



March 1, 2007

Legislative Digest

H.R. 800 – Employee Free Choice Act of 2007

Floor Situation

H.R. 800 is being considered on the floor under a structured rule that provides one hour of debate equally divided and controlled by the Chairman and Ranking Member of the Committee on Education and Labor.

The rule waives all points of order against its consideration except for clause 9 (earmark disclosure requirements) and 10 (“PAYGO”) of Rule XXI and provides one motion to recommit with or without instructions.

The rule also makes in order three amendments (see Summaries of Amendments Made in Order by the Rule).

H.R. 800 was introduced by Representative George Miller (D-CA) on February 5, 2007. On February 14, 2007, the Education and Labor Committee voted to favorably report the bill as amended to the House by a vote of 26 to 19. It is expected to be considered on the floor of the House of Representatives on March 1, 2007.

Summary

H.R. 800 has three components:

- **Eliminates secret ballot elections for union certification.** Under H.R. 800, the National Labor Relations Board (NLRB) is directed to certify a union as the employees’ bargaining representative if a majority of workers have approved a union via check card. This eliminates the option for employees to vote on whether or not to unionize as currently protected under law. (Section 2)
- **Mandatory Collective Bargaining.** Provides that if an employer and certified union are unable to reach an agreement within 90 days, the dispute may be referred to the Federal Mediation and Conciliation Services (FMCS) for mediation. After a 30 day period, if mediation does not succeed in an agreement, the dispute is referred to arbitration to be binding on the parties for two years.

**Note: Under current law, submitting disputes to arbitration is voluntary, and neither side can force it on the other. (Section 3)*

➤ **New Penalties for Employers:**

1. Requires NLRB to seek mandatory injunctive relief if an employer violates the National Labor Relations Act (NLRA) under certain conditions.
2. Requires the employer to pay three times back pay if it is determined that an employee was improperly discharged during an organization drive.
3. Requires NLRB to impose fines of up to \$20,000 against employers who willfully or repeatedly violate employees' rights during an organization drive.

**Note: H.R. 800 does not impose any increased penalties on unions for violations of the NLRA, just employers. Representative David Davis offered an amendment in committee to apply the penalties equally to employers and employees who violate the NLRA. The amendment was defeated in committee with all Democrats voting no. (Section 4)*

Background

Under the NLRA, a union drive is initiated by petition. After it is shown by petition that at least 30 percent of employees want recognition of a union for bargaining purposes, the National Labor Relation Board (NLRB) establishes a secret ballot election with a majority vote determining the winner. The average time it takes to hold an initial election is 39 days. An employer is also free to recognize a union once a majority of employees have signaled their support via check card, but the employer is not required to do so.

Two competing bills propose to change current law with respect to secret ballot elections for union recognition.

The first piece of legislation, the Secret Ballot Protection Act (H.R. 866), was authored by the late Representative Charlie Norwood. H.R. 866 would require a secret ballot election before a union is certified and make it an unfair labor practice for either an employer to recognize a union not selected via secret ballot or for a union to attempt to bargain on behalf of employees that have not recognized it via a secret ballot election. The Secret Ballot Protection Act was also introduced in the 109th Congress (H.R. 874) and the 108th Congress (H.R. 4343).

The second piece of legislation is H.R. 800 which substitutes a card check process for secret ballot elections.

Whether a secret ballot election or a card check is the most appropriate vehicle for determining union recognition hinges on two policy questions: Which process is fairer to the participants in the process? What is the impact on the level of unionization?

Fair Process

The main argument proponents of secret ballot elections make is that it prevents an employee from being intimidated into signaling their support for a union. It is an argument that even some supporters of the Employee Free Choice Act have made.

For example, in 2001, 16 Democratic Members, including Representative George Miller, wrote concerning Mexican labor law: “We understand that the secret ballot is allowed for, but not required, by Mexican labor law. However, we feel that the secret ballot is absolutely necessary in order to ensure that workers are not intimidated into voting for a union they might not otherwise choose.”

Conversely, the main argument proponents of the Employee Free Choice Act make against allowing secret ballot elections is that an employer can influence the results of a secret ballot election by making the case against unionization to their employees.

The NLRA does allow employers to actively campaign against union recognition just as organizers can campaign in favor of it. However, there are several things an employer cannot legally do to influence the outcome of an election. An employer cannot threaten employees with the loss of their jobs should they vote to join a union, nor can an employer discriminate based on an employee’s participation in union organizing activities. An employer cannot even try to influence the results of an election by raising wages. A 2004 Zogby poll of union members nationwide shows that 71 percent of union members believe the current secret ballot process is fair.

There are other significant differences between a secret ballot election and a card check process. In a secret ballot election the vote of an individual is by definition not public, whereas in a card check process an individual’s support or opposition has to be declared openly. In a secret ballot election all workers get to vote for their position, but in a check card process many workers may not even have a chance to express their position on union recognition before the process is finalized.

The courts have also noted the advantages of a secret ballot over a card check process in numerous decisions, as noted in the Republican Views from the Committee Report for H.R. 800:

“An election is the preferred method of determining the choice by employees of a collective bargaining representative.” *United Services for the Handicapped v. NLRB*, 678 F.2d 661, 664 (6th Cir. 1982).

“Workers sometimes sign union authorization cards not because they intend to vote for the union in the election but to avoid offending the

person who asks them to sign, often a fellow worker, or simply to get the person off their back, since signing commits the worker to nothing (except that if enough workers sign, the employer may decide to recognize the union without an election).” *NLRB v. Village IX, Inc.*, 723 F.2d 1360, 1371 (7th Cir. 1983).

Level of Unionization

According to CRS, unions have lost between 45 and 60 percent of secret ballot elections conducted by the NLRB over the past decade.

Union organizers believe it is easier to achieve certification under a check card than a secret ballot election. AFL-CIO President John Sweeney is quoted in the December 8, 2006 Washington Post as saying: "The Employee Free Choice Act is the most important work we'll be doing, because it's a key to succeeding on everything else."

Committee Amendments

Several amendments were offered by Republicans during consideration of H.R. 800. All of them were rejected with unanimous Democratic opposition. These amendments included:

- **Secret Ballot Protection Act (Amendment in Nature of a Substitute).** Ranking Member McKeon offered an amendment which substituted the text of the Secret Ballot Protection Act (H.R. 866) in place of H.R. 800.

Roll Call Vote: Defeated 19 to 27

- **Check card decertification.** Representative Kline offered an amendment to allow a union to be decertified by a check card process.

Roll Call Vote: Defeated 19 to 28

- **NLRB oversight.** Dr. Boustany offered an amendment to make a check card valid only if it is signed in the presence of an NLRB representative. The intent of this amendment is to prevent undue coercion or pressure from causing an employee to sign a check card that the worker would not sign in a neutral environment.

Roll Call Vote: Defeated 19 to 28

- **Applying penalties to employers *and* unions.** Representative David Davis offered an amendment to apply the bill's penalties for National Labor Relations Act (NLRA) violations to unions as well, instead of to just employers.

Roll Call Vote: Defeated 20 to 27

- **Striking.** Representative Walberg offered an amendment to prevent a strike unless workers first have an opportunity to vote on management's best offer.

Roll Call Vote: Defeated 19 to 28

- **Preventing harassment.** Representative Foxx offered an amendment allowing workers to notify a union that they do not wish to be contacted about a recognition drive and to require a union to honor the worker's request.

Roll Call Vote: Defeated 18 to 25

- **Preventing a union from ignoring a worker's request to have a check card returned.** Dr. Price offered an amendment to make it an unfair labor practice for a union to count a check card that a worker asked be returned as part of a majority for recognition or to not return a check card upon a worker's request within five days.

Roll Call Vote: Defeated 19 to 26

- **Eligibility for signing a check card.** Representative Ehlers offered an amendment to prevent a worker from signing a check card unless the worker has been employed for at least 180 days.

Roll Call Vote: Defeated 18 to 26

- **Penalties for violence by union organizers.** Representative Wilson of South Carolina offered an amendment to prevent the NLRB from ordering the reinstatement of an employee who has engaged in union violence. This amendment would also have required the decertification of any union that encourages violence.

Roll Call Vote: Defeated 18 to 26

- **Right to Work.** Representative Wilson of South Carolina offered an amendment to prevent a worker from having to join a union in order to keep a job.

Roll Call Vote: Defeated 16 to 26

- **Protecting immigration laws.** Representative Marchant offered an amendment preventing a check card from being considered valid unless it is signed by a legal resident of the United States.

Roll Call Vote: Defeated 17 to 26

- **Protecting Tribal Sovereignty.** Representative Kline offered an amendment to not extend the check card requirement to Indian tribes, just as it is not extended to state and local governments.

Roll Call Vote: Defeated 17 to 27

- **Striking the Collective Bargaining Provisions.** Representative Biggert offered an amendment to strike Section 3 of the bill, the section that provides a process leading to binding arbitration.

Roll Call Vote: Defeated 19 to 26

CBO Estimate

The Congressional Budget Office projects a slight increase in federal revenue upon enactment of H.R. 800 (as a result of the increased fines on employers in Section 4 of the legislation), but the estimated amount is not expected to exceed \$500,000 annually.

Administration Position

The President has stated his intent to veto this legislation.

Summaries of Amendments Made in Order by the Rule

Rep. King (R-IA) may offer an amendment (#14). The amendment adds a section to the bill to amend the National Labor Relations Act to discourage the practice of “salting.” This amendment will change the NLRA to ensure that a company’s workers are employed for the sole benefit of that company.

Rep. Foxx (R-NC) may offer an amendment (#7). This amendment requires the National Labor Relations Board to promulgate standards and a model notice for an employer to put him or herself on a “do not call or contact” list to avoid union solicitation.

Rep. McKeon (R-CA) may offer an Amendment in the Nature of a Substitute (#4). This amendment would strike the underlying text and insert in its place the text of H.R. 866, the Secret Ballot Protection Act. The amendment would prohibit the recognition of unions via check card, and provide that a union may only be recognized and certified after a secret ballot election conducted by the NLRB.

Staff Contact

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