115TH CONGRESS
*1st Session*
HOUSE OF REPRESENTATIVES
REPORT
115–326

# WORKFORCE DEMOCRACY AND FAIRNESS 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. 2776]

[Including cost estimate of the Congressional Budget Office]

The Committee on Education and the Workforce, to whom was referred the bill (H.R. 2776) to amend the National Labor Relations Act with respect to the timing of elections and pre-election hearings and the identification of pre-election issues, 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 "Workforce Democracy and Fairness Act".

**SEC. 2. PRE-ELECTION HEARINGS.**

Section 9(c)(1) of the National Labor Relations Act (29 U.S.C. 159(c)(1)) is amended in the matter following subparagraph (B)—

(1) by inserting ", but in no circumstances less than 14 calendar days after the filing of the petition" after "upon due notice";

(2) by inserting after "with respect thereto." the following: "An appropriate hearing shall be one that is non-adversarial with the hearing officer charged, in collaboration with the parties, with the responsibility of identifying any relevant and material pre-election issues and thereafter making a full record thereon. Relevant and material pre-election issues shall include, in addition to unit appropriateness, the Board's jurisdiction and any other issue the resolution of which may make an election unnecessary or may reasonably be expected to impact the outcome of the election. Parties may independently raise any relevant and material pre-election issue or assert any relevant and material position at any time prior to the close of the hearing."; and

(3) by striking "and shall certify the results thereof" and inserting "to be conducted as soon as practicable but no earlier than 35 calendar days after the filing of an election petition. The Board shall certify the results of the election after it has ruled on each pre-election issue not resolved before the election and any additional issue pertaining to the conduct or results of the election".

**SEC. 3. DETERMINATION OF APPROPRIATE UNITS FOR COLLECTIVE BARGAINING.**

Section 9(b) of the National Labor Relations Act (29 U.S.C. 159(b)) is amended—

(1) by redesignating paragraphs (1) through (3) as subparagraphs (A) through (C), respectively;

(2) by striking "The Board shall decide" and all that follows through "or subdivision thereof:" and inserting the following: "(1) In each case, prior to an election, the Board shall determine, 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. Unless otherwise stated in this Act, and excluding any bargaining unit determination promulgated through rulemaking before August 26, 2011, the unit appropriate for purposes of collective bargaining shall consist of employees that share a sufficient community of interest. In determining whether employees share a sufficient community of interest, the Board shall consider—

"(A) similarity of wages, benefits, and working conditions;

"(B) similarity of skills and training;

"(C) centrality of management and common supervision;

"(D) extent of interchange and frequency of contact between employees;

"(E) integration of the work flow and interrelationship of the production process;

"(F) the consistency of the unit with the employer's organizational structure;

"(G) similarity of job functions and work; and

"(H) the bargaining history in the particular unit and the industry.

To avoid the proliferation or fragmentation of bargaining units, no employee shall be excluded from the unit unless the interests of the group seeking a separate unit are sufficiently distinct from those of other employees to warrant the establishment of a separate unit. Whether additional employees should be included in a proposed unit shall be determined based on whether such additional employees and proposed unit members share a sufficient community of interest, with the sole exception of proposed accretions to an existing unit, in which the inclusion of additional employees shall be based on whether such additional employees and existing unit members share an overwhelming community of interest and the additional employees have little or no separate identity."; and

(3) by striking "*Provided,* That the Board" and inserting the following:

"(2) The Board".

## PURPOSE

The *Workforce Democracy and Fairness Act*, H.R. 2776, reverses the National Labor Relations Board's (NLRB or Board) August 26, 2011, decision in *Specialty Healthcare and Rehabilitation Center of Mobile* [1] (*Specialty Healthcare*), and reverses the NLRB's December 15, 2014, final representation-case procedures rule [2] (the ambush election rule). The legislation ensures cohesion in the workplace, employee free choice, and employer free speech, without upsetting any other current law.

## COMMITTEE ACTION

### 112TH CONGRESS

### *Subcommittee Hearing on Concerns about the NLRB's Harmful Actions*

On February 11, 2011, the Subcommittee on Health, Employment, Labor, and Pensions (HELP) of the Committee on Education and the Workforce (Committee) held a hearing on "Emerging

[1] 357 NLRB 934, 940 (2011)

[2] 79 Fed. Reg. at 74308.

Trends at the National Labor Relations Board." The hearing examined controversial and precedent-changing NLRB holdings and invitations for briefs (including *Specialty Healthcare*), the NLRB's December 22, 2010, Notice of Proposed Rulemaking that mandated employers display a vague and biased poster regarding union rights at work, and new policies issued by Acting NLRB General Counsel Lafe Solomon. Witnesses at this hearing were Mr. Philip A. Miscimarra, Partner, Morgan, Lewis & Bockius LLP, Chicago, Illinois; Mr. Arthur Rosenfeld, Former National Labor Relations Board General Counsel, Alexandria, Virginia; Mr. G. Roger King, Partner, Jones Day, Columbus, Ohio; and, Ms. Cynthia Estlund, Professor of Law, New York University School of Law, New York, New York.

*Committee Hearing on NLRB's Unprecedented Rulemaking*

On July 7, 2011, the Committee heard testimony on the NLRB's proposed election procedure regulation in a hearing on "Rushing Union Elections: Protecting the Interests of Big Labor at the Expense of Workers' Free Choice." Witnesses agreed the cumulative changes in the proposal would significantly hinder an employer's ability to communicate with his or her employees and cripple an employee's right to choose whether to be represented by a labor organization. Witnesses were the Honorable Peter C. Schaumber, former National Labor Relations Board Chairman, Washington, D.C.; Mr. Larry Getts, Tube Press Technician, Dana Corporation, Garrett, Indiana; Mr. John Carew, President, Carew Concrete & Supply Company, Appleton, Wisconsin, testifying on behalf of 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 Disenfranchise 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." At the end of August 2011, the NLRB issued a number of biased, anti-worker decisions, including *Specialty Healthcare*. Additionally, the Board finalized a rule requiring almost every employer to post a vague, union-biased notice on employee rights under the *National Labor Relations Act* (NLRA). The Board's unbridled overreach of authority demanded a complete examination by the Committee. Witnesses were Mr. Curtis L. Mack, Partner, 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-Chairman John Kline (R–MN) introduced H.R. 3094, the *Workforce Democracy and Fairness Act*, with 26 cosponsors. Recognizing the NLRB had gone far beyond its statutorily assigned role as an adjudicative body designed to implement congressional intent under the NLRA, legislation was necessary to (1) reinstate the traditional standard for determining

which employees make up an appropriate bargaining unit; (2) ensure employers are able to participate in a fair union election; (3) guarantee workers have the ability to make fully informed decisions in union elections; 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 testified the Board had overturned decades of precedent to facilitate union organizing at the cost of employee free choice and employer free speech and these actions would have devastating economic consequences for the country. Witnesses were 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, testifying on behalf of 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 Passage 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 to clarify that years of labor policies affecting the acute health care industry remain in place; limit pre-election issues to those that are relevant and material; and reaffirm the Board's responsibility to grant or deny requests for review of regional directors' decisions before an election. Nine additional amendments were offered and debated; however, no amendments beyond the substitute were adopted. The Committee favorably reported the bill, as amended, 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. 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 Senate failed to act on the bill before the conclusion of the 112th Congress.

113TH CONGRESS

*Subcommittee Hearing on Union Organizing*

On September 19, 2013, the HELP Subcommittee held a hearing on "The Future of Union Organizing." The hearing reviewed the application of *Specialty Healthcare* and 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, Proskauer Rose, Wash-

ington, 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." Witnesses testified the proposed ambush election rule [3] would considerably shorten the time between the filing of the petition and the election date and substantially limit the opportunity for a full evidentiary hearing or Board resolution of contested issues, including appropriate bargaining unit, voter eligibility, and election misconduct. Witnesses were 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. Sencer, Esq., Shareholder, Weinberg, Roger & Rosenfeld P.C., Alameda, California; and, Mr. William Messenger, Staff Attorney, National Right to Work Legal Defense Foundation, Inc., Springfield, Virginia.

*Introduction of H.R. 4320, Workforce Democracy and Fairness Act*

On March 27, 2014, then-Chairman Kline introduced H.R. 4320, the *Workforce Democracy and Fairness Act*, with 20 cosponsors. The legislation largely mirrored H.R. 3094, the *Workforce Democracy and Fairness Act*, as introduced in the 112th Congress. Recognizing the NLRB's ambush election rule would fundamentally alter representational elections to the detriment of employers and employees, provisions were added to (1) ensure employers were able to participate in a fair union election and (2) guarantee workers had the ability to make a fully informed decision in a union election.

*Committee Passage of H.R. 4320, Workforce Democracy and Fairness Act*

On April 9, 2014, the Committee considered H.R. 4320, the *Workforce Democracy and Fairness Act*. Chairman Kline offered an amendment in the nature of a substitute, making a technical change to clarify the legislation applies to representational elections. Four additional amendments were offered and debated. Rep. Tom Price's (R–GA) amendment codifying the NLRB's bargaining unit determination standard prior to *Specialty Healthcare* was adopted by a vote of 21 to 13. The Committee favorably reported H.R. 4320, as amended, to the House of Representatives by a vote of 21 to 14. The Senate failed to act on the bill before the end of the 113th Congress.

*Committee Hearing on Unionization of Student Athletes*

On May 8, 2014, the Committee held a hearing entitled "Big Labor on College Campuses: Examining the Consequences of Unionizing Student Athletes." Witnesses testified the recent NLRB ruling declaring student athletes to be employees under the NLRA risked bringing micro-unions and ambush elections to college and university campuses further perpetuating the issues seen in non-collegial settings. Witnesses were the Honorable Ken Starr, Presi-

[3] *Representation-Case Procedures*, 79 Fed. Reg. 74308, 7318 (Dec. 15, 2014).

dent and Chancellor, Baylor University, Waco, Texas; Mr. Bradford L. Livingston, Partner at Seyfarth Shaw LLP, Chicago, Illinois; Mr. Andy Schwarz, Partner, OSKR LLC, Emeryville, California; Mr. Bernard M. Muir, Director of Athletics, Stanford University, Stanford, California; and, Mr. Patrick C. Eilers, Managing Director, Madison Dearborn Partners, Chicago, Illinois.

*Subcommittee Hearing on Recent NLRB Decisions*

On June 24, 2014, the HELP Subcommittee held a hearing on "What Should Workers and Employers Expect Next from the National Labor Relations Board?" Witnesses testified NLRB actions, including decisions restricting employee access to secret ballots, imposing ambush elections, and encouraging micro-unions, had generated uncertainty and confusion for employers, hurting job creation and growth. Witnesses were Mr. Seth H. Borden, Partner, McKenna Long & Aldridge LLP, New York, New York; Mr. James Coppess, Associate General Counsel, AFL–CIO, Washington, D.C.; Mr. G. Roger King, Of Counsel, Jones Day, Columbus, Ohio; and, Mr. Andrew F. Puzder, CEO, CKE Restaurants, Carpinteria, California.

114TH CONGRESS

*Subcommittee Legislative Hearing on H.J. Res. 29, Providing for Congressional Disapproval of the 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." The Joint Resolution disapproved and nullified the rule submitted by the NLRB and published on December 15, 2014. At the hearing, witnesses testified to the urgent need for Congress to overturn the NLRB's ambush election rule, which would have negative consequences for workers and families. Witnesses at this hearing were Ms. Brenda Crawford, Registered Nurse, Murrieta, California; Mr. Roger King, Senior Labor and Employment Counsel, on behalf of the Retail Industry Leaders Association, Washington, D.C.; Mr. Arnold E. Perl, Member, Glankler Brown PLLC, Memphis, Tennessee, and, Mr. Glenn M. Taubman, Staff Attorney, National Right to Work Legal Defense and Educational Foundation, Inc., Springfield, Virginia.

*Introduction of H.R. 1768, Workforce Democracy and Fairness Act*

On April 14, 2015, then-Chairman Kline introduced H.R. 1768, the *Workforce Democracy and Fairness Act*, with two cosponsors. The text of H.R. 1768 was identical to that of H.R. 4320 as amended by the Committee in April 2014.

115TH CONGRESS

*Subcommittee Hearing on the Need to Restore Balance 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 decried the extreme, partisan decisions of the NLRB during the Obama administration, including the ambush election rule, and stressed the need for a return to a balance be-

tween workers, employers, and unions in the Board's rulings. Witnesses at this hearing 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, National Right to Work Legal Defense and Education Foundation, Springfield, Virginia; and, Mr. Kurt G. Larkin, Partner, Hunton & Williams LLP, Richmond, Virginia.

*Introduction of H.R. 2776, Workforce Democracy and Fairness Act*

On June 6, 2017, HELP Subcommittee Chairman Tim Walberg (R–MI) introduced H.R. 2776, the *Workforce Democracy and Fairness Act*, with six cosponsors. The text of H.R. 2776 is identical to the text of H.R. 1768, which was referred to the Committee in April 2015 but not acted on prior to the conclusion of the 114th Congress.

*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*." Among other topics, witnesses testified about the need for H.R. 2776 to fix the problems created by the activist-NLRB related to the ambush election rule. Witnesses at this hearing were Mr. Seth H. Borden, Partner, McGuireWoods LLP, New York, New York; 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.

## SUMMARY

The *Workforce Democracy and Fairness Act* (1) codifies the traditional standard for determining an appropriate bargaining unit and the traditional standard used to challenge a petitioned-for bargaining unit; (2) requires the Board to rule prior to the election on challenges to composition of the bargaining unit; (3) ensures employers have at least 14 days to prepare for pre-election hearings; (4) allows parties to raise relevant and material pre-election issues as pre-election hearing records are developed; (5) provides employees with at least 35 days to consider whether they wish to be represented by a union; and (6) ensures parties may request a post-election Board review of regional directors' decisions.

The legislation reverses the NLRB's August 26, 2011, decision in Specialty Healthcare and the NLRB's ambush election rule. The legislation ensures cohesion in the workplace, employee free choice, and employer free speech.

## COMMITTEE VIEWS

In 1935, Congress passed the NLRA, guaranteeing the right of most private sector employees to organize and select their own rep-

resentative.[4] In 1947, Congress passed the *Taft-Hartley Act*,[5] the most significant amendment of the NLRA, 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."[6] The *Taft-Hartley Act* clarified employees have the right to refrain from participating in union activity,[7] created new union unfair labor practices,[8] codified employer free speech,[9] and made changes to the determination of bargaining units.[10]

The NLRA established the NLRB as an independent federal agency to fulfill two principal functions: (1) prevent and remedy employer and union unlawful acts, called unfair labor practices; and (2) 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.[11]

Section 9 of the NLRA broadly lays out the rules under which employees exercise their right to select or reject a union through a secret ballot.[12] In general, NLRB rulings, regulations, and internal policies establish specific representational election procedures.[13]

The representational election process begins when employees, an employer, or a labor organization files a petition for an investigation and certification of the representatives (petition) with the NLRB's regional office.[14] If a petition is filed by employees or a labor organization, the petitioner should present within 48 hours of filing evidence that 30 percent of employees in the proposed bargaining unit support the petition, typically through signed and dated authorization cards.[15]

*Previous Representational Election Process*

Prior to the December 2015 ambush election rule, the regional director,[16] upon receiving a petition, would issue a notice of hearing and serve the following on the employer: the petition, a generic notice of employees' rights, and a Questionnaire on Commerce to receive information relevant to the Board's jurisdiction.[17] Additionally, the regional director would ordinarily request a list of employees in the petitioned-for unit and their job classifications to determine whether 30 percent of employees were interested in represen-

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[4] 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 U.S.C. § 152(2).

[5] 29 U.S.C. § 141 et. seq.

[6] Archibald Cox, *Some Aspects of the Labor Management Relations Act of 1947*, 61 Harv. L. Rev. 1, 4 (1947).

[7] 29 U.S.C. § 157.

[8] *Id.* § 158.

[9] *Id.* § 158(c).

[10] *Id.* § 159(d).

[11] NLRB v. Savair Mfg., 414 U.S. 270, 278 (1973).

[12] 29 USC § 159.

[13] 79 Fed. Reg. at 7319.

[14] National Labor Relations Board Casehandling Manual ¶ 11002.2–11002.3.

[15] *Id.* ¶ 11003.1 and 11023.1.

[16] While the Board is responsible for conducting secret ballot elections, in 1961 it delegated the bulk of its authority over election cases to its regional directors. The regional directors: (1) decide whether a question concerning representation exists; (2) determine the appropriate bargaining unit; (3) direct the election; (4) certify the results of the election; and (5) make findings and issue rulings on objections and challenged ballots.

[17] *Id.* ¶ 11009.

tation and the employer's position as to the appropriateness of the unit described in the petition.[18]

These official requests by the regional director were then followed up by telephone consultations, meetings, and joint conference calls with the parties prior to pre-election hearing to resolve outstanding issues and secure an election agreement.[19] If parties agreed on representational issues, they could enter into one of three types of election agreements: (1) consent election agreement, (2) stipulated election agreement, or (3) full consent election agreement.[20]

In cases where parties could not reach an election agreement, a Board agent would conduct a pre-election hearing to develop and record evidence upon which the Board could discharge its duties under Section 9 of the NLRA.[21] The hearing was investigatory and non-adversarial.[22] Parties could present evidence on issues including the Board's jurisdiction, the existence of any bars to an election, the appropriateness of the unit, and eligibility of particular employees to vote.[23] The employer could petition for inclusion of additional employees in the bargaining unit by showing the additional employees shared a "sufficient community of interest" with the petitioned-for unit.

In most cases, the regional director would either direct an election or dismiss the petition. Under these procedures in 2013, the median time between the notice of hearing and the close of the pre-election hearing was 13 days.[24] The median time between the close of the pre-election hearing and the regional director's decision was 20 days.[25]

To ensure uniform and consistent application, parties could appeal to the Board the regional director's pre- and post-election decisions. Unless waived in a pre-election agreement, parties could obtain Board review of the regional director's disposition of election objections and challenges post-election by filing exceptions.[26]

This previous Board process was effective in expeditiously resolving questions concerning representation while maintaining the rights of employees and employers. For all petitions filed in the final full year before the new rule went into effect, the median time from the filing of a petition to an election was 38 days.[27] Additionally, unions won more than two-thirds of representational elections in that time period.[28]

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[18] *Id.* ¶ 11009.1.
[19] *Id.* ¶ 11012.
[20] *Id.* ¶ 11084. (In consent agreements, post-election issues are decided by the regional director. In stipulated agreements, post-election issues are decided by the Board. There are no outstanding issues in full consent election agreements; therefore, no review is necessary.)
[21] National Labor Relations Board Casehandling Manual ¶ 11181.
[22] *Id.*
[23] 79 Fed. Reg. at 7324.
[24] E-mail from Celine McNicholas, Special Counsel, National Labor Relations Board, to Marvin Kaplan, Workforce Policy Counsel, House Education and the Workforce Committee (Mar. 3, 2014, 12:22 EST) (on file with author).
[25] *Id.*
[26] 79 Fed. Reg. at 7325.
[27] NLRB, MEDIAN DAYS FROM PETITION TO ELECTION (2017), https://www.nlrb.gov/news-outreach/graphs-data/petitions-and-elections/median-days-petition-election.
[28] NLRB, REPRESENTATION PETITIONS (2017), https://www.nlrb.gov/news-outreach/graphs-data/petitions-and-elections/representation-petitions-rc.

*A. The Ambush Election Rule*

In February 2014, in a rare exercise of formal rulemaking, the NLRB published a Notice of Proposed Rulemaking, which became a final rule on December 15, 2014, and went into effect on April 14, 2015.[29] The rule shortens the length of time in which a union representational election can be held to as little as 11 days. The rule also requires employers to complete a Statement of Position in which the employer must raise all pre-election issues challenging the legality of the union's organizing campaign or forfeit all rights to pursue those issues. Additionally, the rule expands the information provided to unions to include employee phone numbers, email addresses, and shift times and locations. The rule also delays Board review until after the election. Taken together, the rule substantially shortens the time between filing of a petition and the election date, and it limits the opportunity for a full evidentiary hearing or Board review on contested issues.

In March 2015, the House and Senate passed a joint resolution of disapproval (S.J. Res. 8) of the new rule under the *Congressional Review Act*. The joint resolution was vetoed by President Obama on March 31, 2015.

To speed up the representational election process, the Board's rule: (1) replaced the Questionnaire on Commerce Information with a Statement of Position; (2) set pre-election hearings to begin seven days after the petition is filed: (3) delayed voter eligibility issues until after the election: and (4) made post-election Board review discretionary.[30]

The newly required Statement of Position solicits the parties' positions on: (1) the Board's jurisdiction; (2) the appropriateness of the petitioned-for unit; (3) any proposed exclusions from the petitioned-for unit; (4) the existence of any bar to the election; (5) the types, dates, times, and locations of the election; and (6) any other issues that a party intends to raise at the hearing.[31] With few exceptions, issues not raised in the Statement of Position will be waived.[32] The Statement of Position is due no later than the date of the pre-election hearing, that is, seven days from the filing of the petition.[33]

Under the rule, disputes concerning the eligibility or inclusion of individual employees that represent less than 20 percent of the unit are resolved, if necessary, after the election.[34] According to the Board, the "adoption of a bright-line numerical rule requiring that questions concerning the eligibility or inclusion of individuals constituting no more than 20 percent of all potentially eligible voters be litigated and resolved, if necessary, post-election, best serves the interests of the parties and employees as well as the public interest in efficient administration of the representation case process."[35]

The rule also eliminates pre-election Board review.[36] All pre-election rulings not rendered moot remain subject to Board review

[29] 79 Fed. Reg. at 7324.
[30] *Id.*
[31] *Id.* at 7328.
[32] *Id.*
[33] *Id.*
[34] *Id.* at 7330.
[35] *Id.* at 7331.
[36] *Id.* at 7333.

post-election.[37] Regional directors are no longer required to provide at least 25 days between the issuance of the decision and the election to allow Board review.[38]

The Board's majority asserted the rule was implemented to "remove unnecessary barriers to the fair and expeditious resolution of questions concerning representation."[39] However, the Board made no "attempt to identify particular problems in cases where the process has failed."[40] In the opinion of former NRLB Member Brian Hayes, "vacancies or partisan shifts in Board membership and the inability of the Board itself to deal promptly with complex legal and factual issues have delayed final resolution far more often than any systematic procedural problems or obstructionist legal tactics."[41] Testifying at a 2011 hearing, Former NLRB Chairman Peter Schaumber agreed the election process was not the source of delays.[42] As Member Hayes has also noted, the "problem" the Board seeks to address with this rule "is not that the representation election process generally takes too long, [i]t is that unions are not winning more elections . . . The [Board] majority [has] act[ed] in apparent furtherance of the interests of a narrow constituency, [unions,] and at the great expense of undermining public trust in the fairness of Board elections."[43] It is the Committee's view the Board sought to address a problem that does not exist.

*B. Specialty Healthcare and Rehabilitation Center of Mobile*

On August 26, 2011, in *Specialty Healthcare*,[44] the Board majority articulated a new standard for determining the composition of bargaining units. Under this new standard, if the union-proposed bargaining unit is made up of a readily identifiable group[45] and the Board finds the employees in the group share a "community of interest," the Board will find the proposed unit appropriate.[46] Any party seeking to enlarge the unit must demonstrate employees in the larger unit share an "overwhelming community of interest" with those in the petitioned-for unit.[47] The Board will no longer determine whether the interests of the group sought are sufficiently distinct from those of other employees to warrant the establishment of a separate unit.[48] While the *Specialty Healthcare* case dealt specifically with non-acute healthcare, the Board decision significantly affects all industries.[49] NLRB regional offices "will have little option but to find almost any petitioned-for unit appropriate."[50] In the opinion of former NLRB Region 10 Director Curtis Mack, "a regional director looking at a representation petition

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[37] *Id.*
[38] 29 C.F.R. 101.21(d).
[39] *Id.* at 7337.
[40] 76 Fed. Reg. at 36833.
[41] *Id.* at 36831.
[42] Rushing Union Elections: Protecting the Interests of Big Labor at the Expense of Workers' Free Choice, Hearing before the House Education and the Workforce Committee, 112th Cong., 1st Sess. at 77 (2011).
[43] Notice of Proposed Rulemaking, Representation—Case Procedures, 76 Fed. Reg. 36812, 80 (June 22, 2011), *available at* http://www.nlrb.gov/sites/default/files/documents/525/2011-15307_pi_2.pdf.
[44] 357 NLRB No. 83 (Aug. 26, 2011).
[45] Such as employees that make up a job classification, department, or work location.
[46] 357 NLRB No. 83, 12 (Aug. 26, 2011).
[47] *Id.* at 6.
[48] *Id.* at 12.
[49] *Id.* at 18.
[50] *Id.* at 20.

would be compelled to hold a representation election for any unit supported by the union."[51] Under the new standard, it is "virtually impossible for a party opposing th[e] unit to prove that any excluded employees should be included."[52]

Under *Specialty Healthcare*, the NLRB has approved fragmented petitioned-for units despite past precedent, and subsequent challenges to the unit have been unsuccessful. For example, on July 22, 2014, in *Macy's, Inc*.,[53] the NLRB determined that cosmetics and fragrance employees at the Macy's store in Saugus, Massachusetts, are an appropriate unit for collective bargaining.[54] Despite past precedent that the appropriate unit is a store-wide unit[55] and extensive evidence that all sales associates share a community of interest,[56] in the opinion of the Board majority,[57] the employer had not "demonstrated that its other selling employees share an overwhelming community of interest with the cosmetics and fragrances employees."[58] While the NLRB rejected a unit consisting of employees in the salon and contemporary shoes departments at a Manhattan Bergdorf Goodman in *The Neiman Marcus Group, Inc*., it appears to endorse an even smaller unit consisting of only those employees in a certain shoes department.[59]

### *C. Implications of the New Representation Election Process and Specialty Healthcare*

The NLRB's representational election rule restricts an employer's ability to communicate with his or her employees, cripples an employee's ability to make an informed decision as to unionization, increases litigation, and decreases election agreements. The August 26, 2011, *Specialty Healthcare* decision has fractured workplaces, increased labor costs and decreased employee opportunities.

#### *Limited Opportunity for a Robust Debate and Employee Free Choice*

Congress recognized the value of employer speech and a robust debate when it added section 8(c) to the NLRA.[60] The Supreme Court noted Congress's express protection of free debate:

> From one vantage, § 8(c) "merely implements the First Amendment," *NLRB v. Gissel Packing Co*., 395 U.S. 575, 617, 89 S.Ct. 1918, 23 L.Ed.2d 547 (1969), in that it responded to particular constitutional rulings of the NLRB. See S.Rep. No. 80–105, pt. 2, pp. 23–24 (1947). But its enactment also manifested a "congressional intent to encourage free debate on issues dividing labor and management." *Linn v. Plant Guard Workers*, 383 U.S. 53, 62, 86 S.Ct.

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[51] *Culture of Union Favoritism: Recent Actions of the National Labor Relations Board: Hearing before the H. Comm. on Educ. and the Workforce*, 112th Cong. at 13 (2011) (written testimony of Curtis Mack).
[52] *Id.* at 19.
[53] Macy's Inc, 361 NLRB No. 4 (2014).
[54] *Id.* at 1.
[55] *Bullocks, Inc., d/b/a I. Magnin & Co*., 119 NLRB 642 (1957).
[56] *Macy's, supra* note 53 at 22–3.
[57] Member Miscimarra dissented and Member Johnson recused himself.
[58] *Macy's, supra* note 53 at 19.
[59] The Neiman Marcus Group, Inc., 361 NLRB No. 11, 3 (2014).
[60] 29 U.S.C. § 158(c)("The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act [subchapter], if such expression contains no threat of reprisal or force or promise of benefit.").

> 657, 15 L.Ed.2d 582 (1966). It is indicative of how important Congress deemed such "free debate" that Congress amended the NLRA rather than leaving to the courts the task of correcting the NLRB's decisions on a case-by-case basis. We have characterized this policy judgment, which suffuses the NLRA as a whole, as "favoring uninhibited, robust, and wide-open debate in labor disputes," stressing that "freewheeling use of the written and spoken word . . . has been expressly fostered by Congress and approved by the NLRB." *Letter Carriers v. Austin*, 418 U.S. 264, 272–273, 94 S.Ct. 2770, 41 L.Ed.2d 745 (1974).[61]

The new election procedures effectively eliminate an employer's opportunity to communicate with his or her employees. Under the new election procedures, representational elections will be held in as little as 11 days.[62] An employer could spend the first seven days finding legal representation and preparing for the pre-election hearing, leaving as little as four days to educate employees and rebut misinformation.

In contrast, a union seeking to organize employees will have weeks, maybe years, to covertly lobby employees while collecting authorization cards. Unlike the employer, the union can promise employees increased wages, benefits, and vacation time with few restrictions under the law.[63] While employees are likely to receive extensive information from the union on the benefits of unionization, they are unlikely to receive information from the union on the union's political or social agenda, dues, or the effects unionization can have on their employer's profitability and market competitiveness.[64] When the union has garnered sufficient support, it selects the date and time for filing the petition.[65]

At the Committee's July 7, 2011, hearing entitled "Rushing Union Elections: Protecting the Interests of Big Labor at the Expense of Workers' Free Choice," Mr. John Carew, president of Carew Concrete and Supply Co., described his experience with a union organizing drive and election. In mid-September 1999, during one of his company's busiest times of year, the NLRB informed Carew Concrete that a union was attempting to organize its entire employee base.[66] This was the first time Mr. Carew had heard about the organizing drive.[67] Speaking of the organizing drive at Carew Concrete, Mr. Carew testified: "[E]mployees would receive mail containing not enough information, misinformation, and misleading information on issues such as striking, healthcare insurance, wages and pensions. At times employees were inaccurately told they would receive increased wages, similar to cities with higher wages nearly 100 miles away."[68] Mr. Carew was forced to shut down temporarily portions of his business to educate supervisors

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[61] Chamber of Commerce v. Brown, 554 U.S. 60, 67–68 (2008).
[62] 76 Fed. Reg. 36831.
[63] *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., at 15 (2011) (written testimony of Peter Schaumber).
[64] *Id.*
[65] *Id.*
[66] *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., at 3 (2011) (written testimony of John Carew).
[67] *Id.*
[68] *Id.*

and managers to ensure they did not violate the NLRA and to counter misinformation.[69]

At the same hearing, Mr. Larry Getts, an employee of the Dana Corporation, described his experience with union organizers:

> [Organizers stated] that our shop would make the same as the workers in the other—much larger—Fort Wayne plant. . . . [T]hat did not seem plausible because we were making twelve dollars an hour, and in Fort Wayne they were making twenty-one dollars an hour. Of course, much of what they told us proved to be false, but it's fair to say we weren't lacking information from union officials.[70]

While Mr. Getts stated he and his fellow employees would have appreciated hearing the views of his employer, he did not have access to a robust debate.[71] His employer had signed a neutrality agreement.[72] Since he and his fellow employees were not hearing opposing points of view, Mr. Getts took it upon himself to research and verify everything they were told.[73]

Mr. Raymond LaJeunesse of the National Right to Work Legal Defense Foundation testified at a February 14, 2017 HELP Subcommittee hearing that the shortened timeframe will infringe upon workers' rights: "[T]he shortened time-frame for representation elections has adversely affected the ability of individual employees to fully educate themselves about the pros and cons of monopoly union representation, and hampered the ability of employees opposed to union representation to organize themselves in opposition to unions and timely obtain legal counsel." [74]

While testifying before a June 14, 2017, HELP Subcommittee legislative hearing on H.R. 2776, labor attorney Mr. Seth H. Borden noted:

> The changes in the 2015 Rule changes were, at best, a proposed solution in search of a problem. To the extent they were intended simply to increase union success in organizing, they did so by limiting employer free speech rights protected by Section 8(c) of the National Labor Relations Act . . . and infringing on the Section 7 rights of employees to refrain from union representation.[75]

At the same hearing, Ms. Nancy McKeague of the Society for Human Resource Management also raised concerns about the ability of employers to properly and legally communicate with their employees during a shortened election. She testified:

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[69] *Id.*

[70] *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., at 2 (2011) (written testimony of Larry Getts).

[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] *Restoring Balance and Fairness to the National Labor Relations Board, Hearing before the Subcomm. on Health, Employment, Labor and Pensions of the H. Comm. on Educ. and the Workforce*, 115th Cong., at 10 (2017) (written testimony of Raymond J. LaJeunesse) [hereinafter LaJeunesse Testimony].

[75] *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., at 3 (2017) (written testimony of Seth Borden) [hereinafter Borden Testimony].

> The ambush election rule significantly impairs small employers' ability in responding to petitions in an accelerated manner and presents significant burdens for large employers with diverse and significant voting units. For example, small employers may not have an HR professional on staff or access to legal counsel that specializes in labor issues.[76]

The expedited timeframe for representational elections in the NLRB's 2015 rule will effectively eliminate employer speech and deprive employees of the right to make a fully informed decision on whether to be represented by a labor organization.

*Increased Controversy During Representational Elections*

The new Statement of Position, combined with the new timeframe for the start of the pre-election hearing and delays in unit composition determinations, will increase conflict between labor and management during representational elections, thereby decreasing the number of election agreements and increasing costs for employers and taxpayers.

As outlined above, the rule requires parties to complete a Statement of Position within seven days of receiving the election petition. With few exceptions, failure to state a position precludes a party from raising the issue at the pre-election hearing. Mr. Robert Sullivan, testifying on behalf of the Retail Industry Leaders Association (RILA) at an October 12, 2011, hearing stated these requirements "will wreak havoc with small and large employers."[77] Small employers will have access to factual information, but they will not have in-house experts to evaluate the legal issues.[78] In contrast, large employers will have the advantage of having in-house experts or access to outside experts, but their size will complicate legal issues.[79]

This situation has been further complicated by the Specialty Healthcare decision. At a Committee hearing on March 5, 2014, entitled "Culture of Union Favoritism: The Return of the NLRB's Ambush Election Rule," labor attorney Ms. Doreen Davis highlighted the difficulty of determining whether employees share an "overwhelming community of interest" and questioned whether seven days provided sufficient time to prepare for the pre-election hearing:

> [U]nder the current rules, sometimes we are required to [prepare for the pre-election hearing] as soon as 10 days [after the petition for election is filed], but not 7 days, and under the current rules, we can litigate at the pre-election conference. . . . We haven't waived issues that weren't raised in the pre-election conference. . . . Under the new rules, there would be no opportunity to do that, unless you had stated it in your statement of position, which is due

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[76] *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., at 3 (2017) (written testimony of Nancy McKeague) [hereinafter McKeague Testimony].

[77] *H.R. 3094, The Workforce Democracy and Fairness Act: Legislative Hearing before the H. Committee on Educ. and the Workforce*, 112th Cong., at 8 (2011) (written testimony of Robert Sullivan) [hereinafter Sullivan Testimony].

[78] *Id.*

[79] *Id.* at 9.

> no later than 7 days after the petition is filed. So it is very challenging for small employers. It is equally challenging for large employers, because as an outside counsel, I have to learn their business, how it operates, which group of employees interact with whom, which employees have a community of interest with others. Do they have similar wages, hours, working conditions, supervision? Is what they do at that company related to what another employee does and how? There are many things that have to be learned in order to effectively represent an employer in these kinds of proceedings, and that is all being very much short-circuited under these proposed rules.[80]

With only seven days to prepare the Statement of Position for the start of the pre-election hearing, there is little opportunity to reach election agreements.[81] To ensure no issues are waived, employers will spend their time preserving their positions rather than working with the regional director to reach a voluntary election agreement.[82] Former NLRB Chairman Schaumber stated "the sum total of these rules is you are going to have far fewer pre-election agreements."[83] Unable to secure election agreements, the NLRB will be forced to hold more pre-election hearings on every possible issue in controversy, increasing both taxpayer and employer legal costs.

Furthermore, leaving open questions, such as the composition of the bargaining unit, could result in significant problems for employers. At a February 14, 2017, HELP Subcommittee hearing entitled "Restoring Balance and Fairness to the National Labor Relations Board," attorney Mr. Kurt Larkin of Hunton and Williams, LLP testified about this issue:

> [I]f an employer believes an employee in the proposed unit is a statutory supervisor, it cannot obtain a determination whether the individual should be excluded from the bargaining unit until after the election. This presents an obvious conundrum for the employer: it can treat the employee as a supervisor during the campaign, and risk unfair labor practice liability for doing so, or it can back off, and lose the ability to campaign through an individual who may well not even be eligible to vote.[84]

Delaying unit composition issues until after the election could increase the number of elections that must be rerun. Pro-union activity by supervisors may taint the election if employees falsely conclude the employer favors the union or if employees support the

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[80] *Culture of Union Favoritism: The Return of the NLRB's Ambush Election Rule: Hearing before the H. Comm. on Educ. and the Workforce*, 113th Cong., (2014). (written testimony of Doreen S. Davis).

[81] *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., at 44 (2011).

[82] *Id.*

[83] *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., at 78–79 (2011).

[84] *Restoring Balance and Fairness to the National Labor Relations Board: Hearing before the Subcomm. on Health, Employment, Labor and Pensions of the H. Comm. on Educ. and the Workforce*, 115th Cong., at 5 (2017) (written testimony of Kurt Larkin) [hereinafter Larkin Testimony].

union out of fear of retaliation.[85] In these cases, the Board may set aside an election. Undoubtedly, pro-union activity by supervisors improperly included in the bargaining unit will be more common under the proposed rules, resulting in more elections being set aside. In cases where the character or scope of the bargaining unit changes significantly, a number of courts have ordered a new election, finding that employees were effectively denied the right to make an informed choice in the representational election.[86] Every rerun election and unfair labor practice charge will cost taxpayer dollars and increase employer legal costs.

*Fragmentation of the Workforce*

The Specialty Healthcare standard for determining the composition of an appropriate bargaining unit will allow unions to gerrymander the bargaining unit, encourage incremental organizing of units that support unionization, and lead to fragmentation in the workplace. In his June 2017 testimony, Mr. Borden summarized the new standard as "a drastic departure from the traditional standard employed by the Board for decades." [87]

As noted above, under the new standard, regional directors will be compelled to approve any unit supported by the union, and employer challenges will be difficult, if not impossible, permitting unions to limit organizing to those employees supporting the union.[88] Mr. Larkin stated the new standard has "the practical effect of allowing unions to seek bargaining units that reflect little more than the extent to which they have been successful in recruiting employees who support unionization." [89]

As a result, instead of one unit, employers have to bargain with multiple units, increasing fragmentation and labor costs. As the number of units within a business increases, labor costs and the risk of strikes increase. Rather than negotiating once every three years, the employer may be forced to negotiate collective bargaining agreements every year or multiple times a year. Each negotiation includes the possibility of a strike, disrupting operations and damaging customer relations.[90]

Moreover, this new standard is detrimental to workers. Drawing lines between departments limits flexibility and employee opportunities. As explained by Mr. Robert Sullivan during the October 12, 2011, Committee hearing, if employees are divided by department, such as sporting goods divided from housewares, employers will not be able to move employees between departments in response to changes in demand, and employees will not be able to pick up shifts in other departments.[91] Additionally, opportunities for advancement into management would be limited without cross-training.[92] Ms. McKeague noted in her June 2017 testimony before the HELP Subcommittee that the Specialty Healthcare standard "discourages teamwork rather than offering solutions that balance the needs of an individual department with the needs of the whole op-

[85] Fall River Sav. Bank v. NLRB, 649 F.2d 50, 56 (1st Cir. 1981).
[86] NLRB v. Lorimar Productions, Inc., 771 F.2d 1294 (9th Cir. 1985); NLRB v. Beverly Health and Rehabilitation Services, 120 F.3d 262 (4th Cir. 1977).
[87] *Borden, supra* note 74 at 7.
[88] Specialty Healthcare, 357 NLRB No. 83, 19.
[89] *Larkin, supra* note 84 at 9.
[90] *Sullivan, supra* note 77 at 4.
[91] *Id.*
[92] *Id.*

eration."[93] In February 2017, Mr. LaJeunesse further detailed the impact on workers at a HELP Subcommittee hearing. He testified that Specialty Healthcare "wrongfully elevated employees' right to unionize above employees' equal right to oppose unionization."[94]

*D. Necessary Legislation To Address NLRB Actions*

Congress is responsible for establishing and revising standards in federal labor law. The NLRB's decision in Specialty Healthcare and its ambush election rule will limit employee free choice and employer free speech, and fragment the workforce. The Workforce Democracy and Fairness Act reverses the NLRB's August 26, 2011, decision in Specialty Healthcare and the ambush election rule without upsetting other standards under current law.

To ensure parties can dispute union-proposed bargaining units, the Workforce Democracy and Fairness Act will codify the test used prior to Specialty Healthcare. Bargaining units will again be comprised of employees that share a "sufficient community of interest." In determining whether employees share a "sufficient community of interest," the Board will weigh eight factors including similarity of wages, working conditions, and skills. The Board will not exclude employees from the unit unless the interests of the group sought are sufficiently distinct from those of included employees to warrant the establishment of a separate unit. Any party seeking to enlarge the proposed bargaining unit must demonstrate that employees in the larger unit share a "sufficient community of interest" with those in the proposed unit, not an "overwhelming community of interest." These provisions of the Workforce Democracy and Fairness Act will limit fragmentation, ensure employer flexibility and greater employee opportunities, and reduce labor costs.

The Workforce Democracy and Fairness Act also addresses the shortcomings of the NLRB's ambush election rule. More specifically, the Act addresses:

- Voter Eligibility. To ensure employees and employers know who will be in their bargaining unit and avoid complications on eligibility (i.e., whether an employee is a supervisor) the Board shall determine the appropriate bargaining unit prior to an election.
- Scheduling of Pre-Election Hearing. The regional director will have discretion as to when the pre-election hearing shall begin, but parties will have at least 14 days to prepare for the pre-election hearing. Employers will have at least 14 days to hire an attorney, identify issues, and prepare their case for the pre-election hearing. The 14 day time period gives unions, employers, and the NLRB an opportunity to compromise and reach an election agreement.
- Identifying Issues in Dispute. Employers and unions will be allowed to raise independently any relevant and material issue or assert any relevant and material position at any time prior to the close of the hearing. Employers and unions will be free to raise issues as the hearing record develops, ensuring a fair and effective pre-election hearing. To ensure parties do not inappropriately delay elections, issues traditionally excluded

[93] *McKeague, supra* note 75 at 7.
[94] *LaJeunesse, supra* note 76 at 5.

from pre-election hearings, such as the eligibility of employees for union membership, may only be raised after the election.

• Timing of Election. Providing the time necessary for employees to understand the costs and benefits of unionization is essential to free choice. In 1959, then-Senator John F. Kennedy stated during the debate over amendments to the NLRA that at least 30 days were required between the petition's filing and the election to "safeguard against rushing employees into an election where they are unfamiliar with the issues."[95] For all petitions filed in the last full year before the ambush election rule took effect, the median time from the filing of a petition to an election was 38 days.[96] Under the legislation, the NLRB will conduct an election as soon as practicable, but no less than 35 calendar days following the filing of an election petition. Employers will have time to educate employees, and employees will have time to effectively judge whether they wish to be represented by a union.

• Post-election Board Review. To ensure uniformity and due process, parties may petition the Board for post-election review of the regional director's decision.

In sum, the Workforce Democracy and Fairness Act will ensure employers have adequate time to communicate with their employees and employees have the time and information necessary to make fully informed decisions about unionization.

## CONCLUSION

Over the last several years, the NLRB has issued multiple decisions and rules intended to unbalance labor relations to benefit organized labor. The two most significant examples are the Board's holding in Specialty Healthcare and its ambush election rule. Together, these actions fragment workplaces, increase labor costs and strife, and limit employer free speech and employee free choice. The Workforce Democracy and Fairness Act will return balance to labor relations by restoring a fair election process for unions, employers, and employees.

## SECTION-BY-SECTION ANALYSIS

The following is a section-by-section analysis of the Amendment in the Nature of a Substitute to H.R. 2776 as offered by HELP Subcommittee Chairman Walberg and reported favorably by the Committee.

Section 1. Provides that the short title is the "Workforce Democracy and Fairness Act."

Section 2. Amends the National Labor Relations Act to reverse the December 14, 2015, final representation-case procedures rule.

Section 3. Amends the National Labor Relations Act to reverse the holding in Specialty Healthcare.

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[95] 105 Cong. Rec. 5361 (1959).

[96] NLRB, MEDIAN DAYS FROM PETITION TO ELECTION (2017), https://www.nlrb.gov/news-outreach/graphs-data/petitions-and-elections/median-days-petition-election.

## 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. 2776, the Workforce Democracy and Fairness Act, reverses the NLRB's August 26, 2011, decision in Specialty Healthcare and reverses the NLRB's December 15, 2014, final ambush election rule.

## 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. 2776 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 en bloc Bill: H.R. 2776 Amendment Number: 2

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

Sponsor/Amendment: Ms. Wilson - Eliminates mandatory 35-day waiting period prior to an election.

| 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. KRISHNAMOORTHI (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: 1 en bloc Bill: H.R. 2776 Amendment Number: 3

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

Sponsor/Amendment: Mr. Espaillat - Requires pre-election hearing within 8 days.

| 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. KRISHNAMOORTHI (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: 1 en bloc Bill: H.R. 2776 Amendment Number: 5

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

Sponsor/Amendment: Mr. Scott - Strikes language allowing any issue to be raised at pre-election hearing.

| 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. KRISHNAMOORTHI (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: 1 en bloc Bill: H.R. 2776 Amendment Number: 6

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

Sponsor/Amendment: Ms. Bonamici - Sanctions frivolous matters raised at pre-election hearings and appeals.

| 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. KRISHNAMOORTHI (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: 1 en bloc Bill: H.R. 2776 Amendment Number: 7

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

Sponsor/Amendment: Mr. DeSaulnier - Prevents employer gerrymandering of a bargaining unit.

| 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. KRISHNAMOORTHI (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: 1 en bloc Bill: H.R. 2776 Amendment Number: 8

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

Sponsor/Amendment: Mr. Polis - Prohibits captive audience meetings after election is ordered.

| 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. KRISHNAMOORTHI (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: 2 Bill: H.R. 2776 Amendment Number: 4

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 Courtney 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. KRISHNAMOORTHI (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: 3 Bill: H.R. 2776 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. KRISHNAMOORTHI (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 goals of H.R. 2776 are to ensures cohesion in the workplace, employee free choice, and employer free speech.

## DUPLICATION OF FEDERAL PROGRAMS

No provision of H.R. 2776 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. 2776 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. 2776 from the Director of the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
*Washington, DC, July 21, 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. 2776, the Workforce Democracy and Fairness 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. 2776—Workforce Democracy and Fairness Act*

H.R. 2776 would amend the National Labor Relations Act to require the National Labor Relations Board to delay, for at least 14 days after a petition is filed, hearings on petitions by employees or employers for representation in collective bargaining. The bill also would set certain requirements for pre-election hearings. In addition, secret ballot elections could be held no earlier than 35 days after an election petition is filed. CBO estimates that enacting H.R. 2776 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. 2776 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 or private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no costs on state, local, or tribal governments.

The CBO staff contact for this estimate is Christina Hawley Anthony. 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. 2776. 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 (existing law proposed to be omitted is enclosed in black brackets, 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 rep-

resentatives 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 exercisiong 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:**]** *(1) In each case, prior to an election, the Board shall determine, 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. Unless otherwise stated in this Act, and excluding any bargaining unit determination promulgated through rulemaking before August 26, 2011, the unit appropriate for purposes of collective bargaining shall consist of employees that share a sufficient community of interest. In determining whether employees share a sufficient community of interest, the Board shall consider—*

*(A) similarity of wages, benefits, and working conditions;*

*(B) similarity of skills and training;*

*(C) centrality of management and common supervision;*

*(D) extent of interchange and frequency of contact between employees;*

*(E) integration of the work flow and interrelationship of the production process;*

*(F) the consistency of the unit with the employer's organizational structure;*

*(G) similarity of job functions and work; and*

*(H) the bargaining history in the particular unit and the industry.*

*To avoid the proliferation or fragmentation of bargaining units, no employee shall be excluded from the unit unless the interests of the group seeking a separate unit are sufficiently distinct from those of other employees to warrant the establishment of a separate unit. Whether additional employees should be included in a proposed unit shall be determined based on whether such additional employees and proposed unit members share a sufficient community of interest, with the sole exception of proposed accretions to an existing unit, in which the inclusion of additional employees shall be based on whether such additional employees and existing unit members share an overwhelming community of interest and the additional employees have little or no separate identity.*

*(2)* **[***Provided,* That the Board**]** *The Board* shall not **[**(1)**]** *(A)* 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)**]** *(B)* 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)⟧ *(C)* 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 defind 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*, but in no circumstances less than 14 calendar days after the filing of the petition*. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. *An appropriate hearing shall be one that is non-adversarial with the hearing officer charged, in collaboration with the parties, with the responsibility of identifying any relevant and material pre-election issues and thereafter making a full record thereon. Relevant and material pre-election issues shall include, in addition to unit appropriateness, the Board's jurisdiction and any other issue the resolution of which may make an election unnecessary or may reasonably be expected to impact the outcome of the election. Parties may independently raise any relevant and material pre-election issue or assert any relevant and material position at any time prior to the close of the hearing.* 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⟧ *to be conducted as soon as practicable but no earlier than 35 calendar days after the filing of an election petition. The Board shall certify the results of the election after it has ruled on each pre-election issue not resolved before the election and any additional issue pertaining to the conduct or results of the election*.

(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 investigatioon 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

The deceptively-named "Workforce Democracy and Fairness Act" is designed to deny private-sector workers a right to a fair union representation election by mandating unnecessary pre-election delays, encouraging additional delays through wasteful and frivolous litigation, and empowering employers to gerrymander the bargaining unit selected by the workers in order to dilute the voting strength of workers who want to form a union.

A worker's right to join a union and collectively bargain is among the most effective means to grow the middle class and reduce income inequality.[1] The majority has advanced H.R. 2776 at a time of soaring income inequality, attributable, in part, to the decline of private-sector union membership. This bill specifically targets the right to join a union by undermining the union representation election process. Instead of raising wages and empowering employees, H.R. 2776 tilts the playing field against workers who want to organize a union.

The bill was approved with 22 Republicans to 16 Democrats, with all Democrats present opposing the bill on a roll call vote.

### H.R. 2776 OVERTURNS KEY PARTS OF THE NLRB'S 2015 ELECTION RULE BY MANDATING DELAYS

The National Labor Relations Board's (NLRB) 2015 election rule updated union election procedures to increase transparency and reduce wasteful litigation that stalls the election process. Unnecessary procedural delays enable employers to have more time to campaign against the union, and research shows that employers often use that time to engage in coercive tactics against workers seeking to unionize.[2] By streamlining the union election process, the 2015 election rule best effectuates the stated purpose of the National Labor Relations Act (NLRA): to "encourag[e] the practice and procedure of collective bargaining" and "protect[] the exercise by workers of full freedom of association."[3]

Under the 2015 election rule, when a union files a petition for a union election, the regional office must schedule a pre-election hearing eight days from the date of the petition.[4] This rule harmonizes the practices of various regional offices; prior to 2015, the regions scheduled hearings using various timelines. The 2015 election rule also narrowed the scope of permissible issues that could be litigated in a pre-election hearing to reduce pre-election delays

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[1] Ross Eisenbrey and Colin Gordon, *As Unions Decline, Inequality Rises*, Economic Policy Institute, June 6, 2012 *http://www.epi.org/news/union-membership-declines-inequality-rises/*.

[2] *NO HOLDS BARRED: The Intensification of Employer Opposition to Organizing*, Kate Bronfenbrenner, Director, Labor Education and Research, Cornell School of Industrial and Labor Relations, May 20, 2009 *http://www.epi.org/files/page/-/pdf/bp235.pdf*.

[3] 29 U.S.C. § 151.

[4] 29 C.F.R. § 102.63(a)(1).

and avoid wasteful litigation.[5] Before 2015, the employer could insist on litigating any issue of voter eligibility. The pre-election hearing now focuses on issues that are necessary to determine whether it is appropriate to conduct the election at all. This way, litigation regarding individual voters' eligibility is postponed to after the election, when many disputes can be mooted if their outcome is not enough to change the results of the election. Once the pre-election disputes are resolved, the NLRB's 2015 rule requires the election to be held as soon as practicable, in order for the elections to be conducted efficiently.[6]

The NLRB's election procedures are now settled law: every court where the 2015 election rule has been challenged has upheld the rule.[7] For example, as the Fifth Circuit Court of Appeals held with regards to the suit filed by the Associated Builders and Contractors (ABC) of Texas:

> [The Board] conducted an exhaustive and lengthy review of the issues, evidence, and testimony, responded to contrary arguments, and offered factual and legal support for its final conclusions. Because the Board acted rationally and in furtherance of its congressional mandate in adopting the rule, the ABC entities' challenge to the rule as a whole fails.[8]

Similarly, the U.S. District Court for the District of Columbia held:

> Congress authorized the Board "to make, amend, and rescind . . . such rules and regulations as may be necessary to carry out the provisions of the NLRA." Plaintiffs complain that "the hundreds of pages in the Board's Final Rule contain remarkably little logic or sound explanation for the sweeping changes made by the Final Rule," but in reality, the Board engaged in a comprehensive analysis of a multitude of issues relating to the need for and the propriety of the Final Rule, and it directly addressed the commenters' many concerns, including a number of the arguments plaintiffs raised here.[9]

The failure of these court challenges to the rule has prompted this legislation to overturn the 2015 NLRB election rule.

H.R. 2776 targets the 2015 election rule by replacing the 8-day deadline for pre-election hearings with a 14-day delay before the hearing. It would also prohibit the NLRB from holding any union election sooner than 35 days after the filing of a petition for an election, even if there are no pre-election matters in dispute. This undermines the parties' free choice: in over 90 percent of union elections, the parties themselves agreed to when the election would

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[5] 29 C.F.R. § 102.64(a).
[6] 29 C.F.R. § 102.67(b).
[7] *Associated Builders & Contractors of Texas, Inc. v. NLRB*, 826 F.3d 215 (5th Cir. 2016); *affirming* 1-15-CV-026, U.S. Dist. LEXIS 78890 (W.D. Tex. June 1, 2015); *Chamber of Commerce of the United States of America v. NLRB*, 118 F. Supp. 3d 171 (D.D.C. 2015).
[8] *Associated Builders & Contractors of Texas, Inc.,* 826 F.3d at 229 (5th Cir. 2016).
[9] *Chamber of Commerce,* 118 F. Supp. 3d at 220 (quoting 29 U.S.C. § 156 and plaintiff's motion for summary judgment, respectively).

occur and who is eligible to vote.[10] During the hearing, the Majority did not articulate any reason to interfere in these agreements by forcing unnecessary delay.

Committee Republicans at the June 29, 2017 markup echoed anti-union business groups in describing the NLRB's 2015 election rule as an "ambush election rule . . . designed to rush employees into union elections."[11] Indeed, when the D.C. District Court considered the Chamber of Commerce's challenge to the rule, it noted that the Chamber "rel[ied] heavily on the repetition of disparaging labels, referring to the Final rule as the 'ambush' or 'quickie' election rule."[12] The court found that "[t]his tendency to speak in broad terms" ignored how, "when one descends to the level of the particular, the provisions at issue are not quite as described. On its face, the Final Rule does not necessarily lead to the outcomes to which plaintiffs object . . . ."[13] By replacing the NLRB's common sense 2015 election rule with mandatory delays, H.R. 2776 serves no useful purpose other than to buy employers more time to chill employee support for a union.

H.R. 2776 OVERTURNS PARTS OF THE NLRB ELECTION RULE THAT STREAMLINES THE HEARING PROCESS AND CREATES OPPORTUNITIES FOR WASTEFUL LITIGATION AND AMBUSH HEARINGS

H.R. 2776 expands the issues that parties can litigate prior to the election. Where the 2015 election rule reduced wasteful litigation by delaying issues that could be mooted by the election's outcome, H.R. 2776 now allows parties to raise any pre-election issue that "may reasonably be expected to impact the outcome of the election." This provision allows employers to raise issues that have no bearing on whether there is an appropriate bargaining unit. Thus, it grants employers the ability to extend hearings for weeks on end to buy time to chill the workers' organizing drive or pressure them from organizing. This is not a one-sided concern: unions facing decertification campaigns could use the same delaying tactics. Any issues even remotely work-related, from unfair treatment by supervisors to the accuracy of campaign flyers, can be considered reasonably expected to impact the election's outcome" and therefore be raised during a hearing. It is foreseeable that the NLRB will be burdened with a docket clogged with cases containing irrelevant issues having nothing to do with whether to conduct an election, or how to define an appropriate bargaining unit. This will further stall review efforts, which in turn will prevent elections from being held.

H.R. 2776 also allows ambush hearings by allowing parties "to raise any issue or assert any position at any time prior to the close of the hearing." The NLRB's 2015 election rules require parties to declare all of the issues to be litigated at the outset of a hearing,

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[10] Percentage of Elections Conducted Pursuant to Election Agreements in FY16, NLRB *https://www.nlrb.gov/news-outreach/graphs-data/petitions-and-elections/percentage-elections-conducted-pursuant-election* (last accessed Jul. 7, 2017).

[11] Address of Chairwoman Virginia Foxx at U.S. House of Representatives Committee on Education and the Workforce Markup (June 29, 2017) *https://edworkforce.house.gov/calendar/eventsingle.aspx?EventID=401796.*

[12] *Chamber of Commerce,* 118 F. Supp. 3d at 189.

[13] *Chamber of Commerce,* 118 F. Supp. 3d at 189.

as is commonly done in civil litigation, to assure orderly proceedings.[14] H.R. 2776 overturns that rule.

H.R. 2776 UNDERMINES EMPLOYEES' RIGHT TO FULL FREEDOM OF ASSOCIATION BY EMPOWERING EMPLOYERS TO GERRYMANDER THE COMPOSITION OF THE BARGAINING UNIT

H.R. 2776 establishes an entirely new regime that would give employers, instead of employees, the dominant voice in determining who should be included and who should be excluded in a bargaining unit. The bill allows employers to dilute the percentage of employees interested in forming a union by expanding the pool of eligible voters with employees who have expressed no interest in joining a union. Employer gerrymandering rigs the NLRB's election process and makes it much harder for employees to win a union.

After a union files its petition for an election, including signatures demonstrating a showing of interest of at least 30 percent of the employees, the NLRB applies its traditional two-step process to resolve disputes regarding whether the bargaining unit that the union petitioned for is appropriate.[15]

- First, the NLRB determines whether the unit is a readily identifiable group sharing a "community of interest" using factors such as similarity of wages, hours, terms and conditions of employment, and supervision.[16]
- Second, assuming the unit shares a "community of interest," if the employer contends additional employees should be added to the unit, then the NLRB looks at whether the employees in the unit share an "overwhelming community of interest" such that there "is no legitimate basis upon which to exclude certain employees from it."[17]

Various units are potentially appropriate for collective bargaining. The union need only petition for *an* appropriate unit, not the single *most* appropriate unit, or even the largest one.[18]

The bill undermines this traditional analysis by lowering the standard the employer needs to meet in order for employees to be added to the unit. H.R. 2776 allows an employer to override the union's petitioned-for unit and require that employees be added if they can be shown to also share a community of interest, but without regard to whether this is how the workers chose to freely associate. This change could head off an election by diluting the percentage of employees interested in forming a union to below the 30 percent threshold required for a showing of interest. Even if an election occurs, the ballot box will be stuffed with votes from workers who had no interest in forming a union at the outset, but were added to the voter pool to advance the employer's efforts to defeat the union. This bill shifts the burden of proof on employees to jus-

[14] 29 C.F.R. § 102.63(b).

[15] *Specialty Healthcare,* 357 NLRB 934 (2011), *enforced sub nom Kindred Nursing Centers East, LLC v. NLRB,* 727 F.3d 552 (6th Cir. 2013).

[16] Other factors can include "whether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the Employer's other employees; have frequent contact with other employees; [and] interchange with other employees." *Specialty Healthcare*, 357 NLRB at 942 (quoting *United Operations, Inc.*, 338 NLRB 123, 123 (2002)).

[17] *Specialty Healthcare,* 357 NLRB at 944.

[18] *Id.* at 940.

tify why the employer cannot simply dilute a proposed bargaining unit with workers who had no interest in organizing.

The practical impact of this bill is that employers will find it much easier to gerrymander bargaining units to determine who can vote in a union election—presumably to either prevent an election or reduce the union's chances of victory.

This provision has been advanced by employer interests under the guise of overturning the NLRB's 2011 *Specialty Healthcare* decision, which clarified the NLRB's traditional two-step analysis. Committee Republicans inaccurately contend that this decision created a new standard for determining an appropriate bargaining unit that creates "micro-units" and allows unions to gerrymander bargaining units. Alarmist warnings of a proliferation of "micro-units" have not materialized, as the median bargaining unit size approved by the NLRB has remained unchanged since the 2011 decision.

| Fiscal Year | Median Bargaining Unit Size Approved by NLRB (Source: NLRB) |
|---|---|
| FY 2007 | 24 |
| FY 2008 | 26 |
| FY 2009 | 24 |
| FY 2010 | 27 |
| FY 2011 | 26 |
| FY 2012 | 28 |
| FY 2013 | 24 |
| FY 2014 | 26 |
| FY 2015 | 25 |
| FY 2016 | 26 |

As the chart illustrates, the median bargaining unit size was 26 three years before the *Specialty Healthcare* was decided, it was 26 when the decision was issued in 2011, and it was unchanged at 26 in 2016, five years later.[19]

The NLRB's traditional two-step analysis is not new: *Specialty Healthcare*, which was affirmed by the Sixth Circuit Court of Appeals, only clarified the NLRB's existing standard. The D.C. Circuit previously articulated the same test and noted the Board's decades-long precedent using that test.[20] Eight separate Courts of Appeals have subsequently considered *Specialty Healthcare* and held that the NLRB merely "laid out the traditional standard,"[21] and, on

[19] Median Size of Bargaining Units in Elections, NLRB *https://nlrb.gov/news-outreach/graphs-data/petitions-and-elections/median-size-bargaining-units-elections* (last accessed Jul. 8, 2017).

[20] *Blue Man Vegas, LLC v. NLRB,* 529 F.3d 417 (D.C. Cir. 2008).

[21] *Macy's, Inc. v. NLRB,* 824 F.3d 557, 567 (5th Cir. 2016) (internal citation omitted); *see also Rhino Northwest, LLC v. NLRB,* Case Nos. 16-1089, 16-1115, 2017 U.S. App. LEXIS 14884 (D.C. Cir. Aug. 11, 2017) ("Throughout, the Board's approach has remained fundamentally the same . . . We thus join seven of our sister circuits in concluding that *Specialty Healthcare* worked no departure from prior Board decisions.") (internal citations omitted); *Constellation Brands, Inc. v. NLRB,* 842 F.3d 784, 792 (2d Cir. 2016) (the standard is "consistent with earlier Board precedents"); *FedEx Freight, Inc. v. NLRB,* 839 F.3 636, 639 (7th Cir. 2016) (the standard is "not the invention of the *Specialty Healthcare* case"); *NLRB v. FedEx Freight, Inc.,* 832 F.3d 432, 442 (3d Cir. 2016) ("The Board's citation to and approval of the D.C. Circuit's understanding of Board precedent was not the adoption of new law"); *Nestle Dreyer's Ice Cream Co. v. NLRB,* 821 F.3d 489, 500 (4th Cir. 2016) ("[T]he Board clarified—rather than overhauled—its unit-determination analysis."); *FedEx Freight, Inc. v. NLRB,* 816 F.3d 515, 523 (8th Cir. 2016) ("The precedents relied on by the Board in *Specialty Healthcare* make clear that the Board does not look at the proposed unit in isolation."), *reh'g and reh'g en banc denied* (May 26, 2016); *Kindred Nursing Centers East, LLC*, 727 F.3d 552, 561 (6th Cir. 2013) ("The Board has used the over-

June 19, 2017, the U.S. Supreme Court declined to hear a case challenging the two-prong test outlined above involving a Macy's department store.[22]

The Majority's allegations that the *Specialty Healthcare* decision enables "union gerrymandering" of a bargaining unit are also unfounded. Section 9(c)(5) of the NLRA specifically states that "the extent to which the employees have organized shall not be controlling" when determining "whether a unit is appropriate." Union gerrymandering is therefore prohibited, and *Specialty Healthcare* complements Section 9(c)(5) by precluding employer gerrymandering. H.R. 2776 disrupts settled law by allowing employers to rig union elections in their own favor.

H.R. 2776 thus undermines the very right to organize a union by replacing the "overwhelming community of interest" standard and requiring that any additional employees with a mere community of interest be added to the voting pool upon the request of the employer. By attacking the NLRB's traditional standard and creating a controversy where none exists, Committee Republicans hope to use this as an opening to rewrite the National Labor Relations Act to de-unionize the economy.

## COMMITTEE DEMOCRATS OFFER AMENDMENTS TO H.R. 2776

Democrats offered the following amendments to H.R. 2776 at the June 29, 2017 markup:

*Amendment 1—To eliminate the 35-day waiting period for an election*

In order to prevent needless delays in conducting elections, Representative Frederica S. Wilson proposed an amendment to strike the text that requires an election to be delayed for at least 35 days from the date the petition was filed when a party contests a pre-election issue. This amendment would restore the current NLRB election rule so an election would be conducted as soon as practicable following the pre-election hearing (consistent with the requirement that a notice of election is posted for three days prior to the election). While H.R. 2776 prescribes minimum delays, there is no provision in the bill to limit the time that an election can be delayed.

This amendment was rejected 16–22.

*Amendment 2—To replace the 14-day waiting period for a pre-election hearing with an 8-day deadline*

In order to prevent needless delays in conducting elections, Representative Adriano Espaillat proposed an amendment to require a pre-election hearing to be held 8 days after the date the petition was filed, replacing text requiring that a pre-election hearing be delayed for at least 14 days from the date of the petition. This amendment would codify the current NLRB election rule that went into effect in April 2015. H.R. 2776 allows open-ended delays in

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whelming-community-of-interest standard before, so its adoption in *Specialty Healthcare* is not new.").

[22] *See Macy's Inc. v. NLRB,* No. 16-1016, U.S. Sup (June 19, 2017).

holding pre-election hearings, while also prescribing a longer minimum time period before pre-election hearings can be held.

This amendment was rejected 16–22.

*Amendment 3—To prevent employers from withdrawing recognition of a union without an election*

In order to promote workforce democracy and fairness, as the bill purports, Representative Joe Courtney proposed an amendment to prohibit employers from withdrawing recognition of the union that was originally certified through an election without first conducting a decertification election. Under current law, if an employer can present objective evidence that a union has lost majority support during a period when the union's decertification is not barred, then the employer can unilaterally withdraw recognition of the union without an election. However, if a union campaigning for representation presents objective evidence that it has majority support, the employer can require an election before being required to recognize the union. This amendment rectifies that double-standard, by requiring an election before an employer can unilaterally withdraw recognition.

This amendment was ruled non-germane. The appeal of the ruling was tabled on a vote of 22–16.

*Amendment 4—To strike language allowing open-ended litigation in pre-election hearings*

In order to ensure that pre-election hearings are focused on resolving genuine disputes, Ranking Member Bobby Scott proposed an amendment striking the text that authorizes parties to raise "any other issue which . . . may reasonably be expected to impact the outcome of the election." Pre-election hearings are for setting election ground rules such as defining the appropriate bargaining unit, or resolving issues that eliminate the need for an election. They are not for concocting litigation over "any other issue" that could impact the election's outcome, which could range from disputes over the accuracy of campaign literature to alleged unfair labor practices by either party.

The amendment was rejected 16–22.

*Amendment 5—To sanction frivolous and vexatious filings*

In order to deter frivolous filings, Representative Suzanne Bonamici proposed an amendment to provide the NLRB with the authority to impose sanctions on any party for presenting a frivolous or vexatious filing during any stage of a representation proceeding. Potential sanctions included reimbursement of the opposing party's attorney fees and costs, using criteria in Rule 11 of Federal Rules of Civil Procedure. In addition, if the Board determines that a party presented a frivolous filing for purposes of delaying an election, the Board shall direct an election in not less than 7 days after such determination. The NLRB has no sanction procedures with regards to representation proceedings.

The amendment was rejected 16–22.

*Amendment 6—To prevent employers from gerrymandering the bargaining unit*

Representative Mark DeSaulnier proposed an amendment to strike text that would allow employers to gerrymander bargaining units as a way to impact the outcome of union elections. The amendment reinstated the traditional requirement that an employer can only succeed in adding employees to the proposed bargaining unit if the additional employees shared an "overwhelming community of interest" with the other employees. This bill hinders employees' right to join a union by empowering employers to cram the pool of eligible voters with employees who have expressed no interest in joining a union. In addressing this problem, the amendment restores the current law as expressed in the NLRB's *Specialty Healthcare* decision.

This amendment was rejected 16–22.

*Amendment 7—To prohibit captive audience meetings after an election is ordered*

To prevent coercion and intimidation by employers during the election process, Representatives Donald Norcross and Jared Polis proposed an amendment to prohibit captive audience meetings between the date an election is ordered and the time of election. Should an employer violate this provision, the election can be invalidated and a new election ordered upon the filing of valid objections. The amendment provided an exception where there is an explicit written agreement between the employer and a union.

Captive audience meetings are compulsory listening sessions that are conducted by employers on an employee's paid time and are used to propagandize against the union seeking recognition. Current law only prohibits captive audience meetings in the 24 hours prior to an election. Under current law, employees who refuse to participate or object to any portion of the presentation can be legally fired by their employer. Unions are not provided equal time at these meetings, nor do they have any right to enter the employer's worksite to provide information. This amendment helps to level the playing field, and it will help ensure that employees can exercise their choice untainted by attendance at forced meetings. The amendment does not restrict the employer's ability to hold voluntary and unpaid meetings with employees, which are the same terms on which unions campaign.

This amendment was rejected 16–22.

*Amendment 8—To substitute the text of the bill with the Raise the Wage Act*

Representative Mark Takano offered an amendment to replace the bill with the Raise the Wage Act (H.R. 15). This amendment raises the federal minimum wage to $15 an hour by 2024. H.R. 2776 does nothing to grow the economy or expand the middle class. By impeding the ability of workers to organize, it depresses wages and creates a more insecure labor market. During this time of skyrocketing inequality, this Committee should be focused on empowering workers and raising wages.

The amendment was ruled non-germane, and the appeal of the ruling was tabled.

ROBERT C. "BOBBY" SCOTT.
*Ranking Member.*
SUSAN A. DAVIS.
RAÚL M. GRIJALVA.
JOE COURTNEY.
MARCIA L. FUDGE.
JARED POLIS.
GREGORIO KILILI CAMACHO SABLAN.
FREDERICA S. WILSON.
SUZANNE BONAMICI.
MARK TAKANO.
ALMA S. ADAMS.
MARK DESAULNIER.
DONALD NORCROSS.
LISA BLUNT ROCHESTER.
RAJA KRISHNAMOORTHI.
CAROL SHEA-PORTER.
ADRIANO ESPAILLAT.

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