July 11, 2013

Dear Chairwoman Mikulski, Vice Chair Shelby, Subcommittee Chairman Harkin, Ranking Member Moran and Members of the Senate Committee on Appropriations:

On behalf of the millions of American businesses concerned with the rights of their employees, the fragile economy, and the need for balance in federal regulation, the Coalition for a Democratic Workplace (CDW) urges support for several important amendments that may be offered during the committee's consideration of the FY 2014 Labor, Health and Human Services, Education and Related Agencies Appropriations Bill.

CDW is a broad-based coalition of over 600 organizations united in opposition to the tenets of the so-called "Employee Free Choice Act" (EFCA) and alternatives that pose a similar threat to workers, businesses, and the American economy. In recent years, the National Labor Relations Board (NLRB or Board) and the Department of Labor (DOL) have attempted to enact many EFCA-like policies through administrative rulings and regulations. In response, much of CDW's focus has been directed toward preventing harmful actions by these agencies, including support for funding limitations. To this end, CDW supports the following possible amendments:

1. Sen. Moran (R-KS) may offer an amendment that would prohibit funding of enforcement of NLRB decisions made by President Obama's "recess" appointments to the Board until the U.S. Supreme Court rules on whether the appointments are constitutional.

On Jan. 4, 2012, President Obama recess appointed three members to the NLRB when the Senate was in session. Several legal challenges were filed against the appointments, including *Noel Canning v. NLRB*, in which CDW was involved. On Jan. 25, 2013, the U.S. Court of Appeals for the D.C. Circuit found that the president's 2012 "intrasession" recess appointments to the Board were unconstitutional. The Board has appealed the *Noel Canning* ruling to the Supreme Court, which has agreed to hear the case.

In the wake of this legal uncertainty, neither the administration nor the NLRB itself took any meaningful steps toward restraint. Instead, the White House re-nominated its controversial recess appointees, and the Board continues to issue decisions and take other administrative actions, many of which would radically change labor law. This uncertainty imposes real costs and additional layers of litigation on employers and other parties involved in pending NLRB actions.

This amendment would impose much-needed restraint over the NLRB's unconstitutional quorum by ceasing enforcement of potentially invalid Board decisions until the Supreme Court rules on the validity of the recess appointments. Under the amendment, workers could continue to petition for union elections and NLRB regional offices could still accept and process unfair labor practice charges.

2. In addition, Sen. Graham (R-SC) may offer several amendments designed to stop the NLRB from implementing backdoor "card-check" (a process that allows a union to organize workers if a majority simply sign a card) through administrative and regulatory action. The first amendment would reinstate the standard for

determining collective bargaining units that was in place prior to *Specialty Healthcare and Rehabilitation Center of Mobile and United Steelworkers, District 9, 357 NLRB No. 83 (2011)*. In *Specialty Healthcare,* the NLRB radically changed the standard for determining an appropriate bargaining unit for all of the estimated six million workplaces covered by the NLRA. Unions can now gerrymander representation elections and organize bargaining units that purposely exclude similarly-situated employees who oppose unionization, leaving them effectively disenfranchised while greatly benefitting organizing drives.

Prior to the *Specialty Healthcare* decision, bargaining units had to include employees with a shared "community of interest," Less inclusive units were permissible only where the Board found a group of employees had interests that were "sufficiently distinct from those of other employees to warrant the establishment of a separate unit." The pre-*Specialty Healthcare* standard prevented gerrymandering and swarms of "fractured units" from overwhelming a business.

Now, under the *Specialty Healthcare* ruling, businesses face the possibility of having to manage multiple bargaining units of similarly situated employees with increased chances of work stoppages, as well as potentially different pay scales, benefits, work rules and bargaining schedules. As a result of workplace "silos" that multiple bargaining units create, employees will have much less flexibility to cross-train and gain new skills outside their own unit, and employers could find themselves unable to meet customer and client demands through lean, flexible staffing. Not surprisingly, employees could experience reduced job opportunities, as promotions and transfers will be hindered by organizational unit barriers.

This amendment would essentially reverse the *Specialty Healthcare* decision and re-instate the standard for determining bargaining units that has been in place for over half a century.

3. A second amendment that Sen. Graham may offer would preserve employees' right to a secret ballot during representation elections, which has been a key right of workers and an integral part of labor relations since the earliest days of the National Labor Relations Act (NLRA).

For more than seventy years, employees have largely decided whether to join a union through a secret ballot election overseen by the NLRB. Recently, however, the Board has attempted to erode employee access to fair and secret ballot elections through administrative decisions and rules permitting the biased and inferior card-check process. For example, the NLRB ruled in *Lamons Gasket Company, 357 NLRB No. 72 (2011),* to abolish employees' right to demand an election within 45 days of their employer agreeing to recognize a union based solely on card check. Without this right, employees could be barred from challenging the union's status for up to four years.

This amendment would stop this erosion of employee access to secret ballots and ensure that employees are afforded the protection of a government-supervised, anonymous voting procedure in future union representation elections.

4. A third amendment Sen. Graham may offer deals with the NLRB's final rule establishing "ambush" elections (*Representation-Case Procedures*, 76 *Fed. Reg.* 80138). If fully implemented, this rulemaking would drastically change the process for union representation elections and severely limit workers' access to information needed to make an informed decision about whether they want to be represented by a union. While a U.S. District Court

struck down the rule in May 2012 on procedural grounds, the judge noted his decision does not prevent the NLRB from addressing the court's concerns and reissuing the rule. The Board Chairman has indicated that the NLRB's goal of speeding up elections remains a priority and options are being considered on how to move forward.

This amendment would prevent the Board's implementation of the ambush elections rulemaking, and allow employers to communicate with their employees prior to a representation election and provide employees with an opportunity to receive balanced information with which to make their decision.

5. Sen. Alexander (R-TN) also plans to offer amendments of interest to CDW. The first would prohibit the use of funds to implement any NLRB regulations or decisions to expand or modify an employer's legal obligation to provide a union with a list of names and home addresses of employees eligible to vote in a union representation election (*Excelsior Underwear Inc., 156 NLRB 1236 1966*). Required disclosure of business email addresses and phone numbers would cause severe hardship and impose significant costs on employers. Required disclosure of personal email addresses and phone numbers would be an unprecedented, improper intrusion on employee privacy rights.

6. Sen. Alexander's second amendment would prohibit funds from being used to implement DOL's controversial "persuader" rulemaking (*Labor-Management Reporting and Disclosure Act; Interpretation of the "Advice" Exemption*, 76 *Fed. Reg.* 36178). In June 2011, DOL proposed radical changes to the regulations interpreting Section 203 of the Labor-Management Reporting and Disclosure Act (LMRDA), which contains federal reporting and financial disclosure requirements regarding individuals and entities hired by employers "to persuade employees to exercise or not exercise or persuade employees as to the manner of exercising, the right to organize...." DOL stated in its most recent regulatory agenda that it plans to release the final "persuader" rule this coming November.

Attorneys, trade associations and other third party advisors and their clients (employers) have long been exempt from the LMRDA's reporting requirements when they discuss union organizing with an employer as long as they do not directly interact with employees. DOL's proposed rule would eviscerate this "advice" exemption, and in doing so trample rights to confidential legal advice. In fact, the American Bar Association filed comments with DOL noting that the proposed rule, if implemented, would interfere with the confidentiality of legal advice and attorney ethical rules. Furthermore, employers could be required to start filing persuader reports if they seek assistance on general workplace policies. Advisors could become persuaders merely by hosting conferences or meetings with a focus on labor relations. These changes are alarming because criminal penalties could be imposed for non-compliance.

Each of the amendments outlined above would help to address drastic labor law changes put forth by the NLRB and DOL. If left unchecked, the actions of these agencies will fuel economic uncertainty and have serious negative ramifications for millions of employers, U.S. workers they have hired or would like to hire, and consumers.

Sincerely,

Geoffrey Burr
Chair, the Coalition for a Democratic Workplace