

## CONGRESS DEBATING “EMPLOYEE FREE CHOICE ACT”

With the political shift in Congress, several important labor or employment laws may significantly change. Of the proposals being considered, perhaps the most controversial is the misnamed “Employee Free Choice Act,” which would radically affect how employees choose union representation, compress collective bargaining, and expose employers to expensive penalties. Employers should consider how this proposal could dramatically impact their workforce now – before it is too late.

### Background

The federal law governing relations between unions, employees, and employers is the National Labor Relations Act (NLRA). The NLRA has long provided a stable foundation governing how employees may select union representation, how negotiations occur between employers and unions, and how to deal with alleged violations by unions or employers.

The nation’s workforce has evolved since the NLRA began many years ago, and the unionized workforce has fallen to an all-time low. As a result, unions are fighting back, particularly through the political process. They are pressing for various changes in the laws in hopes of reversing declining membership. At the top of their agenda is H.R. 800, the “Employee Free Choice Act.”

### Card Check

Currently under the NLRA, employees typically choose or reject union representation through a secret ballot election administered by the National Labor Relations Board (NLRB). The secret ballot has been one of the NLRA’s most fundamental protections against interference or intimidation of employees by unions or employers during the election process.

H.R. 800 would eliminate the secret ballot process by permitting a “card check” process instead. Under the proposal, a union would merely need to collect signed authorization cards or a petition from a majority of employees in a “unit appropriate for bargaining.” No secret ballot election would be held. Rather, if the union presented signed authorization cards from at least a majority of the employees in a designated unit, then the union would become the exclusive collective bargaining representative for all employees within that unit and gain the right to negotiate their wages, hours, and working conditions.

## Collective Bargaining

Under the current law, if employees are represented by a union, then an employer must bargain in good faith with the union over the employees' wages, hours, and working conditions. There is no time limit for good faith bargaining; it may require just a few hours or days or, on the other hand, months or years. Similarly, good faith bargaining does not mandate that one party agree to a particular proposal or even reach an overall agreement.

H.R. 800 would significantly change the collective-bargaining process. The proposal would require an employer and union to begin negotiations normally 10 days after the union has presented authorization cards signed by a majority. The parties would have 90 days to negotiate an entire contract. If no contract is negotiated, they must request assistance from the Federal Mediation and Conciliation Service. If there is still no agreement after 30 more days, H.R. 800 mandates that an "arbitration board" resolve the negotiations by deciding the matter for the parties, thereby unilaterally establishing a collective-bargaining agreement governing the applicable workforce for the next two years.

## Increased Penalties

If an employer or union is shown to have violated the NLRA, then it is subject to a variety of legal consequences. The NLRB decides whether a violation, also known as an unfair labor practice (ULP), has occurred and imposes a remedy. In extreme situations, a federal court may be asked to intervene by issuing an injunction while a ULP charge is pending.

Under H.R. 800, employers – but not unions – would face tremendously greater damages and new fines for proven ULP charges. For example, ULP charges originating during a union campaign or first-contract negotiations could trigger awards of triple back pay and fines of \$20,000 per violation against the employer. H.R. 800 would also increase the likelihood of intervention by a federal court, through an injunction, while the ULP charges are adjudicated.

## Conclusion

At the top of the unions' legislative agenda, H.R. 800 would significantly change the laws governing the workplace and promote unionization. H.R. 800 has support in Congress, and the U.S. House recently approved it. The bill now goes to the Senate and, if passed, likely faces a presidential veto. While the ultimate fate of the bill remains uncertain, the nation's workforce is likely to become much more unionized – and employers will face many new legal challenges – if H.R. 800 becomes law.

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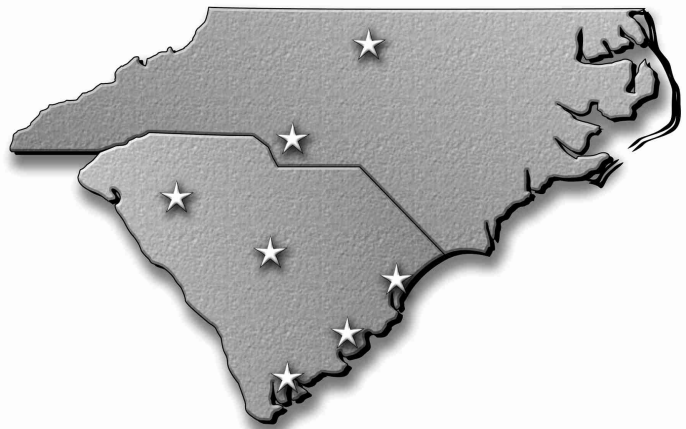
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