GOING FOR BROKE

LABOR'S LEGISLATIVE WISH LIST

U.S. CHAMBER OF COMMERCE
Employment Policy Division

U.S. CHAMBER OF COMMERCE

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Introduction

Since peaking at roughly 35% of the workforce in the 1950s, union membership has steadily declined, and in 2017 it stood at just 10.7%, with a mere 6.5% membership rate in the private sector.[1] Reversing this trend has been a longstanding priority for organized labor, but despite numerous efforts over the years the slide in membership has continued. An increasingly frustrated union movement has now launched its latest attempt, which involves a dramatic rewrite of the National Labor Relations Act (NLRA) and other statutes. The crux of this endeavor is two pieces of legislation: the Workplace Democracy Act (S. 2810 and H.R. 5728, 115th Congress), introduced by Sen. Bernie Sanders (I-VT) and Rep. Mark Pocan (D-WI) and the Workers' Freedom to Negotiate Act (S. 3064 and H.R. 6080, 115th Congress), introduced by Sen. Patty Murray (D-WA) and Rep. Bobby Scott (D-VA).

It is somewhat surprising that unions need to advance these bills at all. After all, for eight years organized labor had staunch allies in the Obama administration, in particular at the National Labor Relations Board (NLRB). Yet even during those years, union membership continued to fall, and the regulatory changes initiated by that administration—as one-sided as they may have been —are proving transient and subject to reversal. This fact, along with the failure of recent high-profile election campaigns against employers like Nissan, has convinced organized labor that it needs a permanent fix to its organizing woes through legislation. And this time, unlike the old Employee Free Choice Act (EFCA), which proposed a handful of targeted fixes to the NLRA, unions have decided to go for broke.

This paper highlights the major changes to the established framework of labor and employment relations that organized labor has in mind. For those who value the free enterprise system, it makes for alarming reading. Some may comfort themselves with the thought that bills like the Workplace Democracy Act and the Workers' Freedom to Negotiate Act will not pass in a Republican-controlled Congress or be signed into law by a Republican president. These were the same thoughts that led to complacency during the George W. Bush administration when EFCA was first introduced. Within a few short years, however, control of both Congress and the White House flipped, and EFCA came within a handful of Senate votes from becoming reality. It would be wise to pay attention to the words of Senate Minority Leader Chuck Schumer (D-NY), who said when discussing these proposed changes to labor law: "We are going to fight, fight, fight to get this done .... Should we ... get the majority, this will be at the top of our list[.]"[2]

Right-to-Work … for a Union

One of the most dramatic provisions in both bills is the effective annulment of the right-to-work laws that have been passed in 28 states since the inception of the Taft-Hartley Act of 1947 (also known as the Labor-Management Relations Act, or LMRA).[3]

Becoming law over the objection of President Harry Truman, the LMRA amended the NLRA in a number of ways. It limited the ability of unions to engage in secondary activities against employers who were not directly involved in a labor dispute, allowed employers to engage in and express opinions about union organizing campaigns, and created the Federal Mediation and Conciliation Service (FMCS).

Perhaps the provision of the LMRA most loathed by unions is the one that allowed states to pass "right-to-work" laws. Put simply, right-to-work laws prohibit employers and unions from adopting contracts that require membership in a union or the payment of dues as a condition of employment. In other words, employees are free to form a union, but no employee can be compelled to join or financially support it in order to keep his or her job. Since Taft-Hartley was passed, 28 states have adopted right-to-work laws, including in recent years several so-called Rust Belt states that for decades were considered union strongholds, such as Indiana, Michigan, West Virginia, and Wisconsin.

Unions and their allies deride right-to-work laws, which they claim "lower wages and benefits, weaken workplace protections, and decrease the likelihood that employers will be required to negotiate with their employees[.]"[4] Economic evidence suggests otherwise, and research by NERA Economic Consulting indicates that right-to-work laws are actually good for the economy, attracting employers and enhancing economic activity.[5] For instance, in right-to-work states private sector employment has grown at almost twice the rate of non-right-to-work states, unemployment is lower, output has grown faster, and personal income grew almost 10% more.[6]

Despite this evidence, the Workplace Democracy Act would ban right-to-work laws outright by repealing Section 14(b) of the NLRA. Not only would this provision overturn democratically enacted state laws all across the country, it would force workers to pay union dues regardless of their wishes. While the Workers' Freedom to Negotiate Act would not *directly* repeal right-to-work laws, it would require employees to pay fees for bargaining and representation regardless of right-to-work status, which effectively has the same result. Either way, both bills represent a sea change in policy that many workers would find distasteful, not to mention undemocratic.

Card Check Comeback

With the election of President Barack Obama in 2008, organized labor thought it had secured passage of the so-called Employee Free Choice Act. The central provision of EFCA was card check, under which unions could organize a workplace simply by securing the signatures of a majority of workers on individual cards instead of going through an NLRB-conducted secret ballot election. Workers could be approached to sign these cards at the workplace, at home, at restaurants, or virtually anywhere. A group of organizers could confront an individual worker seeking a signature. Compared with a secret ballot election, card check raises the obvious concern that workers could be coerced or intimidated into signing a card.

Even though Democrats held the White House and large majorities in Congress, they were unable to move EFCA due to a vigorous campaign that highlighted its many flaws. Nonetheless, unions have never given up on card check, and it still features prominently on organized labor's agenda.

The Workplace Democracy Act simply lifts the card check language straight from EFCA. It would effectively abolish the secret ballot process and allow unions to skip the time, expense, and potential risk of losing that comes with such elections. Instead, if a union were able to persuade more than 50% of workers at a facility to sign cards, they would win, and the NLRB would be *prohibited* from holding a secret ballot election—even if many workers wanted one.

Under card check, a union has no obligation to tell an employer it is launching an organizing drive, and an employer may not find out an organizing campaign is underway until ordered by the federal government to start collective bargaining. Likewise, not all workers may know about organizing efforts, and many of them may not get the opportunity to register their support or opposition to union representation.

One former organizer for the United Steelworkers testified in 2007 about the coercive tactics that come with card check. The erstwhile organizer worked for six years before leaving after he "became revolted by the ugly methods that we were encouraged to use to pressure employees into union ranks."[7] One example he provided included a senior Steelworkers union official asking him "to threaten migrant workers by telling them they would be reported to federal immigration officials if they refused to sign check-off cards during a Tennessee organizing drive," which he called "the last in a long list of abuses I had observed as a union organizer." With the goal of organizing by any means necessary, workers who did not voice support for the union would be subjected to harassment, and "visits to [their] homes … were used to frustrate them and put them in fear of what might happen to them, their family, or homes if they didn't change their minds about the union."

Perhaps recognizing that abolishing secret ballots is not particularly popular, the Workers' Freedom to Negotiate Act takes a different approach to helping unions win recognition. Ironically, it would establish a process under which the government would simply order employers to negotiate with unions regardless of an election outcome.

Under Title I, the legislation bans employer involvement in a campaign by stating that "No employer shall have standing as a party, or to intervene, in a representation proceeding… ."[8] Later in that same section, it states that if a union loses a secret ballot election, and the NLRB finds that the employer has "interfered" with a "fair election" (which because of the earlier language could mean any involvement at all), "the Board shall, without ordering a new or rerun election, certify the labor organization … and issue an order requiring the employer to bargain with the labor organization[.]"[9] The only caveat would be that the union must have secured a majority of cards signed by workers sometime within the year preceding the election. As discussed, this should not prove difficult for a determined union. The bottom line is that under both bills, the card check process would displace a secret ballot, and unions would have an almost certain pathway to recognition.

Government-Dictated Contracts

Abolishing secret ballot elections may have been the part of EFCA that gathered the most attention, but other parts of that bill were equally harmful—in particular, provisions establishing mandatory, binding arbitration in the wake of union certification. The Workplace Democracy Act and the Workers' Freedom to Negotiate Act both include language on binding arbitration, although they differ slightly in their mechanics.

The Workplace Democracy Act again lifts its language straight from EFCA. Under the bill, an employer must commence collective bargaining with a newly formed union within 10 days. Within 90 days, the parties would be expected to complete a first contract. If they fail to do so, either side may refer the matter to the Federal Mediation and Conciliation Service. The FMCS then would have exactly 30 days from the date of the request to strike a deal. Should that effort fail (and there would be no incentive for a union to give up any of their demands), the FMCS would be required to refer the matter to a federal arbitration panel, which would hand down a contract that would be binding on both sides for two years. That scenario essentially puts the government in the business of dictating the terms of a collective bargaining agreement—whether the employees affected by the outcome like it or not. The Workers' Freedom to Negotiate Act largely follows the same process, except that it specifies the makeup of the arbitration panel, which is to consist of one member chosen by the employer, one chosen by the union, and one neutral member agreed upon by both parties. A majority of this panel would then dictate the terms of the contract.

However, the Workers' Freedom to Negotiate Act adds a new wrinkle. The terms of the contract are to be based on the following criteria:

> "the employer's financial status and prospects
>
> "the size and type of the employer's operations and business
>
> "the employees' cost of living
>
> "the employees' ability to sustain themselves, their families, and their dependents on the wages they earn from the employer; and
>
> "the wages and benefits other employers in the same business provide their employees."[10]

Needless to say, these requirements would add a great deal of uncertainty and subjectivity into the arbitration process. The result, though, would be the same—a binding contract driven by union goals over which workers would have no say.

Both of these mandatory arbitration proposals also have the obvious flaw of forcing the complex negotiation of a first contract into a compressed time frame. And far from leading to productive bargaining, binding arbitration would likely cause just the opposite. If a union feels it is losing the edge in contract talks, it has every incentive to stonewall and wait for an arbitration panel to hand down a contract because regardless of the result, a union would rather have a bad contract than no contract.

Furthermore, from a worker's perspective, binding arbitration would deny employees the ability to vote on the pay, benefits, and working conditions in their new contract. Worse yet, an employer could be stuck with a contract that is completely incompatible with its cost structure and business model, and it would have to try and survive under that contract for two years.

The use of mandatory binding arbitration in the public sector already has illustrated how manifestly unwise this policy would be in the private sector. Indeed, binding arbitration has wreaked havoc on numerous states and municipalities—in some cases causing bankruptcies—due to unrealistic decisions by arbitrators with no skin in the game or an understanding of how the employer operates. Cities such as Vallejo, California; Detroit, Michigan; and Scranton, Pennsylvania, have all witnessed the ill effects of binding arbitration in recent years. Ranging from inflated salary increases and cost-of-living adjustments to soaring pension costs, mandatory arbitration has upended many fiscal coffers in the public sector across the country.[11] In the private sector, there is ample reason to believe that the same practice would lead to similar results, except that employers could not turn to taxpayers for relief. They would simply go under.

Ambush Elections

During the Obama administration, the NLRB took the relatively unusual step of changing policy through the rulemaking process. One of these regulations, dealing with election procedures, is known as the "ambush" rule because it dramatically shortens the time period for union representation elections. It became effective on April 14, 2015.[12]

The rule makes it difficult for workers to get full and complete information about a critical workplace decision. The rule eliminates the minimum 25-day period traditionally required before an election can be held, and in some cases a representation election can happen as quickly as 10 days after a petition is filed. Given that turnaround time, the rule makes it nearly impossible for many employers to comply with its requirements, much less find legal representation familiar with this area of the law. This accelerated timeline and various changes to what issues can be challenged (and when) were designed to undermine employers' due process rights and prevent them from giving employees their views on the impact of unionization.

The rule also requires employers to disclose to union organizers "a list of employees with contact information, including … modern forms of contact information such as personal email addresses and phone numbers if the employer has such contact information in its possession. The list should also include shifts, job classifications, and work locations."[13] Employees have no ability to prevent this personal

contact information from being shared, regardless of privacy concerns they may have or whether they wish to be contacted by a union organizer.

Concerns over the ambush election rule have caused the current NLRB majority to initiate a process to repeal it. Perhaps as a result, the Workers' Freedom to Negotiate Act seeks to codify several of its components.

First, the bill would require pre-election hearings to begin within 8 days. Second, it would require post-election hearings to take place no later than 14 days after the filing of any objections to an election. And, finally, it would maintain the requirement of the ambush rule that employers release personal information about their employees, including "personal landline and mobile phone numbers, and work and personal email addresses"—all within two days, an unworkably short deadline even if this disclosure were appropriate.[14]

Expanding Employment Liability

Undermining the Use of Independent Contractors: The ABC Test

Alleged misclassification of employees as independent contractors has been an area of concern for organized labor for some time, perhaps because independent contractors are not subject to unionization. The Workplace Democracy Act and Workers' Freedom to Negotiate Act both look to address this concern by incorporating into federal law California's new "ABC" test for determining independent contractor status.

The ABC test derives its name from the three factors that all must be satisfied for an individual to be considered an independent contractor. Several states use an ABC test, and it typically includes the following language:

> A) The worker is free from control or direction in the performance of the work under the contract of service and in fact
>
> B) The service is performed either outside the usual course of the business for which it is performed or is performed outside of all places of business of the enterprise for which it is performed; and
>
> C) The individual is customarily engaged in an independent trade, occupation, profession, or business.

In April 2018, the California Supreme Court adopted a stringent new version of the ABC test in a case known as *Dynamex*. In particular, the decision modified factor B, making it much more difficult to classify an individual as an independent contractor instead of an employee. The factors in the California test to be classified as an independent contractor are as follows:

> A) The worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact
>
> B) The worker performs work that is outside the usual course of the hiring entity's business; and
>
> C) The worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed.[15]

California's new test has raised significant concerns for so-called gig economy companies, information technology firms, transportation businesses, and a host of other employers who utilize independent contractors. Of course, as potentially damaging as it may be, California's test still only applies to workers in that state. To ensure that the new standard is imposed nationally, the Workplace Democracy Act and the Workers' Freedom to Negotiate Act include California's language almost verbatim.

Increased Joint Employer Liability

One of the most controversial policies of the Obama-era NLRB was the Board's effort to expand joint employer liability. To that end, on August 27, 2015, the NLRB issued a decision in a case called *Browning-Ferris* that rewrote the definition of "joint-

employer" under the NLRA.[16] Both the Workplace Democracy Act and the Workers' Freedom to Negotiate Act would codify the NLRB's *Browning-Ferris* standard for joint employment.

In *Browning-Ferris*, the NLRB established a sweeping new standard for joint employment based on "indirect" control or even "potential" control over the terms and conditions of employment—exposing all manner of businesses to possible legal liability. Businesses under threat from this policy include many franchises (e.g., restaurants, dry cleaners, fitness centers, convenience stores, tax preparers, auto maintenance, hair salons, or hotels); companies that use subcontractors, such as construction, janitorial services, landscaping, accounting, or shipping firms; and companies that are the major purchaser of goods or services from a particular vendor or supplier. Put simply, under *Browning-Ferris*, which as of October 2018 is still in effect, the NLRB can hold many businesses liable for workplaces they neither manage nor control and for workers they do not employ. Unions can use the *Browning-Ferris* standard to organize national franchise chains under a single organizing agreement rather than having to go store by store.

The drafters' insistence on including the *Browning-Ferris* standard in both bills is likely due to two factors. First, in 2012, the Service Employees International Union (SEIU) launched the Fight for $15 campaign, a highly coordinated and determined effort to unionize the fast food industry. The SEIU has spent a minimum of $83 million on this effort as of October 2018, mostly to support flashy protests.[17] Actually unionizing fast food workers (to date the campaign appears to have netted zero new members), however, would be impractical without an expanded joint employer standard firmly in place. Without it, the SEIU will have wasted its money.

Second, the Republican majority on the NLRB has made it clear that it takes a dim view of the legality of *Browning-Ferris*, and, in fact, the Board has launched a rulemaking process that is likely to restore the traditional view of joint employment based on direct and immediate control. Such a rule, though, would be superseded by a statutory change.

Unfair Labor Practices: Liberating Labor, Hamstringing Employers

When Congress passed the NLRA in 1935, its aim was "to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred."[18] To that end, it created the framework through which employees and employers would engage with each other. A core aspect of that framework was the determination that certain activities would constitute unfair labor practices to be adjudicated by the NLRB. The NLRA applies to both employers and unions, and each of them are prohibited from engaging in unfair labor practices as set forth in the law. Unsurprisingly, the Workplace Democracy Act and the Workers' Freedom to Negotiate Act would allow unions to engage in previously unlawful activities while simultaneously expanding the list of unfair labor practices for employers and imposing significant financial penalties on them for violations.

Intermittent Strikes

Labor unions have various tools to apply pressure on employers, and principal among them are strikes and picketing. The concept is simple enough—employees involved in a labor dispute withhold their labor and express their views with signs and the occasional inflatable rat to generate public awareness and pressure their employers to accede to their demands. By the mid-1930s—the peak of strike activity in the U.S.—there were nearly 5,000 in a single year.[19]

The NLRA defines strikes as a "concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective-bargaining agreement) and any concerted slowdown or other concerted interruption of operations by employees."[20] In general, the NLRA states that employers are prohibited from disciplining employees for exercising their right to participate in a lawful strike.[21]

However, the NLRA does not provide *carte blanche* permission for unions to engage in strikes, but, instead, places some limitations on what is lawful. As the NLRB states, "[a] strike may be unlawful

because an object, or purpose, of the strike is unlawful," and the misconduct of strikers likewise could render a strike unlawful.[22] In addition, the NLRB has traditionally found that short-term—or intermittent—strikes are unlawful and that workers engaged in them do not enjoy the protection of the NLRA. The NLRB's former general counsel, Frederick L. Feinstein, summarized this position in 1998, observing that, "a refusal to work will be considered unprotected intermittent strike activity 'when the evidence demonstrates that the stoppage is part of a plan or pattern of intermittent action which is inconsistent with a genuine strike or genuine performance by employees of the work normally expected of them by the employer.'"[23]

Notwithstanding these limitations, in recent years some labor unions and the front groups they support have increased their use of short-term walkouts. Rather than engaging in the planned, long-term strikes that characterized the more heavily unionized workforce of the past, organized labor has turned to encouraging small groups of employees to walk out of work unannounced in order to maximize disruption of an employer's operations. A notable example includes the Fight for $15's series of walkouts and raucous demonstrations that this organization has promoted at fast food locations nationwide since 2012 although, in fact, the impact of these activities has been minimal.

The NLRB's standard for evaluating these types of strikes, however, remains unclear. During the Obama administration, the agency sought to establish a precedent that they are lawful. To that end, the NLRB's Office of General Counsel in 2016 issued a memorandum and "model" brief to regional directors in case they confronted a case involving such intermittent strikes.[24] The memo asked the regional directors to include the language from the model brief in their arguments before administrative law judges and/or the Board itself encouraging the NLRB to "clarify its jurisprudence on intermittent and partial strikes and extend the [NLRA's] protection to multiple strikes over the same labor dispute, except in certain limited circumstances."[25]

Should the Workers' Freedom to Negotiate Act become law, that protection would be codified. The bill would amend the NLRA to state that "the duration, scope, frequency, or intermittence of any strike or strikes shall not render such strike or strikes unprotected or prohibited."[26] Thus, employers confronting unpredictable, repeated walkouts would have no legal recourse, and indeed, were such an employer to discipline an employee for participating in these strikes, it would be the employer who would face legal jeopardy.

Permanent Replacements

The NLRA did not include a provision relating to the permanent replacement of employees engaged in an economic strike (e.g., to win higher wages as opposed to recognition or to remedy unfair labor practices), a practice that was in place at the time the law was passed in 1935 and permitted by the National Labor Board, the NLRB's predecessor. Then, in 1938, a Supreme Court decision declared that employers may hire permanent replacements for striking workers in order to keep their businesses running—something unions have long detested and the Workers' Freedom to Negotiate Act would end.

The case, *NLRB v. Mackay Radio & Telegraph Co.*,[27] involved a radio company locked in a negotiation with the American Radio Telegraphists Association, which represented its employees. The employees at Mackay authorized a strike in October 1935, but among the various locations involved, only the company's transmission office in San Francisco saw a major walkout. *Mackay* flew in 11 replacement workers from other locations to fill the gap, and after all was said and done, the company refused to rehire 4 of the 11 striking workers who had been replaced.

In a unanimous decision, the Supreme Court found that Mackay had not engaged in an unfair labor practice by declining to rehire the 4 workers. The decision observed that notwithstanding the NLRA's protections for employees, "it does not follow that an employer, guilty of no act denounced by the statute, has lost the right to protect and continue his business by supplying places left vacant by strikers. And he is not bound to discharge those hired to fill the places of strikers, upon the election of the latter to resume their employment, in order to create places for them."[28] That determination has been the object of derision by

labor unions ever since, and they have long sought to reverse it. During the Obama administration, the NLRB took at least a partial step toward making it more difficult for employers to hire permanent replacement workers. In *American Baptist Homes of The West d/b/a Piedmont Gardens* (Piedmont Gardens)[29] the Board ruled against the employer for permanently replacing dozens of its striking employees. Piedmont Gardens and the Service Employees International Union, United Healthcare Workers–West had been engaged in contract negotiations for several months, during which time Piedmont Gardens contracted with a staffing agency and ultimately replaced 38 striking employees. The NLRB found that action unlawful because the employer had an alleged "independent unlawful purpose" of wanting to discourage future strikes, even though the replacements might have otherwise been legal.

The Workers' Freedom to Negotiate Act would amend the NLRA to eviscerate the protection for employers that the *Mackay* doctrine has provided for 80 years. It would declare that hiring permanent replacement workers for employees on strike would constitute an unfair labor practice and thus force employers to leave positions unfilled and rehire striking employees regardless of the impact on the business.

Secondary Boycotts

In the NLRA, Congress observed that "certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest... ."[30] As a result, the NLRA declared that strikes by labor organizations would be unlawful when they are used to further certain purposes including compelling:

- Membership in an employer or labor organization.
- A so-called hot cargo agreement.
- Recognition of an uncertified union.
- Recognition of a union if another union has been certified.
- Assignment of certain work to certain employees.[31]

These provisions prohibit so-called secondary boycotts. The term secondary boycott is imprecise, but it generally means activities that target third-party employers with no direct connection to a labor dispute a union may have with a "primary" employer.[32]

In the early 20th century labor movement, unions wantonly added secondary boycotts to their arsenal of tactics. These highly coercive actions focused on companies that did business with the union's primary target. For example, if a union had a dispute with a furniture manufacturer, a secondary boycott could attack the retail stores that sold the furniture or the trucking companies that shipped products from the factory to the stores. The hope was that these companies would cease doing business with the primary target, making it more likely to give in, or that they would demand that the target surrender to the union simply to save their own businesses.

Numerous variations and examples of these activities proliferated until Congress passed the Taft-Hartley Act of 1947, which declared such actions illegal. Unions have denounced Taft-Hartley since its passage, and both the Workplace Democracy Act and the Workers' Freedom to Negotiate Act would strip away the prohibition against secondary boycotts. In doing so, the proposals would again allow unions to target consumers and businesses having nothing to do with a labor dispute. The result would be a license for unions to harass, intimidate, and bully almost any business at any time.

Arbitration Agreements: A New Unlawful Labor Practice

One of the more arcane areas of focus during the Obama era was the NLRB's attempt to outlaw the use of mandatory arbitration agreements prohibiting class action lawsuits in employment contracts. Under the Obama NLRB's view of the law, such arbitration clauses constituted a violation of Section 7 of the NLRA, which guarantees employees the right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection."[33]

Perhaps the most noteworthy case dealing with this issue was the NLRB's ruling in *D.R. Horton*, in which

the Board first articulated its dubious interpretation.[34] In that case, the Board held that an employer may not require employees to sign arbitration agreements prohibiting them from pursuing class action lawsuits because class actions constitute "protected concerted activity." Ultimately, the Supreme Court was forced to weigh in on the issue in a related case called *Epic Systems Corp. v. Lewis.* in which the Court repudiated the NLRB's theory and found that the NLRA did not preempt the Federal Arbitration Act (FAA).[35] Indeed, the Court found that arbitration agreements must be enforced according to their terms, even as to alleged violations of other federal laws, unless the FAA's mandate has been "overridden by a contrary congressional command."[36]

The Workers' Freedom to Negotiate Act confronts the Supreme Court's ruling head on and declares that "it shall be an unfair labor practice … for any employer to enter into any contract or agreement … whereby an employee … undertakes or promises not to pursue, bring, join, litigate, or support any kind of collective legal claim … in any forum that, but for such contract or agreement, is of competent jurisdiction."[37] This bill also would prohibit federal contractors from using arbitration to handle certain claims without the voluntary consent of the employee or independent contractor involved after a dispute arises.

Ending 'Advice' for Employers

The Workplace Democracy Act and the Workers' Freedom to Negotiate Act both would reinstate a relatively obscure, but harmful, Obama administration regulatory effort known as the "persuader rule." The persuader rule sought to deter employers from working with consultants during organizing drives by mandating onerous reporting requirements on both entities.

The persuader rule would have significantly changed the Department of Labor's (DOL's) interpretation of the Labor-Management Reporting and Disclosure Act (LMRDA) as it relates to reporting requirements for employers and labor relations consultants. Under Section 203 of the LMRDA, these consultants and the businesses that hire them are required to report details about their arrangements to the Office of Labor-Management Standards (OLMS), the agency within the DOL that enforces the LMRDA.[38] However, the LMRDA expressly exempts reporting for "advice" given by labor consultants, and for decades, OLMS interpreted this so-called advice exemption to mean that a report is not required for arrangements between employers and consultants engaged to assist with an organizing campaign if the consultant does not directly contact employees.

Labor activists have consistently maintained that the advice exemption should be curtailed, and, in fact, issuing the persuader rule was one of the AFL-CIO's suggestions for the Obama administration's transition team back in 2009, with the rule change listed as one of the "High +" priorities.[39] In early 2016, a final rule was released that met the AFL-CIO's objectives.[40]

The rule, however, was challenged by business groups and overturned in court, with a federal judge writing that it was "not merely fuzzy around the edges …. [it] is defective to its core."[41] Later that same year, the same court issued a permanent, nationwide injunction against it, and the Trump DOL subsequently rescinded the persuader rule.[42]

Both bills would reinstate the rule. However, the Workplace Democracy Act goes further. Under the bill, an employer that distributes negative information about a union to workers within seven days of an election, regardless of whether a "persuader" helped develop it, would have to disclose that information to the union and the secretary of labor along with the names and contact details of any employees who received it. In addition, any person who wished to act as a consultant to an employer would have to register with the DOL and submit to a background check. The department would have the authority to reject the registration, which could become a regular occurrence depending on the philosophy of the secretary of labor. The end result would be less information provided to employees about the critical choice of whether to join a union.

Financial Penalties

The Workplace Democracy Act and the Workers' Freedom to Negotiate Act also dramatically increase penalties on employers—but not on unions—for alleged violations of the law. For its part, the Workplace Democracy Act would impose a civil penalty not to exceed $10,000 for failing to comply with the union campaign consultant reporting requirements, and it would impose a civil penalty of $250 per day on campaign consultants for noncompliance with their reporting requirements.

The Workers' Freedom to Negotiate Act likewise imposes serious financial penalties on employers for alleged unfair labor practices. Specifically, it imposes a civil penalty up to $50,000 for each violation of the NLRA and raises that to $100,000 for an employer found to have committed an unfair labor practice within the preceding five years. Moreover, the bill provides financial awards to employees who have been discharged or suffered "other serious economic harm" for engaging in protected activities. In such cases, the bill would require the NLRB to award "back pay without any reduction (including any reduction based on the employee's interim earnings or failure to earn interim earnings), front pay (when appropriate), consequential damages, and an additional amount as liquidated damages equal to two times the amount of damages awarded."[43]

In addition, the Workers' Freedom to Negotiate Act eliminates the need for the NLRB to seek enforcement of its orders in federal court, as the NLRA currently requires. Instead, the bill would amend the NLRA to state that "[a]ny person who fails or neglects to obey an order of the Board **shall** forfeit and pay to the Board a civil penalty of not more than $10,000 for each violation, which shall accrue to the Board and may be recovered in a civil action" (emphasis added) in federal court.[44] Moreover, each separate violation of an NLRB order would become a separate offense, and every day that a person or business fails to obey a final NLRB order would constitute a separate offense in and of itself—in other words, the penalty would increase up to $10,000 per day. Employers attempting to appeal their case to a federal court would also face an uphill battle, as the bill states that "findings of the Board with respect to questions of fact … shall be conclusive," absent extraordinary circumstances.[45]

Employees alleging violations of their right to engage in union activities also would be given the right to file a civil lawsuit in federal court against their employers "in addition to or in lieu of filing [an unfair labor practice] charge" with the NLRB.[46] Like the remedies provided via the Board, such a court case could result in back pay, front pay (where appropriate), consequential damages, and liquidated damages double the total amount of the first three remedies. It also could result in punitive damages and payment of attorneys' fees. The bill also requires these awards to employees regardless of their legal status with respect to immigration.

Finally, the civil penalties imposed under the Workers' Freedom to Negotiate Act would extend not only to the employer but also to officers and directors of the employer. The bill would add personal liability to "any director or officer of the employer who directed or committed the violation, *had established a policy that led to such a violation, or had actual or constructive knowledge of and the authority to prevent the violation and failed to prevent the violation*" (emphasis added).[47] While the penalties for officers and directors would not be automatic, it would place the power to impose them in the hands of the NLRB, which is a worrisome prospect given the hostile stance the Board took toward employers during the Obama years. Should another anti-employer majority take over in the future, the potential to abuse such power would be substantial.

Mandatory Neutrality and Blacklisting

Progressives have frequently used government contractors as vehicles to impose their policy preferences, and the Workers' Freedom to Negotiate Act continues this practice. The bill includes a number of provisions harmful to those who provide goods and services to the federal government.

First, the bill would restrict the ability of contractors to speak to their own workers when it comes to unionization. It imposes a "neutrality" provision that prohibits contractors from using federal funds to

"engage in activities undertaken to persuade employees, of any entity, to exercise or not to exercise … the right to organize and bargain collectively[.]"[48] For many government contractors, federal funds are their only source of income. This language renders federal contractors powerless to present their views on unionization to their employees, which is precisely the intent of the legislation.

The proposed legislation also would codify the so-called blacklisting regulation for federal contractors issued under the Obama administration. In July 2014, President Obama signed the Fair Pay and Safe Workplaces Executive Order (E.O. 13673), which had more to do with helping unions than the title would suggest.[49]

The blacklisting regulation created a virtual "guilty until proven innocent" process on federal contractors and subcontractors, as well as any business hoping to land a government contract. The regulation required these businesses to report "violations" of 14 different labor and employment laws and executive orders (as well as equivalent state laws) that were defined to include even minor citations and unproven allegations that were still being contested.

As the blacklisting moniker implies, the Fair Pay and Safe Workplaces executive order and regulations threatened contractors with the virtual death sentence of debarment. This handed labor unions a powerful tool to coerce employers into offering organizing concessions to avoid being charged with labor law violations that could destroy their businesses. As one organization, the Teamsters for a Democratic Union (TDU),[50] noted on its blog, the regulation gave unions "unprecedented new leverage against companies and institutions that contract with the federal government."[51] The rule, TDU observed, would "significantly increase [union] bargaining power by the simple expedient of filing … charges with the NLRB, OSHA, the EEOC, or the DOL."

The regulations implementing E.O. 13673 were invalidated by Congress under the Congressional Review Act, and President Trump rescinded the blacklisting executive order. The Workers' Freedom to Negotiate Act would require the government to reissue the final rule. For businesses that have, or hope to have, work with the government, the blacklisting rule would open the door for what amounts to little more than legalized extortion.

Conclusion

The Workers' Freedom to Negotiate Act and the Workplace Democracy Act represent aggressive efforts to rewrite labor law. They are intended to transform the organizing process from one in which both employers and unions have a fair opportunity to make their cases to employees, to one in which the employer is shut out and the union is given significant advantages. They include virtually every bad idea in labor law from previous decades, and, unfortunately, Democratic leadership in Congress seems to have bought in.

The bills are unlikely to become law anytime before the 2020 elections, but that does not mean they should be ignored. Solid bipartisan opposition is needed to ensure that, when the time comes, nothing resembling these bills can pass Congress and wind up on the desk of a president who would sign either of them. It was only a sustained and vigorous campaign that defeated EFCA between 2007 and 2010. With the introduction of the Workers' Freedom to Negotiate Act and the Workplace Democracy Act, the stakes are even higher.

Endnotes

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