. Ohio 2006).

155. *United States v. Cervone*, 907 F.2d 332 (2d Cir. 1990).

156. *Zentner v. Am. Fed’n of Musicians*, 343 F.2d 758 (2d Cir. 1965).

157. *White v. Nat’l Football League*, 836 F. Supp. 1458 (D. Minn. 1993).

158. *Local Union No. 636 of United Bhd. of Carpenters and Joiners of Am. v. Del. Contractors Ass’n*, 344 F. Supp 1281 (D. Del 1972).

159. *Employers’ Indep. Union v. Wyman Gordan Co.*, 314 F. Supp. 458 (N.D. Ill. 1970).

160. *Aroroyo v. United States*, 359 U.S. 419 (1959).

161. *Adcock v. Freightliner LLC*, 550 F.3d 369 (4th Cir. 2008).

162. *NLRB v. United Bhd. of Carpenters and Joiners of Am. Local No. 1913*, 531 F.2d 424 (9th Cir. 1976).

163. *United States v. Carlock*, 806 F.2d 536 (5th Cir. 1986).

- Employer's payment of lease and provision of a car to union official for four months¹⁶⁴
- Free monthly use of an automobile over three-month period¹⁶⁵
- Gift of chauffeuring services provided to a business agent without payment of fair market value¹⁶⁶
- Payment of kickbacks to fund trustees from real estate commissions earned when the fund purchased property¹⁶⁷
- Construction services on a business agent's residence provided below the fair market price¹⁶⁸
- Information with respect to one's employees¹⁶⁹
- Payment to union official by contractor-employer who often employed union members, but did not employ any union members at the time the payments were made; the contractor-employer relied on the continual source of employees provided by the hiring hall as needed¹⁷⁰
- Payments to a trust by an employer for the purpose of building relations between employer and union member employees¹⁷¹
- Payments made to a union official as salaries of employees who were never actually employed¹⁷²
- Payments to a union official as benefits through the employer's established pension plan¹⁷³
- Payments as commissions made by a restaurant coffee supplier to union officials representing employees of a restaurant in exchange for the agreement that the employer would purchase the supplier's coffee¹⁷⁴
- Payments to a union official's third-party creditor by an employer to satisfy the union official's debts¹⁷⁵
- Payment of a \$16,300 salary to a girlfriend of a union official for unneeded bookkeeping services¹⁷⁶
- Contributions by an employer to a dinner honoring a retiring union official, and the surplus proceeds were distributed to the union official in cash¹⁷⁷
- Payment by corporate employer to transport company owned by union official¹⁷⁸

164. *United States v. Boffa*, 688 F.2d 919 (3d Cir. 1982).

165. *United States v. Sheeran*, 699 F.2d 112 (3d Cir. 1983).

166. *United States v. Cody*, 722 F.2d 1052 (2d Cir. 1983).

167. *Id.*

168. *Id.*

169. *Zentner v. Am. Fed'n of Musicians*, 237 F. Supp. 457 (S.D.N.Y. 1965).

170. *United States v. Gibas*, 300 F.2d 836 (7th Cir. 1962).

171. *Conditioned Air and Refrigeration Co. v. Plumbing and Pipe Fitting Labor-Mgmt. Relations Trust*, 159 F. Supp. 887 (S.D. Cal. 1956).

172. *United States v. Pecora*, 798 F.2d 614 (3d Cir. 1986).

173. *United States v. Phillips*, 19 F.3d 1565 (11th Cir. 1994).

174. *United States v. Ferrara*, 458 F.2d 868 (2d Cir. 1972).

175. *Korholz v. United States*, 269 F.2d 897 (10th Cir. 1959).

176. *United States v. Lanni*, 466 F.2d 1102 (3d Cir. 1972).

177. *Pecora*, 798 F.2d at 614.

178. *United States v. McMaster*, 343 F.2d 176 (6th Cir. 1965).

- Interest-free loans made to union officials without a request for collateral¹⁷⁹
- Delivery of \$900 in cash as an unrequested Christmas gift by an employer to a union business representative¹⁸⁰
- Lower interest rates on loans given to a union representative¹⁸¹
- Payment by an employer, at direction of a union official, to a third party, despite a lack of evidence that the union official actually benefited¹⁸²
- Free cruise tickets given to union officials by waterfront employers¹⁸³
- Payment of union president's insurance premiums by an employer¹⁸⁴
- Payments made directly to International Longshoremen's Association to compensate the union for lost dues revenues as a consequence of containerization¹⁸⁵
- Delivery by employer to union official of free construction materials¹⁸⁶
- Below market price hotel rates at "union" hotels¹⁸⁷
- Monthly payments of pension benefits to union negotiators in exchange for concessions¹⁸⁸
- Union official's demand that an employer award a contract to a company in which the union official had an interest, and that the employer hire employees at the direction of the official¹⁸⁹
- A union official's order that an employer lease equipment from a company owned by the union official's former daughter-in-law¹⁹⁰

VIII. Guidance Through the Department of Labor

The majority of Section 186 cases involve egregious violations. Whether the DOJ would bring charges based on gifts of lesser value than those mentioned in this Article is debatable. However, its right to do so is definite, as there is no de minimus exception within Section 186. The DOJ has not given any guidance as to what constitutes "a thing of value." However, the Department of Labor ("DOL"), through its enforcement of the LM-10 form (employers) and LM-30 form

179. *United States v. Roth*, 333 F.2d 450 (2d Cir. 1964); *United States v. Borland*, 309 F. Supp. 280 (D. Del. 1970).

180. *United States v. Thompson*, 466 F. Supp. 18 (W.D. Pa. 1978).

181. *United States v. Fruehauf*, 365 U.S. 146 (1961).

182. *United States v. DeBrouse*, 652 F.2d 383 (4th Cir. 1981).

183. *United States v. Kopituk*, 690 F.2d 1289 (11th Cir. 1982).

184. *United States v. Lippi*, 190 F. Supp. 604 (D. Del. 1961).

185. *Int'l Longshoremen's Ass'n v. Seatrain Lines, Inc.*, 326 F.2d 916 (2d Cir. 1964).

186. *United States v. Fisher*, 387 F.2d 165 (2d Cir. 1967).

187. *United States v. Schiffman*, 552 F.2d 1124 (5th Cir. 1977).

188. *Cox v. Adm'r U.S. Steel and Carnegie*, 17 F.3d 1386 (11th Cir. 1994).

189. *United States v. DeBrouse*, 652 F.2d 383 (4th Cir. 1981).

190. *United States v. Carlock*, 806 F.2d 535 (5th Cir. 1986).

(union), has made it clear that even small gifts constitute “a thing of value.” The LM-10 and LM-30 forms mandate that an employer/union officer or employee must record and report any benefit with monetary value which the DOL has clarified to mean “anything of value, tangible or intangible.”¹⁹¹ This means meals, tickets, donations, green fees, holiday presents, and anything of value with few exceptions.¹⁹² The DOL offered a list of examples it considered reportable payments by an employer for LM-10/LM-30 purposes:

- A vendor of office supplies to a union guarantees payment of a bank loan made to a representative of that union
- A vendor of printing and publishing services to a union sends a holiday gift basket worth more than \$250 to the union’s treasurer
- An employer of the union members provides the union’s officers an exclusive opportunity to purchase the employer’s stock at below market prices
- A vendor of legal or accounting services to a union takes the union’s officers on a golf excursion
- A vendor whose business consists in substantial part of selling restaurant equipment to the employer of the union members makes loans to the union’s officers
- A vendor of financial services to a union affiliated pension plan provides a gift worth more than \$250 to a union trustee
- An employer of the union members pays a union official for a “no-show” job
- An employer of the union members takes a union official, with whom it is negotiating a collective bargaining agreement out for dinner and drinks worth more than \$250
- An employer pays any of its employees to persuade other employees not to join a union or to affect the negotiation of a collective bargaining contract
- An employer makes expenditures for the printing and dissemination of pamphlets, advertisements, or other printed matter that threatens to move or close the plant if organized
- An employer gives gifts or provides services to employees on the condition that they would not organize
- An employer pays a labor relations consultant to deliver an anti-union speech to its employees

191. Office of Labor-Mgmt. Standards, U.S. Dep’t of Labor Employment Standards Admin., LM-30 Frequently Asked Questions, http://www.dol.gov/esa/olms/regs/compliance/RevisedLM30_FAQ.htm (last visited Aug. 29, 2009).

192. There is an exception to LM-30 reporting if the item given is unrelated to the officer or employee’s status. However to fall within the LM-30 de minimus exception, the amount or value of the item must be less than \$250, be sporadic or occasional and unrelated to the business of the union. Office of Labor-Mgmt. Standards, U.S. Dep’t of Labor Employment Standards Admin., Form LM-10 Frequently Asked Questions, http://www.dol.gov/esa/olms/regs/compliance/LM10_FAQ.htm (last visited Aug. 29, 2009).

- An employer pays a labor relations consultant to plant agents among its employees to obtain reports about a union's organizational activities¹⁹³

Payments to a charity independent of the union are exempt from the reporting requirements of the LM-10/30. For example, a donation to the United Way is non-reportable as it is independent of the union. Similarly, a donation to the United Way would not fall within the confines of Section 186 because it would not fall within subsections (a) or (b). The more delicate situation is one in which an employer makes a donation to a union apprenticeship fund or union relief fund or scholarship. These donations should be non-reportable for the LM-30 and legal under Section 186—they would fall within the exceptions of Section 186(c). However, the fund must conform to the requirements of Section 186(c)(5). The more independence such fund has from the union can only help ensure its legality. Further, the donations should be made directly to the fund and not filter through the union or official. For example, if checks for a charity golf tournament were made to the union with proceeds going to an independent charity, it could be classified as a prohibited transaction under Section 186 despite even the best intentions.

The most important aspect of the LM-10/30 reporting forms is that everything reported on both is potentially—and more than likely—a technical violation of Section 186. While it is unclear as to whether the DOL will assist the DOJ by sharing the content of such reports, the DOL has made it clear that the purpose of the reports is to make public any actual or potential conflict between the personal financial interests of a labor organization officer or employee and his or her obligations to the labor organization and its members.¹⁹⁴ Therefore, it is in the best interest of union officials and members to refrain from receiving any gift or benefit that would potentially need to be reported on the LM-30 form, as doing so would effectively be documenting and handing evidence of a violation to the DOL.

Conclusion

This Article provides insight into the scope and flexibility of Section 186. The statute places absolute prohibitions on the transactions described in this Article, while requiring little criminal intent. How-

193. *Id.*

194. Office of Labor-Mgmt. Standards, U.S. Dep't of Labor Employment Standards Admin., Fact Sheet LM-30, <http://www.dol.gov/esa/olms/regs/compliance/RevisedLM30factsheet.htm> (last visited Aug. 29, 2009).

ever, the purpose of Section 186 is prevention, and courts have been willing to broadly read and apply its rules and penalties. The criminal penalty for a violation of Section 186 in which the “thing of value” exceeds \$1000 is imprisonment for five years and a fine for each violation. For transactions in which the “thing of value” is \$1000 or less, the penalty is imprisonment for one year and a fine.¹⁹⁵ While many gifts are designed to foster goodwill within management/labor relations, such activities must be reconsidered. The above analysis only highlights those situations in which certain transactions are prohibited and further emphasizes that a better course of action would be to cease all acceptances of gifts, payments, or anything of value from employers. Through strict adherence to a general no gift policy, union officials and membership can eliminate any guesswork involving managing the application of Section 186. While gifts can legitimately have beneficial goodwill affects, any such benefit is outweighed by the criminal conduct that could result. Therefore, to best ensure that no violation of Section 186 occurs, unions and their membership should strive to maintain independence from employers by ceasing all acceptances of gifts or anything of value.

195. 29 U.S.C. § 186(d) (2006).

