

**LEGISLATIVE REFORMS TO THE NATIONAL
LABOR RELATIONS ACT:
H.R. 2776, WORKFORCE DEMOCRACY AND
FAIRNESS ACT;
H.R. 2775, EMPLOYEE PRIVACY PROTECTION ACT;
AND, H.R. 2723, EMPLOYEE RIGHTS ACT**

HEARING

BEFORE THE

SUBCOMMITTEE ON HEALTH,
EMPLOYMENT, LABOR, AND PENSIONS

COMMITTEE ON EDUCATION
AND THE WORKFORCE

U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED FIFTEENTH CONGRESS

FIRST SESSION

HEARING HELD IN WASHINGTON, DC, JUNE 14, 2017

Serial No. 115-18

Printed for the use of the Committee on Education and the Workforce



Available via the World Wide Web: www.govinfo.gov

or

Committee address: <http://edworkforce.house.gov>

U.S. GOVERNMENT PUBLISHING OFFICE

25-712 PDF

WASHINGTON : 2019

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**Wednesday, June 14, 2017
House of Representatives,
Subcommittee on Health,
Employment, Labor, and Pensions,
Committee on Education and the Workforce,
Washington, D.C.**

The subcommittee met, pursuant to call, at 1:01 p.m., in Room 2175, Rayburn House Office Building, Hon. Tim Walberg [chairman of the subcommittee] presiding.

Present: Representatives Walberg, Wilson of South Carolina, Roe, Allen, Lewis, Mitchell, Smucker, Ferguson, Estes, Sablan, Norcross, Espaillat, and Courtney.

Also Present: Representatives Foxx and Scott.

Staff Present: Bethany Aronhalt, Press Secretary; Andrew Banducci, Workforce Policy Counsel; Courtney Butcher, Director of Member Services and Coalitions; Ed Gilroy, Director of Workforce Policy; Jessica Goodman, Legislative Assistant; Callie Harman, Legislative Assistant; Nancy Locke, Chief Clerk; Geoffrey MacLeay, Professional Staff Member; John Martin, Professional Staff Member; James Mullen, Director of Information Technology; Alexis Murray, Professional Staff Member; Krisann Pearce, General Counsel; Lauren Reddington, Deputy Press Secretary; Brandon Renz, Staff Director; Joseph Wheeler, Professional Staff Member; Tylease Alli, Minority Clerk/Intern, Fellow Coordinator; Kyle deCant, Minority Labor Policy Counsel; Christine Godinez, Minority Staff Assistant; Stephanie Lalle, Minority Press Assistant; Kevin McDermott, Minority Senior Labor Policy Advisor; Richard Miller, Minority Senior Labor Policy Advisor; Udochi Onwubiko, Minority Labor Policy Counsel; and Veronique Pluviose, Minority General Counsel.

Chairman WALBERG. A quorum being present, the Subcommittee on Health, Employment, Labor, and Pensions will come to order.

Before we move into the subject of today's hearing, I want to start by saying, I wish this morning would have started differently. Many of us are still processing the tragic events that have occurred this morning, and I know that our thoughts and prayers are focused on friends in the hospital at this moment, including a former staffer of mine, graduate of Adrian College, Adrian, Michigan, my home county, and a young man who became like a third son to Sue, my wife, and myself, who is in surgery at this time and in very grave condition.

It's very hard to imagine that such a tragedy could have occurred while our colleagues were doing something as simple as practicing for a charity baseball game before they came to work. The horrific events of this morning have made us all pause and give thanks for the brave men and women of the Capitol Police who serve and protect us all, whether Members of Congress, whether staff members or visitors to this great institution of democracy.

As well as giving thanks for a strong Capitol Hill community, with friends and family who have rallied together in support of those who have been impacted by the events of this morning. Members of this Capitol Hill community are here because they are answering a call, a call to serve the American people, and the best way we can help those impacted by the events of this morning is by continuing to serve our fellow citizens.

Additionally, I want to thank our witnesses, the audience members, and fellow members of the committee for their cooperation with the rescheduling of our hearing, which undoubtedly has caused some disruption of plans.

I will come back to my opening comments following some other comments that will be made by my colleagues here. But I would also like to do something, and I just request, with all due respect, of my colleagues that you would allow me, as a Christian -- and I certainly respect all faiths, but as a Christian, I believe in power of prayer. And it's not normal that we open our committee hearings in prayer, but I would like to do that this afternoon.

Father, we don't come to You just in a moment of silence. We come to You as a loving God who hurts when Your created beings go through challenging, difficult, painful circumstances, and ultimately circumstances that indicate there is still evil.

So, today, even before we carry on with the business that we have been sent here to do, we call upon You to address these very unique concerns, thinking of the Capitol Police personnel, Matt Mika, and Steve Scalise, who are all in various processes of having their wounds, their injuries, the life-threatening things cared for.

We ask that You would protect them, that You would sustain them, and that You would heal them, that You'd be with their families, families who are hurting and worried and concerned, families who have this impact upon their lives for days, weeks, maybe years to come. We ask that You would sustain them and, for the community here in this Capitol, that You would undertake for needs as well.

Lord, we pray as well that You would restore our country, that You would heal our divides, that You would bring us together, and that You'd create a Nation indivisible with liberty, justice for all.

I thank You that You can hear and answer those prayers. And it's in the name of Jesus I pray. Amen.

I would now yield to my friend and colleague, the ranking member, Mr. Sablan, for your comments.

Mr. SABLAN. Thank you very much, Chairman Walberg.

I know that words are insufficient at this time, and I can only imagine how you feel when you found out that Matt, one of your former staff, was wounded this morning. I was horrified also when Seth came to pick me up, give me a ride to a meeting we had that one of our own colleagues, staff and former -- and Capitol Hill Police officers were in an accident -- were shooting victims in a practice for tomorrow's game. My heart goes out to the families. My prayers go out to Steve, Congressman Scalise, the staff, the Capitol Police, their families, and all of those affected by this morning's horrible event.

And just as Speaker Ryan said earlier today, when one is attacked, we are all attacked. I pray that there's no more such incidents in the future.

But for you, Mr. Chairman, I know this is also personal, and I'll keep you in my prayers as well.

I yield back.

Chairman WALBERG. I thank the gentleman.

Now, I'd like to recognize the ranking member of the full committee, Mr. Scott, for any comments on this morning that you will like to share.

Mr. SCOTT. Thank you, Mr. Chairman, and thank you for the opportunity to speak briefly about this morning's shooting in Alexandria.

Like you, I was shocked and saddened to learn of what happened this morning to our colleagues gathered to practice for the annual Congressional Baseball Game. Our thoughts and prayers are with Majority Whip Scalise, Zach Barth, Congressman Roger Williams' staff, and your former staffer, Matt Mika, now with Tyson Foods, also, the two Capitol Police officers who heroically intervened and were shot while responding to this incident, and, of course, to all of their families. I remain hopeful that each of the victims will recover.

Mr. Chairman, violence has no role in our political discourse. While we have disagreements over policies and sometimes get in heated debates, each of us and our staffs are motivated by a shared common principle: It is love for our country and the desire to make the lives of the people we represent better. I've seen that every day that I've had the honor and privilege to serve in this Chamber, and I wish the American people could actually see firsthand the close, bipartisan friendships that are developed here.

It's my understanding that the Congressional Baseball Game will go on as planned tomorrow evening. That's great news. This annual event has always been an opportunity for Democrats and Republicans to come together for a friendly game of baseball while raising money for local charities.

This moment of levity in Washington is always needed, but certainly now more than ever.

So I thank you, Mr. Chairman. I yield back.

Chairman WALBERG. I thank the gentleman.

And you're absolutely right, and that's why this hearing is going on as well. We will not have evil stop us from doing our business we've been called to do.

And, Bobby, I hope you noticed: I didn't pray for victory for the Republican side tomorrow. We won last year, but it has been a long time coming. So we'll see what happens tomorrow evening. But I think we'll all win by playing the game, absolutely.

Well, this brings us to our hearing this morning, as we work to address pressing issues that impact hard-working Americans. And I recognize myself for an opening statement.

Our first subcommittee hearing of the 115th Congress was focused on the need to restore balance and fairness to federal labor policies. This has long been a priority for House Republicans, and today, we are taking the next step in our efforts.

The *National Labor Relations Act* was signed into law more than 80 years ago to protect the rights of workers in union elections. Congress understood workers deserve the opportunity to make informed decisions on union-related matters and that employers deserve a level playing field with labor leaders.

The NLRA established important protections. It also created a neutral arbiter, the National Labor Relations Board, to serve as a fair and objective referee over labor disputes. But that certainly has not been the NLRB we've come to know, I believe, in recent years. Instead, over the last eight years, the Board launched an activist agenda aimed at tilting the balance of power toward powerful special interests. Unfortunately, it came at the expense of the hard-working men and women who keep our economy moving.

Decision after decision by the NLRB restricted the rights of workers and employers. Make no mistake: both Republicans and Democrats respect the right of workers to join a union. I was a union worker. But workers also deserve the right to make a free and informed decision in that matter. That means workers should have the chance to hear from both sides of the debate, and I hope we can all agree workers deserve to make a decision in an environment free of threats, coercion, or intimidation.

However, the NLRB's actions over the years sent a different message. For example, in 2015, the Board implemented a rule designed to rush employees into union elections. The Board dictated that workers should only be afforded as few as 11 days to make a decision on whether or not to join a union. That's roughly a week and a half to consider all the facts and consequences before casting a vote on a personal issue that directly impacts on employees' job and paycheck and future.

Meanwhile, employers were given just seven days to find legal counsel and prepare their entire case before the NLRB hearing officer. That's nearly impossible for most employers, let alone a small-business owner.

With such a short timeframe, employers hardly have a chance to communicate with their employees. But limiting debate and stifling employer free speech for the sake of speeding up union elections was precisely what the Board had in mind, I believe. It's no surprise that union elections have been organized 38 percent faster since this new rule took effect.

To make matters worse, the rule jeopardized the privacy of workers and their families. The NLRB forced employers to hand over the private information of their employees to union organizers, including home addresses, phone numbers, email addresses, work locations, and work schedules.

At the same time, workers and employers have been hit with a micro-union scheme that empowered union leaders to gerrymander the workplace. This new standard has created division in workplaces across the country, buried small business in red tape, and undermined job creation.

It's long past time to put an end to these misguided policies. That's why I was proud to introduce the *Workforce Democracy and Fairness Act* to restore the rights of workers and employers in union elections.

My colleague, Representative Joe Wilson, has also introduced the *Employee Privacy Protection Act*. This important legislation will safeguard the privacy of America's workers and give them greater control over their personal information.

In addition, Dr. Phil Roe introduced the *Employee Rights Act* to ensure workers aren't stuck in unions they no longer support. The bill would modernize the union election process, require periodic union recertification elections, and give workers more control over how their union dues are spent.

These are all commonsense proposals that will protect the rights of workers and restore balance and fairness to the rules governing union elections. I hope we can have a thoughtful discussion as we review these positive reforms.

And I will now yield to Ranking Member Sablan for his opening remarks.

[The statement of Chairman Walberg follows:]

Prepared Statement of Hon. Tim Walberg, Chairman, Subcommittee on Health, Employment, Labor and Pensions

Our first subcommittee hearing of the 115th Congress was focused on the need to restore balance and fairness to federal labor policies. This has long been a priority for House Republicans, and today, we are taking the next step in our efforts.

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The NLRA established important protections. It also created a neutral arbiter—the National Labor Relations Board—to serve as a fair and objective referee over labor disputes.

But that's certainly not the NLRB we've come to know in recent years. Instead, over the last eight years, the board launched an activist agenda aimed at tilting the balance of power toward powerful special interests.

Unfortunately, it came at the expense of the hardworking men and women who keep our economy moving. Decision after decision by the NLRB restricted the rights of workers and employers.

Make no mistake; both Republicans and Democrats respect the right of workers to join a union. But workers also deserve the right to make a free and informed decision in the matter.

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These are all commonsense proposals that will protect the rights of workers and restore balance and fairness to the rules governing union elections.

Mr. SABLAN. Thank you, Chairman Walberg, for holding this hearing today. I thank and welcome all the witnesses also for being here with us today.

At my first hearing as ranking member of this subcommittee, I stated that the purpose of the *National Labor Relations Act* was to strengthen unions as an institution in our economy to ensure that wealth is more fairly shared.

When working Americans are empowered to collectively bargain with their employers over wages and conditions of employment, productivity gains can be linked to wage growth. However, the three bills under consideration today sabotage workers' ability to organize and collectively bargain for a better life.

Make no mistake about it, taken together, these bills are not just union-busting bills; they're union elimination bills. Workers should have a right to a fair union election. In any normal election, you have to win a majority of those voting to win.

H.R. 2723 would require the union to win a majority of all eligible voters. This means that every person who does not vote is counted as a "no" vote against a union. And my colleagues all know that this is now how our elections work and that many of us would not be here if we have to get 50 percent plus one of all eligible voters in our elections.

H.R. 2723 would mandate an election every three years, if 50 percent of the workforce changed, on whether employees should even have the right to have a representative and collectively bargain. Workers already have democratic rights under union constitutions. They can vote under collective bargaining agreements, and under existing law, they can vote to decertify the unions if they do not want one.

This bill would force each local union to misdirect its resources to battle for its very existence on a continuing basis instead of building a stable collective bargaining relationship. So it is fundamentally at odds with the NLRA-stated purpose to promote collective bargaining.


Employees have a right to be fully informed in a union election, yet both H.R. 2775 and H.R. 2776 would overturn the NLRB's election rule that promotes transparency by assuring that the union and the employer have the same employee contact information.

H.R. 2776 would provide three major impediments to union elections. It would impose a minimum 35-day waiting period just to hold an election, even in instances where the employer and employees agree to a speedier election; it would delay pre-election hearings for at least 14 days; and it reverses a rule that requires litigation on some issues to occur only after the election. The bill would enable frivolous litigation, which is often used for the purpose of delay. In fact, employer law firms openly encourage companies to engage in pre-election litigation as a way to buy time to allow the heat of the union's message to chill prior to the election.

Mr. Chairman, I ask unanimous consent to introduce a document from the Jackson Lewis law firm website into the record.


Chairman WALBERG. Without objection, and hearing none, it will be entered.

[The information follows:]



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Time Is On Your Side

Posted: July 7, 2001

After a Labor Board representation election petition is filed, the employer must decide: (1) if it wants to participate in a hearing before the Labor Board regarding any voter eligibility issues; or (2) whether it will simply reach a voluntary election agreement about these issues, eliminating the need for a hearing. A hearing of some length can put valuable time between the union's moment of maximum support - when the election petition was filed - and the date of the election. During that time, an employer can communicate with its employees and hope to erode support for the union. In a recent campaign among 870 registered nurses at South Shore Hospital in Massachusetts (which was represented by Jackson Lewis), a 27-day hearing contributed to the five-month period between the filing of the petition and the election. According to David Schildmeier, a spokesperson for the union, "The five-month delay was a killer."

Hearings do not always work to the employer's advantage, nor are they always available or advisable. However, if a hearing is legally warranted, an employer should consider it an opportunity for the heat of the union's message to chill prior to the election.

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Mr. SABLAN. Thank you.

The *National Labor Relation Act* -- the NLRA seeks to assure employees the fullest freedom of association and does so by directing the National Labor Relations Board to determine the unit appropriate for the purpose of collective bargaining. Yet this bill directly empowers employers to gerrymander the bargaining unit by allowing them to add voters who do not share an overwhelming community of interests with those seeking to form a union and might have no interest in joining a union.

As we learned in our February 14 subcommittee hearing, the NLRB's Specialty Healthcare decision ensures the voting unit cannot be gerrymandered by the employer. Eight -- eight separate federal circuit courts of appeals have approved this decision, and not one has overturned it.

Specialty Healthcare has not led to the parade of horrors trumpeted by those who claim that microunits would proliferate and create havoc. The median bargaining unit size has remained at approximately 26 in the years before and after a Specialty decision.

But before I close, I ask my colleagues not to be deceived by the names given to these union elimination bills. The *Employee Rights Act* takes rights away from employees. The *Employee Privacy Protection Act* does not protect intrusions of an employee's privacy from their employer. And the *Workforce Democracy and Fairness Act* undermines fair and democratic union elections by allowing unnecessary delay on elections based on gerrymandered voting units.

This is the 27th hearing that this committee has held on unions since my colleagues start -- the Republican majority took over. And I hope in the future we can spend nearly that amount of time on retirement security, job safety, and other issues more pressing to the American people.

While we may disagree, I want to thank the chairman for allowing regular order on these bills. I also want to thank each of the witnesses for taking the time to prepare their testimony and appear here today. And I thank you also for your patience because of the delay.

Finally, I want to recognize a young lady, Nadia Ali, who is here today. Nadia is interning in my congressional office this week as part of the program with the Girl Scouts of America.

Welcome, Nadia.

And I yield back, Mr. Chairman.

[The statement of Mr. Sablan follows:]

Prepared Statement of Hon. Gregorio Kilili Camacho Sablan, Ranking Member, Subcommittee on Health, Employment, Labor and Pensions

Thank you Chairman Walberg for holding this hearing today.

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to win a majority of all eligible voters. This means that every person who does not vote is counted as a “no” vote against the union.

My colleagues all know that is not how our elections work and that many of us would not be here if we had to get 50% + 1 of all eligible voters in our elections.

H.R. 2723 would mandate an election every three years, if 50% of the workforce changed, on whether employees should even have the right to have a representative and collectively bargain. Workers already have democratic rights under union constitutions: they can vote on their collective-bargaining agreements, and, under existing law, they can vote to decertify their unions if they do not want one. This bill would force each local union to misdirect its resources to battle for its very existence on a continuing basis, instead of building a stable collective bargaining relationship. It is fundamentally at odds with the NLRA’s stated purpose to promote collective bargaining.

Employees have a right to be fully informed in a union election. Yet both H.R. 2775 and H.R. 2776 would overturn the NLRB’s Election Rule that promotes transparency by assuring that the union and the employer have the same employee contact information.

H.R. 2776 would provide three major impediments to union elections. It would impose a minimum 35-day waiting period just to hold an election, even in instances where the employer and employees agree to a speedier election. It would delay pre-election hearings for at least 14 days. And, it reverses a rule that requires litigation on some issues to occur only after the election. The bill would enable frivolous litigation which is often used for the purpose of delay. In fact, employer law firms openly encourage companies to engage in pre-election litigation as a way to buy time to allow “the heat of the union’s message to chill prior to the election.”

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While we may disagree, I want to thank the Chairman for following regular order on these bills. I also want to thank each of the witnesses for taking the time to prepare their testimony and appear here today.

Finally, I want to recognize a young lady, Nadia Ali, who is here today. Nadia is interning in my office this week as part of a program with the Girl Scouts of America. Welcome Nadia.

I yield back.

Chairman WALBERG. I thank the gentleman.

And now we’ve heard the parameters of the issue, and that’s the way it should be.

And, Nadia, welcome.

Pursuant to committee rule 7(c), all members will be permitted to submit written statements to be included in the permanent hearing record.

And, without objection, the hearing record will remain open for 14 days to allow such statements and other extraneous material referenced during the hearings to be submitted for the official hearing record.

It's now my pleasure to introduce our distinguished panel of witnesses. Ms. Nancy McKeague, from my home state of Michigan, is senior vice president of employer and community strategies and chief human resources officer for the Michigan Health & Hospital Association and not a stranger to this panel.

Welcome.

Ms. Karen Cox is a cycle counter handling inventory at an auto parts storage facility in Dixon, Illinois.

Welcome.

Mr. Jody Calemine is general counsel at the Communications Workers of America. Additionally, Mr. Calemine is a former staffer here at the committee for the minority.

Welcome back.

Mr. Seth Borden is a partner at McGuireWoods LLP, representing management in labor and employment matters. Welcome.

I'll now ask our witnesses to raise your right hand.

[Witnesses sworn.]

Chairman WALBERG. Let the record reflect the witnesses all answered in the affirmative.

Before I recognize you to provide your testimony, let me briefly explain our lighting system. Most of you have been through this before, but it's like the traffic light. When it's green, keep going in your five minutes of testimony. When it hits yellow, begin to wrap up. You have a minute remaining. And when it hits red, don't be like me, just sliding it through, but finish your thought as quickly as possible. And we'll have opportunity to ask questions. It will probably bring further opportunity to finish your statements.

And so now let me recognize our first witness for the first five minutes of testimony, Ms. McKeague.

STATEMENT OF NANCY MCKEAGUE, SENIOR VICE PRESIDENT AND CHIEF OF STAFF, MICHIGAN HEALTH & HOSPITAL ASSOCIATION, OKEMOS, MICHIGAN, TESTIFYING ON BEHALF OF THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT

Ms. MCKEAGUE. Thank you, Mr. Chairman. Good afternoon to all of you.

And my sympathies to you, your staff members, and those who protect you for the situation this morning.

Good afternoon, Chairman Walberg, Ranking Member Sablan, and the members of the committee. It's an honor to be here to discuss legislative reforms to the *National Labor Relations Act*.

I serve as senior vice president and chief of staff for the Michigan Health & Hospital Association, or MHA, a nonprofit association advocating for hospitals and the patients they serve throughout the state of Michigan. And I appear before you today on behalf of the Society for Human Resource Management, or SHRM.

Mr. Chairman, SHRM has always supported balanced labor-management relations and believes an employee's decision on unionization should be based on relevant and timely information as well as free choice. Additionally, H.R. professionals have a responsibility to understand, support, and champion employment-related actions that are in the best interest of both the organization and its employees regarding third-party representation by labor unions.

Unfortunately, the NLRB's ambush rule substantially shortens the period of time when a representation petition is filed and when an election is held while severely hampering an employer's right to exercise free speech during union organizing campaigns. The rule also cripples the employer's ability to learn the employer's perspective on the impact of collective bargaining on the workplace.

Consider, for example, that MHA allows employees up to five weeks to complete their annual benefit open enrollment, a friendly, noncontroversial process that requires open dialogue between the employer and employee so both parties understand their healthcare elections. During this time, our employees have access to our providers so they're fully educated on any potential changes and the impact those changes might have on them or their family. This engagement provides our employees assurances that everyone's best interests are served.

Although MHA has never experienced an organizing effort, I know SHRM members that have, and it's clear to me that a similar amount of time and focus would be needed to educate supervisors, staff, and employees about the rights, requirements, and our perspectives on the organizing drive.

But the ambush rule would greatly diminish the ability of employers to adequately respond, because it allows for an election within 11 days of a petition being signed. Now, contrast this with the ability of unions to prepare for their entire organizing campaign before it's made public, which clearly creates an imbalance between the rights of employees, employers, and labor organization in the pre-election period. This imbalance is compounded for small employers who may lack an H.R. professional or access to legal counsel, and for multi-state employers who may have decentralized operations, making expedited communication with employees very difficult.

Given these concerns, SHRM appreciates the chairman's leadership in introducing H.R. 2776, the *Workforce Democracy and Fairness Act* to restore fairness to union elections, providing both employers and employees ample time to review a union petition.

Now, I want to take a minute to discuss employee privacy issues associated with the Excelsior List. SHRM is deeply concerned that the ambush rule requires employers to provide personal information to union organizers, including home addresses, home and cell phone numbers, without employees' consent once a union petition has been signed.

Mr. Chairman, this is abhorrent, and it goes against everything that H.R. professionals have been trained to do without providing any safeguards for the information being shared with union organizers. Therefore, SHRM supports H.R. 2775, the *Employee Privacy Protection Act*, to address these privacy concerns and allow employ-

ees to choose how they want to be contacted if a union petition is signed.

Finally, SHRM is concerned with the interplay between the NLRB Specialty Healthcare decision and the ambush rule. Their concurrent existence provides labor organizations the ability to effectively target any industry or subgroup with the union petition.

As outlined in my written statement, MHA has been advising hospitals across the state to prepare for this type of micro-union organizing activity because the success of any hospital is dependent on the ability of its staff members to work as a cohesive unit with mutual respect. And this decision threatens this vital component and empowers union organizers to create division and discord among professional employees.

In closing, Mr. Chairman, SHRM looks forward to working with this committee to advance H.R. 2775 and H.R. 2776. Importantly, these bills would modernize the election process while providing employees the privacy they desire while also restoring the delicate balance between the rights of employers, employees, and labor organizations.

Again, thank you for this opportunity, and I look forward to your questions.

[The statement of Ms. McKeague follows:]



**STATEMENT OF NANCY McKEAGUE, SHRM-SCP, SPHR
SENIOR VICE PRESIDENT & CHIEF OF STAFF
MICHIGAN HEALTH & HOSPITAL ASSOCIATION
OKEMOS, MI**

**ON BEHALF OF THE
SOCIETY FOR HUMAN RESOURCE MANAGEMENT**

**SUBMITTED TO
U.S. HOUSE COMMITTEE ON EDUCATION AND THE WORKFORCE,
SUBCOMMITTEE ON HEALTH, EDUCATION, LABOR & PENSIONS**

**HEARING ON
"LEGISLATIVE REFORMS TO THE NATIONAL LABOR RELATIONS
ACT: H.R. 2776, WORKFORCE DEMOCRACY AND FAIRNESS ACT;
H.R. 2775, EMPLOYEE PRIVACY PROTECTION ACT; AND H.R.
2723, EMPLOYEE RIGHTS ACT"**

JUNE 14, 2017

Introduction

Chairman Walberg, Ranking Member Sablan and distinguished members of the Committee, my name is Nancy McKeague. I am the Senior Vice President and Chief of Staff at the Michigan Health & Hospital Association, based near Lansing, Michigan. I am honored to be here today to discuss legislative reforms to the National Labor Relations Act (NLRA), specifically H.R. 2776, Workforce Democracy and Fairness Act, and H.R. 2775, Employee Privacy Protection Act.

I appear before you today on behalf of the Society for Human Resource Management (SHRM), of which I am a member. SHRM is the world's largest human resource (HR) professional society, and for nearly seven decades the Society has been the leading provider of resources serving the needs of HR professionals and advancing the practice of human resource management. SHRM represents 285,000 members that are affiliated with more than 575 chapters in the United States and subsidiary offices in China, India and United Arab Emirates.

The Michigan Health & Hospital Association (MHA), founded in 1919 as a nonprofit association, works to advance the health of individuals and communities. Through our leadership and support of hospitals, health systems and the full care continuum, we are committed to achieving better care for individuals, better health for populations and lower per-capita costs. Our membership includes all community hospitals in the state, which are available to assist each of Michigan's nearly 10 million residents 24 hours a day, seven days a week. Michigan hospitals consist of various types of health care facilities, including public hospitals—owned by city, county, state or federal government—nonpublic hospitals, which are individually incorporated or owned and operated by a larger health system. In total, MHA has 110 employees, including 82 exempt employees and 28 nonexempt employees. MHA has employees in a variety of occupations including lawyers, physicians, allied health professionals, and computer and information technology professionals.

As you know, the National Labor Relations Board (NLRB) implemented the “ambush” election rule in 2015, which fundamentally and needlessly altered the delicate balance between the rights of employees, employers and labor organizations in the pre-election period—a balance that, prior to the rule, provided employees the opportunity to make an educated and informed decision to form, join or refrain from joining a labor organization. Moreover, the regulation severely hampers an employer's right to exercise free speech during union-organizing campaigns and cripples the ability of employees to learn the employer's perspective on the impact of collective bargaining on the workplace. Equally troubling is the rule's requirement that employers provide unions with additional employee information that was not previously required, such as personal phone numbers and e-mail addresses, home addresses, work locations, shifts, and job classifications. Thank you, Mr. Chairman, for convening today's hearing to examine these issues and legislative solutions to address the negative effects of the rule.

In my testimony, I will outline SHRM's views on employee rights under federal labor law; discuss the impact the rule has had on hospitals across the state of Michigan; highlight

employee privacy issues associated with the excelsior list; explain how micro-unions pose a unique challenge to the health care industry; and discuss legislative solutions to address challenges under the NLRA.

SHRM Views on Employee Representation

Enacted in 1935, the NLRA is the principal statute governing collective bargaining activities in the private sector. The NLRA was enacted to ensure the right of employees to assemble and collectively bargain with employers on matters of workplace welfare, including wages, hours, working conditions and benefits.

SHRM supports balanced labor-management relations and recognizes the inherent rights of employees to form, join, assist or refrain from joining a labor organization. Employee rights under the NLRA to form, join, assist or refrain from joining a union without threats, interrogation, promises of benefits or coercion by employers or unions must be protected. SHRM believes an employee's decision on unionization should be based on relevant and timely information and free choice, and that representation without a valid majority of employee interest is fundamentally wrong.

Ultimately, SHRM believes that HR professionals have a responsibility to understand, support and champion employment-related actions that are in the best interests of their organizations and their employees regarding third-party representation by labor unions.

The Need for H.R. 2775 and H.R. 2776

As you know, the ambush election rule substantially shortens the period of time between when a representation petition is filed with the NLRB and when an election is held. SHRM is concerned that this does not allow adequate time for employees to develop an educated and informed decision to form, join or refrain from joining a labor organization.

SHRM is also particularly concerned about the rule's mandate that employers provide their employees' personal phone numbers and e-mail addresses to labor organizations. SHRM members tasked with protecting employee privacy and personal information have expressed grave concern throughout the rulemaking process about providing this information to organized labor and in the time frames required under the rule.

At MHA, we dedicate a significant amount of time and effort to communicating to our team members about important workplace decisions, such as employee benefits, compensation and health care. These are decisions that impact not only our team members but often the team members' families as well. For example, MHA communicates health care benefits changes to employees by sending letters to employees' homes to ensure that all employees are notified of the pending change. This is a relatively easy exercise for MHA given that we have only 110 employees and all are in Michigan. For SHRM members at larger, multi-state employers, a great deal of planning and preparation goes into this effort. In many situations, it requires multiple meetings over multiple days to make sure that those

employers can communicate with and educate their employees directly and answer any questions employees may have on crucial workplace issues.

At MHA, our employees value the amount of time they have to make critical decisions regarding benefits that not only affect them but their spouses and children as well. For example, MHA allows employees up to five weeks to complete their annual benefit open enrollment. This is a friendly, noncontroversial process that requires open dialogue between the employer and employee so that both understand their health care elections for the upcoming year. MHA offers employees the opportunity to talk with our providers so that they are fully educated on any potential changes and the impact those changes might have on them as an individual or collectively as a family.

Even though the five weeks is time consuming, our process provides assurances that everyone's best interests are served. Although MHA has never experienced an effort to organize the workplace, I suspect it would require a similar amount of time and focus from our management team to educate our supervisors, staff and employees about the rights, requirements and our perspectives on the organizing drive. Knowing this, I struggle to envision how we would possibly educate our team members about an organizing drive in 11 days, which is a permissible amount of time between a union petition filing and a union election under the ambush election rule.

Contrast an employer's experience with a union-organizing effort with that of a union preparing to organize. After all, unions can prepare their entire organizing campaign before making it public. Unless employers have adequate time to prepare their educational materials and to share this information with their employees, employees will not have adequate time to learn the employer's perspective on the impact of collective bargaining on the workplace. While the precise length of time for the election process varies under the ambush election rule, union organizers now can hold an election in as little as 11 days of a union petition being signed. This circumstance creates an imbalance between the rights of employees, employers and labor organizations in the pre-election period. At the same time, the ambush election rule severely impacts an employer's freedom of speech and ability to share its perspective with employees about the organizing drive, which creates a distinct disadvantage for employers in the organizing process.

Another major concern for SHRM is that the ambush election rule significantly impairs small employers' ability in responding to petitions in an accelerated manner and presents significant burdens for large employers with diverse and significant voting units. For example, small employers may not have an HR professional on staff or access to legal counsel that specializes in labor issues. A large employer, on the other hand, may have a geographically dispersed workforce and centralized operations where communicating with its employees in such an expedited manner is almost impossible.

Given these concerns, SHRM believes H.R. 2776, Workforce Democracy and Fairness Act, would help restore fairness to union elections by giving both employers and employees ample time to review a union petition. Importantly, this legislation ensures that no union elections could be held in less than 35 days.

SHRM is also deeply concerned that employers are now required to provide personal, confidential information about employees when a union petition has been filed. This requirement to provide so much confidential information about an employer's employees constitutes an invasion of privacy for employees and an unnecessary data collection burden on employers.

Mr. Chairman, one of an HR professional's greatest responsibilities is being trustworthy and keeping in confidence employees' personal information and circumstances. In fact, failing to do so is grounds for immediate termination at my organization. At MHA, our HR professionals collect not only our employees' full names and Social Security numbers but those of their spouses and children as well. In addition, MHA collects military records (including the D.D. 214), immigration records, medical records, divorce records, education transcripts, security or background check information, and occasionally credit reports.

If we begin to provide to a third party, without employees' consent, personal information such as home addresses, home telephone numbers, cell phone numbers, and shift schedules, how long do you think the employee will trust us with the rest of the employment information we keep?

This reality is abhorrent and goes against everything that HR professionals have been trained to do without providing any safeguards for the information being shared with union organizers. In addition, while MHA does collect extensive employee contact data, not every employer collects this type of information or can keep the data up-to-date and accurate. H.R. 2775 addresses these concerns and provides appropriate levels by allowing employees to choose how they would want to be contacted if a union petition was signed.

Equally challenging is the requirement for the voter eligibility list and employee contact information to be provided to the organizing union within two workdays of the Direction of Election. Previously, employers had seven workdays to provide this information. While we update our employee contact information frequently at MHA, I am positive there are instances where the information is outdated or incorrect. I suspect that is true for the bulk of employers in the United States. Additionally, for security reasons, employee information may be housed in different software programs or databases, meaning it is next to impossible in some circumstances to compile this information in two business days let alone guarantee its accuracy.

From the outset, the ambush election rule appeared to be a solution in search of a problem. Union density has been declining for decades in America. According to the Bureau of Labor Statistics, only 10.7 percent of wage and salary workers in the public and private sectors were members of a union in 2016, compared to 20.1 percent in 1983.¹ In 2016, union membership declined by 240,000 from 2015 bringing the total number of employees belonging to unions to 14.6 million. Even though labor organization leaders have long argued that previous laws on union representation favored management and hindered

¹ Bureau of Labor Statistics, U.S. Department of Labor (2017). <https://www.bls.gov/news.release/union2.nr0.htm>

employees' ability to organize a union, this data suggests otherwise. The median number of days from petition to election decreased from 33 in fiscal year 2015 to 23 in fiscal year 2016.² It is clear that other factors have influenced union membership over the last 34 years. In an attempt to protect union membership, the ambush election rule has severely impacted employers' First Amendment rights while limiting the ability of employees to make an informed decision as to whether or not to join a union. H.R. 2776 would restore fairness to union elections allowing both employers and employees ample time to review a union petition – under the proposed legislation no union elections could be held in less than 35 days.

Micro-Bargaining Units and MWH

SHRM believes it is important to raise a serious concern over the interplay between the NLRB's decision in *NLRB v. Specialty Healthcare and Rehabilitation Center of Mobile (Specialty)* of Aug. 26, 2011 and the ambush election rule. In *Specialty*, the Board established a new standard that allows it to deem a unit appropriate unless the employer demonstrates that employees in a larger unit share an "overwhelming community of interest" with those in the petitioned-for unit. In practice, the *Specialty* decision allows labor organizations to form "micro-bargaining units" and "fragmented units" by permitting them to target only subsets of employees who are most likely to support the union. This combination of the ambush election rule with the latitude of the *Specialty* decision provides labor organizations the ability to effectively target any industry with a union petition.

In response to this, MHA is advising hospitals and health care systems throughout the state of Michigan to be prepared for micro-union organizing activity. Specifically, MHA recommends that hospitals identify positions that are "similar and constitute a readily identifiable group" as well as consider how those positions are "sufficiently distinct" from other positions, as prescribed under the *Specialty* decision. Micro-unions are of particular concern to MHA because health care is the ultimate team endeavor, where the needs of the patient must come first. If, for example, the nurse practitioners in the cardiac intensive care unit are organized but the physician assistants are not (or vice versa) and two of each respond to a code blue, it is likely that the physician or charge nurse will violate the collective bargaining agreement in some manner during the emergency. This can happen when supervisory roles overlap or change, when a medical staff member moves into mandatory overtime, or when a medical staff member is called in from another unit, for example. Any of these scenarios could result in a deviation from standard work rules under the collective bargaining agreement.

Historically the NLRB has preferred larger "wall-to-wall" bargaining units as a way to rationalize the bargaining process and preserve labor peace. The *Specialty Healthcare* decision allows unions to sub-divide a workforce into small bargaining units represented

² National Labor Relations Board (2017). Median Days to Elections Graph, Fiscal Year 2007-2016, <http://www.nlr.gov/news-outreach/graphs-data/petitions-and-elections/median-days-petition-election>

by different unions, each driven by their own self-interest instead of the interest of the whole organization. This decision discourages teamwork rather than offering solutions that balance the needs of an individual department with the needs of the whole operation. This sub-divided situation is terrible for any employer, but is a matter of life or death in a health care setting.

The success of any hospital is dependant on the ability of its staff members to work as a cohesive unit with mutual respect. The *Specialty* decision threatens this vital component and empowers union organizers to create division and discord among professional employees. In addition to the previous examples, problems may arise where a hospital employee who performs cross-functional roles across multiple departments (sub-specialty groups) particularly if one such unit has a collective bargaining agreement. In this scenario, it becomes inherently difficult for HR professionals to determine how best to classify that employee and determine whether he or she has protections under the agreement. In the end, HR professionals' attention would be diverted from improving patient care and streamlining efficiency. In my opinion, the "overwhelming community of interest" language in *Specialty* is likely why there has been little micro-union activity in the hospital setting following the decision.

Conclusion

Mr. Chairman, thank you again for holding this hearing to examine needed NLRA reforms to address both the ambush election rule and the impact of the *Specialty* decision.

SHRM welcomes the introduction of H.R. 2775, Employee Privacy Protection Act and H.R. 2776, Workforce Democracy and Fairness Act. H.R. 2775 would modernize the election process while providing employees the privacy they desire in the 21st century workplace. H.R. 2776 would restore the balance between the rights of employees, employers and labor organizations in the pre-election period—hopefully resetting the median time from a representation petition to an election back to 38 days.³

SHRM looks forward to working with this Committee as these bills advance through the U.S. House of Representatives. I welcome your questions.

³ National Labor Relations Board (2017). Median Days to Elections Graph, Fiscal Year 2007-2016, <http://www.nlrb.gov/news-outreach/graphs-data/petitions-and-elections/median-days-petition-election>

Chairman WALBERG. Thank you.
Now I recognize Ms. Cox for your five minutes of testimony.

STATEMENT OF KAREN COX, DIXON, ILLINOIS

Ms. Cox. Chairman Walberg, Ranking Member Sablan, and members of the committee, thank you for the opportunity to testify today. My name is Karen Cox. And I'm here today from Dixon, Illinois, a small town from about two hours west of Chicago and the boyhood home of former President Reagan.

Today, I work at an auto parts storage facility in Dixon, but I was previously employed at a cold storage facility in Rochelle, Illinois. For those of you who have not worked in cold storage, a typical day involves wearing full-body freezer gear and using a standup forklift to move pallets into and out of a storage freezer.

My story begins in the spring of 2012. Rumors started going around about a union trying to come into our workplace. To be specific, this was the Retail, Wholesale, and Department Store Union, or RWDSU. I didn't take it that seriously because my coworkers and I were pretty content with our jobs.

Soon we learned we were going to have an election. I was not particularly happy about it, but I thought at least we had time to educate ourselves and have a fair vote. But then I came into work 1 day and I was told the union was in and we were not going to have an election. The company had recognized them through a process called card check. This bypasses a secret ballot election, eliminating employees' rights to make a real choice for or against a union. I had never heard of this before, and it angered me. To me, it was un-American, and many of my coworkers agreed.

Several employees had signed cards because they had been told they would just receive information about the union. They didn't know that, if the union got enough signatures, 50 percent plus one, the company could recognize them and they could come in without an election.

I had no experience with labor law and no clue what to do. After several phone calls to the National Labor Relations Board, I eventually got in touch with a lawyer from the National Right to Work Foundation who helped guide me through the process to remove the union from the workplace, which is called decertification. It requires collecting signatures from 30 percent of the coworkers in the bargaining unit. I had to do this on my own, in break areas only, and during nonworking hours. It was a frustrating process, and I dealt with intense pressure from the union.

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

And I was shocked.

After I filed my third petition in June 2013, we were granted an election. It was held a couple months later in August. However, since the union had appealed, we were unable to see the results, and the ballots were locked up until a decision was made on their appeal. A year later, we were still waiting on that decision, and the

union contract that they negotiated for us was basically the company handbook. We were paying dues for something we already had.

After several more months of waiting, in the spring of 2015, the NLRB finally made a decision. They concluded that we did not deserve the decertification election because, although the union had a year to bargain and had even scheduled a contract ratification before I filed the petition that got us the election, they still had not had enough time to bargain.

The ballots were destroyed, and we will never know the results. Today, I work at a different storage facility, but my experiences with the union at my last job will be with me forever. I am not anti-union, but I believe that all employees deserve a fair and secret vote on whether or not they want to join a union.

That's why I support the *Employee Rights Act*, which guarantees a secret ballot vote. I want to ensure that other employees don't find themselves in the situation my coworkers and I were in: stuck with a union we didn't have a chance to vote for and that is difficult, if not impossible, to remove from the workplace.

Thank you for your time today, and I'd be happy to answer any questions.

[The statement of Ms. Cox follows:]

TESTIMONY OF KAREN COX
SUBCOMMITTEE ON HEALTH, EMPLOYMENT, LABOR, AND PENSIONS
JUNE 14th, 2017

Chairmen Walberg, Ranking Member Sablan, and members of the committee, thank you for the opportunity to testify today. My name is Karen Cox, and I'm here today from Dixon, Illinois, a small town about two hours west of Chicago and the boyhood home of former President Reagan.

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Soon we learned we were going to have an election. I wasn't particularly happy about it, but I thought at least we had time to educate ourselves and have a fair vote. But then I came into work one day and was told that the union was in and we were not going to have an election. The company had recognized them through a process called "card check." This bypasses a secret ballot election, eliminating employees' rights to make a

real choice for or against a union. I had never heard of this before, and it angered me. To me, it was un-American, and many of my coworkers agreed.

Several employees had signed cards because they had been told they would just receive information about the union. They didn't know that if the union got enough signatures, 50% plus one, the company could recognize them and they could come in without an election.

I had no experience with labor law and no clue what to do. After several phone calls to the National Labor Relations Board, I eventually got in touch with a lawyer from the National Right to Work Foundation who helped guide me through the process to remove the union from the workplace, which is called decertification. It requires collecting signatures from 30% of the coworkers in a bargaining unit. I had to do this on my own, in break areas only, and during non-working hours.

It was a frustrating process and I dealt with intense pressure from the union. In November 2012 I made the two-hour trip to Peoria and filed the first petition with the NLRB. On my way back I got a phone call from my dad. He told me a union rep contacted him and mentioned something about people losing their jobs and said that I needed to settle my grievances. My dad said, "Watch your back, because that was a threat." I was shocked.

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A year later, we were still waiting on that decision, and the union "contract" that they negotiated for us was basically the company handbook--we were paying dues for something we already had. After several more months of waiting, in the spring of 2015, the NLRB finally made a decision. They concluded that we did not deserve the decertification election because, although the union had a year to bargain and had even scheduled a contract ratification before I filed the petition that got us the election, they still had not had enough time to bargain. The ballots were destroyed and we will never know the results.

Today I work at a different storage facility, but my experiences with the union at my last job will be with me forever. I am not anti-union, but I believe that all employees deserve a fair and secret vote on whether or not they want to join a union. That's why I support the Employee Rights Act, which guarantees a secret ballot vote. I want to ensure that other employees don't find themselves in the situation my coworkers and I were in--stuck with a union we didn't have a chance to vote for and that is difficult if not impossible to remove from the workplace.

Thank you for your time today. I'd be happy to answer any questions.

Chairman WALBERG. Thank you, Ms. Cox, for your testimony.

Mr. Calemine, welcome, and I recognize you for your five minutes.

STATEMENT OF GUERINO J. CALEMINE, III, GENERAL COUNSEL, COMMUNICATIONS WORKERS OF AMERICA, WASHINGTON, D.C.

Mr. CALEMINE. Thank you, Chairman Walberg, Ranking Member Sablan, and members of the subcommittee. My name is Jody Calemine. I am general counsel of the Communications Workers of America. We represent hundreds of thousands of workers in the private and public sectors across the United States, Puerto Rico, and Canada. Thank you for the invitation to testify today.

Before I begin, I too want to express my shock at the events this morning. On behalf of myself and the Communications Workers, our thoughts and prayers are with all the victims this morning. It's a horrific, heartbreaking event that we had today.

As you said, not long ago, I used to work for the committee. It feels very funny sitting in front of you instead of behind you, but it's -- you know, it's great to be back. I wish it was under different circumstances. I wish it was about a bill that would bring us all together. I wish it was about a bill that would bolster workers' rights.

I wish we were here to consider a bill that would allow workers to freely exercise the full breadth of their bargaining power, so that they can negotiate a better life for themselves and their families to share in the wealth that they helped create in this country.

I wish we were talking about a bill that would allow more workers to stand up and fight to bring jobs back to the United States. I wish. I wish.

Instead, the committee is considering three bills that, in my view, are nothing but bad news for American workers, and so I must speak out against them. I will try to stay measured about this.

I worked on the Hill for 11 years, and all that time, I never saw a bill as extreme and provocative and anti-union, anti-worker as the *Employee Rights Act*. Hands down, it is the most far-reaching assault against workers' organizations that I've seen introduced in the U.S. Congress in modern times. I, personally -- I was beside myself when I read it.

Taken together, as they are presented at this hearing, these bills are a very loud alarm bell. In provision after provision, an already tilted playing field is tilted even further against the American worker.

Briefly, here's what they do: The default way that workers organize a union in the private sector is with an NLRB election. The bills do their best to rig that election against workers and their unions. For example, they try to block workers from communicating with a union before an election.

If an election happens, the bills stuff the ballot box with anti-union votes by counting every person who doesn't vote as an anti-union vote. Congressional elections aren't run that way; if they were, few, if any, Members here probably would have won their elections.

These bills work hard to delay union certification elections, to give employers more time to campaign while creating a new decertification process that can be triggered by the employer and for which these bills tolerate zero delay.

If you're a worker trying to get a union, these bills make you wait. If you're an employer trying to destroy a union, these bills give you the fast track. These bills allow employers to gerrymander the elections, to pack the voter rolls with workers who haven't been involved in the organizing drive and didn't petition for the election, because the employers hope these workers will be "no" votes.

And if workers try to escape this unfair government-run process by negotiating a voluntary recognition agreement with their employer, well, these bills won't permit it. They strip workers of the least conflict-ridden way to win union representation.

These bills contain at least five different ways to drain union treasuries with pointless expenses. These bills strip union members of control of their own unions and outrageously give that control to employers and nonmembers. These bills seek to criminalize strikes and do their best to make being a union member an identity crime.

I would be happy to answer questions about how the bills accomplish these ends, but I think the more interesting question is "why?" We've seen this across the country, many assaults against workers' rights to organize and collectively bargain in statehouses and the courts and here.

But labor unions win workers higher wages, better benefits, safer working conditions. That's our mission. Labor unions fought for and helped win things like minimum-wage increases, health and safety protections, sick leave, family leave, Social Security, and civil rights, and we do stand in the way of their repeal.

Labor unions call out unfair trade agreements, and fight every day to stop companies from outsourcing jobs overseas and to bring offshore jobs back home. Workers joining together and fighting for a better life, that's one of the things that made America great. Unions fought for and won the American Dream for millions of Americans over the last century. We are the single best private sector mechanism for raising workers' wages.

Unions are your fellow Americans. Our membership cuts across race, gender, and ethnicity, party lines—pulling people together for a common project to look out for one another. We have a right to exist. Workers' voices matter to an individual company, to the economy, and to our democracy. No one can make America great again without us.

Thank you.

[The statement of Ms. Calemine follows:]

Before the U.S. House of Representatives Subcommittee on Health, Labor,
Employment, and Pensions

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

June 14, 2017

Testimony of Guerino J. Calemine, III

General Counsel, Communications Workers of America

I appreciate the opportunity to testify at this hearing on three anti-union bills, H.R. 2776, H.R. 2775, and H.R. 2723, all with Orwellian titles: the Workforce Democracy and Fairness Act (WDFA), the Employee Privacy Protection Act (EPPA), and the Employee Rights Act (ERA), respectively.

I've been asked to analyze these bills for the subcommittee. Deceptively short, these bills are chockfull of malicious intent to render elections absurdly undemocratic, strip workers of rights, take control of unions away from union members, drain union treasuries, and otherwise destroy labor unions. These bills don't reflect sound policy or an attempt at consistent application of rules – but are a naked political assault on labor unions and nothing more. The subcommittee should reject them.

Here is what the bills do, in nine insidious steps:

Step One: Block Voter Access to Union Information

Two of the bills – EPPA and ERA – seek to make it as difficult as possible for a worker to speak with a union organizer before a union certification election.

A key element of any free and fair election is equal access to voters by the contending parties. Current law already fails to provide anything approaching equal access in a representation election administered by the National Labor Relations Board (NLRB). Employers may block union organizers from accessing the workplace – the one place where all voters congregate. Meanwhile, employers have total access to voters in the workplace and may compel voters under threat of discipline to attend anti-union captive audience meetings. Current law's attempt at providing a modicum of access is the provision of the Excelsior list – a list of voter names, job classifications, work locations, shifts, and contact information provided to the union within two days after the bargaining unit determination.

The authors of EPPA want the union to receive this list of voters as late as possible, to limit the union's access to voters ahead of an election. EPPA provides that the voter list may only be turned over “*not earlier than 7 days* after a final determination by the Board of the appropriate bargaining unit.” This minimum waiting time is not coupled with a maximum waiting time. EPPA

does not limit how long the union may be forced to wait for this basic information. The union could receive the list of voters the night before the election under EPPA.

EPPA and ERA would restrict what the list may contain. EPPA provides that the list may not provide any more than the voter's name and one form of contact information (telephone, email, or mailing address), chosen by the employee in writing. Even if an employee wanted to provide more than one way to be contacted, so that they might be sure to obtain information from the union before voting, the bill prohibits it. Moreover, since employees make their choice in writing to the employer, this procedure is ripe for intimidation and coercion. Supervisors collecting the employees' choices may pressure employees into providing the least useful form of contact information for the union.

ERA goes a step further than EPPA in this regard. Under ERA, the list may only include employee names and home addresses. Even if an employee wanted to provide an email address or telephone number, the bill does not permit it. ERA also allows employees to "elect to be excluded from such list by notifying the employer in writing." Again, this procedure is ripe for intimidation and coercion, with supervisors pressuring employees to exclude themselves from the list altogether, or workers excluding themselves due to the inherently coercive nature of this process. In that event, the union would not know the names of the voters, let alone how to contact them before the election. Meanwhile, the employer has had those names all along – and has had constant access to those voters in the workplace.

The point of these provisions is not to ensure a fair election or employee privacy. Both the ERA and EPPA couch these provisions as giving employees a choice on what or whether to disclose while making sure employees cannot choose freely. First, they cannot choose freely because the choices are arbitrarily limited (only home addresses, nothing else, in the case of ERA, or only one form of contact and no more, in the case of EPPA). Second, they cannot choose freely because the employees must provide their choice to their employer, who controls their working lives and who will frown upon the wrong choice or strongly encourage another. Third, they cannot apply those same choices toward what information they provide to their employers; nothing in these bills prevents employers from requiring their employees to provide them all of their contact information as a condition of employment and then using that information to further the employer's anti-union campaign.

The knife-twisting doesn't stop there. ERA allows employers to pressure voters into keeping their existence, let alone their contact information, secret from the union altogether. EPPA allows employers to provide the list of voters and contact information to the union as late as possible before the election. The point of these provisions is to deprive one party – the union – of the opportunity to speak to voters in a timely way – even if the voters want to allow as much opportunity as possible for communications with the union.

	Current Law	EPPA	ERA
Does the employer have total access to the voters everyday at work?	Yes	Yes	Yes
May the employer require voters to attend anti-union captive audience meetings?	Yes	Yes	Yes
Does the union have the right to access the voters inside the workplace, the one place they congregate everyday?	No	No	No
How may the union access the voters?	Outside of work	Outside of work	Outside of work
Is the union guaranteed to receive a complete list of voter names?	Yes	Yes	No
Will the union receive the voters' job classifications, work locations and shifts?	Yes	No	No
Is the union guaranteed to receive some sort of contact information for each voter?	Yes	Yes	No
May the union receive more than one form of contact information?	Yes	No	No
What form of contact information may the union receive, if any?	Home address and, if the employer has any of them, personal email addresses and personal cell and telephone numbers.	Only one of the following: Telephone number OR email address OR mailing address	Home address, unless employer obtains written request from employee to be excluded

Step Two: Stuff Ballot Boxes with No Votes

The sponsors of ERA set rules for union elections that they wouldn't set for their own elections. Under ERA, in a union certification election all non-votes are considered no votes. Under current law, the majority of ballots cast determine the outcome of any election under the

National Labor Relations Act (NLRA). Those voters who choose not to cast a ballot simply do not count one way or another; they have opted to allow co-workers who cast ballots to decide the question of unionization. This should sound familiar to members of the Subcommittee, as it is the way congressional elections are conducted.

ERA, however, seeks to stuff the ballot box with no votes. Under ERA, for a union to win a certification election, it must obtain yes votes from a majority of the employees in the bargaining unit, not just the majority of the employees who cast ballots.

We don't run political elections this way in the United States. People are free to not cast ballots without their decision to not vote counting as a vote for one candidate or another. Indeed, if the ERA's election rules were applied to congressional elections, none of the original cosponsors of this bill would have been elected, per a recent study by the Economic Policy Institute.¹ None of the bill sponsors won a majority of all eligible voters in their congressional districts. Just as such a rule would severely hamper the ability of members of this Subcommittee to win elections, the ERA's stuff-the-ballot-box provision is designed to severely hamper unions' ability to win elections.

Tellingly, ERA does not apply this rule to its new process for automatic decertification elections – employer-triggered elections to get rid of a union. Under that provision, ERA is very explicit that anti-union forces do not need a majority of all eligible voters in order to eliminate an incumbent union: “If a majority of the votes cast in a valid election reject the continuing representation by the labor organization, the Board shall withdraw the labor organization’s certification...” What’s good for the goose is not good for the gander because the sponsors of ERA are trying to put the law’s thumbs on the scale against unions and workers. Fairness and uniformity are utterly foreign concepts in this bill.

Under ERA, if your shop is...	Then you need to meet this standard...	In order to...
Non-union	Majority of all eligible voters to vote for the union	Certify a union, triggered by an employee petition
Union	Majority of just those casting ballots to vote against the union	Decertify a union, triggered by employer’s alteration of the bargaining unit

¹ <http://www.epi.org/blog/under-new-bills-election-standard-unions-would-never-win-an-election-and-neither-would-the-bills-cosponsors/>

Notice the standard changes depending on whether the election is for a non-union shop to become union, or a union shop to become non-union. ERA greases the skids for deunionizing and makes the mountain even steeper than it already is for unionizing.

Step Three: Eliminate ways for workers to form a union and create new ways for employers to bust unions

ERA eliminates a key method by which employees win union representation while creating a new method just for employers to strip workers of union representation.

First, ERA prohibits employers from voluntarily recognizing a union based on a showing of majority support from the employees. Voluntary recognition has been permitted under the NLRA since its inception. It is the preferred way of organizing because it minimizes the strife of the election process, and voluntary recognition usually comes by way of agreements that also require the employer to be neutral or provide the union with actual access to the voters in the workplace. In these cases, there is no NLRB election because an outright majority of the workforce has already signed cards seeking recognition of their union and the employer has agreed to recognize. ERA does not abide voluntary recognition because voluntary recognition agreements are the means by which the bulk of workers are organized in the workplace today.

Just to be clear, ERA's prohibition of voluntary recognition is not because secret ballots are a sacred principle for ERA. ERA does not touch the withdrawal of recognition doctrine, which is the anti-union mirror of voluntary recognition. Under this doctrine, an employer may withdraw recognition from a union without an election if there is a showing that a majority of the employees no longer support the union. ERA is fine with this doctrine, even though it does not involve a secret ballot election, because it is a way of eliminating a union.

While blocking workers from voluntary recognition of their union, ERA creates new, undemocratic ways for employers to eliminate a union.

Under ERA, an employer can manipulate its workforce through turnover, expansion, or some other alteration, such that the change in the workforce exceeds 50 percent of the original bargaining unit size, and trigger an automatic decertification election. This election would happen even if not a single employee wants it. It is an election that may be triggered entirely on the employer's initiative.

Interestingly, for all their talk about "ambush elections," the anti-union forces behind this bill appreciate speed when it comes to an employer-triggered election. Under this process, speed counts. Because of employer alterations, there are brand new workers in the bargaining unit, so ERA does not want to give the union workers time to talk to their new brothers and sisters. So a petition need not be filed. No hearing is called for. Unfair labor practices cannot stall the election date. The election must happen within a *maximum* 30 day timeframe from the date of the employer's alteration of the bargaining unit when there is no collective bargaining agreement in place. Otherwise, in cases where there is a collective bargaining agreement in place, ERA requires the

election to happen within a particular 10-day window (between the 120th and 110th day prior to contract expiration). This entire decertification process happens even if not a single employee wants to alter his union representation. The automatic decertification election is an open invitation to employers to manipulate their workforces to trigger votes and decertify the union. Again, unlike certification elections for new unions, which are designed to be as difficult as possible for the union to win, this employer-triggered decertification process requires only a majority of those casting ballots to change the status quo and eliminate the incumbent union.

Moreover, this new decertification process would undermine the NLRB's emphasis on stability in collective bargaining relationships. The process could be triggered by an employer who does not even mean to trigger it or simply because of persistently high turnover. Depending on the workplace, decertification elections could be happening on a near-constant basis, even though neither the employer nor employees want one. They will stop, however, once the anti-union vote wins. None of the bills require periodic elections in non-union workplaces to determine whether workers now want a union.

Step Four: Delay a Union Certification Election When Workers Want One

Recall that ERA's new employer-triggered method for elections requires elections within a *maximum* of 30 days of whenever the employer has changed the composition of the bargaining unit, wherever there is no collective bargaining agreement. Do you think these bills would impose a maximum waiting period when workers trigger an election? Of course not. WDFA requires, when the workers trigger an election to win union representation, a *minimum* 35-day waiting period before the election may occur. When employers trigger the election, the vote must happen fast. When workers trigger the election, the vote must be stalled. These bills ensure that, when the employer is not the party triggering the election, this pre-election time period is long enough for some serious employer campaigning. At least one study found that this period between petition and election is when employers are most likely to commit unfair labor practices. It's a critical period for unionbusting.

But would a minimum of 35 days always be long enough for the employer to bust the union drive? If not, there are plenty of other delays built into the bills. While current law aims to hold pre-election hearings on petitions within 8 days of the petition filing, both ERA and WDFA require a two-week waiting period before a pre-election hearing about the bargaining unit, voter eligibility, and other issues. After that initial delay, the bills diverge on their approaches to creating further needless delay. Under ERA, after the Regional Director issues his decision, the employer may appeal any or all of the decisions to the full National Labor Relations Board, and the Board must rule on all of those appeals before the election may occur. By challenging one employee's eligibility to vote in the election – arguing, for example, against all reason that the employee is a supervisor – would provide months of delay for a high-paid unionbuster to kill the organizing drive ahead of the election. This massive delay opportunity must be why ERA does not even bother with WDFA's 35-day minimum waiting period. Meanwhile, under WDFA, more delay is built into the pre-election hearing itself by requiring the Regional Director and the Board not to just determine *an* appropriate

bargaining unit but *the* appropriate bargaining unit, a novel concept which will be discussed later in this testimony. Incidentally, it appears that under both bills, even if the union and the employer agree on every pre-election issue, the government must waste taxpayer money holding a hearing anyway. (ERA is clearest about this requirement: "No election shall take place... unless and until... a hearing is conducted before a qualified hearing officer...")

	If you're employees petitioning for an election to win a union...	If you're an employer triggering a decertification election by altering a bargaining unit...
Minimum Delay Required	At least 35 days from the date of the petition.	None.
Maximum Delay Permitted	No limit.	30 days where there is no collective bargaining agreement; as little as fewer than 10 days where there is a collective bargaining agreement, depending on how soon the agreement expires.

Step Five: Gerrymander the voting districts.

One of the most confounding complaints of anti-union forces in recent years is their concern about a 2011 case called *Specialty Healthcare*.² In that case, certified nursing assistants (CNAs) filed a petition for a union election at a nursing home. They asked for a bargaining unit of just CNAs – all 53 of them. But the operator had other ideas. The operator demanded that 33 maintenance assistants, cooks, data entry clerks, business office clericals and receptionists be added to the bargaining unit. The Board told the operator that it could not pack an otherwise appropriate bargaining unit with voters who were not asking for an election unless the operator could show that there is an "overwhelming community of interest" between all of these workers the employer wants to add to the unit and the petitioned-for unit. The "overwhelming community of interest" language is drawn from a decision of three Republican-nominated judges on the D.C. Circuit Court of Appeals.³ Seven other federal circuit courts have upheld the Board's application of *Specialty*

² 357 NLRB 934 (2011).

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

Healthcare.⁴ These circuit courts have acknowledged that the Board's *Specialty Healthcare* standard is not a departure from its precedents, but simply a clarification. Therefore, the *Specialty Healthcare* decision is nothing radical, but simply stands for the proposition that an employer cannot displace the employees' petitioned-for unit without showing that the employees it seeks to add to the unit share an overwhelming community of interest with those in the proposed unit.

Nevertheless, the anti-union groups have been screaming "micro-units" ever since the Board's 2011 decision. That is, they say that, thanks to *Specialty Healthcare*, unions would petition to represent tiny units of workers, which would be a hassle for the employer to deal with. But would unions actually do that? Generally speaking, unions have little incentive to expend their limited resources on bargaining for countless "micro-units." Data has borne out that, in 2011, the year that "micro-unit" hell was unleashed by the Board, the median size of bargaining units in NLRB elections was 26 employees. In 2016, after five years of *Specialty Healthcare*, the median size for bargaining units was still 26 employees.

So the "micro-unit" nightmare is not grounded in reality. But was the fear of micro-units even genuine? Think about it. Unionbusters often tell employees that they don't need a union because they can cut their own great deals with management, without a "third party" involved. Would that not be an extreme version of micro-unit hell, bargaining with thousands of micro-units consisting of one employee each at the same large employer? Yes, of course, it would be. Maybe the employer would even favor a single bargaining representative for efficiency's sake, if this individualized bargaining was a reality in a nonunion workplace. But it's not real. In the non-union workplace, very little bargaining, if any, takes place with any particular employee. Employees are expected to accept whatever the employer deigns to offer them and nothing more. If they don't like it, they can quit.

So what's really behind the attack on *Specialty Healthcare*? The case limited an employer's ability to pack the voter rolls with workers who had hitherto no involvement in the union organizing drive. After all, workers petitioning for an election are likely to petition for a bargaining unit consisting of workers who share a community of interest from the outset – say, all the assembly line workers but not the warehouse workers with whom they rarely interact. It's to the employer's advantage, however, to be able to add groups of workers who do not closely share the organizing workers' interests and probably have not been involved in the organizing drive. As the WDFA lays out, "employees shall not be excluded from the unit unless the interests of the group seeking a separate unit are sufficiently distinct from those of other employees to warrant the establishment of

⁴ See *Kindred Nursing Ctrs. E., LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013) (enforcing the original *Specialty Healthcare* case); *Constellation Brands, U.S. Operations, Inc. v. NLRB*, 842 F.3d 784 (2d Cir. 2016); *NLRB v. FedEx Freight, Inc.*, 832 F.3d 432 (3d Cir. 2016); *Nestle Dreyer's Ice Cream Co. v. NLRB*, 821 F.3d 489 (4th Cir. 2016); *Macy's, Inc. v. NLRB*, 824 F.3d 557 (5th Cir. 2016); *FedEx Freight, Inc. v. NLRB*, 839 F.3d 636 (7th Cir. 2016); *FedEx Freight, Inc. v. NLRB*, 816 F.3d 515 (8th Cir. 2016).

a separate unit.” The WDFA puts the presumption in the voter-packing employer’s favor and against the desires of the employees who undertook the petition in the first place. Again, this preference in favor of the employer is understandable once you accept that unionbusting, not employee self-determination, is the animating force behind these bills.

Incidentally, let’s not forget to read these bills as a whole. Thanks to the voter-packing rules in these bills, the employer will have added voters to the rolls that had no involvement in the organizing drive, did not want to be part of a bargaining unit, and are not part of the original unit that the organizing employees sought. Thanks to the manipulation of the Excelsior Lists, under EPPA, the union may not find out who these voters are until shortly before the election – and certainly “not earlier than seven days” after the Board has defined the bargaining unit. And under ERA, the union may not find out who some of these voters are... ever, thanks to supervisors pressuring the workers to opt out of the Excelsior list altogether. Great system!

The WDFA does provide for one instance in which smaller units are favored: when a union seeks to accrete additional employees to an existing unionized bargaining unit. The WDFA is very clear about this double standard: “Whether additional employees should be included in a proposed unit shall be determined based on whether such additional employees and proposed unit members share a sufficient community of interest, with the sole exception of proposed accretions to an existing unit, in which the inclusion of additional employees shall be based on whether such additional employees and existing unit members share an overwhelming community of interest and the additional employees have little or no separate identity.” In other words, small unionized units are bad, and making a small unionized unit a bigger unionized unit is also bad.

For anyone who is confused at this point by these bills’ efforts to address *Specialty Healthcare*, here’s a table to help decipher:

Arrangement	Desirability for WDFA
A “micro unit” of all 53 certified nursing assistants at a nursing home getting a union	Too small!
Once unionized, a “micro unit” of all certified nursing assistants at a nursing home that seeks to become a bigger unit	Too big!
159 million micro units consisting of one employee each, without a union	Just right!

Per these bills, no matter what size the bargaining unit is, if it’s unionized, it’s not the right size!

Step Six: Play a Gotcha Game so Employers Have Carte Blanche to Undermine Elections

ERA includes new penalty provisions in the NLRA directed at unions. If a union is found to have interfered with, restrained, or coerced employees in the exercise of their Section 7 rights or to join a union or refrain from joining a union, the union is liable for wages lost and union dues or fees collected unlawfully as well as an unspecified “additional amount as liquidated damages.” It’s unclear what problem this provision seeks to solve. The last year for which the NLRB issued statistical data on the types of unfair labor practices filed shows that there were 10 times as many formal actions taken for charges filed against employers as against labor organizations.⁵ But despite the far higher likelihood that an employer commits an unfair labor practice than a labor organization does, ERA does not seek liquidated damages from employers.

ERA also plays a game of gotcha with unions: Any union “found to have [committed an 8(b)(1) violation] in connection with the filing of a decertification petition shall be prohibited from filing objections to an election held pursuant to such petition.” In other words, once a shop steward or union activist makes any mistake during a decertification drive, the employer is given carte blanche to render the decertification election as unfair as possible, and the union cannot object to the unfair conditions. So the point of this provision is not to ensure a fair election. After all, most unfair labor practices are committed by employers – but ERA does not strip employers of their right to object to unfair election conditions simply because the employer itself has committed unfair labor practices. As with all the previous provisions, the point of this penalty provision is to help employers eliminate unions.

Step Seven: Drain Union Treasuries

ERA contains a number of amendments to the Labor Management and Disclosure Act (LMRDA) designed to simply drain union treasuries.

First, ERA requires all internal union elections – such as for union officers, setting dues, authorizing strikes, or ratifying contracts – to be conducted “in the privacy of a voting booth.” This might sound innocuous to the average person. But here’s the problem: any particular local union or bargaining unit may have members scattered over very wide geographic areas. Depending on the situation, the only feasible, affordable, franchising way to conduct an election is by mail ballot – or in some cases via internet or telephonic voting. But the phrase “in the privacy of a voting booth” appears to specifically prevent anything other than in-person voting. The end result will be to either force unions to conduct elections in multiple physical places at once, with all of the election judges and observers present at each polling location, or simply disenfranchise geographically dispersed members. A single bargaining unit may have members scattered in locations with just a couple employees across many states. After a few elections, a geographically dispersed local union or

⁵ FY2010 NLRB Annual Report.

bargaining unit won't have much resources left to fight for its members, which is the point of this provision.

Second, ERA really does not want an organization of working people to be free to engage in their communities the way, say, a business organization would be free to engage in its community. In the United States, you can join any organization you want and pay dues however you want and expect that the law won't require you to constantly give consent about how those dues are to be spent. But ERA tolerates the freedom of association only so much. Under ERA, if you are a 100% committed union member and union supporter, enthusiastically paying dues, attending union meetings, or even becoming union president, ERA requires you to give consent in writing every year for your organization to use your dues for anything "not directly related to the labor organization's collective bargaining or contract administration functions." ERA calls this provision "Right Not to Subsidize Union Non-Representational Activities." Now, such a right already exists under current law. Under current law, no one is required to join a union or pay union dues. In so-called right-to-work states, a nonmember bargaining unit employee does not have to pay a cent to the union, even though the union must represent him. And in freedom-of-contract, fair-share states, a nonmember bargaining unit employee may be required to pay an agency fee to cover the costs of representing him but has the right to object to any portion of that fee paying for anything not "germane" to the union's duties as bargaining agent. Under ERA, however, a union member already paying dues would be required to give annual consent – after 35 days written notice each year – for the union to use any portion of that member's dues (already sitting in the union treasury) for say, a voter registration drive or sponsoring a Little League team. So this provision does not actually create a "Right Not to Subsidize Union Non-Representational Activities," it restricts and burdens the right to do so. And while current law allows agency fee objectors to make a "continuing objection" that does not have to be renewed each year and permanently restricts his fees from being used for anything non-germane to collective bargaining, ERA prohibits the same automatic renewal of a member's consent for the union to use his dues for non-germane activities. Obtaining this consent annually from every full-blown union member in good standing is an expense in and of itself. Someone really does not want unions involved in politics or their communities.

Third, ERA would require unions to conduct, at their own expense, contract ratification votes which they may otherwise not have any reason to conduct. Under ERA, if a union wants to conduct a strike authorization vote, it must first conduct a ratification vote on any outstanding proposed collective bargaining agreement from the employer. The union may know – or at least have very strong reasons to believe – that its members would vote down the particular proposal, which is why the strike vote is necessary in the first place; yet ERA would require the pointless ratification vote – in the privacy of a voting booth – for every member and nonmember employee in the bargaining unit (more on that later).

Fourth, ERA would not allow this contract ratification vote and the strike authorization vote to be conducted by the union – something that unions are very capable of doing. Instead, ERA would require the union to contract with a private third party to conduct these elections. Moreover,

the employer must agree on who that private third party is, even though the union alone must pay for the entire undertaking. Would an employer hellbent on busting the union agree to an affordable third party – or one that will drain the union coffers? There's a business opportunity in ERA for starting an overpriced election services company.

Fifth, ERA apparently creates an obligation for every labor organization to conduct an "independently verified annual audit of the labor organization's financial condition and operations." Unions already provide extensive financial reporting, their officers are bound by fiduciary duties, their officers must be bonded, and their entire governance is subject to democratic elections. While it's obviously a good practice to utilize an independent auditor, not every local union can afford this cost. Typically, a local union with extremely limited resources will appoint a finance committee of members to conduct an audit of its books. It is not independently verified, but it is the best a small union can do. ERA has found yet another way to force a union to spend its resources on something other than smartly advancing workers' interests. It is a wonder the bill's authors did not require the employer to consent to which auditing company the union may use.

Step Eight: Take control of the union away from dues-paying union members (so maybe they'll stop paying dues)

Recall that ERA strips union members of their right to freely subsidize their union's activities without annual government interference. The flip side of that coin is that ERA gives nonmembers new rights over the members' union.

Under ERA, nonmembers would be granted the same rights as members to vote on contract ratifications and strike authorizations. This provision is an entirely new level of free-riding. In a so-called right-to-work state, nonmembers would pay zero for the services of the union and be entitled to participate in the union's ultimate decisionmaking. The bill authors know that having a say in contract ratification is one of the strongest incentives to join the union for some workers. So getting that say for free will reduce the chances a particular worker will become a member.

Furthermore, strikes are a big deal. Members are expected to honor picket lines. Members who cross picket lines may be fined. Nonmembers cannot be fined. They can scab without consequence. So, imagine a strike authorization vote in which nonmembers join some number of members to vote for a strike. The strike is called. The members must honor the picket lines, while the nonmembers who forced them to strike may scab. Then, when a possible contract is reached and sent out for ratification, the nonmembers can vote to reject the contract, prolonging the strike for members while the nonmembers have been collecting a paycheck all along. The nonmembers may want the strike to continue to force the company to improve a provision or two, or because they are financially benefiting from the overtime during the strike. After all, it's no skin off the nonmembers' back to prolong the strike, as the members are the only ones who must honor the picket lines.

Union members have contributed and obligated themselves in ways which correctly give them the exclusive right to vote on contract ratifications and strike authorizations. Nonmembers

have not earned such a right. This provision undermines the very concept of a union. It is also an assault on the constitutionally-protected associational rights of the union members.

Under ERA, it's not just nonmember employees who obtain inappropriate power over a union's internal affairs. The employer is also granted a ridiculous say over the union. As noted earlier, a union cannot call a strike authorization vote unless the employer has agreed on what private third party will conduct the vote. This employer consent requirement would give the employer veto power over when and whether a strike vote happens. The strike is the ultimate economic weapon of a union in collective bargaining. The timing of a strike vote is an internal strategic decision of the union. ERA would eliminate the union's prerogative on this issue and eviscerate the right to strike.

Step Nine: Create a One-Sided Federal Crime Targeting Union Supporters and Fail to Deter Violence by Employers and their Agents

ERA adds a new criminal provision to the LMRDA: "It shall be unlawful for any person, through the use of force or violence, or threat of the use of force or violence, to restrain, coerce, or intimidate, or attempt to restrain, coerce, or intimidate any person for the purpose of obtaining from any person any right to represent employees or any compensation or other term or condition of employment." A person found guilty of this provision shall be fined up to \$100,000 or imprisoned up to 10 years or both.

Let's be clear about the target of this provision: unions. It is unions that seek the right to represent employees or seek terms or conditions of employment in the course of collective bargaining or a strike. Of course, it is old hat to talk of violent union "goons." During a strike, however, especially when emotions run highest, unions have strong incentives to maintain nonviolence and tamp down any violent-sounding rhetoric. Set aside that violence and threats of violence are already illegal and criminally prosecuted under state law. The slightest mistake on the picket line will land the union in a county court within hours, where a judge may enjoin the picket lines, rendering the strike ineffective.

Managers and replacement workers are not covered by this ERA provision. Yet managers and replacement workers have been found engaging in violent, physically threatening, or verbally threatening behavior near picket lines. In fact, CWAers wear red on Thursdays to commemorate a member who was killed on a picket line when a manager's daughter broke through a picket line with a car and struck him. Sometimes this replacement worker or manager behavior is used to bait picketers into responding, perhaps in hopes of obtaining an injunction against the picket lines. And now this behavior can be used to bait picketers into responding so that strikers will spend 10 years in jail. This lopsided provision renders strikers even more vulnerable to violence or threats of violence.

Finally, ERA includes a provision that would apply the Hobbs Act – a federal criminal law outlawing extortion – to unions' legitimate objectives. In *U.S. v. Enmons*, the Supreme Court exempted unions pursuing legitimate objectives from the Hobbs Act. It did so for good reason: the

Hobbs Act broadly defines extortion as inducing a victim to give up property wrongfully using reasonable fear of physical injury or economic harm in a way that actually or potentially affects interstate commerce. Consider a strike. It has a legitimate objective: a collective bargaining agreement. That collective bargaining agreement, however, may involve the employer paying more in wages and benefits to employees than it otherwise would (giving up property). An economic strike or threat of an economic strike may be intended to make the employer afraid of economic harm, if not experience economic harm. And a strike is nearly always going to affect interstate commerce. But because federal law gives unions the right to strike, the Supreme Court found that the use of reasonable fear of economic harm could not be “wrongful” when a union was pursuing legitimate objectives. By specifically stating that the lawfulness of a union’s objective shall not remove or exempt its conduct from the definition of extortion, ERA potentially turns otherwise lawful strikes into federal crimes and weakens unions’ ability to win higher wages, better benefits, and improved working conditions for workers.

While these three bills are relatively short, they are packed with malicious intent. Their goal is to weaken or eliminate unions, full stop. I’ve attempted to explain the how. The more interesting question is:

Why?

Why would anyone want to weaken or eliminate unions altogether from the American landscape? These bills are part and parcel of a coordinated assault by wealthy interests on workers’ rights around the country, here in Congress, in state houses, and in the courts. Why the attack?

Is it because unions allow workers to exercise their real bargaining strength so that they may insist on their fair share of the wealth they help create, raising wages, obtaining benefits, protecting health and safety?

Is it because unions are an effective and organized voice for workers’ interests in the political and legislative realm, winning or helping win minimum wage increases, health and safety laws, paid leave, civil rights protections, and so on?

Is it because super wealthy interests have ideological dreams of cutting taxes on the rich, eliminating regulatory protections for working people, and eliminating any safety net – and unions tend to stand in the way of that dystopia?

I urge the subcommittee to reject these bills. Thank you for the opportunity to testify.

Chairman WALBERG. I thank the gentleman.
And I recognize Mr. Borden for your five minutes of testimony.

**STATEMENT OF SETH H. BORDEN, PARTNER, MCGUIREWOODS
LLP, NEW YORK, NEW YORK**

Mr. BORDEN. Good morning, Chairman Walberg, Ranking Member Sablan, and distinguished members of the subcommittee. It is a great honor and privilege to appear before you today.

I want to echo the sentiments of the rest of the panelists and indeed some of you. My family will keep you all and your colleagues in our thoughts and prayers as we go forward.

My name is Seth Borden. I'm a partner in the New York office of the law firm McGuireWoods. I'm not appearing today on behalf of any clients however, and my testimony does not necessarily reflect the views of McGuireWoods or any of my colleagues.

I've been practicing traditional labor and employment law for 19 years, representing employers of all types and sizes in a variety of industries across the United States before the National Labor Relations Board. A copy of my firm bio is provided with the written version of my testimony.

The Board's final rules, effective April 2015, overhauling representation election procedures and the Board's 2011 decision in Specialty Healthcare cast aside standards and procedures that had worked for decades. To turn a phrase, the Board sought to fix something that wasn't broke in an effort to facilitate private sector union organizing.

Passage of H.R. 2776, the *Workforce Democracy and Fairness Act*, and H.R. 2775, the *Employee Privacy Protection Act*, will be a significant step forward to reversing these unnecessary and misguided policy changes and restoring the proper balance of rights and interests that had worked sufficiently for most of the Board's history.

The Board's 2015 rule all but eliminated pre-election resolution of very significant legal issues, like eligibility and unit inclusion, deferring litigation until after the election. In addition, the Board implemented new time targets, reducing the pre-election period during which employees can learn and contemplate their decision to as few as 13 days.

These changes limit employer free speech protected by Section 8(c) of the *National Labor Relations Act* and infringe on the section 7 rights of employees to refrain from union activity. Postponing resolution of important legal issues until after an election only serves to enhance union electoral success by leveraging employer uncertainty and risk.

H.R. 2776 would restore the pre-election hearing process. It will require a hearing absent agreement of the parties, provide time for the parties to prepare, and allow for the creation of a complete evidentiary record on all relevant and material issues expected to impact the outcome of the election.

The Board's 2011 Specialty Healthcare decision announced a new standard for determining whether a bargaining unit proposed by a petitioning union is appropriate. It cast aside presumptions which were the result of decades of practical experience in case law development and opened the door to so-called microunit organizing, whereby unions are the ones that can gerrymander a larger work-

force and cherry-pick smaller units best suited to organizing success.

Potential proliferation of microunits within a single workplace does not promote but rather threatens industrial peace and stability. It's all but certain to restrict an employer's ability to meet operational demands by efficient, flexible staffing, limit cross training and promotional opportunities, and lead to higher customer prices and budget pressures.

H.R. 2776 would reverse this misguided policy direction and restore the Board's traditional community of interest analysis. It would provide additional stability and mitigate the ability of future boards to misuse newly announced standards by expressly incorporating these traditional factors into the body of the statute. These standards are far more consistent with the express terms and intent of the NLRA and had effectively met expectations for decades.

The Board's 2015 rule also forces the employer to turn over extensive personal employee contact information. Now, within two days after direction of an election, the employer is now required to turn over the eligible voters' names and mailing addresses as well as all available personal email addresses and all available home and personal cell phone numbers.

These requirements needlessly violate the section 7 rights of employees to refrain from union activity and the expectation of privacy employees have when providing personal contact information to their employers. More importantly, these days, no one is immune from the risks of hacking, phishing attacks, and identity theft, all of which increase with the volume of unwanted email or text messages directed at employees. Finally, many employers simply do not have all of the required information in one location or in a single common format for compiling and emailing in a two-day timeframe.

H.R. 2775 will restore the seven-day timeframe for the careful compilation and transmittal of employee information to the Board, which worked sufficiently for nearly 50 years. Moreover, it would afford employees the choice of which method of contact each would prefer. This puts the choice of showing interest and sharing private contact information in the hands of the employees, where the statute would place it.

For all these reasons, the subcommittee should move expeditiously to passage of H.R. 2776 and 2775 to fundamentally correct the unnecessary and misguided direction of the last six years. I look forward to your questions.

[The statement of Mr. Borden follows:]

SETH H. BORDEN, PARTNER, MCGUIREWOODS LLP

STATEMENT TO THE RECORD

**“Legislative Reforms to the National Labor Relations Act: H.R. 2776, Workforce
Democracy and Fairness Act; H.R. 2775, Employee Privacy Protection Act; and,
H.R. 2723, Employee Rights Act.”**

**U.S. House Committee on Education and the Workforce
Health, Education, Labor & Pensions Subcommittee**

June 14, 2017 – 10:15 a.m.

Good morning, Chairman Walberg, Ranking Member Sablan and distinguished Members of the Subcommittee. It is a great honor and privilege to appear before this Subcommittee as a witness. My name is Seth Borden. I am a partner in the New York office of the law firm McGuireWoods LLP.

My testimony today should not be construed as legal advice as to any specific facts or circumstances. I am not appearing today on behalf of any clients. My testimony is based on my own personal views and does not necessarily reflect those of McGuireWoods or any of my individual colleagues there.

I have been practicing traditional labor and employment law for 19 years. During that time, I have represented employers of all types and sizes, in a variety of industries, throughout the United States and Puerto Rico before the National Labor Relations Board (“the Board” or “NLRB”). In 2010, I authored a chapter regarding new technologies and traditional labor law in the Thompson publication *Think Before You Click: Strategies for Managing Social Media in the Workplace*, the first treatise of its kind. Finally, since 2008, my team and I have maintained the *Labor Relations Today* blog, which has received numerous accolades and has been archived by the U.S. Library of Congress. A copy of my firm bio is provided with the written version of my testimony.

Mr. Chairman, I request that the entirety of my written testimony, and the attachments thereto, be entered into the record of the hearing.

In December 2014, the National Labor Relations Board announced a Final Rule, implemented in April 2015 (“2015 Rule”), effecting a sweeping overhaul of its longstanding representation election procedures. These changes were designed purely to facilitate private sector union organizing. They followed soon after the Board’s decision in *Specialty Healthcare*, 357 NLRB 934 (2011), which established new unit definition criteria by which unions have sought to organize “micro-units” – smaller, gerrymandered groups of employees within a larger workplace. These actions by the Board cast aside standards and procedures that had operated for decades without significant complaint. To turn the phrase – the Board here sought to “fix” what was never “broke.” Passage of H.R. 2776, the Workforce Democracy and Fairness Act; and, H.R. 2775, the Employee Privacy Protection Act, would be a significant step toward reversing

these unnecessary and misguided policy changes, and restoring the proper balance of rights and interests that had worked sufficiently for decades.

Workforce Democracy and Fairness Act (H.R. 2776)

A. Restoring Pre-Election Due Process and Free Speech Rights

The Board's 2015 Rule altering the procedures around elections significantly limits the time available to an employer to communicate with its employees in advance of a Board run representation election. In its effort to drastically abbreviate the time between the filing of a petition and the conduct of an election, the Board all but eliminated pre-election resolution of significant eligibility, unit inclusion, and other important legal issues, deferring their litigation until after the election. In addition, the Board implemented new time targets, reducing the pre-election period during which the employees may learn about and contemplate their decision to as few as 13 days, down from a fairly consistent annual median of 38-39 days.

The changes in the 2015 Rule changes were, at best, a proposed solution in search of a problem. To the extent they were intended simply to increase union success in organizing, they did so by limiting employer free speech rights protected by Section 8(c) of the National Labor Relations Act ("the Act" or "NLRA"), and infringing on the Section 7 rights of employees to refrain from union representation. Postponing resolution of important legal issues until after an election only serves to enhance union electoral success by allowing them to leverage employer uncertainty and risk. Take, for example, the issue of whether an individual or group of individuals are "employees" covered by the NLRA or rather "supervisors" exempted by Section 2(11). How is an employer to communicate lawfully with these purported supervisors without

knowing whether or not the Board will ultimately find them to be covered or exempt? The employer's choice is either (a) to decline to communicate with these individuals to the maximum extent allowed, and thereby deny these workers, and the workers they supervise, the fullest array of information and discourse protected by Section 7 of the Act; or (b) to risk potentially unlawful communications with them which could have the consequence of overturning the results of an election. It is the lack of certainty *at the outset* of the process that creates these untenable options – all of which create legal exposure for the best-intentioned employers and infringe upon the rights of the employees to seek a prompt, conclusive determination on the issue of representation.

Section 2 of the Workforce Democracy and Fairness Act would restore the pre-election hearing process. This would allow a robust opportunity for early resolution of issues with the potential to impact the election process. This bill would, among other things, require a hearing absent agreement of the parties; provide at least 14 days following the filing of the petition to prepare; and, allow for the creation of a complete evidentiary record on any relevant and material pre-election issues which might reasonably be expected to impact the outcome of the election. This 14 day time period should be sufficient to permit employers – particularly small businesses who may not enjoy the luxury of counsel with subject-matter expertise – to obtain the proper representation and guidance; to properly explore whatever pressing legal issues may exist; and, to present those issues and all relevant evidentiary support at a hearing aimed at resolving any that might impact the parties' conduct during the time period up to and including the election.

Moreover, it would require a period of at least 35 days between the filing of the petition and the holding of the election. All parties can benefit from an efficient determination process, without unnecessary delay. But the rights of employees to seek union representation and the

equal rights of employees to refrain from such representation must be properly balanced. For decades the Board ensured that employees had sufficient time to make this important decision in a fully informed manner. This bill's 35-day minimum provision will not ensure the same timeframe that worked suitably for decades prior to April 2015, but it goes a long way to restoring the appropriate balance between all interests involved.

B. Enhancing Stability and Certainty in Unit Composition

Another effort to facilitate union organizing, the Board's *Specialty Healthcare* decision, 357 NLRB 934 (2011), announced new standards for determining whether the bargaining unit proposed by a petitioning union is appropriate. This Board decision casually cast aside presumptions which were the result of decades of practical experience and case law development, and opened the door to so-called "micro-unit" organizing, whereby unions can gerrymander a large workforce and cherry-pick small units best suited to organizing success.

Section 9(b) of the NLRA provides that

[t]he Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for purposes of collective-bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

29 U.S.C. § 159 (b).

For decades prior to 2011, the Board satisfied this statutory obligation by analyzing a number of factors to determine whether the employees in a petitioned-for unit shared a sufficient "community of interest" to make their representation in a single bargaining unit reasonable and effective. The factors that the Board generally considered in unit determinations included:

whether the employees are organized into a separate department;
have distinct skills and training; have distinct job functions and

perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the Employer's other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised.

Specialty Healthcare, 357 NLRB at 942, quoting *United Operations, Inc.*, 338 NLRB 123 (2002). In 1989, the Board engaged in formal rulemaking to set forth an industry-specific exception to this traditional approach, and promulgated specific rules for the determination of appropriate units in acute care hospitals. See 29 CFR §103.30; *American Hospital Ass'n v. NLRB*, 499 U.S. 606 (1991). Following implementation of this rule, the Board sought in *Park Manor Care Center*, 305 NLRB 872 (1991), to clarify and differentiate its standards for determining units in non-acute health care facilities. The decision added a few industry-specific factors to be considered, in addition to the traditional community of interest factors, when considering units in these facilities. 305 NLRB at 877.

Specialty Healthcare involved just such a non-acute care facility. The employer challenged the bargaining unit proposed by the union, and before the Board, the employer simply argued that the Regional Director had failed to properly apply the *Park Manor* standard. Both parties – the employer and the union – agreed that *Park Manor* standard was the controlling principle in the case. *Specialty Healthcare*, 356 NLRB 289, 292–294 (2010). (Hayes, B., dissenting). Nevertheless, the Board unilaterally sought briefing on whether or not *Park Manor* should be overruled in connection with unit determinations in non-acute healthcare facilities. *Id.* at 289.

The resulting decision discarded entirely the *Park Manor* analysis for determining units in non-acute healthcare facilities, and announced a new standard: where the employees in the petitioned-for unit are a readily identifiable group who share a community of interest, they

constitute a statutorily appropriate unit unless it can be demonstrated that other excluded employees share an “overwhelming community of interest” with the petitioned-for group. *Specialty Healthcare*, 357 NLRB at 947.

This new standard reflects a drastic departure from the traditional standard employed by the Board for decades. In 2010, the Board itself explained its historical approach thus:

the Board’s inquiry “never addresses, solely and in isolation, the question whether the employees in the unit sought have interests in common with one another. Numerous groups of employees fairly can be said to possess employment conditions or interests ‘in common.’ Our inquiry—though perhaps not articulated in every case—necessarily proceeds to a further determination whether the interests of the group sought are sufficiently distinct from those of other employees to warrant the establishment of a separate unit.”

Wheeling Island Gaming, Inc., 355 N.L.R.B. 637, at n.2 (2010) quoting *Newton-Wellesley Hospital*, 250 NLRB 409, 411–412 (1980). See also, *Swift & Co.*, 129 N.L.R.B. 1391 (1961); *U.S. Steel Corp.*, 192 N.L.R.B. 58 (1971); *Publix Super Markets, Inc.*, 343 N.L.R.B. 1023 (2004); *Casino Aztar*, 349 N.L.R.B. 603 (2007).

Yet just one year later, without any explanation of a compelling need, in a case where neither party requested or argued for it, the Board announced a new standard under which any “readily identifiable group” proposed by the petitioning union will be deemed appropriate unless the employer satisfies a new significant burden – proving there is an “*overwhelming* community of interest” between that group and any excluded employees. *Specialty Healthcare*, 357 NLRB at 947 (emphasis supplied).

This course of conduct would be troubling and problematic in itself, had the Board genuinely sought to limit the impact of its decision. The conclusion of the *Specialty Healthcare* projected limited effect:

(1) We overrule one decision, Park Manor, which had created a unique test for unit determinations in nonacute health care facilities (the “pragmatic or empirical community of interests” test).

(2) We hold that the traditional community of interest test—to which we adhere—will apply as the starting point for unit determinations in all cases not governed by the Board’s Health Care Rule (including cases formerly controlled by Park Manor)

Id.

An August 30, 2011 NLRB press release entitled “Board issues decision on appropriate units in non-acute health care facilities,” likewise sought to convince observers that the impact of the decision was limited to one particular type of operation in one particular industry:

In a decision made public today, the National Labor Relations Board has adopted a new approach for determining what constitutes an appropriate bargaining unit in health care facilities other than acute care hospitals (which are covered by the Board’s Health Care Rule).

In addition, the Board clarified the criteria used in cases where a party argues that a proposed bargaining unit is inappropriate because it excludes certain employees. *The Board did not create new criteria for determining appropriate bargaining units outside of health care facilities.*

NLRB Press Release, August 30, 2011, <https://www.nlr.gov/news-outreach/news-story/board-issues-decision-appropriate-units-non-acute-health-care-facilities>, last accessed June 11, 2017 (emphasis supplied).

These proclamations were inaccurate at best. Since issuance of the *Specialty Healthcare* decision, the National Labor Relations Board has applied the new standard in a wide variety of industrial settings beyond non-acute healthcare facilities. See, e.g., *First Aviation Services - Teterboro*, NLRB Case No. 22-RC-061300 (private aviation services); *Odwalla, Inc.*, 357 NLRB 1608 (2011) (beverage manufacturing); *T-Mobile USA, Inc.*, NLRB Case No. 29-RC-012063

(telecommunications); *DTG Operations*, 357 NLRB 2122 (2011) (car rental); *Bread of Life, LLC dba Panera Bread*, NLRB Case No. 07-RC-072022 (bakery); *Nestle Dreyer's Ice Cream*, NLRB Case No. 31-RC-066625 (ice cream manufacturing); *Volkswagen Group of America, Inc.*, Case No. 10-RC-162530 (auto manufacturing); *Constellation Brands, U.S. Operations, Inc., d/b/a Woodbridge Winery*, NLRB Case No. 32-RC-135779 (winery); *Northrop Grumman Systems Corp.*, NLRB Case No. 31-RC-136471 (military equipment); *see also*, U.S. Chamber of Commerce, *Trouble With The Truth: Specialty Healthcare and the Spread of Micro-Unions* (October 31, 2016). In a fairly well-known case challenging the application of *Specialty Healthcare* outside the non-acute healthcare industry, the retailer Macy's is challenging the Board's approval of a micro-unit consisting only of the 41 cosmetic and fragrance salespersons working at a store in Saugus, Massachusetts, and excluding over a hundred other salespersons working in the various other departments throughout the store. 361 NLRB No. 4 (2014). In its decision, the Board expressly confirmed that *Specialty Healthcare* would indeed trump the longstanding retail industry presumption in favor of store-wide bargaining units. *Id.* at 16.

The proliferation of micro-units within a workplace threaten the very thing the National Labor Relations Act is intended to promote – industrial peace and stability. In the dissent from the Court's denial of Macy's petition for a rehearing en banc, Judge Jolly of the Fifth Circuit Court of Appeals explained:

Peace and stability are weakened by the balkanization of bargaining units in a single, coordinated workplace. *NLRB v. R. C. Can Co.*, 328 F.2d 974, 978–79 (5th Cir. 1964). In this case, the NLRB sacrificed considerations of promoting labor peace by using a rationale that approved a small, carved-out bargaining unit that contains no real limiting principle in future cases. For example, nothing in the NLRB's rationale prevents a dozen micro-units within a retail store's salesforce—all fraught with mini-bargaining at multiple times and the possibility of disputes and mini-strikes occurring continually over the working year. One is led to assume,

as the amici suggest, that three bowtie salesman would be an appropriate bargaining unit if they sold bowties at a separate counter from other merchandise. So much for promoting labor peace and stability.

Macy's Inc. v. Nat'l Labor Relations Bd., No. 15-60022, 2016, at *2 (5th Cir., November 18, 2016)(Jolly, J., dissenting).

Moreover, the presence of multiple distinct bargaining units within a single facility is all but certain to greatly limit an employer's ability to meet operational demands via efficient, flexible staffing. Contract provisions limiting performance of so-called "unit work" by non-unit personnel are commonplace in collective-bargaining, and tend to limit cross-training, utilization, scheduling flexibility and promotional opportunities. In turn, these additional inefficiencies and inflexibility will lead to higher customer prices and budgetary pressures before factoring in the additional economic cost of more complex bargaining, grievance resolution, management training and legal assistance.

Section 3 of the Workforce Democracy and Fairness Act would reverse the misguided policy direction of the Board's 2011 *Specialty Healthcare* decision, by restoring the Board's traditional standards for determining whether a unit is appropriate for bargaining. This bill would provide additional stability and mitigate the ability of future Boards to abuse newly announced standards by expressly incorporating the "community of interest" factors into the body of the statute. Finally, it would avoid "proliferation or fragmentation of bargaining units" by restoring the traditional principle of ensuring employees are not excluded from a unit unless their interests are "sufficiently distinct" to warrant a separate unit. These standards are far more consistent with the express terms and intent of the National Labor Relations Act and effectively met expectations for decades.

Employee Privacy Protection Act (H.R. 2775)

The Board's 2015 Rule also forces the employer to turn over personal employee contact information, placing employee privacy at risk. For nearly five decades, employers were subject to the same set of post-petition obligations to provide the petitioning union with employee contact information. *Excelsior Underwear*, 156 NLRB 1236 (1966). Within seven (7) days after the Direction of Election, the employer was obligated to provide the Board with a list of all eligible voters, including for each a home address to allow for union outreach to the voters. The April 2015 rule changes shrank the employer's response time to just two days, required the employer to send the required employee contact information directly to the union, and expanded exponentially the amount of information the employer is forced to turn over – to include all “*available personal email addresses, and available home and personal cell telephone numbers.*” 29 CFR §102.67(l) (emphasis supplied).

These rule changes needlessly upset a delicate balance of employee rights during union organizing efforts which had been working for nearly fifty years. An oft-cited quote by Justice Brandeis proclaims that the “right to be let alone” is “the most comprehensive of rights and the right most valued by civilized men.” *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). More specifically, Section 7 of the NLRA protects not only the right of each employee “to form, join, or assist labor organizations, [and] to bargain collectively through representatives of their own choosing,” but also the right of each employee “to refrain from any or all of such activities....” 29 U.S.C. §157. For almost fifty years, the Board struck a particular

balance between these important employee privacy and Section 7 rights. And notably, during the rulemaking process which gave rise to the 2015 overhaul, the Board failed to cite *any* evidence that the longstanding *Excelsior* list requirement was not working.

Employees who provide alternative contact information to their employers do so for specific, discrete operational reasons – e.g., to receive information about scheduling changes, emergency contact messages, etc. They do so with some expectation that their employer will hold such information for these specific, discrete operational reasons – and not to publicize, sell or share the information with outside organizations for other purposes.

More importantly, these new eligibility list requirements have put employee privacy at risk. The Board’s final rule included the vague and tepid warning:

[P]arties shall not use the list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

29 CFR §102.67(l). But despite numerous comments seeking assurances about enforcement of this provision, the Board declined to include any specific mechanisms to protect against abuse. The more significant risks, however, go far beyond the prospect that a union might intentionally misuse this employee personal contact information. Nowadays, no one is immune from the dangers of data piracy. The risks of falling victim to hacking, “phishing” attacks, and/or identity theft are all increased by the volume of unwanted email or text message engagement directed at employees. Nothing in the rule dictates what measures should be taken to protect this information – for example, whether it might be stored on secured networks only, or whether it must be destroyed upon resolution of the petition, etc. The Board glossed over all these very real concerns. In sum, it acknowledged there were employee privacy risks exacerbated by the new

rules, but simply concluded that the increased ability of unions to communicate their campaign message to the employees outweighed the risks to individual employees.

Compressing the time within which an employer has to assemble and transmit all of this employee contact information from seven (7) to two (2) days has unnecessarily complicated the early stages of the election process. Many employers simply do not have all of the required information in one centralized location, or in a single common format for simply compiling and e-mailing. Dedicated legal and/or human resources staff – to the extent an employer has it -- will likely have been heavily occupied with the other important practical and legal considerations, some described above, required on a compressed timetable by the 2015 Rule.

The most significant problems with this new standard are perhaps illustrated by the Regional Director's Decision and Direction of Second Election in the *Danbury Hospital* case, NLRB Case No. 01-RC-153086 (October 16, 2015). On June 19, 2015, the Board conducted an election among a unit of 866 eligible voters. The tally of ballots showed that 346 employees voted for union representation, while 390 employees voted against. The union filed objections, blaming its election loss, in part, on the employer's failure to provide a "complete voter list," pursuant to the new rules. The undisputed facts were that the employer provided a complete list of names and home mailing addresses by running a report from its Human Resources database. This list, to the extent accurate, would have satisfied the *Excelsior* list requirements in effect during tens of thousands of representation proceedings from 1966 until April 2015.

The list also contained telephone numbers, either home or cell, for approximately 94% of the eligible voters, and whatever e-mail addresses were in the database. The employer thus provided significantly more opportunity for union outreach than was customary for almost 50 years. Yet, the Regional Director sustained this objection, discarding the employees vote against

union representation and ordering a re-run election, because the employer did not show that it made a diligent enough search of additional contact lists maintained by each separate department, the hiring office's recruiting system, and even perhaps, individual teams and managers, to determine if there were any additional employee telephone numbers or personal e-mail addresses not turned over to the union. In demanding this level of scrutiny of an employer, the Regional Director expressly rejected the employer's protest that obtaining additional e-mail addresses from the hiring system would have required sorting through 36,000 records -- to *possibly* locate some additional information for some of the 866 eligible voters. This interpretation of the Voter List requirements thoroughly undermines the Board's pronouncement upon implementation that "assembling the information should not be a particularly time-consuming task." 79 Fed. Reg. 74308, 74354 (Dec. 15, 2014). By requiring this extreme level of evaluation, search and compilation of data in a 48 hour period -- and invalidating election results for the employer's failure to find and then turn over every single stone in search of a stray e-mail address -- the new rules are serving as a vehicle to impede, not protect, the Section 7 rights of employees.

The Employee Privacy Protection Act would restore the seven (7) day time frame for the careful compilation and transmittal of this information directly to the National Labor Relations Board -- which procedure worked sufficiently for nearly fifty years. Moreover, it would afford employees the choice of which single method of contact each would prefer for receipt of union campaign communications. This puts the choice of showing interest and sharing personal and private contact information -- of choosing to engage or to refrain -- in the hands of the employees, where the statute properly places it.

CONCLUSION

For all the reasons set forth above, the Subcommittee should move expeditiously to passage of H.R. 2776 and, H.R. 2775, to fundamentally correct the unnecessary and misguided direction undertaken by the Board in this area during the past six (6) years.

Chairman WALBERG. Thank you for your testimony.

Thanks to each of you.

And now, noting that the witnesses pretty well kept to the time period, I would say the same thing to my colleagues here -- of course, not the one I'll recognize first, and that's the chairwoman of the full committee, Mrs. Foxx.

We welcome you for your statements.

Mrs. FOXX. Thank you, Mr. Chairman.

As chair of the full committee, I just want to take a moment to thank everyone for accommodating our time change today, especially the witnesses who came from out of town.

As Mr. Walberg noted in his opening comments, this is a very sad day for this House. I know we're all praying for our colleagues, Members and staffs and brave Capitol Police, officers who suffered such a terrible act of violence this morning.

But I truly believe that the best way we can honor our friends who are in the hospital or recovering with loved ones this afternoon is by doing what they would be doing if their day had not taken such a tragic turn, is by doing what all of us came here to do, and that's the people's work. So I do want to thank again everyone, our colleagues on both sides of the aisle, for being here.

Now, I'd like to ask some questions of our witnesses. And, again, thanks to all of you for being here today and providing your valuable testimony and staying within the timeframe.

Ms. McKeague, there's obviously concern among workers that the ambush election rules require employers to turn over to unions a number of pieces of personal information, including workers' home addresses, phone numbers, personal cell numbers, personal email addresses. This rule also puts employers in a difficult position.

Can you give some examples of the burdens the 2015 changes to [Excelsior List] pose for employers? Additionally, what types of problems arise from needing to provide more information only two days as opposed to the prior seven-day standard?

Ms. MCKEAGUE. Yes. Thank you very much.

As most of you are probably aware, because you've been in the position of being on the giving side of that information stream yourself, we compile a lot of information about our employees, and it may be in a couple of different databases. So we have, you know, home addresses, home telephone numbers, cell phone numbers when they give them to us. We have the same information about their dependents. We start collecting Social Security numbers as soon as they're issued on their infants. We have military records. We have background check information. We have all sorts of sensitive information, and they're stored in a variety of different ways.

The problem it creates for me, as an H.R. professional, is that these employees trust me to keep that information confidential. Because with the wealth of information I have, I can become them if I wanted to for purposes of applying for a credit card, getting a mortgage, doing anything that I shouldn't do with this. The chief rule I have for our H.R. team is that to misuse or leave that information out where it's available to somebody else is a dischargeable offense.

In order to provide the Excelsior List information, I have to sort out from that what's being asked for on the Excelsior List. I have

to check to make sure that it's accurate, because if it isn't accurate, I can be fined for that.

Employees don't always update the information with me. For instance, a lot of my employees now, while I have a landline listed for them, they no longer use a landline, so I just have a cell phone. They certainly don't update the cell phone if they get a secondary cell phone.

So it takes me a while to go back through that to make sure that it's as complete as it can be. And I only have 110 employees. So I can only imagine what it's like at a larger enterprise, which is more likely to be the target of an organizing drive.

Mrs. FOXX. Thank you very much.

Mr. Borden, over the last eight years, the National Labor Relations Board made a lot of changes under the facade of helping workers. However, it appears to some of us that these changes actually hurt those they're intended to protect.

For example, it seems to me the Board should be able to review the decision of a regional director before union election takes place. Can you give some examples of why pre-election board review is essential?

Mr. BORDEN. I'd love to. I think that this is, in particular, an area where the Board's 2005 -- 2015 rule, pardon me, got it exactly wrong. I think that when there are important questions of unit eligibility, inclusion, important legal issues that are likely to impact the conduct of the parties in the weeks leading up to an election and possibly impact the election itself, it is in everybody's best interest to have those issues resolved at the outset.

Nobody wants to play an entire game only to find out after the final buzzer that the rules have been completely changed and all of a sudden Tom Brady is on the other team and all his touchdowns count for them instead. No one wants to find out the rules that they're playing under after the fact.

And I think that the restoration of the pre-election hearing process here to resolve those issues -- is someone a supervisor or not? That has very, very serious legal implications for an employer and the people with whom it can communicate and how it communicates during an election contest.

Issues of eligibility, voter eligibility, the Labor Board does a phenomenal job of protecting the secrecy and the privacy of the ballots cast. But my experience has been that employees don't want to hear: Oh, your eligibility is being contested so you can vote in this election, but your ballot may become the source of litigation after the fact.

That has a chilling and intimidating effect that is unnecessary if we are able to resolve those issues at the outset.

Mrs. FOXX. Thank you.

And I just want to say, Ms. Cox, thank you for the courage you showed and the actions you took and for being here to share that.

Thank you, Mr. Chairman. I yield back.

Chairman WALBERG. I thank the gentlelady.

And I recognize the ranking member, Mr. Sablan.

Mr. SABLAN. Thank you very much, Mr. Chairman.

Mr. Calemene, Jody, welcome back. It's good to see you again. Thank you very much for appearing this afternoon, and thank you for your many years of service to this committee.

Your statement says that, while the three bills under consideration today are relatively short, they are packed with malicious intent. You pointed out that the true goal of the legislation is to weaken or eliminate unions. So, if this bill is forever enacted, what would become of collective bargaining, and what would be the effect on income inequality in our nation?

Mr. CALEMINE. It's well studied that unions help push wages up, not just for their own -- the companies that are unionized—but their competitors then are forced to increase wages and benefits. A good example would be in the auto industry: UAW has done a good job of setting standards for wages, and it has helped push up wages across the industry.

It would, in an immediate sense, as union -- if unions were eliminated, when we bargain, we bargain higher wages. We have I think a 27 or so percent difference between what union members make or what unionized workforces make compared to nonunionized workforces. It makes a huge difference in terms of -- that difference is even more dramatic when you look at the wage differences between union and nonunion workers who are women or African American or Latino.

It just -- it does -- if we were to -- if these bills were to become law and organizing were to become next to impossible, especially under the *Employee Rights Act*, we would see income equality, just to get to the bottom line here, exacerbated and all the social and economic ills that come along with that.

Mr. SABLON. All right. Yeah.

And H.R. 2723, if it becomes law, it would require the majority of all eligible voters in order to certify the establishment of a union but would only require a majority of those actually casting ballots to the decertify a union. So that means that all nonvoters are "no" voters when it comes to electing a union, and you alluded to saying that some of us may not be here. I agree with you, my first two elections, I would not be here.

But is there a double standard that sets out different tests for certification and decertification elections, or is this simply what it appears to be, a blueprint to eliminate unions?

Mr. CALEMINE. Well, it's absolutely a double standard in this bill, what the *Employee Rights Act* does. As you said, if you are a non-union workforce trying to become union, to do that you would need the votes of all eligible voters -- or I'm sorry -- a majority of all eligible voters to win.

If you're a union shop, going through this automatic decertification process that has been -- that is introduced in this new bill, to decertify, you only need a majority of the votes cast. So it's far harder to win a union, far easier to eliminate a union.

Mr. SABLON. So, then, if I understand H.R. 2723 correctly, there's a mandatory requirement for union recertification elections also every three years if there is a 50 percent employee turnover since the previous union election. So doesn't this effectively amount to a decertification process even though there was no decertification petition filed?

Mr. CALEMINE. Right. Even though no worker may have wanted to decertify, there's now this process that causes an election to happen when the workforce changes by at least -- or, I guess, one more than 50 percent.

Mr. SABLAN. Right.

Mr. CALEMINE. There's an automatic decertification, probably triggered by the employer's changes to the workforce.

Mr. SABLAN. Right.

And, Jody, you very well know me. I'm from the insular areas, the territories. In this committee, we're calling the outlying areas. On Sunday or Saturday, there was an election in Puerto Rico where 93 percent of those who went to vote voted aye for statehood, but only 26 or 27 percent of the population of the registered voter population voted. So is that a majority of voters? I mean, is that how we would win union elections also?

Mr. CALEMINE. Yeah, I don't follow exactly, but it doesn't sound like it.

Mr. SABLAN. All right.

Mr. Chairman, my time is up. Thank you.

Chairman WALBERG. I thank the gentleman.

Now I recognize the gentleman from Georgia, Mr. Allen.

Mr. ALLEN. Thank you, Mr. Chairman.

And thanks to our panel for being here and talking about this important issue.

Mr. BORDEN. I'm interested to know about the impact of the combination of all these Board changes in recent years. For instance, what is the relationship between Specialty Healthcare and the NLRB's ambush election rule, and what effects have you seen since the decision and the rule were handed down?

Mr. BORDEN. Sorry. I think it's hard to even focus on just the interchange of those two changes because there were so many changes during the last five or six years where the Board changed drastically longstanding principles of law that are critical to an employer's approach to these issues and critical to the balance of the employees' unions and the employers' rights: the joint employer standard, which was overhauled significantly; the multiemployer bargaining unit cases whereby third-party employees can be included with the regular full-time employees of an employer without the consent of all parties; and even some of the more discrete issues like use of the employers' equipment for organizing purposes.

These all cast aside 30, 40, 50 years of precedent and the manner in which employers were accustomed to doing things. When you add in the fact that now, on a compressed time framework, where the employer has only a few days after the filing of a petition to discover all of the legal issues that they may have to approach, consider these new legal frameworks, compile all of the evidence that might be necessary for assessing and addressing those issues to the Board in the hopes -- in the hopes -- of getting a hearing to create a record and preserve issues, and then you couple that with the further complication of the Specialty Healthcare standard that they'll be forced to consider and the need to do all of these other things, like compiling all this data that Ms. McKeague spoke about, in order to get it to the union within just two days after that direc-

tion of election, it eats significantly into the resources and the focus that employer has to exercise its free speech rights for whatever timeframe it might have before that election.

Mr. BORDEN. And it makes it harder to comply with all of the technicalities.

Mr. ALLEN. Certainly, Ms. Cox, in your testimony, you brought some examples about some of the issues you've dealt with. You know, we're talking here today about legislation that would correct some of these things.

Mr. Borden, you talked about -- let's talk about the overwhelming community of interest test. When does the Board use this test in determining bargaining units, Mr. Borden?

Mr. BORDEN. Well, the answer to that question differs as to whether you meant before 2011 and the Specialty Healthcare decision or now. The overwhelming community of interest language was plucked out of an unrelated standard that the Board employed in -- traditionally in accretion cases, which is the standard that's applied when you have an existing bargaining unit in place represented by a union. And the union or employees petition for the inclusion of another group of employees into that existing bargaining union without an election. And the Board had traditionally looked at that and said, we'll only allow that to take place if those additional employees share an overwhelming community of interest with the already represented employees.

Mr. ALLEN. Okay.

Mr. BORDEN. The Specialty Healthcare case, pluck that language out of context and applied it to the traditional test that turned the traditional test on its ears to change and add a significant burden to employers when they wanted to challenge the handpicked unit that a union petitioned for.

Mr. ALLEN. Does the *Workforce Democracy and Fairness Act* adequately address this issue? Do you believe it?

Mr. BORDEN. I think it does. I think it does by -- as I said in my opening comments, by putting the traditional community of interest factors, the test that had been used for decades prior to Specialty, expressly into the language of the statute, it would provide that clarity and that stability, the inability of a future board to approach this issue unilaterally and kind of whimsically change the standard.

Mr. ALLEN. I yield back, Mr. Chairman.

Chairman WALBERG. I thank the gentleman.

And I recognize the gentleman from New Jersey, Mr. Norcross.

Mr. NORCROSS. Thank you, Chairman. And our thoughts go out for what happened today, a remarkably sad day.

But I want to start with what the Speaker talked about, and that is the relationships and working together. You on this panel know that I worked as a business agent for close to two decades. I've lived what you're talking about today. And my hand is extended, and any time you'd like to hear a view from the opposing side, who have been to the NLRB, who had filed elections.

But let's look at the facts. It almost seems like we're in some alternate universe of how bad the employer has it. I'm going to bring to your attention the percentage of union workers over the course of the last quarter century. When those are telling us you have it

so bad. We're down to 10 percent, the union side. You can see it behind you. So all these horrible rules, yet you're still winning all the elections. Facts count, and this is what I want to be talking about.

Now, we as a country many years ago decided that people would have a voice in the workplace, that they would be able to join unions, have collective bargaining. Well, there's been a tremendous drop over the course of -- since 1983. And there is just so much to cover here today, but I want to try to focus in on a couple of those.

First and foremost, when we talk about access to the employees, the employer has unlimited access. They have any number of meetings that they want to put together, there's captive audiences. It's up to you. And you're suggesting that you don't even know your own employees. And to say you can't pull the electronic information out—I think my 12-year-old grandson could pull that out. This is not burdensome. In fact, union membership has gone down since you put this rule into effect. I know the lawyers like it. This creates a lot more opportunities, but this is just trying to create fairness.

There was a statement made by Ms. Cox that talked about the employees who had signed the authorization card to receive -- they said they thought they were going to receive union information. The fact of the matter is that can be used as an unfair labor practice. And I have one right in front of me that talks about exactly what it says: I hereby accept membership in the above-named union, and on my own free will, I hereby authorize.

So, Mr. Calemene, is there anything in this that you would say is deceptive?

Mr. CALEMINE. No, it's very plain language.

Mr. NORCROSS. It's one that's used universally, because the card could be thrown out if it's not following the rules, right?

Mr. CALEMINE. All cards have language along those lines.

Mr. NORCROSS. Why do you think we're in this position today, the ambush rule as they call it? Where's the problem with that if the elections are still, by majority, being won by the employer?

Mr. CALEMINE. Well, I think -- I appreciate the question, because it allows me to provide more context for what's going on here. There isn't -- it's not as if when the petition is filed -- I would be surprised if there's a case out there where -- or that there are very many cases out there anyway where an employer did not know workers were trying to organize a union until that moment that petition was filed.

An organizing drive takes a lot of work and it is very difficult, because the union does not have access to the workplace; the employer has total access. So there's a lot of attempting to get people's attention outside, to meet with people outside of work. And as Ms. Cox described, when you're a union supporter trying to organize a union, you're also confined to nonwork areas, nonwork time when you're in the workplace. So it's very difficult.

So I don't view this as ambush. I actually -- I think what happens is when the petition is filed, I think it sends a signal to the employer, uh-oh, they must now have the votes, and now is the time to really start campaigning to switch those people back. So the more time they have after a petition has been filed, the better off they are. I think there have been studies showing that that's

the time when unfair labor practices are more likely to be committed in that timeframe. So I think that's a fine time to turn the election.

Mr. NORCROSS. Five seconds less on your support bill, but, again, when we can work together, that's how our country will grow, not by creating the good guys and the bad guys or the union and the employer. We really could have a conversation and work this out.

I yield back.

Chairman WALBERG. I thank the gentleman.

And now I recognize the gentleman from Michigan, Mr. Mitchell.

Mr. MITCHELL. Thank you, Mr. Chair.

Ms. COX, I don't want you to get bored there, especially all the time you waited. And thank you to all of you for rearranging your schedules today.

I'm aware of concerns that employees have that sometimes they don't feel adequately advised what the consequences of signing a card given to them by union organizers, union representatives. In your experience, did the union provide you and your fellow employees with accurate information about what it meant to sign the card? And what recourse did you have?

Ms. COX. Many of my coworkers were very upset after they found out we were not going to have an election, because they were told, no matter what it said on that card, they were told that if they signed that card, they would get information about the union, whether or not they wanted to decide to have a union or not.

And they did this -- actually, nobody was doing this petitioning outside of work like I did when I was doing it on the other side. These people were doing it on work time and inside the building, during work hours. They weren't supposed to, but, you know, they were sneaky about it.

Mr. MITCHELL. And you didn't think that was quite as balanced as it should be, I assume?

Ms. COX. No, I do not. I don't think that's fair at all.

Mr. MITCHELL. Let me ask you a question, giving that information, your personal information as part of the union organizing drive, the current system has basically any of the identifying information short of your Social Security number and your address, all your telephone numbers, all of that is required to be turned over as part of the organizing drive. What's your opinion of that?

Ms. COX. Of the union having my address and everything?

Mr. MITCHELL. Address, all your phone numbers, your cell number, they're entitled to all that, based on the current rulings.

Ms. COX. Well, I don't agree with it. I do know that, after I started petitioning, many of the union reps were visiting homes and upsetting many of my coworkers, because they came to their door and tried to persuade them against me.

Mr. MITCHELL. Did any of your benefits people come to your home to talk to you about your health insurance benefit or anything else?

Ms. COX. No.

Mr. MITCHELL. They didn't. But they're supposed to help you out as workers. Do you know if any of the union organizers come to talk to you?

Ms. COX. No.

Mr. MITCHELL. Did the union come to talk to you about what the contract negotiation should be like? Did they stop in to see your thoughts on that?

Ms. COX. No, they did not.

Mr. MITCHELL. So they only came by to make sure you signed the card so they could organize.

Ms. COX. Exactly.

Mr. MITCHELL. Well, so much for being concerned about representing the employees.

Ms. McKEAGUE, we talked about the distribution of information with the [Excelsior List.] My company had 650 employees. I'm not -- to be brutally honest with you, I'm not sure we could ever comply with a two day turnaround with the information required by that list. More importantly, is there any other function that you had that requires you turn over a list to that extent of your employees to some other entity?

Ms. McKEAGUE. The only way I would turn over any of that other information would be under a court order.

Mr. MITCHELL. That would be as a result of some legal action or a subpoena?

Ms. McKEAGUE. Generally, the only other time I would get a request for that kind of information without the employee's consent would be under a pending divorce action or a child custody dispute.

Mr. MITCHELL. But that would only be for one employee, correct?

Ms. McKEAGUE. That would be one employee, correct.

Mr. MITCHELL. One or two, depending on the circumstances. Right.

Ms. McKEAGUE. Yes.

Mr. MITCHELL. But not all of your employees?

Ms. McKEAGUE. No. I've never seen a circumstance where it would be required for all of my employees.

Mr. MITCHELL. And you've never -- other than the union organizing activity, never seen -- I've never it in my career other than this. It is the most unique thing I've seen.

Ms. McKEAGUE. Correct. And this is information that all of us teach our children not to hand out to anybody else because of the risk.

Mr. MITCHELL. As a matter of fact, you're right.

Ms. McKEAGUE. Uh-huh.

Mr. MITCHELL. And when we obtain utility service, health insurance, I can give you a long list, we in fact only provide specific information we want to provide for contact. We get to choose. But in this one instance, under the current rulings, all that information is released.

Ms. McKEAGUE. And that's my objection, is it's done without the employee's consent.

Mr. MITCHELL. And to be direct and honest with you, it's my objection as well, which is why I support the legislation that would make this change and will urge us moving forward when it comes time for markup.

My time has expired. I appreciate everyone being here. Have a good weekend.

Chairman WALBERG. I thank the gentleman.

Now I recognize the ranking member of the full committee, Mr. Scott.

Mr. SCOTT. Thank you, Mr. Chairman.

Ms. McKeague, you mentioned some problems at the acute hospitals. So there are special rules for organizing bargaining units in acute care hospitals?

Ms. McKEAGUE. I'm not a specialist in bargaining. Most of my hospitals that are organized have very good cooperative, respectful relationships with their bargaining units. And assuming that this goes back to the Specialty Healthcare decision, this is where I will agree with Mr. Calamine about Specialty Healthcare.

I believe the circuit courts of appeals, it was mentioned earlier, eight of them agreed with the NLRB on Specialty. I think that was a very fact-specific case dealing with a nonacute care facility and the bargaining unit. And I believe the circuit courts got it right.

My concern on Specialty, which has since been used to deal with microunits outside of the nonacute care setting, has been that it could be used, if it isn't corrected, on a go-forward basis in an acute care setting would be very dangerous.

Mr. SCOTT. Well, that's why there are special rules in acute care hospitals. Has your position taken -- speaking of healthcare, has your position taken a -- has your organization taken a position on the TrumpCare?

Ms. McKEAGUE. Yes.

Mr. SCOTT. What is it?

Ms. McKEAGUE. The Michigan Health & Hospital Association has taken a position. SHRM, which I'm here to testify on behalf of, has not.

Mr. SCOTT. And what is that position?

Ms. McKEAGUE. Michigan Health & Hospital Association is opposed to the *Affordable Health Care Act* which the President has proposed.

Mr. SCOTT. Thank you.

Mr. Borden, you've indicated a need to get everything straight before the vote. If the subjects of the litigation would be moot because the number of votes in controversy are overwhelmed by the margin victory, why shouldn't the vote go forward?

Mr. BORDEN. Well, I think there are, as I mentioned earlier, there are practical consequences and possible real legal exposure that employers are forced to undertake if they don't have the certainty of certain issues.

Mr. SCOTT. Right. But, I mean, you can argue about one or two votes here, one or two votes there. If the margin of victory was like hundreds of votes, why would you delay, through various levels of litigation, the vote to get -- to figure out whether or not those votes are eligible or not eligible when all of those questions would be moot if there is a much larger margin?

Mr. BORDEN. I think because there are issues beyond simple inclusion or eligibility of certain voters that pertain to whether their vote will count or not. The issue of supervisory involvement is one that I mentioned, is the one that springs most chiefly to mind.

Mr. SCOTT. And if you're arguing about a handful of votes when the margin is hundreds, why would you want to delay a bill and wait for a final verdict?

Mr. BORDEN. Because it has nothing do with the handful of votes. It has do with the fact that if there are 10 or 15 workers who an employer deems to be supervisors, management, agents of the company, and the union contends are employees, failure to resolve that issue at the outset has far reaching consequences. Now, as an employer, I'm forced to make a decision. I'm forced to either decide I'm not going to talk to these 15 people, who I earnestly believe to be members of management during this campaign, deny them the information and my communications --

Mr. SCOTT. So if you can find side issues that would be totally moot, if you could just get to a vote --

Mr. BORDEN. With due respect, I don't think the supervisory issue is mooted. And, frankly, it threatens to undermine the vote.

Mr. SCOTT. It would be mooted if you're talking about a handful of supervisors and you're about to lose the election by hundreds of votes. Why should you be able to delay for months and even years an election, Mr. Calemene?

Mr. CALEMINE. Yeah. I was just pointing out -- I think the question of whether or not somebody is a supervisor or not, if it's a real problem for the employer, it's been a problem for a long time, because the organizing drive has been happening for a long time. You only get to resolve these questions at the end. And it's at the end of that campaign, that long campaign, whether the election is about to be delayed or not, on some level.

I also just wanted to make a point that with respect to all the information that the NLRB rules allow -- now have employers provide to unions, these bills do not protect employees' privacy from their own employers. That is, the employers can compel employees to give them their email addresses, their personal email addresses, their personal cell phones, et cetera, for purposes of use in the campaign. So one side, again -- and remember that the reason this has become an issue for 50 years getting this [Excelsior List] is that the union is not permitted to come into the workplace.

It might be a completely different debate if what we were actually debating was the unions -- to avoid having to talk to workers outside of the workplace—if unions were entitled to access to the workplace. That would be -- and in some cases, that's what happens, employers and unions will reach an agreement to provide for union access, but unions aren't entitled to that. So how are unions supposed to talk to the voters when the employers have the voters captive, essentially, for captive audience meetings or throughout the workday and talk to them all the time? There's just -- this is just a matter of fairness.

Chairman WALBERG. The gentleman's time has expired.

Now I recognize the gentleman from South Carolina, the sponsor of H.R. 2775.

Mr. WILSON of South Carolina. Thank you, Mr. Chairman. And thank you, Mr. Chairman, for your dedication and leadership for meeting today and with our thoughts and prayers with Congressman Steve Scalise, the U.S. Capitol Police, and then staff members. And I particularly am thinking of different offices, like the office of Tim and Sue Walberg, that their office has been directly affected. And it's just so impressive to have a chairman who will con-

tinue on important issues as we work for the citizens of our country. God bless you. Thank you.

Ms. McKeague, in your experience, are union organizing campaigns always started by employees or is it instead a result of a union operative coming in from the outside? Can you explain the process?

Ms. MCKEAGUE. No, they're not always started by employees, but there has to be a receptive employee for the union to get a foothold in the organization. So, you know, generally it's a little bit of both. And my experience tends to come from a receptive audience within our workforce. And it's generally more successful when there's been a relationship between an employee in one of our facilities and somebody from the union which wants to become recognized in the workplace. That can come about from a friendship or an existing relationship with an employer where that employee used to work, but it generally comes out of a collaborative working relationship or friendship that they've had someplace else.

Mr. WILSON of South Carolina. I'm grateful. In my home state of South Carolina we've recently had an organizing campaign at the Boeing facility in North Charleston, South Carolina, and it was really outside. And to the credit of the workers, the results of the most recent vote was 73 percent not to organize. And it was truly a credit of the workforce, a credit to the personnel there, such a positive environment. And we in South Carolina truly benefited. We now have nearly 9,000 people at that facility in North Charleston. And then the ripple effect for suppliers. Throughout the district, I represent perturbing for interior for the cable, and so we've seen a very positive result just recently in my home state.

Ms. Cox, I want to thank you for being here today and sharing your information. I share your concerns about employee privacy. You and your father's experience with the threat made by union representatives shouldn't happen to American workers or their families. Yet there are numerous articles that cite similar occurrences.

In a [Washington Times] article, Jennifer Parrish tells of how a person came to her house uninvited and became increasingly angry when she refused to sign his petition. The petition he wanted her to sign was indeed a union authorization card.

The ambush election rule that we're discussing today requires employers to provide even more private information to union representatives than before.

You mentioned your family has been contacted. How did the union get that information? Given your experience, does providing even more private information about the employee increase the possibility of greater coercion or harassment from paid union organizers?

Ms. COX. I'm really not sure how they got my dad's -- even his name, because we don't share the same last name, and I was not living with my parents. I'm not sure -- he must have done some research on me beyond my address and name.

Mr. WILSON of South Carolina. Well, again, thank you for your courage for being here today.

Mr. Borden, thank you for your service. As a fellow attorney, I particularly appreciate your insight. And as we have legislation

today, I appreciate your endorsement of the *Employee Privacy Protection Act*. And can you give any other reasons why this is so important?

Mr. BORDEN. I think that beyond the -- beyond just the problems that the other witnesses have spoken to about turning this personal contact information over is the manner in which some regions of the Board have enforced these new requirements. And what particularly comes to mind is a case coming out of the Boston region, Danbury Hospital case, where despite the fact that within this two-day timeframe the employer turned over every voter name, every voter home address, what had been required for 50 years, to the union, had turned over phone numbers and/or email addresses for 94 percent to the bargaining unit.

So that was far more than any union had gotten in any election in 50 years from an employer. Because the Board regional director found that they did not do an extensive enough search of individual department lists and separate lists that might be maintained, even perhaps by individual managers, to see if there were any other available numbers or email addresses available, he threw out the results of that election. This enfranchised 390 people that voted against that union. That is not a reasonable result within the framework of these new rules.

Mr. WILSON of South Carolina. Well, thank you for your background very much. Bye-bye.

Chairman WALBERG. I thank the gentleman.

And now I recognize the sponsor of H.R. 2723, the chairman of the Veterans' Affairs Committee and the gentleman from Tennessee.

Mr. ROE. Thank you, Mr. Chairman.

I'm going to associate my remarks with Mr. Wilson in his comments about what happened today. And I thank all of you all for being here.

Mr. Calemine, I thank you for your years of service on the minority.

I want to get a couple of things in the record, Mr. Chairman. To start with, one, less than 10 percent of union members ever voted for a union they currently represent. Number two, since the ambush -- the so-called ambush election rule came in, unions were winning, at that time, 68 percent of representation case elections, contrary to what Mr. Calemine said. And as fiscal year 2016, the first full year of the rule when the elections were representation cases, it won 72 percent.

I know as an employer there's no way on this planet I could get an attorney, a labor attorney in 10 or 11 or 12 days to represent me. There would be no way I could educate myself. I am completely disarmed. So I want to get that on the record.

Number three I would like to get on the record is that the *Railway Labor Act* covers major airlines and rail employment has the same absolute majority requirement in election for over 75 years, that's been going on. And to compare that to an election we have, which is going to get me to the secret ballot election, is that a Congressman can't deduct anything from your paycheck. We can't force you to go on strike, and we can't have you fired if you don't follow the rules. There's a big difference.

Forty-four years ago, right now, I'm 11 miles south of the demilitarized zone in Korea, serving in the United States Army. I put on that uniform and left this country so that you could have a secret ballot to elect me, the President, and the union heads. And yet Ms. Cox can't get that if there's a card check. She can't have the same protections.

And, Ms. Cox, I think that bothers me more than anything, is that I think we need to have -- this country was founded on the secret ballot. My wife tells me she voted for me. I don't know that for a fact because it's a secret election, a secret ballot. And I think that you as an employee ought to have exactly the same right. And I cannot understand why anybody at this dais would not insist that you have that right. While somebody could check a card and then decide for you belong to an organization, I don't get that.

And I want to ask you, and you spoke very eloquently about this, decertification process that you personally went through. But you took your own time, you traveled in the NLRB office. And it appeared, all to no avail, two years later they threw the ballots out. And do you believe that individual employees are given a voice in the process as you describe in your testimony or is NLRB more concerned with interest of unions and employers instead of the employee?

Ms. COX. I truly believe that the NLRB was very biased and sided with the union. I mean, I don't know how -- the petition that I filed that got us the election was filed before -- I'm sorry -- after they scheduled the ratification. They were done bargaining. So how can the NLRB tell me now that we didn't deserve that election because they didn't have enough time to bargain when they already were done?

Mr. ROE. So why do you think that was?

Ms. COX. Why do I think --

Mr. ROE. Why do you think the NLRB ruled like they did?

Ms. COX. I'm really not sure.

Mr. ROE. Do you think that was a fair ruling?

Ms. COX. No, I don't think that's fair at all.

Mr. CALEMINE. I can answer.

Mr. ROE. I think another thing that's in the bill that I have here is secret ballot votes for a strike. I grew up in a union household. My father worked in the United Rubber Workers union. And I remember the strikes we went on, that he had to go on, where our family was deprived of income. Some of them went as long as 3 months. I mean, I can still remember those. We would go out and sand floors and do whatever we could to make a living to feed our family. And eventually his company left the country. And here's a 50-year-old, after World War II -- 50 years old, a high school education and no job. And so I've seen where people have lost their job; not have higher wages but no wages at all.

And, Ms. Cox, I think your testimony is incredibly compelling to me, when you didn't want this, you weren't afforded the rights that I think any employee ought to be afforded.

Ms. COX. Thank you.

Mr. ROE. Mr. Borden, do you have any comments on that?

Mr. BORDEN. I do not, other than to say that the Labor Board does usually do a phenomenal job of trying to protect the secrecy and the privacy of the ballots in those elections.

Mr. ROE. Why would they have thrown them away?

Mr. BORDEN. I think it's one of the things, frankly, that the Labor Board does best.

Mr. ROE. I yield back, Mr. Chairman. Thank you.

Chairman WALBERG. I thank the gentleman.

And now I recognize myself for five minutes of questioning.

Ms. McKeague, the ambush election rule is especially difficult for smaller employees -- employers. Excuse me. Are smaller employers particularly affected by the timetable of an ambush rule?

Ms. McKEAGUE. Yes, in my opinion, they are. Most small employers don't have an HR staff, certainly not a professional staff in most cases. And as was just noticed -- mentioned, they certainly don't have a retained legal counsel that specializes in labor law. And in order to hire outside counsel, even if you were able to hire somebody in that first day or so, they have to do a conflict check in order to take you as a client, that of course means checking you against everybody else.

Chairman WALBERG. How long would that take?

Ms. McKEAGUE. A minimum of -- a minimum of 72 hours, depending on the size of the firm.

Chairman WALBERG. You're talking of seven days potentially that you have, right, to get this accomplished? Taking out those 72 hours?

Ms. McKEAGUE. Yeah, taking out the 72 hours, because you can't go over the facts of the case with them, the lawyer, until you know that they don't have a conflict. So you're in a holding pattern until they can get that conflict checked done. So you've lost three days before you can even sit down with outside counsel and go over it. So you can start to do some background work within your place of business, but if you don't have the internal expertise to do that, you're dead in the water for three days before you can even start to get up and running. So as the gentleman noticed, yeah, you are already past your two day period.

Chairman WALBERG. Even for the employer with best interests to make sure that a fair disclosure is given out there and an employee of his or her business understands very clearly it is almost impossible, especially for the small employer, to do the due diligence, to care for their employees, as well as their own setting to keep the jobs.

Ms. McKEAGUE. I would say for an employer of fewer than 50 employees, impossible. For an employer of 100 or fewer, still a very close call.

Chairman WALBERG. It's tough. Thank you.

Mr. Borden, the Obama NLRB sought to tilt the playing field, as we discussed, under the guise of helping employees like Ms. Cox in the direction of unions. In your experience, when do employers become aware of union organizing drives?

Mr. BORDEN. I would say that there's been a -- that I've seen a varied experience there, to be candid. I think there are some employers, as Mr. Calemine suggests, that are aware ahead of time, that have the heads-up. But just as much, I have seen that more

savvy union organizers make a concerted effort to stay below ground for as long as they possibly can and to use as much time, weeks, months, or years prior to filing a petition, prior to alerting the employer to what's going on to organize a group of employees that are going to drive the organizing effort.

Chairman WALBERG. And the ambush rule has made it even more challenging?

Mr. BORDEN. Well, it's made it more challenging in the sense that, regardless of how much time ahead of the filing of the petition the union has been working quietly, the amount of time that the employer has after the filing of that petition has been significantly reduced.

Chairman WALBERG. Ms. Cox, thank you for sharing firsthand experience that you've gone through, you've walked through and had a memorable, to say the least, testimony to share for this committee today. It's the most important perspective, I believe, to consider, how it actually works in relationship with the employee.

In your experience, are the interests of employees and interests of unions always the same?

Ms. COX. I'm not sure what you mean.

Chairman WALBERG. Looking at how this came about in your life, was the interest of the employee and the interest of the employer the same, and especially in its impact upon you?

Ms. COX. The interest of -- like my interest as an employee compared to my employer?

Chairman WALBERG. Employer, correct.

Ms. COX. I believe there's a difference, for sure. I mean, with the employer, it's a business thing.

Chairman WALBERG. Would it be safer to say -- I didn't want to make a trick question out of that. But would it be safer to say that the interest of employers, employees, and unions are all different?

Ms. COX. Yes.

Chairman WALBERG. And so all ought to be considered?

Ms. COX. Yes.

Chairman WALBERG. In a timely fashion.

Ms. COX. I agree.

Chairman WALBERG. Hopefully brings about the best results.

Ms. COX. Yes.

Chairman WALBERG. I see my time has expired. I appreciate the answers. I appreciate the witnesses and the chance to respond to questions, but we've come to the end of the hearing.

This is, as was mentioned earlier, an appreciation for regular order. This is what we wanted to do. We want the subcommittee to work and address it first. I'm sure there will be other discussions that go on. I know that's the interest of the chairman of this full committee on Education and Workforce, to make sure that we deal with a very timely and important issue, relative to employers, employees, and unions in a way that isn't just a pass of the hand, but we look at it and hear testimony.

And so now I would turn and ask the ranking member if you have any closing remarks to make.

Mr. SABLON. Yes, Mr. Chairman. And I want to thank the witnesses again for their testimony.

As I noted at the outset, the right to collective bargaining is to keep ensuring a fair economy. Numerous studies show that income inequality has skyrocketed as union density has dropped. Today, private sector union members have just a little over 6 percent, and the legislation before us today is aimed at the extinction of private sector unions as we know them. Today, we have learned that the three bills under discussion are designed to sabotage any notion of a fair union election process.

H.R. 2723, the so-called *Employee Rights Act*, rigged union elections by counting every eligible employee who did not vote as having voted no against union representation.

H.R. 27 -- and if I may note at this time, and with huge -- I have huge respect for the distinguished gentleman and my chairman of the Veterans' Affairs Committee, the gentleman from Tennessee. I think he maybe has incorrectly claimed that the labor -- *Railway Labor Act* currently uses the ERA's rule, making nonvoters vote against the union. I think the rule was amended in 2010 to require a bare majority of votes and not voters, like he stated.

H.R. 2775, the so-called voter *Democracy and Fairness Act*, prohibits unions from having the same access to employees' contact information as the employer during the election process, thus preventing employees from being informed about union representation. And as one of the witnesses stated, that although she didn't fill the form, she thought, and many employees thought, that filling out the form, and which is written in both English and Spanish, was to provide information. But it actually hereby also says that, I hereby accept membership in the above-named union of my own free will, and hereby authorize it to act for me as a collective bargaining agency in all matters pertaining to wages, hours, and conditions of employment. And this is a union of the Retail, Wholesale, and Department Store Union, district council, UFCW.

And I'd like to insert this for the record, if I may, Mr. Chairman.

Chairman WALBERG. Without objection, and hearing none, it will be inserted.

[The information follows:]

RWDSU

UFCW

370 Seventh Avenue, Suite 501, New York, NY 10001

(212) 684-5300

OFFICIAL AUTHORIZATION

Name (Print) _____

E-mail _____ Cell _____

Address _____ Phone _____

Apt. _____ City _____ State _____ Zip _____

Where Employed _____

Class of Work _____ Dept. _____ Shift _____

I hereby accept membership in the above named Union, and of my own free will, and hereby authorize it to act for me as a Collective Bargaining Agency in all matters pertaining to wages, hours and conditions of employment. I have read this form carefully, and have entered into it of my own volition. No promise or representation whatsoever has been made to induce me to sign this form.

DATE _____ SIGNATURE _____



RWDSU

UFCW

370 Seventh Avenue, Suite 501, New York, NY 10001

(212) 684-5300

AUTORIZACIÓN OFICIAL

Nombre (imprima) _____

Correo electrónico _____ Celular _____

Dirección _____ Teléfono _____

Apto. _____ Ciudad _____ Estado _____ Zona Postal _____

Lugar donde trabajo _____

Clase de trabajo _____ Departamento _____ Hora _____

Por medio de la presente y por decisión propia acepto ser miembro del sindicato arriba citado, y lo autorizo a representarme como agente negociador colectivo en todo lo relacionado con salarios, horas o condiciones de trabajo. He leído este formulario cuidadosamente y he aceptado el mismo por voluntad propia. No se me ha hecho promesa o representación alguna para persuadirme a firmar el mismo.

FECHA _____ FIRMA _____



Mr. SABLAN. And H.R. 2776, the so-called *Employee Privacy Protection Act*, mandates arbitrary waiting periods that delay elections and empower employers to gerrymander the voting composition of bargaining unions by adding employees who have expressed no interest in joining the union. So instead of relentlessly attacking voters' rights and retaliating against employees who want a union, the committee should be focusing on efforts to strengthen workers' rights to organize, raise the minimum wage, and provide paid sick days.

I'd like to ask also unanimous consent, Mr. Chairman, to insert for the record a letter from the United Food and Commercial Workers Union, and the Retail, Wholesale, and Department Store Union District Council. If no objection, Mr. Chairman?

Chairman WALBERG. Without objection, it will be inserted.
[The information follows:]



June 14, 2017

Honorable Tim Walberg
Education and the Workforce
Subcommittee on Health, Education, Labor, and Pensions
U.S. House of Representatives
2176 Rayburn House Office Building
Washington DC 20515

Honorable Gregorio Kilili Camacho Sablan
Education and the Workforce
Subcommittee on Health, Education, Labor, and Pensions
U.S. House of Representatives
2101 Rayburn House Office Building
Washington DC 20515

Dear Chairman Walberg and Ranking Member Camacho Sablan:

On behalf of the United Food and Commercial Workers International Union (UFCW) and the Retail, Wholesale and Department Store Union District Council of the UFCW (RWDSU), we would like to respond to the written testimony of former Americold Logistics employee Karen Cox on the "Employee Rights Act," H.R. 2723.

RWDSU organized after the merger between Versacold Logistics and Americold Logistics took place when employees stood together because they wanted a better life for themselves and their families. The union negotiated an increase in wages across the board; additional vacation time; they also addressed a seniority issue between the two facilities; a grievance procedure was put in place; and they handled a health care provider issue.

There are clear procedures put in place by the National Labor Relations Act (NLRA) which are followed closely by our union when we organize a workplace. For example, Ms. Cox testified about being "angered" that the company had recognized the union through a process called "card check" and that an election did not occur. However, RWDSU followed correct procedures. A majority of her co-workers signed authorization cards that clearly stated that they wanted an organized union to represent them. RWDSU does not force or coerce anyone to sign these cards and additional information was available for those who requested it.

Anthony M. Perrone, *International President*
Esther R. López, *International Secretary-Treasurer*



United Food & Commercial Workers International Union, AFL-CIO, CLC
1775 K Street, NW • Washington DC 20006-1598
Office (202) 223-3111 • Fax (202) 466-1562 • www.ufcw.org

Honorable Tim Walberg
Honorable Gregorio Kilili Camacho Sablan

June 13, 2017

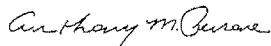
- 2 -

There are also procedures put in place by the NLRA that protect employees. A member can always withdraw membership and, in fact, Ms. Cox chose not to be a member of the union. Ms. Cox was paying beek fees, which means her dues were only going towards representational activities. A member can choose to decertify the union and, in fact, Ms. Cox went through the decertification process but her efforts were unsuccessful.

We are proud to represent more than 1.3 million Americans, including the employees at Americold Logistics. We have done everything from assist employees with individual matters to negotiate contracts that improve working conditions for everyone. While it is disappointing to hear that one person had a negative experience, we strongly believe that a majority of the hard-working men and women at Americold Logistics are proud to be members of our union family.

Thank you for your time.

Sincerely,



Anthony M. Perrone
UFCW International President



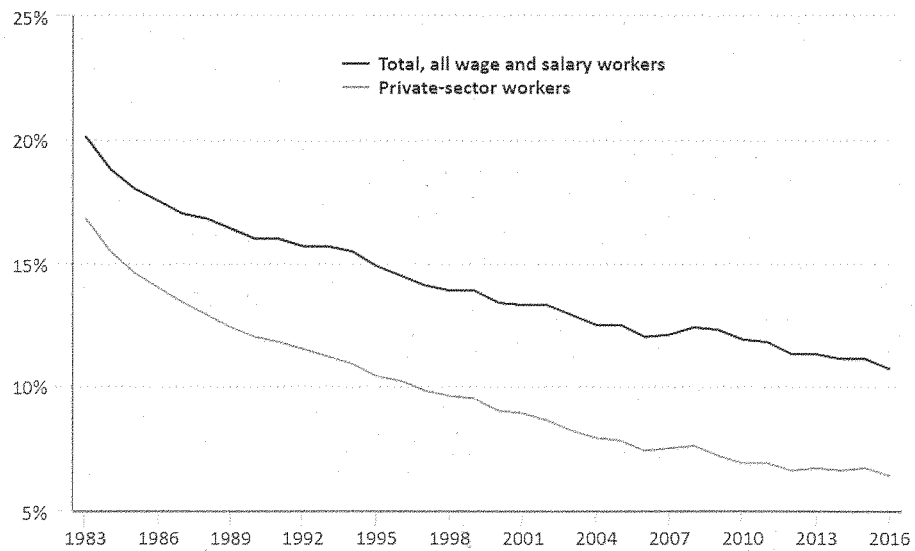
Stuart H. Appelbaum
Executive Vice President
President, RWDSU District Council

Mr. SABLAN. I would also like to ask unanimous consent that the graph used by Congressman Norcross be inserted in the record.

Chairman WALBERG. Without objection, it will be inserted.

[The information follows:]

Percentage of wage and salary workers who were members of unions, total and private sector, 1983–2016



Click legend items to change data display. Hover over chart to view data.
Source: U.S. Bureau of Labor Statistics.

Mr. SABLON. I also would like to ask unanimous consent that a press release from the New Illinois Members at Americold Win First Contract. I would like a letter from -- a press statement from RWDSU, the union, which won a five-year collective bargaining agreement of Americold in Illinois, because that document explains the union won better pay, scheduling, improvements, and a better -- and a stronger grievance process. And these gains would not have been possible had her coworkers followed the lead of Ms. Cox and the National Right To Work Committee and decertified.

Chairman WALBERG. Hearing no objection, that will be inserted as well.

[The information follows:]

News | New Illinois Members at Americold Win First Contract | RWDSU

RETAIL, WHOLESALE &
DEPARTMENT STORE
UNION
UFCW

Media & Press News New Illinois Members at Americold Win First Contract

NEWS

RWDSU news from across North America

New Illinois Members at Americold Win First Contract

THURSDAY, AUGUST 1, 2013

0

THURSDAY



Americold Logistics workers in Rochelle, Illinois, are celebrating after reaching an agreement on a new five-year contract. The ratified agreement includes wage increases over the next five years with lump sum bonuses plus a \$300 signing bonus, along with a strong grievance procedure and a new absentee policy.

The 111 workers at two Rochelle facilities joined RWDSU Local 578 to address a number of issues, and are excited about the changes a union contract will bring. "We are elated," said Daniel Williams, president of the RWDSU Local 578. "We

News | New Illinois Members at Americold Win First Contract | RWDSU

won because we all stood together. Standing shoulder to shoulder with our community, Americold workers together won a great contract."

Americold is a leader in temperature-controlled warehousing and logistics to the food industry, offering the most comprehensive warehousing, transportation, and logistics solutions in the world. Based in Atlanta, Americold owns and operates over 182 temperature-controlled warehouses in the United States, Australia, New Zealand, China, Argentina, and Canada.

"We're proud of the work we do for Americold," said Ron McBride, a steward and worker at the Americold Drive facility. "With negotiations behind us, our union can remain focused on building a secure, stable future for our members, their families and our community."

The new contract, effective June 30, 2013, marks the first contract for Americold workers who have long complained of a taxing and confusing scheduling system with five different shifts and lack of health insurance benefits.

"We are extremely happy to have the RWDSU behind us," said Ken Dougherty, a steward at the Caron Road facility. "Other area employers are closing or cutting back, but as RWDSU members, we were able to negotiate wage increases and benefit improvements."

"When we launched the Americold organizing campaign 16 months ago, very few people thought it would be such a great success," said Dennis Williams, Senior Business Representative for the RWDSU Central States Council. "We congratulate the workers at Americold on their victories, and we know this contract will become a great beginning for this industry in Illinois."

RWDSU Local 578 also represents workers at the Del Monte Foods Distribution Center also in Rochelle, Illinois.

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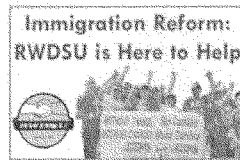
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RWDSU RECORD



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Mr. SABLAN. And finally, I would like to enter for the record -- I ask unanimous consent to enter for the record a letter from Mary Kay Henry on behalf of the 2 million members of SEIU opposing the three bills before us today. She notes these bills will lead to complete subversion of their elections.

Chairman WALBERG. Hearing no objection, that will be inserted.
[The information follows:]



MARY KAY HENRY
International President

GERRY HUDSON
International Secretary-Treasurer

NEAL BISNO
Executive Vice President

LUISA BLUE
Executive Vice President

HEATHER CONROY
Executive Vice President

SCOTT COURTNEY
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Executive Vice President

VALARIE LONG
Executive Vice President

ROCIO SÁENZ
Executive Vice President

SERVICE EMPLOYEES
INTERNATIONAL UNION
CTW, CLC

1800 Massachusetts Ave., NW
Washington, DC 20036

202.730.7000

www.SEIU.org

June 13, 2017

Dear Representative:

On behalf of the two million members of the Service Employees International Union (SEIU), I am writing to express our strong opposition to three deceptively named bills being considered by the House Education & Workforce Subcommittee on Health, Employment, Labor and Pensions: H.R. 2723, the "Employee Rights Act"; H.R. 2776, the "Workforce Democracy and Fairness Act"; and H.R. 2775, the "Employee Privacy Protection Act." Each bill is an absolute attack on working families and designed to severely limit the ability of workers to organize in an effort to limit their voice in the workplace.

H.R. 2723 – "Employee Rights Act"

H.R. 2723 does anything but protect employees who are exercising their rights under the National Labor Relations Act (NLRA) to organize. The most extreme element of this legislation is its complete subversion of fair elections by requiring unions to win a majority of eligible voters, instead of current law where the union must win a majority of those who vote in the election. This would mean that every non-voter is counted as a "no" vote. This change to union elections makes no sense, as union elections are modeled after the U.S. election system where the majority of the participating vote wins the election. There is no reason to create an entirely new and unprecedented procedure of voting, especially one that would only target workers and the union they wish to join. The bill would also prohibit employers from voluntarily recognizing a union and mandates Board elections even when there is mutual agreement between the parties. There is no intent behind this change to current law other than to totally and completely undermine the ability of working people to organize.

The bill would create new rules for union elections with the sole purpose of preventing union representation. The legislation would require a new union election every three years at workplaces where more than 50 percent of current employees didn't vote in the original certification election, effectively requiring a union to be in constant election mode. High turnover workforces would be especially susceptible to decertification, meaning that the union would have to spend more time on elections than on its core functions of representation, bargaining, workforce training, etc. of the workers in that profession. Current law allows for workers to oust their union through a decertification election if only 30 percent of workers file a petition for an election after contract expiration. There is already a process for workers to expel a union if they wish, but as previously stated, the bill is designed to weaken the power of workers, not enhance it.

H.R. 2776 – "Workforce Democracy and Fairness Act"

H.R. 2776 does the exact opposite of its misleading title, and would erode democracy in the workplace and eliminate fairness by giving employers the ability to delay elections and gerrymander the voting composition of bargaining units. The legislation would eliminate any "fairness" in the workplace by imposing arbitrary waiting periods on union elections. The 35-day delay prior to an election and 14-day delay prior to a pre-election hearing would give unscrupulous employers more time to use any means, be they legal or illegal, to pressure employees into abandoning their mission to organize into a union. There is no reason or

Page 2
June 13, 2017

justification for these delays, only to weaken employees' power in the workplace and decrease fairness.

Furthermore, the legislation would encourage employers to stall union election with frivolous litigation, which would backlog the National Labor Relations Board (NLRB) by requiring it to rule on all pre- and post-election disputes before a union is certified. The provision could cause workers to wait months or years in order to have an election. Make no mistake: this legislation is a deliberate attack on the ability of workers to organize and combine their collective power in the workplace.

And yet the bill is made even worse by allowing employers to gerrymander the bargaining unit against unions. Under this legislation, employers could expand the pool of eligible voters to employees who expressed no interest in joining a union in an effort to undermine the election for the workers who have expressed interest in organizing into a union. Combined with H.R. 2723 the employer could expand the pool of voters to employees who have no interest in even voting in the election, giving the employer the direct ability to rig an election against workers. There is no democracy and fairness present in this legislation, only deception and impairment of workers' ability to organize.

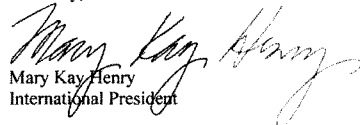
H.R. 2775 – "Employee Privacy Protection Act"

H.R. 2775 does not protect employee privacy and simply tips the scale in the workforce further against workers who want to organize. The bill would prohibit unions from having access to the same employee contact information as the employer for the purpose of communicating during the union election campaign. Information available to the union would be only the employee's name and one form of contact information. Currently, the NLRB's election rule requires the employer to share the home addresses, available personal email addresses, and available home and personal cell telephone numbers. To be clear, this information is available only for the purposes of the representation proceeding and not for other matters. This creates an imbalance in the election proceedings that puts workers who want to make an informed decision at a disadvantage before they vote in the proceedings, and gives the employers far too much leverage to be able to berate or misinform workers who want to exercise free choice. Adding insult to injury, the bill micromanages the means and process by which unions get the list of workers of the determined bargaining unit in order to communicate with them during the election. These provisions combined greatly weaken the organizing capacity of workers and are designed to delay or obstruct a union's ability to communicate with workers and inform them of their rights under the NLRA during an election.

Conclusion

These bills under consideration at the hearing claim to protect the rights of workers under the NLRA when in fact they would diminish their rights and remove many essential rules to ensure fairness when workers organize. The ability to have a voice in the workplace has been a cornerstone of the American middle class, and these bills would erode that promise. We strongly urge you to oppose the bills in this hearing and in any other proceeding before the Congress. If you have any questions, please reach out to John Gray at john.gray@seiu.org or (202)-730-7669.

Sincerely,


Mary Kay Henry
International President

MKH:JG:jf

opeiu#2
afl-cio, clc

Mr. SABLAN. And, Mr. Chairman, despite that we may have disagreements, again, I am very grateful that you're following over regular order.

I want to thank witnesses; we may have disagreements, but I think those disagreements are honest, and I respect that you took the time to prepare and come today. I apologize for the delay, it was unavoidable.

And I yield the balance of my time.

Chairman WALBERG. I thank the gentleman.

And I too want to thank the witnesses. You've added value to our discussions, and we know where to find you if we need any further information as well on either side of the issue.

Let me just state very clearly for the record that this is not an attempt to eliminate unions, not at all. And sometimes it's classified as an either/or. That isn't the case.

From my own experience, and subsequent to my time working at U.S. Steel South Works number two electric furnace, right down on the borders of Lake Michigan, unions have had some extremely positive impacts. And going back to the steel mills now and seeing the difference in some of the working conditions that I just took for granted, I'm, frankly, worried about it. It's changed.

And there has been positive impact, I know, as a result of union efforts for their workers. But seeing the graph that was brought by Mr. Norcross earlier on, I would contend that there's also a rationale there that says that unions and the impact, the positive impact they've had, may indeed have had an interesting impact of workers seeing them work themselves out of their job. The benefits that have been achieved, and now saying, tell you what, like Ms. Cox, I would at least like to know how it's going to be better for me than what I have right now. And if indeed that justifies the union dues that will be taken out and also how those dues will be used relative to political efforts, *et cetera*.

And I think that's what the three bills we're looking at today are going toward in saying let them make their choices with the fullest information possible, as fairly as possible from both sides, not rushed, not jammed through. And the people that are truly interested are the ones who will make the decisions on what comes forward. That's all we're asking.

And this indeed is regular order in the process of discussion. So we'll continue it on, we'll see where it takes us from here. The bottom line, we want to make sure that everything we do here promotes more safer, more secure and increased number of opportunities of choice for employees to have with employers as well. And so we'll continue looking at this. I want to again say thank you.

With no further issues to come before the subcommittee today, I call this meeting adjourned.

[Additional submissions by Chairman Walberg follow:]



June 13, 2017

The Honorable Tim Walberg
Chairman
Committee on Education and the Workforce
Subcommittee on Health, Employment, Labor
and Pensions
U.S. House of Representatives
Washington, DC 20515

The Honorable Joe Wilson
Committee on Education and the Workforce
Subcommittee on Health, Employment, Labor
and Pensions
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Walberg and Representative Wilson:

I write to share the National Retail Federation's (NRF) strong support for the Workforce Democracy and Fairness Act (H.R. 2776) and the Employee Privacy Protection Act (H.R. 2775). Reining in the unprecedented activism at the National Labor Relations Board (NLRB) over the past eight years is a top priority for retailers, and we appreciate your attention to these important issues.

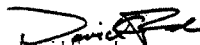
NRF is the world's largest retail trade association, representing discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants and Internet retailers from the United States and more than 45 countries. Retail is the nation's largest private sector employer, supporting one in four U.S. jobs – 42 million working Americans. Contributing \$2.6 trillion to annual GDP, retail is a daily barometer for the nation's economy.

Retailers applaud your efforts to reverse the harmful and unnecessary changes made by the NLRB in its unprecedented ambush elections rule and *Specialty Healthcare* decision. H.R. 2776 would codify an election system that has worked well for decades and restore balance in the process governing union organizing. Specifically, H.R. 2776 would require a minimum of 35 days before a union election can be held to ensure employees have an opportunity to hear from both sides and make an informed decision. It also would ensure employers are able to participate in a fair election process by providing employers with at least 14 days to prepare their case to present before an NLRB election officer. In addition, the legislation would restore the traditional standard for determining bargaining units, providing relief from the Board's unprecedented sanctioning of disruptive micro-unions.

H.R. 2775 would provide employees with greater control over the personal information that is provided to union organizers, which was significantly expanded under the NLRB's ambush elections rule. Employers would be given seven days to provide employee names as required by law, but it would leave the question of what other one piece of information is provided up to the discretion of individual employees.

Both bills are critical to ensuring employee and employer rights are protected and restoring balance in the election process. We look forward to working with you to advance H.R. 2776 and H.R. 2775 in the House.

Sincerely,


David French
Senior Vice President
Government Relations

cc: Members of the House Education and the Workforce Committee

NATIONAL RETAIL FEDERATION
1101 New York Avenue, NW, Suite 1200
Washington, DC 20005
www.nrf.com



1700 North Moore Street, Suite 2250, Arlington, VA 22209

June 14, 2017

The Honorable Tim Walberg
 Chairman
 Subcommittee on Health, Employment, Labor and Pensions
 Committee on Education and the Workforce
 2436 Rayburn HOB
 Washington, D.C. 20515

The Honorable Gregorio Kilili Camacho Sablan
 Ranking Member
 Subcommittee on Health, Employment, Labor and Pensions
 Committee on Education and the Workforce
 2411 Rayburn HOB
 Washington, DC 20515

Chairman Walberg and Ranking Member Sablan,

Thank you for holding a legislative hearing on H.R. 2776, Workforce Democracy and Fairness Act and H.R. 2775, the Employee Privacy Protection Act. Both bills represent needed reforms to the National Labor Relations Act.

By way of background, the Retail Industry Leaders Association (RILA) is the trade association of the world's largest and most innovative retail companies. RILA members include more than 200 retailers, product manufacturers, and service suppliers, which together account for more than \$1.5 trillion in annual sales, millions of American jobs, and more than 100,000 stores, manufacturing facilities, and distribution centers domestically and abroad.

As RILA members are leaders in the workforce arena, we offer countless ways for employees just stepping into the workforce to learn new skills. Workforce training and flexibility is the hallmark of the industry, and one of the ways in which retail employees learn the ropes is by cross-training in different departments. Learning new skill-sets leads to upward mobility but bad policy is threatening that opportunity. Unfortunately, due to policies adopted by the Obama Administration and its National Labor Relations Board, like the decision in *Specialty Healthcare* and the ambush election rule, opportunities for employees to move through the ranks have been stifled through the NLRB's top-down regulatory approach.

Specifically, the NLRB upended years of established law in favor of allowing micro-bargaining units — small units of an entire store — to organize without the consent of the majority of workers at a company. This misguided decision allows unions to gerrymander a workplace to establish micro-unions, creating unnecessary divisions within the workforce, undermining staff flexibility and impeding retailers' ability to meet the expectations of their customers. In addition, the Board's ambush election rule shortened election time for elections reducing preparation by employers to present vital information to their employees. The rule also required the employer give sensitive employee contact information to union organizers — potentially infringing on employees' privacy rights and exposing them to harassment



1700 North Moore Street, Suite 2250, Arlington, VA 22209

and intimidation. Taken together, these actions by the Board severely limit both employer flexibility to operate effectively, as well as opportunities for growth for the workforce.

For these reasons, RILA strongly supports H.R. 2776, Workforce Democracy and Fairness Act and H.R. 2775, the Employee Privacy Protection Act, which will restore commonsense policies that support growth, innovation and opportunity in the retail industry.

Sincerely,

Evan Armstrong
Vice President, Government Affairs



June 14, 2017

The Honorable Tim Walberg
Chairman
U.S. House Subcommittee on
Health, Employment, Labor, and Pensions
U.S. House of Representatives

The Honorable Gregorio Kilili Camacho Sablan
Ranking Member
U.S. House Subcommittee on
Health, Employment, Labor, and Pensions
U.S. House of Representatives

Dear Representatives Walberg and Sablan:

On behalf of Associated Builders and Contractors (ABC), a national construction industry trade association with 70 chapters representing more than 21,000 members, I am writing to express our support for H.R. 2776, the Workforce Democracy and Fairness Act, and H.R. 2775, the Employee Privacy Protection Act; both of which would undo the harmful changes made by the National Labor Relations Board (NLRB) concerning union representation. We thank the Subcommittee on Health, Employment, Labor and Pensions for calling a hearing on how to reform and improve the National Labor Relations Act.

H.R. 2776 would give employees an appropriate amount of time to make an informed decision on whether to vote for union representation by allowing them at least 35 days between the filing of a petition and a vote. It would also ensure employers have the ability to access counsel by providing them with at least 14 days to prepare their case before an NLRB election officer. In addition, the bill would take the important step of reinstating the longstanding standard of a bargaining unit which was radically altered by the NLRB under its decision in *Specialty Healthcare*.

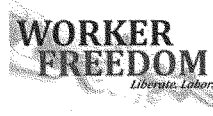
Under *Specialty Healthcare*, the Board opened the door for the formation of "micro-unions," or small, fractured bargaining units. Because of rigid union job classifications, these new units would prevent workers from cross-training and developing workplace skills to further their careers.

H.R. 2775 prevents unions from accessing sensitive and private data from employees and allows workers to determine which personal information can be shared. This allows employees to make an informed decision without coercion or pressure from a union.

We thank Subcommittee Chairman Tim Walberg (R-MN) and Rep. Joe Wilson (R-SC) for introducing H.R. 2776 and H.R. 2775, respectively. We encourage Congress to move these bills swiftly to protect workers and restore balance in labor and employment policies.

Sincerely,

Kristen Swearingen
Vice President of Legislative & Political Affairs



Americans for Tax Reform and The Center for Worker Freedom

Support The Employee Rights Act (ERA)

Rep. Phil Roe (R-Tenn.) has introduced the Employee Rights Act ([H.R. 2723](#)), important legislation that would protect workers from union abuses and ensure fair representation in the workplace.

The ERA would include important revisions to current labor law, including:

- 1) Guaranteeing a secret-ballot vote in unionization elections
- 2) Requiring unions to regularly run for re-certification
- 3) Forbidding union bosses from spending dues on anything besides collective bargaining without the express consent of the worker

Americans for Tax Reform (ATR) president Grover Norquist praised the ERA, saying in a statement: "For too long union bosses have been allowed to bully and intimidate people into voting for unionization. Secret-ballot elections will help ensure union elections are *actually* free and fair."

"These reforms are long overdue," agreed Matt Patterson, executive director of the Center for Worker Freedom (CWF). "Fewer than 10 percent of union members ever had a say in that representation. Making unions go regularly before their members and earn their vote will make their leadership more honest and less political."

"This is not an 'anti-union' bill," assured Patterson. "But it is an anti-bullying bill, in that the power of union bosses to stalk and intimidate would be greatly curtailed. If unions win an election, fine, but let them do it fair and square."

The full text of the ERA can be read [here](#).

*****ATR and CWF applaud this legislation, and urge all Representatives to support it.*****

The Center for Worker Freedom is a special project of Americans for Tax Reform

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For more information contact

Olivia Grady

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[202-785-0266](tel:202-785-0266)



2303 Nance Street
Houston, TX 77020
office: 713.850.0287
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www.pjs.com

Testimony of Brent Southwell, CEO, PJS Houston
before the U.S. House Subcommittee on
Health, Employment, Labor and Pensions
June 14, 2017

Chairman Walberg and Members of the Subcommittee:

Thank you for the opportunity to testify in support of legislation to amend our federal labor laws. I am the CEO of Professional Janitorial Service Houston, Inc. (PJS). My testimony is offered to give members of the subcommittee a business perspective on this important issue.

PJS has been the target of a decades-long assault by the Service Employees International Union (SEIU), a union sent to Texas from Washington, DC to destroy our business because we would not allow the union to speak for our employees without a secret ballot election as prescribed by the National Labor Relations Act. PJS has continued to grow despite every effort by the federal government to aid the union, and despite any effort by the government to act impartially toward PJS, or even to consider my company's impeccable reputation with its employees.

PJS has been forced to fight a corrupt national union, multiple federal agencies that positioned themselves as tools for the union, and an Administration that used unilateral regulatory changes and high-level directives to target my company. In any other context, the actions taken against my company for more than a decade by national labor unions and my own federal government would constitute unlawful conspiracy, and would certainly result in major civil and criminal penalties. Even in the face of tremendous and sometimes outrageous protections provided to unions under the National Labor Relations Act, PJS won a disparagement lawsuit against the SEIU this year in which we were awarded a \$5.3 million judgment for the damage it caused trying to drive us out of business.

I. THE PROBLEM

Employer-employee relations have evolved. The Wagner Act of 1935 was intended to protect employees in a different time who faced conditions that are only rarely found in any significant American business today. Modern-day employers must invest as much into retaining and developing employees in tight labor markets as they invest in any other part of their operations. The fact that businesses must operate under a national law that allows outside organizations to interfere in their relationships and operations has always been odd, a problem addressed only marginally by the Taft-Hartley Act of 1947. The fact that the same law allows these organizations to impose themselves on

employees in the absence of secret ballot elections is worse than odd—it is an affront to personal liberty. The time to modernize the NLRA is a generation overdue.

II. SOLUTIONS

Legislation before the subcommittee will improve some of the most important problems of the NLRA. Most importantly, a provision would prevent so-called “ambush elections,” a new privilege granted to unions by the U.S. Department of Labor to prevent employers and employees who don’t want unions from prevailing in union elections. Another provision will reverse new regulations that divide employee groups into micro units for purposes of organizing under the NLRA, and another will prevent new rules that compel employers to violate their employees’ privacy rights by handing over their personal information to unions that will almost certainly harass them at their homes. I support these provisions as proper responses to overreach by the DOL and the National Labor Relations Board, and as minimally required action by Congress to restore integrity to our federal agencies.

I also support efforts by the subcommittee to eliminate once and for all the “walk around” rule that was created unilaterally by the Occupational Safety and Health Administration (OSHA) for one purpose, which was to help the SEIU attack companies that resist its threats and coercion. To understand how corrupt our employment agencies have become, I encourage members of the subcommittee to look more closely at this issue, including to demand all records and communications that went into this new regulatory effort. You will find the perfect example of the worst of government.

Specifically, OSHA and the DOL established this regulatory “reinterpretation” to target my company. When PJS worked with the National Federation of Independent Business and the Pacific Legal Foundation to sue OSHA over this rule, we discovered that the new program had only been used against us. Given that our lawsuit resulted in a settlement whereby OSHA has agreed to drop the new rule, my understanding is that no other company in the nation was ordered—as PJS was—to allow union organizers who were disparaging the company into its workspaces under color of official federal government business.

Additionally, I encourage the subcommittee to go further in its overall reforms. For example, are you aware that the NLRB is forcing companies like PJS to eliminate mediation clauses in their employment agreements as a condition for the agency to dismiss unfair labor practice (ULP) charges? This is despite federal appellate court rulings that prevent this action by the agency. This practice, which continues under the nose of Congress, creates a fool-proof strategy for unions where they can file ULP claims without merit for the sole purpose of positioning the NLRB to interfere with private employment contracts. This abuse must be eliminated.

III. LARGER REFORM

Business owners across the country are turning their attention to broader reforms that are needed to reign in abuses by unions, and to terminate corrupt collaborations

between unions and government. As a result, I encourage Congress to look at a large and growing problem that has a simple and elegant solution.

Because unions are failing to attract members, they are resorting to another strategy. This entails using private arrangements with government agencies to create permanent revenue streams for the unions from the paychecks of government employees. The revenues are then used to fund private sector campaigns—outside the limits of the NLRA—to collude with employers who will turn over their employees without elections, and to destroy employers who won't.

In my case, the SEIU used funds from the paychecks of city employees in Houston to fund its attack on PJS. The union joined with AFSCME to form a joint venture in Houston called "HOPE" (or Houston Organization of Public Employees), and then convinced the city to collect dues for them through payroll deductions. The SEIU then used the funds to open an office in Houston from which they now run campaigns against local businesses. This includes pressure on restaurants and small businesses to pay a \$15 minimum wage, and boycotts and other actions intended to damage local employers.

This is how the SEIU has maintained an assault against PJS for more than a decade. The SEIU filed frivolous lawsuits against PJS, retained a public relations firm to spread false claims about us, and retained lobbyists in Austin to defend these actions with state legislators. It has also engaged elected officials—some who are serving in this institution—to sign letters to my customers that encourage them to terminate their contracts with PJS and give them to companies favored by the unions. Finally, the union filed baseless charges against PJS with OSHA and the NLRB to ensure federal assistance in the harassment campaign against us, including to claim we are being "investigated" by government.

Here is something legislators must understand: Business leaders across America believe they have been abandoned by lawmakers, and are left to fight against these union abuses on their own.

But there is an easy way to end this abuse. Whether or not this subcommittee has jurisdiction over public sector unions, every member can encourage President Trump to take executive action to reverse President Kennedy's Executive Order 10988 (1962), which provides authorization for federal agencies to withhold dues for public sector unions from federal employee paychecks.

IV. CONCLUSION

Your efforts today give hope to responsible employers that federal employment laws can be reformed to meet the demands of our modern economy, and to protect the rights of employees from union abuse. On behalf of the nation's large independent employers who value their employees, we appreciate your commitment to these issues.

Heritage Action Supports Rep. Phil Roe's Employee Rights Act

This month, Rep. Phil Roe (R-Tenn.) introduced the Employee Rights Act ([H.R. 2723](#)). This legislation would protect workers from union pressure by putting power in the hands of employees and making union leaders more accountable to their members. As the Heritage Foundation [notes](#), if union bosses “were angels, such changes would be unnecessary” but “since they are not” new protections are necessary.

Heritage [explains](#) the legislation would guarantee employees the rights to:

- Vote privately in a secret ballot election before forming a union;
- Opt out of having their personal contact information provided to a union during an organizing drive;
- Hear from employers at least 40 days prior to voting in a union election;
- Vote in a secret ballot election before accepting a contract or going on strike;
- Vote regularly on re-electing their union;
- Decide whether their union can spend their dues on matters unrelated to collective bargaining; and,
- Be free from union interference or extortion in exercising their legal rights.

Workers should not be pressured or coerced by unions or union bosses to take actions that undermine their rights. Protecting the voting rights of employees is essential:

“Under general union representation, employees relinquish their individual negotiating authority to a union. The union becomes the sole representative of the employees in negotiations with their employer. Unionized employers must negotiate employment terms with the union and the union alone. They may not bargain with individual workers.”

Though the purpose of unions is ostensibly to protect workers, they often fail to do so because they are motivated by the “institutional objectives” of expanding in size, income and influence. They want “contracts that protect their institutional powers.” When the interests of unions come in conflict with the interests of workers, unions often make decisions that benefit them rather than employees. In an effort to expand power and influence, unions discourage secret ballot elections or work to eliminate them altogether; this results in the loss of privacy benefits for workers. Unions can also call for a strike without first consulting workers.

Workers deserve a say in decisions that put their jobs at risk. The Employee Rights Act would amend this by requiring a secret ballot vote before a union can call a strike. Furthermore, the bill would solidify paycheck protection provisions, provide a mechanism for union re-certification, and finally criminalize union threats under federal law.

David W. Kreutzer, Ph.D., Senior Research Fellow in Labor Markets and Trade in the Institute for Economic Freedom and Opportunity at The Heritage Foundation, issued this statement:

“All union members deserve the protection of secret ballots and reasonable choice over who represents them. Ninety-four percent of union members are represented by unions for whom they

never voted. Let the dues-payers decide whether their union is an effective advocate for them or not. Competent, worker-focused union leadership has nothing to fear from members' freedom to choose."

The Employee Rights Act would solve many problems workers face today, including problems enshrined in current labor law. The bill would help restore a balance of power in the workplace from unions to workers and help ensure labor unions best serve the interest of employees, not union bosses.

*****Heritage Action supports the legislation, encourages Representatives to support it, and reserves the right to key vote in the future.*****



June 14, 2017

The Honorable Virginia Foxx
Chairwoman
Committee on Education and the Workforce
U.S. House
Washington, DC 20515

The Honorable Robert C. Scott
Ranking Member
Committee on Education and the Workforce
U.S. House
Washington, DC 20515

Re: Employee Privacy Protection Act (H.R. 2775), Workforce Democracy and Fairness Act (H.R. 2776), Representation Fairness Restoration Act (H.R. 2629) and Employee Rights Act (H.R. 2723)

Dear Chairman, Ranking Member & Members of the U.S. House Committee on Education and the Workforce,

On behalf of the Workforce Fairness Institute (WFI), an organization devoted to educating workers, their employers, employees and citizens about issues affecting the workplace, we write today in strong support of two recently introduced pieces of legislation: Employee Privacy Protection Act (H.R. 2775) and Workforce Democracy and Fairness Act (H.R. 2776).

The Employee Privacy Protection Act assures worker privacy is protected, which has been put at risk by the Obama-era National Labor Relations Board (NLRB). We are very pleased that H.R. 2775 would enact safeguards for employees so that their personal information cannot be used improperly by union organizers.

As it stands now, labor organizers have access to far too much employee information, such as workers' names, phone numbers, email addresses, home addresses, and work schedules and locations. By allowing employees the ability to determine which contact information is shared by their employer and their preferred method of communication, this legislation will once again give workers the power over their personal information.

Further, the Workforce Democracy and Fairness Act would roll back the NLRB's decision in 2015 to codify ambush elections, which unnecessarily expedites labor elections affording workers as few as 11 days to determine whether to support or oppose a collective bargaining unit.

By protecting workers' rights and setting the minimum time for labor elections at a reasonable 35 days, employees will have sufficient time to ask questions and receive answers concerning the union election process. Additionally, employers are provided 14 days to prepare their case to an NLRB election representative, which also gives them the necessary time to appropriately engage concerning workplace organizing efforts.

H.R. 2776 also addresses the NLRB's ruling in *Specialty Healthcare*, an egregious decision handed down in 2011 that allowed for the formation of so-called micro-unions. Micro-unions are disruptive to workplaces and make it harder for employers to run their businesses, while allowing labor organizers to place immense pressure on workers.

For the record, the Workforce Fairness Institute would also like to raise the importance of several additional pieces of legislation, including the Representation Fairness Restoration Act and Employee Rights Act.

Specifically, the Representation Fairness Restoration Act would overturn the aforementioned micro-union decision requiring labor organizers to win elections with a majority of the workforce voting in favor of forming a collective bargaining unit. Union organizers should not be allowed to hand-pick and sort sub-groups of employees more favorable to representation. These allowances do not benefit workers and certainly don't benefit our nation's job creators.

The legislation discussed in this correspondence are necessary to give power back to workers after eight years of unilateral actions by an activist and biased NLRB working on behalf of Big Labor. The scales in America's workplaces have been grossly tipped in favor of union bosses, and against America's workers and business owners.

We strongly support the Employee Privacy Protection Act and Workforce Democracy and Fairness Act, and urge each bill receive a prompt vote from the members of the U.S. House Committee on Education and the Workforce.

Sincerely,

Heather Greenaway
Workforce Fairness Institute

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Please see the below letter issued today by the Workforce Fairness Institute (WFI):



June 14, 2017

The Honorable Virginia Foxx
Chairwoman
Committee on Education and the Workforce
U.S. House
Washington, DC 20515

The Honorable Robert C. Scott
Ranking Member
Committee on Education and the Workforce
U.S. House
Washington, DC 20515

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Sincerely,

Heather Greenaway
Workforce Fairness Institute

###

The Workforce Fairness Institute is an organization committed to educating voters, employers, employees and citizens about issues affecting the workplace. To learn more, please visit: <http://www.workforcefairness.com>.

To schedule an interview with a Workforce Fairness Institute representative, please contact Ryan Williams at (202) 677-7060.

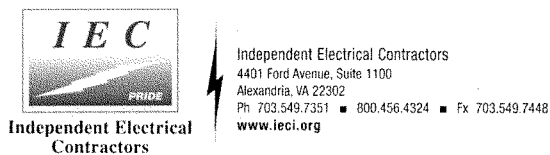
Statement
of the
Independent Electrical Contractors
Before the
Subcommittee on Health, Employment, Labor, and Pensions

United States House of Representatives

Hearing on
“Legislative Reforms to the National Labor Relations Act: H.R. 2776,
Workforce Democracy and Fairness Act; H.R. 2775, Employee Privacy
Protection Act; and, H.R. 2723, Employee Rights Act.”

Washington, DC

June 14, 2017



Chairman Walberg, Ranking Member Sablan and Members of the Subcommittee:

On behalf of the Independent Electrical Contractors (IEC), I want to thank you for holding a hearing on H.R. 2776, Workforce Democracy and Fairness Act; H.R. 2775, Employee Privacy Protection Act; and, H.R. 2723, Employee Rights Act. IEC voices its strong support for all three bills, which would bring common sense reforms and much needed worker protection into the union election process.

On December 12, 2014, the National Labor Relations Board (NLRB) finalized its 'ambush' election rule, which drastically changed the process for union representation elections. The rule shortened the time between the union filing a petition for election and the NLRB holding of that election from the previous median time of 38 days to as few as 14 days, effectively limiting employers' ability to communicate with employees prior to a representation election and severely limiting worker access to the information needed to make an informed decision about whether to vote for union representation. The rule also had a tremendous impact on employee privacy by requiring employers to provide, within two business days of the election agreement or decision directing an election, employees' personal telephone numbers and e-mail addresses without providing employees an opportunity to determine which contact information would be handed over. This breach of privacy would potentially expose employees to harassment and intimidation.

The bills being discussed during this hearing, if enacted, would reverse the harmful policy changes instituted by the 'ambush' rule. The Workforce Democracy and Fairness Act would help guarantee workers have time to gather all the facts to make a fully-informed decision in a union election and ensure employers are able to participate in a fair union election process. It would accomplish this by mandating that no union election will be held in less than 35 days while also giving employers at least 14 days to prepare their case before a NLRB election officer. In addition, the legislation would require the NLRB to determine the appropriate group of employees to include in the union before the union is certified, as well as address any questions of voter eligibility.

The Employee Privacy Protection Act is an important piece of legislation that would empower workers to control the disclosure of their personal information during the union election process. This bill would require employers to provide a list of employee names within seven days and employees would get to choose one additional piece of contact information to be submitted.

Finally, the Employee Rights Act would go a step further by, among other things, requiring a secret ballot election to determine whether or not employees want to be represented by a union and require elections be held in certified and recognized unions that have experienced turnover or expansion in excess of 50 percent. These changes would guarantee workers the ability to make their decisions about a union in private and provide the opportunity for workers to revisit union representation upon a reasonable amount of turnover or growth within a given unit.

IEC applauds the Subcommittee for holding this hearing on these important pieces of legislation and look forward to working with Congress on these proposals that provide critical worker protections to the union representation process.

Jason E. Todd
Vice President, Government Affairs
Independent Electrical Contractors

[Whereupon, at 2:48 p.m., the subcommittee was adjourned.]

