

EMPLOYEE PRIVACY PROTECTION ACT

SEPTEMBER 25, 2017.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Ms. FOXX, from the Committee on Education and the Workforce, submitted the following

R E P O R T

together with

MINORITY VIEWS

[To accompany H.R. 2775]

[Including cost estimate of the Congressional Budget Office]

The Committee on Education and the Workforce to whom was referred the bill (H.R. 2775) to amend the National Labor Relations Act to require that lists of employees eligible to vote in organizing elections be provided to the National Labor Relations Board, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike all after the enacting clause and insert the following:

**SECTION 1. SHORT TITLE.**

This Act may be cited as the “Employee Privacy Protection Act”.

**SEC. 2. LISTS OF EMPLOYEES ELIGIBLE TO VOTE IN ELECTIONS.**

Section 9(c)(1) of the National Labor Relations Act (29 U.S.C. 159(c)(1)) is amended by adding at the end the following: “Not earlier than 7 days after a final determination by the Board of the appropriate bargaining unit, the Board shall acquire from the employer a list of all employees eligible to vote in the election to be made available to all parties, which shall include the names of the employees, and not more than one additional form of personal contact information for the employee, (such as a telephone number, an email address, or a mailing address) chosen by the employee in writing.”.

## PURPOSE

H.R. 2775, the *Employee Privacy Protection Act*, protects employee privacy, modernizes the voter eligibility list,<sup>1</sup> and empowers workers, while ensuring unions can continue to communicate with employees. The legislation ensures labor organizations will continue to receive a list of eligible voters within seven days of an election agreement or direction of an election. However, rather than requiring employers to provide each employee's home address, as required under current law, the bill provides employees the right to choose the contact information provided to the union.

## COMMITTEE ACTION

## 112TH CONGRESS

*Committee Hearing on National Labor Relations Board's Unprecedented Rulemaking*

On July 7, 2011, the Committee on Education and the Workforce (Committee) held a hearing entitled "Rushing Union Elections: Protecting the Interests of Big Labor at the Expense of Workers' Free Choice" on the National Labor Relations Board's (NLRB) June 22, 2011, proposed election procedure regulation. The proposal expanded the list of required employee contact information (*Excelsior* list) and reduced the time for production. Witnesses before the Committee agreed the proposal would have significantly hindered an employer's ability to communicate with his or her employees and crippled an employee's right to choose whether to be represented by a labor organization. Witnesses before the panel were the Honorable Peter C. Schaumber, Former NLRB Chairman, Washington, D.C.; Mr. Larry Getts, Tube Press Technician, Dana Corporation, Garrett, Indiana; Mr. John Carew, President, Carew Concrete & Supply Company, Appleton, Wisconsin, representing himself and the National Ready Mixed Concrete Association; Mr. Michael J. Lotito, Attorney, Jackson Lewis LLP, San Francisco, California; and, Mr. Kenneth Dau-Schmidt, Professor, Indiana University, Maurer School of Law, Bloomington, Indiana.

*Committee Hearing on NLRB's Decision to Disfranchise Employees in Union Elections*

On September 22, 2011, the Committee held a hearing on the "Culture of Union Favoritism: Recent Actions of the National Labor Relations Board." In August 2011, the NLRB issued a number of biased anti-worker decisions, including *Specialty Healthcare and Rehabilitation Center of Mobile (Specialty Healthcare)*,<sup>2</sup> *Lamons Gasket Company*,<sup>3</sup> and *UGL-UNICCO Service Company*.<sup>4</sup> Additionally, the NLRB finalized a rule requiring almost every employer to post a vague, union-biased notice on employee *National Labor Relations Act* (NLRA) rights. The NLRB's unbridled overreach of authority demanded a complete examination by the Committee. Witnesses before the Committee included Mr. Curtis L. Mack, Partner,

<sup>1</sup>The voter eligibility list is a list of employees who are presumed to be eligible to cast a vote in a union election.

<sup>2</sup>357 NLRB No. 83 (2011).

<sup>3</sup>357 NLRB No. 72 (2011).

<sup>4</sup>357 NLRB No. 76 (2011).

McGuireWoods LLP, Atlanta, Georgia; Ms. Barbara A. Ivey, Employee, Kaiser Permanente, Keizer, Oregon; Mr. Arthur J. Martin, Partner, Schuchat, Cook & Werner, St. Louis, Missouri; and Mr. G. Roger King, Partner, Jones Day, Columbus, Ohio.

*Introduction of H.R. 3094, Workforce Democracy and Fairness Act*

On October 5, 2011, then-Committee Chairman John Kline (R-MN) introduced H.R. 3094, the *Workforce Democracy and Fairness Act*, with 26 cosponsors. Recognizing the NLRB had moved far beyond an adjudicative body designed to implement congressional intent under the NLRA, the legislation sought to (1) reinstate the traditional standard for determining which employees comprise an appropriate bargaining unit; (2) ensure employers can participate in a fair union election; (3) guarantee workers have the ability to make a fully informed decision in a union election; and, (4) safeguard employee privacy by allowing workers to decide the type of personal information provided to a union.

*Committee Legislative Hearing on H.R. 3094, Workforce Democracy and Fairness Act*

On October 12, 2011, the Committee held a legislative hearing on H.R. 3094. Witnesses included the Honorable Charles Cohen, Senior Counsel, Morgan, Lewis and Bockius LLP and Former Member, National Labor Relations Board, Washington, D.C.; Mr. Robert Sullivan, President, RG Sullivan Consulting, Westmoreland, New Hampshire, representing the Retail Industry Leaders Association; Mr. Michael J. Hunter, Partner, Hunter, Carnahan, Shoub, Byard and Harshman, Columbus, Ohio; and, Mr. Phillip Russell, Attorney, Ogletree Deakins, Tampa, Florida.

*Committee Consideration of H.R. 3094, Workforce Democracy and Fairness Act*

On October 26, 2011, the Committee considered H.R. 3094. Then-Chairman Kline offered an amendment in the nature of a substitute. Nine additional amendments were offered and debated; however, no additional amendments were adopted. The Committee favorably reported H.R. 3094 to the House of Representatives by a vote of 23 to 16.

*House Passage of H.R. 3094, Workforce Democracy and Fairness Act*

On November 30, 2011, the House of Representatives considered H.R. 3094, as amended by the Committee. Four amendments and an amendment in the nature of a substitute were offered, but none were adopted. The House passed H.R. 3094 by a bipartisan vote of 235 to 188. The bill was not considered by the Senate prior to the conclusion of the 112th Congress.

113TH CONGRESS

*Subcommittee Hearing on Union Organizing*

On September 19, 2013, the Subcommittee on Health, Employment, Labor, and Pensions (HELP) held a hearing on “The Future of Union Organizing” to examine the future of NLRB representational elections. Witnesses were Mr. David R. Burton, General

Counsel, National Small Business Association, Washington, D.C.; Mr. Clarence Adams, Field Technician, Cablevision, Brooklyn, New York; Mr. Ronald Meisburg, Member of the Firm, Proskauer, Washington, D.C.; and Mr. Stefan J. Marculewicz, Shareholder, Littler Mendelson, Washington, D.C.

*Committee Hearing on the NLRB's Proposed Ambush Election Rule*

On March 5, 2014, the Committee held a hearing entitled “Culture of Union Favoritism: The Return of the NLRB’s Ambush Election Rule.” Ms. Doreen S. Davis, Partner, Jones Day, New York, New York; Mr. Steve Browne, Vice President of Human Resources, LaRosa, Cincinnati, Ohio; Ms. Caren P. Spencer, Shareholder, Weinberg, Roger & Rosenfeld P.C., Alameda, California; and, Mr. William Messenger, Staff Attorney, National Right to Work Legal Defense Foundation, Inc., Springfield, Virginia, testified before the Committee. The witnesses stated the February 6, 2014, proposed ambush election rule, like its predecessor, would substantially limit the opportunity for a full evidentiary hearing or NLRB resolution of contested issues, including voter eligibility.

*Introduction of H.R. 4321, Employee Privacy Protection Act*

On March 27, 2014, then-HELP Subcommittee Chairman David “Phil” Roe (R-TN) introduced H.R. 4321, the *Employee Privacy Protection Act*, with 20 cosponsors. With the NLRB’s ambush election rule undermining employee privacy, the legislation was necessary to ensure employees could choose what personal information was provided to a union.

*Committee Consideration of H.R. 4321, Employee Privacy Protection Act*

On April 9, 2014, the Committee considered H.R. 4321. HELP Subcommittee Chairman Roe offered an amendment in the nature of a substitute to make a technical change to clarify employees only have to provide one form of personal contact information. Two additional amendments were offered and debated but were not adopted. The Committee favorably reported H.R. 4321 to the House of Representatives by a vote of 21 to 17.

114TH CONGRESS

*Subcommittee Legislative Hearing on H.J. Res. 29, Providing for Congressional Disapproval of the NLRB's Ambush Election Rule*

On March 4, 2015, the HELP Subcommittee held a legislative hearing entitled “H.J. Res. 29, Providing for congressional disapproval under chapter 8 of title 5, United States Code, of the rule submitted by the National Labor Relations Board relating to representation case procedures.” This Joint Resolution would have disapproved and nullified the NLRB’s December 15, 2014, rule relating to representation case procedures. Witnesses testified to the urgent need for Congress to overturn the NLRB’s ambush election rule because of its negative consequences for workers and families. Witnesses were Ms. Brenda Crawford, Registered Nurse, Murrieta, California; Mr. Roger King, Senior Labor and Employment Counsel, testifying on behalf of the Retail Industry Leaders Association,

Washington, D.C.; Mr. Arnold E. Perl, Member, Glankler Brown, Memphis, Tennessee; and Mr. Glenn M. Taubman, Staff Attorney, National Right to Work Legal Defense and Education Foundation, Inc., Springfield, Virginia.

*Introduction of H.R. 1767, Employee Privacy Protection Act*

On April 14, 2015, then-HELP Subcommittee Chairman Roe introduced H.R. 1767, the *Employee Privacy Protection Act*, with two original cosponsors. The text of H.R. 1767 was identical to the text of H.R. 4321 from the 113th Congress.

115TH CONGRESS

*Subcommittee Hearing on Restoring Balance and Fairness to the NLRB*

On February 14, 2017, the HELP Subcommittee held a hearing entitled “Restoring Balance and Fairness to the National Labor Relations Board.” Witnesses discussed the harmful consequences of several NLRB actions, including the ambush election rule, which cripples worker free choice. Witnesses were Ms. Reem Aloul, BrightStar Care of Arlington, Arlington, Virginia, on behalf of the Coalition to Save Local Business; Ms. Susan Davis, Partner, Cohen, Weiss, and Simon, LLP, New York, New York; Mr. Raymond J. LaJeunesse, Jr., Vice President and Legal Director, National Right to Work Legal Defense Foundation, Inc., Springfield, Virginia; and, Mr. Kurt G. Larkin, Labor Attorney, Hunton & Williams, LLP, Richmond, Virginia.

*Introduction of H.R. 2775, Employee Privacy Protection Act*

On June 6, 2017, Rep. Joe Wilson (R-SC) introduced H.R. 2775, the *Employee Privacy Protection Act*, with seven cosponsors. The text of H.R. 2775 is identical to the text of H.R. 1767 from the 114th Congress, which was referred to the Committee in April 2015.

*Subcommittee Legislative Hearing on H.R. 2776, H.R. 2775, and H.R. 2723*

On June 14, 2017, the HELP Subcommittee held a hearing entitled “Legislative Reforms to the *National Labor Relations Act*: H.R. 2776, *Workforce Democracy and Fairness Act*; H.R. 2775, *Employee Privacy Protection Act*; and H.R. 2723, *Employee Rights Act*.” Witnesses testified about the need for H.R. 2775 to fix the increased burden on employers of requiring additional employee information to be given to a union with little prior notice. Witnesses also testified that H.R. 2775 would protect workers and provide workers’ choice in determining what personal information may be shared with a union. Witnesses were Mr. Seth H. Borden, Partner, McGuireWoods LLP, New York, NY.; Mr. Guerino J. Calemine, III, General Counsel, Communications Workers of America, Washington, D.C.; Ms. Karen Cox, Dixon, Illinois; and, Ms. Nancy McKeague, Senior Vice President and Chief of Staff, Michigan Health and Hospital Association, Okemos, Michigan, on behalf of the Society for Human Resource Management.

*Committee Consideration of H.R. 2775, Employee Privacy Protection Act*

On June 29, 2017, the Committee considered H.R. 2775, the *Employee Privacy Protection Act*. Rep. Wilson offered an amendment in the nature of a substitute, making a technical change to clarify employees only have to provide one form of personal contact information, which was adopted. Additional amendments were offered and debated but were not adopted. The Committee favorably reported H.R. 2775, as amended, to the House of Representatives by a vote of 22 to 16.

SUMMARY

The *Employee Privacy Protection Act*, H.R. 2775, ensures labor organizations will continue to receive a list of eligible voters within seven days of an election agreement or direction of election. The bill modernizes the process, while providing employees the right to choose how they wish to be contacted by a union.

COMMITTEE VIEWS

In 1935, Congress passed the NLRA, guaranteeing the right of most private sector employees<sup>5</sup> to organize and select their own representative. In 1947, Congress passed the most significant amendment to the NLRA, the *Taft-Hartley Act*<sup>6</sup> (Taft-Hartley), abandoning “the policy of affirmatively encouraging the spread of collective bargaining [and] striking a new balance between protection of the right to self-organization and various opposing claims.”<sup>7</sup> Taft-Hartley clarified employees have the right to refrain from participating in union activity,<sup>8</sup> created new union unfair labor practices,<sup>9</sup> codified employer free speech,<sup>10</sup> and made changes to the determination of bargaining units.<sup>11</sup>

The NLRA established the NLRB, an independent federal agency, to fulfill two principal functions: (1) to prevent and remedy employer and union unlawful acts (called unfair labor practices or ULPs) and (2) to determine by secret ballot election whether employees wish to be represented by a union. In determining whether employees wish to be represented by a union, the NLRA is wholly neutral.<sup>12</sup>

To promote free and informed choice in union elections, in the 1966 *Excelsior Underwear Inc.* case, the NLRB created a requirement that employers must provide a list of all eligible voters and their home addresses to the union(s) seeking representation prior to the election.<sup>13</sup> This list is commonly referred to as the *Excelsior* list. Currently, within two days of the regional director’s pre-election decision or approval of the election agreement, the employer

<sup>5</sup>The NLRA does not cover all employees and employers in the United States. For example, public sector employers (state, local, and federal employees), employers covered by the Railway Labor Act (airlines and railroads), agricultural labor, and supervisors are not covered by the act. 29 USC § 152(2).

<sup>6</sup>29 U.S.C. § 141 et. seq.

<sup>7</sup>Archibald Cox, *Some Aspects of the Labor Management Relations Act of 1974*, 61 Harv. L. Rev. 1, 4 (1947).

<sup>8</sup>29 U.S.C. § 157.

<sup>9</sup>29 U.S.C. § 158.

<sup>10</sup>29 U.S.C. § 158(c).

<sup>11</sup>29 U.S.C. § 159(d).

<sup>12</sup>*NLRB v. Savair Mfg.*, 414 U.S. 270, 278 (1973).

<sup>13</sup>*Excelsior Underwear Inc.*, 156 NLRB 1236 (1966).

must file the *Excelsior* list with the regional director (from 1996 through 2014, employers had seven days to provide this information).<sup>14</sup> The regional director makes the list available to all parties. Unless waived, the non-employer parties, most commonly the union(s) seeking representation, must have at least 10 days to review the list prior to the election.<sup>15</sup> Under this procedure (including the seven-day timeframe), unions won over two-thirds of representational elections in Fiscal Year (FY) 2014.<sup>16</sup>

In February 2014, in a rare exercise of formal rulemaking, the NLRB published in the Federal Register a Notice of Proposed Rulemaking, which became final on December 15, 2014, and took effect on April 14, 2015. This rule adds additional information to the *Excelsior* list and cuts the timeframe for its production.<sup>17</sup> In addition to employee names and addresses, the employer now must provide unit employees' phone numbers, email addresses, work locations, shift information, and job classifications.<sup>18</sup> Absent extraordinary circumstances or party agreement, this information must be provided to the union within two days of the regional director's decision or approval of the election agreement.<sup>19</sup> Under this new procedure, unions won over 72 percent of representational elections in FY 2016.<sup>20</sup>

#### *Privacy Implications of an Expanded Excelsior List*

The inclusion of employee phone numbers and email addresses on the *Excelsior* list further encroaches on employee privacy. Moreover, providing unions with employees' phone numbers, email addresses, and home addresses without consent puts employees and their families at risk of coercion and intimidation. The NLRB reported that in FY 2010 unions faced a total of 6,338 unfair labor practice allegations; 80.6 percent of those charges were cases where a union attempted to "restrain or coerce employees in the exercise of the rights guaranteed" by the NLRA (Sec. 8(b)(1)).<sup>21</sup>

The December 2014 rule provides only a vague warning that this information should not be misused. It states that employee information shall not be used "for purposes other than the representation proceeding, Board proceedings arising from it, and related matters." Seth Borden, a Partner at McGuireWoods LLP, testified at a June 14, 2017, HELP Subcommittee hearing that "despite numerous comments seeking assurances about enforcement of this provision, the Board declined to include any specific mechanisms to protect against abuse."<sup>22</sup>

<sup>14</sup> National Labor Relations NLRB Casehandling Manual ¶ 11312.

<sup>15</sup> *Id.*

<sup>16</sup> NLRB, REPRESENTATION PETITIONS (2017), <https://www.nlr.gov/news-outreach/graphs-data/petitions-and-elections/representation-petitions-rc>.

<sup>17</sup> 79 Fed. Reg. at 7324.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> NLRB, *supra* note 15.

<sup>21</sup> NLRB, TABLE 2: TYPES OF UNFAIR LABOR PRACTICES ALLEGED, FISCAL YEAR 2010, [https://www.nlr.gov/sites/default/files/attachments/basic-page/node-1696/table\\_2.pdf](https://www.nlr.gov/sites/default/files/attachments/basic-page/node-1696/table_2.pdf).

<sup>22</sup> *Legislative Reforms to the National Labor Relations Act: H.R. 2776, Workforce Democracy and Fairness Act; H.R. 2775, Employee Privacy Protection Act; and, H.R. 2723, Employee Rights Act: Hearing before the Subcomm. on Health, Employment, Labor and Pensions of the H. Comm. on Educ. and the Workforce*, 115th Cong., 12 (2017). (written testimony of Seth Borden) [*hereinafter* Borden].

Employees clearly face significant and, at times, unlawful union pressure.<sup>23</sup> However, union communications need not be unfair labor practices or criminal acts to be unwelcome. In testimony before the HELP Subcommittee witnesses described their negative and unwelcome experiences with union organizers.

In her June 2013 testimony, Ms. Marlene Felter, a medical records coder at Chapman Medical Center in Orange, California, stated the following:

From July to November 2011, my co-workers reported that [Service Employees International Union] operatives were calling them on their cell phones, coming to their homes, stalking them, harassing them, and even offering to buy them meals at restaurants to convince them to sign union cards.<sup>24</sup>

In his June 2011 testimony, Mr. Larry Getts, a Dana Corporation employee in Fort Wayne, Indiana, stated the following:

On a daily basis[,] my coworkers and I would find UAW officials waiting in our break room. They'd approach us during our lunch breaks. They would even follow us to our vehicles at the end of the day and some of us even to our homes.<sup>25</sup>

Not surprisingly, Mr. Getts said he would object to his employer providing his phone number and email address to a union.<sup>26</sup>

In a 2014 Washington Times article, Ms. Jennifer Parrish described her alarming experience with a Service Employees International Union organizer, saying:

My story starts in the spring of 2006, when a man I'd never met walked into my Minnesota home and asked for my signature on what he claimed was a petition asking the state for health insurance for child care providers like myself (sic). As it happened, I already had health insurance, and I didn't feel it was the state's responsibility to provide it to me.

I repeatedly declined to sign his petition, but this wasn't enough. The gentleman grew angry, and his demands became louder and more insistent. His behavior was alarming; to get him to leave, I promised to sign his card later if he would return after I had time to look it over.<sup>27</sup>

On June 14, 2017, at a HELP Subcommittee hearing, Ms. Karen Cox testified about her experience attempting to decertify an unwanted union and how her privacy was infringed upon as a result. She stated the following:

<sup>23</sup> NLRB, *supra* note 21.

<sup>24</sup> *Legislative Hearing on H.R. 2346, Secret Ballot Protection Act, and H.R. 2347, Representation Fairness Restoration Act: Hearing before the Subcomm. on Health, Employment, Labor and Pensions of the H. Comm. on Educ. and the Workforce*, 113th Cong., 2 (2013) (written testimony of Marlene Felter).

<sup>25</sup> *Rushing Union Elections: Protecting the Interests of Big Labor at the Expense of Workers' Free Choice: Hearing before the H. Comm. on Educ. and the Workforce*, 112th Cong., 2 (2011) (written testimony of Larry Getts).

<sup>26</sup> *Id.* at 2-3.

<sup>27</sup> Parrish, Jennifer, *A breath of employee freedom*, The Washington Times (Aug. 7, 2014), <http://www.washingtontimes.com/news/2014/aug/7/parrish-a-breath-of-employee-freedom/>.



In November 2012, I made the two-hour trip to Peoria and filed the first petition with the NLRB. On my way back[,] I got a phone call from my dad. He told me a union rep contacted him and mentioned something about people losing their jobs and said that I needed to settle my grievances. My dad said, ‘Watch your back, because that was a threat.’ I was shocked.<sup>28</sup>

Of equal concern are alleged union misuses of personal employee information outside an organizing campaign. In the fall of 2007, 33 AT&T employees at the company’s Burlington, North Carolina facility resigned from Communication Workers of America (CWA) membership and ceased paying union dues.<sup>29</sup> In apparent retaliation, the CWA Local posted the 33 AT&T employees’ names and social security numbers on a publicly accessible bulletin board located in a hallway close to the building entrance, stating the employees had resigned from the union and ceased paying dues.<sup>30</sup>

In 2009, Ms. Patricia Pelletier, an employee of the Connecticut Student Loan Foundation, organized an effort to decertify the CWA.<sup>31</sup> In response, CWA representatives allegedly forged Pelletier’s signature on numerous magazine subscriptions and product solicitations.<sup>32</sup> As a result, Pelletier received numerous unwanted pieces of mail. Not only was Pelletier forced to spend many hours canceling subscriptions, she was also billed for thousands of dollars by magazine companies.<sup>33</sup> Ultimately, Ms. Pelletier filed a lawsuit against the union that was settled.<sup>34</sup>

At a June 14, 2017, HELP Subcommittee hearing, Ms. Nancy McKeague, Senior Vice President and Chief of Staff of the Michigan Health and Hospital Association, testifying on behalf of the Society of Human Resource Management, noted that from a HR professional’s perspective the new requirements were “abhorrent.” She stated, “If we begin to provide to a third party, without employees’ consent, personal information such as home addresses, home telephone numbers, cell phone numbers, and shift schedules, how long do you think the employee will trust us with the rest of the employment information we keep?”<sup>35</sup>

Additionally, there is a threat from mishandled or unprotected personal data. At the same hearing, Mr. Seth H. Borden, Partner at McGuireWoods LLP in New York City, New York, testified to the following:

The more significant risks, however, go far beyond the prospect that a union might intentionally misuse this em-

<sup>28</sup> *Legislative Reforms to the National Labor Relations Act: H.R. 2776, Workforce Democracy and Fairness Act; H.R. 2775, Employee Privacy Protection Act; and, H.R. 2723, Employee Rights Act: Hearing before the Subcomm. on Health, Employment, Labor and Pensions of the H. Comm. on Educ. and the Workforce*, 115th Cong., 2 (2017) (written testimony of Karen Cox).

<sup>29</sup> AT&T Workers Petition U.S. Supreme Court to Overturn Union Exemption for Identity Theft Laws, National Right to Work Legal Defense Foundation, Inc. (July 19, 2012), <http://www.nrtw.org/en/press/2012/07/fisher-supreme-court-appeal-07192012>.

<sup>30</sup> *Id.*

<sup>31</sup> Union Settles Lawsuit Alleging Identity Theft in Retaliation Campaign against Independent Worker, National Right to Work Legal Defense Foundation, Inc. (May 9, 2009), <http://www.nrtw.org/en/press/2009/05/union-settles-lawsuit-alleging-ident>.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Legislative Reforms to the National Labor Relations Act: H.R. 2776, Workforce Democracy and Fairness Act; H.R. 2775, Employee Privacy Protection Act; and, H.R. 2723, Employee Rights Act: Hearing before the Subcomm. on Health, Employment, Labor and Pensions of the H. Comm. on Educ. and the Workforce*, 115th Cong., 5 (2017) (written testimony of Nancy McKeague).

ployee personal contact information. Nowadays, no one is immune from the dangers of data piracy. The risks of falling victim to hacking, ‘phishing’ attacks, and/or identity theft are all increased by the volume of unwanted email or text message engagement directed at employees. Nothing in the rule dictates what measures should be taken to protect this information for example, whether it might be stored on secured networks only, or whether it must be destroyed upon resolution of the petition, etc. The [NLRB] glossed over all these very real concerns.<sup>36</sup>

As these examples illustrate, employees face unwelcome, even unlawful, union coercion and intimidation, as well as union misuse of their personally identifiable information. Providing additional private personal information to unions will only increase these incidents.

*Necessary Legislation To Address Unnecessary Encroachment on Employee Privacy*

The *Employee Privacy Protection Act* addresses the shortcomings of the NLRB’s December 15, 2014, changes to union election procedures by modernizing the *Excelsior* list, while protecting employee privacy by empowering workers. Seven days after the regional director’s pre-election decision or approval of the election agreement, employers will be required to provide a list of eligible employees. The list shall include employee names and one additional piece of personal contact information. The additional piece of information, such as a phone number, an email address, or a home address, will be chosen in writing by employees, thereby ensuring effective union communication and modernizing the *Excelsior* list while protecting employee privacy by allowing employees to choose how to be contacted by the union.

*Privacy Protection*

Congress has acted repeatedly to protect personally identifiable information. The following are examples of federal laws that include protections for personally identifiable information:<sup>37</sup>

- The *Fair Credit Reporting Act of 1970* (FCRA) sets forth rights for individuals and responsibilities for consumer “credit reporting agencies” in connection with the preparation and dissemination of personal information in a consumer report. Under the FCRA, consumer reporting agencies are prohibited from disclosing consumer reports to anyone who does not have a permissible purpose.
- The *Family Educational Rights and Privacy Act of 1974* governs access to and disclosure of educational records to parents, students, and third parties.
- The *Right to Financial Privacy Act of 1978* restricts the ability of the federal government to obtain bank records from financial institutions and sets forth procedures for the federal government’s access to bank customer records.

<sup>36</sup>Borden, *supra* note 22 at 12.

<sup>37</sup>E-mail from Gina Stevens, Congressional Research Service American Law Division, to Marvin Kaplan, former-Workforce Policy Counsel, House Education and the Workforce Committee (Aug. 12, 2014, 11:08 EST) (on file with author).

- The *Cable Communications Policy Act of 1984* limits the disclosure of cable television subscriber names, addresses, and utilization information for mail solicitation purposes.
- The *Video Privacy Protection Act of 1988* regulates the treatment of personal information collected in connection with video sales and rentals.
- The *Driver's Privacy Protection Act of 1994* regulates the use and disclosure of personal information from state motor vehicle records.
- The *Health Insurance Portability and Accountability Act of 1996* set a deadline of August 1999 for congressional action on privacy legislation for electronically transmitted health information and required the secretary of Health and Human Services to issue final privacy regulations by February 2000 in the absence of congressional action.
- The *Communications Act of 1934*, as amended by the *Telecommunications Act of 1996*, limits the use and disclosure of customer proprietary network information by telecommunications service providers and provides a right of access for individuals.
- The *Children's Online Privacy Protection Act of 1998* requires parental consent to collect a child's age or address and requires sites collecting information from children to disclose how they plan to use the data.
- The *Gramm-Leach-Bliley Act of 1999* requires financial institutions to disclose their privacy policies to their customers. Customers may opt out of sharing personal information, and the institutions may not share account numbers with non-affiliated telemarketers and direct marketers.

The National Do Not Call Registry, authorized by the bipartisan *Telemarketing and Consumer Fraud and Abuse Prevention Act*, provides insight into American sentiment on this issue. The National Do Not Call Registry gives Americans the opportunity to limit the telemarketing calls they receive.<sup>38</sup> Once registered on the National Do Not Call Registry, covered telemarketers must cease calling the registered number within 31 days.<sup>39</sup> According to the Federal Trade Commission, at the end of FY 2012 the National Do Not Call Registry contained approximately 217 million actively registered phone numbers.<sup>40</sup> In 2012, the U.S. population was approximately 314 million,<sup>41</sup> suggesting the vast majority of Americans would object to having an employer provide their personal information to any third party.

Former Rep. John Dingell (D–MI) stated during debate on the *Do-Not-Call Implementation Act* that the “national [Do Not Call Registry] will allow consumers to limit . . . unwanted intrusions

<sup>38</sup> National Do Not Call Registry, Federal Trade Commission, <http://www.consumer.ftc.gov/articles/0108-national-do-not-call-registry> (last visited Aug. 2, 2017).

<sup>39</sup> *Id.*

<sup>40</sup> FTC Issues FY 2012 National Do Not Call Registry Data Book, Federal Trade Commission, <http://www.ftc.gov/news-events/press-releases/2012/10/ftc-issues-fy-2012-national-do-not-call-registry-data-book> (last visited Aug. 2, 2017).

<sup>41</sup> Annual Estimates of the Resident Population for Selected Age Groups by Sex for the United States, States, Counties, and Puerto Rico Commonwealth and Municipios: April 1, 2010 to July 1, 2014. United States Census Bureau, <https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk> (last visited on Sep. 8, 2017).

and once again answer their telephones without aggravation.”<sup>42</sup> Like the National Do Not Call Registry, the *Employee Privacy Protection Act* limits unwanted intrusions. However, recognizing the importance of a free and informed choice in union elections, the *Employee Privacy Protection Act* does not forbid employers from providing employee information to a union. Instead, the *Employee Privacy Protection Act* modernizes the *Excelsior* list and allows employees to choose what personal information is provided to the union.

#### *Modernized Union Communication*

Under current rules, labor organizations have multiple avenues through which they may contact employees to encourage support for the union. In general, employees may solicit support in the workplace during non-work time, including breaks and lunch.<sup>43</sup> Given that unions win over two-thirds of representational elections, having employee phone numbers and email addresses is not essential to secure employee support. However, the Employee Privacy Protection Act recognizes that the *Excelsior* list promotes free and informed choice, but it is outdated. As such, the Employee Privacy Protection Act codifies a modernized *Excelsior* list that protects employee privacy and choice.

The ways individuals communicate has changed significantly since 1966 when the NLRB created the *Excelsior* list. At the time, traditional mail was one of the most widely used forms of communication.<sup>44</sup> However, the use of traditional mail has declined significantly in recent years. From 2007 to 2016, single-piece First-Class Mail volume dropped by approximately 22.6 billion pieces.<sup>45</sup> In contrast, the use of email and cell phones has risen significantly. According to Statista, there are 203.8 million adult email users in the United States.<sup>46</sup> According to Pew Research, as of January 2017 95 percent of American adults have a cell phone, 77 percent of which are smartphones.<sup>47</sup> The *Employee Privacy Protection Act* modernizes the *Excelsior* list to allow employees to provide a personal email address or phone number in lieu of a home address. However, to ensure employee privacy and choice, the *Employee Privacy Protection Act* leaves it to the individual employee to choose which piece of personal information is provided to the union.

#### CONCLUSION

Over the last several years, the NLRB has issued multiple decisions and rules intended to unbalance labor relations to benefit organized labor. One of the most significant of these recent actions was the NLRB’s December 15, 2014, rulemaking regarding election procedures. The changes to the *Excelsior* list unnecessarily infringe

<sup>42</sup> DO-NOT-CALL IMPLEMENTATION ACT. *Congressional Record*. February 12, 2003, 108th Congress, 1st Session .Issue: Vol. 149, No. 26

<sup>43</sup> *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).

<sup>44</sup> *Excelsior Underwear Inc.*, 156 NLRB 1236 (1966).

<sup>45</sup> U.S. POSTAL SERVICE: A DECADE OF FACTS AND FIGURES, United States Postal Service, <https://about.usps.com/who-we-are/postal-facts/decade-of-facts-and-figures.htm> (last visited Aug. 2, 2017).

<sup>46</sup> NUMBER OF ADULT E-MAIL USERS IN THE UNITED STATES FROM 2012 TO 2017 (in millions), Statista, <https://www.statista.com/statistics/253794/number-of-adult-e-mail-users-in-the-united-states/> (last visited Aug. 2, 2017).

<sup>47</sup> Mobile Technology Fact Sheet, Pew Research Center Internet Project, <http://www.pewinternet.org/fact-sheet/mobile/> (last visited Aug. 2, 2017).

on employee privacy. The *Employee Privacy Protection Act* protects employee privacy by providing employees with the power to choose what personal contact information is provided to the union.

#### SECTION-BY-SECTION

The following is a section-by-section analysis of the Amendment in the Nature of a Substitute offered by Rep. Wilson and reported favorably by the Committee.

Section 1. Provides that the short title is the “Employee Privacy Protection Act.”

Section 2. Amends the National Labor Relations Act to reverse the December 15, 2014, changes to representational election procedures by establishing the composition of and timetable upon which the employer must provide a list of eligible voters. Seven days after the final determination by the NLRB of the appropriate bargaining unit, the NLRB shall acquire the list of eligible employees from the employer and make it available to all parties. The list shall include the employee names and one additional form of personal employee contact information, such as telephone number, email address, or mailing address, chosen by the employee in writing.

#### EXPLANATION OF AMENDMENTS

The amendments, including the amendment in the nature of a substitute, are explained in the body of this report.

#### APPLICATION OF LAW TO THE LEGISLATIVE BRANCH

Section 102(b)(3) of Public Law 104–1 requires a description of the application of this bill to the legislative branch. H.R. 2775, the *Employee Privacy Protection Act*, protects employee privacy, modernizes the voter eligibility list, and empowers workers, while ensuring unions can continue to communicate with employees.

#### UNFUNDED MANDATE STATEMENT

Section 423 of the Congressional Budget and Impoundment Control Act (as amended by Section 101(a)(2) of the Unfunded Mandates Reform Act, P.L. 104–4) requires a statement of whether the provisions of the reported bill include unfunded mandates. This issue is addressed in the CBO letter.

#### EARMARK STATEMENT

H.R. 2775 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9 of House Rule XXI.

#### ROLL CALL VOTES

Clause 3(b) of rule XIII of the Rules of the House of Representatives requires the Committee Report to include for each record vote on a motion to report the measure or matter and on any amendments offered to the measure or matter the total number of votes for and against and the names of the Members voting for and against.

Date: June 29, 2017

**COMMITTEE ON EDUCATION AND THE WORKFORCE RECORD OF COMMITTEE VOTE**

Roll Call: 1 Bill: H.R. 2775 Amendment Number: 6

Disposition: Adopted by a vote of 22 yeas and 16 nays

Sponsor/Amendment: Mr. Thompson - Motion to table the appeal of the ruling of the chair on the Polis #2 amendment.

Name & State	Aye	No	Not Voting	Name & State	Aye	No	Not Voting
Mrs. FOXX (NC) (Chairwoman)	X			Mr. SCOTT (VA) (Ranking)		X	
Mr. WILSON (SC)	X			Mrs. DAVIS (CA)		X	
Mr. HUNTER (CA)	X			Mr. GRIJALVA (AZ)		X	
Mr. ROE (TN)	X			Mr. COURTNEY (CT)		X	
Mr. THOMPSON (PA)	X			Ms. FUDGE (OH)		X	
Mr. WALBERG (MI)	X			Mr. POLIS (CO)		X	
Mr. GUTHRIE (KY)	X			Mr. SABLAN (MP)			X
Mr. ROKITA (IN)	X			Ms. WILSON (FL)		X	
Mr. BARLETTA (PA)			X	Ms. BONAMICI (OR)		X	
Mr. MESSER (IN)	X			Mr. TAKANO (CA)		X	
Mr. BYRNE (AL)	X			Ms. ADAMS (NC)		X	
Mr. BRAT (VA)	X			Mr. DeSAULNIER (CA)		X	
Mr. GROTHMAN (WI)	X			Mr. NORCROSS (NJ)		X	
Ms. STEFANIK (NY)	X			Ms. BLUNT ROCHESTER (DE)		X	
Mr. ALLEN (GA)	X			Mr. KRISHNAMOORTHY (IL)		X	
Mr. LEWIS (MN)	X			Ms. SHEA-PORTER (NH)		X	
Mr. ROONEY (FL)	X			Mr. ESPAILLAT (NY)		X	
Mr. MITCHELL (MI)	X						
Mr. GARRETT (VA)	X						
Mr. SMUCKER (PA)	X						
Mr. FERGUSON (GA)	X						
Mr. ESTES (KS)	X						
Mrs. HANDEL (GA)	X						

TOTALS: Aye: 22 No: 16 Not Voting: 2

Total: 40 / Quorum: 14 / Report: 21

(23 R - 17 D)

Date: June 29, 2017

**COMMITTEE ON EDUCATION AND THE WORKFORCE RECORD OF COMMITTEE VOTE**Roll Call: 2 Bill: H.R. 2775 Amendment Number: 2Disposition: Defeated by a vote of 16 yeas and 22 naysSponsor/Amendment: Mr. Scott - Amends excelsior list requirements to conform with NLRB's 2015 election rule.

Name & State	Aye	No	Not Voting	Name & State	Aye	No	Not Voting
Mrs. FOXX (NC) (Chairwoman)		X		Mr. SCOTT (VA) (Ranking)	X		
Mr. WILSON (SC)		X		Mrs. DAVIS (CA)	X		
Mr. HUNTER (CA)		X		Mr. GRIJALVA (AZ)	X		
Mr. ROE (TN)		X		Mr. COURTNEY (CT)	X		
Mr. THOMPSON (PA)		X		Ms. FUDGE (OH)	X		
Mr. WALBERG (MI)		X		Mr. POLIS (CO)	X		
Mr. GUTHRIE (KY)		X		Mr. SABLAN (MP)			X
Mr. ROKITA (IN)		X		Ms. WILSON (FL)	X		
Mr. BARLETTA (PA)			X	Ms. BONAMICI (OR)	X		
Mr. MESSER (IN)		X		Mr. TAKANO (CA)	X		
Mr. BYRNE (AL)		X		Ms. ADAMS (NC)	X		
Mr. BRAT (VA)		X		Mr. DeSAULNIER (CA)	X		
Mr. GROTHMAN (WI)		X		Mr. NORCROSS (NJ)	X		
Ms. STEFANIK (NY)		X		Ms. BLUNT ROCHESTER (DE)	X		
Mr. ALLEN (GA)		X		Mr. KRISHNAMOORTHY (IL)	X		
Mr. LEWIS (MN)		X		Ms. SHEA-PORTER (NH)	X		
Mr. ROONEY (FL)		X		Mr. ESPAILLAT (NY)	X		
Mr. MITCHELL (MI)		X					
Mr. GARRETT (VA)		X					
Mr. SMUCKER (PA)		X					
Mr. FERGUSON (GA)		X					
Mr. ESTES (KS)		X					
Mrs. HANDEL (GA)		X					

TOTALS: Aye: 16 No: 22 Not Voting: 2

Total: 40 / Quorum: 14 / Report: 21

(23 R - 17 D)

Date: June 29, 2017

**COMMITTEE ON EDUCATION AND THE WORKFORCE RECORD OF COMMITTEE VOTE**

Roll Call: 3 Bill: H.R. 2775 Amendment Number: 3

Disposition: Defeated by a vote of 16 yeas and 22 nays

Sponsor/Amendment: Mr. Polis #1 - Defines employer to prohibit requiring access to personal social media accounts.

Name & State	Aye	No	Not Voting	Name & State	Aye	No	Not Voting
Mrs. FOXX (NC) (Chairwoman)		X		Mr. SCOTT (VA) (Ranking)	X		
Mr. WILSON (SC)		X		Mrs. DAVIS (CA)	X		
Mr. HUNTER (CA)		X		Mr. GRIJALVA (AZ)	X		
Mr. ROE (TN)		X		Mr. COURTNEY (CT)	X		
Mr. THOMPSON (PA)		X		Ms. FUDGE (OH)	X		
Mr. WALBERG (MI)		X		Mr. POLIS (CO)	X		
Mr. GUTHRIE (KY)		X		Mr. SABLAN (MP)			X
Mr. ROKITA (IN)		X		Ms. WILSON (FL)	X		
Mr. BARLETTA (PA)			X	Ms. BONAMICI (OR)	X		
Mr. MESSER (IN)		X		Mr. TAKANO (CA)	X		
Mr. BYRNE (AL)		X		Ms. ADAMS (NC)	X		
Mr. BRAT (VA)		X		Mr. DeSAULNIER (CA)	X		
Mr. GROTHMAN (WI)		X		Mr. NORCROSS (NJ)	X		
Ms. STEFANIK (NY)		X		Ms. BLUNT ROCHESTER (DE)	X		
Mr. ALLEN (GA)		X		Mr. KRISHNAMOORTHY (IL)	X		
Mr. LEWIS (MN)		X		Ms. SHEA-PORTER (NH)	X		
Mr. ROONEY (FL)		X		Mr. ESPAILLAT (NY)	X		
Mr. MITCHELL (MI)		X					
Mr. GARRETT (VA)		X					
Mr. SMUCKER (PA)		X					
Mr. FERGUSON (GA)		X					
Mr. ESTES (KS)		X					
Mrs. HANDEL (GA)		X					

TOTALS: Aye: 16 No: 22 Not Voting: 2

Total: 40 / Quorum: 14 / Report: 21

(23 R - 17 D)



Date: June 29, 2017

**COMMITTEE ON EDUCATION AND THE WORKFORCE RECORD OF COMMITTEE VOTE**

Roll Call: 4 Bill: H.R. 2775 Amendment Number: 4

Disposition: Defeated by a vote of 16 yeas and 22 nays

Sponsor/Amendment: Ms. Shea-Porter - Defines employer to prohibit activating video surveillance of employees in private areas.

Name & State	Aye	No	Not Voting	Name & State	Aye	No	Not Voting
Mrs. FOXX (NC) (Chairwoman)		X		Mr. SCOTT (VA) (Ranking)	X		
Mr. WILSON (SC)		X		Mrs. DAVIS (CA)	X		
Mr. HUNTER (CA)		X		Mr. GRIJALVA (AZ)	X		
Mr. ROE (TN)		X		Mr. COURTNEY (CT)	X		
Mr. THOMPSON (PA)		X		Ms. FUDGE (OH)	X		
Mr. WALBERG (MI)		X		Mr. POLIS (CO)	X		
Mr. GUTHRIE (KY)		X		Mr. SABLAN (MP)			X
Mr. ROKITA (IN)		X		Ms. WILSON (FL)	X		
Mr. BARLETTA (PA)			X	Ms. BONAMICI (OR)	X		
Mr. MESSER (IN)		X		Mr. TAKANO (CA)	X		
Mr. BYRNE (AL)		X		Ms. ADAMS (NC)	X		
Mr. BRAT (VA)		X		Mr. DeSAULNIER (CA)	X		
Mr. GROTHMAN (WI)		X		Mr. NORCROSS (NJ)	X		
Ms. STEFANIK (NY)		X		Ms. BLUNT ROCHESTER (DE)	X		
Mr. ALLEN (GA)		X		Mr. KRISHNAMOORTHY (IL)	X		
Mr. LEWIS (MN)		X		Ms. SHEA-PORTER (NH)	X		
Mr. ROONEY (FL)		X		Mr. ESPAILLAT (NY)	X		
Mr. MITCHELL (MI)		X					
Mr. GARRETT (VA)		X					
Mr. SMUCKER (PA)		X					
Mr. FERGUSON (GA)		X					
Mr. ESTES (KS)		X					
Mrs. HANDEL (GA)		X					

TOTALS: Aye: 16 No: 22 Not Voting: 2

Total: 40 / Quorum: 14 / Report: 21

Date: June 29, 2017

**COMMITTEE ON EDUCATION AND THE WORKFORCE RECORD OF COMMITTEE VOTE**

Roll Call: 5 Bill: H.R. 2775 Amendment Number: 5

Disposition: Defeated by a vote of 17 yeas and 21 nays

Sponsor/Amendment: Ms. Adams - Defines employer to prohibit conducting video surveillance of employees in private areas.

Name & State	Aye	No	Not Voting	Name & State	Aye	No	Not Voting
Mrs. FOXX (NC) (Chairwoman)		X		Mr. SCOTT (VA) (Ranking)	X		
Mr. WILSON (SC)		X		Mrs. DAVIS (CA)	X		
Mr. HUNTER (CA)		X		Mr. GRIJALVA (AZ)	X		
Mr. ROE (TN)		X		Mr. COURTNEY (CT)	X		
Mr. THOMPSON (PA)		X		Ms. FUDGE (OH)	X		
Mr. WALBERG (MI)		X		Mr. POLIS (CO)	X		
Mr. GUTHRIE (KY)		X		Mr. SABLAN (MP)			X
Mr. ROKITA (IN)		X		Ms. WILSON (FL)	X		
Mr. BARLETTA (PA)			X	Ms. BONAMICI (OR)	X		
Mr. MESSER (IN)		X		Mr. TAKANO (CA)	X		
Mr. BYRNE (AL)		X		Ms. ADAMS (NC)	X		
Mr. BRAT (VA)		X		Mr. DeSAULNIER (CA)	X		
Mr. GROTHMAN (WI)		X		Mr. NORCROSS (NJ)	X		
Ms. STEFANIK (NY)	X			Ms. BLUNT ROCHESTER (DE)	X		
Mr. ALLEN (GA)		X		Mr. KRISHNAMOORTHY (IL)	X		
Mr. LEWIS (MN)		X		Ms. SHEA-PORTER (NH)	X		
Mr. ROONEY (FL)		X		Mr. ESPAILLAT (NY)	X		
Mr. MITCHELL (MI)		X					
Mr. GARRETT (VA)		X					
Mr. SMUCKER (PA)		X					
Mr. FERGUSON (GA)		X					
Mr. ESTES (KS)		X					
Mrs. HANDEL (GA)		X					

TOTALS: Aye: 17 No: 21 Not Voting: 2

Total: 40 / Quorum: 14 / Report: 21

Date: June 29, 2017

**COMMITTEE ON EDUCATION AND THE WORKFORCE RECORD OF COMMITTEE VOTE**

Roll Call: 6 Bill: H.R. 2775 Amendment Number: \_\_\_\_\_

Disposition: Adopted by a vote of 22 yeas and 16 nays

Sponsor/Amendment: Mr. Wilson - motion to report the bill to the House with an amendment and with the recommendation that the amendment be agreed to, and the bill as amended do pass.

Name & State	Aye	No	Not Voting	Name & State	Aye	No	Not Voting
Mrs. FOXX (NC) (Chairwoman)	X			Mr. SCOTT (VA) (Ranking)		X	
Mr. WILSON (SC)	X			Mrs. DAVIS (CA)		X	
Mr. HUNTER (CA)	X			Mr. GRIJALVA (AZ)		X	
Mr. ROE (TN)	X			Mr. COURTNEY (CT)		X	
Mr. THOMPSON (PA)	X			Ms. FUDGE (OH)		X	
Mr. WALBERG (MI)	X			Mr. POLIS (CO)		X	
Mr. GUTHRIE (KY)	X			Mr. SABLAN (MP)			X
Mr. ROKITA (IN)	X			Ms. WILSON (FL)		X	
Mr. BARLETTA (PA)			X	Ms. BONAMICI (OR)		X	
Mr. MESSER (IN)	X			Mr. TAKANO (CA)		X	
Mr. BYRNE (AL)	X			Ms. ADAMS (NC)		X	
Mr. BRAT (VA)	X			Mr. DeSAULNIER (CA)		X	
Mr. GROTHMAN (WI)	X			Mr. NORCROSS (NJ)		X	
Ms. STEFANIK (NY)	X			Ms. BLUNT ROCHESTER (DE)		X	
Mr. ALLEN (GA)	X			Mr. KRISHNAMOORTHY (IL)		X	
Mr. LEWIS (MN)	X			Ms. SHEA-PORTER (NH)		X	
Mr. ROONEY (FL)	X			Mr. ESPAILLAT (NY)		X	
Mr. MITCHELL (MI)	X						
Mr. GARRETT (VA)	X						
Mr. SMUCKER (PA)	X						
Mr. FERGUSON (GA)	X						
Mr. ESTES (KS)	X						
Mrs. HANDEL (GA)	X						

TOTALS: Aye: 22 No: 16 Not Voting: 2

Total: 40 / Quorum: 14 / Report: 21

(23 R - 17 D)

STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

In accordance with clause (3)(c) of House Rule XIII, the goal of H.R. 2775 are to protect employee privacy, modernize the voter eligibility list, and empower workers, while ensuring unions can continue to communicate with employees.

DUPLICATION OF FEDERAL PROGRAMS

No provision of H.R. 2775 establishes or reauthorizes a program of the Federal Government known to be duplicative of another Federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111-139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

DISCLOSURE OF DIRECTED RULE MAKINGS

The Committee estimates that enacting H.R. 2775 does not specifically direct the completion of any specific rule makings within the meaning of 5 U.S.C. 551.

STATEMENT OF OVERSIGHT FINDINGS AND RECOMMENDATIONS OF THE COMMITTEE

In compliance with clause 3(c)(1) of rule XIII and clause 2(b)(1) of rule X of the Rules of the House of Representatives, the Committee's oversight findings and recommendations are reflected in the body of this report.

NEW BUDGET AUTHORITY AND CBO COST ESTIMATE

With respect to the requirements of clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974 and with respect to requirements of clause 3(c)(3) of rule XIII of the Rules of the House of Representatives and section 402 of the Congressional Budget Act of 1974, the Committee has received the following estimate for H.R. 2775 from the Director of the Congressional Budget Office:

U.S. CONGRESS,  
CONGRESSIONAL BUDGET OFFICE,  
*Washington, DC, July 24, 2017.*

Hon. VIRGINIA FOXX,  
*Chairwoman, Committee on Education and the Workforce,  
House of Representatives, Washington, DC.*

DEAR MADAM CHAIRWOMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 2775, the Employee Privacy Protection Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Christina Hawley Anthony.

Sincerely,

MARK P. HADLEY  
(For Keith Hall, Director).

Enclosure.

*H.R. 2775—Employee Privacy Protection Act*

H.R. 2775 would amend the National Labor Relations Act to require the National Labor Relations Board wait at least seven days after the board has issued its final determination on a petition for collective bargaining representation before obtaining from an employer a list of employees who are eligible to vote in an election for such representation. CBO estimates that enacting H.R. 2775 would not affect the federal budget.

Enacting the bill would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply. CBO estimates that enacting H.R. 2775 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2028.

The bill contains no intergovernmental mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no costs on state, local, or tribal governments.

The bill would impose a private-sector mandate as defined in UMRA by requiring employers to obtain, in writing, their employees' preferred method of being contacted by union representatives. The bill would allow employees to choose what type of personal contact information (telephone number, email address, or mailing address) to share with union organizers seeking to establish a union in their workplace. Because complying with the mandate would only entail a small change relative to current requirements, CBO estimates that the aggregate cost of the mandate would fall well below the annual threshold established in UMRA for private-sector mandates (\$156 million, in 2017, adjusted annually for inflation).

The CBO staff contacts for this estimate are Christina Hawley Anthony (for federal costs) and Logan Smith (for private-sector mandates). The estimate was approved by H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

## COMMITTEE COST ESTIMATE

Clause 3(d)(1) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison of the costs that would be incurred in carrying out H.R. 2775. However, clause 3(d)(2)(B) of that rule provides that this requirement does not apply when the Committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act.

## CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (new matter is printed in italic and existing law in which no change is proposed is shown in roman):

## CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill,

as reported, are shown as follows (new matter is printed in italic and existing law in which no change is proposed is shown in roman):

### NATIONAL LABOR RELATIONS ACT

\* \* \* \* \*

#### REPRESENTATIVES AND ELECTIONS

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employees or a group of employees shall have the right at any time at present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided*, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a); the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof. *Not earlier than 7 days after a final determination by the Board of the appropriate bargaining unit, the Board shall acquire from the employer a list of all employees eligible to vote in the election to be made available to all parties, which shall include the names of the employees, and not more than one additional form of personal contact information for the employee, (such as a telephone number, an email address, or a mailing address) chosen by the employee in writing.*

(2) In determining whether or not a question or representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 10(c).

(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this Act in any election conducted within twelve months after the commencement of the strike. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) the extent to which the employees have organized shall not be controlling.

(d) Whenever an order of the Board made pursuant to section 10(c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10(e) or 10(f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

(e)(1) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 8(a)(3), of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer.

(2) No election shall be conducted pursuant to this subsection in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held.

\* \* \* \* \*



## MINORITY VIEWS

This bill overturns the National Labor Relations Board's (NLRB) 2015 election rule that levels the playing field by ensuring that a union has access to the same employee contact information as the employer prior to a union representation election. The bill tilts the playing field against workers' efforts to unionize by unfairly restricting employee contact information that an employer must provide to a union after the NLRB orders a union representation election, and then by imposing needless delays in providing such contact information. The bill was approved and reported out of the Committee with 22 Republicans voting "aye" and all 16 Democrats present opposing H.R. 2775.

### *Background*

Since the NLRB's *Excelsior Underwear* decision<sup>1</sup> over 60 years ago, the NLRB has required the employer to provide a list of employee names and home addresses prior to a representation election. The "*Excelsior* list" had to be provided to the NLRB within 7 days of the direction of an election by the NLRB, which, in turn, provided the list to the union. The reason for this mandate was to address the problem where only one side—the employer—had the opportunity to communicate by mail with all workers prior to the election, and the union did not have an equivalent ability to respond. The employer, unlike the union, is also free to contact employees one-on-one in the workplace, and can lawfully require employees to attend captive audience meetings on the worksite where they must listen to the employer's views regarding unionization. Given the employer's advantages in contacting employees during a union election, the *Excelsior* list attempts to level the playing field.

In 2015, the NLRB's election rule updated the requirements for the *Excelsior* list to better effectuate the list's purpose. The NLRB's current rule requires the employer to provide the list directly to the union in electronic form within 2 days of the ordering of an election.<sup>2</sup> Further, the contents of the list now must include, in addition to the employees' names and home addresses, their work locations, shifts, job classifications, available personal email addresses, and available home and cell phone numbers.

### *Impact of the Legislation*

H.R. 2775 does not simply reverse the NLRB's 2015 rule governing the *Excelsior* list, it undermines the list's purpose. The bill does not replace the 2-day deadline with the 7-day deadline that existed prior to the rule. Instead, it mandates a minimum 7-day waiting period before the employer can submit the list to the

<sup>1</sup> 156 NLRB 1236 (1966).

<sup>2</sup> 29 C.F.R. § 102.62(d).

NLRB, with no maximum timeframe for submission. The bill “does not limit how long the union may be forced to wait for this basic information. The union could receive the list of voters the night before the election under EPPA,” according to the testimony of Jody Calemine, General Counsel of the Communications Workers of America, before a June 14, 2017 legislative hearing on H.R. 2775.<sup>3</sup> Adding further delay, the bill requires the employer to send the list to the NLRB, rather than directly to the union.

This bill goes even further by limiting the amount of information that the employer must include in the list. Under H.R. 2775, the employer only must include the employee’s name and one of three forms of contact information—a mailing address, email address, or telephone number—to be selected by each employee and provided to his or her supervisor. This procedure invites intimidation, where employers can pressure their workers to provide outdated contact information.

In undermining the effectiveness of the *Excelsior* list, H.R. 2775 unnecessarily interferes with settled law. The NLRB’s 2015 election rule, which governs the *Excelsior* list, has been upheld in every court where the rule has been challenged.<sup>4</sup>

*Republican Arguments Regarding Employee Privacy Are Hypothetical and Are Not Supported by Evidence*

Committee Republicans contend that the new NLRB rule “jeopardizes the privacy of workers” because unions will abuse this contact information. They rely upon anecdotes that have not been substantiated by NLRB complaints or proceedings.

To assess the merits of this contention, the NLRB was asked whether there have been any unfair labor practice charges or cases adjudicated regarding the improper use of *Excelsior* list contact information by a union, or complaints filed about improper contact with eligible voters during a union election campaign using information provided through the *Excelsior* list. If such cases exist, the NLRB was asked how many of these cases have there been since April 2015 when the NLRB election rule went into effect.

The NLRB’s response: There are no such cases.<sup>5</sup>

This is unsurprising since the NLRB rule states that “[t]he parties shall not use the list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.”<sup>6</sup>

Given the absolute lack of evidence, it appears that this legislation is a solution in search of a problem, and is nothing more than a pretext to undermine the ability of workers to band together and attempt to bargain with their employers to improve the employees’ wellbeing.

<sup>3</sup>Testimony of Guerino J. Calemine, III, Before the U.S. House of Representatives Subcommittee on Health, Labor, Employment, and Pensions (June 14, 2017) [https://edworkforce.house.gov/uploadedfiles/calemine\\_-\\_testimony.pdf](https://edworkforce.house.gov/uploadedfiles/calemine_-_testimony.pdf).

<sup>4</sup>*Associated Builders & Contractors of Texas, Inc. v. NLRB*, 826 F.3d 215 (5th Cir. 2016); *Chamber of Commerce of the United States of America v. NLRB*, 118 F. Supp. 3d 171 (D.C. Cir. 2015).

<sup>5</sup>Email communications to the Education and Workforce Committee Democratic staff from the NLRB, July 6, 2017.

<sup>6</sup>29 CFR 102.62(d)

COMMITTEE DEMOCRATS OFFER AMENDMENTS TO FIX  
FLAWS IN H.R. 2775

Democrats offered the following amendments to H.R. 2775 at the June 29, 2017 markup:

AMENDMENT 1—TO AMEND THE TIMING AND CONTENT OF THE VOTER  
INFORMATION LIST

In order to ensure that employee contact information is provided to unions in a timely manner and to assure adequate modes of communication, Ranking Member Bobby Scott offered an amendment to codify the NLRB’s 2015 election rule. This amendment requires employers to provide the union with the *Excelsior* list of eligible voters within 2 days of the direction of an election, instead of setting a minimum 7-day waiting period to provide the list to the NLRB (and not directly to the union) provided in the bill. The amendment ensures that the employer provides the employee’s name, mailing address, phone number, or email if available. This amendment assures unions have access to all modes of contact information, in addition to work locations, shifts, and job classifications.

The amendment was rejected 16–22, with all present Committee Democrats voting for the amendment.

AMENDMENT 2—PROTECTING EMPLOYEE PRIVACY REGARDING EM-  
PLOYERS THAT REQUIRE ACCESS TO EMPLOYEES’ SOCIAL MEDIA AC-  
COUNTS

In order to ensure that the Employee Privacy Protection Act improves employee privacy, Representative Jared Polis offered an amendment that would limit application of the bill to employers who adopt policies barring management from requiring employees’ email and social media names, user names, and passwords. Currently, federal law does not protect employees from employers requiring such disclosures. Although 25 states have enacted some protections for employees, they vary greatly across the states.<sup>7</sup> The amendment, unlike the bill text, actually protects the employee privacy that the bill’s title purports to protect.

The amendment was rejected 16–22, with all present Committee Democrats voting for the amendment.

AMENDMENT 3—PROTECTING EMPLOYEE PRIVACY REGARDING EM-  
PLOYERS ENGAGING IN GPS TRACKING OF EMPLOYEES DURING NON-  
WORK HOURS

In order to ensure that the Employee Privacy Protection Act actually improves employee privacy, Representative Carol Shea-Porter offered an amendment that would limit application of the bill to employers who adopt policies that prohibit management from installing and activating GPS tracking through employer-provided

<sup>7</sup> See, e.g. Utah Code §34–48–102 (prohibits employers from requiring employees to provide passwords); N.H. Rev. Stat. §275:74 (prohibits employers from requiring passwords, requiring employees to add themselves to a list of contacts, or to change privacy settings of social media accounts). See generally State Social Media Privacy Laws, National Conference of State Legislatures <http://www.ncsl.org/research/telecommunications-and-information-technology/state-laws-prohibiting-access-to-social-media-usernames-and-passwords.aspx> (May 5, 2017).

cellular phones, unless the employee provides written consent. Although employers may have reason to track employees during working hours, such tracking of employees during their personal time is an unwarranted violation of employees' privacy without any legitimate business purposes. No federal law currently protects employee privacy from GPS tracking by their employers outside working hours.

The amendment was rejected 16–22, with all present Committee Democrats voting for the amendment.

AMENDMENT 4—PROTECTING EMPLOYEE PRIVACY REGARDING EMPLOYERS CONDUCTING VIDEO SURVEILLANCE IN EMPLOYEE BATHROOMS AND LOCKER ROOMS

In order to ensure that the Employee Privacy Protection Act actually improves employee privacy, Representative Alma Adams offered an amendment that would limit application of the bill to employers who prohibit management from conducting video surveillance of employees in designated private areas, such as bathrooms and locker rooms. Although at least six states have codified this principle, most jurisdictions allow this surveillance and no federal protections exist.<sup>8</sup>

The amendment was rejected 17–21, with all present Committee Democrats and one Republican voting for the amendment.

AMENDMENT 5—TO SUBSTITUTE THE TEXT OF THE BILL WITH THE GIVING WORKERS A FAIR SHOT ACT

Representative Polis offered an amendment to replace the bill with the Giving Workers a Fair Shot Act (H.R. 2275). This amendment promotes collective bargaining by authorizing mandatory arbitration for a first contract following an election if the parties cannot reach agreement after a reasonable period of time. It also prohibits federal contractors from seeking reimbursement for union avoidance activity, and prohibits the CEO and Chairman of a publicly traded company from being the same person. The bill also establishes monetary sanctions for violations of the NLRA, and strengthens the enforcement of the Occupational Safety and Health Act, the Fair Labor Standards Act, the Federal Mine Safety and Health Act, and the Migrant and Seasonal Agricultural Worker Protection Act.

The amendment was ruled non-germane. The appeal of the ruling was tabled on a vote of 22–16, with all present Committee Democrats voting for the amendment.

ROBERT C. “BOBBY” SCOTT,  
*Ranking Member.*  
 SUSAN A. DAVIS.  
 RAÚL M. GRIJALVA.  
 JOE COURTNEY.  
 MARCIA L. FUDGE.  
 JARED POLIS.  
 GREGORIO KILILI CAMACHO  
 SABLÁN.

<sup>8</sup> See Cal. Lab. Code § 435; Conn. Gen. Stat. § 31–48b; Del. Code tit. 11, § 1335; N.Y. Lab. Law § 203–c; R.I. Gen. Laws § 28–6.12–1; W. Va. Code § 21–3–20.

FREDERICA S. WILSON.  
SUZANNE BONAMICI.  
MARK TAKANO.  
ALMA S. ADAMS.  
MARK DESAULNIER.  
DONALD NORCROSS.  
LISA BLUNT ROCHESTER.  
RAJA KRISHNAMOORTHY.  
CAROL SHEA-PORTER.  
ADRIANO ESPAILLAT.

