

RSC Outlook: Labor Policy

February 2009

Big organized labor initiatives are going to be a high priority for Democrats during the 111th Congress. With a Democrat in the White House, this is their first opportunity to enact labor reforms, especially those aimed at expanding union membership. We have already seen this approach in President Obama's recent reversal of a number of Bush-era Executive Orders, which made workplaces more favorable toward unions. While many of the legislative measures discussed below have either passed the House in the 110th Congress or are expected to pass in the 111th, there is still doubt as to whether cloture on many of these bills is achievable in the Senate – especially on major bills like the Employee Free Choice Act. Nevertheless, conservatives should remain on guard.

The Employee Free Choice Act, aka “Card Check”: The 111th Congress will see legislation allowing the National Labor Relations Board (NLRB) to certify unions without conducting a secret-ballot election. With the Democrats having gained eight seats in the Senate, it is likely that they will come much closer to getting cloture. However, it is also likely that Congress will not proceed to the measure until that is a guarantee. Most recent projections are that the House will see anti-secret ballot legislation in the early spring. Senator Reid has recently announced the Senate would like to take up the legislation in the summer.

The bill considered in the 110th (H.R. 800) would strip employees of their democratic right to a private ballot election and would put undue pressure on employees to vote in favor of a union. Additionally, once a union has been certified for a given set of employees, it would force employers and unions into binding arbitration – essentially forcing employees and unions into “agreements” to which they might not agree.

Previous Action: The House passed H.R. 800, the Employee Free Choice Act, on March 1, 2007, by a vote of 241-185. It failed to get cloture in the Senate by a vote of 51-48.

NOTE: The RSC is gathering co-sponsors for the Secret Ballot Protection Act, soon to be introduced by Congressman Kline, Chairman McKeon, and Chairman Price.

The Re-Empowerment of Skilled and Professional Employees and Construction and Tradeworkers Act, aka “RESPECT Act”: This legislation, widely talked about as being one of the bills that will be considered during the 111th, would change the National Labor Relations Act (NLRA) definition of “supervisors” to allow them to unionize along

with their employees. The bill would have the effect of abolishing any distinction between supervisors and those employees that he or she supervises. By placing supervisors on an equal playing field with those whom they supervise, the legislation creates an imbalance in the workplace and acts as a mechanism for expanding union membership.

Previous Action: The RESPECT Act was marked up in the full Education and Labor Committee on September 19, 2007 and reported out by a vote of 26-20. It never came to the House floor.

WARN Act: The WARN Act was enacted in 1988 and made effective in February 1989. Its intent was to provide notice to workers of mass layoffs and plant closings. Due to inability to pass TAA Reauthorization in the Senate (the vehicle by which WARN would have been amended), WARN Act consideration was stalled. It is anticipated that the House will attempt to amend the WARN Act sometime this Congress.

The WARN Act requires employers to provide written notice to affected workers or their representatives at least 60 days before a mass layoff or plant closing is expected to occur. Small businesses with fewer than 100 employees are exempt. The proposals in the 110th lengthen the warning time required for a mass layoff or plant closure, which would force employers to alert employees of a possible closure even if the closing is not yet final. It would also have the effect of alerting foreign competitors of problems within a company.

Previous Action: On October 31, 2007, the House passed H.R. 3920 which reauthorized the Trade Adjustment Assistance (TAA) program. The bill contained provisions very similar to H.R. 3796, the Early Warning and Health Care for Workers Affected by Globalization Act - a bill that would have amended the WARN Act. H.R. 3796 was marked up in the Education and Labor Committee earlier in October. Among its major provisions were: an increase in notice of a mass layoff or plant closing to at least 90 days, an increase in backpay for violations of the law, and an authorization of the Secretary of Labor to bring civil action on behalf of workers.

The Family and Medical Leave Act (FMLA): The FMLA requires private employers with 50 or more employees and public employers of any size to give 12 weeks of unpaid leave to care for a new child (just born or adopted), because of illness, or to take care of a family member with a serious health condition.

It is likely that the 111th Congress will seek to expand FMLA even further. Some of the proposed changes that have been suggested would: lower the 50 employee threshold, require employers to provide paid FMLA leave, expand the reasons for which an individual can take leave (i.e. school activities for a child), and expand the eligible recipients of FMLA leave.

Previous Action: The National Defense Authorization Act of 2008 expanded coverage to family members whose spouse, child or parent is called to active

duty. It also expanded to 26 weeks of unpaid leave, leave for the spouse, child, parent, or next-of-kin to care for an injured servicemember. The Department of Labor also issued regulations in November that made alterations to FMLA mostly related to expanding FMLA to military members and their families.

Public Safety Employer-Employee Cooperation Act: Due to its popularity among Democrats and many Republicans, this bill could be brought up early this Congress. The legislation considered in the 110th Congress would create a new federal collective bargaining system for public safety officers (firefighters, police officers, and emergency medical technicians) – effectively unionizing them. Under this bill, states and localities would be required to collectively bargain with these employees, which will allow bargaining over wages and hours. Additionally, states and localities must provide a dispute resolution mechanism like binding arbitration.

The bill would preempt state authority to regulate the collective bargaining rights of its state and local public safety employees. Essentially, if a state doesn't match or exceed what the federal government wants, it will be preempted. The concern is that collective bargaining and the process that surrounds it can cause strife in the workplace that might otherwise undermine Americans' public safety.

Previous Action: The House passed H.R. 980, the Public Safety Employer-Employee Cooperation Act, on July 17, 2007 by a vote of 314-97. The bill had 98 Republican supporters. The Senate withdrew the bill by unanimous consent and it never received a vote.

Trade Adjustment Assistance (TAA): The TAA program aids those workers who are unemployed due to trade-related reasons. It will likely be one of the first trade-related matters brought to the floor during the 111th.

In order to qualify for TAA, workers must prove that: 1) their jobs moved to a country with which the U.S. has a free trade agreement or to beneficiary countries under the Andean Trade Preference Act, African Growth and Opportunity Act, or the Caribbean Basin Economic Recovery Act; 2) their job losses can be attributed to increased imports that contributed importantly to an actual decline in sales or production; or 3) their job losses resulted from the loss of business with a primary firm because of a trade-related reason.

Proposed changes to the program will likely expand coverage to service and government workers, extend benefits, and expand eligibility to workers who have lost jobs to *any* country – not just one with which we have a Free Trade Agreement. It will also likely exponentially expand the program to cover government and service workers.

Previous Action: The authorization for TAA has expired. However, funding for the program has been extended through March 6, 2009. Although the House passed a TAA Reauthorization bill in the 110th (H.R. 3920), the Senate did not act.

Davis-Bacon: Democrats seek to expand Davis-Bacon, which requires paying workers prevailing wages on public works projects, whenever they can. The 111th Congress will see Davis-Bacon provisions in numerous bills – the first of which is the stimulus bill which attaches Davis-Bacon wage provisions to every job related to the bill. Specifically, Davis-Bacon provisions will likely be seen in any infrastructure-related bill with federal construction projects.

The Employment Non-Discrimination Act (ENDA): This bill is likely to see floor time in the House this Congress. ENDA prohibits employment discrimination on the basis of actual or *perceived* sexual orientation (“perceived” is not defined in the bill). The bill makes sexual orientation a protected class status by providing a comprehensive federal prohibition of employment discrimination based on an individual’s sexual orientation. It also contains vague language on religious exemptions from being subject to ENDA – thus potentially infringing on their right to hire employees based on their religious code of ethics.

Previous Action: The House passed ENDA (H.R. 3685) on November 7, 2007. It never received floor time in the Senate.

Popcorn Workers Lung Disease Prevention Act: It is likely that the Democrat Congress will continue to engage in aggressive oversight of the Occupational Safety and Health Administration (OSHA), which will likely lead to consideration of bills like the Popcorn Workers Lung Disease Prevention Act. The legislation, considered in the 110th, directs OSHA to set standards for the maximum exposure to diacetyl, a butter-flavored additive usually used on popcorn. Among other things, the bill requires a written exposure control plan and engineering, work-practice controls, and respiratory protections to minimize exposure to diacetyl.

There are concerns that the bill would require circumvention of the normal OSHA process of testing and evaluating potentially dangerous chemicals. Additionally, there is little conclusive evidence to prove that diacetyl causes lung disease - as stated in the National Institute for Occupational Safety and Health (NIOSH) report on this issue.

Previous Action: On September 26, 2007, the House passed H.R. 2693, the Popcorn Workers Lung Disease Prevention Act (Woolsey, D-CA) by a vote of 260-154. The Senate did not consider the legislation.

Combustible Dust: Again, with increased oversight of OSHA, it is likely that bills requiring more regulation of OSHA will be seen at some point this Congress. The Worker Protection Against Combustible Dust Explosions and Fires Act considered in the 110th would require issuance of Labor Department standards for combustible dust—which is dust that can explode in the manufacturing process mostly due to heating or ventilation problems. The bill requires that an interim regulation be released within 90 days of the enactment of the bill, and a final regulation within 18 months.

Under the Hazard Communication Standard, employers are currently required to maintain data sheets that list the hazards, including the combustibility, of materials brought onto a worksite. OSHA currently has the authority to cite employers for failing to comply with these standards and they do so frequently. Concerns with this legislation include its speedy requirement for DOL to issue a rule on combustible dust with new, huge federal mandates on small businesses across the country.

Previous Action: H.R. 5522, the Worker Protection Against Combustible Dust Explosions and Fires Act (Miller, D-CA) passed the House on April 30, 2008 by a vote of 247-165. The Senate did not consider the legislation.

Federal Employees' Compensation Act (FECA): Expansions to FECA will likely be seen in the 111th Congress. FECA is a workers' compensation program for workers that sustain injuries on the job or are subject to disease and illness resulting from a job. Bills introduced in the 110th, such as H.R. 4561, the Improving Access to Workers' Compensation for Injured Federal Workers Act, and H.R. 1142, the Federal Fire Fighters Fairness Act, include expansions of FECA.

Other Possible Legislation:

- The Supplemental-Mine Improvement and New Emergency Response Act (S-MINER), introduced as H.R. 2768 in the 110th; and
- Overtime Pay Eligibility Issues.

Obama Administration Alert:

- **Anticipated Repeal of Executive Order 13202, regarding Project Labor Agreements (PLAs).** PLAs are agreements that require a federal construction project be awarded only to contractors and subcontractors that recognize unions as representatives of their employees. PLAs increase the cost of projects and are a direct attack on open bidding. E.O. 13202 bars federal agencies from requiring union-only PLAs on federal construction projects. Thus, its repeal will make many federal projects more restrictive and more expensive.

Note: This is not meant to be an exhaustive list of all the labor issues that will come up during the 111th Congress.

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