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Virginia Department of Labor and Industry
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Richmond, Virginia 23230

Via email to: cristin.bernhardt@doli.virginia.gov

Re: Proposed regulation of the Department of Labor and Industry, “Local Government Union Requirements and Employee Protections”

Dear Ms. Bernhardt:

I appreciate the opportunity to comment on the pressing need for the regulations proposed by the Virginia Department of Labor and Industry (Department) to protect the rights of local government employees and to suggest amendments to the proposed regulations that would better serve the Department’s objectives.

I am an attorney with the Competitive Enterprise Institute and a citizen of the Commonwealth of Virginia. The Competitive Enterprise Institute is a non-profit research and advocacy organization that focuses on regulatory policy and defends free enterprise.

Last year, the Department issued a [Notice of Intended Regulatory Action](#). The notice stated,

The regulatory action will address the following requirements and employee protections for local government employees and unions:

Current statutes require secret ballot elections for employee labor organizations (see Va. Code §40.1-54.3).

Current statutes prohibit private sector employers from requiring employees to pay union dues (see Va. Code § 40.1-62) and further prohibit private sector employers from withholding union dues from an employee’s pay “without the written and signed authorization of the employee” (see Va. Code § 40.1-29.C).

Current law prohibits any person from attempts at solicitation or persuasion to join a union in such a manner that would “interfere with, or interrupt the work of any employee during working hours”. (see Va. Code § 40.1-66).

In accordance with that notice, the Department subsequently published the proposed regulations in question, which address those three requirements and employee protections for local government

employees and unions. Local Government Union Requirements and Employee Protections, 14 Va. Reg. issue 16 (proposed Mar. 24, 2025) (to be codified at 16 Va. Admin. Code agency 15, ch. 70).

The Importance of the Proposed Rules' Purpose

The proposal states the following objective: “Purpose: The proposed regulation is essential to the public health, safety, and welfare because it ensures equal opportunity, application, and protection of the law for local government employers and employees in union elections.” It is indeed a laudable purpose to ensure the law’s protections of local government employers and employees in union elections. The law whose protections of local government employers and employees in union elections need to be ensured is “an Act . . . relating to the right of individuals to vote by secret ballot for a designation, a selection, or an authorization for employee representation by a labor organization.” 2013 Va. Acts ch. 484 (“the Act”). The Act is codified at section 40.1-54.3 of the Virginia Code and provides in part, “In any procedure providing for the designation, selection, or authorization of a labor organization to represent employees, the right of an individual employee to vote by secret ballot in such a procedure is a fundamental right that shall be guaranteed from infringement.” Va. Code Ann. § 40.1-54.3(B).

The National Labor Relations Board “has recognized . . . that secret elections are generally the most satisfactory—indeed the preferred—method of ascertaining whether a union has majority support.” *Nat’l Lab. Relations Bd. v. Gissel Packing Co.*, 395 U.S. 575, 602 (1969). The Act does not state how the fundamental right to vote by secret ballot in representation elections “shall be guaranteed from infringement.” The title in which it appears, however, makes clear that the commissioner of labor and industry (Commissioner) has a duty to guarantee the right from infringement. Section 40.1-6 of the Virginia Code provides in part that the Commissioner shall

2. Enforce the provisions of this title and shall cause to be prosecuted all violations of law relating to employers or business establishments before any court of competent jurisdiction;

3. Make such rules and regulations as may be necessary for the enforcement of this title. . . .

The necessity of regulations for the enforcement of the Act became more urgent after the General Assembly amended a statute prohibiting collective bargaining by political subdivisions of Virginia by adding an exception that largely swallowed the rule. As the Department’s preamble to the proposal notes, the prohibition now applies “unless, in the case of a county, city, or town, such authority is provided for or permitted by a local ordinance or by a resolution.” Va. Code § 40.1-57.2(A).

The extension of collective bargaining to counties, cities, towns, and school boards makes the Act and its implementation consequential for two reasons. First, the National Labor Relations Act does not preempt a state’s regulation of labor relations with public employees. 29 U.S.C. § 152(2). Second, public employers, being answerable to an electorate that includes public-sector employees—many of whom are more organized and carry greater influence than their fellow unorganized elector—are more likely than private employers to make concessions,¹ such as acceding to a union’s request for recognition by card

¹ Matthew Dimick, *Compensation, Employment Security, and the Economics of Public-Sector Labor Law*, 43 U. Tol. L. Rev. 533, 546-47 (2012); Peter Feuille, *Unionism in the Public Sector: The Joy of Protected Markets*, 12 J. Lab. Res. 351, 353

check or some other means that gives short shrift to employees' right to vote by secret ballot under the guise of harmonious labor relations.² Card check is a procedure by which a union can obtain recognition without an election by instead presenting authorization cards it obtained from a majority of workers by one means or another. A union organizer's request to an employee to sign a card is inherently coercive.³ As the U.S. Supreme Court observed, "The failure to sign a recognition slip may well seem ominous to nonunionists who fear that if they do not sign they will face a wrathful union regime, should the union win."⁴ Secret ballot elections are the only means to verify that signed cards were signed voluntarily. If the union did obtain the cards honestly, then the election will merely prove this point, in which case the union has nothing to fear regarding the outcome

The concern that public employers may be less protective of the secret ballot is not hypothetical, contrary to a misleading assertion of the Virginia Education Association in its comment. The Virginia Education Association claimed that all collective bargaining resolutions adopted by Virginia school boards *provide* for secret ballot elections. Many of the ordinances and resolutions authorizing collective bargaining in Virginia political subdivisions do provide for or mention secret ballot elections, but they fail to guarantee from infringement "the right of an individual employee to vote by secret ballot" because they also provide for ways around that procedure. The Richmond and Arlington school boards authorize a third-party labor relations administrator or a panel to establish election procedures.⁵ Loudoun County's ordinance permits the parties (the union and the agency—not the employees) to agree to an alternative to the method established by the labor relations administrator.⁶ Even worse, the resolution of the Richmond School Board authorizes recognition of a union *without an election* if the union demonstrates majority support by "membership cards, dues payment, a petition, authorization forms, or other evidence of an Employee's desire to be represented by an Employee association for the purposes of collective bargaining."⁷ In other words, by card check. The resolution goes on to deny the employer any ability to verify the validity or the number of cards.⁸

Some ordinances make no provision at all for secret ballot elections. The city of Alexandria and the county of Arlington authorize a third-party labor relations administrator to establish election

(1991) (noting that public employers "do not have the same incentives to resist unions as their private sector counterparts do because of the absence of competitive product market pressures").

² Rafael Gely & Timothy Chandler, *Understanding Card-Check Organizing: The Public Sector Experience*, 44 (U. Mo. School of Law Legal Studies Research Paper No. 2010-12),

<https://scholarship.law.missouri.edu/cgi/viewcontent.cgi?article=1234&context=facpubs>.

³ Allison R. Hayward, *Why Vote in Secret? Balancing Autonomy in Absentee, Card Check, and Corporate Voting Contexts*, 11 Engage 67, 69 (Mar. 31, 2010), <https://fedsoc.org/fedsoc-review/why-vote-in-secret-balancing-autonomy-and-accountability-in-absentee-card-check-and-corporate-voting-contexts>.

⁴ *Nat'l Labor Relations Bd. v. Savair Mfg. Co.*, 414 U.S. 270, 281 (1973).

⁵ School Board of Richmond, Va., Resolution for Collective Bargaining in Richmond City Public Schools § 4(A)(6) (Dec. 6, 2021); Arlington, Va., School Board Resolution Authorizing Collective Bargaining in Arlington County Schools § 5(A)(4) (May 26, 2022).

⁶ Loudoun County, Va., Code of Ordinances § 259.09(c)(2).

⁷ School Board of Richmond, Va., Resolution for Collective Bargaining in Richmond City Public Schools § 4(B) (Dec. 6, 2021).

⁸ *Id.* ("The Employer is precluded from having access to or ownership of any ballot, membership card, petition, authorization form, showing of interest form, or any other information that would reveal Employee identities as these documents will remain the property of the Employee association.")

procedures without making any reference to voting by secret ballot.⁹ The collective bargaining ordinance of the city of Richmond requires mail-in ballot elections for certifications but does not require that they be secret and does not establish their procedures.¹⁰

Proposals Ensuring the Protection of the Laws in Union Elections

Proposed subsection 15-70-20(A) addresses the need to protect the secret ballot in local union elections by making the Act applicable to local government public employers, along with eight other statutory provisions related to employee protections and their enforcement. Absent such a regulation, the statutes would not apply to public employers. Va. Code Ann. § 40.1- 2.1.

The proposal makes another gesture toward implementation of the Act that is not fully realized. While it should go without saying, the style manual for Virginia regulations instructs, “Do not define terms not used in the regulation.” *Form, Style and Procedure Manual for Publication of Virginia Regulations* art. II, § 3.10(B). Nonetheless, proposed section 15-70-10 defines secret ballot, and then the term is never used again in the proposed regulations.

A provision using the term might have been deleted during the drafting process. The term should be inserted in proposed section 15-70-30 so that the proposed regulations could make a more serious attempt to achieve their purpose. The section should read:

The commissioner may request prosecution in any court of competent jurisdiction by the appropriate attorney for the Commonwealth of all violations of law relating to local government union requirements and employee protections, including protection of the right to vote by secret ballot in any procedure providing for the designation, selection, or authorization of a labor organization to represent employees.

Proposals Implementing the Other Requirements and Employee Protections for Local Government Employees and Unions

Proposed subsection 15-70-20(A) makes applicable to local government public employers statutes prohibiting private sector employers from requiring employees to pay union dues (see Va. Code Ann. § 40.1-62) and prohibiting any person from attempts at solicitation or persuasion to join a union in such a manner that would “interfere with, or interrupt the work of any employee during working hours.” (see Va. Code Ann. § 40.1-66).

Proposed subsections 15-70-20(B) and (C) address the widespread problem of deduction of union dues from public employees’ pay without their knowing and voluntary authorization. Deductions of union dues from a public employee without the employee’s consent violates the first amendment to the U.S. Constitution, *Janus v. AFSCME*, 585 U.S. 878 (2018), as well as section 40.1-29(C) of the Virginia Code.

Proposed subsection 15-70-20(B)¹¹ is a prohibition of such illicit deductions. The subsection’s prohibition states that “no local government public employer shall withhold any part of the wages or

⁹ Alexandria, Va., Code tit. 2, ch. 5, art. E, § 2-5-74; Arlington County, Va., Code § 6-30(H)(1).

¹⁰ Richmond, Va., Ordinance 2022-221, § 2-1301.9(c) (July 25, 2022).

¹¹ “Pursuant to § 40.1-29 C of the Code of Virginia, to the extent that an alleged violative conduct concerns improper withholding of any dues, fees, or other charges of any kind to any labor union or labor organization, no local government

salaries of any employee except for payroll, wage, or withholding taxes or in accordance with law without the written and signed authorization of the employee.” A condition awkwardly precedes this prohibition (“to the extent that an alleged violative conduct concerns improper withholding of any dues, fees, or other charges of any kind to any labor union or labor organization”). Beginning that condition with “to the extent that” is not good draftsmanship. The phrase “to the extent that” establishes a sliding scale, denoting that the main clause will apply to varying degrees. While the use of the phrase “to the extent that” may be appropriate in subsection 15-70-20(C), it is not appropriate in subsection 15-70-20(B) because the unauthorized withholding of wages is either prohibited or it’s not. In a binary situation like that, the word “if” should precede the condition, denoting that the main clause will apply if the condition is present.¹² In this case, where the elements of the condition overlap with the elements of the prohibition, it is simpler to include the condition in the elements of the prohibition. Subsection 15-70-20(B) should be rewritten as follows:

Pursuant to § 40.1-29 C of the Code of Virginia, no local government public employer shall withhold any dues, fees, or other charges of any kind to any labor union or labor organization from any part of the wages or salaries of any employee without the written and signed authorization of the employee.

Proposed subsection 15-70-20(C) makes subsections 40.1-29(E) through (H) of the Code of Virginia applicable to local government public employers as was done with other statutes in proposed subsection 15-70-20(A). It is unclear why 40.1-29(C), the subject of the previous proposed subsection (15-70-20(B)), was omitted from the subsections of 40.1-29 that proposed subsection 15-70-20(C) applies to local government. The previous subsection might imply that 40.1-29(C) applies to local government, but it would be better to say so expressly.

Enforcement

Finally, proposed section 15-70-30 sets forth the means of addressing violations of law relating to local government requirements and employee protections. As noted above, the section should expressly provide that employee protections include protection of the right to vote by secret ballot in representation elections. *See supra* p. 4.

Proposed section 15-70-30 will serve to remind Commissioners of their ability and their duty to “cause to be prosecuted all violations of law relating to employers or business establishments before any court of competent jurisdiction.” Va. Code Ann. § 40.1-6(2). As proposed section 15-70-30 recognizes, Commissioners generally do this through attorneys for the Commonwealth, who have a corresponding duty: “The attorney for the Commonwealth of the proper county or city, upon the request of the Commissioner, or any of his authorized representatives, shall prosecute any violation of law or rule or regulation adopted thereunder which it is made the duty of the Commissioner to enforce.” Va. Code Ann. § 40.1-7. Attorneys for the Commonwealth represent the Department of Labor and Industry in civil and

public employer shall withhold any part of the wages or salaries of any employee except for payroll, wage, or withholding taxes or in accordance with law without the written and signed authorization of the employee.”

¹² Gerald Lebovitz, *Making Offers No One Can Refuse: Effective Contract Drafting — Part 5*, N.Y. St. B.J., June 2016, at 59-60. “An example of what not to do: ‘To the extent that the Company is a public corporation, Company shall file all applicable reports required by the Securities and Exchange Commission.’” *Id.* at 60.

criminal proceedings to establish violations of any law or regulation that the Commissioner has the duty to enforce.¹³

Further, in proposed subsection 15-70-20(A)(3) the Department astutely extends to local government employers coverage of another enforcement statute, subsection 40.1-49.4(F)(2) of the Virginia Code. Subsection 40.1-49.4(F)(2) provides, “Any court described in this section shall also have jurisdiction, upon petition of the Commissioner or his authorized representative, to enjoin any violations of this title or the standards, rules or regulations promulgated thereunder.” The circuit courts of Virginia are courts “described in this section.” Subsection 40.1-49.4(F)(2) permits the Commissioner to proceed without an authorized representative and does not require an authorized representative of the Commissioner to be an attorney for the Commonwealth.

These enforcement mechanisms will require monitoring of collective bargaining units to be effective. As part of the monitoring process, the Department should publicize a means by which workers can complain to the Department of violations, and the Department should investigate and act upon complaints it receives. Only then will the proposal’s needful enforcement mechanisms guarantee employee protections from infringement.

Cordially yours,

David S. McFadden

Attorney

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¹³ Va. Op. Att’y Gen. 146 (1996).