



Rehberg's proposed riders to Labor-HHS-Education Appropriations Act would undercut American workers

BY ROSS EISENBREY, GORDON LAFER, AND ADRIENNE DERVARTANIAN

Rep. Denny Rehberg (R-Mont.), chairman of the House Appropriations Subcommittee on Labor, Health and Human Services and Education has proposed numerous riders to the fiscal 2012 appropriations bill for labor, health and human services, and education. Rehberg's proposals concerning the Department of Labor would do nothing to save money, and thus do not belong in an appropriations bill. They are policy riders with one unifying theme: to weaken legal protections for U.S. workers. The proposals would undermine initiatives that help keep U.S. workers from losing their jobs to foreign workers, suffering job-related injuries or death, and having their wages depressed or cut—all while imposing new, costly, and unnecessary duties on the Labor Department.

Similarly, Chairman Rehberg's proposals with respect to the National Labor Relations Board have no impact on the federal budget but represent an aggressive agenda to undermine American workers' ability to bargain with their employers over wages and working conditions.

Weakening labor standards and overburdening the Department of Labor

Rather than imposing spending limitations, provisions in Rehberg's measure would make significant legislative

changes to longstanding, needed protections for American workers. The appropriations process is not the means by which Congress should review and potentially rewrite decades-old labor laws.

Gutting prevailing wages (Sec. 110)

Section 110 of Rehberg's bill amends the Davis-Bacon Act to require that prevailing wages for purposes of the act be determined by the Bureau of Labor Statistics through surveys using "proper random statistical sampling techniques."

This legislative change would effectively block implementation of the Davis-Bacon Act, which requires the payment of locally prevailing wages on most federal construction and repair projects. The Bureau of Labor Statistics has nothing to do with setting Davis-Bacon wage rates and does not have funding to determine prevailing wages on federal construction projects. BLS surveys cannot distinguish lower-wage residential construction from higher-wage heavy and highway construction. Nor do they include fringe benefits. Using BLS surveys for Davis-Bacon Act wage rates, as Rehberg proposes, would automatically depress wages and hurt construction workers.

Setting wage rates for particular projects would be very costly for the bureau, which would not receive any additional funds under Rehberg's proposal.

Blocking project labor agreements (Sec. 111)

Sec. 111 of the Rehberg measure prohibits the use of funds appropriated in the bill to implement, administer, or enforce regulations relating to project labor agreements.

Project labor agreements (PLAs) establish the compensation and work practices for all contractors and employees working on a construction project, while guaranteeing an uninterrupted supply of skilled labor. They are very common in large private sector construction projects and have been used on a number of government projects, with substantial success. The proposed amendment would prohibit the use of a PLA, even if it were determined that the project would be built faster, for less money, and more safely under a PLA than not, and built without anyone being denied a job on the basis of union membership or lack thereof.

Chairman Rehberg's proposal is so hostile to unions and collective bargaining that any agreement between owners and labor representatives, regardless of its terms and benefits, would be prohibited.

Leaving cheated low-wage workers without recourse (Sec. 112)

Section 112 prohibits use of funds in the bill to implement or promote the "Bridge to Justice" program.

The Bridge to Justice program connects low-wage workers who have been cheated out of legally required wages with private attorneys screened by the American Bar Association who can help them get the pay they are owed. This is a very low-cost referral program that will help achieve a goal that the public strongly supports: making sure that workers get paid what they earned. The program is needed. The Labor Department's Wage and Hour Division has only about 1,000 investigators for the entire United States (approximately one for every 150,000 employees in the labor force), so many of the tens of thousands of wage-violation complaints to the division each year cannot be investigated by the federal government. Fortunately, the Fair Labor Standards Act, the Family and Medical Leave Act, and several other statutes provide for a private right of action so that workers are not entirely dependent on the Labor Department to vindicate their rights and obtain the pay they are owed. The Bridge to Justice Program is a critical component of this right of action.

Blocking the program protects only those employers who have violated the law, while hurting the most vulnerable workers.

Limiting workers' 'right to know' (Sec. 113)

Section 113 prohibits the use of funds in the appropriations bill to develop or promulgate "Right to Know Under the Fair Labor Standards Act" regulation.

Chairman Rehberg proposes to block legislation that would require employers to let employees or contractors know when the employer has decided to treat the employee or contractor as exempt from certain labor rules. If an employer exempts an employee from FLSA overtime-pay requirements (effectively disqualifying the employee for overtime pay), the employee should know why—what analysis backed the legal judgment? The same goes for an independent contractor exempt from all the labor regulations. But employers rarely share these analyses or even explain that they have made a decision to limit the employee's rights.

Chairman Rehberg's proposal suggests that employees should be left in the dark. It is estimated that employers underpay workers by billions of dollars each year because they knowingly or mistakenly misclassify employees as exempt. If employees knew they were being removed from protections, they could challenge the employer's reasoning and either persuade the employer to make a proper classification or force the employer to correct the misclassification through litigation or DOL enforcement.

This amendment of Rehberg's would cost the government revenue. Misclassifying workers as exempt from overtime protection reduces their income, in turn reducing both payroll taxes and the employees' income taxes. To the extent that independent contractor status is wrongly applied to employees, the revenue losses will be even greater.

The right-to-know rule that would address these costly classification errors is still being drafted, and has not even been issued as a proposed rule for public comment, so any proposal to block it is premature.

Removing U.S. worker protections from H2 guestworker programs

Several sections of Rehberg's bill take particular aim at those labor standards carefully crafted to protect the

foreign and domestic workers affected by the H-2A guestworker visa program, under which foreign citizens enter the United States to work in temporary or seasonal agricultural jobs, and the H-2B program, under which foreign citizens enter the country to fill a labor shortage unmet by domestic workers.

Shifting transportation costs from employers to guestworkers (Sec. 115)

Section 115 prohibits the use of funds in the appropriations bill to implement specified requirements regarding payment of transportation expenses for workers under H2-A visas.

For many years, H-2A program employers have had to reimburse workers for their in-bound transportation costs after one-half of the season has elapsed and then pay return travel costs for employees who complete the season. Chairman Rehberg's measure would require employers to pay only for travel costs to and from the location where the worker was approved to enter the United States, which could be a U.S. consulate hundreds of miles from the worker's home. Further, Section 115 seeks to overrule a U.S. Court of Appeals decision, *Arriaga v. Florida Pacific Farms*, regarding the Fair Labor Standards Act. Section 115 would essentially allow H-2A employers to reduce the workers' wages below the federal minimum wage by requiring that workers absorb visa, transportation, and other costs related to entering the United States. This provision would drive foreign workers further into debt and make them even more vulnerable to exploitation, and increase the displacement of U.S. workers by making foreign workers cheaper to hire.

Abolishing the preference for U.S. workers (Sec. 116)

Section 116 prohibits use of funds in the appropriations bill to implement the requirement that employers of workers with H-2A visas hire qualified U.S. workers until half the contract period has expired.

The last thing our country needs in this economic environment is more job loss for U.S. workers, yet this is what Rep. Rehberg is proposing. Section 116 would abolish the H-2A program's "50 percent rule," which requires that H-2A employers hire qualified U.S. workers who apply for work until half of the season has elapsed. Due to the hiring patterns of farmworkers and the nature of agricultural work, which often involves varying start times and a gradual development leading up to the peak season, it makes perfect sense to ensure that qualified U.S. job applicants are hired even

after the first "official" day of work. A 1986 congressionally mandated study concluded that the 50 percent rule protects American jobs without significant burden to employers.¹ The desire to hire cheap foreign workers instead of domestic workers is not a proper justification for ending the 50 percent rule.

Not only would Section 115 eliminate the 50 percent protection, its language is so broad that it would remove any job priority protections for U.S. workers at all points during the H-2A application process. Many H-2A employers already discriminate against U.S. workers in favor of vulnerable guestworkers. While U.S. workers are able to enforce their labor protections and can seek better employment opportunities, H-2A guestworkers are tied to their employer and will work to the limits of human endurance due to their desperate need to keep their employment. Further, many H-2A employers prefer H-2A workers because they can handpick their ideal H-2A workforce by age, gender, and national origin, while such factors would be illegal in hiring U.S. workers. And because employers don't have to pay unemployment or social security taxes on their H-2A workers, they save about 10 percent on their labor cost per H-2A worker. Despite the many disadvantages already facing U.S. workers seeking employment at H-2A employers, this rider would

¹In the 1986 amendments to the H-2A program, grower concern about the 50 percent rule prompted Congress to order DOL to continue the rule for three years while the department performed a study to consider the costs and benefits of the rule and determine whether to maintain it. In addition to its own survey and analysis, DOL commissioned a study that concluded that the benefits of the 50 percent rule outweighed the costs: Peter Bateman, Laurence Rudolph, and Deidra Dain, *The Benefits and Costs of the '50 Percent Rule'*, prepared for the U.S. Department of Labor under Contract No. 99-9-4700-75-059-01 by the COSMOS Corp., Oct. 25, 1990. In 1990, the first Bush Administration announced that it was maintaining the 50 percent rule: 55 Fed Reg. 29356 (July 19). DOL officials explained that a significant minority of the U.S. workers hired by H-2A employers gained their jobs after the foreign workers departed their homelands, so that elimination of the 50 percent rule would foreclose legitimate employment opportunities for U.S. farmworkers. The department said that it "also is not aware of any circumstances wherein application of the rule has resulted in any significant burden, financial or otherwise, being placed on employers or workers." (55 Fed Reg. 29356, 29358).

remove any obligation of H-2A employers to hire available U.S. workers. This is wrong. U.S. workers should have first crack at jobs inside the United States when an employer claims it must bring in temporary foreign workers on nonimmigrant visas to meet its labor needs.

Drastically lowering farmworker wages (Sec. 117)

Section 117 prohibits the use of funds in the appropriations bill to implement specified requirement relating to wage rates for workers under H2-A visas.

Despite the fact that farmworkers are among the lowest paid workers in our country, Section 117 would drastically lower their wages. The Labor Department requires H-2A employers to offer workers at least the average regional hourly wage for farmworkers as determined by the USDA Farm Labor Survey. Although this survey's results are low because of the presence of a large number of undocumented workers, this rider would lower the wage rates even further by switching to a prevailing hourly wage, presumably the Bureau of Labor Statistics' Occupational Employment Survey (BLS OES). The BLS OES does not even survey farms, but surveys farm-labor contractors, the lowest paying employers of farmworkers. In addition, the BLS OES divides the wages into four arbitrarily created "wage levels." Employers would likely pay the lowest level, which is the average wage received by the lowest-paid one-third of farmworkers in a geographic area (i.e., generally the 16th percentile). Under the Bush Administration's H-2A rules, employers were also permitted to pay the prevailing hourly wage. Across the country, farmworker wages fell an average of about \$1.00 to \$2.00 per hour. Most H-2A employers in North Carolina, for example, were permitted to pay \$7.25 per hour instead of \$8.85 in 2008 and \$9.34 in 2009, which H-2A workers would have earned under the traditional H-2A wage formula. The concept of an adverse-effect wage rate has been in existence since the 1940s' Bracero program for Mexican guestworkers as a necessary protection against depression in prevailing wages (wage rates often stagnate because guestworkers have little ability to demand higher wages). The proposed wage formula would not protect U.S. workers from adverse effects on their wages.

Removing protections for U.S. workers undercut by the unskilled H-2B visa program (Sec. 118)

Section 118 prohibits the use of funds in the appropriations bill to develop, promulgate, or

implement two regulations related to workers under H2-B visas, who are authorized to fill a labor shortage only if an unemployed person capable of performing

such work cannot be found in the United States. The H-2B visa is used to bring in 66,000 unskilled workers per year, regardless of overall economic conditions or unemployment in the United States. Thus, for example, even though the unemployment rate of landscaping employees is far above 10 percent, and even though millions of unemployed Americans could do landscaping work, employers received approval to import more than 27,000 landscaping employees from Mexico and other foreign countries last year.

Historically, the H-2B program required employers to advertise and pay wage rates set by the Davis-Bacon Act and Service Contract Act, both as a way to attract U.S. workers and to prevent employers from depressing wages. Where wage determinations under those laws did not exist, employers were required to use average wage rates calculated by the Bureau of Labor Statistics. The Bush Administration changed this practice by allowing employers to ignore Davis-Bacon and Service Contract wage rates and the average wage in each occupation and instead pay H-2B guestworkers rates at the lowest end of a multitiered wage scale that employers essentially controlled. Not surprisingly, the result was a significant decrease in the wages advertised to U.S. workers and paid to H-2B workers, making it more desirable and easier for employers to hire low-wage H-2B workers rather than offer jobs to unemployed U.S. workers.

The Obama Labor Department recently restored the historical rule, which better protected U.S. workers and reduced the incentive for employers to favor foreign workers. Chairman Rehberg would restore the Bush rule, to the disadvantage of U.S. workers.

The second H-2B rule that would be blocked has been proposed but has not been made final. It seeks to increase recruitment of U.S. workers and to ensure that they have every opportunity to access jobs before those jobs are given to foreign workers. Among other things, the rule would reinstate the practice of verifying compliance with program rules, rather than relying on employers' attestations. A recent DOL audit discovered that more than half of all H-2B employers that said they were in compliance with regulatory obligations for the program were not in compliance. Typical violations included offering and paying workers less than the prevailing wage and rejecting U.S. workers for other than lawful, job-related reasons.

Blocking this rule would make it more likely that foreign workers replace unemployed U.S. workers.

Dismantling critical occupational safety and health regulations

Another series of Rehberg riders would effectively dismantle critical worker safety protections administered by the Occupational Safety and Health Administration (OSHA) and state agencies under federal law, and by the Mine Safety and Health Administration (MSHA).

Removing tracking of musculoskeletal disorders (Sec. 119)

Section 119 prohibits the use of funds in the appropriations bill to develop, promulgate, or implement occupational injury and illness recording and reporting requirements relating to musculoskeletal disorders.

OSHA has proposed to reinstate a rule, enacted in 2001 but repealed in 2003 by the Bush Administration, to include a check box on the OSHA 300 injury log to identify which injuries are musculoskeletal disorders (MSDs). A similar requirement to identify cumulative trauma disorders was in place for 30 years under OSHA's original injury recordkeeping rule. This rule does not require any additional injuries to be recorded; it only requires employers to identify which of the injuries already recorded are MSDs.

This information collection could help employers and workers in their efforts to prevent MSDs at the workplace, which is important because MSDs account for nearly 30 percent of all injuries. It also allows the BLS to capture information on the extent of the MSD problem at the industry and national level.

OSHA proposed the MSD recordkeeping rule in January 2010 and held public hearings in March 2010. Due to business objections, in January 2011 OSHA withdrew the draft final rule in order to get further input from small businesses, even though most are exempt from OSHA's recordkeeping rules and would not be covered by the standard. OSHA held special meetings and calls with small business representatives and reopened the record for further public comment. OSHA is now deciding what action to take regarding the final rule.

Chairman Rehberg's amendment would prevent an accurate assessment of the extent of the MSD problem and the effectiveness of efforts to prevent MSDs.

Curbing injury prevention efforts (Sec. 120)

Section 120 prohibits the use of funds in the appropriations bill to develop, promulgate, or implement the OSHA Injury and Illness Prevention Program regulation.

OSHA has led a safety revolution in U.S. workplaces that has succeeded in reducing workplace deaths from 14,000 a year in 1970 to fewer than 5,000 in 2010, even as the workforce doubled. To make further progress, OSHA is developing an injury and illness prevention program rule, which would require employers to create programs to identify and correct hazards in the workplace on an ongoing basis. This systematic approach to addressing workplace hazards is the basis of all of OSHA's voluntary programs and is widely advocated by consensus standards organizations and safety and health professionals. Regulations or freestanding laws requiring safety and health programs have been adopted by more than 20 states, and issuance of a program rule has been supported by past Democratic and Republican OSHA administrators.

The Injury and Illness Prevention Program rule is still being developed and a draft of a proposed rule has not yet been presented for the required small business review under the Small Business Regulatory Enforcement Fairness Act (SBREFA). Even though the draft rule hasn't been released, business groups are trying to stop OSHA from getting small business or public input.

Rehberg's proposal would block all progress on this attempt to create an improved safety culture in U.S. workplaces, where injuries and illnesses cause more than \$50 billion of losses each year in workers compensation alone.

Ending an initiative to prevent injuries from falling off roofs (Sec. 121)

Section 121 prohibits the use of funds in the appropriations bill to enforce cancellation of an OSHA compliance directive related to fall protection in residential roofing.

In the mid-1990s, OSHA issued a directive to its compliance officers to not enforce in residential construction the fall protection rules that apply to the rest of the construction industry. Since then, hundreds

of residential construction workers have fallen to their deaths and hundreds more have suffered serious injuries. Falls are the number one cause of death in residential construction, and 50 residential construction workers fell to their death last year, alone. Between 1992 and 2010, workplace fatalities overall fell by more than 25 percent. Of the four most common causes of workplace deaths, only fatalities from falls increased over that period. OSHA's attempt to improve this situation by requiring home builders to operate by the same rules as other contractors would be blocked by Rehberg's rider.

Considering that workers' compensation costs for falls to a lower level exceed \$5 billion a year, it is hard to argue that imposing fall protection rules on home builders will impose unreasonable costs.

Exposing miners to coal dust (Sec. 122)

Section 122 prohibits the use of funds in the appropriations bill to develop, promulgate, or implement a new rule relating to miners' exposure to coal dust.

Coal dust kills or disables thousands of miners every year, and reducing miners' exposure to coal dust would profoundly improve the health of the average miner. It would also save the federal government money by reducing future payouts from the Black Lung Disability Trust Fund. Yet Chairman Rehberg would prevent spending to issue or enforce an MSHA proposed rule implementing new technologies and systems to reduce coal dust exposure, regardless of the rule's cost-effectiveness and potential to save and improve lives. This is particularly puzzling since the proposed rule involves the use of new dust monitoring devices that the coal industry itself has been demanding for more than a decade.

Weakening the National Labor Relations Act and the right to collective bargaining

According to polls, up to 60 million nonunion workers in the United States say that they wish they had a union in their workplace.² This desire is not surprising.

² AFL-CIO, "Nearly 60 million U.S. workers would join a union if they could," www.aflcio.org, accessed July 15, 2011; <http://www.aflcio.org/joinaunion/voiceatwork/efca/57million.cfm>

National data indicate that the ability to bargain with one's employer is one of the most important tools working Americans have in seeking to secure a decent living. All other things being equal, comparing employees of the same age, same education, and working in the same industry, those with a union in their workplace earn 15 percent more in wages than otherwise similar employees working in the same industry without a union. Union employees also have an approximately 20 percent greater chance of receiving job-based health insurance, and nearly a 25 percent better chance of getting a pension through their job, than their nonunion counterparts.³ This is part of what makes the right to bargain such an essential ingredient in reversing the crisis of growing income and wealth inequality and restoring the American middle class.

Yet while up to 60 million Americans may want a union, only 100,000 employees per year manage to newly organize unions under the current procedures of the National Labor Relations Board.⁴ The inability of the other 59.9 million employees to realize their desire is primarily the result of the flawed process of workplace elections under the NLRB's current rules — "elections" that because they are quite undemocratic could be likened more to those of the old Soviet Union than anything resembling American democracy.

Blocking efforts to make union certification more democratic (Secs. 402 and 403)

Section 402 prohibits the use of funds in the appropriations bill by the National Labor Relations Board to implement, create, apply, or enforce any standard for initial bargaining unit determinations that conflicts with the majority opinion in a 2010 NLRB case titled *Wheeling Island Gaming, Inc.* (except in situations currently covered by another NLRB rule).

Section 403 prohibits the use of funds in the appropriations bill by the NLRB to implement, create, apply, or enforce any standard for secret-ballot elections that conflicts with the majority opinion in a 2007 NLRB case titled *Dana Corp.*

³ The union advantage in wages and premiums is detailed in John Schmitt, *The Unions of the States*. Washington, D.C.: Center for Economic and Policy Research, 2010.

⁴ National Labor Relations Board (NLRB), *FY 2009 Annual Report*, Washington, D.C.: NLRB, 2009.

Chairman Rehberg's legislative proposal seeks to lock American employees into a failed union certification system that allows employers to file nearly endless legal challenges to the union election before and after it is held, while they use the delays to bombard workers with a one-sided propaganda campaign, intimidation, threats, and even firings of union supporters. There are no fines or penalties to discourage misconduct. In recent years, the NLRB has explored several very modest efforts to make the union certification process more democratic. These include permitting employers to voluntarily recognize a union on the basis of a majority of employees having signed statements of support, and removing incentives for frivolous legal claims aimed at delaying the date of a workplace vote. Rehberg's rider would ban the NLRB from instituting even such mild improvements to the system.⁵

Denying employees knowledge of their rights (Sec. 406)

Section 406 prohibits use of funds in the bill by the NLRB to implement or enforce the final rule issued in August governing notification of employee rights under the National Labor Relations Act.

At the most fundamental level, Rep. Rehberg's measures appear to seek to deny Americans the ability to even know what their rights are under current law. Earlier this year, the NLRB designed a new poster that employers are required to post in each workplace—

⁵ Chairman Rehberg's *Draft of FY 2012 Labor-HHS-Ed Appropriations Act* dated September 30, 2011, identifies "new riders and legislative provisions" including to Title IV, section 403, prohibiting "use of funds in the bill by the NLRB to implement, create, apply, or enforce any standard for secret-ballot elections that conflicts with the majority opinion in a 2007 NLRB case titled *Dana Corp.*" The *Dana* case significantly restricted the conditions under which employers may voluntarily recognize a union based on an impartially verified declaration of desire to unionize by a majority of employees. The attempt to remove incentives for frivolous legal delays in union certification elections is included in a series of rules proposed by the NLRB in mid-2011 and currently under review to be finalized. These proposals are described in greater detail in Gordon Lafer, *Proposed Rule Changes By Labor Board Will Make Workplace Elections More Democratic*, Economic Policy Institute, Policy Memorandum #188, July 2011. Rehberg's proposal "prohibits use of funds in the bill by the NLRB to implement to promulgate or implement any final rule relating to representation elections."

generally, such notices (including already-required announcements regarding the minimum wage) are posted on bulletin boards in employee break rooms. Distribution of the notice doesn't cost a thing to either employers or the government—it is downloadable for free from the NLRB's website—and conveys no new rights for employees. It simply notifies employees of their right to "join or assist" a union or to refrain from joining or assisting a union. It lets employees know that they have the right to talk about unionization on break times and in break areas, and that it is illegal for employers to threaten to fire, demote, or otherwise punish employees for supporting unionization. It likewise informs employees that it is illegal for a union to threaten or coerce employees in order to gain their support. Finally, the poster lists the NLRB's phone number, which workers can call with further questions about their rights under the law. Rehberg's rider would deny American's knowledge of these basic rights, because the measure prohibits the NLRB from taking any steps "to implement or enforce the final rule issued in August governing notification of employee rights under the National Labor Relations Act." Few rights are more central to the effort to restore the ability of working families to support themselves in dignity.

Curbing access to employees eligible to vote for a union (Sec. 405)

Section 405 prohibits use of funds in the appropriations bill by the NLRB to develop, promulgate, or implement any final rule relating to representation elections.

Rehberg proposes to further deny pro-union employees the most basic right of any electoral campaign—access to the list of eligible voters. Under current law, while managers have access to all employees' complete contact information from the date of hire—and are free to campaign against unionization at all times and throughout the workplace—pro-union employees do not even get the list of eligible voters until all legal proceedings regarding the technicalities of the election's conduct have been heard. This provides anti-union employers with an incentive to engage in frivolous legal delaying tactics in order to prolong the period in which management may conduct a full-blown campaign while union supporters don't even know the names and addresses of the electorate.⁶ The NLRB

⁶ The requirement to provide pro-union employees a preliminary list of eligible voters as soon as employees indicated their desire for an election is included in a series

recently proposed that pro-union employees should have access to a preliminary list of eligible voters as soon as employees make known their desire to hold an election. Rehberg's rider would prohibit this change.

Obscuring the work of anti-union consultants (Sec. 114)

Section 114 prohibits use of funds in the appropriations bill to amend regulations on consultant reporting under the Labor-Management Reporting and Disclosure Act.

Chairman Rehberg's proposal also seeks to deny employees the right to know when their employer has hired outside consultants to thwart employees' attempts at organizing. Employers spend large sums on "union avoidance" consultants who specialize in tactics of intimidation aimed—in their own words—at preventing employees from ever being allowed to hold an election on whether to form a union.⁷ Under current law, such consultants are required to file disclosure reports whenever they are engaged in "persuader activities" such as writing speeches, producing videos, drafting leaflets, and coaching supervisors in how to deliver the most aggressive anti-union messages to their subordinates. The disclosure reports are very brief, and contain much less information than is required from the union side. But even this minimal disclosure has become the subject of heated opposition. An unforeseen loophole in the law has allowed consultants to avoid filing disclosure reports even if they do all these things, as long as they are not personally engaged in direct conversation with the employees. The Labor

of rules proposed by the NLRB in mid-2011 and currently under review to be finalized. These proposals are described in greater detail in Gordon Lafer, *Proposed Rule Changes By Labor Board Will Make Workplace Elections More Democratic*, Economic Policy Institute, Policy Memorandum #188, July 2011. Chairman Rehberg's proposal "prohibits use of funds in the bill by the NLRB to implement to promulgate or implement any final rule relating to representation elections."

⁷ Many "union avoidance" consultants celebrate their ability to prevent workplace elections. One management guidebook, for instance, explains that "that, dear reader, is the goal of this manual – to help you avoid an election." Gene Levine Associates, *Complete Union Avoidance*, 2005, p. 2. Estimates of employer spending on anti-union campaigns are provided in Lafer, *Neither Free Nor Fair*, 2007, p. 14.

Department has proposed to close this loophole, so that employees, shareholders, and the public will know when employers choose to devote resources to such aggressive anti-union specialists.⁸ But under Chairman Rehberg's proposal, these unsavory practices would not be exposed; his proposal would prohibit the Labor Department from closing this loophole and bringing the same transparency to anti-union campaigns as already exists for pro-union campaigns.

Reducing voting protections and flexibility (Sec. 404)

Section 404 prohibits use of funds in the appropriations bill, or in any previous appropriations bill, for the NLRB to issue any new directive or regulation that would provide employees with any means of voting through any electronic means that enables off-site, remote, or otherwise absentee voting in an election to determine bargaining representatives.

Chairman Rehberg's rider would prohibit employees' ability to cast their ballots in a location away from anti-union managers. Currently, while ballots themselves are secret, union certification elections take place on terms that would be unacceptable in elections for Congress. The vote is held at work, in an atmosphere dominated by one-sided anti-union propaganda—posters, banners, leaflets and speeches—with no opportunity for equal time for the opposition. In electoral terms, this is the equivalent of holding congressional elections in the headquarters of one party—festooned with partisan paraphernalia, and with a ban on the other party's signs or literature.

There is an easy solution to this problem: allowing employees to vote by mail and electronically, by computer, or touch-tone phone. This system is already in use by the National Mediation Board, which oversees union elections for employees in the railway and airline industries, and these elections have proven as secure and accurate as in-person voting. It is also how tens of millions of Americans cast their ballots for congressional and presidential elections. In the state of

⁸ The common tactics of "union avoidance" professionals are described in John Logan, "Consultants, Lawyers, and the 'Union Free' Movement in the USA Since the 1970s," *Industrial Relations Journal*, Vol. 33, No. 3 (2002), pp. 197-214; and in Gordon Lafer, *Neither Free Nor Fair: The Subversion of Democracy Under National Labor Relations Board Elections*, American Rights at Work, Washington, D.C., 2007.

Oregon, all votes for every office are done exclusively by mail. Indeed, voting by mail would provide considerable budget savings for the NLRB, since these ballots are less costly to administer than on-site balloting. But the anti-union consulting industry is opposed to this money-saving innovation because it removes the act of voting from the one-sided atmosphere they seek to create in the workplace.⁹ Rehberg's rider would forego budgetary savings in order to keep employees locked into this undemocratic voting procedure.

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⁹ For one management attorney's explanation of how vote-by-mail would weaken management's control of the electoral environment, see "Reasons Employers Should Resist Mail Ballots" in Alfred DeMaria, editor, *Management Report*, vol. 23, no. 4, 2000, pp. 4-5.