Labor Reform Bill Seeks to Shorten Contract Negotiations

shrm.org/topics-tools/employment-law-compliance/labor-reform-bill-seeks-to-shorten-contract-negotiations

Allen Smith, J.D.

Many employers have concerns about a labor reform bill that would amend the National Labor Relations Act to shorten collective bargaining contract negotiations through mediation and arbitration. The bill, the Faster Labor Contracts Act, has some bipartisan support and is advancing in the U.S. House of Representatives. The Senate is considering companion legislation.

"The business community is overwhelmingly opposed to the bill," said Alex MacDonald, an attorney with Littler in Washington, D.C.

In the House, seven Republicans have joined nearly all Democrats in signing a discharge petition to force a vote on the bill on the House floor, noted Jim Plunkett, an attorney with Ogletree Deakins in Washington, D.C.

"That vote will likely take place sometime in June, and proponents of the bill have a good chance of prevailing," he said. "There are three Republican supporters of the bill in the Senate. The White House's position on the bill is unclear at this time."

The conventional wisdom is that the bill is unlikely to be enacted for now, but it has notable momentum, according to John Ring, former chair of the National Labor Relations Board (NLRB) and an attorney with Morgan Lewis in Washington, D.C., and Brian Mahoney, an attorney with Morgan Lewis in Philadelphia.

That said, the bill has a shot at being enacted this Congress or the next, Plunkett said.

"If enacted, it would materially change the timeline for first-contract negotiations," according to Ring and Mahoney. "It would be a significant change, and HR leaders should be preparing for it even if the odds of enactment remain uncertain."

The bill, which would speed up bargaining between companies and unions to reach a first labor agreement, would set strict uniform bargaining timelines for the negotiations of all collective bargaining agreements.

Bill proponents contend that employers frequently use tactics to delay entering into a collective bargaining agreement, said Steve Kruzel, an attorney with Quarles in Milwaukee. They maintain that these delays weaken union support and effectively deny employees the benefits they voted for by electing the union, he added.

“If enacted, HR professionals need to be prepared to negotiate at an expedited timeline and advise their business counterparts of the same,” he said.

Concerns About the Bill

The primary critique of the law is that it would strip away the traditional negotiating dynamic in which employees ultimately vote on whether to ratify a contract, Kruzel said.

The law would impose the following mandatory negotiation timeline, he explained:

- Employers would have to hold a first bargaining session within 10 days after receiving a written request for bargaining from a newly elected union.
- Either party would be able to request mediation from the Federal Mediation and Conciliation Service (FMCS) after 90 days of bargaining.
- Finally, if the parties have not reached an agreement by no later than 30 days after the request for mediation, and absent an agreed-upon extension by the parties, the FMCS would have to refer the dispute to a three-person arbitration panel. Following arbitration, the panel would issue a decision binding the parties to terms and conditions of a collective bargaining agreement for two years. This provision of the legislation is referred to as the “First Contract Arbitration” provision.

The current average of bargaining a first labor agreement is about 461 days, said David Pryzbylski, an attorney with Barnes & Thornburg in Indianapolis.

“This is normal, in my experience,” he said, adding that “from wages to benefits to vacations to overtime procedures to job bidding to work rules, there is a lot of ground to cover.”

Concerns about bargaining time can be legitimate, according to Phillip Wilson, CEO and general counsel with LRI Consulting Services Inc. in Broken Arrow, Okla.

However, he said, the Faster Labor Contracts Act’s proposed “remedy is not. Mandatory arbitration doesn’t get workers a better deal faster — it replaces bargaining with a government-imposed contract that workers themselves never get to approve.”

While time limits would be imposed on negotiations under the legislation, the arbitration timeline itself would be unlimited, Kruzel explained. “It could take months — if not years — for an arbitration panel to issue a decision regarding terms, particularly if the arbitrators make the effort to understand a company’s finances, market, and operational structure,” he said.

Plunkett said the bill raises constitutional concerns and is “bad policy.”

The bill would reward bad-faith bargaining, Wilson said. A union that holds firm and runs out the 90-day clock would get a government arbitrator who would look at the most aggressive comparable contracts in the industry, he said. “The employer wouldn’t be able to walk away from terms it could not afford.”

An arbitrator following comparator contracts might also force a newly organized employer into underfunded multiemployer pension plans that might bankrupt the company, Wilson added.

“If arbitrators under this bill can force companies to accept demands from a union that will damage or even kill the company, that is a big deal — especially since arbitrators likely won’t have extensive firsthand knowledge of the business itself [and] market conditions,” Pryzbylski said.

Bill’s Targeted Objective

The bill is much more limited in scope than the proposed Protecting the Right to Organize Act, Kruzel noted.

Narrowing organized labor’s legislative objective may have increased the likelihood of enactment one day.

“The more durable concern is the long game,” Wilson said. “This proposal has now been introduced in three consecutive Congresses, each time with broader co-sponsorship and more effective framing. Republicans are increasingly looking at vehicles like this as ways to prove their populist bona fides. Once you head into the presidential primaries, a number of contenders, on both sides of the aisle, could use this as a way to prove their alignment with organized labor.”