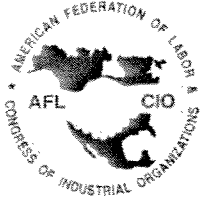
AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS



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LEGISLATIVE**ALERT**

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July 10, 2013

The Honorable Tom Harkin, Chairman
Subcommittee on Labor, Health And
Human Services, Education,
and Related Agencies
131 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Jerry Moran
Ranking Minority Member
Subcommittee on Labor, Health And
Human Services, Education,
and Related Agencies
131 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Harkin and Ranking Member Moran:

On behalf of the AFL-CIO, I am writing to urge you to vote against policy riders to the Labor-HHS appropriations bill for FY 2014 that would limit the authority of key federal agencies to carry out their vital missions. After nearly a decade of neglect, both the Department of Labor and the National Labor Relations Board (NLRB) are taking steps to improve the working conditions of millions of works and to guarantee them a voice on the job. The Committee should reject efforts to roll back these protections.

National Labor Relations Board

1. **Oppose Efforts to Disable the NLRB –** We urge you to oppose any amendment that would prevent the NLRB from enforcing the law while President Obama's recess appointment authority is litigated. Suspending the Board's enforcement authority for even a brief period of time would deny workers their basic rights under the National Labor Relations Act, including the right to be reinstated with back pay when they have been illegally fired, the right to choose whether to be represented by a union, and the right to bargain for better wages and safer jobs. While the NLRB safeguards the fundamental rights of workers, it also protects business and the public by providing orderly procedures for preventing disruptions of commerce by either side to a labor dispute. Shutting down the NLRB until the recess appointment matter is resolved would deprive both labor and management of their ability to have their rights adjudicated when federal labor law is violated.

2. **Uhold *Specialty Healthcare*** – Oppose any amendment that would overturn the NLRB's *Specialty Healthcare* decision. Despite claims to the contrary, *Specialty Healthcare* reiterated the approach the Board has applied for many decades in making determinations about the appropriate unit for a union election. It is an approach that considers *both* "whether the employees in the unit sought have interests in common with one another" *and* "whether the interests of the group sought are sufficiently distinct from those of other employees."

   The claims of business advocates that *Specialty Healthcare* stands for the proposition that "micro-units" are now favored by the NLRB are overblown and do not square with decisions that have been issued since *Specialty Healthcare*. In fact, two recent decisions belie the claims of retailers that small groups of employees within large retail establishments will be able to organize under the *Specialty Healthcare* test. In a case involving Home Depot, the Board rejected a petition by certain merchant department specialists that they meet the community-of-interest test, finding instead that a wall-to-wall unit was the only appropriate unit at the Home Depot store. **Home Depot USA, 20-RC-067144 (November 18, 2011)**

   Similarly, the Board found in a case involving the Odwalla food company that merchandisers had to be included in the petitioned-for unit of drivers, warehouse associates, and cooler technicians. Relying on *Specialty Healthcare*, the Board determined that the employer had carried its burden of proving that the merchandisers shared an overwhelming community of interest with the included employees and that excluding the merchandisers would result in a fractured unit. **Odwalla, Inc., 357 NLRB No. 132 (December 9, 2011)**

3. **Preserve the NLRB Election Rule –** Oppose any amendment that would require a minimum number of days before workers can vote whether or not to form a union. This amendment would in effect prohibit the NLRB from enforcing its new rule updating and modernizing the procedures used by the Board to supervise elections for workers who want to vote on whether to form a union. Last year, the Senate voted 54-45 to reject a motion of disapproval under the Congressional Review Act. The election rule makes modest, sensible changes to bring balance to the election process, which has all too often become a lengthy, drawn out process filled with litigation and endless delays.

4. **Preserve the Rights of Employers and Workers to Agree to Voluntary Recognition –** Oppose any amendment that would prohibit the NLRB from asserting in federal court that state laws that mandate a secret ballot election are preempted by the National Labor Relations Act. For over 70 years, the NLRA has permitted so-called 'voluntary recognition agreements,' in which employers voluntarily agree to recognize a union as the exclusive bargaining agent for the employees without an election, based on a majority showing of interest. In 2010, four states – reacting to the possibility that Congress would pass the Employee Free Choice Act – passed state laws prohibiting employers from reaching voluntary recognition agreements with their employees. Because these state laws interfere with the exercise of federally protected rights, the NLRB was right to inform the states that these state laws were preempted by federal law and to take action to preserve the uniformity of our nation's labor laws.

Department of Labor

1. **Allow the Companion Rule to Proceed –** Oppose any amendment that would prohibit DOL from issuing a final companionship regulation that would extend minimum wage and overtime protection of the Fair labor Standards Act to many, but not all, home health care workers. Under the proposal, third party employers will no longer be entitled to claim an exemption from minimum wage and overtime pay requirements for workers employed as companions, or to claim the exemption from overtime requirements for live-in domestic service workers. However, an individual or household that employs a worker to perform companionship services will continue to maintain the exemption from minimum wage and overtime pay requirements.

2. **Allow the Persuader Rule to Proceed –** Oppose any amendment that would prohibit DOL from issuing a proposed rule to close a loophole that permits employers to avoid reporting on their activities to influence their employees' decisions regarding forming or joining a union. Currently, employers can avoid filing reports by claiming outside consultants are providing "advice" but are not engaged in persuader activities, even if the employer uses the consultants' materials and follows the consultants' plans. This undermines the language and purposes of the Labor Management Reporting and Disclosure Act (LMRDA) of 1959, which requires disclosure of activities to persuade employees regarding unionization. The Department of Labor's proposed rules promote transparency and should not be blocked.

3. **Protect OSHA Walk-Around Rights** – Oppose any amendment that would prohibit OSHA from allowing employees to designate a representative of their choosing to participate in OSHA workplace inspections. The OSH Act provides for "a representative authorized by employees" to accompany OSHA during workplace enforcement inspections. This representative is usually an employee of the employer, but OSHA regulations have always provided for inspectors to recognize a non-employee as the employee representative if the inspector determines it would aid in the conduct of an effective inspection. Earlier this year, OSHA interpreted this provision to include individuals who could help interpret for non-English speaking workers, help facilitate communication with inspectors where employees feared possible retaliation or provide special technical knowledge or skills. Employer groups have objected to this interpretation claiming it is intended to assist unions in organizing drives or contract disputes and will undermine safety and health. On the contrary, this policy will help ensure that workers can effectively participate in OSHA inspections and help improve workplace safety and health.

4. **Allow DOL's Fiduciary Rule to Proceed** – Oppose any amendment that would prohibit or delay DOL from updating rules that protect workers' retirement savings. The Department of Labor is nearing the end of a comprehensive analysis that will culminate in a proposed rule to modernize ERISA fiduciary protections to safeguard worker retirement accounts. ERISA's fiduciary rules protect workers' retirement savings from fraudulent, deceptive, and misleading practices, but the Labor Department's rulemaking process has not kept pace with the dramatic changes in the retirement income landscape over the past four decades. Key ERISA fiduciary protections have not been updated since 1975, when few workers had self-directed retirement accounts such as 401(k)s or

IRAs. The Fiduciary Rule must be modernized to reflect these changes and address critical gaps that threaten workers' hard-earned retirement savings.

5. **Preserve the H-2B Rule** – Oppose any amendment that would weaken the Department of Labor's long-delayed H-2B comprehensive rule. The H-2B comprehensive final rule guarantees U.S. workers a fair opportunity to obtain jobs before an employer is permitted to bring in temporary foreign guest workers. Current law permits employers to advertise positions with state workforce agencies (SWAs) for as little as ten days, and to do so almost four months prior to the anticipated first day of work. In contrast, the final rule requires employers to continuously recruit U.S. workers up until 21 days prior to the date of need, and to rehire former employees when available.

   In addition to enhanced recruitment, the rule restores the certification model that was in place until 2009. The rule also enhances protections for H-2B workers by requiring that employers (1) pay the cost of in-bound transportation; (2) provide tools and equipment needed to perform the job; and (3) guarantee the work hours equal to at least three-fourths of the workdays in each 12 week period. Finally, the rule protects workers against retaliation if they bring a complaint alleging a violation of any of the requirements.

The Obama Administration has pursued common sense solutions to problems that have plagued working families for decades, and it is obvious from the list of potential riders that corporations and their advocates on Capitol Hill are determined to erase these gains. We urge you to reject these efforts to turn back the clock.

Sincerely,

William Samuel, Director
Government Affairs Department