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Management Alert

# The Employee Free Choice Act Getting Ready for Vote

The Employee Free Choice Act (EFCA) has passed the House and has completed its first round of Senate hearings. This legislation would affect those private sector employers who employ the 92.7% of U.S. workers currently unrepresented by a labor union. This Management Alert provides an update on the status of this legislation and discusses a lesser publicized but perhaps an even more controversial aspect of EFCA—that is, its provision for binding arbitration that will significantly change the collective bargaining process for first contracts.

## *Status of the Legislation and Background*

EFCA was reintroduced in the House of Representatives on February 5, 2007 by Representative George Miller (D-CA), Chair of the House Education and Workforce Committee. EFCA, commonly referred to as the "card check" law, establishes a mandatory process requiring an employer to recognize a union as the bargaining representative of its employees based on a union merely obtaining a majority of signed authorization cards. This would replace the current process of a federally supervised secret ballot election during which the employer position and information about unions and the collective bargaining process may be presented to employees who may have signed authorization cards before hearing "the rest of the story." Equally important, the bill as currently drafted, allows a third-party to impose a first contract upon the parties.

The House bill (H.R. 800) is sponsored by 230 Congressman, including several Republicans. On March 1, 2007, less than three (3) weeks after its introduction, the House overwhelmingly passed its version of the bill by a 241-185 vote. Coincidentally, on March 20, 2007, Ted Kennedy (D-MA), Chairman of the Senate Health, Education, Labor and Pensions Committee, introduced an identical version of EFCA (S. 1041) with 46 co-sponsors—all Democrats. A brief hearing was held on March 27, 2007. Shortly after the record is closed (anticipated to be June), the bill is expected to be presented to the full Senate for immediate consideration. The only Democratic Senators who have not yet announced their views are Blanche Lincoln (AK), Mark Pryor (AK), Ben Nelson (NE) and Ken Salazar (CO) (who, incidentally, co-sponsored the same bill last year).

On the Republican side, Arlen Specter (R-PA), who co-sponsored the identical Senate bill last year but has not done so this year, has nevertheless publicly announced his support. Major labor unions behind this modification of the historical secret-ballot voting and collective bargaining processes are reportedly lobbying many Republicans as potential supporters.

It is expected that the bill will be sent to the Senate floor for consideration by the full Senate next week on either June 19 or 20. Given the uncertainty inherent in all political matters, sufficient Senate votes are nevertheless expected for passage. Regardless, because so many senators have

not yet openly declared a position, it is less clear whether either the requisite 60 votes can be mustered to invoke cloture of a possible Republican filibuster or, equally as important, whether, in fact, there exists the 67 Senate and 290 House votes necessary to override the clearly announced and anticipated Presidential veto.

## *Goals of the EFCA*

The specific goals of the bill—card check, interest arbitration and enhanced remedies for violations of the NLRA—present problems for employers for reasons previously discussed in our earlier (February 9, 2007) Management Alert. Equally problematic in these regards, however, is the lack of statutory guidance regarding fundamental procedural issues in conducting card check and interest arbitration proceedings. This absence of guidance alone will undoubtedly cause confusion and significant litigation as the parties attempt to fill the voids left by Congress, if the bill passes "as is."

For example, Section 2 of the proposed legislation, *Streamlining Union Certification*, authorizes the use of card checks but provides no guidance regarding such key questions as:

- What rules, if any, will govern union organizers who solicit authorization cards?
- How long will the authorization cards be valid?
- Will employees being able to decertify the union by card check?
- How, if at all, can employees rescind their authorization?
- How is the statutory "appropriateness" of a bargaining unit determined when card checks are used?

## *Binding Arbitration of First Contract Disputes*

Section 3 of the proposed legislation, *Facilitating Initial Collective Bargaining Agreements*, most certainly will have significant impact far beyond what has been characterized as the mere "facilitation" of the negotiation process. This EFCA provision not only eliminates the traditional bargaining process (*i.e.*, the mutual "give and take"), but replaces it with a largely undefined binding and mandatory arbitration process.

In a nutshell, the bill provides a maximum of only 120 days for the parties to reach all terms in a first agreement; and, in the absence of agreement, permits submission of the contract to a panel of arbitrators appointed by the Federal Mediation and Conciliation Service (FMCS). The arbitrator then has complete authority to determine all the terms of a collective bargaining agreement, binding the parties for up to two (2) years, including not only the usual economic terms such as wages, health, pension and other welfare benefits (and the sharing of their costs), but also such entrepreneurial matters as:

- work hours
- management rights
- work schedules
- subcontracting
- staffing
- introduction of automation

This legislation effectively removes an employer's right to reject union demands and risk a strike if the union ultimately elects to bring economic pressure to bear. Instead, the union can "appeal" any "no" answer to the arbitrator, whose decision is binding on both parties.

Not only does this bill provide for an outside third-party to determine how to spend an employer's dollars and how to manage its workforce; but, it includes no guidance regarding rudimentary questions including:

- What qualifications or industry knowledge and experience, if any, must the arbitrator possess before

rendering such vitally important decisions?

- What criteria will the arbitrator(s) consider in rendering a determination?
- What system of binding government mandated arbitration will be employed; and
- Will non-union employers be compared with (and thus ordered to meet) union wage and benefit levels and worksite requirements?

Although answers to these questions are critical, the bill leaves the responsibility for answering all these questions to the FMCS. Of equal moment in this specific regard, the vast majority of the FMCS professional staff traditionally have been former union officials who have never worked in and are often unacquainted with legitimate business interests, concerns, specific industry competitive factors and the impact of collective bargaining on the rapidly emerging global economy.

Interest arbitration can severely inhibit good faith bargaining and replace frank discussion with arbitral-litigation posturing. Moreover, it alters the fundamental statutory obligation to bargain in good faith, which as defined in Section 8(d) of the National Labor Relations Act, “does not compel either party to agree to a proposal or require the making of a concession.” In interest arbitration, however, it is the arbitrator, not the concerned parties, who, in the final analysis, determines what will or will not be agreed upon, significantly reducing the importance of collective bargaining between the parties. These are concepts the drafters of the original Wagner Act never contemplated and, indeed rejected as part of the statutory objectives of the law. As the Supreme Court noted in summarizing the legislative history of the National Labor Relations Act:

> The object of this Act was not to allow governmental regulation of the terms and conditions of employment, but rather to ensure that employers and their employees could work together to establish mutually satisfactory conditions… [I]t was never intended that the Government would in such cases step in, become a party to the negotiations and impose its own views of a desirable settlement.
>
> *H.K. Porter v. NLRB*, 397 U.S. 99, 103-04 (1970).

## *Experience with Interest Arbitration*

We have successfully represented both private and public employers in interest arbitration litigation, which has been statutorily mandated in a number of states for public sector employees and in California for the private sector agricultural employees governed by state rather than federal labor law. In the very first California case subject to interest arbitration (and the basis for a pending legal challenge to the interest arbitration law), the arbitrator found in favor of the union regarding every issue except one (contract duration). There is no reason to believe that such results would not be the norm under EFCA. Although the California statute delineates criteria which the arbitrator must follow, EFCA has none.

Generally, interest arbitrators look to “similarly situated” employers to determine contractual benefits. In the public sector, this is a relatively simple concept because the relevant economic data is public information and many of the occupations are more or less standard (*e.g.*, school teachers and police). In the private sector, however, such information is not readily available nor is it as easy to determine who is “similarly situated.” Most significantly, unions have greater access to data regarding unionized companies to present to an arbitrator than management regarding its non-unionized competitors. Indeed, antitrust implications may even prevent employers from cooperating in providing such information. Unions, on the other hand, have no such constraints.

Interest arbitration has been used much more extensively in private industry in Canada, where it is required by most provincial labor laws. As stated in one of the leading treatises on Canadian labor law, however:

> While first contract arbitration is intended to guide parties toward a workable, long-term bargaining relationship, there is evidence the first contract awards are not successful in this regard.
>
> Douglas C. Gilbert, et. al, Canadian Labour and Employment Law for the U.S. Practitioner, (BNA), 77 (2000).

Somewhat alarming is the fact that EFCA also delineates precise time limits for the parties to negotiate a contract. Clearly, these time limits have been decided upon in the absence of any rational analysis of the collective bargaining process as it really exists. In well established collective bargaining relationships, the parties more often than not take months to reach an agreement and months in preparation for those negotiations. In initial bargaining situations, the parties consistently take even more time to reach agreement.

Both the NLRB and the courts have long recognized that a full year (not EFCA's 120 days) is generally the minimum time necessary to negotiate an initial collective bargaining agreement. And, this is so, simply because initial contracts are often more difficult and critical than subsequent agreements. The NLRB has noted that:

> In initial bargaining, unlike in renewal negotiations, the parties have to establish basic bargaining procedures and core terms and conditions of employment, which may make negotiations more protracted than in renewal contract bargaining.
>
> Lee Lumber and Building Materials, 334 NLRB 399, 408 (2001).

Moreover, based on FMCS data for fiscal year 2000, the average length of time to reach agreement on an initial collective bargaining contract was 347 days after certification of a newly-certified union.

Under EFCA there likely will be little meaningful initial bargaining between the parties. Rather, the parties will be forced to utilize valuable time in preparing for the upcoming arbitration hearings. The unrealistic time restraints proposed all but ensure that all first contracts will be resolved by interest arbitration.

## Conclusion

Although, the proposed "card check" process for recognition is contrary to our democratic and deep-rooted history of secret-ballot elections supervised by the federal government (NLRB), other provisions of this legislation—particularly those involving arbitration of first contracts—are equally problematic to employers. While receiving less notice and publicity, these provisions may be the actual hidden objective and the genuine focal point of organized labor.

We will continue to update you regarding important developments.

*If you have any questions concerning this Management Alert, please contact the Seyfarth Shaw LLP attorney with whom you work or any labor & employment attorney on our website at www.seyfarth.com.*

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