Legislative Analysis

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WORKER FREEDOM ACT

House Bill 4316 without amendment
Sponsor: Rep. Mark Meadows
Committee: Labor

First Analysis (7-17-07)

BRIEF SUMMARY: The bill—to be known as the "Worker Freedom Act"—would prohibit employers from forcing employees to attend a meeting at which the primary purpose was to communicate the employer's opinion about a religious or political matter, including the employer's opinion about whether its employees should join or form a union. Voluntary meetings and other forms of communication would still be allowed. Aggrieved employees would have a cause of action to enforce the bill.

FISCAL IMPACT: There would be no significant fiscal impact on the State of Michigan or its local units of government. This assumes the increased Judiciary costs of civil suits arising from this bill could be recovered by the courts hearing such cases.

THE APPARENT PROBLEM:

Some employers reportedly use mandatory workplace meetings to promote their religious and political beliefs to their workers. Without a specific law prohibiting such meetings, employers have a virtually unlimited right to compel workers to attend such meetings or risk losing their jobs. Some say that employers have forced workers to listen to their views on gay marriage, the war in Iraq, or other issues unrelated to job performance, or to participate in prayer breakfasts or other religious exercises.

In particular, mandatory meetings held by company officials trying defeat a union organizing drive are common. Employers often hire anti-union consultants and engage in expensive campaigns to defeat union organizing drives—called "union-busting" by critics. The tactics used by employers and their consultants in opposing union organizing drives sometimes include forced "one on one" meetings at which supervisors confront individual employees and mandatory group meetings at which employees are sometimes threatened, directly or indirectly, with losing their jobs or at which negative consequences of unionization are described.

Some employers whose workers are forming a union—some studies show about one quarter to one third—not just threaten but actually do fire one or more workers involved in the organizing drive, even though doing so is illegal under federal labor law. Although the National Labor Relations Act is supposed to protect workers from interference with their right to freely choose whether or not to join a union, some say that federal labor laws are weak and poorly enforced. Federal labor law does not specifically prohibit or protect mandatory captive-audience meetings at which employers try to discourage their employees from forming or joining a union (although the National Labor Relations Board

has adopted a 24-hour rule banning such meetings within a day of a union representation election).

A study of more than 400 union representation election campaigns, found that during 92 percent of union organizing drives, employers forced their employees to attend closed-door anti-union meetings. In addition, 78 percent of employers directed supervisors to deliver anti-union messages to employees in one-on-one meetings. On average, employers held 11 captive audience meetings during every union organizing campaign. See, for example, Kate Bronfenbrenner, *Uneasy Terrain: The Impact of Capital Mobility on Workers, Wages and Union Organizing*, U.S. Trade Deficit Review Commission, 2000.

The bill would attempt to protect workers from being required to attend meetings which are designed to express an employer's opinion about religious and political matters and about whether employees' should join or form a union. Employers could still hold such meetings so long as attendance was optional or could communicate their opinions in other ways; workers would be able to refuse to attend such meetings without fear of discipline or losing their job. The bill would protect *all* workers from being required to listen to communications regarding political or religious matters unrelated to their work and specifically address what some perceive as a common abuse of worker free choice during union organizing drives.

THE CONTENT OF THE BILL:

The bill would create a new act to be called the Worker Freedom Act, under which an employer could not require an employee to attend an employer-sponsored meeting or participate in any communication with the employer if the primary purpose is to communicate the employer's opinion about religious or political matters. "Political matters" would specifically include political party affiliation or the decision to join or not to join a labor organization or other lawful political, social, or community group or activity.

Exceptions.

- Meetings or communications of a religious, political, or labor organization directed to its own employees.
- Lectures or classes required of student instructors covering matters that are part of the regular coursework at an educational institution.
- Meetings or communications necessary to comply with other laws.

Scope of Bill.

- The bill's prohibitions would apply to an employer, an employer's agent, representative, or designee.
- The term "**employer**" would mean "an individual or entity engaged in business that has employees" and would include state government and political subdivisions.
- The term "**employee**" would mean an "individual engaged in service to an employer in the business of an employer" and would specifically include research

assistants, research fellows, teaching assistants, teaching fellows, postdoctoral associates, postdoctoral fellows, and medical interns and residents.

- The term "**political matters**" would include political party affiliation or the decision to join or not to join any lawful political, social, or community group or activity or labor organization.

Civil Enforcement Actions. An aggrieved employee could bring a civil action within one year of a violation to recover damages (including up to three times actual damages as exemplary damages) and equitable relief, including reinstatement. A prevailing employee could also recover reasonable attorney fees and costs. An action under this law would be an alternative to other causes of action that may exist under other laws, and would not limit an employee's right to bring a common law cause of action for wrongful termination or diminish or impair rights under a collective bargaining agreement.

No Employer Retaliation. An employer would be prohibited from discharging, disciplining, or otherwise penalizing an employee (or threatening to) because the employee makes a written or oral good faith report of a violation or a suspected violation of the act; brought an action to enforce the act; or cooperated in an investigation or proceeding for enforcement of the act. An employee who makes a false report or provides false information, however, would not be protected.

BACKGROUND INFORMATION:

National Labor Relations Act. The National Labor Relations Act (NLRA) protects the collective bargaining rights of most private sector workers in the United States. Under the NLRA, workers have the right to form, join, and assist unions, and to bargain collectively with their employers, through representatives of their own choosing. The NLRA prohibits employers from interfering with, restraining, or coercing employees in their exercise of these rights.

Section 8(c) of the National Labor Relations Act, sometimes called the employer free speech proviso, states that "[t]he expressing of any views, arguments, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit." 29 U.S.C. § 158(c).

The National Labor Relations Board has adopted a rule barring both employers and unions from making campaign speeches "on company time to massed assemblies of employees' during the 24 hours before a union representation election." *Peerless Plywood Company*, 107 NLRB 427, 429 (1953). A violation of this rule is not considered an unfair labor practice, but may be grounds for overturning the election results.

Other states. Other states have considered legislation similar to House Bill 4316. New Jersey passed a similar, but not identical, law in 2006 (New Jersey's law does not specifically ban mandatory meetings in which employers express opinions about unions).

Other states considering similar legislation include Connecticut, New Hampshire, and Oregon. Colorado's governor vetoed a similar bill (HB 1314 of 2006) in May 2006.

At least one state, Ohio, prohibits employers from making any captive audience speeches during *public sector* union organizing drives.

Federal "Employee Free Choice Act of 2007". H.R. 800, the Employee Free Choice Act of 2007 would, among other things, amend the NLRA to require a union to be certified as the employees' representative when a majority of employees have signed union authorization cards and stiffen penalties for violation of the NLRA. This bill was passed by the federal House of Representatives on March 1, 2007 and awaits action in the Senate. The Michigan House of Representatives passed House Resolution No. 21 in support of this federal legislation on March 7, 2007.

Other sources of information. Information about captive audience speeches from a various perspectives is available from many sources, including:

- Supportive of unions and worker protections: www.americanrightsatwork.org

- Pro-human rights: *Unfair Advantage: Worker's Freedom of Association in the United States under International Human Rights Standard*, a report issued in 2000 by Human Rights Watch, urging reforms of U.S. labor law, including those relating to captive audience speeches, as a matter of human rights. See www.hrw.org/reports/2000/uslabor/USLBR008-03.htm

- Opposed to restrictions on employer speech: www.michamber.com

ARGUMENTS:

For:

Workers should not have to choose between tolerating unwelcome political or religious messages and keeping their jobs. Some employers use mandatory workplace meetings to try to force their religious and political beliefs on workers. In a free country, employees should not be forced to attend meetings where they are subject to indoctrination about beliefs or issues unrelated to their job performance or risk losing their jobs. While employers could still hold such meetings and communicate their opinions in other ways, they would not be allowed to compel attendance at such meetings under the bill.

Under current law, employers may, almost without limit, force workers to attend meetings where company officials urge their own religious and political beliefs, including beliefs about joining a union. Employers can fire and discipline workers who refuse to attend or who try to leave such meetings. People need their jobs and so, absent legal protection, will often tolerate infringement of their rights as citizens in order to provide for their families.

For:

Forcing unwilling workers to sit through mandatory anti-union presentations when they are trying to form a union should be banned. Mandatory meetings held by company managers painting a negative picture of unions and predicting adverse consequences of unionization are a very common tactic of employers who are trying defeat an attempt by their employees to form or join a union. Employers often hire anti-union consultants and wage expensive and aggressive anti-union campaigns which may include forced "one on one" meetings in which supervisors confront individual employees; or group "closed-door" meetings, where employees are sometimes threatened, directly or indirectly, with losing their jobs if they organize. (Even worse, many employers actually do fire employees who are active in union organizing drives, even though doing so is illegal under federal labor law.) The bill would provide a minimum level of protection for employees against being compelled to listen to speech with which they disagree without preventing employers from presenting their views in less intrusive ways.

While some are concerned about the free speech rights of employers, others express concerns about the rights of captive audiences, such as employees during the work day, not to be forced to listen to messages on political and religious topics. In the context of an upcoming union representation election, why shouldn't employees get to choose, as in the case of political elections, which campaign events, if any, they wish to attend?

Response:

A ban on anti-union captive audience speeches would be preempted under federal labor law. The bill would intrude upon employer's free speech rights under the National Labor Relations Act, and is therefore preempted under federal labor law. Employers should be allowed to present information and their opinions to employees to ensure that employees can decide about union representation armed with a full range of facts and opinions.

For:

Employers would still have many other ways to present their views that are less intrusive. Employers would still have many opportunities to present their views that would be less intrusive than mandatory meetings. For instance, they could post notices on bulletin boards, send letters, or hold meetings at which attendance was voluntary. It is inaccurate to say that the law would prevent an employer from presenting its political, religious, or anti-union views. In the context of a union organizing drive, employers opposing unionization would still have a huge advantage over employees trying form a union in that they could hold voluntary meetings on company property on company time and could communicate with employees during the work day. Employees attempting to form a union are not permitted to hold union meetings on company property on company time and must hold meetings outside of work or contact employees at their homes.

Against:

The bill would impair the free speech of employers in general. To the extent the bill bans mandatory meetings opposing unions, it is preempted under federal labor laws. In general, the bill would impair an employer's right to have a mandatory meeting about any topic they wish. The bill proposes to regulate an area of law that Congress intended

federal law to cover and therefore would be preempted by federal labor law. Section 8(c) of the NLRA specifically protects an employer's right of free speech, and the NLRB has not banned employers from holding captive audience meetings to address concerns relating to union organizing campaigns. The NLRB regulates the timing of so-called captive audience meetings by banning them within twenty-four hours of a union election. Under the *Garmon* preemption doctrine, which flows from the United States Supreme Court's decision *San Diego Building Trades v. Garmon*, 359 U.S. 236 (1959), the National Labor Relations Act (NLRA) preempts state regulation of "activity that the NLRA protects, prohibits, or arguably protects or prohibits." This bill would prevent employers from opposing union organizing drives in ways that are allowed under federal labor law.

Response:

The bill is not preempted by federal labor law. Not every law that touches upon the complex interrelationships between employers, employees, and unions is preempted. For example, states possess broad authority to protect workers with minimum standards laws such as child labor laws, minimum wage laws, and health and safety laws. States can establish minimum working conditions without interfering with federal labor law. House Bill 4316 is a minimum conditions law to protect all workers from forced meetings on issues unrelated to job performance.

Moreover, Section 8(c) of the NLRA does not afford an affirmative right to employers to hold "captive audience" meetings in the context of union organizing drives. It merely creates an employer defense in a proceeding in which the employer is accused of engaging in unfair labor practices under federal law. The bill is not preempted under *Garmon* preemption or any other preemption doctrine.

Against:

The broad prohibitions in the bill might have unintended consequences and lead to costly litigation. Under Title VII, the federal law banning employment discrimination, or other laws, an employer might need to have meetings with employees to explain employer or employee rights and obligations. Would the bill ban making attendance at such a meeting mandatory? Would an employer violate the law if its employees were required to attend a luncheon in which they were urged to vote in an upcoming election? Would it be unlawful for an employer to require its employees to attend a meeting at which they were encouraged to volunteer with the Red Cross after a disaster?

The bill's broad and unclear ban on mandatory meetings could lead to litigation that would be especially costly to employers because they would have to pay the attorney fees of employees who win their lawsuits.

Response:

The bill specifically exempts meetings that an employer must hold to comply with other laws so it would not prevent an employer from having a meeting with its employees to explain obligations under Title VII or any other law. The bill would not ban an employer from holding *voluntary* meetings on any subject it wished, including encouraging its employees to volunteer for worthy causes. An employer could easily avoid lawsuits by following the law and sponsoring only optional meetings on political and religious subjects.

Against:

Given Michigan's current economic climate, this is a bad time to place any new restrictions on employers, especially ones that might be perceived as making it easier for employees to form or join unions. Some opponents of the bill express dismay that any new restrictions on employers would be considered in the current economic climate. Passing a worker protection law, they say, might send the wrong message or discourage companies from choosing to locate operations here in Michigan.

Response:

As a practical matter, whether state law permits an employer from compelling attendance at political and religious meetings unrelated to the work of the business is unlikely to be a major factor influencing any company's decision to locate its business in Michigan. In any event, however, Michigan workers deserve minimum protections against being forced to listen to political, religious, or views about unions.

POSITIONS:

International Brotherhood of Electrical Workers (IBEW) Local 655 supports the bill. (4-10-07)

International Union, UAW supports the bill. (4-10-07)

Ironworkers Local 340 supports the bill. (4-10-07)

Michigan AFL-CIO supports the bill. (4-10-07)

Michigan Nurses Association supports the bill. (4-10-07)

Service Employees International Union (SEIU) supports the bill. (5-8-07)

United Food and Commercial Workers (UFCW) supports the bill. (4-10-07)

Michigan Chamber of Commerce opposes the bill. (4-10-07)

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■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.