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THE NATIONAL EMPLOYMENT & LABOR LAW FIRM®

The Employee Free Choice Act: It's More than Just a Misleading Name

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Summary: The House of Representatives passed the Employee Free Choice Act on March 1, 2007 by a vote of 241-185. The Act soon will be introduced in the Senate, where considerable debate is expected.

The Employee Free Choice Act (EFCA), introduced into the U.S. House of Representatives on February 5, 2007, would amend the National Labor Relations Act (NLRA) to change dramatically the world of both union organizing and bargaining over first time labor agreements. The proposed law, which also will soon be introduced into the U.S. Senate, would constitute the most significant change to the NLRA in its over 70-year history.

The EFCA initially was introduced in Congress in 2005, but the bill was short-lived. This time the chances of passage are much greater due to the Democratic majority in Congress and some bi-partisan support. H.R. 800, as the House version of the EFCA is known, was co-sponsored by over 230 members of the House, including 7 Republicans. In contrast to the last time that the law was introduced, when the bill never got out of committee, the discussion in the media already is focused on whether the Senate will stop the law through a filibuster and whether President Bush would veto the legislation. For employers, that isn't a good starting place for discussion of the serious issues presented by the EFCA.

Unions are spending meaningful dollars to push the EFCA. Both the AFL-CIO and Change to Win are strongly advocating the law, and their websites, e-mails and newspaper ads are full of pro-EFCA rhetoric. The AFL-CIO has already published a 42-page handbook that is intended to create grassroots support for the law. According to Change to Win, the law is needed because:

> Most elections where workers decide whether to join a union are not free or fair. Nearly 23,000 workers a year are fired, demoted, laid off or otherwise discriminated against as a result of the workers' union activity. Employers typically tell workers that having a union means lower wages and lower benefits. In half of union elections employers threaten to close their doors if the union wins, but only 2% actually do. Nine out of 10 employers force employees to attend one-on-one anti-union meetings with their supervisors. And the employer can decide to ignore the election results and tie up the election for years in court without fear of meaningful retribution.

Wow! Who knew that employers were so universally violating the law? And how does this Change to Win horror story comport with the fact that for years, unions have actually won more organizational elections than they have lost? Nevertheless, the above comment is only part of what Congress is hearing from unions and others in support of passage of the EFCA.

The Nature of the Proposed Law

The EFCA, in general terms, would make five substantial changes to the NLRA. The key provisions of the law are:

1. A union can be certified as the representative of a unit of employees through either an election or through a majority of employees signing union authorization cards. The law requires the NLRB to develop model card authorization language and to establish procedures for establishing a card check process.
2. If a union is certified and if the employer and

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the union cannot reach agreement on a first contract after 90 days, either party can request assistance from the Federal Mediation and Conciliation Service. If such assistance does not result in a contract within 30 days, the matter can be referred to binding arbitration. The results of the arbitration will be binding on the parties for two years.

3. Civil penalties of up to $20,000 per violation will be established against employers found to have willfully or repeatedly violated employees' rights in either a campaign or in relation to a first contract.

4. If an employer unlawfully discriminates against an employee in a campaign or in relation to a first contract, any back pay that results will be trebled.

5. The EFCA expands the circumstances in which the NLRB should seek injunctive relief against an employer, including in circumstances where there is simply "reason to believe" that the employer has discharged, threatened to discharge, or engaged in conduct that significantly interferes with employee rights during an organizing campaign or a first contract situation.

The Background and the Issues

The history of the NLRA revolves around Section 7 of that Act. The purpose of Section 7 is to permit employees to make a free choice as to whether or not to organize. Much of the remainder of the NLRA is intended to ensure that Section 7 rights are not violated.

For decades, employees have been provided the right to a secret ballot election as to whether or not they want to be represented by a union. In increasing numbers, however, unions have sought to avoid the secret ballot process through a card check process. Under the latter process, a union is recognized if a majority of employees sign valid authorization cards.

Currently, an employer cannot be forced into a card check process as a matter of law. So why would an employer voluntarily agree to a card check instead of insisting on an election? Employers might agree in order to obtain benefits at the bargaining table at a different location, to get the union to agree to stop bringing frivolous wage and hour or OSHA complaints against the employer, or to get the union to stop saying negative things about an employer in a "corporate campaign." While most employers have resisted such pressure, many employers have agreed to card checks based on the balance of their business interests, one of which is to obtain union cooperation in regard to issues ranging from work practice changes to reductions-in-force.

Not surprisingly, unions prefer card checks to elections. By removing the secret ballot process, peer pressure and intimidation become very effective union tools. There is no question that some employees sign cards just to eliminate the pressure that a union or pro-union coworkers are putting on them, which often includes visiting employees at their homes. In fact, there exists evidence that some unions have paid employees to obtain coworker signatures on cards and have even offered money to employees to sign authorization cards.

Where an election follows the card signing process, the effect of peer pressure can be overcome through the secret ballot process. Employees are free to vote their conscience, even if that means "misleading" peers or the union about how they actually voted. If a union can be legally certified without an election, however, the few can force in a union through pressure and intimidation, with only limited means by which employees or employers can challenge such a result.

As additional background to the EFCA, first contracts following a union election provide a challenge to both the employer and the union. The employer's goal typically is to retain as much of its rights as possible. By contrast, the union's challenge arises from the fact that it wants to live up to promises it made to the workers, but not at the risk of failing to obtain a labor agreement (absent an agreement, the union will not be able to recoup the investment it has made through the collection of dues). Under these difficult circumstances, first contracts take time and, while a union is guaranteed majority status for a year, some unions fail to achieve a first contract due to a combination of lack of employee support and legally permissible "hard bargaining" by employers.

The Potential Ramifications of the Legislation

The EFCA, if passed, will dramatically change both the legal landscape and the economic balance of power between labor and management on first labor contracts, as well as the effect of those contracts upon subsequent agreements. Unions are fully aware that they will be more successful in increasing their numbers through the card check process and that the mandatory arbitration process will protect them from failing to gain a first contract. That is why they see the EFCA as the most important legislation that has been before Congress in years.

While unions now prevail in a majority of NLRB elections, many organizing efforts fall short of having an election. However, there is no doubt that EFCA would increase union membership, at least in the short term. Card checks are substantially more likely than elections to lead to union representation.

Most troubling about the card check process is the fact that secret ballot elections have always been thought of as *the fairest way to evaluate union majority status.* The NLRB for years has consistently held that the election process is the preferred process for deciding such issues, including in regard to decertification elections versus employer withdrawals of recognition. In

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fact, by entitling the current proposed law the "Employee Free Choice Act," the supporters of the law have turned logic on its head. By providing for a card check instead of an election, free choice may mean very little to employees unwilling or unable to fend off formidable union and peer pressure. Little wonder some opponents have taken to calling the EFCA the "No Choice Law."

The proponents of the EFCA respond to such criticisms by arguing that the proposed law does not do away with elections, which is true. What the EFCA does, however, is make such elections far less likely to occur. Unions typically get signed cards from 60-75% of workers before seeking any election, knowing that not everyone who signs a card will vote for the union. The EFCA, then, would enable a union to eliminate any doubt, even though the employees who would otherwise have been able to vote may have heard very little from the employer or anyone else about why a union could be a detriment rather than a benefit. In fact, many union card showings made to the NLRB in order to obtain an election occur before a naïve or unknowing employer has even begun its efforts to tell voters "the rest of the story."

Because the EFCA will make organizing so much easier, employers who are in industries or geographic areas that are predominately "non-union," particularly smaller employers and those who have become complacent about the prospect of ever facing a union organizing campaign, may well find themselves taken by surprise. A card check process will make it much more likely that they would be forced to deal with a union, perhaps only because some disaffected employees convinced a majority of their coworkers to sign cards.

Also troubling are the remaining provisions of the EFCA. Beyond the increased risk that inherently follows an increase in penalties, the mandatory arbitration provision in the law is unrealistic and highly problematic to employers. An absolute core concept of the NLRA is that the parties to an agreement are free to bargain as they please so long as both act in good faith. Negotiations, as they do in the business world, revolve primarily around economic leverage. A mandatory arbitration following only 90-120 days of negotiations, however, greatly limits free bargaining. Instead it places ultimate control in the hands of a panel of arbitrators, who can effectively order any agreement that they please.

The power of arbitrators in these circumstances is tremendous. The arbitration panel is not *interpreting* a contract provision, they are *creating* such provisions either on their own or by choosing one party's proposal over the other party's language. To add to the concern of such a practice, arbitration decisions are entitled to very limited review in the courts, thus essentially leaving employers in the hands of persons who may have no knowledge of their business or industry and who certainly have no responsibility for the potentially frightening consequences of the economic or non-economic terms they have unilaterally imposed upon the company. Certainly in some cases, the employer forced to go through this process may be dealt a hand that puts it at a substantial competitive disadvantage.

Further, the 90-120 day negotiations period is completely unrealistic. In some instances, the union has not even made its opening offer in that time frame. Typically, first contracts take 6-12 months to negotiate. In addition, if the employer takes a legal but "hard position," the union need only wait the employer out, knowing it is likely to get more in arbitration than in negotiations.

In short, the EFCA reverses several of the most central aspects and philosophical underpinnings of the NLRA. Rather than giving free choice, it limits free choice. Rather than permitting free bargaining, it potentially substitutes a third party decision. As a result, employers are legitimately concerned about the far-reaching changes that the EFCA will create.

The Chances of the EFCA Becoming Law

The possibility of the EFCA becoming law was virtually zero until the November 2006 election. Now, however, the politics have changed. While it is too early to predict anything with reasonable certainty, some observers are stating that the law will get through Congress. That may or may not be the case, for several reasons. Further, as discussed below, if the EFCA is passed, it may well be vetoed by President Bush.

Initially, most Americans seem to be opposed to a law that would eliminate the "free choice" that comes through a secret ballot election. According to a poll commissioned by an arm of the U.S. Chamber of Commerce, an overwhelming number of Americans believe that elimination of a secret ballot election would be contrary to democratic ideals. Four out of five persons polled oppose the card check provisions of the EFCA and nearly 90% prefer the current process of secret ballot elections. The poll in question was conducted after H.R. 800 was introduced on February 5, 2007.

Second, the business community is now raising serious alarm bells in Congress regarding the EFCA. Hopefully, effective lobbying will convince moderate legislators that the bill is a very one-sided piece of legislation. Groups that are involved include the U.S. Chamber of Commerce, the Right to Work Foundation, SHRM and a variety of trade organizations. You too may be able to help in that regard, as discussed below.

Third, the amendment process is likely to create disruption in regard to the bill. A number of pro-employer organizations are currently evaluating potential amendments to the EFCA. That strategy is both good and bad. On the negative side, there is no need to offer amendments if the bill is unlikely to pass. On the positive side, however, amendments slow the processing of a bill

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and increase the chances of the legislation failing to become law. Amendments such as permitting card checks in decertification campaigns, eliminating the union's one year guarantee of majority support following an election, requiring a union to announce its intent to campaign, and adding greatly to the period in which the parties can negotiate over a first contract all could have an effect on the viability of the law. Further, broader amendments also could be raised, such as the re-introduction of the "team" legislation from several years ago protecting employer committees from attack under Section 8(a)(2) of the NLRA.

Fourth, while there may be enough votes to get the current bill through both the House and the Senate, there may not be enough votes to prevent a filibuster in the Senate. The Democratic-Republican balance in the Senate is obviously a close one. Consequently, absent additional bi-partisan support for the EFCA, a filibuster is likely to occur. Such a process can effectively prevent a law from passing by precluding a Senate vote, and this bill is one where conservative and moderate Senators will be inclined to seek a filibuster. At a minimum, the threat of a filibuster could lead to a watering down of the current, one-sided nature of the bill.

Finally, as noted above, the EFCA, if passed, could be vetoed by President Bush. This reaction to the EFCA was offered by Labor Secretary Elaine Chao: "A worker's right to a secret ballot election is an intrinsic right in our democracy that should not be legislated away at the behest of special interest groups." Well said, but an issue remains as to whether President Bush would veto a law when that veto could be used against the Republican party in the 2008 elections, particularly given the current opinion polls as to which party most Americans would prefer to be in power. Nevertheless, in a speech to the National Association of Manufacturers on February 14, 2007, Vice President Cheney clearly made it sound like a veto would occur if the law made it through Congress.

What You Can Do to Help

H.R. 800 has a meaningful way to go before becoming law. However, things are currently on the fast track – hearings on the bill began only a few days after the law was introduced, and the House Education and Labor Committee already has approved the law (26-19, with the vote following party lines). At least for now, a full vote in the House is likely by April. In the Senate, Senator Ted Kennedy is preparing to introduce the EFCA now that H.R. 800 is through committee. Interest in the legislation is high on both sides of the labor-management table.

There are several ways that any employer can help to ensure that the EFCA does not become law:

1. Work with your trade organization in regard to lobbying on the EFCA. Given the potential impact of the law, this is one instance where lobbying funds would be well expended. Relying upon a potential veto is risky.

2. Contact and support other organizations with which you may have a relationship. SHRM, NAM, the U.S. Chamber of Commerce and other organizations are making their positions known on the law. They would appreciate any showing of support that would help them communicate with Congress on the issues.

3. Write to any member of Congress who may serve an area in which your entity has a location. While writing to one's congressperson may sound trite or outdated, it can be effective.

4. Beyond opposing the law, employers should reassess their ability to withstand a union campaign. Both the AFL-CIO and Change to Win are pushing for new campaigns in light of the press they are getting through the EFCA. As a result, employers should consider non-union maintenance audits, manager training, compliance efforts, the implementation of respect and diversity programs as well as other tools. Employers are too often surprised by campaigns that they don't expect. It pays to be ready. It pays even more to do the things that make campaigns less likely to occur in the first place.

Littler Mendelson is prepared to assist you in regard to all the above union prevention tools and the Firm is working to help prevent the passage of the EFCA. If you would like information on our state of the art union avoidance training programs or advice from one of the 140 attorneys who comprise our labor relations practice group, contact any Littler attorney, Gavin Appleby, or the co-chairs of our labor relations practice group, John Skonberg and Jim Ferber.

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