MB&J | MORGAN BROWN&JOY

www.morganbrown.com

The Employee Free Choice Act: A Management Perspective

As the administration of President Obama begins, it is an opportune time to closely review the Employee Free Choice Act ("EFCA"), a bill that the President co-sponsored in the Senate and which labor unions are and will be pushing the President to promote early in his term of office. After remaining largely unchanged for more than 50 years, EFCA will fundamentally change national labor policy in two significant ways. These changes may lead to results that are both unwise and unsound.

Secret Ballot Elections

One of the fundamental tenets of current national labor policy is that the decision of whether workers wish to be represented by a labor union will be based on the results of a federally supervised secret ballot election. This democratic method of choosing representation will come at the culmination of an election campaign whereby workers will be informed of the pro's and con's of unionization and will, thus, be able to make an informed choice in a non-coercive environment.

In a section entitled, "Streamlining Union Certification," EFCA provides that the National Labor Relations Board ("NLRB") will certify a union as the representative of employees if it finds that a majority of employees in an appropriate unit have signed valid authorizations designating the union as their representative. In other words, a card check majority will result in union certification.

Whereas previously signed authorization cards commenced the election process culminating in a secret ballot election, now those same cards will result in unionization without any of the safeguards of an election. This could happen even before the employees have been informed of any of the reasons why joining a union may not be in their best interest.

Support for EFCA is not being led by grass-root employee/worker groups. Indeed, most polling data reveals that a strong majority of the public believes that a secret ballot election supervised by the federal government is the most appropriate method of choosing representation. Support for EFCA is led by the AFL-CIO and labor unions who have seen union membership diminish in the private sector and see EFCA as their vehicle for significantly increasing that membership.

Labor unions argue that card check certifications are necessary because employer threats and discharges of union adherents have rendered the secret ballot process unfair. However, three responses establish that the result sought by the labor unions, card check certification, is not a sound or wise response to their argument.

First, it's clear that the statistics cited by labor unions have often been exaggerated. For example, the statistics cited regarding employee discharges include discharges in all manner of circumstances and not simply those taking place during an initial union organizing drive.
Second, card signing campaigns can also include threats, harassment, and other pressures to sign. While there is not a lot of statistical data available on this score, there is certainly significant anecdotal evidence of employees signing cards out of fear, in order to have union organizers stop

© 2021 Morgan, Brown & Joy, LLP

visiting them at home, due to peer pressure, and other reasons unrelated to their desire for union representation. Further, the incentive to pressure workers to sign cards will only increase with passage of EFCA.

Because of the many different reasons why employees may sign cards, the Courts have generally found them to be an invalid indicator of union support. Indeed, in a 1969 U.S. Supreme Court case, the Court acknowledged that "cards . . . were inferior to the election process" for determining true employee sentiment. Despite the passage of almost 40 years, there is no reason to believe that authorization cards are a better gauge of union sentiment today.

Finally, the validity of the union's argument in support of EFCA is diminished by the fact that labor unions have consistently won approximately 60% of NLRB supervised elections. While labor unions may believe they deserve to win 90-100% of elections, most sports franchises would be considered huge successes if they consistently maintained a 60% winning percentage.

Arbitration Of First Contract Disputes

When a union is certified as the bargaining representative of employees, the law requires both sides to bargain in good faith towards reaching a collective bargaining agreement. However, a fundamental tenet of national labor policy in the private sector has been that no third party, the government or otherwise, could require either the employer or the union to agree to a proposal or to make a concession. This language was specifically written into the statute more than 60 years ago. And in 1970, the U.S. Supreme Court reinforced this policy, holding that even the Board's broad remedial power did not permit it to remedy an employer's unfair labor practice by ordering the employer to agree to a substantive proposal. As the Court observed, the role of the federal government was to oversee and referee the process but leave the results of the contest to the bargaining strengths of the parties and their willingness to compromise.EFCA would fundamentally alter this national labor policy. The section entitled "Facilitating Initial Collective Bargaining Agreements" provides the parties with 90 days from the date of the commencement of bargaining to reach agreement. If the parties are unable to reach agreement during that period, or any mutually agreed upon extension of that period, then either party can request mediation. If mediation is not successful within 30 days from the date it is requested, then it is referred to an arbitration panel for resolution of the dispute. The decision of the panel shall be binding on the parties for 2 years.

The statute does not tell us who will comprise the arbitration panel referred to in the statute. Presumably, the panel will consist of labor arbitrators presently engaged in deciding private sector grievance/arbitration cases and occasional public sector interest arbitrations. While a number of these arbitrators are highly skilled, they have no responsibility for looking out for the public good or interest. Under EFCA, they would not be accountable to anyone.

Moreover, the statute does not spell out any factors or criteria for arbitrators to consider. Should arbitrators consider the relative bargaining strengths of the parties? Should arbitrators choose between the last proposals made by the parties or consider a compromise that may not be satisfactory to either party? Should an arbitrator consider the public interest? If so, as defined by whom?

© 2021 Morgan, Brown & Joy, LLP

How these questions get resolved will have a significant impact on the bargaining positions of the parties. What willingness will a party have to compromise if the party believes it can succeed at arbitration? How will a party structure its bargaining proposals and positions if it is concerned that an arbitration panel will consider the parties' bargaining history before issuing its decision? EFCA will not encourage compromise or arriving at a mutually satisfactory agreement.

The goals of national labor policy have always been industrial peace, economic stability and economic progress. While arbitration of first contract disputes will certainly promote industrial peace in the short term, query whether that industrial peace will continue in the long term. The statute does not provide for arbitration of contract disputes after this initial contract. If one side feels it was the loser in the first contract arbitration, then all bets may be off when the parties meet to negotiate a successor agreement.

If economic stability and progress are important goals of national labor policy, why should first contract terms, including wages and benefits, be left to unknown third parties with their own unknown interests and agendas? There is no reason to believe that these third parties will make wise decisions with the goal of promoting stability and progress.

Finally, if the goal of EFCA is to speed up the time period in which parties arrive at a first contract, then it is not clear that arbitration will achieve that aim. The arbitration process can be lengthy and cumbersome. In those states which have arbitration of public sector contract disputes, the arbitration process can take 12 or more months.

For the most part, the statutory scheme for the past 50-70 years has largely achieved its goals of industrial peace, economic stability and growth. After such long-term success, it would be unsound to leave to unaccountable third parties the difficult task of determining what constitutes a fair contract for particular parties.

ConclusionIf the goal of Congress is merely to help unions organize a greater number of employees, then EFCA may be sound legislation. However, if the goal is to foster and maintain those fundamental tenets which have guided national labor policy since 1935, including securing employee rights, then EFCA is an ill-conceived and inartful piece of legislation.

Nathan L. Kaitz is an attorney at Morgan, Brown & Joy, LLP and may be reached at (617) 523-6666 or at nkaitz@morganbrown.com Morgan, Brown & Joy, LLP focuses exclusively on representing employers in employment and labor matters.

This publication, which may be considered advertising under the ethical rules of certain jurisdictions, should not be construed as legal advice or a legal opinion on any specific facts or circumstances by Morgan, Brown & Joy, LLP and its attorneys. This newsletter is intended for general information purposes only and you should consult an attorney concerning any specific legal questions you may have.

Search

© 2021 Morgan, Brown & Joy, LLP