The TEAM Act Brings Us Back To The Future Again

By **Daniel Johns** (April 26, 2022)

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In the movie "Back to the Future," lead character Marty McFly travels back in time and encounters younger versions of his parents. Marty must make sure his parents fall in love in order to ensure that they will get married and thus allow him to continue to exist, and make it back to the present time.

Labor law in the year 2022 has become like a version of "Back to the Future," as the Biden administration and the National Labor Relations Board attempt to change the law, both legislatively and administratively, back to what it was — or had been proposed to become — during previous administrations.

Memos and public statements from the current general counsel of the NLRB, Jennifer Abruzzo, have made clear that she has a long list of such labor law changes that she wishes to enact during the current administration.

Such labor law pingpong jurisprudence is not limited to the Democrats. In February, Republican Sen. Marco Rubio of Florida and Rep. Jim Banks of Indiana introduced a labor reform bill that has its roots in a failed legislative action from the 1990s.

Specifically, Rubio and Banks introduced the Teamwork for Employees and Managers, or TEAM, Act of 2022.

The TEAM Act mostly tracks the 1995 Teamwork for Employees and Managers Act. That piece of legislation passed Congress, but was vetoed by then-President Bill Clinton.[1]

The 1995 version of the TEAM Act was a legislative attempt to overturn the NLRB's 1992 decision in Electromation Inc.[2]

In that case, the NLRB found that employee action committees, which existed to discuss employer policy issues and to communicate employee issues to management, were illegal, company-dominated unions.

In so holding, the NLRB relied upon Section 8(a)(2) of the National Labor Relations Act, which makes it an unfair labor practice for employers "to dominate or interfere with the formation or administration of any labor organization."[3]

The NLRB made clear in Electromation that employee committees formed or run by management were illegal unless they only existed for the purpose of passing along information from employees to management without any back-and-forth on the issues.

Thus, the legal distinction has long been that an employer can form committees to brainstorm or merely serve as a suggestion box for employee ideas, but not to make specific proposals on behalf of the employee population or to discuss or bargain over them.

Under this standard, employers have often complained that the line between legal and illegal employee committees is difficult to draw.

The 2022 TEAM Act is another attempt to make Electromation employee committees legal under the NLRA. More specifically, the TEAM Act would accomplish the following:

- Employers and employees would be allowed to establish voluntary employee involvement committees, or EIOs, to discuss workplace issues and employee concerns. Such issues of mutual concern include "quality of work, productivity, efficiency, compensation, benefits (including education and training), and accommodation of religious beliefs and practices."

- EIOs would be established and dissolved by mutual consent between employers and employees.

- EIOs would not be authorized to negotiate collective bargaining agreements and cannot be used to preclude employees from unionizing if they so choose.

- Challenges to EIOs would be adjudicated in state or federal courts, rather than through unfair labor practice litigation before the NLRB.

- EIO members at companies with gross revenues of more than $1 billion would have the opportunity to elect a representative to serve as a nonvoting member of the company's board of directors. Such an election would happen through secret ballot and would only apply to employees legally able to work in the U.S.

- Unions would be prohibited from funding EIO candidates for elections to determine board representatives.

- EIOs for such large employers, if certified for more than five years, could only be dissolved by employers on the basis of the corporate business judgment rule. For smaller employers, EIOs would be dissolvable by the employer for any reason.

If passed, the TEAM Act would not have a direct impact on how unions operate. However, unions are concerned that EIOs would be an alternative to unionization and thus limit the potential for successful union organizing drives.

Employees might look to EIOs instead of unions in order to deliver the voice to their employer that some employees seek through unions, without the burden of having to pay union dues to obtain that voice.

Employers obviously would prefer EIOs to the formation of unions because they would have much more control of the process and would not necessarily have to bargain over issues brought before EIOs.

As with most areas of labor law these days, the reactions to the TEAM Act presented contrasting visions with almost no hope of the respective sides attempting to bridge the gap on issues that might be beneficial to both employers and employees.

Rubio, in his press release accompanying the introduction of the bill, stated:

> The vast majority of working Americans go to work every day to earn a living and provide for their families, not because they want to participate in the latest "woke" workplace trend. ... In reality, many American workers are sick and tired of being subjected to radical company policies and would gladly trade in their "diversity workshop" for a discussion on benefits or flexibility.[4]

On the union side, the reaction to the introduction of the TEAM Act has been predictably negative.

One labor blog, Labor Lab's The Steward, called it "awful" and a "dangerous idea."[5] That same blog went on to warn employees:

> If you're interested in learning more about the history of company unions and why they not only don't work but are inherently designed to dis-empower workers, Google "yellow unions."[6]

Another union-side blog from the People's Policy Project described the TEAM Act as providing employers with

> another union avoidance tool by allowing them to muddy the waters and by allowing them to fend off union organizing drives by setting up their own internal labor organizations, aka company unions.[7]

Setting the dueling rhetoric aside for a second, it might be worth considering that, in an era of continued decline of unionization in the overall American workforce, employees could benefit from participation in EIOs in that they would have an avenue of communication with their employers on issues of concern beyond just the typical supervisory and human resources route.

And, employers would certainly be more likely to consider EIO formation if Electromation liability at the NLRB is off the table.

As with most labor law issues these days, however, it does not appear that there will be much appetite for compromise or consideration of shared interests.

As with the Clinton veto back in the '90s, the TEAM Act is likely dead on arrival at the Biden White House if it makes it through Congress — which, like Marty McFly, only brings us back to the future once again.

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[1] The vetoed legislation was similarly named, the Teamwork for Employees and Managers Act of 1995.

[2] 309 N.L.R.B. No. 163 (1992).

[3] 29 U.S.C Sec. 158(a)(2).

[4] See Rubio Press Release, available at https://www.rubio.senate.gov/public/index.cfm/2022/2/rubio-banks-introduce-pro-worker-labor-reform-bill.

[5] See Labor Lab, available at https://www.laborlab.us/rubio_wants_to_bring_back_company_unions.

[6] Id. Historically, a yellow union was a union that sided with the interest of the employer or government against the interest of the employees which it represented.

[7] See people Policy Project, available at https://www.peoplespolicyproject.org/2022/02/07/whats-the-point-of-the-rubio-company-union-bill/.