



“SIGN UP FOR UNION” BILL PASSES HOUSE



Joe Lynch
“This bill would automatically establish a union, with no election of any type, if more than 50% of the employees sign union cards.”

On March 1, 2007, the U.S. House of Representatives by a 241-185 margin, passed the “Employee Free Choice Act of 2007.” This bill would automatically establish a union, with no election of any type, if more than 50% of the employees sign union cards. In addition, the bill would raise the penalties — triple back pay and a \$20,000 fine per violation — for companies that unlawfully discriminate, intimidate or fire employees during union organizing campaigns.

In situations in which unions and employees cannot reach an agreement at the bargaining table, the bill would allow an arbitrator to draft the initial union contract. This bill, if passed into law, would have the most dramatic impact of any labor statute since the NLRB was created in the 1930’s.

The attention now shifts to the U.S. Senate. This will be the third year in a row that the bill has been introduced in the Senate, but the difference now is that the Democrats are in control and the bill’s chief sponsor, Senator Edward Kennedy, chairs the Senate committee that is responsible for bringing the bill to the Senate floor. The bill was very partisan in the House, as only two Democrats voted against the bill, and only 13 Republicans voted for it. In the Senate, with the Democrats holding a one-vote majority, it is likely that all of them will support the bill. Further, one or more Republican Senators may support the bill as well.

Of course, filibustering is still allowed in the Senate, and it takes a 60-vote margin to shut off

debate. Further, even if the bill did manage to pass the Senate, President Bush could veto it. The last time organized labor had a chance to make a major change in the National Labor Relations Act was in 1977 when the Democratic majority tried to break a filibuster led by freshman Senator Orin Hatch on six different occasions, but the most votes they could gather to shut off debate was 58 votes.

In the current law, it takes a minimum of 30% of employees in the voting unit to sign union authorization cards or some other showing of support, in order to qualify for a secret ballot election supervised by officials from the National Labor Relations Board (NLRB). The NLRB conducts a secret ballot election which must generally take place within 60 days of the filing of the petition (request) for the election. However, past history indicates that the petitioning unions end up usually losing more than half of these secret ballot elections.

The unions contend that employers engage in unfair labor practices and otherwise use their power over employees to coerce them into voting against having a union. Employers, on the other hand, contend the employees are free to vote however they want, particularly since it is a secret ballot. And employers also argue that unions can apply their own particular peer pressure on employees to encourage or induce them to sign union cards, pressures that could be as powerful or more powerful as those any employer can bring to the workplace. Employers argue that employees often sign union cards due to misunderstandings, or inappropriate promises or threats. Further, employers argue that unions would be able to engage in “stealth” organizing, so that employers may not even be aware of the organizing and employees will not have an opportunity to hear both sides of the story, and thus make a more informed choice.

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Howard B. Jackson



HOWARD B. JACKSON is a Member of firm, which he joined in 2001. Located in the Knoxville office, his practice

includes substantial experience with labor law, employment litigation, including both discrimination cases of all kinds and employee restrictive agreements, frequent training and counseling of employers on a wide variety of employment law issues, and commercial litigation. Howard graduated from Georgia Tech in 1983, with a B.S. in Industrial Management, from Duke University in 1987, with a Masters of Divinity, and from Georgia State University in 1994, with a Juris Doctor. He graduated summa cum laude from Georgia State University, where he was Lead Articles Editor of the Law Review and First Honor Graduate. He is a member of the bar in Georgia and Tennessee. Howard and his family live in Maryville, where he is active in the Blount Chamber Partnership. He enjoys running, and along with his wife, serves as Co-Director of the Wimberly Lawson Townsend 10K, a road race benefitting Second Harvest Food Bank.

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UNION MEMBERSHIP DROPS FURNISH ADDITIONAL IMPETUS FOR LABOR BILL



Michael Jones
"Union membership also fell last year among public workers, dropping 0.3 percentage points."

Union membership in the U.S. last year dropped from 12.5% to 12%, or 15.4 million workers, according to the Bureau of Labor Statistics. The unionization rate among employees in the private sector actually fell to 7.4% from 7.8%, the lowest percentage in more than 100 years. Membership in the UAW fell below 600,000 in 2005, from a peak of 1.5 million members.

The highest union membership rates among private industries were transportation and utilities at 23.2%, followed by construction, at 13%. The unionization rate in manufacturing, once the backbone of the labor movement, for the first time fell lower than the broader job market. Unionization of the manufacturing industry fell from 13% in 2005, to only 11.7% in 2006. Union membership also fell last year among public workers, dropping 0.3 percentage points. However, the percentage of unionized workers in the public sector remains relatively steady at around 36%.

South Carolina and North Carolina had the lowest unionization rates at 3.3% each. The next lowest were Virginia with 4%, Georgia with 4.4%, and Texas with 4.9%. Hawaii had the highest union membership rate at 24.7%, followed by New York with 24.4%, Alaska with 22.2%, and New Jersey at 20.1%.

Unions are showing a trend with more cooperation in union-management relations and a "softer" approach, recognizing union and management are in the same boat and must pull together. In the recent past, UAW had worked closely with Ford to forge agreements on employee buyouts, health care and plant efficiencies saving Ford significant money. However, they are not shy about seeking Congressional assistance. Labor leaders have been quick to say that law-breaking, anti-union companies are largely to blame for the decline in union membership. They called on the new Democratic-led Congress to pass legislation making it easier for workers to form unions.



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GENETIC DISCRIMINATION BILL

MAY PASS CONGRESS AS WELL



Anita Patel

"... individuals seeking to file claims of genetic discrimination would be required to first exhaust administrative procedures before going to court..."

A recently introduced House bill (H.R. 493) which would make it illegal for employers and insurers to discriminate against individuals based on genetic information, has broad bipartisan support. Under the current proposal

dealing with the issue, individuals seeking to file claims of genetic discrimination would be required to first exhaust administrative procedures before going to court, and the current legislation would also cap

damages at the level provided for under other federal civil rights laws. Thus, punitive and compensatory damages would be lower for smaller employers and higher for larger companies, as in current federal discrimination cases. The bill has Republican support not only in the House, but in the Senate, and even the White House has indicated support for the concept of a ban on genetic discrimination.

However, there is still some debate on whether greater protection is needed for workers who believe their employer or health insurance company has used their family history of genetic results to discriminate against them. Some argue that the legislation is a "solution in search of a problem," or that genetic testing can help to reduce employers' health care costs by detecting diseases from the early stages or by preventing disease in the first place. Further, employers are concerned about privacy provisions in the bill, pointing out that employers routinely obtain healthcare information with sick leave request forms and other such sources. An issue remains as to how the bill would interact with current state laws.

Congressional testimony involving the bill cited historical cases involving African Americans tested for sickle cell anemia in the 1970's, and a \$2 million settlement paid by the Burlington Northern Sante Fe Corp., where the company had sought to test employees for carpal tunnel syndrome. Witnesses stated that many individuals have chosen to forego genetic testing out of fear of negative consequences.

EMPLOYERS NEED TO PLAN OVER

ADJUSTMENTS FOR MINIMUM WAGE CHANGES



Judith DePrisco

"The proposed changes also focused attention as to how the minimum rate changes affected employees higher on the rate scale during these negotiations.."

Congress is poised to raise the minimum wage from \$5.15 an hour to \$7.25 an hour by 2009, as the proposal has already passed the House of Representatives and is pending in the Senate. Wimberly, Lawson attorneys engaged in some union contract

negotiations over the past month in which the proposed minimum wage changes would affect both start rates and, potentially, the base rates of some employees. The proposed changes also focused attention as

to how the minimum rate changes affected employees higher on the rate scale during these negotiations. Because the federal minimum wage has not changed in so many years, there is very little literature or guidance in labor publications on these issues. This article is intended to at least sensitize employers to the issues.

Obviously, minimum wage increases are going to have the greatest effect on start rates, as they are an employer's lowest pay rates. Most employers have a "base" rate that goes into effect upon the completion of the probationary period, and/or graduated increases that increase over time until a designated pay rate is reached. An initial issue in the negotiations, which is equally applicable to non-union employers, is how the minimum rate or start rate increases affect the adjustments that normally take place at the end of the probationary period, and/or the step increases, until a regular rate is reached. A union representative contended, in this regard, that if an employer normally had an increase in pay after 90 days, and if minimum wage increases forced the start rate to increase, the same differential must be maintained between the start rate and the non-probationary rate. The company was fortunate with respect to this point because its union contract did not provide for a cents per hour increase, but simply established the base rate at a set figure, such as \$7.00 per hour. Thus, the employer was able to successfully argue that the historic differentials between start rate and base rate did not have to be maintained under the union contract scheme. Nevertheless, the dispute points out an argument that unions may raise, and indeed that many non-union employees may assume: that historical differentials will be maintained, even when the federal minimum wage forces increases in start rates.

The union in these negotiations finally accepted the employer's contention

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that the base rate did not have to remain at a historical higher rate than the start rate, and indeed the final contract proposal indicated that base rates would be at or above start rate levels. Nevertheless, for various reasons, including competitive hiring and employee expectations, many employers will want to maintain base rates and pay escalations at historical levels above start rates, or at least some middle level.

In at least one contract negotiated by Wimberly Lawson, an employer successfully negotiated a “progression on progression” method of allocating pay increases between start rate and the base rate or topped-out rate. That is, the rates in the progression between start and topped-out or base rate were allocated so that each step increase would be a fraction of the total increase, with the number of months at each step level from the start rate being the numerator, and the total number of months in the progression being the denominator, so that each step level of the progression wage increases was progressive. This is just one example of an innovative pay resolution the employer used in that particular situation. The basic idea is to raise the start rate in accordance with necessary adjustments from federal minimum wage increases, but to have only a limited, dampened effect on steps in the progression of other rates.

Another issue is the timing of pay adjustments, particularly for non-union employers. Many employers like to consider adjusting their pay prior to mandated increases in the federal minimum wage, so as to get some “credit” for such pay adjustment in advance of any mandated legal changes. The idea is to minimize any feeling by employees that they expect get an increase at the time the federal minimum wage increases, as employees would have recently received a pay increase. This concept is certainly worthy of consideration by the employer. Also, employers should be careful in wording their pay increase announcements in order to generate the maximum good will.

Another factor to consider is the cost of any pay increases. Many employers simply multiply the pay increase by an hourly amount, such as 2,080, times the number of employees, in order to figure the cost increases. Actually, rate changes affect other cost increases, such as holidays, vacations, payroll taxes, workers compensation, overtime, etc. So, to more accurately cost pay increases, it is appropriate to also consider a “roll-up” factor, to account for the effect on fringe benefits and payroll taxes. Some employers consider a “roll-up” factor of approximately 20-25%.

BANK ONE SETTLES ADMINISTRATIVE SEPARATION CASE WITH EEOC FOR \$2.2 MILLION



In November, the EEOC reached a significant settlement in a disability discrimination case with J.P. Morgan Chase & Co., the international financial firm that acquired Chicago-based Bank One in 2004. The conciliation agreement

Marty Conway
“The conciliation agreement calls for the employer to individually assess whether a disabled employee on a leave of absence should receive additional job protection or other accommodations.”

settles a finding by the Commission that Bank One violated the ADA by refusing to accommodate a group of 222 employees who were medically released to return to work after their leaves of absence

exceeded six months, but who were not properly accommodated by their employer. The EEOC found “reasonable cause” to believe the company had engaged in discrimination regarding Bank One’s policy that protected employees’ jobs for leaves of absence of less than six months, but which provided no protection to employees who took longer leaves. Under Bank One’s policy, if the job had been filled during the employee’s absence, the employee had 30 days to either find another job within Bank One or was terminated, a policy that the EEOC found violated ADA. The conciliation agreement calls for the employer to individually assess whether a disabled employee on a leave of absence should receive additional job protection or other accommodation.

Editor’s note — The EEOC’s position in this case is very unsettling to most employers, as administrative separations similar to that used by Bank One, are quite common in industry. When the EEOC or private plaintiffs take such issues to court, they usually lose. Courts almost consistently find administrative separation policies, consistently enforced, to be lawful. Nevertheless, cautious employees may consider “building into” their administrative separation policies some areas pertaining to reasonable accommodation. Advice of counsel is recommended concerning the drafting and implementing of such policies.