



SENATE REPUBLICAN

POLICY COMMITTEE

Legislative Notice

No. 19

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H.R. 800 – “Employee Free Choice Act of 2007” (the Labor Union Card-Check Bill)

Calendar No. 66

H.R. 800 was read a second time and placed on the Senate Calendar on March 2.

Noteworthy

- Senate Majority Leader Harry Reid filed a motion to proceed to H.R. 800, the labor union “card check” bill on June 19. It is uncertain at this time when the Senate will vote on the cloture motion as there are other cloture petitions in front of the one regarding H.R. 800.
- The bill passed the House on March 1 by a mostly party-line vote of 241 to 185. The Senate Health, Education, Labor and Pensions Committee held a hearing on its bill (S. 1041) on March 27. S. 1041 was introduced by Senator Kennedy with 46 cosponsors (including no Republicans). The Kennedy bill is still pending in committee.
- H.R. 800 seeks to displace the current-law secret-ballot election overseen by the federal National Labor Relations Board with the use of the so-called “card check” process. Under this process, a labor union is recognized as the representative of workers once it presents authorization cards signed by a majority of workers. H.R. 800 also seeks to impose binding arbitration after only 3 months from when the union is certified as the worker representative. Current law permits the employer and union to deliberate the initial contract, with a vote by employees to ratify. Under the bill, binding arbitration would allow an arbitrator to decide the initial contract based on his or her opinions of what is prudent and fair, rather than having the employer and the union deliberate the contract on their own. Additionally, H.R. 800 would also increase penalties imposed on employers for unfair labor practices.
- Supporters of H.R. 800 include the AFL-CIO, Service Employees International Union (SEIU), Interfaith Worker Justice, and the Democratic National Committee. Opponents include the Associated Builders and Contractors, U.S. Chamber of Commerce, National Retail Federation and American Hotel and Lodging Association.

Highlights

The Majority Leader filed a motion to proceed to H.R. 800, the so-called “Employee Free Choice Act” (EFCA), on June 19. At press time, it is uncertain as to when the Senate will vote on the motion to proceed to H.R. 800 since there are other cloture motions in front of the one regarding H.R. 800.

The bill seeks to require recognition of a labor union as the representative of workers once it presents authorization cards signed by a majority of workers. The use of this so-called “card check” process would displace the traditional secret-ballot election overseen by the federal National Labor Relations Board. H.R. 800 also seeks to impose binding arbitration after only three months from when the union is certified as the worker representative. Under the bill, binding arbitration would allow an arbitrator to decide the initial collective bargaining agreement based on his or her opinions of what is prudent and fair, rather than having the employer and union deliberate the contract on their own. Current law leaves it to those most impacted – the employer and union, with employee ratification – to deliberate the initial collective bargaining agreement. The decision of the arbitrator would be valid for two years. Additionally, EFCA would also increase penalties imposed on employers for unfair labor practices.

H.R. 800, the “Employee Free Choice Act of 2007,” was introduced in the House on February 5, and reported out of the House Education and Labor Committee on February 16. It passed the House of Representatives on March 1 by a mostly party-line vote of 241 to 185. On March 2, H.R. 800 was read for a second time and placed on the Senate Calendar.

On March 29, Senator Kennedy introduced S. 1041, companion legislation to H.R. 800. The Senate Health, Education, Labor and Pensions Committee held a hearing on S. 1041 on March 27. S. 1041 is still pending before the HELP Committee. It currently has 46 cosponsors, all Democrats plus Senators Sanders and Lieberman.

Senator Kennedy and Representative George Miller introduced similar bills in the 109th and the 108th Congresses. Additionally, in the 109th Congress, Senator Kennedy introduced S. 2357, the “Right Time to Reinvest in America’s Competitiveness and Knowledge Act,” in the 109th Congress which contained the Employee Free Choice Act as one of its provisions. None of these bills saw any legislative action.

Background

Under current law, the National Labor Relations Act (NLRA) gives private-sector workers the right to join or form a labor union and to bargain collectively over wages, hours, and working conditions. Unions exist to permit workers to present a united front to their employers and to protect the economic interests of the workers they represent.¹ For these reasons, the

¹ Paul Kersey, “Congress Should Protect Secret-Ballot Union Representation Elections,” The Heritage Foundation, November 12, 2004.

NLRA insists that a union demonstrate that it has the support of a majority of workers in any bargaining unit before it may be acknowledged as the representative of those workers.

Historically, under the NLRA, the decision as to whether a union will serve as the bargaining representative of a group of employees is made through a secret ballot. The National Labor Relations Board (NLRB) is the independent, federal agency charged with the administration and enforcement of the NLRA. Under these NLRB procedures dating back to the 1940s, a union representation election typically takes place after a union has demonstrated to the NLRB that at least 30 percent of those whom it is seeking to represent wish to have an election. The NLRB regards the 30-percent level as a sufficient demonstration of a “showing of interest” to hold an election. This interest is generally demonstrated by employees signing union authorization cards that indicate a desire by the employee to be represented by the union or to have an election to determine the issue. When an election is held, it is supervised by the NLRB. The NLRB ensures that employees may cast their ballots in a confidential manner, free of coercion by either management or the union. Employees or a union may petition the NLRB for an election.

The NLRA allows an exception to the standard process described above in which an election may be considered “superfluous” because it is clear to the employer that the union enjoys the support of a majority of the employees. Under this exception, when presented with union authorization cards by more than 50 percent of the employees of a bargaining unit, the employer may voluntarily recognize the union. This has been tolerated under the law, despite the absence of the numerous safeguards that are provided by the secret-ballot election supervised by the NLRB.

Although current law permits voluntary recognition by employers based on union authorization cards that have been signed by a majority of the employees, both the NLRB and the Supreme Court have long recognized that a Board-conducted secret-ballot election is “the most satisfactory, indeed preferred method” of ascertaining employee support for a union.² In fact, in the landmark 1969 *Gissel Packing Co.* decision, the Supreme Court affirmed that cards are “admittedly inferior to the election process.”³

Support for secret-ballot elections is widespread and bipartisan. For example, in 2002, Congress reaffirmed the right to a secret ballot, free of coercion and intimidation in the passage of the Help America Vote Act (HAVA). This bill required that the voting systems for the American electorate “must also maintain voter privacy and ballot confidentiality.”⁴ During consideration of that bill, Senator Harkin (D-IA) stated that “one of the most fundamental of all rights that make us uniquely American [is] the right of the secret ballot.”⁵ Senator Dodd (D-CT) echoed this sentiment, noting that “the sanctity of a private ballot is so fundamental to our system of elections.”⁶

² John N. Raudabaugh, shareholder at Butzel Long (and former member of the NLRB), in testimony before the House Subcommittee on Employer-Employee Relations at the Committee on Education and the Workforce, September 30, 2004.

³ *Gissel Packing*, 395 U.S. at 602.

⁴ Congressional Research Service, “Election Reform: Overview and Issues,” CRS Report to Congress RS 20898, January 18, 2007.

⁵ Senator Tom Harkin, *Congressional Record*, February 26, 2002.

⁶ Senator Christopher Dodd, *Congressional Record*, April 11, 2002.

The AFL-CIO, which has made passage of card check legislation a top legislative priority this Congress,⁷ supports secret-ballot elections when it comes to union *decertification*. In a joint brief, the AFL-CIO argued before the NLRB that in decertification petitions (the process by which it is determined a union no longer represents a majority of employees), secret-ballot elections “provide the surest means of avoiding decisions which are the result of group pressures and not individual choices.”⁸ Some House Democrats who support card-check authorization in the United States support the use of the secret ballot in other countries. A letter sent by Rep. Miller and 15 other members of Congress to Mexican government officials stated, “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.”⁹ The letter followed a labor dispute at a facility in Mexico, following efforts by workers to affiliate with an independent union rather than the traditional union.¹⁰

While binding arbitration may appear to be beneficial, the reality is that the very existence of a binding, third-party dispute resolution could undermine the bargaining process and prove harmful to employers and employees alike. H.R. 800 would impose a break in the long-standing tradition of leaving negotiations, such as collective bargaining decisions, to the parties themselves. This would have the effect of limiting the say of the affected parties (the union, workers, and employers). It would also impede innovation and competitiveness. For example, a company with its own distinctive business model could be forced to adopt the practices of its competitors by the arbitrator, causing it to lose its competitive advantage. Additionally, binding arbitration would deny accountability to the affected parties. Binding arbitration results in decisions being made by an arbitrator who suffers none of the consequences of his or her decisions.¹¹

Bill Provisions

Section 1. Short Title

Section 2. Streamlining Union Certification

Section 2 amends Section 9(a) of the National Labor Relations Act (NLRA) by adding language requiring that whenever a petition is filed by an employer, group of employees, or a

⁷ Libby George, “Reid Plans to Act on Union-Friendly Measure Despite Fierce Opposition,” *CQToday*, June 15, 2007.

⁸ U.S. Chamber of Commerce, “The Secret Ballot Protection Act: Reduce Coercion in Union Organizing; Protect Employee Privacy,” 2005. See: <http://www.secretballotprotection.com/NR/rdonlyres/enio7vmjn6soib43gcm7pm7mk2p2q3rfy3atv716hep24w3zzmb4dhzclsglpjz6frb5oc72mzqqb7m71wvpoa26wyc/SecretBallotProtectionActPolicyPaperPDF.pdf>.

⁹ George Miller, Marcy Kaptur, Bernard Sanders, William Coyne, Lane Evans, Bob Filner, Martin Olav Sabo, Barney Frank, Joe Baca, Zoe Lofgren, Dennis Kucinich, Calvin Dooley, Fortney Pete Stark, Barbara Lee, James McGovern and Lloyd Doggett, Members of Congress, Letter to Junta Local de Conciliacion y Arbitraje del Estado de Puebla, August 29, 2001.

¹⁰ For additional information on this point, please see RPC paper “Union Elections by Secret Ballot Protect Workers’ Rights,” issued on February 27, 2007.

¹¹ For additional information on this point, please see RPC paper “More Harm Contained in Union Secret-Ballot Elimination Bill: Binding Arbitration,” released March 27, 2007.

labor organization acting on their behalf seeking representation by a labor organization, the Board shall investigate the petition. Once the Board finds that a majority of the employees in an appropriate bargaining unit have signed, designating the labor organization as their bargaining representative (and no other labor organization is currently certified as the bargaining representative), the Board shall not direct an election but shall certify the labor organization as the representative.

Section 2 also requires the Board to develop guidelines and procedures for the designation by employees of a bargaining representative to include model collective bargaining authorization language. This section also amends the National Labor Relations Act to make it an unfair labor practice for noncompliance of recognizing a union based on signed authorization cards.

Section 3. Facilitating Initial Collective Bargaining Agreements

Section 3 amends the NLRA to add the following requirements for initial collective bargaining contract negotiations:

- Not later than 10 days after receiving a written request for collective bargaining from a newly organized or certified labor organization, or within a mutually agreed upon period, the parties shall meet to bargain collectively and shall make “every reasonable effort to conclude and sign a collective bargaining agreement.”
- If after 90 days of bargaining collectively, or such additional period as the parties may agree upon, and the parties have failed to reach an agreement, either party may notify the Federal Mediation and Conciliation Service (FMCS) of a dispute and request mediation.
- If after 30 days of requesting mediation from the FMCS, or such additional time as agreed to, the FMCS is not able to bring the parties to agreement, the FMCS shall refer the dispute to an arbitration board. The decision of the arbitration board shall be binding upon the parties for two years, unless agreed to otherwise by both parties.

Section 4. Strengthening Enforcement

Section 4 makes it so that any unfair labor practice by employers during an organizing drive or during the period after a labor organization has been recognized until the first collective bargaining contract has been reached shall be given priority by the NLRB over all other cases, except other unfair labor practice cases by employers already under investigation.

Section 4 amends the NLRA to require the Board to seek injunctive relief including reinstatement of discharged workers before final adjudication by the NLRB. Additionally, Section 4 increases penalties for unfair labor practices by employers (but not unions) during an organizing drive or during the period after a labor organization has been recognized until the first collective bargaining agreement is reached. On top of back-pay restitution and liquidated damages of two times that amount, Section 4 increases civil penalties to \$20,000 per violation.

Administration Position

At press time, a Statement of Administration Position (SAP) to the Senate was not available. However, the White House issued a SAP on February 28 when H.R. 800 was being considered by the House. The SAP states:

The Administration strongly opposes H.R. 800, the “Employee Free Choice Act.” H.R. 800 would strip workers of the fundamental democratic right to a supervised private ballot election, interfere with the ability of workers and employers to bargain freely and come to agreement over working terms and conditions, and impose penalties for unfair labor practices only on employers -- and not on union organizers -- who intimidate workers. If H.R. 800 were presented to the President, he would veto the bill.

The full text of the SAP can be found at <http://www.whitehouse.gov/omb/legislative/sap/110-1/hr800sap-r.pdf>.

Cost

The Congressional Budget Office issued a cost analysis on H.R. 800 on February 16, 2007. According to CBO, H.R. 800 would increase revenues due to the increased penalties in the legislation up to \$500,000 a year. The bill would also impose an unfunded mandate under the Unfunded Mandates Reform Act. The text of CBO’s cost estimate is below:

H.R. 800 would amend the National Labor Relations Act to allow workers to unionize by signing a card or petition, in lieu of a secret-ballot election. The bill also would provide a time frame for employers to begin discussions with the workers’ union. In addition, the bill would impose civil monetary penalties of up to \$20,000 for repeated violations of fair labor practices. Enacting H.R. 800 could increase revenues from those penalties. However, CBO estimates that the amount is likely to be less than \$500,000 annually.

H.R. 800 would impose a mandate on private-sector employers by adding requirements under the National Labor Relations Act, including requiring that employers commence an initial agreement for collective bargaining no later than 10 days after receiving a request from an individual or a labor organization that has been newly organized or certified. CBO has determined that the requirement would increase the costs of an existing mandate and would thereby impose a mandate under the Unfunded Mandates Reform Act (UMRA). CBO estimates, however, that the direct cost of complying with the new requirements would be negligible. H.R. 800 contains no intergovernmental mandates as defined in UMRA, and would not affect the budgets of state, local, or tribal governments.