COALITION FOR A
DEMOCRATIC WORKPLACE

July 9, 2024

Dear Members of the House of Representatives:

The Coalition for a Democratic Workplace[1] (CDW) writes to express our support for Sections 409 and 410 of the Fiscal Year 2025 Labor, Health and Human Services, Education, and Related Agencies (Labor HHS) appropriations bill,[2] which would prohibit the National Labor Relations Board (NLRB) from using appropriated funds to implement electronic voting in union representation elections and its "Standard for Determining Joint Employer Status" Final Rule,[3] respectively.

President Biden and a handful of members of Congress have urged dramatic increases to the NLRB's FY25 budget. The NLRB, however, is already wasting existing resources on radical policy changes and long-shot litigation, including rulings that will limit employees' access to secret ballots in representation elections, expanding the joint employer and independent contractor standards in a manner contrary to governing court decisions and that could threaten entrepreneurs and small businesses, and enforcement efforts focused on applying the National Labor Relations Act (NLRA) to collegiate athletes, which is clearly beyond the intent of the NLRA. Any increase to the agency's budget should be accompanied by policy riders that keep resources focused on the NLRB's mission as set forth by Congress and interpreted by the courts. Fortunately, the Labor HHS bill in question would target two of the Board's misguided policies with the aim of reining in the agency and realigning its actions with its intended mission.

Section 409 of the Labor HHS appropriations bill prohibits the NLRB from utilizing its appropriated funds to move away from in-person, secret ballot elections to determine if workers wish to be represented by a union and toward electronic voting. This rider has been in place for decades and supported on a bipartisan basis in both chambers of Congress because electronic voting in representation elections would break with NLRB precedent, increase the risk of coercion and fraud in union elections, and waste NLRB resources.

Historically, it has been the NLRB's "longstanding policy… that representation elections should, as a general rule, be conducted manually, either at the employees' workplace or some other appropriate location."[4] In-person elections provide the privacy of the voting booth, the security of NLRB supervision, and the accessibility of voting in the workplace. This is why members of Congress, the NLRB, and federal courts have routinely acknowledged that secret ballot elections are the best means for ensuring workers can freely vote their conscience and providing secure, credible elections.

Electronic voting provides no such supervision or protection for workers. Employees can access their ballots and vote at any time, in any location, and potentially in the presence of anyone. They have no privacy guarantees and will therefore be exposed to potential voter intimidation, coercion, and fraud via pressure campaigns by colleagues, union organizers, and/or employers to vote a certain way. Moreover, it would be

[1] CDW is a broad-based coalition of hundreds of organizations representing hundreds of thousands of employers and millions of employees in various industries across the country concerned with a longstanding effort by some in the labor movement to make radical changes to the National Labor Relations Act without regard to the severely negative impact they would have on employees, employers, and the economy. CDW was formed in 2005.
[2] Labor HHS appropriations bill, House Appropriations Committee Subcommittee on Labor HHS, available at https://docs.house.gov/meetings/AP/AP07/20240627/117475/BILLS-118-SC-AP-FY2025-LaborHHS-FY25LHHSSubcommitteeMark.pdf.
[3] NLRB, "Standard for Determining Joint Employer Status" (88 FR 73946), October 27, 2023, available at https://www.federalregister.gov/documents/2023/10/27/2023-23573/standard-for-determining-joint-employer-status.
[4] *Aspirus Keweenaw*, 370 NLRB No. 45, slip op. at 2 (Nov. 9, 2020) (citing *San Diego Gas & Elec*., 325 NLRB 1143, 1144 (1998)).

difficult for the NLRB to detect when or to what extent such intimidation or interference might occur. In addition, in-person voting routinely results in higher voter turnout, meaning more workers participate in the representation process and guaranteeing the results genuinely reflect the desires of the workforce.

There are many examples of the dangerous consequences online and electronic voting can have on the credibility and reliability of elections. CDW published a white paper[5] in 2022 highlighting numerous instances of government agencies and state and foreign governments attempting to implement electronic voting in various situations and experiencing significant setbacks. Our white paper also highlights how costly attempting to implement and safeguard electronic voting can be and how those costs are usually made in vain. The costs of such efforts often significantly exceed that of in-person elections.

Section 410 of the Labor HHS appropriations bill would prohibit the NLRB from using appropriated funds to implement the Board's joint employer final rule. The rule expanded the definition of a "joint employer" under the NLRA. The Board uses the standard to determine when two or more entities are jointly responsible for the terms and conditions of employment over the same group of employees and are therefore jointly responsible for labor law violations and bargaining with unions representing the employees. Under the broader standard, the NLRB would find a business a joint employer of another company's workers if they have just indirect or reserved control over the workers' terms and conditions of employment. Previously, a business had to have direct and immediate control to trigger joint employer status, but this new standard ropes in essentially every contractual relationship across the economy.

While the rule will have devastating consequences economy-wide, it will be devastating for the contracting and franchise models. Various industries and organizations have expressed concerns that the rule will make franchisors liable for workplace matters of their franchisees despite having no control over those employees, increase operational costs for franchisees and franchisors, force franchisees to cut jobs, and increase litigation.

Moreover, the rule promotes collective bargaining at the expense of workers, employers, and the economy. It would place unions in the middle of routine business-to-business agreements. As the two Republican Board members explained in their dissent, "It is difficult to imagine a better recipe than today's final rule for injecting chaos into the practice and procedure of collective bargaining that the majority claims to promote."

The rule has also seen significant opposition from Congress and federal courts. Both the House and Senate passed, on a bipartisan basis, a Congressional Review Act challenge[6] to nullify the rule.[7] In addition, in March 2024, the U.S. District Court for the Eastern District of Texas nullified the "arbitrary and capricious" rule,[8] saying it "would treat virtually every entity that contracts for labor as a joint employer because virtually every contract for third-party labor has terms that impact, at least indirectly… essential terms and

[5] CDW White Paper, "Online Voting in Union Representation Elections: The Latest Attempt to Eliminate Workers' Right to Secret Ballots," July 2022, available at https://myprivateballot.com/wp-content/uploads/2022/07/Online-Voting-in-Union-Representation-Elections_Latest-Attempt-to-Eliminate-Secret-Ballots_July-2022.pdf.

[6] "*Providing for congressional disapproval under chapter 8 of title 5, United States Code, of the rule submitted by the National Labor Relations Board relating to 'Standard for Determining Joint Employer Status,'*" H.J.Res.98, 118th Cong. (2024), available at https://www.congress.gov/bill/118th-congress/house-joint-resolution/98.

[7] President Biden, unfortunately, vetoed the legislation.

[8] *Chamber of Commerce of the United States v. NLRB*, 6:23-cv-00553 (E.D. Tex. Mar. 18, 2024), available at https://casetext.com/case/chamber-of-commerce-of-the-united-states-v-natl-labor-relations-bd-1.

conditions of employment."[9] Judge Barker wrote that the rule would "likely promote labor strife rather than peace by forcing an underdefined category of entities to take a seat at a bargaining table and negotiate over a multitude of influences that may otherwise be presented (and resolved) only through the invisible hand of the marketplace." Despite opposition from Congress and the courts, the NLRB has deemed it appropriate to appeal the District Court's decision to the U.S. Court of Appeals for the 5th Circuit.[10] The decision to appeal is yet another example of the NLRB's misallocation of its limited resources to defend its radical interpretations of the NLRA.

CDW urges the House of Representatives to pass the Labor HHS appropriations bill with these policy riders in order to protect the representation election process and the economy and prevent the NLRB from wasting resources.

Sincerely,

Kristen Swearingen
Chair
Coalition for a Democratic Workplace

[9] *Chamber of Commerce v. NLRB*, 6:23-cv-00553, (Mar. 8, 2024) Available at https://www.uschamber.com/assets/documents/2024.03.08-044-Opinion-and-Order.pdf
[10] *Chamber of Commerce v. NLRB*, 6:23-cv-00553, (May. 7, 2024) Available at https://www.uschamber.com/assets/documents/NLRB-Notice-of-Appeal-Chamber-of-Commerce-v.-NLRB-E.D.-Tex.pdf