Labor and Workforce

In This Chapter

EXECUTIVE SUMMARY

It is critical that we always protect the right of American workers to have a guaranteed secret ballot. In order to do that, card check must be off the table. President Obama and Democrats have made it abundantly clear that Big Labor has a seat at the head of the table when it comes to anything they have promoted and tried to push through Congress concerning our nation's workforce and the rights of our workers and employers. Additionally, Republicans are committed to working hard to ensure that American workers' retirement security is not jeopardized because of more government, more spending and more taxes.

Pensions, Retirement Security and Health Benefits

There are two major types of pension plans: defined contribution plans and defined benefit plans. A defined contribution plan does not promise a specific amount of benefits at retirement. A defined benefit plan promises participants a specified monthly benefit at retirement. The Pension Benefit Guaranty Corporation (PBGC) is a quasi-federal government agency whose main purpose is to insure the retirement benefits of workers who participate in defined benefit pension plans offered by employers. The PBGC maintains two separate insurance programs for both single employer and multiemployer defined benefit plans. The single employer program protects about 34.2 million workers and retirees in approximately 28,800 pension plans. The multiemployer program protects more than 9.9 million workers and retirees in approximately 1,600 pension plans.

Workplace Civil Rights Issues

Under federal law, numerous civil rights statutes exist to protect individuals from discrimination – including discrimination in and pertaining to our workforce. Arguably most prominent among these is the Civil Rights Act of 1964 (CRA). Title VII of the CRA specifically prohibits discrimination in employment on the basis of race, color, religion, national origin or sex. The Equal Employment Opportunity Commission (EEOC) is responsible for enforcing federal laws that make it illegal to discriminate against a job applicant or an employee because of the person's race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information. The EEOC actually enforces eight different federal laws. According to EEOC data, in fiscal year (FY) 2011, more than half, 66 percent, of all charges filed with them regarding discrimination were found to have no reasonable cause.

The Employment Non-Discrimination Act (ENDA) is legislation that has been introduced for several Congresses to outlaw employment discrimination based on sexual orientation or gender identity, which is a top priority for many gay-rights groups. It was last brought up and passed by House Democrats in the 110th Congress, but it is not likely that ENDA will see any legislative action in the 112th Congress.

Employer-Employee Relations

The National Labor Relations Act (NLRA) of 1935 gave private sector workers the right to organize and/or form a labor union and to bargain collectively with their employers through representatives of their choice over wages, hours and other working conditions. The NLRA is administered and enforced by the National Labor Relations Board (NLRB), which was created in 1933 by President Roosevelt. The NLRB is split into two entities – the Board and the General Counsel. The Board is composed of up to five members who adjudicate labor disputes through administrative hearings. Currently, the Board has five members. Last year, the Board had three members until Craig Becker's, a recess appointee of President Obama's, term ended on Dec. 31, 2011, leaving just two members. In January 2012, President Obama made three recess appointments to the NLRB while the Senate was meeting regularly in pro forma session. Never before had a president made recess appointments to the NLRB at a time when Congress was not actually in recess.

Labor Unions and Collective Bargaining

As previously mentioned, the NLRA gives workers the right to join or form a labor union and to bargain collectively over wages, hours and other conditions of employment. Under the NLRA, workers also have the right not to join a union. Under current law, union certification is conducted through secret ballot elections called representation elections (RCs).

Right-to-Work

In general, right-to-work laws guarantee that no person can be compelled, as a condition of employment, to join or not to join, nor to pay dues to, a labor union. There are currently 23 states that have their own right-to-work laws on the books.

Card Check

On the opposite of labor issues from right-to-work is card check. Organized labor's highest legislative priority is to pass the misleadingly titled Employee Free Choice Act (EFCA), also known as "card check." The legislation would replace the current process of organizing a union by secret ballot elections with public card-signing and would give union bosses and Washington bureaucrats unprecedented controls in the workplace. Card check would take away a worker's right to a private ballot and gives control of the workplace to government bureaucrats. Card check legislation passed the House in the 110th Congress, but has not been brought up for Floor action since.

Davis-Bacon and PLAs

Davis-Bacon requires the payment of "prevailing wage rates" on federal construction projects over $2,000. Project Labor Agreements (PLAs) require any contractor on a construction project to enter into a labor agreement pre-negotiated by the owner with respect to workers' wages, work rules and benefits. Essentially, these projects then become "union-only," as non-union contractors do not want (or are not able) to pay union wages.

PENSION, RETIREMENT SECURITY AND HEALTH BENEFITS

Originally, the Internal Revenue Service (IRS) was the primary regulator of private pension plans. The Revenue Acts of 1921 and 1926 allowed employers to deduct pension contributions from corporate income and allowed for the income of the pension fund's portfolio to accumulate tax free. The plan's participant realized no income until monies were distributed to him or her, provided the plan was tax-qualified. To qualify for such favorable tax treatment, the plans had to meet certain minimum employee coverage and employer contribution requirements. The Revenue Act of 1942 provided stricter participation requirements and, for the first time, disclosure requirements.

By the late 1950s, the U.S. Department of Labor became involved in the regulation of employee benefit plans upon passage of the Welfare and Pension Plans Disclosure Act of 1959 (WPPDA). Plan sponsors (e.g. employers and labor unions) were required to file plan descriptions and annual financial reports with the government – this information was also made available to plan participants and beneficiaries. WPPDA was intended to provide employees with enough information regarding plans so that they could monitor their plans to prevent mismanagement and abuse of plan funds. The WPPDA was amended in 1962 giving the Labor Department enforcement, interpretative and investigatory powers over employee benefit plans to prevent mismanagement and abuse of plan funds.

Employee Retirement Income Security Act (ERISA)

In the early 1970s, a groundswell of public opinion for pension and benefit reform was created after extensive congressional hearings and related news reports on pension losses resulting from the lack of vesting, inadequate funding and plan failures. This resulted in the enactment of the Employee Retirement Income Security Act (ERISA) in 1974. ERISA is the federal law that sets minimum standards for most voluntarily established pension and employee benefit plans in private industry to provide protection for individuals in these plans. In general, ERISA does not cover retirement plans or health plans established or maintained by government entities, churches for their employees or plans which are maintained solely to comply with applicable workers compensation, unemployment or disability laws. ERISA also does not cover plans maintained outside the United States primarily for the benefit of nonresident aliens or unfunded excess benefit plans.

Employee Benefits Security Administration (EBSA)

The Department of Labor's Employee Benefits Security Administration (EBSA) administers and enforces the fiduciary, reporting and disclosure provisions of ERISA. At the time of its name change in February 2003, EBSA was known as the Pension and Welfare Benefits Administration (PWBA). Prior to January 1986, PWBA was known as the Pension and Welfare Benefits Program. At the time of this name change, it was upgraded to a sub-cabinet position with the establishment of Assistant Secretary and Deputy Assistant Secretary positions. The administration of ERISA is divided among the U.S. Department of Labor, the Internal Revenue Service (IRS) and the Pension Benefit Guaranty Corporation (PBGC).

Pension and Retirement Security

ERISA does not require any employer to establish a pension plan. It only requires that those who establish plans must meet certain minimum standards. For example, if an employer maintains a pension plan, ERISA specifies when an employee must be allowed to become a participant, how long they have to work before they have a non-forfeitable interest in their pension, how long a participant can be away from their job before it might affect their benefit and whether their spouse has a right to part of their pension in the event of their death. ERISA does the following regarding pension plans:

- Requires plans to provide participants with information about the plan including important information about plan features and funding – the plan must furnish some information regularly and automatically – some is available free of charge, some is not.

- Sets minimum standards for participation, vesting, benefit accrual and funding. The law defines how long a person may be required to work before becoming eligible to participate in a plan, to accumulate benefits and to have a non-forfeitable right to those benefits. ERISA also establishes detailed funding rules that require plan sponsors to provide adequate funding for your plan.

- Requires accountability of plan fiduciaries. ERISA generally defines a fiduciary as anyone who exercises discretionary authority or control over a plan's management or assets, including anyone who provides investment advice to the plan. Fiduciaries who do not follow the principles of conduct may be held responsible for restoring losses to the plan.

- Gives participants the right to sue for benefits and breaches of fiduciary duty.

- Guarantees payment of certain benefits if a defined plan is terminated, through a federally chartered corporation, known as the Pension Benefit Guaranty Corporation (PBGC).

There are two major types of pension plans: defined contribution plans and defined benefit plans.

Defined Contribution Plans: A defined contribution plan does not promise a specific amount of benefits at retirement. In these plans, the participant or the employer (or both) contribute to the participant's individual account under the plan, sometimes at a set rate, such as five percent of their earnings annually. These contributions generally are invested on the participant's behalf. The participant will ultimately receive the balance in their account, which is based on contributions plus or minus investment gains or losses. The value of the account will fluctuate due to changes in the value of investments. The employee bears the investment risk, and the benefits are not insured by the PBGC. An employee who terminates employment before retirement may generally receive any vested benefits as a lump-sum payment at the time of termination. Examples of defined contribution plans include 401(k) plans, 403(b) plans, employee stock ownership plans and profit-sharing plans. The general rules of ERISA apply to each of these types of plans, but some special rules also apply.

- **401(k) plans:** An employer may establish a defined contribution plan that is a cash or deferred arrangement, usually called a 401(k) plan. A participant can elect to defer receiving a portion of their salary which is instead contributed on their behalf, before taxes, to the 401(k) plan. Sometimes the employer may match the contributions. There are special rules governing the operation of 401(k) plans. For example, there is a dollar limit on the amount a participant may elect to defer each year. The amount may be adjusted annually by the Treasury Department to reflect changes in the cost of living. Other limits may apply to the amount that may be contributed on a participant's behalf. For example, if the participant is highly compensated, they may be limited depending on the extent to which rank and file employees participate in the plan. An employer must advise participants of any limits that may apply to them. Although a 401(k) plan is a retirement plan, participants may be permitted to access funds in the plan before retirement. Also, the plan may permit a withdrawal on account of hardship, generally from the funds the participant contributed.

- **Profit Sharing or Stock Bonus Plan:** A profit sharing or stock bonus plan is a defined contribution plan under which the plan may provide, or the employer may determine, annually, how much will be contributed to the plan (out of profits or otherwise). The plan contains a formula for allocating to each participant a portion of each annual contribution. A profit sharing or stock bonus plan may include a 401(k) plan.

- **Employee Stock Ownership Plans (ESOPs):** ESOPs are a form of defined contribution plan in which the investments are primarily in employer stock. Congress authorized the creation of ESOPs as one way of encouraging employee participation in corporate ownership.

Defined Benefit Plans: A defined benefit plan promises participants a specified monthly benefit at retirement. The plan may state this promised benefit as an exact dollar amount, such as $100 per month at retirement. Or, more commonly, it may calculate a benefit through a plan formula that considers such factors as salary and service – for example, one percent of average salary for the last five years of employment for every year of service with an employer. The employer bears the risk that the investments will not provide adequate funds and is responsible for any shortfalls. If the plan is terminated, the benefits are insured (up to a certain limit) by the PBGC. An employee who terminates employment before retirement will generally receive any vested benefits as an annuity at normal retirement age.

Defined benefit plans established by one employer for its employees are called "single employer" plans, and are administered and funding by the employer. Defined benefit plans may also be established by a collective bargaining agreement (CBA) between two or more unrelated employers and a union. This type of plan is called a "multiemployer" plan. In a multiemployer plan, all participating employers contribute to the plan through a funding formula negotiated by a joint board of trustees equally divided between representatives of the employers and the union. This joint board of trustees also oversees and administers the multiemployer plan. The defined benefit plan is generally the more traditional type of pension plan and the one that was the most prevalent when ERISA was passed in the early 1970s. However, over the past two decades, there have been significant changes in the nature of the employer-sponsored, defined benefit pension system as more employers have converted their traditional defined benefit plans to hybrid pension plans.

Hybrid plans, such as cash balance plans, combine the features of defined benefit and defined contribution plans. Essentially, cash balance plans define a promised, PBGC-protected benefit at retirement (like a defined benefit plan) through an account balance that can be viewed by the participant and is portable for when an employee leaves the job (like a defined contribution plan). However, legally, these plans are defined benefit plans and are regulated as such under ERISA.

As the economy has shifted from manufacturing to service-based, sponsorship of all defined benefit plans has declined, while sponsorships of defined contribution plans, such as the 401(k), has increased.

<u>Pension Benefit Guaranty Corporation (PBGC)</u>

Established by ERISA, the Pension Benefit Guaranty Corporation (PBGC) is a quasi-federal government agency whose main purpose is to insure the retirement benefits of workers who participate in defined benefit pension plans offered by employers. The PBGC maintains two separate insurance programs for both single employer and multiemployer defined benefit plans. The single employer program protects about 34.2 million workers and retirees in approximately 28,800 pension plans. The multiemployer program protects more than 9.9 million workers and retirees in approximately 1,600 pension plans.

There are two different ways that a pension plan may be terminated: an employer can voluntarily ask to terminate its single employer pension plan in either a "standard" or "distress" termination. In a standard termination, the plan must hold enough assets to pay all benefits, whether vested or not, before the plan can terminate. After workers receive promised benefits, in the form of a lump sum payment or an insurance company annuity purchased by the employer, the PBGC guarantee ends. In a distress termination, where the plan does not have enough money to pay all benefits, the employer must prove severe financial distress and show that continuing to make the required contributions to the plan would force the company to shut down – this is generally decided by a bankruptcy judge. In those instances, the PBGC will pay guaranteed benefits, usually covering a large part of total earned benefits, and undertakes efforts to recover additional funds from the employer. Finally, the PBGC may seek to terminate a single-employer plan without the employer's consent to protect the interests of workers, the plan or the overall health of the PBGC's insurance fund. The PBGC must act to terminate a plan that cannot pay current benefits.

For multiemployer pension plans that are unable to pay guaranteed benefits when due, the PBGC will provide financial assistance to the plan in the form of a loan so that current and future retirees can receive their benefits.

The PBGC is not funded by general tax revenues, so there is no direct taxpayer liability for PBGC obligations. Under ERISA, the PBGC is required to be self-supporting and, therefore, does not receive any appropriations from the federal government. Rather, its revenue comes from premiums set by Congress which it charges to defined benefit plans, the assets of those plans that it has taken over, investment income and certain recoveries from companies who sponsored and underfunded plans. The PBGC is also authorized to borrow up to $100 million from the U.S. Treasury and its receipts and disbursements must be included in the annual federal budget.

The PBGC pays monthly retirement benefits, up to a guaranteed maximum, to about 800,000 retirees in more than 3,500 pension plans that ended. Including those who have not yet retired and participants in multiemployer plans receiving financial assistance, the PBGC is responsible for the current and future pensions of about 1.5 million people in 4,300 failed plans. The maximum pension benefit guaranteed by PBGC is set by law and adjusted yearly. For pension plans that terminated in 2010 or 2011, the maximum guaranteed amount was $4,500 per month ($54,000 yearly) for a participant retiring at age 65. The guarantee is lower for those who retire early or when there is a benefit for a survivor. The guarantee is increased for those who retire after age 65. In FY 2011, 873,000 people received benefit from PBGC. Every month, on average, the PBGC pays benefits totaling $458 million.

When it started, the PBGC had fewer than 50 personnel. By the end of FY 1999, the PBGC had just over 1,400 personnel and about a $7 billion surplus, with assets of $19 billion and liabilities of $12 billion. Today, the PBGC is operated with about 2,300 personnel and in FY 2011, had a $26 billion deficit, with assets of $81 billion and liabilities of $107 billion. The 2008 financial crisis largely contributed to the recent expansion in deficits.

Health Care and Health Benefits

ERISA requires health care plan fiduciaries to design a responsible health plan for employees by establishing a legal "plan document" governing the operation of the plan. The plan fiduciary must then implement and follow the terms of the plan. In fulfilling their responsibilities, fiduciaries must act in the exclusive interest of plan participants and beneficiaries and act according to the documents that govern the health plan. A fiduciary that violates ERISA's standards may be held personally liable for violating the terms of the plan document. The reporting, disclosure and fiduciary standards of ERIS are administered and enforced by the EBSA.

In general, private-employers that elect to offer health coverage will either fully insure (with a traditional state-regulations insurance company) or self-insure their liabilities for payment of claims and health benefits for employees and dependents. Smaller companies with fewer assets are more likely to purchase coverage from state-regulated insurance companies, and that coverage is generally subject to state-mandated health benefits and other state insurance requirements (such as premium taxes), which tend to drive costs higher. Companies with more assets tend to self-insure their employee health coverage liabilities and are therefore subject only to the requirements and mandates of ERISA, which "preempts" application of individual state insurance laws and makes it easier and more affordable to insure employees across state lines.

Impact of the Democrats' Health Care Overhaul: When it comes to the issue of employer-sponsored health coverage, Republicans are primarily concerned for the impact the Democrats' government takeover of health care will have on businesses. For example, beginning in 2014, employers would have to provide "acceptable" coverage to their employees or pay a new per employee tax of $2,000. This provision alone is estimated to cost employers billions of dollars and will likely have a negative impact on employer margins and job creation, especially for those employers that do not currently provide coverage or have low margins. Many employers have commented that the Democrats' health care overhaul does not control costs and, in fact, mandates more types of coverage and raise overall health care costs for employers and employees. Further, the health care overhaul renders illusory the Democrats' promise that "…if you like your health coverage, you'll be able to keep it…" under the health reform law, since many employers may drop their coverage and pay the penalty given the availability of coverage subsidies through insurance exchanges.

Small Business Health Plans (SBHP): House Republicans offered alternate legislation in November 2009 when the House first considered the Democrats' health care overhaul legislation. The Republican alternative would have lowered premium costs by up to 10 percent for small businesses, expanded access to coverage for about three million individuals, included strong tort reform measures and would have reduced the federal deficit by more than $60 billion over ten years. The Republican alternative also included Small Business Health Plan (SBHP) legislation.

SBHPs build on the successful ERISA framework which has, for more than 25 years, provided federal standards for employers who sponsor health plans. SBHPs would provide trade associations with the ability to form large regional or national groups that can either purchase fully-insured health insurance or self-insure at their risk, thus putting small businesses on a level playing field with their large employer counterparts. Like large employer health plans under ERISA, SBHPs would give small businesses economies-of-scale, bargaining power with providers, uniformity of plans, freedom from costly state-mandated benefit packages and significantly lower overhead costs.

SBHP legislation, which has been passed with significant Democratic support in past Congresses, would require that sponsors be bona fide associations who have a purpose separate from simply providing health insurance to their members (associations must obtain certification of this fact from the Labor Department). In addition, all employer members of the association must be eligible for participation in the plan and all employees of the members must also be eligible for coverage, notwithstanding their health status.

Considering health care cost pressures and a weakening economy, small employers are increasingly unable to provide health care coverage. Further, they face an uncertain future and higher costs associated with implementation of the Democrats' government takeover of health care. In light of these facts, SBHPs continue to represent one of the valuable opportunities to lower health care costs and provide care to Americans without health insurance. Any Republican solution to repealing and replacing the Democrats' government takeover of health care should include SBHPs.

Editor's Note: *For more information on the Democrats' government takeover of health care and Republican efforts to repeal and replace it, please refer to the Health Care chapter of the 2012 NRCC Issues Book.*

WORKPLACE CIVIL RIGHTS ISSUES

Under federal law, numerous civil rights statutes exist to protect individuals from discrimination…including discrimination in and pertaining to our workforce. Arguably most prominent among these is the Civil Rights Act (CRA) of 1964, which expanded civil rights protections to many different settings and served as a model for subsequent anti-discrimination laws. Among the various provisions of the CRA, Title VII specifically prohibits discrimination in employment on the basis of race, color, religion, national origin or sex. Title VII applies to employers with 15 or more employees, including the federal government and state and local governments.

Equal Employment Opportunity Commission (EEOC)

Generally, an individual wishing to challenge an employment practice under Title VII (whether it be a termination, the denial of a promotion or pay increase, or another adverse employment action) must first file a charge with the Equal Employment Opportunity Commission (EEOC) within 180 days after the alleged unlawful employment practice occurred (or, where EEOC works in concert with a state agency, 300 days). If an employee does not submit a timely EEOC charge, the employee may not later challenge that practice in court. The EEOC is responsible for enforcing federal laws that make it illegal to discriminate against a job applicant or an employee because of the person's race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information. It is also illegal to discriminate against a person because the person complained about discrimination, filed a charge of discrimination or participated in an employment discrimination investigation or lawsuit. Most employees with at least 15 employees are covered by EEOC laws (20 employees in age discrimination cases). Most labor unions and employment agencies are also covered.

There are eight laws currently enforced by the EEOC:

Title VII of the Civil Rights Act of 1964 (Title VII): As previously mentioned, this law makes it illegal to discriminate against someone on the basis of race, color, religion, national origin or sex. The law also makes it illegal to retaliate against a person because they complained about discrimination, filed a charge of discrimination or participated in an employment discrimination investigation or lawsuit. Title VII also requires that employers reasonably accommodate applicants' and employees' sincerely held religious practices, unless doing so would impose an undue hardship on the operation of the employer's business.

Pregnancy Discrimination Act: This law amended Title VII to make it illegal to discriminate against a woman because of pregnancy, childbirth or a medical condition related to pregnancy or childbirth.

Equal Pay Act of 1963: This law makes it illegal to pay different wages to men and women if they perform equal work in the same workplace.

Age Discrimination in Employment Act of 1967 (ADEA): This law protects people who are 40 or older from discrimination because of age.

Title I of the Americans with Disabilities Act of 1990 (ADA): This law makes it illegal to discriminate against a qualified person with a disability in the private sector and in state and local governments. It also requires that employers reasonably accommodate the known physical or mental limitations of an otherwise qualified person with a disability who is an applicant or employee, unless doing so would impose an undue hardship on the operation of their business.

Sections 102 and 103 of the Civil Rights Act of 1991: Among other things, this law amends Title VII and the ADA to permit jury trials and compensatory and punitive damage awards in intentional discrimination cases.

Sections 501 and 505 of the Rehabilitation Act of 1973: This law makes it illegal to discriminate against a qualified person with a disability in the federal government.

Genetic Information Nondiscrimination Act of 2008 (GINA): This law, made effective Nov. 1, 2009, makes it illegal to discriminate against employees or applicants because of genetic information. Genetic information includes information about a person's genetic tests and the genetic tests of family members, as well as information about any disease, disorder or condition of one's family members (i.e. a person's family medical history).

The EEOC has the authority to investigate charges of discrimination against employers who are covered by the law and to then fairly and accurately assess the allegations in the charge and then make a finding. If they find that discrimination has occurred, the EEOC will try to settle the charge. If they are not successful, the EEOC has the authority to file a lawsuit.

The following chart, courtesy of the EEOC, represents the total number of charge receipts filed and resolved under all laws enforced by the EEOC. EEOC total workload includes charges carried over from previous fiscal years so, resolution of charges each year may therefore exceed receipts

	FY 2000	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
Receipts	79,896	80,840	84,442	81,293	79,432	75,428	75,768	82,792	95,402	93,277	99,922	99,947
Resolutions	93,672	90,106	95,222	87,755	85,259	77,352	74,308	72,442	81,081	85,980	104,999	112,499
Resolutions By Type												
Settlements	7,937	7,330	8,425	8,401	8,665	8,116	8,500	8,834	8,831	8,634	9,777	10,234
	8.50%	8.10%	8.80%	9.60%	10.20%	10.50%	11.40%	12.20%	10.90%	10.00%	9.30%	9.10%
Withdrawals w/Benefits	3,753	3,654	3,772	3,700	3,827	4,072	4,052	4,122	4,790	4,892	5,391	5,689
	4.00%	4.10%	4.00%	4.20%	4.50%	5.30%	5.50%	5.70%	5.90%	5.70%	5.10%	5.10%
Administrative Closures	19,156	18,636	19,633	15,262	15,416	12,659	12,298	12,865	16,615	16,189	17,330	18,053
	20.50%	20.70%	20.60%	17.40%	18.10%	16.40%	16.60%	17.80%	20.50%	18.80%	16.50%	16.00%
No Reasonable Cause	54,578	51,562	56,514	55,359	53,182	48,079	45,500	42,979	47,152	52,363	67,520	74,198
	58.30%	57.20%	59.30%	63.10%	62.40%	62.20%	61.20%	59.30%	58.20%	60.90%	64.30%	66.00%
Reasonable Cause	8,248	8,924	6,878	5,033	4,169	4,426	3,958	3,642	3,693	3,902	4,981	4,325
	8.80%	9.90%	7.20%	5.70%	4.90%	5.70%	5.30%	5.00%	4.60%	4.50%	4.70%	3.80%
Successful Conciliations	2,040	2,365	1,940	1,432	1,217	1,319	1,141	1,137	1,128	1,240	1,348	1,351
	2.20%	2.60%	2.00%	1.60%	1.40%	1.70%	1.50%	1.60%	1.40%	1.40%	1.30%	1.20%
Unsuccessful	6,208	6,559	4,938	3,601	2,952	3,107	2,817	2,505	2,565	2,662	3,633	2,974

Conciliations												
	6.60%	7.30%	5.20%	4.10%	3.50%	4.00%	3.80%	3.50%	3.20%	3.10%	3.50%	2.60%
Merit Resolutions	19,938	19,908	19,075	17,134	16,661	16,614	16,510	16,598	17,314	17,428	20,149	20,248
	21.30%	22.10%	20.00%	19.50%	19.50%	21.50%	22.20%	22.90%	21.40%	20.30%	19.20%	18.00%
Monetary Benefits (Millions) - does not include monetary benefits obtained through litigation	$245.70	$247.80	$257.70	$236.20	$251.70	$271.60	$229.90	$290.60	$274.40	$294.20	$319.40	$364.70

The definitions of the terms used for this data are as follows:

- **Administrative Closure:** Charge closed for administrative reasons which include: failure to locate charging party, charging party failed to respond to EEOC communications, charging party refused to accept full relief, closed due to the outcome of related litigation which establishes a precedent that makes further processing of the charge futile, charging party request withdrawal of a charge without receiving benefits or having resolved the issue, no statutory jurisdiction.

- **Merit Resolutions:** Charges with outcomes favorable to charging parties and/or charges with meritorious allegations. These include negotiated settlements, withdrawals with benefits, successful conciliations and unsuccessful conciliations.

- **No Reasonable Cause:** EEOC's determination of no reasonable cause to believe that discrimination occurred based upon evidence obtained in investigation. The charging party may exercise the right to bring private court action.

- **Reasonable Cause:** EEOC's determination of reasonable cause to believe that discrimination occurred based upon evidence obtained in investigation. Reasonable cause determinations are generally followed by efforts to conciliate the discriminatory issues which gave rise to the initial charge (Note: Some reasonable cause findings are resolved through negotiated settlements, withdrawals with benefits and other types of resolutions, which are not characterized as either successful or unsuccessful conciliations.)

- **Settlements (Negotiated):** Charges settled with benefits to the charging party as warranted by evidence of record.

- **Successful Conciliation:** Charge with reasonable cause determination closed after successful conciliation. Successful conciliations result in substantial relief to the charging party and all others adversely affected by the discrimination.

- **Unsuccessful Conciliation:** Charge with reasonable cause determination closed after efforts to conciliate the charge are unsuccessful. Pursuant to EEOC policy, the field office will close the charge and review it for litigation consideration. (Note: Because "reasonable cause" has been found, this is considered a merit resolution.

- **Withdrawal with Benefits:** Charge is withdrawn by charging party upon receipt of desired benefits. The withdrawal may take place after a settlement or after the respondent grants the appropriate benefit to the charging party.

According to this EEOC data, in fiscal year (FY) 2011, the most recently available data, **more than half, 66 percent, of all charges were found to have no reasonable cause.** This means that for more than half of charges resolved in FY 2011, it was determined by the EEOC's investigation that no discrimination actually occurred.

Equal Pay Act

Federal law also currently prohibits an employer from paying an employee different wages, or otherwise discriminating in any term or condition of employment, on the basis of sex. These protections are provided by way of both Title VII of the CRA (which generally prohibits discrimination in the terms and conditions of employment on the basis of sex) and the Equal Pay Act of 1963 (EPA). The EPA makes it illegal to pay different wages to employees of the opposite sex for equal work on jobs that require "equal skill, effort and responsibility," and which are "performed under similar working conditions." The EPA generally allows for wage differentials based on seniority systems, merit systems, systems that measure earnings by quality or quantity of production or any factor other than sex. Thus, courts addressing EPA claims generally focus on job similarity and whether they require substantially the same skill, effort and responsibility.

The EPA and Title VII provide overlapping coverage for claims of sex-based wage discrimination, but differ in important substantive, procedural and remedial aspects. A crucial difference is that the "equal work" standard of the EPA – which requires "substantial" similarity between compared male and female jobs – does not limit an employer's liability to intentional wage discrimination (as is generally the case under Title VII). Conversely, a Title VII plaintiff alleging pay discrimination on the basis of sex will generally be required to prove that an employer engaged in intentional discrimination – the requirement of discriminatory intent need not be shown to prove an EPA claim.

Remedies for violation of the two laws differ. Under the EPA, a prevailing plaintiff may obtain back pay for any wages unlawfully withheld as the result of pay inequality and twice that amount in liquidated damages for a willful violation. By contrast, Title VII provides for compensatory and punitive damages for victims of intentional sex discrimination, in wage cases and otherwise. Pay equity advocates claim that these laws are not sufficient and ineffective in remedying the workplace of systemic "pay discrimination," and argue that these laws need to be strengthened to make it easier for plaintiffs to prove claims of pay inequity.

Related Legislative Action

In the previous 111th Congress, Democrats pushed several pieces of legislation that would purportedly "strengthen worker protections."

The Lilly Ledbetter Fair Pay Act of 2009: In January 2009, the Democrat-controlled Congress and President Obama enacted S. 181, the Lilly Ledbetter Fair Pay Act of 2009 (P.L. 111-2). This legislation was in response to a May 2007, U.S. Supreme Court decision in *Ledbetter v. Goodyear Tire & Rubber Co.* Lilly Ledbetter worked as a supervisor at Goodyear's tire assembly department in Gadsden, Ala. from 1979 to 1998, when she received an anonymous letter claiming that she was being paid less for the same position as her male colleagues because of her sex. After receiving this letter, Ms. Ledbetter filed a discrimination charge with the EEOC in March 1998, under Title VII of the CRA. Under the law at that time, claims had to be filed within 180 days (or 300 days, depending on the state) of the original discriminatory act. Nonetheless, Ms. Ledbetter filed suit against Goodyear in the Northern District of Alabama.

During this trial, her attorneys argued that each paycheck represented a discriminatory act and, therefore, she was entitled to sue pursuant to Title VII. Goodyear argued that the difference in pay was not based on her sex, but rather based upon poor job reviews she had received during her career. The managers at her particular plant had implemented a system beginning in 1982 that ranked output and performance of its employees. Based on this system, raises were awarded for those at the top of the list and those at the bottom were not granted raises. Throughout her career, Ms. Ledbetter constantly ranked near the bottom of this list and, because of this, Goodyear argued, she did not receive raises.

Because of the timing of her lawsuit, Ms. Ledbetter was only able to offer evidence of pay discrimination that occurred after September 1997, due to Title VII. Still, the Alabama court ruled in her favor and awarded her $4 million in pay and punitive damages, which the judge then reduced to $360,000. Goodyear appealed the ruling in the 11th Circuit Court of Appeals which unanimously dismissed the claim and award. Following this ruling, Ms. Ledbetter appealed to the Supreme Court. On May 29, 2007, in a 5-4 decision, the Court ruled against Ms. Ledbetter. Writing for the majority, Justice Samuel Alito explained that, "Ledbetter should have filed an EEOC charge within 180 days after each allegedly discriminatory pay decision was made and communicated to her. She did not do so, and the paychecks that were issued to her during the 180 days prior to the filing of her EEOC charge do not provide a basis for overcoming that prior failure."

Justice Alito also noted, "This short deadline (180 or 300 days) reflects Congress's strong preference for the prompt resolution of employment discrimination allegations through voluntary conciliation and cooperation."

House Democrats initially brought this legislation up in the 110th Congress where it passed the House on July 31, 2007, by a vote of 225 to 199. But, the Senate did not take any action on the legislation in the 110th Congress. One of the first bills passed and enacted in the 111th Congress was the Ledbetter Fair Pay Act. The Ledbetter Fair Pay Act was first considered (as H.R. 11) in conjunction with H.R. 12, the Paycheck Fairness Act (more about this legislation later). Each was voted on separately, but then were "merged" on the House Floor and sent to the Senate in tandem. Click here and here to see how they voted on H.R. 11 and H.R. 12, respectively. The Senate then separated the bills, choosing to act only on the Ledbetter legislation, and sent S. 181, the Lilly Ledbetter Fair Pay Act, back to the House where it was ultimately passed and enacted into law (P.L. 111-2). Click here to see how they voted on the final Ledbetter Fair Pay Act.

The Ledbetter Fair Pay Act amended four different statutes: Title VII of the CRA, the ADEA, the ADA and the National Rehabilitation Act. It reversed the Supreme Court decision by extending the statutory limit for reporting discriminatory acts stating that the 180-day statute of limitations for filing an equal-pay lawsuit regarding pay discrimination resets with each new discriminatory paycheck. Democrats argued effectively, if somewhat disingenuously, that this was an issue of "equal pay for women." This law essentially gutted the statute of limitations that were intended to promote the timely filing of such claims in order to encourage prompt resolution of disputes and prevent "stale" evidence.

Paycheck Fairness Act: In the previous 111th Congress, as just mentioned, Democrats also attempted to enact legislation to purportedly strengthen worker protections under the Equal Pay Act. Unfortunately, the so-called "Paycheck Fairness Act" contained a number of objectionable provisions, including an expansion of remedies under the Equal Pay Act to include compensatory and punitive damages, even where there is no finding that the employer engaged in intentional discrimination against any employee. As a practical matter, this type of legislation would open up employers to claims that their pay systems discriminate if they do not reflect pay for "comparable worth" (the argument, e.g., that postoperative nurses are as important to a patient's recovery as the doctor who performed the surgery, and that they should be paid accordingly).

This means, for example, an employer may be put in the business of defending a claim that a predominantly-female clerical staff should be paid wages equal to a predominantly-male grounds keeping staff – irrespective of the nature of the work, market supply and demand for both jobs, working conditions and the like. From the business community's perspective, such legislation would make it vastly more difficult, if not impossible, for employers to defend legitimate differences in pay among employees based on a host of factors other than sex. Equally important, the bill would likely lead to an increase in frivolous and costly litigation.

Employment Non-Discrimination Act (ENDA)

As previously detailed, Title VII of the Civil Rights Act of 1964 protects employees against discrimination by certain employers. The Employment Non-Discrimination Act (ENDA) is legislation that has been introduced for several Congresses to outlaw employment discrimination based on sexual orientation or gender identity, which is a top priority for many gay-rights groups.

There is significant concern about creating a special class or protection based on someone's actual or perceived "sexual orientation" or "gender preference." There is also concern that an eventual ENDA law could force religious schools, organizations and religious business owners to hire and give preferential treatment to people involved in homosexual behavior and/or people physically altering their gender.

In the 110th Congress, Democrats brought up and passed ENDA in November 2007. But, it did not move any further in the Senate. It is not likely that ENDA will see any legislative action in the 112th Congress.

EMPLOYER-EMPLOYEE RELATIONS

National Labor Relations Act (NLRA)

The National Labor Relations Act of 1935 (NLRA) gives private sector workers the right to organize and/or form a labor union and to bargain collectively with their employers through representatives of their choice over wages, hours and other working conditions. Additionally, the NLRA provides employees the right to engage in concerted action for mutual aid or protection and to refrain from such activities. To ensure that employees can either choose their representative or choose not to be represented, the law authorizes the National Labor Relations Board (NLRB) to enforce and administer the NLRA and conduct secret ballot elections. The NLRA also delineates the contours of the duties of management and labor in collective bargaining. Finally, to protect the rights of both employers and employees and to prevent labor disputes that may adversely affect the general public, the NLRA defines certain practices of employers and labor organizations as unfair labor practices.

The NLRA does not apply to railroads or airlines, federal, state or local governments, agricultural workers, family domestic workers, supervisors, independent contractors and others.

National Labor Relations Board (NLRB)

As mentioned above, the NLRA is administered and enforced by the NLRB which was created in 1934 by President Franklin D. Roosevelt in Executive Order 6763. It was subsequently codified into law by the NLRA in 1935 (commonly known as the Wagner Act). According to the NLRB webpage, "The National Labor Relations Board is an independent federal agency vested with the power to safeguard employees' rights to organize and to determine whether to have unions as their bargaining representative." In practice, the NLRB and its affiliates serve as a quasi-judicial system designed to investigate and adjudicate labor disputes between unions and employers as well as organize and oversee union representation (forming a union) and decertification (abolishing an existing union) elections. To conduct these duties, the NLRB is split into two separate entities – the Board and the General Counsel.

The Board: The Board is composed of up to five members who adjudicate labor disputes through administrative hearings. Board members are appointed to five-year terms by the president and confirmed by the Senate, with the term of one Board member expiring each year. Currently, the Board has five members (Chairman Mark G. Pearce, Brian Hayes, Sharon Block, Terence F. Flynn and Richard Griffin). Last year, the Board had three members (Pearce, Craig Becker and Hayes). Becker was a recess appointee of President Obama's and his term ended on Dec. 31, 2011, leaving only Pearce and Hayes. Under a 2010 Supreme Court ruling, the five-member board needs a quorum of three in order to adjudicate cases or issue new rules. Without Becker, the Board would have been reduced to two members unless the Senate approved one of President Obama's nominees. Republican senators vowed to block the nominees demanding an investigation into the Board's relationship with labor unions. So, instead of going through the regular appointment process, in January 2012, President Obama made three recess appointments (Block, Flynn and Griffin) to the NLRB while the Senate was meeting regularly in pro forma session. Never before has a president made recess appointments to the NLRB at a time when Congress was not actually in recess.

Republicans heavily criticized these appointments and some even deemed them unconstitutional since Congress was not officially in recess (they were in what is known as pro forma session). But, on Jan. 12, 2012, the Justice Department released a memo stating that appointments made during a pro forma session are supported by the Constitution and precedent.

The General Counsel: The General Counsel is responsible for conducting investigations and prosecuting unfair labor practice cases as well as general oversight of case work at NLRB field offices. The General Counsel is independent from the board and is appointed by the President and confirmed by the Senate to a 4-year term. Lafe Solomon had been serving as acting General Counsel since June 21, 2010, until Jan. 27, 2011, when President Obama nominated him to a full four year term (though the Senate has not yet confirmed his appointment).

Board Composition: Due to the traditionally close ties between the Democrat party and labor unions, NLRB appointments have become an increasingly partisan issue with Democrats generally supporting pro-union nominees in order to shore up union support and Republicans supporting pro-business nominees in order to encourage economic growth and job creation. These disparate preferences have lead to a number of impasses between the Presidents and the Senate on member appointments which, in turn, has caused to frequent vacancies.

LABOR UNIONS AND COLLECTIVE BARGAINING

As previously mentioned, the NLRA gives workers the right to join or form a labor union and to bargain collectively over wages, hours and other conditions of employment. Under the Act, workers also have the right not to join a union. It requires an employer to bargain in good faith with a union chosen by a majority of employees. To protect the rights of employees and workers, the Act defines certain activities as unfair labor practices.

Bargaining Units

A bargaining unit is a group of employees represented, or seeking representation, by a union. A bargaining unit is generally determined on the basis of a "community of interest" of the employees involved. Employees who have the same or similar interest with respect to wages, hours and other working conditions may be grouped together into a bargaining unit. A bargaining unit may include the employees of one employer, one establishment, or one occupation or craft. A union and employer may agree on the appropriate bargaining unit – if not, the issue is settled by the NLRB.

Organizing Campaign Rules

Campaign rules differ for employers, employees and union organizers. Rules also differ for soliciting union support and for distributing union literature. In general, employers may campaign against unionization. Employers can require employees to attend meetings during work hours where management can give its position on unionization. These meetings are called "captive audience" meetings. These cannot be held during the 24-hour period before an election.

During work hours, employees can campaign for union support from their coworkers in both work and nonwork areas (i.e. coffee room, company parking lot, etc.). But employees can only campaign on their own time (i.e. at lunch, during breaks, etc.) If an employer does not allow the distribution of literature in work areas, employees may only distribute union literature in nonwork areas.

In general, union organizers cannot conduct an organizing campaign on company property. A union cannot reply to an employer's captive audience speech if the union has other means of reaching employees. Nonemployee union organizers may be allowed in the workplace if the site is inaccessible or if the employer allows nonemployees to solicit on company property. Union organizers may meet with employees on union property. They may hand out literature or solicit support on public property. Organizers can also contact employees at home by phone or mail or may visit employees at home.

Unfair Labor Practices

Although employers have the right to campaign against unionization, they cannot interfere with, restrain or coerce employees in their right to form or join a union. An employer cannot threaten employees with the loss of their jobs, wages or benefits if they vote for a union or join a union. Just like employers, unions cannot restrain or coerce employees to join or not join a union. A union must bargain in good faith with respect to wages, hours and other working conditions.

An unfair labor practice may be filed by an employee, employer, labor union or any other person. After an unfair labor practice charge is filed, regional staff of the NLRB investigates to determine whether there is reason to believe that the Act has been violated. If no violation is found, the charge is dismissed or withdrawn. If a charge has merit, the regional director first seeks a voluntary settlement. If this effort fails, the case is heard by an NLRB administrative law judge. Decisions by administrative law judges can be appealed to the NLRB.

The NLRA allows the NLRB to issue cease-and-desist orders to stop unfair labor practices and to order remedies for violations of unfair labor practices. If an employer improperly fires an employee for engaging in union activities, the employer may be required to reinstate the employee (to their prior or equivalent job) with back pay. If a union causes a worker to be fired, the union may be responsible for the worker's back pay. In fiscal year (FY) 2011 alone, $60.5 million in backpay or reimbursement of fees, dues and fines was awarded. Estimates of the number of workers who are illegally fired for union activities range from 1,000 to 3,000 a year.

Union Certification and Recognition

The NLRA states that a union may be "…designated or selected for the purposes of collective bargaining by the majority of the employees." Currently, there are three ways for employees to join or form a union:

- a union that is selected by a majority of employees in an election conducted by the NLRB is certified as the bargaining representative of employees in the bargaining unit

- an employer may voluntarily recognize a union if a majority of employees in a bargaining unit have signed authorization cards;

- the NLRB may order an employer to recognize and bargain with a union if a majority of employees have signed authorization cards and the employer has engaged in unfair labor practices that make a fair election unlikely.

A union must be certified through a secret ballot election or recognized by an employer before collective bargaining can begin.

Secret Ballot Elections

The NLRB conducts a secret ballot election when a petition is filed requesting one. A petition can be filed by a union, worker or employer. Employees or a union may petition the NLRB for an election if at least 30 percent of employees have signed authorization cards. An employer can request an election if a union has claimed to represent a majority of its employees and has asked to bargain with the employer (and the union itself has not requested an election). An employer is not required to give a reason for requesting an election. If a majority of employees voting (not a majority of employees in the bargaining unit) in an NLRB-conducted election choose to be represented by a union, the union is certified by the NLRB as the employees' bargaining representative. The NLRA does not provide a timeline for holding an election. Certification of a union by the NLRB does not require that a union and employer reach an initial contract agreement.

After a petition is filed requesting an election, the employer and union may agree on the time and place for the election and on the composition of the bargaining unit. If an agreement is not reached, a hearing may be held in the regional office of the NLRB. The regional director can then direct that an election be held.

In a secret ballot election, employees choose whether to be represented by a labor union. If an election has more than one union on the ballot and no choice receives a majority of the vote, the two unions with the most votes face each other in a runoff election.

The NLRB also conducts secret ballot elections to decertify a union that has previously been certified or recognized. A decertification petition must be signed by at least 30 percent of the employees in the bargaining unit represented by the union.

RECENT NLRB CONTROVERSIES

Proposed Changes for Union Elections

Under current law, union certification is conducted through secret ballot elections called representation elections (RCs). Employees or a union may file a petition for an RC after collecting signatures from at least 30 percent of workers in the potential bargaining unit. Petitions that are not withdrawn or dismissed result in a NLRB-conducted election. A majority of votes decides the outcome. These union certification elections are subject to a number of rules and regulations set forth and administered by the NLRB. Included amongst these regulations is an appeal and review process designed to ensure that both employers and union organizers have an opportunity to file and settle litigation regarding voter eligibility before a certification election is held. Additionally, it requires the NLRB to review post-election decisions to ensure they were conducted in a fair and honest manner.

According to the Fiscal Year 2009 (FY2009) NLRB annual report (the most recent available), under the current system there were 1,619 conclusive RCs held in FY2009 with workers choosing labor unions as their bargaining agents in 63.8 percent of the elections. Despite their relative success rate in these elections, union organizers have pushed for regulations that curtail an employer's access to the appeal and review process.

NLRB Proposed Rules: On June 21, 2011, the NLRB proposed a series of rule changes that would significantly change many of the current regulations that govern the appeal and review process for these elections, generally making it more difficult for employer's to campaign against or challenge union elections in their workplace. Since the NLRA was enacted in 1933, the NLRB has amended its representation election rules at least three dozen times.

Regarding these proposed rule changes, published as a Notice of Proposed Rulemaking (NPRM) in the *Federal Register* on June 22, 2011, the NLRB stated that the proposed changes were designed to "…reduce unnecessary litigation, streamline pre- and post-election procedures and facilitate the use of electronic communications and document filing." Included in the proposed changes were provisions that would:

- Require that pre-election hearings be set to begin only seven days after a hearing notice is served (absent special circumstances)
- Require that post-election hearings be set to begin 14 days after the tally of ballots
- Require that all involved parties receive, along with a copy of the petition: 1) a description of NLRB representation case procedures, with rights and obligations, as well as 2) a 'statement of position form'
- Following whatever takes place at the pre-election hearing, requires that an employer post a final notice to employees of the impending election for at least two days before the election (meaning, this could give workers as little as 10 days to consider all the consequences of joining a union before having to vote in the election)
- Shift litigation regarding voter eligibility in union elections until after the election had already concluded
- Consolidate all election-related appeals to the NLRB into a single post-election appeals process and thereby eliminate delay in holding elections currently attributable to the possibility of pre-election appeals
- Require that the non-petitioning party (typically, the employer) produce and file a preliminary voter list within two work days (currently, it is seven days), including names, work location, shift and classification, email addresses and phone numbers by the opening of the pre-election hearing

- Make NLRB review of post-election decisions discretionary rather than mandatory

NLRB member Brian Hayes, the NLRB's lone Republican, dissented to the proposed rules stating that, "The Board and General Counsel are consistently meeting their publicly-stated performance goals under the current representation election process, providing an expeditious and fair resolution to parties in the vast majority of cases, less than 10 percent of which involve contested preelection issues. Without any attempt to identify particular problems in cases where the process has failed, the majority has announced its intent to provide a more expeditious preelection process and a more limited postelection process that tilts heavily against employers' rights to engage in legitimate free speech and to petition the government for redress. Disclaiming any statutory obligation to provide any preliminary notice and opportunity to comment, the majority deigns to permit a limited written comment period and a single hearing when the myriad issues raised by the proposed rules cry out for far greater public participation in the rulemaking process both before and after formal publication of the proposed rule. The majority acts in apparent furtherance of the interests of a narrow constituency, and at the great expense of undermining public trust in the fairness of Board elections."

Mr. Hayes' dissent was joined by business groups, including the U.S. Chamber of Commerce which characterized the proposed regulations as an unnecessary gift to organized labor at the expense of employers' rights to free speech.

The NLRB invited comments on the proposed rule changes in two ways: through a public NLRB hearing held on July 18 and 19 and through a 60-day period for written comments (deadline for filing these comments: Aug. 22, 2011), with 14 days for replies (deadline for filing reply comments: Sept. 6, 2011).

H.R. 3094, Workforce Democracy and Fairness Act: On Oct. 5, 2011, Rep. John Kline, Chairman of the House Education and Workforce Committee, introduced H.R. 3094, the Workforce Democracy and Fairness Act. First, it would prevent the proposed "ambush" or "quickie" union election rule which, if implemented, would reduce the amount of time that an employer has to prepare its case before a pre-election hearing from the current 14 days to seven. H.R. 3094 would require that a pre-election hearing cannot take place less than 14 calendar days after a petition for an election has been filed. In addition, the rule would reduce the amount of time an employee has to decide if they want to join a union (i.e. time period from when the petition for an election is initially filed to when the election is actually held) from the current 35 days down to as few as 10 days. Under H.R. 3094, no union election would be held in less than 35 days. According to numerous business groups, the rule would make it more difficult for employers to adequately prepare for a union organization election at their workplace and would unfairly favor unions in organization elections.

Second, it would also reverse an August 2011 NLRB decision which allowed for the formation of "micro-unions," which allow unions to organize workers according to smaller sub-units within a single company. H.R. 3094 would reverse that ruling and reinstate the previous rule which prohibits exclusion of employees from the unit unless the interest is "sufficiently distinct" from those of other employees to warrant the establishment of a separate unit.

On Oct. 27, 2011, Chairman Kline sent a letter to Mark Pearce, Chairman of the NLRB, expressing his concern and opposition to the proposed rules as well as requesting information about the process and timeline for the issuance of the final rule. Chairman Kline asked that this information be provided no later than Nov. 10, 2011. The NLRB's Nov. 10, 2011, response letter to Chairman Kline provided him with information regarding past practices and timelines of previous similar NLRB cases. But, regarding the timing of when the NLRB would vote on how to proceed, would circulate the draft of the final rule or would publish the final rule, their response was simply "unknown."

A few days after receiving this letter, Chairman Kline received a letter from NLRB Member Brian Hayes, dated Nov. 18, 2011, in which Hayes stated that there actually was "a timeline for anticipated actions." Mr. Hayes' went on to say that the NLRB was committed to issuing a final rule on this issue before NLRB Member Craig Becker's (a Democrat Member of the NLRB appointed by President Obama) recess appointment expired at the end of the current First Session of the 112th Congress (the importance of this is that the breakdown of the NLRB at that time was two Democrats and one Republican – without Becker, based on recent practices, when the Board only had one Democrat and one Republican, they agreed to simply adjudicate cases only where they could reach a consensus). Mr. Hayes also stated that this sudden rush to final rulemaking judgment by the NLRB was also "taken in the face of active consideration of H.R. 3094, provisions of which are in direct conflict with the Board's proposed rule."

On Nov. 18, 2011, the NLRB scheduled a Nov. 30, 2011, public meeting during which the Board members would discuss and vote whether or not to proceed with a scaled-down version of what was proposed back in June 2011.

In a 2-1 vote on Nov. 30, 2011, the NLRB voted to approve a resolution to advance portions of the proposed rules to speed up union elections. A summary of what this resolution did and did not include from what was originally proposed can be found here.

Also on Nov. 30, 2011, the House passed H.R. 3094 by a vote of 235-188.

Final NLRB Rule: On Dec. 21, 2011, the NLRB announced adoption of a final rule amending its election case procedures. The final rule was published in the *Federal Register* Dec. 22, 2011. Under the previous rules, employers could challenge inclusion of certain workers in a proposed union in a regional hearing. If they lost, they could appeal to the NLRB. Under the new final rule, employers can still raise concerns, but they cannot appeal until after the union election. This change also applies to legal challenges initiated by unions, which sometimes try to hinder workers from voting to get rid of another union in the workplace.

Employers often contend that certain workers are not eligible to vote on union formation because they are actually management, or that certain part-time workers should be excluded from the vote. Labor unions and the NLRB say this rule would prevent anti-union employers from stalling the vote with lawsuits. Business groups and Republicans denounced the rule as a gift to unions that would deny small businesses their right to make their case to workers against voting for a union. The U.S. Chamber of Commerce even filed a lawsuit Dec. 20, 2011, in the U.S. District Court for the District of Columbia against the rule.

Although union participation has fallen steadily in recent years (unionization rates in the private sector have dropped to just 6.9 percent of the U.S. workforce in 2010), these changes could speed up union-organizing efforts at companies in the health care, communications, transportation and service industries. The changes could also prompt more workers and labor groups to hold union-organizing elections, with the hope of getting a better shot at a vote without delay.

The changes will compress the time between when workers file a petition with the NLRB to hold an election and when the actual voting occurs. That period will shrink to 25 days or fewer, some legal experts estimate, nearly two weeks less than the current median. According to the NLRB, the median amount of time from the filing of a petition for an election to the actual balloting was 38 days in 2008; the average time was 57 days.

Court Decision Invalidates Ambush Election Rule: On May 14, 2012, the U.S. District Court for the District of Columbia overturned the "ambush election" rule, which had been in effect since April 30, 2012. The Court ruled that the NLRB did not satisfy the quorum requirement necessary for the vote to approve the rule to take place. The judge decided that because only two members voted on the rule, this was a violation of the NLRB's own laws governing its operations – it takes three members to have a quorum even when there are vacancies on the Board. At the time of the vote in December 2011, the NLRB had only three members. One of these members – Brian Hayes – did not participate in the vote.

Boeing Complaint

On Oct. 28, 2009, Boeing Co., announced that it had chosen its North Charleston, S.C., facility as the location for its second final assembly site for the 787 Dreamliner. Construction of the facility, which hired 1,000 new workers, was set to be completed July 2011, when assembly of the first airplane would begin. Despite the fact that no job loss had been experienced in Boeing's Washington state facilities, on March 29, 2010, the International Association of Machinists and Aerospace Workers union District 751 (IAM), the union representing the employees at the Washington state plant, filed a complaint with the NLRB regarding Boeing's decision. Citing several examples of Boeing executives mentioning past strikes as the reason for moving the plant to South Carolina, IAM claimed that by opening the line in South Carolina, a right-to-work state (state law forbids requiring union membership as a condition of employment), rather than in Washington state, Boeing was attempting to intimidate its union workers and retaliate for past IAM strikes. Federal labor law explicitly prohibits employers from taking retaliatory action against employees for forming a union or participating in a strike. The most recent IAM strike against Boeing lasted for 58 days in 2008 and cost the company around $1.8 billion.

On behalf of IAM, the NLRB's Acting General Counsel, Lafe Solomon, filed a complaint on April 20, 2011, against Boeing charging that Boeing broke the law when it decided to shift some production of the 787 Dreamliner jet to the South Carolina factory. The NLRB claimed that Boeing's intent was to punish the IAM for the union's past strikes. In the complaint, the NLRB requested that a federal judge order Boeing to move the 787 Dreamliner production line back to unionized facilities in the state of Washington and either close or find an alternative use for its South Carolina facility, a move that Boeing called "unrealistic."

The decision shocked both the business community and South Carolina government officials who saw the actions as an unprecedented overreach of the NLRB's authority and an affront to states rights. Governors of 16 "right-to-work" states wrote a letter to the NLRB and its general counsel protesting the action insisting that the company's action could not be retaliatory since no job loss was experienced in the Washington state facilities. In addition, Boeing says that it began construction of the South Carolina facility in early 2009, and that the appropriate time for the NLRB to have filed such a complaint would have been before the company had invested $750 million and arranged to hire approximately 1,000 new workers.

H.R. 2587, Protecting Jobs From Government Interference Act: On July 19, 2011, Rep. Tim Scott introduced H.R. 2587, the Protecting Jobs From Government Interference Act, in response to these NLRB proceedings. H.R. 2587 would prohibit the NLRB from ordering a company to "close, relocate or transfer employment under any circumstance." The bill was passed by a vote of 238-186, largely along party lines.

On Dec. 9, 2011, the NLRB's Acting General Counsel Lafe Solomon announced that the NLRB would no longer pursue its complaint against Boeing Co. on behalf of IAM. IAM requested that the complaint against Boeing be withdrawn following its ratification of a four-year collective bargaining agreement (CBA) between its members and Boeing. On Dec. 7, 2011, 74 percent of its 31,000 Boeing workers in Washington state voted to approve the CBA which includes a pledge by Boeing to build a retooled version of its 737 jet at a union plant in Renton, Wash., wage increases of two percent a year and improved pension benefits, among other things.

Below are selected vote hits on Democrats who voted against H.R. 2587:

- **On Sept. 15, 2011, House Republicans passed a bill to prevent the National Labor Relations Board (NLRB) from forcing businesses to close or relocate jobs**

    - On Sept. 15, 2011, House Republicans passed a bill that would prevent the National Labor Relations Board from ordering a company to reinstate production or make certain investments at a given location. The bill also would prohibit the board from blocking a firm's decision to relocate, and would apply the prohibitions to all complaints that have not received final adjudication by the time the bill is enacted. (Passed 238-186; D: 8-179; R: 230-7)[1]

    - In a Sept. 15, 2011, article, *Politico* reported, "The GOP-led House on Thursday launched a full-scale assault against the National Labor Relations Board – the first step in their fall goal of rolling back regulations that they say hamper job growth.

      "The chamber voted 238-186 on a bill that bars the NLRB from forcing businesses to close or relocate jobs — a direct rebuke of a recent decision by the board to block Boeing from moving a plant to South Carolina. The legislation likely doesn't have much of a future in the Democratic-controlled Senate, although Republicans in the upper chamber have pushed for action on the matter."[2]

- **The bill was in response to the NLRB's attempt to block Boeing from opening a new production plant for its 787 Dreamliner aircraft in South Carolina**

    - In a Sept. 15, 2011, article, *Politico* reported, "The GOP-led House on Thursday launched a full-scale assault against the National Labor Relations Board – the first step in their fall goal of rolling back regulations that they say hamper job growth.

      "The chamber voted 238-186 on a bill that bars the NLRB from forcing businesses to close or relocate jobs — a direct rebuke of a recent decision by the board to block Boeing from moving a plant to South Carolina. The legislation likely doesn't have much of a future in the Democratic-controlled Senate, although Republicans in the upper chamber have pushed for action on the matter.

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1 H.R. 2587, CQ Vote #711, Sept. 15, 2011
2 Seung Min Kim, "House rebukes NLRB on Boeing," *Politico*, Sept. 15, 2011, http://www.politico.com/news/stories/0911/63613.html

"'The NLRB has plenty of tools at its disposal to protect workers and hold employers accountable for unlawful labor practices,' said Rep. Tim Scott (R-S.C.), who sponsored the bill. 'There is simply no reason it should have the power to dictate where a private business can establish its workforce.'

"The dispute – which has become a cause célèbre among conservatives — stems from Boeing's opening of a $1 billion non-union plant in South Carolina, following union strikes that disrupted production of the 787 Dreamliner aircraft in Washington state. The labor board argues that Boeing's actions were in retaliation against the strikes and a violation of labor laws."[3]

- **Boeing has already built the new $750 million South Carolina plant and hired 1,000 new workers**

  - In a June 29, 2011, article, the Associated Press reported, "The NLRB alleges that Boeing retaliated against its unionized work force in Washington state by opening a new production line for its 787 airplane in South Carolina, a right-to-work state. The agency wants a judge to order Boeing to return all 787 assembly work to Washington, even though the company has already built a new $750 million South Carolina plant and hired 1,000 new workers there."[4]

- **Boeing says that "shuttering the South Carolina facility would eliminate 1,000 jobs"**

  - In a Sept. 15, 2011, article, *Politico* reported, "The GOP-led House on Thursday launched a full-scale assault against the National Labor Relations Board – the first step in their fall goal of rolling back regulations that they say hamper job growth.

    "The chamber voted 238-186 on a bill that bars the NLRB from forcing businesses to close or relocate jobs — a direct rebuke of a recent decision by the board to block Boeing from moving a plant to South Carolina."[5]

  - According to the same article, "Boeing has argued that shuttering the South Carolina facility would eliminate 1,000 jobs."[6]

- **Boeing CEO and president, Jim McNerney, said that the NLRB's ruling would make CEOs "reluctant to place new plants in unionized states-lest they be forever restricted from placing future plants elsewhere across the country"**

  - In a May 11, 2011, opinion editorial, Boeing CEO and president, Jim McNerney, wrote in *The Wall Street Journal*, "The world the NLRB wants to create with its complaint would effectively prevent all companies from placing new plants in right-to-work states if they have

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[3] Seung Min Kim, "House rebukes NLRB on Boeing," *Politico*, Sept. 15, 2011, http://www.politico.com/news/stories/0911/63613.html
[4] Sam Hananel, "Boeing labor dispute turns into headache for Obama," Associated Press, June 29, 2011, http://www.msnbc.msn.com/id/43581530/ns/business-us_business/t/boeing-labor-dispute-turns-headache-obama/
[5] Seung Min Kim, "House rebukes NLRB on Boeing," *Politico*, Sept. 15, 2011, http://www.politico.com/news/stories/0911/63613.html
[6] Seung Min Kim, "House rebukes NLRB on Boeing," *Politico*, Sept. 15, 2011, http://www.politico.com/news/stories/0911/63613.html

existing plants in unionized states. But as an unintended consequence, forward-thinking CEOs also would be reluctant to place new plants in unionized states—lest they be forever restricted from placing future plants elsewhere across the country.

"U.S. tax and regulatory policies already make it more attractive for many companies to build new manufacturing capacity overseas. That's something the administration has said it wants to change and is taking steps to address. It appears that message hasn't made it to the front offices of the NLRB."[7]

- **McNerney went on to say "U.S. tax and regulatory policies already make it more attractive for many companies to build new manufacturing capacity overseas. That's something the administration has said it wants to change and is taking steps to address. It appears that message hasn't made it to the front offices of the NLRB."**

  - In a May 11, 2011, opinion editorial, Boeing CEO and president, Jim McNerney, wrote in *The Wall Street Journal*, "The world the NLRB wants to create with its complaint would effectively prevent all companies from placing new plants in right-to-work states if they have existing plants in unionized states. But as an unintended consequence, forward-thinking CEOs also would be reluctant to place new plants in unionized states—lest they be forever restricted from placing future plants elsewhere across the country.

    "U.S. tax and regulatory policies already make it more attractive for many companies to build new manufacturing capacity overseas. That's something the administration has said it wants to change and is taking steps to address. It appears that message hasn't made it to the front offices of the NLRB."[8]

- **The Boeing case is currently pending before an administrative law judge, who is to decide whether to order Boeing to move the South Carolina production plant to Washington State**

  - In a Sept. 15, 2011, article, *The New York Times* reported, "The House voted on Thursday to approve a Republican-backed bill that would prohibit the National Labor Relations Board from trying to block Boeing from operating a new $750 million aircraft assembly line in South Carolina. The largely party-line vote was 238 to 186.

    "Republicans denounced the labor board's case against Boeing, asserting that the board was overreaching its authority and should not be dictating where companies can locate their operations. But many Democrats and union leaders condemned the legislation, arguing that it undercut an independent federal agency and favored Boeing, a potent lobbying force and prominent political donor."[9]

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[7] Jim McNerney, "Boeing Is Pro-Growth, Not Anti-Union," *The Wall Street Journal*, May 11, 2011, http://online.wsj.com/article/SB10001424052748703730804576315141682547796.html
[8] Jim McNerney, "Boeing Is Pro-Growth, Not Anti-Union," *The Wall Street Journal*, May 11, 2011, http://online.wsj.com/article/SB10001424052748703730804576315141682547796.html
[9] Steve Greenhouse, "In Boeing Case, House Passes Bill Restricting Labor Board," *The New York Times*, Sept. 15, 2011, http://www.nytimes.com/2011/09/16/business/house-approves-bill-restricting-nlrb.html

- According to the same article, "The Boeing case is pending before an administrative law judge, who is to decide whether to order Boeing to move the South Carolina production plant, which assembles 787 Dreamliners, to Washington State. The House bill has a retroactivity clause that would bar the labor board from seeking such an order." [10]

➢ **A column in *The Washington Examiner* said that if NLRB decides in the unions favor, "American unemployment will be permanently higher than otherwise. More American manufacturing plants will locate overseas. Fewer foreign firms will invest here."**

- In a May 12, 2011, column in *The Washington Examiner,* Diana Furchtgott-Roth wrote, "America has a 9 percent national unemployment rate. Americans' top concerns are jobs, jobs and jobs. So it strains belief that the unconfirmed acting general counsel of an obscure regulatory agency wants to stop Boeing Co. from using its newly built aircraft manufacturing plant in South Carolina.

  "But it's happening.

  "The National Labor Relations Board's main mission is to settle disputes between employers and labor unions. Its acting general counsel, Lafe Solomon -- nominated by President Obama in January but as yet unconfirmed by the Senate -- has charged that Boeing's decision to expand production of its 787 Dreamliner in its new Charleston plant was made in retaliation for prior strikes at its Everett, Wash., plant.

  "Solomon's charge was brought after a complaint from the International Association of Machinists and Aerospace Workers, which represents Boeing employees in Washington state.

  "Hearings will begin in mid-June before an NLRB judge. Appeals could last up to two years and will cost millions of dollars -- funds that could have been used to build more planes and hire more workers.

  "If the NLRB decides in the union's favor, American unemployment will be permanently higher than otherwise. More American manufacturing plants will locate overseas. Fewer foreign firms will invest here."[11]

  Editor's Note: *Diana Furchtgott-Roth is a senior fellow at the Manhattan Institute. She was previously a senior fellow at the Hudson Institute, and previously was chief economist of the U.S. Department of Labor. From 2001 to 2002 she served as chief of staff of the President's Council of Economic Advisers under President George W. Bush.*

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[10] Steve Greenhouse, "In Boeing Case, House Passes Bill Restricting Labor Board," *The New York Times*, Sept. 15, 2011, http://www.nytimes.com/2011/09/16/business/house-approves-bill-restricting-nlrb.html

[11] Diana Furchtgott-Roth, "NLRB's Boeing suit could send U.S. jobs overseas," *The Washington Examiner*, May 12, 2011, http://washingtonexaminer.com/opinion/columnists/2011/05/nlrbs-boeing-suit-could-send-us-jobs-overseas

- **The U.S. Chamber of Commerce supports the bill, saying that "The NLRB and the Department of Labor, through numerous decisions, proposed regulations, and other policy, are making it harder for businesses to justify investing in the United States"**

    - In a July 28, 2011, letter to members of the U.S. House of Representatives, R. Bruce Josten of the U.S. Chamber of Commerce wrote, "The U.S. Chamber of Commerce, the world's largest business federation, representing the interests of more than three million businesses and organizations of every size, sector, and region supports H.R. 2587, the "Protecting Jobs from Government Interference Act" and additional appropriate legislation to rein-in the National Labor Relations Board (NLRB) and Department of Labor.

      "The NLRB and the Department of Labor, through numerous decisions, proposed regulations, and other policy, are making it harder for businesses to justify investing in the United States. The most obvious example is the complaint issued by the NLRB's Acting General Counsel seeking to force The Boeing Company to relocate production of 787 Dreamliners from South Carolina to Washington State."[12]

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[12] R. Bruce Josten, "Ket (sic) Vote letter supporting H.R. 2587, the 'Protecting Jobs from Government Interference Act,'" U.S. Chamber of Commerce, July 28, 2011, http://www.uschamber.com/issues/letters/2011/letter-supporting-hr-2587-protecting-jobs-government-interference-act

RIGHT-TO-WORK

In general, a right-to-work law guarantees that no person can be compelled, as a condition of employment, to join or not to join, nor to pay dues to, a labor union. Currently, the right to enact right-to-work laws is affirmed by the Taft-Hartley Act of 1947 and is given to the states. There is not currently a federal right-to-work law, although many right-to-work supporters would like for there to be and there is typically at least one bill introduced each Congress to enact a federal or national right-to-work law.

There are currently 23 states that have their own right-to-work laws on the books.

Alabama
Arizona
Arkansas
Kansas
Florida
Georgia
Idaho
Indiana
Iowa
Louisiana
Mississippi
Nebraska
Nevada
North Carolina
North Dakota
Oklahoma
South Carolina
South Dakota
Tennessee
Texas
Utah
Virginia
Wyoming

Click here to view an interactive map that shows these states as well as links to each state's actual law.

CARD CHECK

On the opposite of labor issues from right-to-work is card check. Organized labor's highest legislative priority is to pass the misleadingly titled Employee Free Choice Act (EFCA), also known as "card check." The legislation would replace the current process of organizing a union by secret ballot elections with public card-signing and would give union bosses and Washington bureaucrats unprecedented controls in the workplace.

Some suggest that the real motivation behind organized labor's push for card check is increasing membership - overall union membership has been in steady decline over the past several decades. Card check would make it easier for unions to organize and therefore increase their membership. More membership means more dues and more dues means increased political power for labor unions and their allies in the Democratic Party. Unions, naturally, deny this claim and argue that card check reveals employees' preferences more reliably than the private ballot. Unions argue that the EFCA would level the playing field and put the power to form a union back in the hands of workers, where it will be easier for workers to bargain for better employment terms and benefits. Interestingly, unions oppose letting workers use card check to ***leave*** a union.

Elements of the Employee Free Choice Act

Taking away a worker's right to a private ballot: Under current law, if a union organizer goes into a workplace and gets 30 percent of the employees to sign a "union interest" card, an election is ordered and supervised by the NLRB. A secret-ballot vote on whether or not to unionize is held six weeks later, giving both the union and employer time to make their case to the workers. The EFCA would change the law to provide that if a simple majority signs a union card, the union will be automatically recognized, ***without an election***. This process is called "card check." Workers would never have the option of voting against union membership, and millions of workers could be forced into a union without a democratic process.

Government control of the workplace: The EFCA does more than take away workers' rights to vote in privacy. It also gives control of the workplace to government bureaucrats. Currently, once workers join a union, both workers and management bargain freely to reach a contract. Both use their leverage to get the best terms they can. Workers can threaten to strike and management can threaten to lockout. Yet, in the end, the business operates under a contract agreed upon by both sides.

Under the EFCA, if an agreement is not reached, federal bureaucrats could step in and dictate the contract. The EFCA allows unions to call in government arbitrators to write the contract at any time 90 days after negotiations start for any reason – regardless of whether or not the employer bargains in good faith – including if they believe the government will give them a better deal than what they could get otherwise. These binding decisions could cover every major facet of business operations including wages and benefits, promotion procedures, retirement plans, health benefits, subcontracting, mergers, work assignments, even the machines used to run a plant. With a government-imposed contract, workers and employers alike would lose all say in the workplace.

Card Check Legislation

In 2008, during the 110th Congress, the House voted 241 to 185 to approve H.R. 800, the EFCA, a bill that would allow union organizers to bypass secret-ballot elections if a majority of eligible employees sign a petition in support of union formation and would establish a system of mediation and arbitration that would apply when an employer and union are unable to agree on their first contract. You can see how they voted here. The bill did not move forward in the Senate during the 110th Congress.

That same legislation was reintroduced in the 111th Congress and has 229 current cosponsors (226 Democrats, 3 Republicans). To date, it has not been reintroduced in the 112th Congress.

Below are selected vote hits on Democrats who voted for the EFCA and card check:

- **The Employee Free Choice Act, otherwise known as "card check," would strip American workers of their right to a secret-ballot vote**
  - In a Jan. 18, 2009, article, the *Las Vegas Review-Journal* reported, "The Employee Free Choice Act would do away with the secret-ballot measure, and require the labor board to certify a bargaining unit once a majority of workers have signed cards. As noted, the law would place no limits on where unions could mount organizing efforts. They could visit employees at home, or in the parking lot after work."[13]

- **The Employee Free Choice Act would require companies to submit to binding arbitration, and increase penalties for unfair labor practices committed by employers but not by unions**
  - In an April 23, 2007, backgrounder, The Heritage Foundation wrote, "The Employee Free Choice Act would strip American workers of their right to a private-ballot vote, require companies to submit to binding arbitration, and increase penalties for unfair labor practices committed by employers but not by unions. Each of these provisions would be bad for American workers."[14]

- **Card check exposes workers to threats and intimidation from both unions and employers**
  - In an April 23, 2007, backgrounder, The Heritage Foundation wrote, "Replacing organizing elections with public card checks is a move in the wrong direction. Card checks expose workers to threats and intimidation from unions and employers. Even when organizers obey the law, card checks still leave workers vulnerable to peer pressure and harassment. Organizers know who has and has not signed, so they repeatedly return to pressure holdouts to change their minds. They give workers a high-pressure sales pitch that only presents the union side and press them to commit immediately without time for reflection. Cards signed under these circumstances do not accurately reflect an employee's true intentions--a fact that unions privately acknowledge.[15]

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[13] Jennifer Robison, "Labor battle brews for '09," *Las Vegas Review-Journal*, Jan. 18, 2009
[14] James Sherk and Paul Kersey, "How the Employee Free Choice Act Takes Away Workers' Rights," The Heritage Foundation, April 23, 2007, revised and updated Feb. 27, 2009
[15] James Sherk and Paul Kersey, "How the Employee Free Choice Act Takes Away Workers' Rights," The Heritage Foundation, April 23, 2007, revised and updated Feb. 27, 2009

- **The binding arbitration requirements in the Employee Free Choice Act would give government bureaucrats the ability to impose employment contracts on newly organized companies, without the input of the worker or the employer**

    - In an April 23, 2007, backgrounder, The Heritage Foundation wrote, "Congress should also protect the right of workers and employers to bargain freely. Binding arbitration means that unaccountable and unknowledgeable government bureaucrats would impose employment contracts on newly organized companies. Workers would not have the option of voting down the contract, and companies would have no recourse if an arbitrator imposed uncompetitive terms that would drive it into bankruptcy. It fundamentally conflicts with the principal of mutual consent underlying American labor law. Congress should not let the government impose wage controls throughout the economy."[16]

- **The U.S. Chamber of Commerce said that the Employee Free Choice Act would have a "devastating impact on small employers who, as the primary source for new jobs, would be counted on to reverse the current economic downturn"**

    - In a Nov. 21, 2008, letter to Members of Congress, R. Bruce Josten, executive vice president of government affairs at the U.S. Chamber of Commerce, wrote, "The Chamber believes that the Employee Free Choice Act would have a particularly devastating impact on small employers who, as the primary source for new jobs, would be counted on to reverse the current economic downturn. You may hear that the EFCA should be considered in the context of helping to revive the economy. This bill is an awful idea in good economic times and a catastrophic idea in the difficult economic times now upon us."[17]

- **The U.S. Chamber of Commerce called the Employee Free Choice Act "an awful idea in good economic times and a catastrophic idea in the difficult economic times now upon us"**

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[16] James Sherk and Paul Kersey, "How the Employee Free Choice Act Takes Away Workers' Rights," The Heritage Foundation, April 23, 2007, revised and updated Feb. 27, 2009

[17] R. Bruce Josten, "Letter to Members of the United States Congress," U.S. Chamber of Commerce, Nov. 21, 2008

[18] R. Bruce Josten, "Letter to Members of the United States Congress," U.S. Chamber of Commerce, Nov. 21, 2008

OTHER LABOR-RELATED ISSUES

Davis-Bacon

Enacted in 1931, the Davis-Bacon Act requires the payment of "prevailing wage rates" on federal construction projects over $2,000. Prevailing wages must be paid on contracts for which either the United States or the District of Columbia is a party. Federal contractors must certify and submit weekly payroll reports to the Department of Labor to ensure that appropriate wages are being paid. The Davis-Bacon Act has remained largely unchanged since its passage.

The Secretary of Labor determines prevailing wage rates based on a survey of local wage rates. Appropriate business entities or labor organizations may voluntarily submit wage data to the Department of Labor. The law is often criticized for the inaccuracy of the collected data: some wage rates are up to seven years old, leading to questions about the effectiveness of the program. Responsibility for administering the Davis-Bacon Act is housed in the Department of Labor's Wage and Hour Division.

In 2004, a Department of Labor's Inspector General (IG) report was highly critical of the wage data gathering. The deficiencies included a flawed data gathering methodology and failure to confirm wage data. Because the wage data is likely flawed, it is estimated that Davis-Bacon wages usually increase the costs of federal projects by as much as 15 percent – costs which get passed on to the taxpayers.

Much of the legislative activity in the 111th Congress involved the inclusion of Davis-Bacon requirements in various construction-related legislation. For example, the 2009 economic stimulus package required Davis-Bacon be applied to all projects funded by the legislation.

In the 112th Congress, there have been a few votes related to Davis-Bacon – below are just some of these votes:

Rep. Steve King (R-Iowa) Amendment to H.R. 1: would have prevented the use of funds to administer Davis-Bacon Act prevailing wage requirements for any project or program paid for by H.R. 1

Rep. Paul Gosar (R-Ariz.) Amendment to H.R. 2354, Energy and Water Appropriations Act for FY 2012: would have prevented the use of funds to administer Davis-Bacon Act prevailing wage requirements for any project or program paid for by H.R. 2354

Below are selected vote hits on Davis-Bacon and these amendments:

- **On Feb. 19, 2011, the House failed to pass an amendment that would have prevented the use of funds to administer Davis-Bacon Act prevailing wage requirements for any project or program paid for by the bill**
    - On Feb. 19, 2011, the House failed to pass the Rep. King (R-Iowa) amendment that would bar the use of funds made available in the bill to administer Davis-Bacon Act prevailing wage requirements for any project or program funded by the bill. (Rejected: 176-250; D: 0-190; R: 176-60)[19]

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[19] H.R. 1, CQ Vote #144, Feb. 19, 2011

- H.R. 1 would provide continuing appropriations through fiscal 2011 for all government agencies, except the Defense Department, which would receive $515.8 billion in base funding. Most other programs would be funded at fiscal 2010 levels, less eliminations, reductions and rescissions totaling roughly $61.5 billion. The bill does not include earmarks and eliminates all previous fiscal 2010 earmark funding from continuing appropriations. As amended, the bill would eliminate funding for the F-35 Joint Strike Fighter alternative engine program and prohibit any funding from being made available to Planned Parenthood and its affiliates. It also would bar the use of funds made available in the bill for a variety of executive branch regulatory activities and implementation of several provisions of the health care overhaul law. (Passed 235-189; D: 0-186; R: 235-3)[20]

➢ **On July 15, 2011, the House failed to pass an amendment that would have prevented federal prevailing wage requirements of the Davis-Bacon Act for contracts with the Energy Department, the Army Corps of Engineers, the Interior Department's Bureau of Reclamation and several regional water and power authorities under $20 million**

- On July 15, 2011, the House failed to pass the Rep. Gosar (R-Ariz.) amendment that would bar the use of funds in the bill to administer or enforce the prevailing wage requirements of the Davis-Bacon Act, except for contracts that exceed $20 million. (Failed 183-238; D: 1-185; R: 182-53)[21]

- H.R. 2354 provides $30.6 billion in fiscal 2012 to fund the Energy Department, the Army Corps of Engineers, the Interior Department's Bureau of Reclamation and several regional water and power authorities. It also would provide $1 billion in emergency aid to areas in the Missouri and Mississippi River basins. In total, the bill would provide the Energy Department with $24.7 billion, of which $1.3 billion is designated for renewable energy and energy-efficiency programs. The bill also would provide $10.6 billion for the National Nuclear Security Administration, as well as $4.8 billion for the Army Corps of Engineers. (Passed 219-196; D: 10-175; R: 209-21)[22]

➢ **The Davis-Bacon Act requires that federal or DC government contractors and subcontractors pay "prevailing wages" to workers employed on federally funded or assisted projects - prevailing wages are determined based on wages paid to various classes of laborers and mechanics employed on specific types of construction projects in an area**

- According to an April 2009, U.S. Department of Labor fact sheet regarding Davis-Bacon and Related Acts (DBRA), "DBRA requires payment of prevailing wages on federally funded or assisted construction projects. The Davis-Bacon Act applies to each federal government or District of Columbia contract in excess of $2,000 for the construction, alteration, or repair (including painting and decorating) of public buildings or public works."[23]

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[20] H.R. 1, CQ Vote #147, Feb. 19, 2011
[21] H.R. 2354, CQ Vote #585. July 15, 2011
[22] H.R. 2354, CQ Vote #600, July 15, 2011
[23] "Fact Sheet #66: The Davis-Bacon and Related Acts (DBRA)," U.S. Department of Labor, April 2009, http://www.dol.gov/whd/regs/compliance/whdfs66.pdf

- According to the same U.S. Department of labor fact sheet, "Davis-Bacon wage determinations are published on the Wage Determinations On Line (WDOL) website for contracting agencies to incorporate them into covered contracts. The "prevailing wages" are determined based on wages paid to various classes of laborers and mechanics employed on specific types of construction projects in an area."[24]

➢ **A *Washington Post* editorial called for the repeal of the Davis-Bacon Act as a "job-rescuing policy change" and saying it used "a formula skewed to reflect union pay rates"**

- In a Dec. 14, 2009, editorial, *The Washington Post* wrote, "With unemployment stuck around 10 percent, President Obama has pledged 'to take every responsible step to accelerate the pace of job growth.' Here's a thought: Instead of trying to 'create' jobs by tweaking this tax break or increasing that spending program, why not stop doing things that destroy jobs?

  "I suggest starting with these three job-rescuing policy changes, none of which would cost taxpayers a dime."[25]

- According to the same editorial, "Repeal the Davis-Bacon Act. Passed in the 1930s to 'stabilize' the construction industry (in part by protecting white workers in the North against competition from migrating Southern blacks), this law requires employers to pay the 'prevailing' local wage on federally funded projects. Today, Davis-Bacon applies to about a third of all public construction spending.

  "A large staff at the Labor Department calculates prevailing wages using a formula skewed to reflect union pay rates. This inflates the cost of labor on public construction by an average of about 10 percent, according to a 2008 study by the Beacon Hill Institute of Suffolk University in Boston. The added cost to taxpayers was $8.6 billion in 2007, the study found.

  "Repealing Davis-Bacon would enhance the employment impact of Obama's proposed infrastructure spending. In fact, the president has the power to suspend the law by declaring a national emergency. If the job crisis doesn't qualify, what does?"[26]

➢ **The Davis Bacon Act has been called a favorite of construction unions and tends to require a wage that is near the union level**

- In a Nov. 1, 2010, article, *The New York Times* reported, "If the Republicans win control of the House, Representative John Kline, a Minnesota Republican, is expected to succeed George Miller, a California Democrat, as chairman of the House Education and Labor Committee.

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[24] "Fact Sheet #66: The Davis-Bacon and Related Acts (DBRA)," U.S. Department of Labor, April 2009, http://www.dol.gov/whd/regs/compliance/whdfs66.pdf
[25] Charles Lane, "Kill These Job-Killers," *The Washington Post*, Dec. 14, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/12/13/AR2009121302448.html
[26] Charles Lane, "Kill These Job-Killers," *The Washington Post*, Dec. 14, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/12/13/AR2009121302448.html

"'One of the greatest threats to job creation is economic uncertainty,' Mr. Kline said in an e-mail after being asked about his plans should he become chairman. 'The solution is to take economic threats — like tax hikes and card check — off the table and make the laws governing our workplaces more understandable, workable and effective for workers and employers.'

"Mr. Kline is chief sponsor of the Secret Ballot Protection Act, a bill with 115 House co-sponsors that would bar employers from agreeing to unionization through card check. He has also criticized two policies that are favorites of construction unions: the Davis-Bacon Act, which requires that contractors on federal public works projects pay workers the prevailing wage, usually near the union wage, even if they are not unionized; and project labor agreements, which tend to tilt the awarding of federally financed construction projects toward unionized contractors."[27]

- **The Department of Labor's Wage and Hour Division is responsible for calculating the prevailing wage standards that are used under the Davis-Bacon Act**

  - In a February 2008, study, The Beacon Hill Institute found, "At the Department of Labor, The Wage and Hour Division (WHD) has the job of calculating the prevailing wage under the DBA [Davis-Bacon Act]."[28]

    Editor's Note: *The Beacon Hill Institute is the research arm of the Economics Department at Suffolk University in Boston. It specializes in the development of state-of-the-art economic and statistical models for policy analysis.*

- **A 2008 study found that the methods used to calculate prevailing wages under the Davis-Bacon Act inflate wages by an average of 22 percent**

  - In a February 2008, study, The Beacon Hill Institute found, "We compared the estimates reported by the WHD to the estimates reported by BLS for a sample of nine occupational categories accounting for 59% of all construction workers across 80 metropolitan areas. We found that on average the DBA prevailing wage is almost $4.43 per hour, or more than 22%, above the BLS average wage when wages are weighted according to the number of workers in each trade and each metropolitan area.

    "As a result, taxpayers pay a premium for work performed on public construction projects."[29]

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[27] Steven Greenhouse, "Unions Fear Rollback of Rights Under Republicans," *The New York Times*, Nov. 1, 2010, http://www.nytimes.com/2010/11/02/us/politics/02labor.html
[28] Sarah Glassman, Michael Head, David G. Tuerck and Paul Bachman, "The Federal Davis-Bacon Act: The Prevailing Mismeasure of Wages," The Beacon Hill Institute at Suffolk University, February 2008
[29] Sarah Glassman, Michael Head, David G. Tuerck and Paul Bachman, "The Federal Davis-Bacon Act: The Prevailing Mismeasure of Wages," The Beacon Hill Institute at Suffolk University, February 2008

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    "As a result, taxpayers pay a premium for work performed on public construction projects."[30]

- **The same study found that, in 2008, these methods inflated construction costs by 9.91 percent, raising the cost to taxpayers by $8.6 billion**

  - In a February 2008, study, The Beacon Hill Institute found, "Labor costs are about 50% of construction costs. On that basis, we estimate that the systematic biases in the statistical measures used to implement the DBA raise the cost of public construction projects subject to the federal prevailing wage by 9.91%. This is the nationwide average."[31]

  - In a February 2008, study, The Beacon Hill Institute found, "Using data from the Congressional Budget Office, we estimate that 32% of total public construction spending is subject to the DBA. Total public construction spending was $298 billion in 2007. Thus, about $95 billion is currently spent on DBA projects. Given that the WHD procedures add 9.91% to construction costs, those procedures currently cost taxpayers $8.6 billion in overpayments for public construction projects."[32]

- **According to The Heritage Foundation, Davis-Bacon Act requirements cost the federal government $10.9 billion in 2010 which, if repealed, could have been used to employ an additional 155,000 construction workers**

  - In a Feb. 14, 2011, WebMemo, The Heritage Foundation wrote, "The DBA effectively requires federal contractors to overpay their workers. Sheet metal workers on Long Island earn $31.37 an hour at market rates, while the DBA requires federal contractors to pay $48.15 hour—a 53 percent premium. Nationwide, DBA rates average 22 percent above market rates.

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[30] Sarah Glassman, Michael Head, David G. Tuerck and Paul Bachman, "The Federal Davis-Bacon Act: The Prevailing Mismeasure of Wages," The Beacon Hill Institute at Suffolk University, February 2008

[31] Sarah Glassman, Michael Head, David G. Tuerck and Paul Bachman, "The Federal Davis-Bacon Act: The Prevailing Mismeasure of Wages," The Beacon Hill Institute at Suffolk University, February 2008

[32] Sarah Glassman, Michael Head, David G. Tuerck and Paul Bachman, "The Federal Davis-Bacon Act: The Prevailing Mismeasure of Wages," The Beacon Hill Institute at Suffolk University, February 2008

> "These inflated wages unnecessarily increase the cost of federal construction projects by 9.9 percent. Repealing the DBA and paying market wages would have saved taxpayers $10.9 billion in 2010."[33]

Project Labor Agreements (PLAs)

Project Labor Agreements (PLAs) require any contractor on a construction project to enter into a labor agreement pre-negotiated by the owner with respect to workers' wages, work rules and benefits. More often than not, these labor agreements mirror those contracts collectively bargained by the building and trade unions in a particular city or region. Essentially these projects then become "union-only," as non-union contractors do not want (or are not able) to pay union wages. Moreover, a non-union company that agrees to work under the PLA can be limited as to whom they can hire and may be forced to use the union hiring hall rather than their own workforce.

In 2001, President Bush singed Executive Order 13202, Preservation of Open Competition and Government Neutrality Towards Government Contractors' Labor Relations on Federal and Federally Funded Construction Projects. This Executive Order requires that contracting officers neither require nor prohibit the use of PLAs in federal contracting. In July 2002, the U.S. Court of Appeals for the District of Columbia unanimously ruled in *Building Construction Trades Department v. Allbaugh* that the NLRA did not preempt Executive Order 13202. The Court's ruling meant that the Executive Order stood, and federal contractors could neither prohibit nor require the use of PLAs.

In 2009, President Obama issued Executive Order 13502, Use of Project Labor Agreements for Federal Construction Projects, which requires that federal procurement officials consider the use of Project Labor Agreements on construction projects over $25 million. Regulations implementing Executive Order 13502 were finalized on April 13, 2010.

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[33] James Sherk, "Repealing the Davis–Bacon Act Would Save Taxpayers $10.9 Billion," The Heritage Foundation, WebMemo #3145, Feb. 14, 2011, http://www.heritage.org/Research/Reports/2011/02/Repealing-the-Davis-Bacon-Act-Would-Save-Taxpayers-$10-9-Billion#_ftn2

LABOR AND WORKFORCE TALKING POINTS

- It is essential that we permanently protect workers' democratic rights by guaranteeing their right to a secret ballot and taking card check – one of the greatest threats to job creation – off the table.
- President Obama and his party have repeatedly made it clear that Big Labor is one of its allies in advancing an anti-worker agenda, especially after making controversial recess appointments to the NLRB.
- Democrats in Washington have jeopardized American retirement security through their obsession with more government, more spending and more taxes.

ADDITIONAL INFORMATION AND RESOURCES

- National Labor Relations Board (NLRB) – http://www.nlrb.gov/
- House Education and the Workforce Committee – http://edworkforce.house.gov/
- U.S. Department of Labor – http://www.dol.gov/
- National Right to Work Committee – http://www.nrtwc.org/
- Bureau of Labor Statistics – http://www.bls.gov/