

News from our Employment & Labor Group

The Employee Free Choice Act

Important legislation known as the Employee Free Choice Act (“EFCA”) remains pending before the United States Congress. If enacted into law, EFCA would significantly amend the National Labor Relations Act (“NLRA”). EFCA would substantially ease the burden on unions to organize employer workforces. It would also mandate binding arbitration on initial contracts between a union and an employer and would alter and enhance penalties against an employer for NLRA violations.

Eliminating secret ballot elections

Under current law, most efforts to unionize a company’s workforce are subject to secret ballot elections. An election is preceded by a limited period during which the union and the employer may conduct educational campaigns about the pros and cons of unionizing. Under EFCA, this secret ballot system would effectively be eliminated. Instead, unions could garner the necessary support through a “card check” system. Under a card check regime, employees are asked by union backers to sign a card indicating support for unionizing. Opponents believe that this approach will lead to the exertion of undue pressure on employees. For example, an employee may find it difficult to decline signing a card in the presence of several of his or her coworkers who are agitating for support. Further, under EFCA, there would be no prescribed period for education on the issues and no meaningful time restraints, i.e., unions would face no real deadlines by which they have to obtain cards from a majority

of the workforce. In effect, a union could embark on a continuous campaign until it receives a majority vote and recognition from the National Labor Relations Board as a bargaining unit for negotiations with the employer.

Interest arbitration

EFCA would also amend the NLRA to provide for arbitration in the event a newly recognized bargaining unit and an employer cannot agree on a first collective bargaining agreement. Current law mandates that each party bargain in good faith and imposes duties on each side. However, there is no duty to agree. Thus, an employer cannot be compelled to accept a union’s proposal. EFCA will eliminate impasses for first contracts, forcing an employer and union to binding arbitration if they have not agreed to a contract within 120 days. Arbitration would be governed by the Federal Mediation & Conciliation Service (“FMCS”), a federal government agency, and the FMCS would have the power to impose a two-year agreement based on the terms it deems appropriate. This provision would effect a drastic shift of power from the parties to FMCS.

Current state of EFCA

The EFCA bill passed the U.S. House of Representatives on March 1, 2007 and was most recently introduced in identical form on March 10, 2009 to both the House and Senate (H.R. 1409, S. 560). A Democratic majority in the Senate appeared primed to pass the bill in its current form. However, so far the majority has been unable to

muster the 60 votes needed to end debate and bring the measure to a vote. Momentum fizzled in the wake of Senator Arlen

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Specter's (D-Pa.) renunciation of support for the bill. Moreover, eight Democratic senators have publicly expressed substantial concern regarding various aspects of EFCA. Although supporters are certainly not giving up—three pro-EFCA organizations recently launched a seven-figure national ad campaign in support of EFCA—recent events suggest the bill likely will be amended in an attempt to garner the necessary support in the Senate.

Amendments and alternatives

In March 2009, Senator Joe Sestak (D-Pa.) introduced alternative legislation to EFCA called the National Labor Relations Modernization Act ("NLRMA"). This proposed legislation does not include the "card check" provision of EFCA, but does include, among other things, granting equal access to employees for labor unions. Denial of equal access would amount to an unfair labor practice. Some examples of equal access include:

- ▶ refusing to allow an employer to hold a captive audience meeting with employees unless the union has equal time; and
- ▶ requiring employers to give notice to union organizers of any announcements, signs, literature, etc. so that union organizers may respond.

Recent debate in the Senate indicates that even if the NLRMA is not passed, equal access may become part of an ultimate compromise on the EFCA.

Other possible amendments include:

- ▶ establishing timetables to require an election to be held within 10 to 21 days of the filing of a joint petition ("quickie elections");
- ▶ requiring the establishment of a schedule for negotiation as well as imposing costs and attorneys' fees upon a finding that a party is not negotiating in good faith; and
- ▶ alternatives to binding arbitration, including limited-interest arbitration, and allowing an employee vote on management's "last best offer."

Conclusion

EFCA is likely to remain a significant topic in Congress in the near term. Employers should stay attuned to EFCA developments as the EFCA is likely to continue to garner media attention and may generate questions from and discussion among employees. If EFCA passes it will signal a major change in Labor-Management law and employers will need to be ready to respond to the new landscape. If you have questions about this *Alert*, please contact one of the attorneys listed above. ■