

RESURGENT LABOR UNIONS REACH FOR MORE POWER

BY SCOTT DILLEY

Politics, money, and power always make for good intrigue, and labor union agendas involve all three. The Obama Administration and new 111th Congress have a decidedly left-of-center ideological bent that has already helped unions achieve some points on their national agenda. Whether the topic is union financial transparency, empowering union lawyers and other attorneys in court, or changing the rules so unionization is easier, unions appear to be making headway toward increasing their size, power, and influence—a goal advanced by more than \$600 million in union spending on national politics in 2008.

Florida, though, could still stand as an example of how a state can protect workers' rights in the face of union attempts to expand. Here's why that protection is needed now more than ever.

Only days after taking office with the declaration of a “new era of openness,” the Obama Administration began talks of rescinding U.S. Department of Labor transparency rules under the Labor-Management Reporting and Disclosure Act.

That's a law requiring unions to provide their members and the federal government with union financial information such as income, expenditures, and salaries.

This “sunshine eclipse” can be traced back to the AFL-CIO's “Turn Around America” transition project, a list of recommendations by organized labor to the

Obama Administration regarding new policy implementations that they hope to see within the next year. Among AFL-CIO's recommendations for Day 1 was a “stay [of] all financial reporting regulations that have not yet gone into effect...”¹

The AFL-CIO believes the



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financial disclosure requirements have “imposed a series of costly, burdensome, and intrusive reporting requirements on unions and their officers, employees, and volunteers that are designed to produce vast quantities of information with little or no value to union members.”² This is the same tale of woe organized labor told when the Department of Labor proposed the rules in 2003, saying that it could cost organized labor more than \$1 billion to comply. But the first year of compliance only cost the AFL-CIO \$54,150.

Since 1959, most private-sector unions have had to disclose financial information to the federal government. Even publicly traded business now must follow financial disclosure laws, and these rules have proven to be beneficial to many union members.

During the Bush Administration, Secretary of Labor Elaine Chao modernized the reports the unions were required to file under the LMRDA, so they could be posted online and provide union members with detailed information regarding union spending. This transparency has helped publicize some questionable spending by union officials, including huge outlays for booze, movie tickets, steak dinners, golf outings and dinner theater.

It makes sense that these disclosure rules should remain in place and apply to other, additional unions, such as public-sector unions. As one newspaper editorialized recently, “Obama shouldn’t be swayed by arguments that record-keeping required to

comply with disclosure rules is overly burdensome. It hasn’t been. Besides, corruption is always more costly—in dollars and in public perception.”³ Political interests, though, seem to be trumping Obama’s so-called priority of transparency.

The Lilly Ledbetter Case

President Barack Obama kept and broke campaign promises when he signed the first bill of his administration. The Lilly Ledbetter Fair Pay Act, signed by Obama just two days after it passed Congress in January 2009, effectively extends the statute of limitations for an employee to file a lawsuit alleging unequal pay.

The bill overturns the U.S. Supreme Court’s 2007 ruling in *Ledbetter v. Goodyear Tire & Rubber Co.* The case involved Lilly Ledbetter, a Goodyear employee of two decades who discovered the company had not paid her as much as male counterparts performing the same job. Ledbetter won in lower courts, but the Supreme Court held that the 180-day window for filing a lawsuit applies only to the time after the pay was originally agreed to. Since Ledbetter’s claim occurred years later, she lost her case and claim to more than \$200,000 in back pay. Under the terms of the bill, an employee has 180 days to file such a lawsuit, and the clock resets every time an employer issues a paycheck reflective of the discrimination.⁴

The president and his supporters hailed the bill as a step toward better civil rights enforcement. Obama made clear during his nomination

acceptance speech at the 2008 Democratic National Convention that he supported the concept of “equal pay for an equal day’s work, because I want my daughters to have the exact same opportunities as your sons.”⁵ John Sweeney, president of the AFL-CIO, expressed his delight with the legislation.⁶

Critics agree in principle with the concept of equal pay for equal work. The provisions of this bill, though, are a trial lawyer’s dream. Brian Johnson of Alliance for Worker Freedom said the bill “does nothing more than provide political kickbacks to trial lawyers” because the bill removes caps on damage awards and applies those damages even to unintentional wage errors.⁷ According to James Sherk and Andrew Grossman at the Heritage Foundation, businesses will likely take steps to reduce their risk of lawsuits, thereby passing the additional costs of compliance onto consumers in a tough economy.⁸

Obama’s approval of the act also broke his “sunlight before signing” ethics pledge to wait five days before signing non-emergency legislation. The goal of that pledge is to allow time for public review and comment before presidential action. Tom McClusky of the Family Research Council criticized Obama because “there was no five-day ‘waiting period’ before President Obama signed the legislation into law, and certainly no explanation that this trial lawyer’s dream of a bill is ‘emergency’ legislation.”⁹ This action casts doubt on the sincerity of Obama’s statements in support of

making government more transparent.

The new law does not apply retroactively and will not grant Ledbetter new grounds for a lawsuit based on her old claims. While protecting individuals from wage discrimination is a worthy goal, the methods of the Ledbetter Act seem more like a handout to labor unions and trial attorneys.

The ‘Employee Free Choice Act’

In spite of slight upticks in union numbers during the past couple of years, private-sector unions have seen their membership dwindle over the past several decades. Because only about eight percent of the private-sector workforce is now represented by unions,¹⁰ organized labor is looking for mechanisms to increase union membership and dues income. Enter the ironically named “Employee Free Choice Act,” or “card check,” which would re-write the rules for union organizing.

A major priority for organized labor, EFCA would fundamentally change labor relations in the U.S. by eliminating the current practice of requiring secret-ballot elections for workers covered by the National Labor Relations Act. Instead, a union would officially be recognized when 50 percent of eligible workers sign authorization cards in support of the union. Proponents of EFCA point to the need for increasing the ease of unionization of workers, while opponents believe that the elimination of the secret ballot opens the process to coercion and intimidat-

tion of workers.

EFCA would also provide mandatory arbitration for first-time labor contracts if business and labor negotiators cannot agree. Such an arrangement, critics argue, forces both sides to accept an educated guess by a third party, exposes businesses to more federal control, and overrides decisions by the business owner. The bill would also impose penalties on employers—but not unions—for violations of the law.

On numerous occasions during the 2008 campaign President Barack Obama signaled his willingness to support and sign EFCA, and Democratic gains in the Senate signaled an increased chance for passage of the bill. The text of EFCA, formally introduced as H.R. 1409 and S. 560 by Rep. George Miller, D-Calif., and Sen. Tom Harkin, D-Iowa, respectively, was identical to the text of EFCA in the 110th Congress. That version of the bill passed the U.S. House in 2007 by a vote of 241-185. Florida's representatives divided along party lines. Nine Democrats supported the bill, while 16 Republicans voted against it. A Republican filibuster in the Senate impeded the bill's progress.

Republican Senate losses in the 2008 elections and the defection of Pennsylvania Republican Arlen Specter to the Democrats have left them with at most 40 seats in the Senate (depending on the outcome of the Coleman-Franken Minnesota Senate race), so it's not clear that a filibuster could succeed again.

Senator Specter previously announced that he would not vote

for ending debate on the bill, as he did in 2007, when he was the only Republican to vote with the Democrats in support of ending debate (a cloture vote) on EFCA.

At that time, Senator Specter offered a thorough explanation of his decision. He expressed his concerns with card check as it stands now.¹¹ In particular, he pointed to EFCA's elimination of the requirement for a secret ballot vote, which he stated is "the cornerstone of how contests are decided in a democratic society."¹² Specter also said he believed the bill's arbitration provisions may unfairly subject employers to outcomes they cannot support. Such a scenario is in direct violation of the Wagner Act, which only makes the employer accountable for a contract he or she agrees to.

Specter also communicated that his opposition to the bill is not permanent, acknowledging that unions "have suffered greatly"¹³ from the outsourcing of jobs and now face the problem of losses in pensions and health benefits. He indicated he is willing to compromise and issued 12 suggested revisions, including the establishment of a timetable for elections to be held within 10 days of filing of a joint petition from the employer and union. In addition, Specter called for penalizing either a union or an employer for unfair labor practices, including visiting an employee's home without prior consent during a representation campaign.

Another suggested change to EFCA would require parties to begin negotiations within 21 days after a

union is certified and would allow 120 days from the first meeting to call for arbitration by the Federal Mediation and Conciliation Service.

Finally, Specter suggested that the arbitration provision could be “substantially improved” by including a last best offer procedure, which could provide an incentive for both parties to work toward a deal rather than hold back and demand arbitration.

Specter’s announcement dispelled earlier rumors that he accepted labor union support for his re-election campaign next year in exchange for backing EFCA. Specter firmly stated that he “has not traded [his] vote in the past and [he] would not do so now.” Whether he keeps those promises now that he has switched parties remains to be seen.

Meanwhile, three large retailers offered their own compromise position on EFCA. A proposal by Costco Wholesale, Starbucks, and Whole Foods Market would uphold secret-ballot elections and would drop EFCA’s binding arbitration provision. Instead, the proposal called for expanded penalties for companies that retaliate against employees during a unionization drive or that refuse to participate in collective bargaining. The compromise also calls for penalties on unions that violate the law and for easier decertification procedures.

The goal of the companies’ sugges-


tion was to “trigger a conversation between business and labor,” according to their attorney Lanny Davis.¹⁴ But compromise positions seem to be a nonstarter for both business and labor groups.

Speaking for the pro-labor group American Rights at Work, attorney John Goldstein dismissed talk of a compromise. The Starbucks proposal “was written by CEOs for CEOs. It doesn’t address any fundamental issues that must be addressed.”¹⁵


Business groups are perplexed as well. Coalition of a Democratic Workplace spokeswoman Rhonda Bentz responded, “EFCA is

on life support. It makes no sense to negotiate when we are winning.”¹⁶ Doug Stafford of the National Right to Work Committee expressed his opinion on EFCA or possible compromises: “No proposal that makes it easier for employers and union bosses to impose forced unionism on workers is acceptable.”¹⁷

Still, with vote margins as close as they are, EFCA could linger well into the 2010 campaign season while other union priorities come to the forefront. One possibility is the Public Safety Employer-Employee Cooperation Act (introduced as H.R. 980/S. 2123 in 2007), which would provide collective bargaining for state and local public safety officers.



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Another goal of organized labor is to redefine a “supervisor” to eliminate exemptions and allow more workers to be unionized. The Re-Empowerment of Skilled and Professional Employees and Construction Tradeworkers Act (the RESPECT Act), was introduced at H.R. 1644/S. 969 in 2007 and may see reintroduction soon.

Finally, a long-term goal of organized labor is the repeal of Section 14(b) of the Taft-Hartley Act, which allows states to pass “right to work” laws ensuring that workers must not be forced to join a union in order to keep a job.¹⁸

Florida’s Opportunity

What does this discussion mean for Floridians and elected officials in Florida? Depending on the issue, Florida already stands out as one of the best examples of a state that has laws to hold labor unions accountable for their actions.

Generally speaking, states have jurisdiction over their own public-sector labor relations, while federal law prevails in the private sector and with federal jobs. Accordingly, Florida is one of only 11 states that require bargaining between unions and government to be open to the public. In fact, the Second District Court of Appeals in Florida has held that all phases of the collective bargaining process, even after an impasse, are open to the public.¹⁹

Because public-sector unions represent public employees, bargain over public labor wages and conditions, and meet with public officials on public time and in public facilities, Floridians have the right to know what happens at those meetings.

In addition, Florida is only one of 13 states to require some form of public-sector union financial transparency. Florida law states that all members of public employee labor organizations are entitled to inspect their unions’ accounts.²⁰

Florida also requires public employee unions to submit financial reports as part of the yearly registration

process. The reports are to include the sources of all receipts during the year as well as some information on expenditures.²¹ Florida legislators could consider requiring these financial reports to be made available online to unionized employees and even the general public. Such reforms would mirror the transparency reforms of the U.S. Department of Labor during Elaine Chao’s tenure and would allow union members to have increased access to pertinent information.

Workers in Florida, though, may not be immune to possible changes to federal labor law. Any change to section 14(b) of the Taft-Hartley Act could jeopardize Florida’s right-to-work status,²² eliminating one of the



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main sources for union accountability to union members in Florida. On card check, two Florida legislators have already taken the approach offered by Save Our Secret Ballot, a group dedicated to preserving the right to vote by secret ballot in all elections, not just unionization elections.

Florida's House Majority Leader, Rep. Adam Hasner, R-Delray Beach and state Sen. Garrett Richter, R-Naples, have filed HJR 1013 and SJR 1908, respectively, which amend the state Constitution to declare that "right of individuals to vote by secret ballot is fundamental" and that "where local, state, or federal law requires elections by the people for public office, requires public votes by the people on initiatives or referenda, or requires designations or authorizations of employee representation, right of individuals to vote by secret ballot is guaranteed."²³

With the approval of three-fifths of the members in both chambers of the Legislature, the proposed amendment would be placed on the ballot in November of 2010, when it would need 60 percent of the votes cast to become part of the state constitution.²⁴

The Save Our Secret Ballot approach is not without controversy. Conventional legal wisdom declares that federal law preempts state laws regarding labor relations. However, proponents of state action to protect the use of secret ballots point to exceptions recognized by the U.S. Supreme Court that allow states to protect important interests as long as those state actions do not disrupt the federal regulatory scheme.²⁵

While this debate may only be settled through future litigation, at least members of the Florida legislature are willing to address the issue of secret ballot elections in an attempt to head off coercive unionism through federal card check legislation.

No single state holds the corner on labor reforms. However, in terms of public-sector union transparency measures and the resolve to fight for individual rights over forced unionism, Florida serves as a model for other states. In a year of unabashed union efforts at the federal level to shrink public knowledge about union finances and to grow unions through coercion and at the expense of conscience, Florida law puts principle ahead of political expediency.

Current elected officials seem to be doing what they can to help shape the debate over card check into one that respects the time-honored traditions in a state that upholds the sanctity of the individual over the coercive collective. At the heart of classical liberalism is the belief that people should have a voluntary choice about how they use their time and resources. These rights, including one's own decisions about the fruits of his labor, must be safeguarded at all costs on both the state and federal levels. ❧

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Naples, Florida. With the author’s permission, this article was adapted from one he wrote for *The Freeman*.

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