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Client Alert

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Employee Free Choice Act Reintroduced; Battle Lines Are Already Drawn

On Tuesday, March 10, George Miller (D-CA), Chairman of the House Education and Labor Reform Committee, introduced the Employee Free Choice Act (H.R. 1409). Asserting that the bill would "give workers the ability to stand up for themselves" and heralding the effort as a key component of economic recovery, Chairman Miller insisted the EFCA would restore employee rights. Co-sponsor Tom Harkin (D-IA) explained, "just as the National Labor Relations Act, the 40-hour week and the minimum wage helped to pull us out of the Great Depression and into a period of unprecedented prosperity, so too will the Employee Free Choice Act help reinvigorate our economy."

The bill, essentially the same as one passed by the House but killed in the Senate two years ago, faces a stiff fight. Although President Obama has pledged his support to the legislation, employer organizations have mobilized a well-coordinated campaign to highlight what they perceive as significant weaknesses in the Act., also countering with their own proposal, the Secret Ballot Protection Act. To make matters even more confusing, on March 11 Joe Sestak (D-PA) proffered yet another alternative, the National Labor Relations Moderation Act (H.R. 1355), which Congressman Sestak describes as a "middle ground" compromise to preclude a divisive confrontation. As the rhetoric on either side escalates, examination of the key features of EFCA is essential.

"Card Check"

Under current law, if 30 percent of eligible employees in an "appropriate bargaining unit" sign authorization cards or petitions, the National Labor Relations Board will schedule an election to allow affected employees to vote in a secret ballot process. During the period between the filing of a representation petition with the NLRB and the election, both the employer and the union have the ability to inform the electorate of matters affecting their choice at the polls. The campaign process is regulated by the Board and can be challenged in a hearing at which the parties are given the opportunity to brief and argue their respective positions. The results of the election, if not overturned by the Board, are "certified" and if the union has prevailed, the employer is obligated to recognize and bargain with the union as the representative of the employee group in question.

Although there is an option under the present law for an employer to recognize the union voluntarily (or in some cases, to be compelled to do so as a result of having committed serious unfair labor practices), such situations are relatively rare. EFCA would alter this situation completely: If a majority of bargaining unit employees signed authorization cards, the Board would certify the union without any election having occurred and with no employer opportunity to conduct an informational effort. Since statistics show that majority sentiment indicated by authorization cards often changes by election day, two conclusions are suggested: Either, as the unions contend, employers engage in unfair tactics to sway the voters, or, as employers assert, cards signed to allow an election to occur are no evidence that the employees actually want to rely on a union to represent their interests.

First Contract Arbitration

The second dramatic distinction between the prevailing situation and that envisioned by the EFCA is that after only 90 days from certification of the union as bargaining representative, the parties' two-party negotiations would end. Either party could then demand mediation, and once a 30-day window had elapsed, the process

would then turn into so-called "interest arbitration," with a neutral third party being selected to prescribe contract terms which would be binding on the parties for two years. Such a prospect is chilling to employers, given their experience with labor arbitration which is seldom a win or loss, but is more often a compromise. (The Federal Mediation and Conciliation Service doesn't have the resources to supply such an army of mediators followed by a much larger group of arbitrators; perhaps this is one of the ways the legislation would create jobs.)

Even if Labor's arguments against the bargaining procedures which are now in force have some merit, the remedy seems to be grossly disproportionate. Moreover, there would be little incentive for a union to take the 90-day period seriously, since the failure to find acceptable terms without intervention would simply invite a better deal from the third party.

Enhanced Remedies for Unfair Labor Practices

The least-discussed aspect of EFCA is its quantum leap regarding remedies for employer unfair labor practices. Those who are determined to have been fired or otherwise discriminated against during the card-signing, "campaign" and bargaining periods would be awarded triple back pay; however, no similar sanction would apply to union unfair conduct. Additionally, illegal threats, coercion and intimidation by employers could produce a $20,000-per-violation civil penalty, and injunctions would be a tool available to those aggrieved. Currently, court-ordered cease-and-desist directions are extremely uncommon, but EFCA would alter that situation.

Constitutional questions, not to mention a host of practical difficulties with implementation and administration, will need to be resolved if the bill passes, in whole or in part. Pressure on members of Congress, whether or not currently committed to one position or the other, will be intense.

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