CLIENT ALERT: Employee Free Choice Act Re-Introduced in Congress

On March 10, 2009, the Employee Free Choice Act ("EFCA") was introduced in both the House and Senate (S. 560 and H.R. 1409). This version is identical to the bill filed in Congress last session.

EFCA was introduced in Congress in 2007 by Senator Ted Kennedy, (D-Mass) and Representatives George Miller (D-CA) and Peter King (R-NY). It passed the House as H.R.800 on March 1, 2007 by a vote of 241-185. In the Senate, S. 1041 was supported by a vote of 51-48, but fell nine votes short of the 60 necessary to foreclose Senate debate and proceed to final consideration. However, final passage was blocked by a Republican filibuster.

This bill is the core plank of the labor platform that is supported by the Democrats and President Obama and his Labor Secretary Hilda Solis. While it has been predicted that the bill will once again easily pass the House, the Democrats can currently count on only 58 votes in the Senate, thus potentially leading to yet another filibuster.

Millions of dollars have been and will be spent by supporters and opponents of the bill. In January, for example, American Rights at Work, a labor policy and advocacy organization, announced a $3 million campaign to push Congress to approve the bill. This effort supplements the ongoing efforts of the AFL-CIO, SEIU and other labor organizations. On the other side, the Coalition for a Democratic Workplace is vigorously lobbying against the bill, along with chambers of commerce and business groups around the country.

Summary

The bill had several key provisions:

1. **Majority Card Check**. The proposed act would require that when a majority of employees in an appropriate bargaining unit have signed authorization cards designating a union as its representative, the union will be certified as the exclusive bargaining representative of such employees by the National Labor Relations Board ***without a secret ballot election***. The option will remain for a secret ballot election when, as now, 30% of the employees in an appropriate unit sign authorization cards.

2. **First Contract Negotiations**. For first contract negotiations, when an employer and a newly formed union are unable to bargain a first contract within 90 days, either party can request mediation by the Federal Mediation and Conciliation Service. If no agreement has been reached after 30 days of mediation, the dispute is referred to ***binding arbitration.*** The award of any arbitrator would be binding on the parties for two years.

3. **Penalties increased over current law.**
4. **Civil penalties of up to $20,000 per violation** will be in place for employers who have willfully or repeatedly violated employees' rights during an organizing campaign or first contract negotiations.
5. **Treble back pay**. Increases to three times back pay the amount an employer is required to pay when an employee is discharged or discriminated against during an organizing campaign or first contract negotiations.

1. **Mandatory Applications for Injunctive Relief.** Requires the NLRB to seek a federal court injunction when there is reasonable cause to believe an employer had discharged or discriminated against employees, threatened to do so, or engaged in conduct that significantly interferes with employee rights during an organizing campaign or first contract negotiations.

Analysis

As potentially the most sweeping modification of the National Labor Relations Act in over 60 years, EFCA would make unionization easier on a dramatic scale. While technically the option for a secret ballot election would still be on the books, it is unlikely in most settings that a union would ever bother with it. Conventional wisdom is that unions currently never file petitions for elections unless they already have over 50% of an appropriate bargaining unit signed up with authorization cards. It is a rare situation for a union to file with the minimum of 30%, since union strength rarely increases after the petition is filed and before the election. Thus, under EFCA, most unions will wait until they achieve 51% and then simply demand recognition. Why go through the hassles of an election?

Obviously, what is lost to employers – and employees – is the opportunity for concentrated debate and communication about what unionization means. While early union activity might be visible and known to an employer, it might also be taking place under the surface for a long time, as union organizers can work off site and visit employees at their homes. With EFCA, scores of employees may wake up one morning in a unionized setting without ever having a chance to vote on such a crucial issue, and in some cases never even knowing the activity was taking place.

Of potentially even greater concern are the provisions in EFCA for dealing with a first contract. EFCA ultimately would force disputed issues in a first contract into the decision-making hands of private arbitrators, who could make binding decisions for an institution or company. This is problematic enough with money issues, but if one considers what is at stake in first contract negotiations, with contentious issues like the role of seniority, evaluation procedures, management rights and other language items of importance, these arbitration provisions are particularly frightening.

Not surprisingly, EFCA has provoked the most vigorous lobbying efforts in years. Some of the groups that back EFCA – in addition to all major labor organizations — include the aforementioned American Rights at Work, the Sierra Club, the National Organization for Women, People for the American Way, the National Partnership for Women and Families, the National Resources Defense Council, the National Baptist Convention of America, the National Consumers League, and the National Association of Consumer Advocates.

In addition, President Obama, the new Chair of the NLRB, Wilma Liebman, and the new Secretary of Labor, Hilda Solis, are strong supporters. AFL-CIO President John Sweeney is confident of its passage but recognizes that it will have to survive another Republican filibuster.

Opposition to legislation providing workers with card check organizing rights has been led by the U.S. Chamber of Commerce and includes the National Association of Manufacturers, Coalition for a Democratic Workplace, the Center for Union Facts, the National Right to Work Committee, the Heritage Foundation, and the HR Policy Association.

However, given President Obama's strong support, it is likely some form of EFCA will pass. Whether or not it includes the binding arbitration provision is debatable as some have suggested that there are constitutional barriers to allowing an arbitrator to force a private employer to pay compensation and benefits at particular levels.

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