

105TH CONGRESS  
2D SESSION

# S. 2085

To assist small businesses and labor organizations in defending themselves against Government bureaucracy; to protect the right of employers to have a hearing to present their case in certain representation cases; and to prevent the use of the National Labor Relations Act for the purpose of disrupting or inflicting economic harm on employers.

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## IN THE SENATE OF THE UNITED STATES

MAY 14, 1998

Mr. HUTCHINSON introduced the following bill; which was read twice and referred to the Committee on Labor and Human Resources

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## A BILL

To assist small businesses and labor organizations in defending themselves against Government bureaucracy; to protect the right of employers to have a hearing to present their case in certain representation cases; and to prevent the use of the National Labor Relations Act for the purpose of disrupting or inflicting economic harm on employers.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Fairness for Small  
5 Business and Employees Act of 1998”.

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# **TITLE I—TRUTH IN EMPLOYMENT**

## **SEC. 101. FINDINGS.**

Congress makes the following findings:

(1) An atmosphere of trust and civility in labor-management relationships is essential to a productive workplace and a healthy economy.

(2) The tactic of using professional union organizers and agents to infiltrate a targeted employer's workplace, a practice commonly referred to as "salting" has evolved into an aggressive form of harassment not contemplated when the National Labor Relations Act was enacted and threatens the balance of rights which is fundamental to our system of collective bargaining.

(3) Increasingly, union organizers are seeking employment with nonunion employers not because of a desire to work for such employers but primarily to organize the employees of such employers or to inflict economic harm specifically designed to put non-union competitors out of business, or to do both.

(4) While no employer may discriminate against employees based upon the views of employees concerning collective bargaining, an employer should have the right to expect job applicants to be pri-

1       marily interested in utilizing the skills of the appli-  
2       cants to further the goals of the business of the em-  
3       ployer.

4   **SEC. 102. PURPOSES.**

5       The purposes of this title are—

6           (1) to preserve the balance of rights between  
7       employers, employees, and labor organizations which  
8       is fundamental to our system of collective bargain-  
9       ing;

10          (2) to preserve the rights of workers to orga-  
11       nize, or otherwise engage in concerted activities pro-  
12       tected under the National Labor Relations Act; and

13          (3) to alleviate pressure on employers to hire  
14       individuals who seek or gain employment in order to  
15       disrupt the workplace of the employer or otherwise  
16       inflict economic harm designed to put the employer  
17       out of business.

18   **SEC. 103. PROTECTION OF EMPLOYER RIGHTS.**

19       Section 8(a) of the National Labor Relations Act (29  
20   U.S.C. 158(a)) is amended by adding after paragraph (5)  
21   the following flush sentence:

22   “Nothing in this subsection shall be construed as requir-  
23   ing an employer to employ any person who is not a bona  
24   fide employee applicant, in that such person seeks or has  
25   sought employment with the employer with the primary

1 purpose of furthering another employment or agency sta-  
 2 tus: *Provided*, That this sentence shall not affect the  
 3 rights and responsibilities under this Act of any employee  
 4 who is or was a bona fide employee applicant, including  
 5 the right to self-organization, to form, join, or assist labor  
 6 organizations, to bargain collectively through representa-  
 7 tives of their own choosing, and to engage in other con-  
 8 certed activities for the purpose of collective bargaining  
 9 or other mutual aid or protection.”.

## 10 **TITLE II—FAIR HEARING**

### 11 **SEC. 201. FINDINGS.**

12 Congress makes the following findings:

13 (1) Bargaining unit determinations by their na-  
 14 ture require the type of fact-specific analysis that  
 15 only case-by-case adjudication allows.

16 (2) The National Labor Relations Board has  
 17 for decades held hearings to determine the appro-  
 18 priateness of certifying a single location bargaining  
 19 unit.

20 (3) The imprecision of a blanket rule limiting  
 21 the factors considered material to determining the  
 22 appropriateness of a single location bargaining unit  
 23 detracts from the National Labor Relations Act’s  
 24 goal of promoting stability in labor relations.

1 **SEC. 202. PURPOSE.**

2       The purpose of this title is to ensure that the Na-  
3 tional Labor Relations Board conducts a hearing process  
4 and specific analysis of whether or not a single location  
5 bargaining unit is appropriate, given all of the relevant  
6 facts and circumstances of a particular case.

7 **SEC. 203. REPRESENTATIVES AND ELECTIONS.**

8       Section 9(c) of the National Labor Relations Act (29  
9 U.S.C. 159(c)) is amended by adding at the end the fol-  
10 lowing:

11       “(6) If a petition for an election requests the Board  
12 to certify a unit which includes the employees employed  
13 at one or more facilities of a multi-facility employer, and  
14 in the absence of an agreement by the parties (stipulation  
15 for certification upon consent election or agreement for  
16 consent election) regarding the appropriateness of the bar-  
17 gaining unit at issue for purposes of subsection (b), the  
18 Board shall provide for a hearing upon due notice to deter-  
19 mine the appropriateness of the bargaining unit. In mak-  
20 ing its determination, the Board shall consider functional  
21 integration, centralized control, common skills, functions  
22 and working conditions, permanent and temporary em-  
23 ployee interchange, geographical separation, local auton-  
24 omy, the number of employees, bargaining history, and  
25 such other factors as the Board considers appropriate.”.

1       **TITLE III—ATTORNEYS FEES**

2       **SEC. 301. FINDINGS AND PURPOSE.**

3           (a) FINDINGS.—Congress makes the following find-  
4       ings:

5               (1) Certain small businesses and labor organi-  
6       zations are at a great disadvantage in terms of ex-  
7       pertise and resources when facing actions brought by  
8       the National Labor Relations Board.

9               (2) The attempt to “level the playing field” for  
10      small businesses and labor organizations by means  
11      of the Equal Access to Justice Act has proven ineff-  
12      fective and has been underutilized by these small en-  
13      tities in their actions before the National Labor Re-  
14      lations Board.

15              (3) The greater expertise and resources of the  
16      National Labor Relations Board as compared with  
17      those of small businesses and labor organizations ne-  
18      cessitate a standard that awards fees and costs to  
19      certain small entities when they prevail against the  
20      National Labor Relations Board.

21           (b) PURPOSE.—It is the purpose of this title—

22               (1) to ensure that certain small businesses and  
23      labor organizations will not be deterred from seeking  
24      review of, or defending against, actions brought  
25      against them by the National Labor Relations Board

1 because of the expense involved in securing vindica-  
 2 tion of their rights;

3 (2) to reduce the disparity in resources and ex-  
 4 pertise between certain small businesses and labor  
 5 organizations and the National Labor Relations  
 6 Board; and

7 (3) to make the National Labor Relations  
 8 Board more accountable for its enforcement actions  
 9 against certain small businesses and labor organiza-  
 10 tions by awarding fees and costs to these entities  
 11 when they prevail against the National Labor Rela-  
 12 tions Board.

13 **SEC. 302. AMENDMENT TO NATIONAL LABOR RELATIONS**  
 14 **ACT.**

15 The National Labor Relations Act (29 U.S.C. 151  
 16 et seq.) is amended by adding at the end the following  
 17 new section:

18 “AWARDS OF ATTORNEYS’ FEES AND COSTS

19 “SEC. 20. (a) ADMINISTRATIVE PROCEEDINGS.—An  
 20 employer who, or a labor organization that—

21 “(1) is the prevailing party in an adversary ad-  
 22 judication conducted by the Board under this or any  
 23 other Act, and

24 “(2) had not more than 100 employees and a  
 25 net worth of not more than \$1,400,000 at the time  
 26 the adversary adjudication was initiated,

1 shall be awarded fees and other expenses as a prevailing  
 2 party under section 504 of title 5, United States Code,  
 3 in accordance with the provisions of that section, but with-  
 4 out regard to whether the position of the Board was sub-  
 5 stantially justified or special circumstances make an  
 6 award unjust. For purposes of this subsection, the term  
 7 ‘adversary adjudication’ has the meaning given that term  
 8 in section 504(b)(1)(C) of title 5, United States Code.

9 “(b) COURT PROCEEDINGS.—An employer who, or a  
 10 labor organization that—

11 “(1) is the prevailing party in a civil action, in-  
 12 cluding proceedings for judicial review of agency ac-  
 13 tion by the Board, brought by or against the Board,  
 14 and

15 “(2) had not more than 100 employees and a  
 16 net worth of not more than \$1,400,000 at the time  
 17 the civil action was filed,

18 shall be awarded fees and other expenses as a prevailing  
 19 party under section 2412(d) of title 28, United States  
 20 Code, in accordance with the provisions of that section,  
 21 but without regard to whether the position of the United  
 22 States was substantially justified or special circumstances  
 23 make an award unjust. Any appeal of a determination of  
 24 fees pursuant to subsection (a) or this subsection shall be  
 25 determined without regard to whether the position of the

1 United States was substantially justified or special cir-  
2 cumstances make an award unjust.”.

3 **SEC. 303. APPLICABILITY.**

4 (a) AGENCY PROCEEDINGS.—Subsection (a) of sec-  
5 tion 20 of the National Labor Relations Act (as added  
6 by section 302) applies to agency proceedings commenced  
7 on or after the date of the enactment of this Act.

8 (b) COURT PROCEEDINGS.—Subsection (b) of section  
9 20 of the National Labor Relations Act (as added by sec-  
10 tion 302) applies to civil actions commenced on or after  
11 the date of the enactment of this Act.

