

2003 DRAFTING REQUEST

Bill

Received: 11/26/2003

Received By: gmalaise

Wanted: As time permits

Identical to LRB:

For: Tim Carpenter (608) 266-8535

By/Representing: G. Stuart Ewy

This file may be shown to any legislator: NO

Drafter: gmalaise

May Contact:

Addl. Drafters:

Subject: **Employ Priv - miscellaneous**

Extra Copies:

Submit via email: YES

Requester's email: **Sen.Carpenter@legis.state.wi.us**

Carbon copy (CC:) to:

Pre Topic:

No specific pre topic given

Topic:

Prohibiting temporary help agencies from providing temporary employees to replace striking workers

Instructions:

See Attached--amend s. 103.545 to prohibit a temporary help agency from providing a temporary employee to an employer to replace an employee who is on striked or who is locked out by the employer. See 820 ILCS 30/2.

Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?	gmalaise 11/26/2003	kgilfoy 12/26/2003		_____			State
/1			pgreensl 12/29/2003	_____	Inorthro 12/29/2003	Inorthro 12/30/2003	

Vers. Drafted Reviewed Typed Proofed Submitted Jacketed Required

FE Sent For:

<END>

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1?	gmalaise	11-12/26 Kmg	D 1/29 PS	12 1/29 PS/RJ			

FE Sent For:

<END>

Champagne, Rick

From: Sen.Carpenter
Sent: Friday, November 21, 2003 11:59 AM
To: Champagne, Rick
Cc: Sen.Carpenter
Subject: New Bill to draft

Hi Rick -

Here is a link to a bill that has just been signed into law in Illinois.

<http://www.legis.state.il.us/legislation/publicacts/fulltext.asp?Name=093-0375&print=true>

Can you draft something similar for Tim? Let me know if you see any problems in differences between Illinois and WI law in this regard.

Also Please re-draft 2001 bill LRB-5133/1 for Tim for this session. Thanks.

FYI I spoke with Jeff Kuesel about the consolidation of health care department issue I emailed to you earlier; also, Tim is having Deb Kennedy do a substitute amendment to SB 287 to make it similar to what you two crafted for Dane County and Madison.

Let me know if you have any questions. Thanks!!

Regards,
G. Stuart Ewy
Chief of Staff

Office Of Senator Tim Carpenter
State Capitol Building
Room 126S
PO BOX 7882
Madison, WI 53707-7882

(608) 266-8535

Public Act 93-0375

SB90 Enrolled

LRB093 04682 WGH 04738 b

AN ACT concerning employment.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

Section 5. The Employment of Strikebreakers Act is amended by changing Sections 1 and 2 as follows:

(820 ILCS 30/1) (from Ch. 48, par. 2e)

Sec. 1. Definitions. For the purpose of this Act:

(a) "Lockout" means the action of an employer pursuant to a labor dispute in temporarily closing a place of employment or preventing an employee or employees from engaging in their normal course of employment for the purpose of inducing settlement of the dispute or influencing the conditions of employment to be agreed on.

(b) "Person" means any individual, partnership, association, firm, corporation, union, or group of employees.

(c) "Professional strikebreaker" means any person who repeatedly and habitually offers himself for employment on a temporary basis where a lockout or strike exists to take the place of an employee whose work has ceased as a direct consequence of such lockout or strike.

(d) "Strike" means the concerted action of employees pursuant to a labor dispute in failing to report for work, engaging in the stoppage of work, picketing (where the effect of such picketing is to induce any individual not to pick up, deliver or transport any goods or not to perform any services), or abstaining from the full and proper performance of the duties of employment for the purpose of inducing settlement of the dispute or influencing the conditions of employment to be agreed on.

(e) "Day and temporary labor service agency" has the meaning ascribed to that term in the Day and Temporary Labor Services Act.

(Source: P.A. 79-859.)

(820 ILCS 30/2) (from Ch. 48, par. 2f)

Sec. 2. No person shall knowingly employ any professional strikebreaker in the place of an employee, whose work has ceased as a direct consequence of a lockout or strike, or knowingly contract with a day and temporary labor service agency to provide a replacement for the employee, during any period when a lockout or strike is in progress. Nor shall any professional strikebreaker take or offer to take the place in employment of employees involved in a lockout or strike.

Nothing in this amendatory Act of the 93rd General Assembly shall be construed to prohibit the continued employment of a day or temporary laborer by an employer if the day or temporary laborer had already been assigned to work for the employer at the time the strike or lockout began.

(Source: P.A. 79-859.)

Section 10. The Day and Temporary Labor Services Act is amended by changing Section 10 as follows:

(820 ILCS 175/10)

Sec. 10. Statement.

(a) Whenever a day and temporary labor service agency agrees to send one or more persons to work as day or temporary laborers, the day and temporary labor service agency shall, upon request by a day or temporary laborer, provide to the day or temporary laborer a statement containing the following items: "Name and nature of the work to be performed", "wages offered", "destination of the person employed", "terms of transportation", and whether a meal and equipment is provided, either by the day and temporary labor service or the third party employer, and the cost of the meal and equipment, if any.

(b) No day and temporary labor service agency may send any day or temporary laborer to any place where a strike, a lockout, or other labor trouble exists ~~without first notifying the day or temporary laborer of the conditions.~~

(c) The Department shall recommend to day and temporary labor service agencies that those agencies employ personnel who can effectively communicate information required in subsections (a) and (b) to day or temporary laborers in Spanish, Polish, or any other language that is generally used in the locale of the day and temporary labor agency.

(Source: P.A. 91-579, eff. 1-1-00; 92-783, eff. 1-1-03.)

Effective Date: 1/1/2004

Floor Actions

Date	Action
7/24/2003	Public Act



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EMPLOYMENT **(820 ILCS 175/) Day and Temporary Labor Services Act.**

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(820 ILCS 175/1)

Sec. 1. Short Title. This Act may be cited as the Day and Temporary Labor Services Act.

(Source: P.A. 91-579, eff. 1-1-00; 92-783, eff. 1-1-03.)

(820 ILCS 175/5)

Sec. 5. Definitions. As used in this Act:

"Day or temporary laborer" means a natural person who contracts for employment with a day and temporary labor service agency.

"Day and temporary labor" means labor or employment that is occasional or irregular at which a person is employed for not longer than the time period required to complete the assignment for which the person was hired and where wage payments are made directly or indirectly by the day and temporary labor service agency or the third party employer for work undertaken by day or temporary laborers pursuant to a contract between the day and temporary labor service agency with the third party employer. "Day and temporary labor" does not include labor or employment of a professional or clerical nature.

"Day and temporary labor service agency" means any person or entity engaged in the business of employing day or temporary laborers to provide services to or for any third party employer pursuant to a contract with the day and temporary labor service and the third party employer.

"Department" means the Department of Labor.

"Third party employer" means any person that contracts with a day and temporary labor service agency for the employment of day or temporary laborers.

(Source: P.A. 91-579, eff. 1-1-00; 92-783, eff. 1-1-03.)

(820 ILCS 175/10)

Sec. 10. Statement.

(a) Whenever a day and temporary labor service agency agrees to send one or more persons to work as day or temporary laborers, the day and temporary labor service agency shall upon request by a day or temporary laborer, provide to the day or temporary laborer a statement containing the following items: "Name and nature of the work to be performed", "wage offered", "destination of the person employed", "terms of transportation", and whether a meal and equipment is provided either by the day and temporary labor service or the third party employer, and the cost of the meal and equipment, i:



State of Wisconsin
2003 - 2004 LEGISLATURE

LRB-3799/7
GMM.....
King

D-NOTE

[Signature] *1/2*

Sen. Cox

1 AN ACT...; relating to: the provision of temporary employees to a third-party
2 employer by a temporary help agency for the purpose of replacing employees
3 who are on strike against, or who are locked out by, the third-party employer.

Analysis by the Legislative Reference Bureau

Current law prohibits the recruitment of strikebreakers, which is defined under current law as persons who at least twice during the previous 12-month period have accepted employment for the duration of a strike or a lockout in place of employees who are involved in a strike or a lockout. Specifically, current law prohibits all of the following:

1. An employer from knowingly employing or contracting with another to employ a strikebreaker to replace an employee who is on strike against the employer or who is locked out by the employer.
2. Any person who is not directly involved in a strike or lockout from recruiting a strikebreaker for employment or from securing or offering to secure employment for a strikebreaker for the purpose of having the strikebreaker replace an employee in an industry or establishment where a strike or lockout exists.
3. Any person, including a licensed employment agent, from transporting or arranging to transport to this state a strikebreaker for the purpose of replacing an employee in an industry or establishment where a strike or lockout exists.

This bill prohibits a temporary help agency from providing a temporary employee to a third-party employer for the purpose of replacing an employee who is on strike against, or who is locked out by, the third-party employer. Specifically, the bill prohibits all of the following:

1. An employer from knowingly contracting with a temporary help agency, and a temporary help agency from knowingly contracting with an employer, for the

provision to the employer by the temporary help agency of a temporary employee to replace an employee who is on strike against the employer or who is locked out by the employer.

2. A temporary help agency from recruiting an individual for employment, from securing or offering to secure employment for an individual, or from transporting or arranging to transport an individual to a place where a strike or lockout exists for the purpose of providing the individual to a third-party employer to replace an employee who is on strike against the third-party employer or who is locked out by the third-party employer.

The bill, however, does not prohibit the continued employment of a temporary employee by a third-party employer if on the day before a strike or lockout begins the temporary employee has already been assigned to render services to, for, or under the direction of the third-party employer.

For further information see the *state* fiscal estimate, which will be printed as an appendix to this bill.

Insert
2-1

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

1 SECTION 1. 103.545 (1) (c) of the statutes is created to read:

2 103.545 (1) (c) "Temporary employee" means an individual who is employed by
3 a temporary help agency to render part-time or temporary services to, for, or under
4 the direction of a 3rd-party employer under a contract between the temporary help
5 agency and the 3rd-party employer.

6 SECTION 2. 103.545 (1) (d) of the statutes is created to read:

7 103.545 (1) (d) "Temporary help agency" means an employer that is engaged
8 in the business of employing individuals to render part-time or temporary services
9 to, for, or under the direction of a 3rd-party employer under a contract between the
10 employer and the 3rd-party employer.

11 SECTION 3. 103.545 (1) (e) of the statutes is created to read:

12 103.545 (1) (e) "Third-party employer" means an employer that contracts with
13 a temporary help agency for the employment of individuals to render part-time or

1 temporary services to, for, or under the direction of the employer under a contract
2 between the temporary help agency and the employer.

3 SECTION 4. 103.545 (4m) of the statutes is created to read:

4 103.545 (4m) (a) No employer may knowingly contract with a temporary help
5 service, and no temporary help service may knowingly contract with an employer, for
6 the provision to the employer by the temporary help agency of a temporary employee
7 to replace an employee who is on ~~strike against~~ the employer or who is locked out by
8 the employer.

3rd-party

9 (b) No temporary help agency may recruit any individual for employment,
10 secure or offer to secure employment for any individual, or transport or arrange to
11 transport any individual to a place where a strike or lockout exists for the purpose
12 of providing the individual to a 3rd-party employer to replace an employee who is
13 on strike against the employer or who is locked out by the employer.

14 (c) This subsection does not prohibit the continued employment of a temporary
15 employee by a 3rd-party employer if on the day before a strike or lockout begins the
16 temporary employee has already been assigned to render services to, for, or under the
17 direction of the 3rd-party employer.

18 (END)

Insert 2-1 ✓

Section #. 103.545 (title) of the statutes is amended to read:

(B)

and temporary replacement employees

103.545 (title) Recruitment of strikebreakers,

History: 1979 c. 322; 1983 a. 189 s. 329 (4); 1995 a. 27.

(ed & insert)

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-3799/1dn

GMM...:j...
img

Senator Carpenter:

It is possible that this draft, if enacted, would be found unconstitutional by a court because it is preempted by the National Labor Relations Act (NLRA) and therefore is repugnant to the supremacy clause (Article VI) of the U.S. Constitution.

Specifically, the U.S. Supreme Court has developed the following 2 principles under which state regulation of the collective bargaining process is preempted by federal labor law:

1. When the state regulation concerns conduct that is expressly or arguably either prohibited or protected by the NLRA. *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959).
2. When the state regulation concerns conduct that Congress intends to leave unrestricted from regulation by either the National Labor Relations Board (NLRB) or the states.

Based on the second of these principles, the Maine Supreme Court in *Opinion of the Justices*, 571 A. 2d 805 (Me. 1989), held that a Maine statute affecting the hiring of replacement workers was preempted in that it is the intent of Congress to leave the hiring of replacement workers unregulated. In enacting the NLRA, Congress set up a framework for collective bargaining by which employers and employees are each prohibited from using certain weapons of economic pressure while other weapons are left "unregulated and to be controlled by the free play of economic forces." *Machinists v. WERC*, 427 U.S. 132 (1976). The hiring of replacement workers is one of the economic weapons that Congress currently intends to leave unregulated. Therefore, it is up to Congress, not the individual states, to change that intent and determine that the hiring of replacement workers should be regulated.

In reaching its decision, the Maine Supreme Court cited *NLRB v. Mackay Radio*, 304 U.S. 333 (1938), for the proposition that an employer whose employees have gone on economic strike has a right to hire replacement workers to protect and continue the employer's business. The Maine Supreme Court also reiterated that this well-established principle is still good law today by citing *Trans World Airlines, Inc. v. Flight Attendants*, 489 U.S. 426 (1989).

Finally, the Maine Supreme Court noted that there are two limited exceptions to the rule of federal preemption of labor law, but that the Maine statute affecting the hiring

of permanent replacement workers fell into neither exception. These exceptions are 1) conduct that is a merely peripheral concern of the NLRA; and 2) conduct, such as violence, that is a local interest. The Maine Supreme Court held that the Maine permanent replacement worker statute was not a mere peripheral concern of the NLRA, but rather went right to the core of the collective bargaining process. The Maine Supreme Court further held that the Maine permanent replacement worker statute was not on its face an anti-violence measure and that any effect that the Maine permanent replacement worker statute might have had on violence is remote compared to its direct consequence of shifting the economic balance in a labor dispute.

In conclusion, the hiring of replacement workers is an economic weapon that Congress currently intends to leave unregulated. Because only Congress, and not the states, may change the intent of Congress, it is possible that a court would hold that a state law prohibiting the hiring replacement workers would be preempted by the NLRA, unless the state law directly addresses a local concern such as violence.

If you have any questions about the draft or about this drafter's note, please do not hesitate to contact me directly at the phone number or e-mail address listed below.

Gordon M. Malaise
Senior Legislative Attorney
Phone: (608) 266-9738
E-mail: gordon.malaise@legis.state.wi.us

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-3799/1dn
GMM:kmg:pg

December 29, 2003

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Senior Legislative Attorney
Phone: (608) 266-9738
E-mail: gordon.malaise@legis.state.wi.us

Northrop, Lori

From: Ewy, Stuart
Sent: Tuesday, December 30, 2003 11:04 AM
To: LRB.Legal
Subject: Draft review: LRB 03-3799/1 Topic: Prohibiting temporary help agencies from providing temporary employees to replace striking workers

It has been requested by <Ewy, Stuart> that the following draft be jacketed for the SENATE:

Draft review: LRB 03-3799/1 Topic: Prohibiting temporary help agencies from providing temporary employees to replace striking workers