Labor Issues Legislative Update

115th Congress, First Session

The U.S. Chamber of Commerce Labor, Immigration and Employee Benefits Division is monitoring the following labor legislative issues. Issues are not presented in any specific order.

Union and Organizing Issues

Tribal Labor Sovereignty Act of 2017

On January 9, 2017, Sen. Jerry Moran (R-KS) introduced S. 63, the “Tribal Labor Sovereignty Act of 2017.” The legislation would amend the National Labor Relations Act to provide that any enterprise or institution owned and operated by an Indian tribe and located on its lands is not considered an employer (thus excluding such enterprises or institutions from coverage by the Act). The bill would clarify that it would preclude NLRB jurisdiction over Indian tribes themselves, as well as tribal-operated businesses. On February 8, 2017, prior to the bill’s mark-up before the U.S. Senate Committee on Indian Affairs, the Chamber sent a letter, supporting the legislation. On February 8, 2017, the U.S. Senate Committee on Indian Affairs passed the legislation by voice vote.


On June 28, 2017, the Chamber sent a letter to the House Committee on Education and Workforce, prior to the bill’s mark-up, supporting the legislation. On June 29, 2017, the bill was approved by a party-line vote of 22-16.

Representation Fairness Restoration Act

On May 24, 2017, Rep. Francis Rooney (R-FL) and Sen. Johnny Isakson (R-GA) introduced H.R. 2629 and S. 1217, respectively, the “Representation Fairness Restoration Act.” The legislation addresses the Board’s decision in Specialty Healthcare by amending Section 9(b) of the National Labor Relations Act to remove the reference to the “employer unit, craft unit, plant unit, or subdivision,” and would insert the traditional eight-factor test to determine whether employees share a sufficient community of interest to be grouped in a single unit.
Employee Rights Act


The legislation would amend the National Labor Relations Act to mandate a secret ballot election for all union-held elections; redefine the term “majority” to “mean the majority of all the employees in the unit, and not the majority of employees voting in the election”; and require recertification of a union via secret ballot election “whenever any certified or voluntarily recognized bargaining unit existing on or after the date of enactment experiences turnover, expansion, or alteration by merger of unit represented employees exceeding 50 percent of the bargaining unit between the 120th day and 110th day prior to the collective bargaining agreement’s expiration or prior to the conclusion of three years, whichever comes earlier or if there is no negotiated collective bargaining agreement, within 30 days.” The legislation would make the union liable for “wages lost and union dues or fees collected unlawfully, if any, and an additional amount as liquated damages” if the union unlawfully interferes with the filing of a decertification petition.

The bill also reverses the NLRB’s “ambush election” rulemaking on representation procedures by among things, mandating that the Board would stipulate that an election for the union is not to be held until a hearing is conducted, and outstanding issues are resolved by the Regional Director or the Board. Furthermore, election results would not be final until the Board has ruled on “each pre-election issue” after conducting a hearing.

The legislation also amends the Labor Management Reporting and Disclosure Act by preventing a union from ordering a strike unless the union first obtains the majority vote of “every employee in a bargaining unit represented by a labor organization, regardless of membership status” via a secret ballot election; authorizing an employee to opt-in for the purposes of allowing their union dues fees, assessments, or other contributions to be “used or contributed for any purpose not directly germane to the labor organization’s collective bargaining or contract administration;” and strengthening the prohibition against extortion and the use of force or violence thereof for achieving objections relating to union representation, compensation, or conditions of employment by imposing a penalty of no more than $100,000 or imprisonment for 10 years, or both.

On September 7, 2017, Sen. Orrin Hatch (R-UT) introduced the companion bill in the U.S. Senate, S. 1774.

Employee Privacy Protection Act

On June 6, 2017, Rep. Joe Wilson (R-SC) introduced H.R. 2775, the “Employee Privacy Protection Act.” The legislation addresses the Board’s “ambush election” regulation on changes to representation proceedings. The bill would apply to all of the representation case categories in which the National Labor Relations Board conducts secret ballot elections.

The bill would amend Section 9(c)(1) of the National Labor Relations Act to provide that “Not earlier than 7 days after a final determination by the Board of the appropriate bargaining unit, the Board shall acquire from the employer a list of all employees eligible to vote in the
election to be made available to all parties, which shall include the names of the employees, and
one additional form of personal contact information of the employee (such as telephone number,
email address or mailing address) chosen by the employee in writing.”

On June 28, 2017, the U.S. Chamber sent a letter to the U.S. House Committee on
Education and Workforce, prior to the bill’s mark-up, supporting the legislation. On June 29,
2017, the bill was approved by a party-line vote of 22-16.

**Workforce Democracy and Fairness Act**

On June 6, 2017, Rep. Tim Walberg (R-MI) introduced H.R. 2776, the “Workforce
Democracy and Fairness Act.” The legislation addresses the Board’s decision in *Specialty
Healthcare*, and the “ambush elections” regulation on changes to representation proceedings.

To revise the standard announced in *Specialty Healthcare*, the bill would amend Section
9(b) of the National Labor Relations Act, by articulating the traditional eight-factor test used by
the Board. Furthermore, the bill provides that the question of whether additional employees
should be included in a proposed voting unit would be determined by whether those employees
“share a sufficient community of interest” with the proposed unit. The bill would limit the
application of an “overwhelming community of interest standard” to cases involving “proposed
accretions to an existing unit.”

The bill would modify the regulations made to representation proceedings by limiting the
NLRB’s discretion in representation case proceedings. Under the terms of the legislation, the
Board would be required to allow a minimum of 14 days before a pre-election hearing on
representation case issues could be held. The NLRB would also prohibit the agency from
conducting an election proceeding less than 35 days after the filing of a petition.

On June 14, 2017, Sen. Lamar Alexander (R-TN) introduced the companion bill in the
U.S. Senate, S. 1350.

On June 28, 2017, the U.S. Chamber sent a letter to the House Committee on Education
and Workforce, prior to the bill’s mark-up, supporting the legislation. On June 29, 2017, the bill
was approved by a party-line vote of 22-16.

**Save Local Business Act**

On July 27, 2017, Rep. Bradley Bryne (R-AL) introduced H.R. 3441, the “Save Local
Business Act.” The bill would amend the National Labor Relations Act and the Fair Labor
Standards Act. It would reinstate the joint employer test previously in place prior to the NLRB’s
decision in *Browning Ferris*, which required the employer to have “actual, direct and immediate
control.” And apply that same definition to the FLSA.

On October 4, 2017, the U.S. House Education and Workforce Committee passed it by a
party-line vote of 23-17. Prior to the mark-up, the Chamber sent a letter supporting the
legislation. On November 7, 2017, the U.S. House passed the bill by a vote of 242-181 with eight
Democrats supporting and no Republicans opposing. The Chamber Key Voted the bill.
Civil Rights and Discrimination Issues

Americans with Disabilities Act (ADA) Title III Notification

On January 24, 2017, Rep. Ted Poe (R-TX) introduced H.R. 620, the “ADA Education and Reform Act of 2017.” The bill would amend Title III of the ADA to require a notice and cure period for a “failure to remove an architectural barrier to access into an existing public accommodation.” On September 7, 2017, the House Judiciary Committee passed the bill by a vote of 15-9.

On March 10, 2017, Rep. Jeff Denham (R-CA) introduced H.R. 1493, the “ADA Lawsuit Clarification Act of 2017.” The bill would give business owners and operators 120 days to respond to an ADA violation complaint and correct it before being held civilly or criminally liable under federal and state law. The legislation also would require the Department of Justice (DOJ) to make compliance materials available in languages commonly used by business owners and operators.

On July 28, 2017, Rep. Kathy Castor (D-FL) introduced H.R. 3571, the “Reasonable ADA Compliance Act of 2017.” The bill would amend Section 308 (a) of the Americans with Disabilities Act of 1990 to provide “a remedial period of 120 days” for an employer to correct a violation before a lawsuit can proceed in State or Federal court.

Certainty in Enforcement Act of 2017

On March 21, 2017, Rep. Tim Walberg (R-MI) introduced H.R. 1646, the “Certainty in Enforcement Act of 2017.” The legislation would amend Section 703 of the Civil Rights Act of 1964 to make it an “unlawful unemployment practice for an employer, labor organization, or employment agency, or for a joint labor management committee controlling apprenticeships or other training or retaining opportunities as to be deemed to job related and consistent with business necessity... and such use shall not be the basis of liability under any theory of disparate impact.”

Mixed Motive Claims under ADEA and Other Non Discrimination Laws

On February 27, 2017, Sens. Bob Casey (D-PA) and Charles Grassley (R-IA) introduced S. 443, the “Protecting Older Workers Against Discrimination Act.” The bill would amend the Age Discrimination in Employment Act (ADEA), the Americans with Disabilities Act, the Rehabilitation Act of 1973, and certain provisions of Title VII to permit mixed motive claims in a manner consistent with the 1991 amendments to Title VII. The central intent of the bill is to reverse the Supreme Court’s decision in University of Texas Southwestern Medical Center v. Nassar (U.S. 2013) and Gross v. FBL Financial, 129 S. Ct. 2343 (2009), in which the Supreme Court held that mixed motive claims were not cognizable under the ADEA or Title VII.

Family and Medical Leave Act (FMLA) and Other Leave Mandates

**Working Families Flexibility Act of 2017**

On February 16, 2017, Rep. Martha Roby (R-AL) introduced H.R. 1180, the “Working Families Flexibility Act of 2017,” which would amend the FLSA to permit private employers to provide employees the choice of overtime wage paid out in the next paycheck as under current law, or overtime wages paid out in conjunction with paid time off taken later. This comp time option has been available to public sector employees since 1985. An employee may withdraw from a compensatory time off agreement with the employer at any time (except if the employee is part of a collective bargaining unit). However, if the employer wishes to withdraw from the program, a 30-day notice period would be required. Under the terms of the legislation, the program would expire five years after the date of enactment.

On April 5, 2017, the House Education and Workforce Subcommittee on Workforce Protections held a legislative hearing where Leonard Court testified on behalf of the U.S. Chamber regarding the bill’s merits. On April 26, 2017, the U.S. House Education and Workforce Committee passed the legislation by a party-line vote of 22-16. On May 2, 2017, prior to the vote on the House floor, the U.S. Chamber sent a Key Vote letter, supporting the legislation. On May 2, 2017, the U.S. House passed the bill by a vote of 229-197.

On April 3, 2017, Sen. Mike Lee (R-UT) introduced the companion bill in the U.S. Senate, S. 801.

**Workflex in the 21st Century Act**

On November 2, 2017, Rep. Mimi Walters (R-CA) introduced H.R. 4219, the “Workflex in the 21st Century Act.” The legislation would exempt employers from state and local paid leave obligations if they give workers a certain amount of general paid leave that can be used for medical, family, bereavement, vacation, and other reasons. It would also relieve participating federal contractors from requirements under the Obama paid sick leave Executive Order. The amount of leave required would vary from 12 to 20 days a year, based on the business’s size and the time the worker has been on the job. That includes up to six paid holidays. The bill would amend the Employee Retirement Income Security Act, which sets minimum requirements for pension and other benefits plans. The U.S. Chamber has been involved in the development of this bill.

**Anti-Arbitration**

**Arbitration Fairness Act of 2017**

On March 7, 2017, Rep. Henry C. “Hank” Johnson (D-GA) and Sen. Al Franken (D-MN) introduced H.R. 1374 and S. 537, respectively, the “Arbitration Fairness Act of 2017.” The bill would reverse the Supreme Court decision in *Circuit City Stores Inc v. Adams* and reaffirmed in *AT &T Mobility LLC v. Concepcion*, which upheld employer policies requiring pre-dispute binding arbitration agreements as a condition of employment. The bill would amend the Federal
Arbitration Act to make pre-dispute arbitration agreements for employment, consumer, franchise, or civil rights disputes unenforceable.

**Restoring Statutory Rights and Interests of the States Act of 2017**

On March 7, 2017, Rep. David Cicilline (D-RI) and Sen. Patrick Leahy (D-VT) introduced H.R. 1396 and S. 550, respectively, the “Restoring Statutory Rights and Interests of the States Act of 2017.” The bill would reverse the Supreme Court decision in *Circuit City Stores Inc v. Adams* and reaffirmed in *AT &T Mobility LLC v. Concepcion*, which upheld employer policies requiring pre-dispute binding arbitration agreements as a condition of employment.

The bill would make the FAA inapplicable to forced arbitration of claims brought by individuals or small businesses “arising from the alleged violation of a Federal or State statute, the Constitution of the United States, or a constitution of a State;” provide that the grounds “at law or in equity for the revocation of any contract” that allow an arbitration agreement to be declared invalid include “a Federal or State statute, or the finding of a Federal or State court, that prohibits the agreement to arbitrate on grounds that the agreement is unconscionable, invalid because there was no meeting of the minds, or otherwise unenforceable as a matter of contract law or public policy;” and require the determination of whether the FAA applies to an arbitration agreement to be made by a court.

**Occupational Safety and Health Administration (OSHA) Issues**

*Voluntary Protection Program Act*

On March 9, 2017, Rep. Todd Rokita (R-IN) introduced H.R. 1444, the “Voluntary Protection Program Act.”

The bill would replace the cooperative agreements and voluntary protection programs currently carried out by OSHA, with a new cooperative agreement and voluntary protection program, as authorized in the legislation. The bill would require the Secretary of Labor to enter into cooperative agreements with employers to encourage the establishment of comprehensive safety and health management systems that include “requirements for systematic assessment of hazards”; “comprehensive hazard prevention, mitigation; and control programs”; “active and meaningful management and employee participation in the voluntary protection program”; and “employee safety and health training.”

The Secretary of Labor would also establish and carry out a voluntary protection program to encourage excellence and recognize the achievement of excellence in both the technical and managerial protection of employees from occupational hazards. The voluntary protection program would include the following requirements: an employer would have to submit an application to the Secretary of Labor; representatives of the Secretary of Labor would possess the authority to conduct onsite visits; employers who participate in the program would share information about safety and health programs to employees; and such employers would be subject to periodic reevaluations.
The bill also authorizes the Assistant Secretary of Labor to “develop a documentation policy regarding information on follow-up actions taken by OSHA’s regional offices in response to the fatalities and serious injuries at worksites participating in the voluntary protection program”; “establish internal controls that ensure consistent compliance by the regional offices with the voluntary protection program policies of OSHA for conducting onsite reviews and monitoring injury and illness rates, to ensure that only qualified worksites participate in the program”; and “establish a system for monitoring the performance of the voluntary protection program by developing specific performance goals and measures for the program.” An employer site, which has been approved by the Secretary of Labor and elects to participate in the voluntary protection program, would be exempt from inspections or investigations and certain paperwork requirements to be determined, except the employer would still be subject to inspections, investigations and certain paperwork requirements arising from employee complaints, fatalities, catastrophes, or significant toxic releases.

On September 27, 2017, Sen. Michael Enzi (R-WY) introduced the companion bill in the U.S. Senate, S. 1878.

**Appropriations**

**U.S. House of Representatives**

**Commerce, Justice, Science, and Related Agencies Appropriations Act for FY2018**


The Report accompanying the bill also has language directing the agency to pursue conciliation instead of litigation:

“**Conciliation.**—The Committee is concerned with the EEOC’s pursuit of litigation absent good faith conciliation efforts. The Committee directs the EEOC to engage in such efforts before undertaking litigation.”

**Departments of Labor, HHS, and Education, and Related Agencies Appropriations Act for FY 2018**

On July 19, 2017, the U.S. House Appropriations Committee marked up and approved H.R. 3358, the “Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2018” by a party-line vote of 28-22. Of a $156 billion appropriations package, the Labor Department would be funded at $10.8 billion.
Specific agencies would be funded at the following levels:

- $217.5 million for the Wage and Hour Division, decrease from $227.5 million; (decrease of $10 million)
- $94.5 million for OFCCP, decrease from $105 million (decrease of $10.5 million);
- $531.437 million for OSHA, decrease from $552 million (decrease of $20.56 million)

The bill would exempt “any employee employed in insurance claims adjusting” from the FLSA’s overtime requirements. These insurance adjusters would be exempt while performing specified insurance-claims work under particular conditions following a “major disaster.” The exemption would apply only for a twenty-four month period following the major disaster. Each employee would have to receive an average weekly income of at least $591 per week for the period in which the work is performed or “any minimum weekly amount established by the Secretary, whichever is greater.” Among the duties falling within the exception would be interviewing insured, witnesses or physicians with relevant information; inspecting property damage; making recommendations about coverage, liability, or value; negotiating settlements; or making recommendations regarding litigation. Employees of companies (or their affiliates, as defined in the exemption) that underwrite, sell, or market insurance would not be eligible. The legislation would make eligible only those brought in by independent companies that possess the necessary licenses, provide worker’s compensation, and make the required tax withholdings.

The bill also contains a prohibition on the use of funds to promulgate the “Definition of ‘fiduciary- Conflict of Interest’” regulation.

The bill would also fund the National Labor Relations Board at $249 million, which represents a decrease in funding (a decrease of $25 million).

The legislation contains the following funding limitations with respect to the National Labor Relations Board:

- Prohibits the use of “any new administrative directive or regulation” with respect to electronic voting in representation elections conducted by the Board;
- Prohibits the NLRB from asserting jurisdiction over Native American employers;
- Bars the Board from using funds to “issue, enforce, or litigate any administrative directive, regulation, representation issue, or unfair labor practice proceeding, or any other administrative complaint, charge, claim, or proceeding based on the standard for determining whether entities are ‘joint employers’ set forth by the National Labor Relations Board in *Browning-Ferris Industries of California, Inc.*, 362 NLRB No. 186 (August 27, 2015).”

During mark-up, the Committee approved an amendment from Rep. Andy Harris (R-MD) that would prevent the National Labor Relations Board from enforcing the *Specialty Healthcare* decision. The Harris Specialty Healthcare amendment was based on a Chamber request and used language suggested by the Chamber.

The Report accompanying the bill has the following language to direct the agency’s actions:

“Public Comment on EEOC Guidance.--The Committee is concerned that as the EEOC conducts its business in protecting against employment discrimination, its guidance proposals can be adopted without the opportunity of public input prior to implementation and enforcement. Therefore, if requested by at least two Commissioners, the EEOC shall make any new guidance available for public comment in the Federal Register for not less than 30 days prior to taking any potential action on proposed guidance.”

On September 7, 2017, the Senate Appropriations Committee passed S. 1771, the “Departments of Labor, Health and Human Services, and Education and Related Agencies Appropriations Act, 2018” by a vote of 29–2. The bill would fund the Department of Labor at $12 billion.

Specific agencies would be funded at the following levels:

- $227.5 million for the Wage and Hour Division (flat funding);
- $103.4 million for OFCCP, decrease from $104.4 million (decrease of $1 million); and
- $552 million for OSHA (flat funding).

The bill would also fund the National Labor Relations Board at $274 million.

On September 14, 2017, during debate on Senate Amendments to H.R. 2810, the “National Defense Authorization Act for Fiscal Year 2018,” the Chamber sent a letter, stating its support for Inhofe Amendment 906 to strike the blacklisting section.