MINORITY VIEWS
H.R. 2775, "EMPLOYEE PRIVACY PROTECTION ACT" (EPPA)
115TH CONGRESS, 1ST SESSION
SEPTEMBER 15, 2017

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

Background

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

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

Impact of the Legislation

H.R. 2775 does not simply reverse the NLRB's 2015 rule governing the *Excelsior* list, it undermines the list's purpose. The bill does not replace the 2-day deadline with the 7-day deadline that existed prior to the rule. Instead, it mandates a minimum 7-day waiting period before the employer can submit the list to the NLRB, with no maximum timeframe for submission. The bill "does not limit how long the union may be forced to wait for this basic information. The union could receive the list of voters the night before the election under EPPA," according to the testimony of Jody Calemine, General Counsel of the Communications

[1] 156 NLRB 1236 (1966).
[2] 29 C.F.R. § 102.62(d).

Workers of America, before a June 14, 2017 legislative hearing on H.R. 2775.[3] Adding further delay, the bill requires the employer to send the list to the NLRB, rather than directly to the union.

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

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

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

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

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

The NLRB's response: There are no such cases.[5]

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

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

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[3] Testimony of Guerino J. Calemine, III, Before the U.S. House of Representatives Subcommittee on Health, Labor, Employment, and Pensions (June 14, 2017) https://edworkforce.house.gov/uploadedfiles/calemine_-_testimony.pdf.
[4] *Associated Builders & Contractors of Texas, Inc. v. NLRB*, 826 F.3d 215 (5th Cir. 2016); *Chamber of Commerce of the United States of America v. NLRB*, 118 F. Supp. 3d 171 (D.C. Cir. 2015).
[5] Email communications to the Education and Workforce Committee Democratic staff from the NLRB, July 6, 2017.
[6] 29 CFR 102.62(d)

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

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

Amendment 1 – To amend the timing and content of the voter information list

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

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

Amendment 2 – Protecting employee privacy regarding employers that require access to employees' social media accounts

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

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

Amendment 3 – Protecting employee privacy regarding employers engaging in GPS tracking of employees during non-work hours

In order to ensure that the Employee Privacy Protection Act actually improves employee privacy, Representative Carol Shea-Porter offered an amendment that would limit application of the bill to employers who adopt policies that prohibit management from installing and activating GPS tracking through employer-provided cellular phones, unless the employee provides written consent. Although employers may have reason to track employees during working hours, such tracking of employees during their personal time is an unwarranted violation of employees'

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

privacy without any legitimate business purposes. No federal law currently protects employee privacy from GPS tracking by their employers outside working hours.

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

Amendment 4 – Protecting employee privacy regarding employers conducting video surveillance in employee bathrooms and locker rooms

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

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

Amendment 5 – To substitute the text of the bill with the Giving Workers a Fair Shot Act

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

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

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

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