

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HJR 1013

Guaranteeing the Right to Vote by Secret Ballot

SPONSOR(S): Hasner and others

TIED BILLS:

IDEN./SIM. BILLS: SJR 1908

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1)	Governmental Affairs Policy Committee	8 Y, 4 N	McDonald	Williamson
2)	Policy Council	16 Y, 7 N, As CS	Phillips	Hogge
3)	Rules & Calendar Council			
4)				
5)				

SUMMARY ANALYSIS

HJR 1013 would propose an amendment to Article I of the Florida Constitution, declaring the right to vote by secret ballot a fundamental right. The amendment would provide that the right of individuals to vote by secret ballot is guaranteed "when local, state, or federal law requires elections by the people for public office, requires public votes by the people on initiatives or referenda, or requires designations or authorizations of employee representation."

Article VI of the Florida Constitution addresses voting and elections. Section 1 provides that "all elections by the people shall be by direct and secret vote." The Florida Election Code defines the term "elections" and includes all of those referenced in HJR 1013, but does not include those related to designations or authorizations of employee representation.

The portion of the proposed constitutional amendment extending the right to vote by secret ballot when "local, state, or federal law requires designations or authorizations of employee representation" appears to be in direct response to the "Employee Free Choice Act," currently pending before the 111<sup>th</sup> Congress. The Employee Free Choice Act would amend the National Labor Relations Act (NLRA) by requiring the designation of an employee representative based on the submission of signed cards ("card check") from a majority of employees without having an election by secret ballot. Under current law, the employer could refuse to recognize the union as the employee representative in this circumstance and require an election by secret ballot.

The joint resolution must be approved by a three-fifths vote of the membership of each house of the Legislature. If enacted by such vote, the proposal will be presented to the electors of Florida at the November 2, 2010 general election. Approval requires a favorable vote from 60 percent or more of the electors voting on the measure.

Based upon the costs involved in the 2008 election for advertising a proposed constitutional amendment, the total cost for advertising this proposed constitutional amendment is estimated to be \$5,976.63. The cost is determined by multiplying the total number of words in the proposed amendment by the average per word cost of \$92.01.

If approved by Florida voters, the amendment would take effect January 4, 2011.

## HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

HJR 1013 would propose an amendment<sup>1</sup> to Article I of the Florida Constitution, declaring the right to vote by secret ballot a fundamental right. The amendment would provide that the right of individuals to vote by secret ballot is guaranteed when local, state, or federal law:

- 1) requires elections by the people for public office or public votes on initiatives or referenda.
- 2) requires designations or authorizations of employee representation.

*1) THE RIGHT OF INDIVIDUALS TO VOTE BY SECRET BALLOT WOULD BE GUARANTEED WHEN LOCAL, STATE, OR FEDERAL LAW REQUIRES ELECTIONS BY THE PEOPLE FOR PUBLIC OFFICE AND PUBLIC VOTES ON INITIATIVES OR REFERENDA.*

#### Present Situation

##### Relevant Provisions of the Florida Constitution

Article I of the Florida Constitution sets forth certain rights that are guaranteed to all persons. Among these rights are such basic rights as the right to enjoy and defend life and liberty, pursue happiness, be rewarded for industry, and acquire, possess and protect property. It sets forth the right of religious freedom, freedom of speech and press, the right to peaceably assemble, and the right of persons to work without regard to membership or non-membership in a labor union or labor organization. Article I also includes the right of employees to bargain collectively, the right to keep and bear arms.<sup>2</sup>

---

<sup>1</sup> Article XI of the Florida Constitution sets forth various methods for proposing amendments to the constitution, along with the methods for approval or rejection of proposals. One method by which constitutional amendments maybe proposed is by joint resolution agreed to by three-fifths of the membership of each house of the Legislature. Any such proposal must be submitted to the electors, either at the next general election held more than 90 days after the joint resolution is filed with the Secretary of State, or, if pursuant to law enacted by the affirmative vote of three-fourths of the membership of each house of the Legislature and limited to a single amendment or revision, at an earlier special election held more than 90 days after such filing. If the proposed amendment is approved by a vote of a least 60 percent of the electors voting on the measure, it becomes effective as an amendment to the Florida Constitution on the first Tuesday after the first Monday in January following the election, or on such other date as may be specified in the amendment.

<sup>2</sup> Art. 1. Fla. Const.

Article VI of the Florida Constitution sets forth provisions related to suffrage and elections. Section 1, relating to the regulation of elections, provides that "all elections by the people shall be by direct and secret vote."<sup>3</sup> This provision was adopted by the electorate in 1968. Until the revision in 1968, Article VI, Section 6 of the 1885 Constitution referred to "elections by the people," and required that "the vote shall be by ballot." The deletion of the term "ballot" was to avoid confusion when the word is applied to modern methods of voting.<sup>4</sup> The constitutional requirement for a "direct and secret vote" was added in 1968.<sup>5</sup>

### Florida Elections Code

The Florida Election Code specifically defines "elections" to include an election called for the purpose of voting on a party nominee to fill a national, state, county or district office, or to fill such office, or voting on a constitutional amendment.<sup>6</sup> Under the Florida Election Code, the term "election" also includes any election held for the purpose of voting for a municipal office or municipal public measure.<sup>7</sup>

The Florida Election Code also imposes a secrecy requirement, requiring all elections held on any subject that is submitted to a vote, and for all or any state, county, district, or municipal officers are "by secret, official ballot as provided by the code."<sup>8</sup> Additionally, no electronic or electromechanical voting system can be approved by the Department of State unless it is constructed so that, among other things, it "permits and requires voting in secrecy."<sup>9</sup>

Protections are provided for voters throughout the Florida Election Code. Some examples are: the prohibition against voter intimidation or suppression in the "Voter Protection Act"<sup>10</sup>; the prohibition against employers from trying to control votes of employees in elections governed by the code; and, in the special registration requirements for persons with special needs which prohibits the person's employer, the agent of the person's employer, or an officer or agent of the person's union from being a person who can be designated to give assistance in voting.<sup>11</sup>

### **Effect of Proposed Changes**

This proposal expressly states an individual has the fundamental right to vote by secret ballot in certain elections or labor matters. Individuals would have a fundamental right to vote by secret ballot whenever federal, state, or local law requires an election by the people for public office and when voting for designations or authorizations of employee representation, i.e., to form a labor union.

By virtue of the placement of this provision in Article I, it appears the right to vote in secrecy in an election may be elevated to the level of an inalienable right. The right to vote by secret ballot, therefore, may be accorded the same or similar level of scrutiny and protection from legislative and regulatory limitations or restrictions as other fundamental and inalienable rights such as the right to privacy, right to bear arms, and freedom of speech.

### ***2) THE RIGHT OF INDIVIDUALS TO VOTE BY SECRET BALLOT WOULD BE GUARANTEED WHEN LOCAL, STATE, OR FEDERAL LAW REQUIRES DESIGNATIONS OR AUTHORIZATIONS OF EMPLOYEE REPRESENTATION.***

---

<sup>3</sup> It also states general elections shall be determined by a plurality of votes cast and provides that registration and elections shall, and political party functions may, be regulated by law. The remaining sections provide qualifications for electors; oath to be subscribed to by person registering; disqualifications for voting or holding office; primary, general, and special elections; municipal and district elections; and campaign spending limits and funding of campaigns for elective state-wide office.

<sup>4</sup> See Fla. Stat. Ann. pp. 333-334 (Supp. 1995).

<sup>5</sup> Ibid.

<sup>6</sup> See s. 97.021, F.S.

<sup>7</sup> See s. 100.3605, F.S.

<sup>8</sup> See s. 101.041, F.S.

<sup>9</sup> See s. 101.5606, F.S.

<sup>10</sup> See s. 104.0615, F.S.

<sup>11</sup> See s. 97.061(3), F.S.

## Present Situation

### Federal

The National Labor Relations Act (NLRA) states:

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.<sup>12</sup>

The NLRA applies exclusively to private workplaces. Under the NLRA, private sector employees can achieve union representation either through an election process or through majority sign-up, commonly known as “card check.” When more than 30% of employees sign cards requesting employee representation, the employer may choose to recognize the union or require the NLRB to oversee an election. Once the union has majority support, an employer may choose to recognize the union without an election or require an election. The NLRB will designate a union as the representative of employees if the union is selected by a secret ballot. The NLRA establishes a procedure by which employees can exercise their choice at a secret ballot election conducted by the National Labor Relations Board.<sup>13</sup>

Currently, two competing proposals involving designation of employee representatives under the NLRA are pending before Congress. One is known as the Secret Ballot Protection Act.<sup>14</sup> This Act would amend the NLRA to require a secret ballot vote in order to have an employee representative designated; that is, to preclude the designation of an employee representative solely on the basis of a card check.<sup>15</sup>

The other proposal is known as “Employee Free Choice Act.”<sup>16</sup> It would amend the NLRA by requiring the designation of an employee representative based on the submission of signed cards (“card check”) from a majority of employees without having an election by secret ballot. Under current law, the employer could refuse to recognize the union as the employee representative in this circumstance and require an election by secret ballot.

### State

There are three specific provisions in chapter 447, F.S., Labor Organizations that reference the use of a secret ballot. The first is found in Part I, General Provisions, of the chapter relating to union activity. Under s. 447.09(4), F.S., it is unlawful to conduct a vote to participate in a strike, walkout, or cease or continue work unless the election is a secret ballot election.

The other two references, which relate only to public employees, are found in Part II of chapter 447, F.S.:

- Under s. 447.307, F.S., relating to the certification of an employee organization for public employees, the Public Employees Relations Commission (PERC or commission) shall require

---

<sup>12</sup> NLRA; 29 U.S.C. sec. 151.

<sup>13</sup> The NLRA is principally administered and enforced by the NLRB and the General Counsel acting through 52 regional and other field offices located in major cities in various parts of the country. The General Counsel and staff of the regional offices investigate and prosecute unfair labor practice cases and conduct elections to determine employee representatives. See <http://www.nlrb/shared-files/brochures/BasicGuide.html>; Last visited March 12, 2009.

<sup>14</sup> H.R. 1176 (Secret Ballot Protection Act) by Congressman John Kline and S.B. 478 (Secret Ballot Protection Act of 2009) by Senator Jim DeMint.

<sup>15</sup> The language of HJR 1013 is similar to that being proposed by SOS Ballot, Inc., for inclusion in revisions to state constitutions in other states.

<sup>16</sup> H.R. 1409 by Congressman George Miller and S.B. 560 by Senator Edward Kennedy.

an election by secret ballot of an employee organization to represent employees, if an employer has denied recognition of such organization.

- Under s. 447.308, F.S., relating to revocation of certification of an employee organization, the commission shall, after certain findings, order an election by secret ballot to continue the certification or decertify the employee organization as the exclusive bargaining agent of the employees.

The Public Employees Relations Commission (PERC) is responsible for issues relating to collective bargaining issues related to public employees.<sup>17</sup> There are approximately 400,000 public employees in bargaining units throughout the state. PERC holds hearings and resolves disputes about the composition of bargaining units and alleged unfair labor practices. PERC has an Election Division that conducts elections for public employees throughout the state.<sup>18</sup>

Currently, state law relating to public employees (Ch. 447, Part II) mirrors the NLRA relating to the right of public employees to organize and to bargain collectively with their employers. State law for public employees includes the same 30% requirement in federal law for triggering an election option; that is, if 30% or more of the public employees sign cards favoring a particular union, an election may be held. However, employee representatives typically seek signatures from more than a majority of employees before filing for designation as the collective bargaining agent. Once the union has majority support, an employer may choose to recognize the union without an election or require an election.

## **Effect of Proposed Changes**

### Private Workplaces

HJR 1013 extends the right of individuals to vote by secret ballot to situations requiring "designations or authorizations of employee representation".<sup>19</sup> As a result, employees would have the right to a secret ballot election in order to select their union for purposes of collective bargaining. Designation could not occur solely on the basis of a card check. This portion of the proposed constitutional amendment extending the right to vote by secret ballot when "local, state, or federal law requires designations or authorizations of employee representation" appears to be in direct response to the "Employee Free Choice Act."

### Public Workplaces

This proposal would likely require public employers to proceed to an election in circumstances where they might otherwise choose to recognize the union based on signed cards.

## **B. SECTION DIRECTORY:**

None.

---

<sup>17</sup> "Public employees" mean employees of the state, counties, school boards, municipalities, and special taxing districts. This includes all fire, police, corrections, school teachers and support personnel, medical personnel, state troopers, toll collectors, sanitation employees, and clerical, etc. See <http://perc.myflorida.com/>; last visited March 12, 2009.

<sup>18</sup> The elections are held for a wide range of units including Police, Fire, School or University, Sheriff, Medical, and all other City and County units. Elections are conducted when a Representation Certification Petition or a Petition to Revoke Certification is filed. Petitions have to be accompanied by at least a 30 percent showing of interest of the proposed unit. All elections are conducted by secret ballot and by a designated agent of the Commission. The Election Division conducts an average of 65 elections a year with some elections being held for very small units and some for statewide units. Elections have been held for as small as two people in a unit to as many as 30,000.

<sup>19</sup> "Secret Ballot" is defined in Black's Law Dictionary, Sixth Edition, as "the expression by ballot, voting machine, or otherwise, but in no event by proxy, of a choice with the respect to any election or vote taken upon any matter, which is cast in such a manner that the person expressing such choice cannot be identified with the choice expressed." "Vote" is defined in Black's as the "expression of one's will, preference, or choice."

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

Each constitutional amendment must be published in a newspaper of general circulation in each county, once in the sixth week and once in the tenth week preceding the general election.<sup>20</sup> Costs for advertising vary depending upon the length of the amendment. Based upon the costs involved in the 2008 election for advertising a proposed constitutional amendment, the total cost for advertising this proposed amendment is estimated at \$5,796.63. The cost is determined by multiplying the total number of words in the proposed amendment by the average per word cost of \$92.01.<sup>21</sup>

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

There is an indeterminate cost to local government for possible costs related to the printing of the ballot. There could be a cost if additional pages were needed to print the language that appears on the ballot.

### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Indeterminate. It is not known what, if any, additional cost or cost savings the requirement for a secret ballot as a fundamental right will have on employers, employees, or the employee bargaining unit.

### D. FISCAL COMMENTS:

None.

## III. COMMENTS

### A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

None.

2. Other:

Supremacy Clause

HJR 1013 provides an opportunity for voters to approve an amendment to Florida's Constitution that attempts to counter pending federal legislation that, if passed, would dispense with the requirement of a secret ballot election to designate an employee representative. This situation implicates the Supremacy Clause of the federal constitution. The Supremacy Clause, Article VI, paragraph 2 states:

---

<sup>20</sup> Art. XI, sec. 5(d), Fla. Const.

<sup>21</sup> The estimated cost is based on information and methodology received from staff of the Department of State. Based on the language in HJR 1013, the total number of words in the proposed amendment is 63.

This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the contrary notwithstanding.<sup>22</sup>

There are differing opinions concerning the outcome of a constitutional challenge based on the Supremacy Clause. The issue appears to be whether or not the NLRA preempts any state laws to the contrary or whether this proposed constitutional amendment would fall within any preemption exception.

The American Federation of Labor and Congress of Industrial Organizations (AFLCIO), in a letter to Florida Legislators dated March 10, 2009 states that HJR 1013, "would rewrite federal labor law – the national Labor Relations Act ("NLRA") – which courts have consistently held states are legally preempted from doing."<sup>23</sup>

Opposing this position, Clint Bolick with the Goldwater Institute's Scharf-Norton Center for Constitutional Litigation, in an article entitled Assessing Legal Prospects For Protecting The Right To Secret Ballot In State Constitutions, states that "(s)uch amendments would create a constitutional clash between the Supremacy Clause, which provides that federal law supercedes conflicting state laws, and the interests of states in protecting individual liberties in our system of federalism. Under existing U.S. Supreme Court precedents, the NLRA preempts state laws unless they serve a significant state interest in ways that are not unduly burdensome to the federal regulatory scheme....The proposed state constitutional provision should prevail in a clash with federal law."<sup>24</sup> Bolick further argues that the NLRA does not preempt state constitutional provisions in all instances because the Court has carefully carved out an exception for state laws protecting important interests and that this proposed constitutional amendment falls within that exception.

**B. RULE-MAKING AUTHORITY:**

None.

**C. DRAFTING ISSUES OR OTHER COMMENTS:**

The differences in the use of the terms "secret ballot" in the proposed amendment and "direct and secret vote" in Article VI, Section 1 of the Florida Constitution might create some confusion in how to interpret the two provisions and in determining what impact, if any, the differences might have on the current Election Code.

Procedural Requirements

In order for the Legislature to submit HJR 1013 to the voters for approval, the joint resolution must be agreed to by three-fifths of the membership of each house.<sup>25</sup> If HJR 1013 is agreed to by the Legislature, it will be submitted to the voters at the next general election held more than 90 days after the amendment is filed with the Department of State.<sup>26</sup> As such, HJR 1013 would be submitted to the voters at the 2010 General Election. In order for HJR 1013 to take effect, it must be approved by at least 60 percent of the voters voting on the measure.<sup>27</sup>

---

<sup>22</sup> Art. VI, paragraph 2, Constitution of the United States

<sup>23</sup> As cited in such letter - See for example, *Golden State Transit v. City of Los Angeles*, 475 U.S. 608, 613 (1986) (*Golden State I*); *Wisconsin Dept. of Industry, Labor & Human Relations v. Gould*, 475 U.S. 282 (1986); and, *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959). Section 9(a) & (c)(1)(A) of the National Labor Relations Act specifically address the manner and means of employee selection of union representatives.

<sup>24</sup> See source cited supra note 24.

<sup>25</sup> Art. XI, sec. 1, Fla. Const.

<sup>26</sup> Art. XI, sec. 5(a), Fla. Const.

<sup>27</sup> Art. XI, sec. 5(e), Fla. Const.

#### **IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES**

CS/HJR 1013, favorably reported by the Policy Council on March 18, 2009, differs from the originally filed version by providing that the “elections” to which this resolution applies are elections “by the people.”