

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Judiciary Committee

BILL: SJR 1908

INTRODUCER: Senator Richter and others

SUBJECT: Right to Vote by Secret Ballot

DATE: March 24, 2009

REVISED: 03/26/09

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Fox	Rubinas	EE	Favorable
2.	Maclure	Maclure	JU	Fav/1 amendment
3.			TA	
4.			RC	
5.				
6.				

Please see Section VIII. for Additional Information:

- A. COMMITTEE SUBSTITUTE..... ☐ Statement of Substantial Changes
- B. AMENDMENTS..... ☐ Technical amendments were recommended
- ☒ Amendments were recommended
- ☐ Significant amendments were recommended

I. Summary:

Senate Joint Resolution 1908 establishes, in the Declaration of Rights article of the State Constitution, a fundamental right to vote by secret ballot in all public elections involving candidates or issues and in all elections requiring designations or authorizations of employee representation under local, state, or federal law.

The joint resolution must be approved by a three-fifths vote of the membership of each house of the Legislature. If so enacted, the proposal will be presented to the electors of Florida at the 2010 general election. Approval requires a favorable vote from at least 60 percent of the electors voting on the matter. If approved, the amendment would take effect January 4, 2011.

The joint resolution proposes an amendment to the Florida Constitution to create section 28 of Article I.

II. Present Situation:

Article VI of the Florida Constitution currently provides that “[a]ll elections by the people shall be by direct and secret vote.”¹

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.² 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.³

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 officer, to be “by secret, official ballot as provided by this code.”⁴ 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.”⁵

Article I of the Florida Constitution is the Declaration of Rights. Regarding labor unions, the Declaration of Rights provides:

Section 6. Right to work.—The right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization. *The right of employees, by and through a labor organization, to bargain collectively shall not be denied or abridged.* Public employees shall not have the right to strike.⁶

Florida law also provides that “[e]mployees shall have the right to self-organization, to form, join, or assist labor unions or labor organizations or to refrain from such activity, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.”⁷

Federal Provisions Governing Labor Organizations

The federal National Labor Relations Act (NLRA) governs private-sector labor relations, including the relationship among employers, unions, and employees, as well as the rights of employees to form and participate in labor organizations, to engage in protected activities, and to bargain collectively through representatives of their own choosing.⁸ Currently under the NLRA, a union may be formed by soliciting employee signatures on union-authorization cards through

¹ FLA. CONST. art. VI, s. 1.

² See s. 97.021, F.S.

³ See s. 100.3605, F.S..

⁴ Section 101.041, F.S.

⁵ Section 101.5606,(1) F.S.

⁶ FLA. CONST. art. I, s. 6 (emphasis added).

⁷ Section 447.03, F.S. Florida law also requires labor organizations to register with the Department of Business and Professional Regulation and have their business agents licensed. Sections 447.04 and 447.06, F.S.

⁸ National Labor Relations Board, *Workplace Rights*, http://www.nlr.gov/workplace_rights/index.aspx (last visited March 26, 2009).

an open, majority sign-up signature drive, or “card check” process. However, the employer may refuse to recognize the union through this process and insist on a National Labor Relations Board (NLRB or board) election. Alternatively, the union may pursue a secret-ballot, NLRB election if 30 percent of the workers petition the board for one.⁹

Under a majority bill currently pending in Congress, the Employee Free Choice Act (EFCA),¹⁰ employers *must* recognize workers who organize via the majority sign-up process. The EFCA provides that the board would recognize the union as the official bargaining representative if a majority of employees have authorized such representation via the public, majority sign-up (card check) process, without requiring a secret-ballot election. The EFCA still allows employees to choose the NLRB secret-ballot election process, if they so desire.

There is a concerted effort under way in a number of states to head off the potential impact of this anticipated federal legislation, by establishing in state constitutions a fundamental worker’s right to vote by secret ballot in the formation of any union that would impact him or her.¹¹ It is unclear whether such efforts, even if they were to succeed in amending a state’s constitution, would nonetheless be preempted:

- By the federal EFCA, if adopted; or
- By the current National Labor Relations Act, which authorizes organization by majority sign-up if the employer agrees to recognize the union.¹²

State Provisions Governing Labor Organizations

There are three specific provisions in ch. 447, F.S., Labor Organizations, which reference the use of a secret ballot. The first is found in part I, providing general provisions 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 cessation or continuation of 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 ch. 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

⁹ See 29 U.S.C. s. 159. See also National Labor Relations Board, *Procedures Guide*, available at http://www.nlr.gov/publications/Procedures_Guide.htm (last visited March 24, 2009); Committee on Education and Labor, U.S. House of Representatives, *Employee Free Choice Act*, <http://edlabor.house.gov/employee-free-choice-act-efca/index.shtml> (last visited March 24, 2009).

¹⁰ H.R. 1409 (2009); S. 560 (2009). The EFCA proposes amendments to the National Labor Relations Act. It has been introduced and failed to pass in previous congressional sessions.

¹¹ See, e.g., Save Our Secret Ballot, a not for profit organization that describes its mission as educating the public on the continued need for a secret ballot wherever state or federal law requires elections, <http://www.sosballot.org/>. Further, a minority counter-proposal to the EFCA, the Secret Ballot Protection Act, has been filed in Congress to guarantee an employee’s right to a secret ballot in union organizing elections and to allow union certification solely if the union wins majority support in an NLRB secret-ballot election. H.R. 1176 (2009); S. 478 (2009).

¹² Where a state law directly conflicts with a federal law or where Congress intends that the federal law completely “occupy the field,” state law will be preempted to the extent it frustrates the federal scheme. See generally *San Diego Bldg. Trades Council, Millmen’s Union, Local 2020 v. Garmon*, 359 U.S. 236 (1959).

- require 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 of or decertify the employee organization as the exclusive bargaining agent of the employees.

The Public Employees Relations Commission is responsible for collective bargaining issues related to public employees.¹³ There are approximately 400,000 public employees in bargaining units throughout the state. The PERC holds hearings and resolves disputes about the composition of bargaining units and alleged unfair labor practices. The commission has an Election Division that conducts elections for public employees throughout the state.¹⁴

Although the National Labor Relations Act (NLRA) does not apply to public employees, Florida statutory 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-percent requirement in federal law for triggering an election option. If 30 percent 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.

III. Effect of Proposed Changes:

In Article I, the Declaration of Rights article, of the Florida Constitution, the joint resolution proposes the establishment of the fundamental right to vote by secret ballot in all public elections in the state, as well as in all elections requiring designations or authorizations of employee representation under local, state, or federal law.

The resolution seeks to eliminate the right under the current National Labor Relations Act (and any future amendments to the act) to form a labor union by an open, public, majority sign-up signature drive (or “card check” process) without a secret-ballot election.

The joint resolution must be approved by a three-fifths vote of the membership of each house of the Legislature. If so enacted, the proposed constitutional amendment will be presented to the electors of Florida at the 2010 general election. Approval requires a favorable vote from at least 60 percent of the electors voting on the matter. If approved, the amendment would take effect January 4, 2011.

¹³ The term “public employees” means employees of the state, counties, school boards, municipalities, and special taxing districts. The term includes all fire, police, corrections, school teachers and support personnel, medical personnel, state troopers, toll collectors, sanitation employees, clerical, and others. See <http://perc.myflorida.com/> (last visited March 25, 2009).

¹⁴ 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.

IV. Constitutional Issues:**A. Municipality/County Mandates Restrictions:**

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:**Preemption Issues**

This proposed constitutional amendment to guarantee the right to election by secret ballot in the employee representation context may raise questions about whether the language would be preempted by federal law. The concept of preemption is grounded in the Supremacy Clause of the U.S. Constitution, which provides in part:

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.¹⁵

Where a state law directly conflicts with a federal law or where Congress intends that the federal law completely “occupy the field,” state law will be preempted to the extent it frustrates the federal scheme.¹⁶

One legal argument may be that the proposed amendment to the Florida Constitution would conflict with some of the National Labor Relations Act’s provisions regarding the formation of a union and, to that extent, would be preempted by federal law.¹⁷ The federal act does not currently require a secret ballot if the employer agrees to recognize the union organized under the sign-up signature drive, or “card check,” process. A conflict between the proposed state constitutional amendment and the federal act may be heightened by passage of the proposed federal revision to the act, because it would require employers to recognize workers who organize via the majority sign-up process, while Florida law would necessitate a secret ballot.

¹⁵ U.S. CONST. art. VI.

¹⁶ See generally *San Diego Bldg. Trades Council, Millmen’s Union, Local 2020 v. Garmon*, 359 U.S. 236 (1959).

¹⁷ See letter from William Lurye, associate general counsel, American Federation of Labor and Congress of Industrial Organizations, dated March 10, 2009 (on file with the Committee on Judiciary).

An alternative legal argument may be that the federal act would not preempt the state constitutional amendment to the extent the constitutional amendment protects an important state interest. Under this argument, the state requirement for a secret ballot would not frustrate the federal scheme because the federal scheme, as amended under the proposed federal legislation, would not prohibit secret ballots. Further under this argument, the state interest in promoting voting rights and voter anonymity may be balanced against the interests protected under the federal labor law.¹⁸

Constitutional Amendments

This Senate joint resolution proposes an amendment to the State Constitution. Under article XI, section 1 of the Florida Constitution, constitutional amendments proposed by joint resolution must be agreed to be three-fifths of the membership of each house of the Legislature. The proposed amendment generally shall be submitted to the electors at the next general election held more than 90 days after the resolution is filed with the Secretary of State.¹⁹ Thus, this resolution would be voted upon at the 2010 general election. If approved by at least 60 percent of the electors voting on the measure, the amendment would take effect on the first Tuesday after the first Monday in January (January 4, 2011), because an alternative effective date is not specified in the proposed amendment.²⁰

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Employees and employee organizers seeking to unionize using the current majority sign-up process (with employer approval) may incur additional expenses associated with a secret-ballot election. The precise fiscal impact is indeterminate and will depend largely on the facts and circumstances of individual company situations and organization campaigns.

C. Government Sector Impact:

Each constitutional amendment is required to 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.²¹ Costs for advertising vary depending upon the length of the amendment. According to the Department of State, the average cost per word is \$94.68.

¹⁸ See Clint Bolick, *Assessing Legal Prospects for Protecting the Right to Secret Ballot in State Constitutions* (issue paper on file with the Committee on Judiciary). Mr. Bolick is the director of the Goldwater Institute Scharf-Norton Center for Congressional Studies.

¹⁹ FLA. CONST. art. XI, s. 5(a).

²⁰ FLA. CONST. art. XI, s. 5(e).

²¹ FLA. CONST. art. XI, s. 5(d).

The department notes that this non-recurring expense is not currently funded in its budget.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

Barcode 542330 by Judiciary on March 25, 2009:

Adds the phrase “by the people” following references in the proposed constitutional language to the words “elections” and “votes.” This terminology is consistent with article VI, section 1 of the State Constitution, which provides that “elections *by the people*” shall use direct and secret votes (emphasis added). (WITH BALLOT AMENDMENT)